

**This document is a Sample.**

**Additional revisions are anticipated for release by Owner in January 2021.**

**ENGINEERING, PROCUREMENT, AND CONSTRUCTION AGREEMENT**

**by and between**

**OREGON STATE UNIVERSITY**

**and**

**[INSERT CONTRACTOR NAME]**

**dated December \_\_\_\_, 2020**

**Subsea Power Cable Manufacture, Delivery, and Installation: PacWave South**

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## **EXHIBIT LIST**

*Exhibits forming part of the Contract Documents:*

- Exhibit A-1: Owner's Criteria
- Exhibit A-2: Scope of Work
- Exhibit A-3: Definitions
- Exhibit B-1: Form of Early Work Amendment
- Exhibit B-2: Form of Pricing Amendment
- Exhibit B-3: Preliminary Services Sum
- Exhibit C: Insurance Requirements
- Exhibit D: Forms of Waivers and Releases
- Exhibit E: Forms of Performance and Payment Bonds
- Exhibit F: Form of Change Order
- Exhibit G: Form of Construction Change Directive
- Exhibit H: Rate Schedule
- Exhibit I: Notice and Contact Information
- Exhibit J: Key Personnel

This ENGINEERING, PROCUREMENT, AND CONSTRUCTION AGREEMENT (the “Agreement” or “Contract”, as amended, and including exhibits) is made and entered into as of this [\_\_\_] day of \_\_\_\_\_ 2021, by and between OSU, a public university of the State of Oregon (“Owner”) and [\_\_\_\_\_], a [\_\_\_\_\_], Oregon State Construction Contractors Board License No. \_\_\_\_\_ (the “Contractor”). Collectively, the Owner and Contractor are referred to herein collectively as the “Parties” and each as a “Party.”

## RECITALS

WHEREAS, Owner desires to have Contractor engineer, procure, and construct the subsea power and data cable with dry mate connector system (“Subsea Cable”) for the PacWave Project, located south of Newport, Oregon and as more fully described and identified in Exhibit A-1 Owner’s Criteria and Exhibit A-2 Scope of Work; and

WHEREAS, Owner desires to engage Contractor to supply and install the subsea cable, including delivery, design, engineering, coordination, testing, commissioning, and overall management of the work to final completion and acceptance by Owner on a turnkey basis for the Contract Sum stated herein, and Contractor desires to provide such work and services, all in accordance with the terms and conditions set forth in this Agreement; and

WHEREAS, Owner has partnered with the U.S. Department of Energy (“DOE”) and other stakeholders to design and build a wave energy test facility located off the Oregon Coast, between Newport and Waldport, called PacWave South, the nation’s first grid-connected, pre-permitted wave energy test facility (“PacWave” or “PacWave South” or “PacWave Project” or “Project”) supported by DOE’s Office of Energy Efficiency and Renewable Energy (under the Water Power Program Award Number DE-EE0007899), the State of Oregon and other public and private entities; and

NOW, THEREFORE, in consideration of the sums to be paid to Contractor by Owner and of the covenants and agreements set forth herein, the Owner and Contractor agree as follows:

## AGREEMENT

### **ARTICLE 1 GENERAL PROVISIONS**

#### **1.1 General**

The Contractor shall fully execute the entire Work described in the Contract Documents and all work reasonably inferable therefrom to produce the indicated results, except as specifically indicated in the Contract Documents to be the responsibility of others.

#### **1.2 Owner’s Criteria**

The Owner’s Criteria shall be set forth in Exhibit A-1.

**1.2.1** The Contractor shall confirm that the information included in the Owner’s Criteria complies with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

**1.2.1.1** If the Owner's Criteria conflicts with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall notify the Owner of the conflict, with as much advance notice as possible to minimize impacts to the Project.

**1.2.2** If there is a change in the Owner's Criteria, the Owner and the Contractor shall execute a Modification specifically identifying the change in accordance with Article 6.

**1.2.3** If the Owner and Contractor intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions.

### **1.3 Definitions.**

The terms used in this Agreement and listed in Exhibit A-3 Definitions have the definitions and meanings as set forth therein. In addition to the terms defined in Exhibit A-3, other terms are defined throughout this Agreement in sections relevant to their use. If terms are not defined in this Agreement, they shall have their well-known technical or construction industry meanings.

### **1.4 Review By Others**

Review or approval by Owner or its authorized representative of Contractor's design, means, methods, techniques, procedures or Submittals, or of any other aspect of Contractor's Work or services shall not relieve Contractor of its sole liability for any damages resulting from or arising out of defects or deficiencies in the Contractor's design, means, methods, techniques, procedures or submittals, or of any other aspect of Contractor's Work or services.

## **ARTICLE 2 COMPENSATION AND PROGRESS PAYMENTS**

**2.1 Contract Sum.** In accordance with the terms of the Contract Documents, Owner shall pay Contractor the Contract Sum subject to the Preliminary Services Sum and each Pricing Amendment Sum, as the same may be amended from time to time by Change Order. Contractor shall bear, without Owner's reimbursement, all costs in excess of (a) the Preliminary Services Sum and (b) each applicable Pricing Amendment Sum.

**2.2 Alternates.** Owner may approve each Alternate by Change Order. Unless so approved, Contractor shall not proceed with an Alternate. If Owner approves one or more Alternates, payment for such approved Alternates shall be included in Contractor's applicable Applications for Payment.

### **2.3 Allowances.**

**2.3.1** Contractor shall promptly develop and deliver to Owner Parties a final price for each of Contractor's Allowances after the Contract Documents pertinent to each such Allowance are completed. If Contractor's final price exceeds an Allowance, Owner may elect to: (a) issue a Change Order by an amount to which Owner and Contractor agree for the Work of that Allowance, or (b) cause Contractor and its Subcontractors to redesign the Work of that

Allowance, including Work ancillary to the Work of the Allowance, such that the Allowance price set forth in the applicable Pricing Amendment will not be exceeded.

**2.3.2** If Contractor's final price is less than an Allowance, Contractor and Owner will promptly issue a deductive Change Order to the applicable Pricing Amendment.

**2.3.3** In the event some of Contractor's final prices exceed, and others are less than, their applicable Allowance prices, Owner may offset such prices to reduce or eliminate the number of Change Orders otherwise necessary due to all of those Allowances.

**2.4** **Construction Contingency.** Each Pricing Amendment shall include a preliminary Construction Contingency in an initial amount to which Owner and Contractor agree.

**2.4.1** **Use of Funds.** Subject to Owner Parties' prior written approval, Contractor may apply Construction Contingency funds to unexpected increases in costs of the Work, including due to: (i) unforeseen differences in the scope of the Work; (ii) corrective Work due to defective work not caused by the Contractor, Contractor's approved subcontractors, or anyone for whom the Contractor is responsible; (iii) errors in estimating; (iv) overtime expenses not caused by the Contractor or anyone for whom the Contractor is responsible; (v) other errors or omissions not due to breach of the Contract Documents, and not due to negligence or willful misconduct of Contractor or anyone from whom the Contractor is responsible; and (vi) Subcontractor default if Contractor shows it took reasonable steps to cause each such defaulting Subcontractor or Subcontractor's surety to perform its Work; provided, however, requisite or otherwise available insurance would not cover such default. Contractor shall not use Construction Contingency funds to pay Liquidated Damages.

Reduction Milestones. – Reserved

**2.5** **Progress Payments**

**2.5.1** **Applications for Payment.** Contractor shall prepare separate Applications for Payment for the Work of each Deliverable Portion of Work executed, in accordance with this Section 2.5 and Section 9 below. Owner shall make progress payments on account of each applicable Early Work Amendment or Preliminary Services Sum or Pricing Amendment Sum as provided below and elsewhere in the Contract Documents.

**2.5.2** **Required Contents.** Contractor shall include the following in each Application for Payment and each is a condition precedent to Owner's payment:

1. *Schedule of Values.* An updated Schedule of Values showing all current Contractor's and Contractor's approved subcontractors' expenses pertaining to the Work.

2. *Percent Complete.* The percentage each portion of the applicable Work completed, as compared to and categorized in the Schedule of Values, as of the end of the period covered by such Application for Payment. The percentage of the Work that is completed in each Application for Payment is the percentage of Work actually completed and accepted for the applicable Deliverable Portion of Work.

3. *Progress Report.* A current Progress Report, updated Work, Design, and Construction Schedules, if any, for the Deliverable Portion of Work applicable to the Application for Payment, all in accordance with this Agreement.

4. *Supporting Documents.* Contractor shall provide upon OSU's written request, any Supporting Documents and any other evidence Owner Parties reasonably require to demonstrate cash payments, all on account of costs of the Work.

5. *Statement of Furnishing.* A sworn statement identifying: (i) the legal names of all persons and entities furnishing and the goods, labor, or services to the Project with a value in excess of twenty-five thousand dollars (\$25,000) during the time period of the applicable Application for Payment; (ii) payments made to each person or entity furnishing goods, labor, or services; and (iii) amounts due and remaining amounts that are likely to become due to each person or entity furnishing goods, labor, or services.

6. *Claims Statement.* A statement expressly made to induce Owner's payment, detailing the costs of the Work completed less retainage withheld, along with any Claims pertaining to that Work, sworn to by the Contractor and the Subcontractors, attesting to the satisfactory completion of the Work with qualifications pertaining to the Claims.

7. *Lien and Bond Claim and Claim Waivers.* The partial unconditional waiver of liens and bond claims and all other claims, in the form set forth on *Exhibit D*, of Contractor and all Subcontractors and their Sub-subcontractors and Suppliers who are listed in the immediately prior Application for Payment for which Contractor has received payment.

8. *No Change Orders.* Contractor's statement certifying there are no Change Order requests or other claims for additional payment outstanding, or, if a Change Order request or claim for additional payment is outstanding, the amount of funds in issue, the name of the potential claimants, and a description of the pertinent Work.

**2.5.3 Computation.** In accordance with the other terms of the Contract Documents, progress payments are computed as follows:

1. Take that portion of the applicable cost limitation (i.e., the Preliminary Services Sum or Pricing Amendment Sum) that is properly allocable to completed Work as determined by multiplying the percentage completion of the applicable Work by the share of the cost limitation allocated to that Work in the applicable Schedule of Values. Pending final determination of cost to Owner of changes in the Work, amounts not in dispute may be included.

2. Add that portion of the applicable cost limitation properly allocable to Materials and equipment delivered, suitably stored, and in compliance with the Contract Documents.

3. Subtract the sum of Owner's previous payments made on account of the applicable Work.

4. Subtract any shortfall indicated in the documentation required by *Section 2.5.2* above to substantiate prior Applications for Payment, or resulting from errors subsequently discovered in such documentation.

5. Subtract amounts, if any, Owner is entitled to withhold under the Contract Documents.

6. Subtract retainage in accordance with *Section 2.5.4* below.

#### **2.5.4 Review; Payment; Retainage.**

1. *Submittal.* Contractor shall submit an Application for Payment to Owner that covers 1 calendar month on or before the final Day of each month. Owner reserves the right to request draft Application for Payment. If requested, Contractor shall submit to Owner Parties, the draft Application for Payment on or before the **[25th]** Day of each month, together with all applicable Supporting Documents. Owner Parties will review and comment on the draft Application for Payment and return the same to Contractor with comments and changes, if any, within **10 Days**. On or before the **[final]** Day of that month, Contractor shall submit to Owner Parties its Application for Payment, revised to reflect Owner Parties' comments and changes.

2. *Payment.* Owner shall pay Contractor for the amounts in each approved Application for Payment, delivered pursuant to Owner's invoice delivery requirements, within **45 Days** of Owner's receipt of the same. Notwithstanding the foregoing, Contractor is not entitled to payment unless and until Contractor's applicable Application for Payment is approved by all of Owner's reviewing parties. In the event Owner fails to make payment within the time required under this *Section 2.5.4*, Contractor shall furnish Owner with 10 Days' advance written notice as a condition precedent to exercising remedies, including those available under the Contract Documents. After receiving a payment, Contractor shall pay each Subcontractor amounts due and owing within the legal requirement for prompt payment or 7 Days, whichever is less.

3. *Retainage.* Retainage will be withheld and released in accordance with this *Section* and *Section 9* below. Owner will retain from all payments to Contractor five percent (5%) of each such payment as security for the Work, until such time as Owner may release retainage or a approves a retainage substitute in accordance with the Contract Documents.

## **2.6 Final Payment**

**Payment Disputes.** In the event Owner Parties determine Contractor is due less than amounts requested in its final Application for Payment or Owner otherwise withholds amounts, including because of purported failure of the Work to conform to the Contract Documents' requirements or due to unresolved Claims, and Contractor disagrees with any such nonpayment, Contractor may assert a Claim as otherwise provided for in this Agreement.

**2.7 Interest.** Owner shall pay Contractor interest for payable amounts undisputed and overdue, which necessarily do not include retainage properly withheld. For purposes of this *Section*, overdue amounts shall be those due and unpaid for not less than 45 Days from the latest of (a) the date Owner received the accurate, complete, Application for Payment; or (b) the date Owner receives proper notice of a Claim for nonpayment of amounts due and owing. After 45 days, Contractor may assess overdue account charges up to a maximum of two-thirds of one percent (2/3 of 1%) per month or eight percent (8%) per annum on the outstanding balance pursuant to ORS 293.462.

### **ARTICLE 3 GENERAL REQUIREMENTS OF THE WORK OF THE EPC AGREEMENT**

#### **3.1 General**

**3.1.1** The Contractor shall comply with any applicable licensing requirements in the jurisdiction where the Project is located.

**3.1.2** The Contractor shall designate in writing a representative who is authorized to act on the Contractor's behalf with respect to the Project. The Contractor identifies the following authorized representative:

1. [List name, address and other information.]

**3.1.3** The following persons shall serve in the following roles for the Contractor:

1. Project Executive:
2. Senior Project Manager:
3. Project Manager:
4. Project Superintendent:

Unless they leave the employ of the Contractor, the above-named persons shall serve in these positions throughout the duration of the Contractor's performance of the Work except as approved otherwise in writing in advance by the Owner. Persons named to replace those set out above shall be submitted to Owner in writing for approval prior to their replacement. The replacement shall be approved in writing in advance of the replacement by the Owner. The Owner's approvals as required by this Section shall not unreasonably be withheld.

**3.1.4** The Contractor agrees to retain the following Contractors, Subcontractors, or Sub-Subcontractors:

1. Contractor:
2. Subcontractors:

**3.1.5** The Contractor shall perform the Work in accordance with the Contract Documents. The Contractor shall not be relieved of the obligation to perform the Work in accordance with the Contract Documents by the activities, reviews, tests, inspections or approvals of the Owner.

**3.1.5.1** The Contractor shall perform the Work in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Contractor performs Work contrary to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, the Contractor shall assume responsibility for such Work and shall bear the costs attributable to correction.

**3.1.5.2** Neither the Contractor nor any Subcontractor shall be obligated to perform any act which they believe will violate any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Contractor determines that implementation of any instruction received from the Owner, including those in the Owner's Criteria, would cause a violation of any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall promptly notify the Owner in writing. Upon verification by the Owner that a change to the Owner's Criteria is required to remedy the violation, the Owner and the Contractor shall execute a Modification specifically identifying the change to the Owner's Criteria in accordance with Article 6.

**3.1.6** The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Contractors, and their agents, Subcontractors and employees, and other persons or entities performing portions of the Work.

**3.1.7 General Consultation.** The Contractor shall schedule and conduct periodic meetings with the Owner to review matters such as procedures, progress, coordination, and scheduling of the Work. Contractor shall cause its representatives, and representatives of Designer, Consultants and Contractors at all tiers as designated by Owner, if any, to attend and participate in weekly progress meetings. Contractor shall prepare and distribute to all attendees minutes of such progress meetings for review and correction. Progress meetings may be utilized to review the Contractor's design and construction schedules, requests for information, or to address any delays, unusual conditions, or critical items which have affected or could affect the progress of the Work, and to consider any other matter or subject of relevance to the Work as determined by Owner.

**3.1.8** When applicable law requires that services be performed by licensed professionals, the Contractor shall provide those services through qualified professionals licensed in Oregon. Wherever a deliverable is identified as "Engineered" or "Stamped", or any item is described as "Engineered", the deliverable shall have been at a minimum reviewed, agreed to, signed and stamped by a professional engineer ("PE") licensed in the state of Oregon. The PE signing a document shall be licensed and experienced in the appropriate branch of engineering for the deliverable. Where the PE experience is not directly relatable, a subject matter expert may review and sign the deliverable in addition to the PE sign off.

The contractor shall provide full CVs (showing their experience/expertise in the area) for all PEs and subject matter experts who sign off on deliverables). The Owner understands and agrees that the services of the Subcontractors are performed for the benefit of, the Owner. Each agreement with Subcontractor at every tier shall provide that the Owner is and shall be a third-party beneficiary of such subcontract, purchase order and similar agreement, and that the Owner shall have the right, but not the obligation, to assert claims directly against the Designer, Consultants and Contractors for breach of contract, breach of express warranties, breach of implied warranties including but not limited to warranties of merchantability and of fitness for a particular purpose, negligence and other claims arising out of or related to the Work or the Project. The Owner and Contractor acknowledge and agree that the purpose of this Section is to enable the Owner at its discretion, in addition to the Contractor, to assert claims for damages and indemnification directly against Contractor and Subcontractors that are or may be responsible for breach of the contract, defects in the Work, and other damages incurred by the Owner arising out of or related to the Work or the Project.

**3.1.9** The Contractor, with the assistance of the Owner, shall prepare and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project. Owner may request Contractor to obtain a U.S. Customs and Border Patrol letter ruling, including a letter ruling on the Jones Act, prior to vessel use under the Project.

#### **3.1.10 Progress Reports**

**3.1.10.1** The Contractor shall keep the Owner informed of the progress and quality of the Work. On a monthly basis, or otherwise as agreed to by the Owner and Contractor, the Contractor shall submit written progress reports to the Owner, showing estimated percentages of completion and other information identified below:

- i. Work completed for the period;
- ii. Project schedule status;
- iii. Submittal schedule and status report, including a summary of outstanding Submittals;
- iv. Responses to requests for information to be provided by the Owner;
- v. Approved Change Orders and Construction Change Directives;
- vi. Pending Change Order and Construction Change Directive status reports;
- vii. Tests and inspection reports;
- viii. Status report of Work rejected by the Owner;
- ix. Status of Claims previously submitted in accordance with Article 14;

- x. Cumulative total of the Cost of the Work to date including the Contract Sum and Reimbursable Expenses, if any;
- xi. Current Project cash-flow and forecast reports; and
- xii. Additional information as agreed to by the Owner and Contractor.

**3.1.11** [Intentionally deleted.]

### **3.1.12 Contractor's Schedules**

**3.1.12.1** The Contractor, promptly after execution of the Contract, shall prepare and submit for the Owner's information a schedule for the Work. The schedule, including the time required for design and construction, shall not exceed time limits current under the Contract Documents, shall utilize the critical path method, shall be revised at appropriate intervals as required by the conditions of the Work and Project which shall be no less often than monthly, shall be related to the entire Project to the extent required by the Contract Documents, shall provide for expeditious and practicable execution of the Work, and shall include allowances for periods of time required for the Owner's review and for approval of submissions by authorities having jurisdiction over the Project.

**3.1.12.2** The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner.

**3.1.12.3** For purposes of whether any Change Orders or Construction Change Directives extend the contractual dates of Substantial Completion and Final Completion, any "float" or "slack" time for the whole or any part of the Work shall not be for the exclusive use or benefit of either the Owner or the Contractor but shall be reserved and apportioned by the Owner and Contractor in accordance with the needs of the Project. The Contractor shall not be entitled to make and waives any claim based upon an alleged inability to complete the Project early.

**3.1.12.4** In the event the Owner determines that the performance of the Work has not progressed or reached the level of completion required by the current, approved Contractor's schedule, the Owner shall have the right to order the Contractor to take corrective measures as necessary to restore the progress of the Work to the requirements of such schedule, including but not limited to (1) working additional shifts or overtime, (2) furnishing additional labor, services, materials, equipment and facilities and (3) other similar acceleration measures. The costs incurred by the Contractor pursuant to this Section shall be paid by the Contractor.

**3.1.12.5** Without limiting the Owner's rights, upon demand by the Owner the Contractor shall prepare and submit to the Owner a "Recovery Schedule," in a form and providing sufficient detail to explain and display how the Contractor

intends to reschedule those activities to regain compliance with the Contractor's schedule during an agreed Recovery Period.

**3.1.12.6** Within 7 days after the Contractor's receipt of the Owner's demand for a Recovery Schedule, the Contractor shall present the Recovery Schedule to the Owner. The Recovery Schedule shall represent the Contractor's best judgment as to how the Work should be made to comply with the Contractor's schedule within the agreed Recovery Period. The Recovery Schedule shall be prepared to a similar level of detail as the Contractor's schedule.

**3.1.13 Certifications.** Upon the Owner's written request, the Contractor shall obtain from the Subcontractors, and furnish to the Owner, certifications with respect to the documents and services provided by the Subcontractors (a) that, to the best of their knowledge, information and belief, the documents or services to which the certifications relate (i) are consistent with the Contract Documents, except to the extent specifically identified in the certificate, and (ii) comply with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities governing the design of the Project, including but not limited to Jones Act requirements; and (b) that the Owner and its consultants and contractors shall be entitled to rely upon the accuracy of the representations and statements contained in the certifications. The Contractor's Subcontractors shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of their services.

#### **3.1.14 Contractor's Submittals**

**3.1.14.1** Prior to submission of any Submittals, the Contractor shall prepare a Submittal schedule, and shall submit the schedule for the Owner's approval. The Owner's approval shall not unreasonably be delayed or withheld. The Submittal schedule shall (1) be coordinated with the Contractor's schedule provided in Section 3.1.12.1, (2) allow the Owner reasonable time to review Submittals, and (3) be periodically updated to reflect the progress of the Work. If the Contractor fails to submit a Submittal schedule, the Contractor shall not be entitled to and waives any increase in Contract Sum or extension of Contract Time based on delay caused by Owner's review of Submittals.

**3.1.14.2** By providing Submittals the Contractor represents to the Owner that it has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and (3) checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Contract Documents.

**3.1.14.3** The Contractor shall perform no portion of the Work for which the Contract Documents require Submittals until the Owner has approved the respective Submittal.

**3.1.14.4** The Work shall be in accordance with approved Submittals except that the Contractor shall not be relieved of its responsibility to perform the Work

consistent with the requirements of the Contract Documents. The Work may deviate from the Contract Documents only if the Contractor has notified the Owner specifically in writing of a deviation from the Contract Documents at the time of the Submittal and a Modification is executed authorizing the identified deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Submittals by the Owner's approval of the Submittals.

**3.1.14.5** All professional design services or certifications to be provided by the Contractor, including all drawings, calculations, specifications, certifications, shop drawings and other Submittals, shall contain the signature and seal of the licensed design professional preparing them. Submittals related to the Work designed or certified by the licensed design professionals, if prepared by others, shall bear the licensed design professional's written approval. The Owner and its consultants shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals.

**3.1.14.6** Any corrections or revisions to Submittals made by the Owner shall be deemed acceptable by the Contractor, without change in the Contract Sum or Contract Time, unless said changes constitute changes to the Contract Documents and the Contractor provides the Owner with contrary written notice before commencing any such changed Work. In the absence of such notice, the Contractor shall make all corrections requested by the Owner and provide a corrected Submittal without change in the Contract Sum or Contract Time.

**3.1.15 Warranty.** The Contractor warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents will be free from defects, except for those inherent in the quality of the Work or otherwise expressly permitted by the Contract Documents, and that all materials and equipment selected by Contractor, Subcontractors will be suitable for the purposes indicated in the Contract Documents. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed or recommended by the Contractor, Designer, Consultants and Contractors, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Owner, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

**3.1.15.1** Without limiting any remedy of Owner, upon Substantial Completion of the Work or termination of the Contract, the Owner is entitled to enforce at its option any and all Contractor warranties relating to Work performed and materials and equipment furnished by such Contractors. The Contractor agrees to perform the Work in such manner so as to preserve any and all such Contractor warranties. The Contractor also shall collect, assemble in a binder, and submit to the Owner written Contractor warranties and related documents, including without limitation from Subcontractors at all tiers performing Work

and furnishing materials, equipment, appliances and other components of the Project. All such written warranties shall extend to the Owner, including pass-through of manufacturers' warranties.

**3.1.15.2** Effective upon the written demand of the Owner or upon the insolvency, bankruptcy, dissolution or other incapacity of the Contractor, the Contractor assigns to the Owner all Contractors' and manufacturers' warranties in materials and equipment and other portions or components of the Work. Contractor shall provide or obtain warranties that permit Owner to assign all warranties.

### **3.1.16 Royalties, Patents and Copyrights**

**3.1.16.1** The Contractor shall pay all royalties and license fees, and provide or obtain licenses that permit Contractor to perform its obligations under this Agreement, and permit Owner to operate, maintain, and transfer the Project to another legal entity.

### **3.1.17 Indemnification**

**3.1.17.1 General Indemnity. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE INDEMNITEES, FROM ALL LIABILITIES, DAMAGES, LOSSES, EXPENSES, AND COSTS, INCLUDING REASONABLE ATTORNEY FEES AT BOTH THE TRIAL AND APPELLATE LEVELS, (COLLECTIVELY, "LOSSES") AND CLAIMS OF LOSSES, INCLUDING DUE TO BODILY INJURY, DISEASE, DEATH, OR PROPERTY DAMAGE (BUT EXCLUDING DAMAGE TO THE WORK ITSELF TO THE EXTENT COVERED BY BUILDERS RISK INSURANCE/INSTALLATION FLOATER), MADE BY ANY THIRD PARTY, THAT IN ANY WAY ARISE OR RESULT FROM: (I) THE WORK; (II) CONTRACTOR'S ACTIVITIES OR THE ACTIVITIES OF ITS DESIGNERS, SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, OR OTHER PERSONS PERFORMING WORK; (III) OPERATIONS AT THE SITE; OR (IV) VIOLATION OF ANY APPLICABLE LAWS. THE FOREGOING INDEMNITY SHALL BE THE "CONTRACTOR'S GENERAL INDEMNIFICATION."**

**3.1.17.2 Special Indemnity. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT AND TO THE FULLEST EXTENT PERMITTED BY LAW AND SUBJECT TO THE STANDARD OF CARE, CONTRACTOR SHALL INDEMNIFY AND HOLD HARMLESS THE INDEMNITEES FROM ALL LOSSES AND CLAIMS OF LOSSES DUE TO CONTRACTOR'S MISCONDUCT, NEGLIGENCE, ERROR, OR OMISSION, THAT IN ANY WAY ARISE OR RESULT FROM CONTRACTOR'S PROFESSIONAL SERVICES,**

**INCLUDING CLAIMS OF PROFESSIONAL LIABILITY AND VIOLATION OF APPLICABLE LAWS. THE FOREGOING INDEMNITY SHALL BE THE “CONTRACTOR’S SPECIAL INDEMNIFICATION.”**

**3.1.17.3** To the fullest extent permitted by law, the indemnification obligation under this Section 3.1.17 shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Contractor, Subcontractor or anyone directly or indirectly employed by them, under workers’ compensation acts, disability benefit acts or other employee benefit acts. Indemnification obligations shall further not be limited to third party claims.

**3.1.17.4** Liens; Bond Claims. Contractor shall further indemnify, defend, and hold harmless, the Indemnitees, from all Losses and claims of Losses arising or resulting from liens and bonds of any kind asserted against the Project (individually, a “Payment Claim”), Project phase, or any part thereof, by any of Contractor’s Subcontractors, Sub-subcontractors, Suppliers, and other Persons contributing to the Work, except for Payment Claims properly filed due to Owner’s wrongful failure to make payments to Contractor.

**3.1.17.5** Indemnitees’ Control of Defense. Contractor’s obligations in the Contract Documents to defend Indemnitees shall be performed by counsel approved by such Indemnitees, in their reasonable discretion. Indemnitees shall have the right to participate in direction of their defense and shall have the ultimate authority whether to settle any claim that may require any payment or admission of liability.

**3.1.17.6** No Limitation. Contractor’s indemnification obligations shall not be restricted by any limitation on the amount of damages, compensation, or benefits, payable by or for Contractor under applicable workers’ compensation acts, disability benefit acts, or other employee benefits acts. Contractor expressly waives its immunity from suit from Owner under applicable workers’ compensation acts, disability benefit acts, and other employee benefits acts.

**3.1.17.7** Costs of Enforcement. Contractor shall reimburse all costs and expenses incurred by the Indemnitees to enforce Contractor’s indemnification duties in the Contract

**3.1.17.8** Without limiting the generality of Section 3.1.17.1, the Contractor shall defend suits or claims for infringement of copyrights and patent rights, or other violation of intellectual property rights, and shall hold the Owner and its separate contractors and consultants harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers was specifically required by the Owner in Owner’s Criteria, or where the copyright violations are required in the Owner’s Criteria. However, if the Contractor has

reason to believe that the design, process or product required in the Owner's Criteria is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Owner. If the Owner receives notice from a patent, copyright, or other intellectual property owner of an alleged violation of an intellectual property right, attributable to the Contractor, the Owner shall give prompt written notice to the Contractor.

### **3.1.18 Contingent Assignment of Agreements**

**3.1.18.1** Each agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that

- i. assignment is effective after termination of the Agreement by the Owner for cause pursuant to Sections 13.1.4 or 13.2.2, or after termination of the Agreement by the Owner for convenience, and only for those agreements that the Owner accepts by written notification to the Contractor and the Subcontractors whose agreements are accepted for assignment; and
- ii. assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

When the Owner accepts the assignment of an agreement, the Owner assumes the Contractor's rights and obligations under the agreement, except that the assumption of obligations under the agreement does not release Contractor from liability for damages attributable to breaches of the agreement.

**3.1.18.2** Upon such assignment, if the Work has been suspended for more than 30 days, the compensation under the assigned agreement shall be equitably adjusted for increases in cost resulting from the suspension.

**3.1.18.3** Upon such assignment to the Owner under this Section 3.1.18, the Owner may further assign the agreement to a successor Contractor or other entity. If the Owner assigns the agreement to a successor Contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor Contractor's or other entity's obligations under the agreement consistent with Section 3.1.18.2.

**3.1.18.4** Nothing in this Article or elsewhere in the Contract Documents shall be interpreted to (1) constitute an assignment of the Contractor's rights against the Owner to the Subcontractors or (2) make the Subcontractors a third-party beneficiary of the Contract.

**3.1.19 Contractor's Insurance and Payment and Performance Bonds.** The Contractor shall purchase and maintain insurance set forth in Exhibit C and provide bonds as set forth in Exhibit E. Contractor shall furnish and keep in effect at all times while the Contract Documents are in effect (a) a performance bond in sum equal to the Contract Sum and (b) a payment bond in sum equal to the Contract Sum. Any requisite performance bond shall

cover all warranties and guarantees required by the Contract Documents. Owner and Contractor shall agree in writing to the bonding strategy and any requirements that may differ from those contained in the Agreement between Owner and Contractor, of Subcontractors prior to the execution any contracts pertaining to the Project between Contractor and any Subcontractors. Prior to signing the Contract Documents, Contractor shall file with the Oregon Construction Contractors Board, and maintain in full force and effect, the separate public works bond as and when required by Oregon Laws 2015, Chapter 279C, and OAR 839-025-0015. Contractor shall also include in every applicable Subcontract a provision requiring Subcontractor to file and maintain with the Oregon Construction Contractors Board, a separate public works bond as and when required, before starting Work. Contractor shall verify that each Subcontractor has complied with the requirements of this *Section* before permitting each such Subcontractor to begin Work. All sureties guaranteeing performance or payment shall be (i) authorized to do business in the State of Oregon, (ii) have a rating of not less than “A” in the latest version of A.M. Best & Company’s Insurance Guide, (iii) an A.M. Best & Company financial size category of “X” or higher, and (iv) listed by, and in the net limit of, the United States Treasury Department as acceptable for bonding Federal projects. Contractor shall have no affiliation with the bonding agent or agency.

#### **ARTICLE 4 WORK PRIOR TO EXECUTION OF ANY PRICING AMENDMENT**

##### **4.1 Early Work**

**4.1.1** Contractor and Owner may enter into one or more Early Work Amendment identifying specific Work that shall be performed prior to a Pricing Amendment that includes such Work, subject to a not-to-exceed budget and price. All Early Work shall be performed and Owner shall pay for the same in accordance with the terms of the Contract Documents and the terms of the applicable Early Work Amendment.

**4.1.2** Prior to commencing any Early Work: (i) Contractor shall have issued Construction Documents for that Early Work; (ii) Governmental Approvals necessary to commence such Early Work shall have been issued; (iii) Contractor shall have submitted, for Owner Parties’ review and approval, a Construction Schedule and cost estimate for the Early Work; (iv) Contractor shall have selected Subcontractors to perform the Early Work; and (v) Owner Parties shall have issued a Notice to Proceed with the Early Work.

**4.1.3** The costs of Early Work shall be included in the applicable Pricing Amendment and Contractor’s obligation to develop its Pricing Amendments shall not be deferred or waived by any Early Work Amendment.

**4.1.4** Any information submitted by the Contractor, and any interim decisions made by the Owner, shall be for the purpose of facilitating the design process and shall not modify the Owner’s Criteria unless the Owner and Contractor execute a Modification specifically identifying the change to Owner’s Criteria.

**4.1.5** The Contractor shall advise the Owner on proposed site use and improvements, selection of materials, and building systems and equipment. The Contractor shall also provide the Owner with recommendations, consistent with the Owner's Criteria, on constructability; availability of materials and labor; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

## **4.2 Evaluation of the Owner's Criteria**

**4.2.1** The Contractor shall schedule and conduct meetings with the Owner and any other necessary individuals or entities to discuss and review the Owner's Criteria as set forth in Exhibit A-1. The Contractor shall thereafter again meet with the Owner to discuss a preliminary evaluation of the Owner's Criteria. The preliminary evaluation shall address possible alternative approaches to design and construction of the Project and include the Contractor's recommendations, if any, with regard to accelerated or fast-track scheduling, procurement, or phased construction. The preliminary evaluation shall consider cost information, constructability, and procurement and construction scheduling issues.

**4.2.2** After the Contractor meets with the Owner and presents the preliminary evaluation, the Contractor shall provide a written report to the Owner, summarizing the Contractor's evaluation of the Owner's Criteria. The report shall also include

- i. allocations of program functions, detailing each function and their square foot areas;
- ii. a preliminary estimate of the Cost of the Work, and, if necessary, recommendations to adjust the Owner's Criteria to conform to the Owner's budget;
- iii. a preliminary schedule, which shall include proposed design milestones; dates for receiving additional information from, or for work to be completed by, the Owner; anticipated date for the Contractor's Proposal; and dates of periodic design review sessions with the Owner; and
- iv. any other information required to be included in the Contractor's report.

**4.2.3** The Owner shall review the Contractor's written report and, if acceptable, provide the Contractor with written consent to proceed to the development of the Preliminary Design as described in Section 4.3. The consent to proceed shall not be understood to modify the Owner's Criteria unless the Owner and Contractor execute a Modification specifically identifying the change to Owner's Criteria.

## **4.3 Preliminary Design**

**4.3.1** Upon the Owner's issuance of a written consent to proceed under Section 4.2.3, the Contractor shall prepare and submit a Preliminary Design to the Owner. The Preliminary

Design shall include a report identifying any deviations from the Owner's Criteria, and shall include the following where applicable:

- i. Confirmation of the allocations of program functions;
- ii. Site plan;
- iii. Building plans, sections and elevations;
- iv. Structural system; and
- v. Outline specifications or sufficient drawing notes describing construction materials.

The Preliminary Design may include some combination of physical study models, perspective sketches, or digital modeling.

**4.3.2** The Owner shall review the Preliminary Design and, if acceptable, provide the Contractor with written consent to proceed to development of the Contractor's Proposal. The Preliminary Design shall not modify the Owner's Criteria unless the Owner and Contractor execute a Modification specifically identifying the change to Owner's Criteria. The Preliminary Design shall be consistent with the Contract Documents, including but not limited to the Owner's Criteria.

#### **4.4 Contractor's Proposal**

**4.4.1** Upon the Owner's issuance of a written consent to proceed under Section 4.3.2, the Contractor shall prepare and submit the Contractor's Proposal to the Owner. The Contractor's Proposal shall include the following:

- i. A list of the Preliminary Design documents and other information, including the Contractor's clarifications, assumptions and deviations from the Owner's Criteria, upon which the Contractor's Proposal is based;
- ii. The proposed Contract Sum, including a written statement of estimated cost organized by trade categories, allowances, contingencies, Contractor's Fee, and other items that comprise the Contract Sum in such detail and with such substantiation as Owner may reasonably require;
- iii. Any proposed changes to the date the Contractor shall achieve Substantial Completion date shall be incorporated into the Pricing Amendment;
- iv. An enumeration of any qualifications and exclusions, if applicable;
- v. A list of the Contractor's Key Personnel, Contractors and suppliers; and
- vi. The date on which the Contractor's Proposal expires, which date shall be no earlier than 90 days after submission of the Contractor's Proposal to

Owner.

**4.4.1.1** Upon the Owner's receipt of Contractor's Proposal, the Owner and Contractor agree to negotiate in good faith regarding the terms and conditions of the Pricing Amendment, including but not limited to the amount of the Contract Sum. If the Owner and Contractor are unable to agree on the terms and conditions of the Pricing Amendment, the Owner shall have the right to terminate this Agreement pursuant to Section 13.1.5. The amount of time allotted for negotiations and the timing of any termination shall be determined in the Owner's sole discretion.

**4.4.2** Submission of the Contractor's Proposal shall constitute a representation by the Contractor that it has visited the site and become familiar with local conditions under which the Work is to be completed.

**4.4.3** If the Owner and Contractor agree on the terms and conditions of the Pricing Amendment, the Owner and Contractor shall execute the Pricing Amendment in the form set forth on Exhibit B with the blanks and other information completed in the normal course. Notwithstanding anything to the contrary contained in the Contract Documents, Owner shall not be required to enter into any Pricing Amendment and, unless and until the Parties enter into a Pricing Amendment, Contractor's rights, including to payment, under the Contract Documents, shall be limited to only Contractor's completed Work, including completed Early Work set forth in an Early Work Amendment

## **ARTICLE 5 WORK FOLLOWING EXECUTION OF ANY PRICING AMENDMENT**

### **5.1 Construction Documents**

**5.1.1** Upon the execution of the Pricing Amendment, the Contractor shall prepare Construction Documents, including but not limited to Drawings and Specifications. The Construction Documents shall establish the quality levels of materials and systems required. The Construction Documents shall be consistent with the Contract Documents, including but not limited to the Owner's Criteria, and shall include all items necessary for the proper execution and completion of the Work and reasonably inferable from the Contract Documents, including but not limited to the Owner's Criteria, as being necessary to produce the indicated results.

**5.1.2** The Contractor shall provide the Construction Documents to the Owner for the Owner's approval. If the Owner discovers any deviations between the Construction Documents and the Contract Documents, the Owner shall promptly notify the Contractor of such deviations in writing. Unless the Owner and Contractor execute a Modification specifically identifying the particular deviation and Owner's agreement with such deviation, the Contractor shall correct the deviation in accordance with Article 11. The Construction Documents can not modify the Contract Documents, including but not limited to the Owner's Criteria. Execution of the Pricing Amendment does not constitute a Modification accepting a deviation unless the deviation is specifically identified as

changing the Owner's Criteria and described as such in the Pricing Amendment. The failure of the Owner to discover any such deviations does not relieve the Contractor of the obligation to perform the Work in accordance with the Contract Documents.

## **5.2 Construction**

**5.2.1 Commencement.** Except as permitted in Section 5.2.2, Contractor shall not commence construction prior to (1) execution of the Pricing Amendment and (2) Owner's approval of the Construction Documents.

**5.2.2** If the Owner and Contractor agree in a Modification, construction may proceed prior to the execution of the Pricing Amendment. However, such Modification does not waive the Owner's right to reject the Contractor's Proposal or otherwise limit Owner's rights and remedies under this Contract.

**5.2.3** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, design and construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific and explicit instructions concerning these matters.

**5.2.4** The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work. Contractor shall notify Owner in writing, before commencement of any portion of the Work, of any defect, deficiency, or incompatibility of any portion of the Project performed by others, including but not limited to Owner's consultants and separate contractors, which defect, deficiency, or incompatibility would in any manner affect the performance or quality of the Work. The failure to so notify Owner shall preclude Contractor from any claim, which otherwise may have been available under this Contract, for additional compensation, damages, or an extension of time relating to the affected Work. Contractor's commencement of its Work in any aspect or area where others have performed services or work shall constitute acceptance of the services or area and confirmation that Contractor can proceed with its Work.

**5.2.5** The Contractor shall perform such detailed examination, inspection and quality surveillance of the Work as will ensure that the Work is progressing and is being completed in strict accordance with the Contract Documents, including but not limited to Owner's Criteria. The Contractor shall be responsible for evaluation, examination, inspection and quality surveillance of all Work performed by the Contractor and Subcontractors. The Contractor shall determine when it is necessary to perform and shall perform, or arrange for the performance of, tests (in addition to those requested by the Owner or required by the Contract Documents) to verify its inspections or to ensure that the Work is being completed in strict accordance with the Contract Documents.

## **5.3 Labor and Materials**

**5.3.1** Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery,

water, heat, utilities, transportation, and other facilities and services, necessary for proper execution and completion of the Work, whether temporary or permanent, and whether or not incorporated or to be incorporated in the Work.

**5.3.1.1** The Contractor's obligations under Section 5.3.1 shall include without limitation the obligation to pay the Subcontractors and any other person or entity having mechanics', material suppliers', construction or similar lien rights or stop notices regarding the Project due to their performance of the Contractor's obligations under the Contract. Provided the Owner has fulfilled its payment obligations hereunder, the Contractor agrees to keep the Project and the Project site free and clear of any and all such lien claims or stop notices filed by any person or entity at any tier performing the Work or the Contractor's obligations under the Contract, excluding any lien filed by Contractor,

**5.3.1.2** In the event a claim of lien or stop notice is filed, whether due to nonpayment of the claimant or otherwise, and whether contested or not, the Contractor within 10 days after receipt of the Owner's demand and at the Contractor's expense shall cause the lien or stop notice to be removed by payment, compromise or the furnishing and perfection of a release bond or deposit pursuant to applicable law. If the Contractor fails to perform its obligation under the prior sentence, the Owner, without waiving or limiting its rights or remedies or those of any interested persons or entities, and at the Owner's sole discretion, may cause the lien or stop notice to be removed by paying the claimant directly, by paying the Contractor and claimant with a multiple-payee check or by furnishing and perfecting a lien release bond or deposit pursuant to applicable law; provided that in such instance the Owner shall be entitled to retain from any payments then due or which otherwise will become due to the Contractor, whether under the Contract or otherwise, an amount sufficient to hold the Owner harmless considering such payment or such furnishing and perfecting a release bond or deposit and any and all related costs and expenses incurred by the Owner, including without limitation attorneys' fees.

**5.3.1.3** Provided the Owner has fulfilled its payment obligations hereunder, and without limiting Contractor's other indemnity and related obligations under the Contract, Contractor agrees to indemnify, hold harmless, reimburse and defend (with counsel approved by the Owner) the Owner and any other person or entity with an interest in the Project or Project site from, for and against any and all liens, stop notices, actions, suits or proceedings relating to such liens, and any and all related costs and expenses incurred by the Owner, including without limitation attorneys' fees.

**5.3.2** When a material or system is specified in the Contract Documents, the Contractor may make substitutions only in accordance with Article 6. In addition, if Contractor desires to submit a substitute product or method for that Work in lieu of what has been specified, the Contractor shall provide written notice to the Owner setting forth the following information and documents:

- i. a full explanation of the proposed substitution and a submittal of all supporting data, including technical information, catalog cuts, warranties, test results, installation instructions, operation procedures and other like information necessary for a complete evaluation of the substitution;
- ii. reasons the substitution is advantageous and necessary, including but not limited to the benefits to the Owner and the Work in the event the substitution is accepted;
- iii. the adjustment, if any, in the Contract Sum, in the event the substitution is accepted;
- iv. the adjustment, if any, in the Contract Time and the Contractor's construction schedule in the event the substitution is accepted; and
- v. an affidavit stating that (1) the proposed substitution meets all the requirements of the Contract Documents and (2) the Contractor will perform or cause to be performed the warranty and correction of Work obligations with respect to the proposed substitution that would have been performed for the specified product or method.

Proposals for substitutions shall be submitted to the Owner in sufficient time to allow the Owner no less than 14 days for review.

**5.3.3** The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them. The Contractor shall not permit at the site of the Work the use of alcohol or tobacco (including but not limited to smokeless tobacco), illegal use of drugs or other controlled substances, verbal or other harassment, lewd or obscene language or behavior, or disregard for the property, privacy, or personal or business interests of the Owner or other occupants of adjacent or nearby parcels, or their respective contractors. The Contractor agrees to take prompt and effective corrective action in the event of violations of these standards of conduct.

**5.3.4** The Contractor shall coordinate, supervise and otherwise administer the Work so as to maintain labor harmony between and among the trades performing the Work and so as to avoid lockouts, strikes and other labor-related events or circumstances which delay or otherwise impact the Work; provided that the Contractor's obligations under this Section shall be limited to events and circumstances which occur substantially where the Work is performed or which result substantially from the actions of persons or entities performing the Work.

#### **5.4 Taxes**

The Contractor shall pay sales, consumer, use and similar taxes, including but not limited to Contractor's own legal entity and employer taxes, if any, required for the Work, that are legally enacted when the Pricing Amendment is executed, whether or not yet effective or merely

scheduled to go into effect.

## **5.5 Permits, Fees, Notices and Compliance with Laws**

**5.5.1** Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as any other permits, fees, licenses, and inspections by government agencies, necessary for proper execution of the Work and Substantial Completion of the Project, including but not limited to mechanical, plumbing, electrical and similar special permits, plan check fees, system development charges, road approach and right-of-way permits, air discharge permits and all other necessary permits, approvals, easements (including but not limited to swing-way easements), assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

**5.5.2** The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, applicable to performance of the Work.

## **5.6 Allowances**

**5.6.1** The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts, and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

**5.6.2** Unless otherwise provided in the Contract Documents,

1. allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required customs, taxes including import taxes, less applicable trade discounts;
2. the Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts, shall be included in the Contract Sum but not in the allowances; and
3. whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect the difference between actual costs and the allowances under Section 5.6.2.

**5.6.3** The Owner shall make selections of materials and equipment with reasonable promptness for allowances requiring Owner selection.

## **5.7 Key Personnel, Contractors and Suppliers**

Contractor's personnel shall include those described in Contractor's staff chart in attached *Exhibit J* (the "Key Personnel"). Contractor shall submit to Owner Parties for approval within 15 Days of the Effective Date a list of the Key Personnel, which shall include the background, experience, and qualifications, of each of the Key Personnel.

**5.7.1** If the Contractor intends to change any of the Subcontractors identified in the Pricing Amendment, the Contractor shall notify promptly the Owner and provide the name and qualifications of the new Subcontractors. The Owner may reply within 14 days to the Contractor in writing, stating (1) whether the Owner has reasonable objection to the proposed Designer, Consultants, or Contractors or (2) that the Owner requires additional time, information, or both to review. Failure of the Owner to reply within the 14-day period shall constitute notice of no reasonable objection.

**5.7.2** Except for those persons or entities already identified or required in the Pricing Amendment, the Contractor, as soon as practicable after execution of the Pricing Amendment, shall furnish in writing to the Owner the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Owner may reply within 14 days to the Contractor in writing stating (1) whether the Owner has reasonable objection to any such proposed person or entity or (2) that the Owner requires additional time, information, or both for review. Failure of the Owner to reply within the 14-day period shall constitute notice of no reasonable objection.

**5.7.2.1** If the Owner has reasonable objection to a person or entity proposed by the Contractor for the Project, the Contractor shall propose another to whom the Owner has no reasonable objection. If the rejected person or entity was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute person or entity's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

## **5.8 Documents and Submittals at the Site**

The Contractor shall maintain at the site for the Owner electronic copies of the Contract Documents and current set of the Construction Documents, in good order and marked currently to indicate field changes and selections made during construction, and one hard copy of approved Submittals. The Contractor shall deliver these copies of these items to the Owner in accordance with Section 9.10.2 as a record of the Work as constructed.

## **5.9 Use of Site**

The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Contract Documents, and shall not unreasonably encumber the site with materials or equipment.

## **5.10 Cutting and Patching**

The Contractor shall not cut, patch or otherwise alter fully or partially completed construction by the Owner or a separate contractor except with prior written consent of the Owner; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

## **5.11 Cleaning Up**

**5.11.1** The Contractor shall keep the premises and surrounding area free from accumulation of waste and excess materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove and properly dispose of all waste materials, rubbish, the Contractor's and Contractors' tools, construction equipment, machinery and surplus materials from and about the Project.

**5.11.2** If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.

## **5.12 Access to Work**

The Contractor shall provide the Owner and its separate contractors and consultants access to the Work in preparation and progress wherever located. The Contractor shall notify the Owner regarding Project safety criteria and programs, which the Owner, and Owner's contractors and consultants, shall comply with while at the site.

## **5.13 Construction by Owner or by Separate Contractors**

### **5.13.1 Owner's Right to Perform Construction and to Award Separate Contracts**

**5.13.1.1** The Owner reserves the right to perform construction or operations or services related to the Project, and to furnish materials and equipment for the Project, with the Owner's own forces; and to award separate contracts in connection with other portions of the Project, or other construction or operations on the site. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make a Claim as provided in Article 14.

**5.13.1.2** The cost of any materials or equipment to be provided by the Owner shall not be included in the Contract Sum. The cost of installing such materials or equipment shall be included in the Contract Sum to the extent the Contract Documents require the Contractor to install such materials or equipment as part of the Work. Handling and storage of any such materials or equipment supplied by the Owner and delivered to the site for installation by the Contractor shall be the responsibility of the Contractor.

**5.13.1.3** The Contractor shall provide for coordination of the activities of the Owner's own forces, and of each separate contractor, with the Work of the Contractor. The Owner shall require its own forces and separate contractors to

cooperate with the Contractor with respect to such coordination. Owner's own forces and separate contractors shall be subject to the Contractor's reasonable work and safety rules to the extent their work locations overlap. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules. If the Contractor claims that any adjustment in the Contract Sum is necessary because of revisions to the Contractor's schedule, the Contractor shall make a Claim as provided in Article 14. The construction schedules so established shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

#### **5.14 Mutual Responsibility**

**5.14.1** The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and Contractor shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

**5.14.2** If part of the Contractor's Work depends upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, prepare a written report to the Owner, identifying apparent discrepancies or defects in the construction or operations by the Owner or separate contractor that would render it unsuitable for proper execution and results of the Contractor's Work. Failure of the Contractor to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

**5.14.3** The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a separate contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a separate contractor's delays, improperly timed activities, damage to the Work or defective construction.

**5.14.4** The Contractor shall promptly remedy damage the Contractor causes to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5.

**5.14.5** The Owner and each separate contractor shall have the same responsibilities for cutting and patching the Work as the Contractor has with respect to the construction of the Owner or separate contractors in Section 5.10.

#### **5.15 Owner's Right to Clean Up**

If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and will allocate the cost among those responsible.

### **ARTICLE 6 CHANGES IN THE WORK**

## **6.1 General**

**6.1.1** Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order or Construction Change Directive, subject to the limitations stated in this Article 6 and elsewhere in the Contract Documents.

**6.1.2** A Change Order shall be based upon agreement between the Owner and Contractor. The Owner may issue a Construction Change Directive without agreement by the Contractor.

**6.1.3** Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order or Construction Change Directive.

## **6.2 Change Orders**

All Change Orders shall be in the form attached as Exhibit F 'Form of Change Order', shall be priced in accordance with this Article 6, and shall contain the details of the changes to the scope of Work, Contract Time, Contract Sum, and any related adjustments to the Contract Documents. Except as set forth in this Article 6, only a Change Order shall authorize a change to: (i) the scope of the Work, (ii) the Contract Time or a significant modification to the schedule of performance of the Work or the Project, or (iii) the Contract Sum or Contractor's compensation. As such, Contractor shall have no Claim for Work performed that would have been subject to, but for which Contractor failed to request, a Change Order.

A Change Order is a written instrument signed by the Owner and Contractor stating their agreement upon all of the following:

1. The change in the Work;

2. The amount of the adjustment, if any, in the Contract Sum or, if prior to execution of the Pricing Amendment, the adjustment in the Contract Sum; and

3. The extent of the adjustment, if any, in the Contract Time.

**6.2.1** Owner-Directed Changes. Owner Parties may order Contractor to price and determine time impacts of, at any time, a change in the scope of Work, by submitting to Contractor a reasonably-detailed written statement setting forth the nature of the change. If Contractor determines in good faith that Owner Parties' change will (a) increase or decrease the Contract Sum or (b) impact the dates for Substantial Completion set forth in the applicable Construction Schedule, Contractor shall promptly furnish Owner Parties with detailed information setting forth the cost and time impacts of the change in accordance with Section [ ]. If Owner elects to order the changed Work, it shall issue to Contractor a Change Order ordering and authorizing Contractor to proceed with the changes, as agreed. With exception of an emergency endangering life or property as set forth in Section [ ], Contractor shall not commence such a change until Owner has issued a Change Order, except in or as otherwise set forth in this Article 6.

**6.2.2** Changes Other than Owner Directed - Excused Site Condition.

“Excused Site Condition” shall mean and be limited solely to the following:

(a) the discovery of archeological artifacts, cultural burial grounds, endangered or threatened species, or religious, historical or archeological resources above or below the surface of the Site;

(b) the discovery of Hazardous Materials in the subsurface of the Site, provided that such Hazardous Materials (i) were not brought onto or generated at the Site by Contractor or any Subcontractor; and (ii) such Hazardous Materials (1) are not readily apparent from, or could not reasonably be inferred from, a reasonably diligent visual inspection of the Site and (2) are not disclosed in, or reasonably inferable from, a reasonable review of the Preliminary Site Information; and (3) are not disclosed or readily apparent in any of Contractor’s geotechnical information, reports, or studies; and

(c) the discovery of latent subsurface conditions at the Site, provided that such conditions (1) are not readily apparent or expected from, or could not reasonably be inferred from, a reasonably diligent visual inspection of the Site; (2) are not disclosed in, or reasonably inferable from, a reasonable review of the Preliminary Site Information; and (3) (i) are not disclosed or readily apparent in any of the Contractor’s geophysical and geotechnical information, reports, or studies, or (ii) would have been disclosed in Contractor’s geophysical and geotechnical information, reports, or studies had Contractor acted with the standard of care and skill ordinarily used by members of the Contractor’s profession.

**6.2.2.** If Contractor encounters an Excused Site Condition at the Site and such Excused Site Condition will actually impact Contractor’s Schedule or Work, Contractor shall give to Owner Parties notice before such conditions are further disturbed and in no event later than three Days after their discovery. Owner Parties will promptly investigate purported differing conditions to determine if in fact they constitute an Excused Site Condition.

**6.2.3** Prior to the Full Notice to Proceed Date, Contractor obtained the Preliminary Site Information. Owner makes no representation or warranty as to the correctness or completeness of the information in the Preliminary Site Information. Contractor represents and warrants (as of the Full Notice to Proceed Date) that Contractor has investigated the Site and each other location where any portion of the Work shall be performed and surrounding locations to the full extent Contractor deems necessary in order for Contractor to perform this Agreement given its terms and conditions, and that Contractor is familiar with, and has satisfied itself with respect to, the nature and location of the Work and Site Conditions. WITH THE SOLE EXCEPTION OF THE DISCOVERY OF AN EXCUSED SITE CONDITION (THE SOLE RELIEF FOR WHICH, PROVIDED CONTRACTOR HAS COMPLIED WITH ALL CONDITIONS PRECEDENT, IS SET FORTH IN SECTION [ ]8.2), CONTRACTOR EXPRESSLY ACKNOWLEDGES AND AGREES THAT IT HAS AGREED TO TAKE ALL RISKS WITH RESPECT TO THE SITE CONDITIONS, INCLUDING THE DISCOVERY OF SITE CONDITIONS WHICH ARE NOT DISCLOSED IN THE PRELIMINARY SITE INFORMATION, OR THE DISCOVERY OF SITE CONDITIONS OF A DIFFERENT KIND OR NATURE THAN WHAT CONTRACTOR ANTICIPATED TO OCCUR OR EXIST, IN EACH

CASE, AT, ABOVE OR BENEATH THE SITE, AND THAT THE CONTRACT PRICE CONTAINS AMOUNTS WHICH CONTRACTOR BELIEVES WILL COMPENSATE IT FOR AGREEING TO ASSUME SUCH RISKS.

**6.2.4** Owner Parties' Determination. Owner Parties shall be entitled to review Contractor's Claims for Excused Site Conditions as set forth in Section 6.2.2 above, and for changes due to Unavoidable Delay as set forth in the Agreement 8.2 . If, after investigation, Owner Parties agree that a Change Order is appropriate under the circumstances, Contractor will be entitled to adjustment to the Contract Sum, Contract Time, or schedule of performance of the Work, as the case may be, and as agreed to by Owner and Contractor. If a request for Change Order includes requests from Subcontractors, Sub-subcontractors, Suppliers, or other Persons performing Work, Contractor shall analyze and evaluate the merits of such requests prior to including them in Contractor's submission to Owner Parties. By submitting such requests, Contractor represents they are accurate and appropriate.

In any event, if Owner Parties disagree that Contractor is entitled to a Change Order under the circumstances, Owner Parties shall notify Contractor in writing, stating the reasons for disagreement. If Contractor wishes to dispute Owner Parties' determination, Contractor shall have a Claim. However, Owner shall in no event approve a Change Order because of missed Work scope or a lack of coordination in the execution or bidding of the Work.

All Claims due to changes shall proceed in accordance with Article [ ].

**6.2.5** Requisite Performance of Changes. In the event Owner refuses to issue a Contractor-requested Change Order or Owner and Contractor fail to agree to the terms of a Change Order, Owner Parties shall have the right to issue a Construction Change Directive. Upon receiving a Construction Change Directive, Contractor shall proceed to perform such changed Work and if payment is warranted, Owner shall pay Contractor on a time and material basis in accordance with Section 6.2.6 below. Owner Parties and Contractor shall continue to make good faith efforts to agree to the terms of a Change Order for the Work of the Construction Change Directive. Change Orders may be issued for all or any part of a Construction Change Directive. However, if Owner and Contractor cannot agree to one or more Change Orders for all of the Work of a Construction Change Directive, Contractor shall have a Claim for that Work executed but not included in a Change Order.

**6.2.6** Price and Schedule Adjustments. Unless Owner and Contractor agree in writing, all monetary adjustments included in Change Orders and Construction Change Directives, whether cost or credit to Owner, shall be calculated using the terms and figures of Exhibit [ ] and other unit prices set forth in the Contract Documents. However, if quantities of Materials and labor originally contemplated in a unit price significantly differ from those in a Change Order such that a unit price will cause substantial inequity to Owner or Contractor, that unit price shall be equitably adjusted.

When submitting a request for, or responding to, a Change Order, Contractor shall furnish Owner with detailed estimates of proposed adjustment to the Contract Time, changes to the schedule of performance of the Work or the Project, and the Contract Sum or

Contractor's compensation, as the case may be. As applicable, each approved Change Order shall incorporate an accurate revised Schedule of Values and an accurate revised Construction Schedule.

**6.2.7 Accounting.** Contractor and Subcontractors impacted by a Change Order or Construction Change Directive shall maintain itemized accounts of all charges and credits due to changes in the Work as a result of all such changes. Such itemized accounts shall be open to Owner Parties' inspection.

**6.2.8 Owner-Directed Acceleration; Constructive Acceleration.** The Owner shall have the right to accelerate the completion date of the Work by Change Order, which may require the use of overtime. Additionally, Owner shall have the right to refuse to grant to Contractor an extension of time to meet the completion milestones set forth in the Design Schedule, Construction Schedule, or Project Schedule, even if Contractor is entitled to an extension pursuant to the Contract Documents. In the event Owner accelerates performance of the Work, the Contract Sum shall be adjusted in accordance with Section [ ] 6.2.1 above, but Contractor shall not be entitled to any other compensation or recovery. Prior to commencing the acceleration of Work, Contractor shall submit to Owner Parties for approval its written plan to cost efficiently execute such acceleration.

**6.2.9 No Additional Claims.** Neither Contractor nor Subcontractors shall have Claims for impact costs due to a Change Order. All money and time impacts associated with a Change Order shall be included in that Change Order. Contractor shall not be entitled to and shall not request, a Change Order, and shall make no Claims, after Owner Parties receive Contractor's final Application for Payment that includes such changed Work.

### **6.3 Construction Change Directives**

**6.3.1** A Construction Change Directive is a written order signed by the Owner directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or, if prior to execution of the Pricing Amendment, the adjustment in the Contract Sum, or Contract Time. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum or, if prior to execution of the Pricing Amendment, the adjustment in the Contract Sum, and Contract Time being adjusted accordingly. Construction Change Directives shall be substantially in the form as attached hereto at Exhibit G.

**6.3.2** A Construction Change Directive shall be used in the absence of the Parties' agreement on the terms of a Change Order.

**6.3.3** If the Construction Change Directive provides for an adjustment to the Contract Sum or, if prior to execution of the Pricing Amendment, an adjustment in the Contract Sum, the adjustment shall be based on one of the following methods:

1. Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

2. Unit prices stated in the Contract Documents or subsequently agreed upon;
3. Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
4. As provided in Section 6.3.7.

**6.3.4** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

**6.3.5** Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with and diligently continue performance of the change in the Work involved and advise the Owner of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or, if prior to execution of the Pricing Amendment, the adjustment in the Contract Sum, or Contract Time.

**6.3.6** A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum or, if prior to execution of the Pricing Amendment, the adjustment in the Contract Sum, and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

**6.3.7** If the Contractor does not respond within 7 days or disagrees with the method for adjustment in the Contract Sum or, if prior to execution of the Pricing Amendment, the method for adjustment in the Contract Sum, the Owner shall determine the method and the adjustment on the basis of reasonable expenditures and cost savings of those performing the Work attributable to the change. In such case, and also under Section 6.3.3.iii, the Contractor shall keep and present, in such form as the Owner may prescribe, an itemized accounting together with appropriate supporting data.

**6.3.8** The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost decrease.

**6.3.9** Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Owner will make an interim determination for purposes of certification for payment for those costs deemed to be reasonably justified. The Owner's interim determination of cost shall adjust the Contract Sum or, if prior to execution of the Pricing Amendment, the Contract Sum, on the same basis as a Change Order, subject to the right of Contractor to disagree and assert a Claim in accordance with Article 14.

**6.3.10** When the Owner and Contractor agree with a determination concerning the adjustments in the Contract Sum or, if prior to execution of the Pricing Amendment, the

adjustment in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement is effective immediately, unless stated otherwise in writing on such instrument, and the Owner and Contractor shall execute a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

#### **6.4 Change Proposals**

**6.4.1** Within the time limits set out in this Section, after receipt of a Request For Change Order Proposal or a Construction Change Directive, the Contractor shall submit to the Owner a written Change Order Proposal setting out any proposed adjustment in the Contract Sum or Contract Time, or both, to which the Contractor believes it (1) would be entitled as a result of the change in the Work proposed in the Request For Change Order Proposal or (2) is entitled as a result of the change in the Work directed by the Construction Change Directive. Such Change Order Proposal may, at Owner's option, be in the form of a lump sum proposal or a unit price proposal, or a combination thereof, for a proposed increase in the Contract Sum, and in similar form for a proposed extension of the Contract Time, and otherwise shall be in such form and in such detail as the Owner may require. Such Change Order Proposal shall be submitted as soon as practicable after the Contractor's receipt of the Request For Change Order Proposal or the Construction Change Directive, but in no event later than fourteen days after the Contractor's receipt of the Request For Change Order Proposal or the Construction Change Directive.

#### **6.5 No Obligation or Payment Without Executed Change In Work Form**

Contractor shall not be entitled to undertake or be obligated to undertake a Change in the Work unless (a) Contractor has obtained a mutually signed Change Order with the Owner, or (b) immediate action is reasonably required to address an emergency which endangers human health or property. In the absence of (a), or (b) above, if Contractor undertakes any changes in the Work, including but not limited to extra, different or more difficult Work, Contractor shall make any such changes at Contractor's risk and expense and shall not be entitled to any schedule modification or payment hereunder for undertaking such changes. Absent an emergency, it is specifically understood and agreed that no additional, different or more difficult services or reimbursables shall be allowed or compensated unless prior written approval is given by Owner for the specific services and reimbursables at issue.

### **ARTICLE 7 OWNER'S RESPONSIBILITIES**

#### **7.1 General**

**7.1.1** The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all Project matters requiring the Owner's approval or authorization. The Owner also shall designate in writing Owner's Construction Manager. The Owner's Construction Manager shall represent the Owner's interest throughout the performance of the Work. The Owner's Construction Manager shall not have the authority to bind Owner regarding any matter relating to this Agreement. Any

notice required to be delivered to Owner shall also be delivered to Owner's Construction Manager. The Owner identifies the following authorized representative:

OWNER designates, or shall designate, its Authorized Representative as indicated below (check one):

A.  Unless otherwise specified in the Contract Documents, the OWNER designates \_\_\_\_\_ as its Authorized Representative in the administration of this Contract. The above-named individual shall be the initial point of contact for matters related to Contract performance, payment authorization, and to carry out the responsibilities of the OWNER.

B.  Name of OWNER'S Authorized Representative shall be submitted by OWNER in a separate writing.

**7.1.2** The Owner shall render decisions in a timely manner and in accordance with the Contractor's schedule agreed to by the Owner. The Owner shall furnish to the Contractor, within 15 days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

## **7.2 Information and Services Required of the Owner**

**7.2.1** The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness.

**7.2.2** Upon written request of the Contractor, the Owner shall provide, to the extent under the Owner's control and if not required by the Contract Documents to be provided by the Contractor, the results and reports of prior tests, inspections or investigations conducted for the Project involving structural or mechanical systems; chemical, air and water pollution; hazardous materials; or environmental and subsurface conditions and information regarding the presence of pollutants at the Project site. Upon receipt of a written request from the Contractor, the Owner shall also provide surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site under the Owner's control.

**7.2.3** The Owner shall promptly obtain easements, zoning variances, and legal authorizations or entitlements regarding site utilization where essential to the completed Project. The Contractor shall promptly obtain easements (including but not limited to swing-way easements) and other property rights required for construction of the Project.

**7.2.4** The Owner shall cooperate with the Contractor in securing building and other permits, licenses and inspections.

**7.2.5** The services, information, surveys and reports required to be provided by the Owner under this Agreement, shall be furnished at the Owner's expense, and except as otherwise specifically provided in this Contract or elsewhere in the Contract Documents or to the extent the Owner advises the Contractor to the contrary in writing, the Contractor shall be entitled to reasonably rely upon the accuracy and completeness thereof. In no event shall the Contractor be relieved of its responsibility to exercise proper precautions relating to the safe performance of the Work.

**7.2.5.1** Notwithstanding the provisions of Section 7.2.5, the Contractor shall be responsible for determining, prior to commencement of the Work, the locations of all underground utility lines, cables, pipelines and similar such underground public service installations within and serving the Project site, utilizing utility locating services or other means permitted by law. The Contractor shall coordinate with utility and other involved third party representatives regarding utility locations and related issues, and shall hand excavate or otherwise take special precautions so as to perform the Work in such a manner as to avoid damaging, or interrupting the operation of, all utility lines, cables, pipelines and similar public service installations within and serving the Project site, whether above ground or underground.

**7.2.6** If the Owner observes or otherwise becomes aware of a fault or defect in the Work or non-conformity with the Contract Documents, the Owner shall give prompt written notice thereof to the Contractor.

**7.2.7** Prior to the execution of the Pricing Amendment, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract Documents and the Contractor's Proposal. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

**7.2.8** Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner shall communicate through the Contractor with persons or entities employed or retained by the Contractor.

**7.2.9** Contractor acknowledges that Owner does not make any representation or warranty with respect to the accuracy or completeness of documents or information (including oral statements) or opinions provided to Contractor by Owner, any of Owner's Separate Contractors, or anyone else with whom Owner contracts for the Work. Contractor represents and warrants that it has not and will not, and will instruct its Subcontractors to not, rely on Owner for any information, data, inferences or conclusions.

**7.2.10** The Contractor agrees that the Owner shall have no obligation to deliver copies of notices of right to a lien received by the Owner from parties purporting to be performing or furnishing Work under the Contract or on the Project, and that the Owner's failure to deliver copies of such notices to the Contractor shall have no effect on the obligations of the Contractor to hold harmless and indemnify the Owner for mechanics', material suppliers', design professionals', construction or similar liens as required by the Contract or applicable law. However, the Owner shall make a good faith attempt to deliver promptly to the Contractor copies of notices of right to a lien received by the Owner from parties purporting to be performing or furnishing Work under the Contract.

### **7.3 Submittals**

**7.3.1** The Owner shall review and approve or take other appropriate action on Submittals. Review of Submittals by Owner is for the limited purpose of checking for general conformance with the design concept expressed in Owner's Criteria. The Owner's review of Submittals is not conducted for the purpose of determining the accuracy and completeness of other details, such as dimensions and quantities; or for substantiating instructions for installation or performance of equipment or systems; or for determining that the Submittals are in conformance with the Contract Documents, all of which remain the responsibility of the Contractor. The Owner's action will be taken in accordance with the submittal schedule approved by the Owner or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Owner's judgment to permit adequate review. The Owner's review of Submittals shall not relieve the Contractor of the obligations under the Contract, including but not limited to Sections 3.1.14, 3.1.15, and 5.2.3. The Owner's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Owner, of any design, construction means, methods, techniques, sequences or procedures. The Owner's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**7.3.2** Upon review of the Submittals required by the Contract Documents, the Owner shall notify the Contractor of any non-conformance with the Contract Documents the Owner discovers.

**7.4** Visits to the site by the Owner shall not be construed to create an obligation on the part of the Owner to make on-site inspections to check the quality or quantity of the Work. The Owner shall neither have control over or charge of, nor be responsible for, the design or construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, because these are solely the Contractor's rights and responsibilities under the Contract Documents.

**7.5** The Owner shall not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Owner shall not have control over or charge of, and will not be responsible for acts or omissions of the Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work for the Contractor.

**7.6** The Owner has the authority to reject Work that does not conform to the Contract Documents. The Owner shall have authority to require inspection or testing of the Work in accordance with Section 15.5.2, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Owner nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Owner to the Contractor, the Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

**7.7** The Owner shall determine the date or dates of Substantial Completion in accordance with Section 9.8 and the date of Final Completion in accordance with Section 9.10.

### **7.8 Owner's Right to Stop Work**

If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Section 11.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

### **7.9 Owner's Right to Carry Out the Work**

If the Contractor defaults or neglects to carry out all or a portion of the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case, an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including but not limited to the Owner's attorneys' fees, and related costs, disbursements and expenses. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. The right of the Owner to correct deficiencies in the Work shall not give rise to any duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

## **ARTICLE 8 TIME**

### **8.1 Progress and Completion**

**8.1.1** Time limits stated in the Contract Documents are of the essence to the Contract. By executing the Pricing Amendment, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

**8.1.2** The Contractor shall not, except by advance agreement of the Owner in writing, commence the Work prior to the effective date of insurance, other than property insurance, required by this Contract. The Contract Time shall not be adjusted as a result of the Contractor's failure to obtain insurance required under this Contract.

**8.1.3** The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

## **8.2 Delays and Extensions of Time**

**8.2.1** Contractor shall be granted an extension of time for each Unavoidable Delay (defined below). Contractor shall not be granted an extension of time for any Avoidable Delay (also defined below).

1. Force Majeure. "Force Majeure" shall mean an act, event, or occurrence caused by fire, riot, war, acts of God, tornado, hurricane, named storms, flood, earthquake, explosion, public enemy, civil disturbance, pandemic (subject to 8.2.6 below), embargo, unusual and abnormal severe and adverse weather, or any other act, event or occurrence that is beyond the reasonable expectation or control of the party who is asserting an inability to conform to Contract Documents' requirements. Unusually and abnormal severe and adverse weather shall not include weather events that could be reasonably anticipated from the previous 10-year historical records of the general locality of the Site. Such historical records shall be from the Office of the Environmental Data Service of the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce nearest the Site. However, notwithstanding such historical records, (a) daily rainfall greater than one-half (1/2) inch during a month when the monthly rainfall exceeds the normal monthly average by at least twenty-five percent (25%) or (b) daily rainfall greater than three (3) inches, cannot be reasonably anticipated.

2. Avoidable Delays. An "Avoidable Delay" is any Delay other than an Unavoidable Delay, and those Unavoidable Delays that could have been avoided, because: (i) Contractor, Sub-contractors, or Sub-subcontractors failed to exercise care, prudence, foresight, or diligence; (ii) such Delay only affects a portion of Work that does not necessarily interfere with prosecution of other parts of the Work; (iii) such Delay does not impact the Project's critical path; delays caused by Force Majeure that in fact do not adversely impact the Project in a manner that could not have been avoided by rescheduling or by implementing protective measures; or (iv) such Delay results from Owner's Separate Contractors' work that does not necessarily prevent the timely completion of all Work.

3. Unavoidable Delays. An "Unavoidable Delay" is any Delay that is not due to the direct or indirect fault of Contractor, Subcontractor, Sub-subcontractors, Suppliers, or any of their respective agents, employees, or Contractors, and that affects the Project's critical path. Unavoidable Delays include: (i) Delays caused by Owner and Owner's employees and agents, or by Owner's Separate Contractors; (ii) Delays caused by Force Majeure that in fact adversely impact the Project in a manner that could not have been avoided by rescheduling or by implementing protective measures; (iii) Delays caused by any differing Site Conditions.

4. If Contractor's delivery of services or performance of the Work is impacted by an Unavoidable Delay, Contractor's sole remedy shall be an equitable extension to time for each day of Unavoidable Delay; provided, however, in each instance Contractor must first meet the notice provisions and other conditions of the Contract Documents.

Notwithstanding the foregoing, Contractor shall not be granted relief: (i) due to Contractor's financial inability to perform; (ii) unless a Delay is an Unavoidable Delay and affects the Project's or phase's critical path as set forth in the applicable Construction Schedule, and then only to the extent such critical path is affected; or (iii) if a Delay would have resulted because of Contractor's concurrent Avoidable Delay, notwithstanding the existence of an Unavoidable Delay.

5. Mitigation Required. Contractor shall use best efforts to remove, relieve, minimize, and mitigate the effect of all Delays, no matter the cause.

6. No Damage for Delay. To the fullest extent permitted by Applicable Laws, unless otherwise set forth in the Contract Documents, Contractor shall have no Claim against Owner Parties for any increase in the Contract Sum, damages, losses, or expenses, resulting from a Delay, unless Owner or its agents by their acts and omissions caused such unreasonable Delay, in which case Contractor's Claim shall be limited to an equitable adjustment for Contractor's actual and direct costs, expressly excluding indirect and consequential impact costs such as extended home office, overhead, and loss of profit.

7. Owner-Caused Schedule Changes. Contractor acknowledges and agrees as the Project progresses, as is customary among projects of this size and complexity, Owner may make changes to, and Contractor shall subsequently update, the Project Schedule. Contractor shall cooperate with and advise Owner Parties of potential outcomes of such changes including their impact on the Design and Construction Schedules. If Owner subsequently approves any such change, Contractor will have a Claim, but only if the approved change impacts the critical path of the applicable Construction Schedule.

**8.2.2** Claims relating to time shall be made in accordance with applicable provisions of Article 14.

**8.2.3** The commencement date of the Work shall be as specified in each Early Work Amendment or Pricing Amendment.

**8.2.4** The Contractor shall achieve Substantial Completion of the Work not later than as specified in each Early Work Amendment or Pricing Amendment.

**8.2.5** Liquidated Damages. The Owner represents and the Contractor acknowledges that time is particularly of the essence regarding the completion of the Work. In this regard, the Owner and Contractor agree that if Substantial Completion of the Work is not timely achieved, the Owner's actual delay damages will be difficult, impractical or impossible to determine. Accordingly, after negotiation, the Owner and Contractor agree that if Substantial Completion of the entire Work is not achieved by the date of Substantial Completion determined pursuant to Section 8.2.4, the Contractor shall pay to the Owner as liquidated damages the sum of [ ] Dollars (\$[ ]) per day or partial day of delay. The Owner and Contractor agree that such payment shall be in lieu of actual delay damages, that such payment is not intended as a penalty or forfeiture, and that the agreed amount of such damages is reasonable in relation to the approximate scope of actual delay damages

anticipated as of the time of execution of this Agreement. The Owner may withhold accrued liquidated damages from payments otherwise due to Contractor.

**8.2.6 Pandemic Rider.** Contractor and Owner both acknowledge and agree that they are entering into this Agreement during the COVID-19 pandemic. It is the Parties' understanding that the Contract Time and Contract Sum each factor in any and all considerations of the pandemic given available information and state and national guidelines concerning the pandemic. It is the parties' expectations that the circumstances of the pandemic affecting the Contractor's performance of the Work will be substantially the same as they are on the Effective Date of this Agreement. In the event circumstances of the pandemic substantially change in a manner that impacts the Contractor's performance of the Work, (1) the Contractor may request an extension of the Contract Time to account for any actual impacts to the critical path of the schedule due to such substantial change, and (2) the Contractor may request an increase of the Contract Sum for increases in the price of labor, materials, or equipment used in its performance due to such substantial change, provided Contractor presents documentation of such increases (including the original prices and estimates) and evidence of Contractor's reasonable efforts to find alternative sources of material or equipment supply and/or labor at the original/non-impacted prices and/or estimates. Contractor's rights to request increases in the Contract Time or Contract Sum under this section shall be conditioned on the Contractor's compliance with all notice requirements contained in this Contract.

**8.2.7 Phased Construction.**

1. Phases. Contractor acknowledges and agrees the Project will progress in phases, in accordance with the Project Schedule. Contractor shall prepare, for Owner Parties' review and approval, a separate Construction Schedule, for each phase. Each phase commences upon Owner Parties' issuance of a Notice to Proceed for such phase and Contractor shall achieve Substantial Completion by the milestone dates set forth in the Contract Documents, including the Construction Schedule.

2. Contract Sums. Owner may choose to establish separate Contract Sums for each phase of the Project and, if so, Contractor shall cooperate to prepare and timely deliver to Owner when due such Contract Sums as set forth in the Project Schedule.

3. Fast-Track Methods. Contractor represents to Owner that Contractor has experience and expertise in fast-track construction and management practices. As such, Contractor acknowledges, agrees, and shall actively participate in project planning, that may necessitate preparation, issuance, and analysis of a number of bid packages in excess of that which is ordinarily required in non-fast-track construction projects.

4. Waiver of Claims. In consideration of the foregoing, Contractor hereby waives all rights and remedies it may have at law or in equity to extra compensation or damages of any kind, and to extensions to the Project, Design, and Construction Schedules, due in any way to performance or planning of the Work on a fast-track basis.

## **ARTICLE 9 PAYMENT APPLICATIONS AND PROJECT COMPLETION**

### **9.1 Contract Sum**

The Contract Sum is defined in each Pricing Amendment.

### **9.2 Schedule of Values**

The Contractor, prior to the first Application for Payment after execution of any Pricing Amendment shall submit to the Owner a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as the Owner may require. This schedule, unless objected to by the Owner, will be used as a basis for reviewing the Contractor's Applications for Payment.

### **9.3 Applications for Payment**

**9.3.1** The application shall be notarized, if required, and supported by data substantiating the Contractor's right to payment as the Owner may require, such as copies of requisitions from the Subcontractors, and material suppliers, and shall reflect retainage if provided for in the Contract Documents. All project costs must be allowable, allocable, and reasonable. The Contractor must with every Application for Payment document and maintain records of all Contract related expenses, including, but not limited to in-kind contributions.

**9.3.1.1** Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay the Subcontractors, material supplier, or other persons or entities providing services or work for the Contractor, unless such Work has been performed by others whom the Contractor intends to pay.

**9.3.1.2** Each Application for Payment shall be accompanied by the following, all in form and substance satisfactory to the Owner:

(1) Duly executed lien and claim waivers in the forms attached as Exhibit D, executed and acknowledged sworn statement from the Contractor listing the Subcontractors and any other person or entity with whom the Contractor has entered into agreements with related to the Work, the amount of each such agreement the amount requested for payment to each such person or entity, and the amounts to be paid to and retained by the Contractor from such progress payment, together with similar sworn statements from all such persons and entities. The waiver and release forms submitted by the Contractor shall be conditional as to the payment sought by the current Application for Payment and shall be unconditional as to the payment received pursuant to the prior Application for Payment.

(2) Duly executed lien and claim waivers in the forms attached as Exhibit D, executed by the Subcontractors and any other person or entity with whom the Contractor has entered into agreements related to the Work. The lien and claim waiver forms submitted by such person or entities shall be conditional as to the

payment sought by the current Application for Payment and shall be unconditional as to the payment received pursuant to the prior Application for Payment.

**9.3.2** Unless otherwise provided in the Contract Documents, payments shall be made for services provided as well as materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

**9.3.3** The Contractor warrants that title to all Work, including the Instruments of Service, covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that, upon submittal of an Application for Payment, all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities entitled to make a claim by reason of having provided services, labor, materials and equipment relating to the Work.

#### **9.4 Certificates for Payment**

The Owner shall, within 15 days after receipt of the Contractor's Application for Payment for a progress payment, issue to the Contractor a Certificate for Payment indicating the amount the Owner determines is properly due, and notify the Contractor in writing of the Owner's reasons for withholding certification in whole or in part as provided in Section 9.5.1.

#### **9.5 Decisions to Withhold Approval**

**9.5.1** The Owner may withhold a Certificate for Payment in whole or in part to the extent reasonably necessary to protect the Owner due to the Owner's determination that the Work has not progressed to the point indicated in the Contractor's Application for Payment, or the quality of the Work is not in accordance with the Contract Documents. If the Owner is unable to certify payment in the amount of the Application, the Owner will notify the Contractor as provided in Section 9.4. If the Contractor and Owner cannot agree on a revised amount, the Owner will promptly issue a Certificate for Payment for the amount that the Owner deems to be due and owing. The Owner may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued to such extent as may be necessary to protect the Owner from loss for which the Contractor is responsible because of

1. defective or nonconforming Work, including design and construction, not remedied;

2. third party claims, including but not limited to lien and bond claims, filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
3. failure of the Contractor to make payments properly to the Subcontractors or others, for services, labor, materials or equipment;
4. reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
5. damage to the Owner or a separate contractor;
6. reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;
7. repeated or substantial failure to carry out the Work in accordance with the Contract Documents
8. failure of the Contractor to submit updates of the schedule as required this Contract;
9. failure of the Contractor to provide satisfactions of claims of Subcontractors or others; or
10. failure of the Contractor to provide waivers and releases from Subcontractors and others.

**9.5.2** When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

**9.5.3** If the Owner withholds certification for payment under Section 9.5.1.iii, the Owner may, at its sole option, issue joint checks to the Contractor and to Subcontractors, material or equipment suppliers, or other persons or entities providing services or work for the Contractor to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered.

## **9.6 Progress Payments**

**9.6.1** After the Owner has issued a Certificate for Payment for a progress payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents unless Owner has a good faith believe that withholding of payment is necessary to protect Owner from Contractor's failure to perform its obligations under the Contract.

**9.6.2** The Contractor shall pay each Subcontractors, and other person or entity providing services or work for the Contractor no later than the time period required by applicable law, but in no event more than 7 days after receipt of payment from the Owner the amount to which the Subcontractors, and other person or entity providing services or work for the

Contractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the portion of the Work performed by the Subcontractors, or other person or entity. The Contractor shall, by appropriate agreement with Subcontractors, and other person or entity providing services or work for the Contractor, require Subcontractors, and other person or entity providing services or work for the Contractor to make payments to lower-tier parties in a similar manner.

**9.6.2.1** Should the Contractor withhold payment from Subcontractors or others due to a bona fide dispute, the Contractor shall notify the Owner in writing. The Owner may then withhold such funds from the Contractor until the dispute is resolved; provided that this Section shall not be construed or applied to prevent the Contractor from receiving payment from the Owner for Work when such Work is the subject of a good faith backcharge by the Contractor against the person or entity involved in the bona fide dispute.

**9.6.3** The Owner will, on request and if practicable, furnish to the Designer, a Consultant, Contractor, or other person or entity providing services or work for the Contractor, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Owner on account of portions of the Work done by such Subcontractors or other person or entity providing services or work for the Contractor.

**9.6.4** The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid the Subcontractors, or other person or entity providing services or work for the Contractor, amounts paid by the Owner to the Contractor for the Work. If the Contractor fails to furnish such evidence within 7 days, the Owner shall have the right to contact the Subcontractors to ascertain whether they have been properly paid. The Owner shall have no obligation to pay or to see to the payment of money to Subcontractors, except as may otherwise be required by law.

**9.6.5** Contractor payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

**9.6.6** A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

**9.6.7** Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by the Subcontractors and other person or entity providing services or work for the Contractor, shall be held by the Contractor for the Subcontractors, or other person or entity providing services or work for the Contractor, for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

**9.6.8** Upon reasonable evidence of the unjustified nonpayment of the Subcontractors or others by Contractor, the Owner may, after giving reasonable notice and opportunity to cure to the Contractor, make payment of amounts due to such persons or entities by direct payments or by means of multiple-payee checks. Upon request of the Owner, the Contractor shall timely furnish to the Owner such information as the Owner reasonably will need to make such direct or multiple-payee check payments, including but not limited to the names and addresses of the persons or entities and the amounts due to each of them.

## **9.7 Failure of Payment**

If the Owner does not issue a Certificate for Payment, through no fault of the Contractor, or Subcontractors, within the time required by the Contract Documents, then the Contractor may, upon 7 additional days' written notice to the Owner, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

## **9.8 Substantial Completion**

**9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof which the Owner agrees to accept separately is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. The date of Substantial Completion is the date certified by the Owner in accordance with this Section 9.8.

**9.8.1.1** For Substantial Completion of the Work or designated portion thereof to be achieved, the Owner also must have received applicable temporary or final certificate of occupancy and all other governmental approvals necessary and required for the Owner to occupy or utilize the Work or designated portion for its intended purpose. The requirement shall be deemed satisfied if all construction, submittals and other performance by the Contractor required for issuance of the certificate of occupancy and other approvals have been completed but the certificate and approvals have not been issued solely because of factors beyond the reasonable control of the Contractor.

**9.8.2** When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Owner a comprehensive punch list of items to be completed or corrected prior to final payment. Failure to include an item on the punch list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

**9.8.3** Upon receipt of the Contractor's punch list, the Owner shall make an observation to determine whether the Work or designated portion which the Owner agrees to accept separately is substantially complete. If the Owner's inspection discloses any item, whether or not included on the Contractor's punch list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work

or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Owner. In such case, the Contractor shall then submit a request for another observation by the Owner to determine Substantial Completion.

**9.8.4** Prior to issuance of the Certificate of Substantial Completion under Section 9.8.5, unless the Contract Documents otherwise provide for property insurance following Substantial Completion, the Owner and Contractor shall discuss and then determine the parties' obligations to obtain and maintain property insurance following issuance of the Certificate of Substantial Completion.

**9.8.5** When the Work or designated portion thereof is substantially complete, the Contractor will prepare for the Owner's signature a Certificate of Substantial Completion that shall, upon the Owner's signature, establish the date of Substantial Completion and fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

**9.8.6** The Certificate of Substantial Completion shall be submitted by the Contractor to the Owner.

## **9.9 Partial Use**

**9.9.1** The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to, by endorsement or otherwise, by the insurer providing property insurance and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a punch list to the Owner as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor.

**9.9.2** Immediately prior to such partial occupancy or use, the Owner and Contractor shall jointly observe the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

**9.9.3** Unless otherwise agreed upon in a separate agreement, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

## **9.10 Final Completion and Final Payment**

**9.10.1** When the Contractor believes that the Work or designated portion thereof has been finally completed, the Contractor shall submit to the Owner written notice that the Work is ready for final observation and upon receipt of a final Application for Payment, the Owner will promptly make such observation. When the Owner finds the Work acceptable under the Contract Documents and the Contract fully performed (except for those obligations which, by their nature, extend beyond Final Completion), the Owner will, subject to Section 9.10.2, promptly issue a final Certificate for Payment.

**9.10.1.1** The term “Final Completion” as used in the Contract Documents shall mean that (1) Substantial Completion of the Work or designated portion thereof has been achieved, (2) the Owner has received a final certificate of all applicable occupancy and other governmental approvals as necessary and required for the Owner to occupy or utilize the Work or designated portion thereof for its intended purpose and (3) the Contractor has performed all of its obligations under the Contract except for those obligations that, by their nature, extend beyond Final Completion.

**9.10.2** Final payment shall not become due until the Contractor submits to the Owner (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work, for which the Owner or the Owner’s property might be responsible or encumbered, (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment, (5) as-constructed record copy of the Construction Documents marked to indicate field changes and selections made during construction, (6) manufacturer’s warranties, product data, and maintenance and operations manuals, (7) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, or releases and waivers of liens, claims, security interests, or encumbrances, arising out of the Contract, to the extent and in such form as may be designated by the Owner, and (8) as-built Drawings in CAD format acceptable to the Owner and all other documents and items required by the Contract to be provided as a condition of achieving Final Completion. If Subcontractors, or other person or entity providing services or work for the Contractor, refuses to furnish a release and waiver required by the Owner, the Contractor shall furnish a bond or other security satisfactory to the Owner to indemnify the Owner against such liens, claims, security interests, or encumbrances. If such liens, claims, security interests, or encumbrances remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such liens, claims, security interests, or encumbrances, including all costs and reasonable attorneys’ fees.

**9.10.2.1** In addition to other documentation required by the Designer and Owner as a condition of final payment, the application for final payment shall be accompanied by final conditional waivers and releases of stop notices, mechanics’, material suppliers’, construction or similar liens and other claims,

executed by the Contractor, Subcontractors at all tiers. The forms of the waivers and releases shall be as set out in Exhibit D.

**9.10.3** If, after Substantial Completion of the Work, Final Completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting Final Completion, the Owner shall, upon application by the Contractor, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Owner prior to issuance of payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

**9.10.3.1** If the Owner makes such payment in advance of Final Completion, the Owner shall retain an amount no less than one hundred fifty percent (150%) of the sum of the cost of the Work for the Contractor to finally complete the Work.

**9.10.4** The making of final payment shall not constitute a waiver of Claims by the Owner.

**9.10.5** Acceptance of final payment by the Contractor shall constitute a waiver of claims by the Contractor except those previously made in writing and identified by the Contractor as unsettled at the time of final Application for Payment.

## **ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY**

### **10.1 Safety Precautions and Programs**

The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract and the entirety of the Work. In addition, Contractor shall be responsible for the security and protection (i) of its equipment, supplies and tools used in connection with the Work, and (ii) for all of the other property owned or leased by Contractor or any of its Contractors located at the Project site.

### **10.2 Safety of Persons and Property**

**10.2.1** Contractor is responsible for initiating and maintaining all safety precautions and programs, commensurate with industry best practices in connection with the performance Contractor's obligations under this Contract. Without limiting Contractor's obligation to indemnify Owner or any of its other obligations under the Contract, Contractor is solely responsible for the conduct, safety, and health of its employees, agents, Subcontractors and others performing the Work or entering into the Work area, and any impact they or their agents may have on the public arising out of this Contract. Contractor represents and warrants that information provided to Owner with regard to the safe conduct of the Contractor's business, if requested by Owner, is accurate and complete. Failure by Owner to review any information provided by Contractor shall not relieve Contractor of its obligations under the Contract. Further, Contractor shall notify Owner immediately upon

any change in such information. Contractor shall comply with all applicable federal, state, provincial and local safety laws and regulations. These requirements include, but are not limited to, posting and maintaining required material safety data sheets; labeling, handling, transporting, storing and disposing of any hazardous materials; training of all on site employees and Contractor employees regarding safe work practices, and mitigation of any hazards identified; inspection of work sites for any unsafe conditions and prompt correction of any such conditions identified. Contractor's failure to comply with this Section constitutes a material breach of this Agreement, and without limitation to other remedies, subjects Contractor to all rights and remedies available to Owner under law and equity, including, but not limited to, immediate termination of this Agreement. The Contractor shall be responsible for precautions for the safety of, and reasonable protection to prevent damage, injury or loss to

1. employees on and those performing labor or services or furnishing equipment or materials at the Work site and other persons who may be affected thereby;
2. the Work and materials and equipment to be incorporated or utilized therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Subcontractors, or other person or entity providing services or work for the Contractor; and
3. other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, or structures and utilities not designated for removal, relocation or replacement in the course of construction;
4. other structures contiguous to the Work site and otherwise located at or contiguous to the premises, and trees, shrubs, lawns, walks, pavements, roadways and utilities serving such structures and premises; and
5. the work, materials, equipment, tools, machinery and, facilities of or being utilized by the Owner's own forces or their separate design professionals, consultants or contractors.

**10.2.2** The Contractor shall comply with, and give notices required by, applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, bearing on safety of persons or property, or their protection from damage, injury or loss.

**10.2.3** The Contractor shall implement, erect, and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including but not limited to posting danger signs and other warnings against hazards, promulgating safety rules and regulations, and notify owners and users of adjacent sites and utilities of the safeguards and protections.

**10.2.4** When use or storage of explosives or other hazardous materials or equipment, or unusual methods, are necessary for execution of the Work, the Contractor shall exercise utmost care, and carry on such activities under supervision of properly qualified personnel and give the Owner reasonable prior notice.

**10.2.5** The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.ii and 10.2.1.iii, caused in whole or in part by the Contractor, the Subcontractors, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.ii and 10.2.1.iii; except to the extent such damage or loss is attributable to negligent acts or omissions of the Owner, or anyone directly or indirectly employed by the Owner, or by anyone for whose acts the Owner may be liable, excluding Contractor and Subcontractors. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.1.15.

**10.2.6** The Contractor shall designate a responsible member of the Contractor's organization, at the site, whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner.

**10.2.7** The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

### **10.3 Hazardous Materials**

**10.3.1** The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl ("PCB"), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner in writing.

**10.3.2** Upon receipt of the Contractor's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor will promptly reply to the Owner in writing stating whether or not the Contractor has reasonable objection to the persons or entities proposed by the Owner. If the Contractor has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor has no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up.

**10.3.3** To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, the Subcontractors, and employees of any of them, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area, if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to, or destruction of, tangible property (other than the Work itself), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

**10.3.4** The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor brings to the site unless such materials or substances are required by the Owner's Criteria. However, Contractor is responsible for the proper transport, use, handling, storage and maintenance of such materials or substances. The Owner shall be responsible for materials or substances required by the Owner's Criteria, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

**10.3.5** The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently transports, handles, stores, or maintains or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

**10.3.6** If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, subject to the availability of lawful funds, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

#### **10.4 Spill Responsibility**

**10.4.1** The Contractor is responsible for any and all releases of environmental pollution during performance of the Contract which occur as a result of, or are contributed by, actions or omissions of Contractor's agents, employees, suppliers, or Contractors. The Contractor agrees to promptly notify Owner and remediate such releases to satisfaction of the Owner and proper regulatory agencies in a manner that complies with applicable federal, state, and local laws and regulations. Cleanup shall be at no cost to the Owner.

**10.4.2** Contractor shall obtain the Owner's written consent prior to bringing onto the Work site any (i) environmental pollutants or (ii) hazardous substances or materials, as the same or reasonably similar terms are used in any applicable federal, state, or local statutes, rules or ordinances. Notwithstanding such written consent from the Owner, the Contractor, at all times, shall:

1. properly transport, handle, use, maintain and dispose of all environmental pollutants and hazardous substances or materials brought onto the Work

site, in accordance with all applicable federal, state, or local statutes, rules, or ordinances;

2. be responsible for any and all spills, releases, discharges, or leaks of (or from) environmental pollutants or hazardous substances or materials that the Contractor has brought onto the Work site; and
3. promptly clean up, without cost to the Owner, such spills, releases, discharges, or leaks to the Owner's satisfaction and in compliance with all applicable federal, state, or local statutes, rules or ordinances.

**10.4.3** The Contractor shall be liable for any and all costs, expenses, damages, claims, and causes of action, or any of them, related to or arising out of a spill, release, discharge, or leak of (or from) any environmental pollutant or hazardous substance or material, to the extent such spill, release, discharge, or leak was caused or contributed to by the Contractor's or Contractor's Subcontractors (i) fault or (ii) failure to perform in accordance with the Contract Documents. Nothing in this Section shall limit the Contractor's liability or responsibility under any other provision of the Contract Documents.

**10.4.4** The Contractor shall report all reportable quantity releases described in this Section 10.4 to applicable federal, state, and local regulatory and emergency response agencies. Upon discovery, regardless of quantity, the Contractor must promptly , telephonically report all releases to the Owner. A written follow-up report shall be submitted to the Owner within 48 hours of the telephonic report. Such written report shall contain, at a minimum:

1. Description of items released (identity, quantity, manifest number, and all other documentation required by law).
2. Whether amount of items released is EPA/DOE reportable and, if so, when it was reported.
3. Exact time and location of release, including a description of the area involved.
4. Containment procedures initiated.
5. Summary of communications about the release the Contractor has had with members of the press or state officials other than the Owner.
6. Description of cleanup procedures employed or to be employed at the site, including disposal location of spill residue.
7. Personnel injuries, if any, resulting from, or aggravated by, the release.

## **10.5 Emergencies**

In an emergency affecting safety of persons or property, the Contractor shall act, at the

Contractor's reasonable discretion, to prevent actual or threatened damage, injury or loss and notify Owner as soon as possible.

## **ARTICLE 11 UNCOVERING AND CORRECTION OF WORK**

### **11.1 Uncovering of Work**

The Owner may request to examine a portion of the Work that the Contractor has covered to determine if the Work has been performed in accordance with the Contract Documents. If such Work is in accordance with the Contract Documents, the Owner and Contractor shall execute a Change Order to adjust the Contract Time and Contract Sum, as appropriate. If such Work is not in accordance with the Contract Documents, the costs of uncovering and correcting the Work shall be at the Contractor's expense and the Contractor shall not be entitled to a change in the Contract Time unless the Work's condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs and the Contract Time will be adjusted as appropriate.

### **11.2 Correction of Work**

**11.2.1 Before or After Substantial Completion.** The Contractor shall promptly correct Work rejected by the Owner or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, compensation for any design consultant employed by the Owner whose expenses and compensation were made necessary thereby, and the Owner's attorneys' fees and related costs, disbursements, all of which shall be at the Contractor's expense.

#### **11.2.2 After Substantial Completion**

**11.2.2.1** In addition to the Contractor's obligations under Section 3.1.12 and all other rights and remedies of Owner, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be defective or not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of the Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor. If the Contractor fails to correct defective or nonconforming Work within a reasonable time during that period after receipt of notice from the Owner, the Owner may correct it in accordance with Section 7.9.

**11.2.2.2** The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

**11.2.2.3** The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 11.2.

**11.2.3** The Contractor shall remove from the site portions of the Work that are defective or not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

**11.2.4** The Contractor shall bear the cost of correcting destroyed or damaged construction of the Owner or separate contractors, whether completed or partially completed, caused by the Contractor's correction or removal of Work that is defective or not in accordance with the requirements of the Contract Documents.

**11.2.5** Nothing contained in this Section 11.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents or applicable law. Establishment of the one-year period for correction of Work as described in Section 11.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time nor shall otherwise be deemed to limit the time within which the obligation to comply with the Contract Documents or applicable law may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

### **11.3 Acceptance of Nonconforming Work**

If the Owner prefers to accept Work that is defective or not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## **ARTICLE 12 COPYRIGHTS AND LICENSES**

Drawings, specifications, and all other documents furnished by the Contractor, including those in electronic form ("**Instruments of Service**") created in the performance of this Agreement are the property of Owner and are deemed a work made for hire under the U.S. Copyright Act. Contractor hereby assigns all intellectual property rights in works created in the performance of this Agreement to Owner. As part of this assignment, Owner possesses all common law, statutory and other reserved rights, including copyrights. Owner grants Contractor a license to Instruments of Service to copy, distribute, modify, display, transmit, perform, and use in the course of Contractor's business, including as necessary to fulfill the obligations of this Agreement, including submission or distribution of Instruments of Service to meet official regulatory requirements, or for similar purposes in connection with the Project.

**12.1** The Contractor and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party or Owner is the intellectual property owner of such information or has permission from the owner to transmit such information for its use on the Project.

**12.2** Upon execution of this Agreement, the Contractor grants to the Owner an irrevocable and non-exclusive license to copy, distribute, modify, display, transmit, perform, and use the Instruments of Service to the extent they contain pre-existing works for the purpose of the Project, including but not limited to the Project's operation, maintenance, and further development by Owner and others retained by Owner for such purposes. Such license shall extend to those parties retained by Owner for such purposes, including but not limited to other design professionals.

**12.2.1** The Contractor shall obtain ownership rights or require assignment of rights, including but not limited to copyrights and licenses, from the Subcontractors, that allow the Contractor to satisfy its obligations to the Owner under this Article 12.

**12.2.2** In the event the Owner alters the Instruments of Service without the author's written authorization or uses the Instruments of Service on other projects without retaining the authors of the Instruments of Service, the Owner releases the Contractor, Subcontractors and any other person or entity providing services or work for any of them, from all claims and causes of action arising from or related to such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Contractor, Subcontractors and any other person or entity providing services or work for any of them, from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's alteration or use of the Instruments of Service on other projects under this Section 12.3.2. The terms of this Section 12.3.2 do not apply if the Owner terminates this Agreement for cause under Sections 13.1.4 or 13.2.2.

## **ARTICLE 13 TERMINATION**

### **13.1 Termination or Suspension Prior to Execution of the Pricing Amendment**

**13.1.1** If the Owner fails to make payments to the Contractor for undisputed Work prior to execution of the Pricing Amendment in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for suspension of performance of services under this Agreement. If the Contractor elects to suspend the Work, the Contractor shall give 7 days' written notice to the Owner before suspending the Work. In the event of a suspension of the Work, to the extent the suspension is not attributable to the Contractor's failure to comply with the Contract, the Contractor shall have no liability to the Owner for delay or damage caused by the suspension of the Work. Before resuming the Work, the Contractor shall be paid all sums due related to undisputed Work prior to suspension and any expenses incurred in the interruption and resumption of the Contractor's Work. The Contract Sum for, and time to complete, the remaining Work shall be equitably adjusted.

**13.1.2** If the Owner suspends the Project, the Contractor shall be compensated for the undisputed Work performed prior to notice of such suspension. When the Project is resumed, the Contractor shall be compensated for reasonable expenses incurred in the interruption and resumption of the Contractor's Work according to the rate schedule pre-approved in writing by the Owner and attached hereto as Exhibit H. The Contract Sum for, and time to complete, the remaining Work shall be equitably adjusted.

**13.1.3** If the Owner suspends the Project for more than 180 consecutive days for reasons other than the fault of the Contractor, the Contractor may terminate this Agreement by giving not less than 7 days' written notice.

**13.1.4** The Owner may terminate this Agreement upon not less than 7 days' written notice and opportunity to cure should the Contractor fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

**13.1.5** The Owner may terminate this Agreement in whole or in part upon not less than 7 days' written notice to the Contractor for the Owner's convenience and without cause. Owner's right to terminate for convenience specifically includes Owner's termination in the event that Owner fails to obtain a Federal Energy Regulatory Commission license for the Project.

**13.1.6** In the event of termination not the fault of the Contractor, the Contractor shall be compensated for undisputed Work performed prior to termination, together with Reimbursable Expenses then due and any other expenses directly attributable to termination for which the Contractor is not otherwise compensated. In no event shall (1) the Contract Sum under this Section 13.1.6 be greater than the compensation set forth herein and (2) the Contractor be entitled to its fee or other payment, including but not limited to lost profits, on account of Work not performed.

## **13.2 Termination or Suspension Following Execution of the Pricing Amendment**

### **13.2.1 Termination by the Contractor**

**13.2.1.1** The Contractor may terminate this Agreement if the Work is stopped for a period of 180 consecutive days through no act or fault of the Contractor, the Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

- i. Issuance of a lawful order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- ii. An act of government, such as a declaration of national emergency that requires all Work to be stopped; or
- iii. Because the Owner has not made a required payment within the time stated in the Contract Documents.

**13.2.1.2** If a basis for termination described in Section 13.2.1.1 exists, the Contractor may, upon 7 days' written notice to the Owner, and if the Owner fails to cure such reason during the seven-day period, terminate the Agreement and recover from the Owner payment for Work executed, reasonable overhead and profit on Work executed, and costs incurred by reason of such termination.

### **13.2.2 Termination by the Owner For Cause**

**13.2.2.1** The Owner may terminate the Agreement in whole or in part pursuant to Section 13.2.2.2 if the Contractor

- i. fails to submit the Proposal by the date required by this Agreement, or if no date is indicated, within a reasonable time consistent with the date of Substantial Completion;
- ii. persistently or substantially refuses or fails to supply an Designer, or enough properly skilled Subcontractors, workers or proper materials or equipment;
- iii. fails to make payment to the Subcontractors for services, materials or labor in accordance with their respective agreements with the Contractor;
- iv. persistently or substantially disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority;
- v. persistently or substantially fails to carry out the Work pursuant to the Contract Documents;
- vi. persistently or substantially fails to comply with the current Contractor's schedule;
- vii. submits one or more Applications for Payment that the Contractor overstates the amount to be paid, by the Owner; or
- viii. is otherwise guilty of substantial breach of a provision of the Contract Documents;
- ix. or Contractor's Default.

**13.2.2.2** If a basis for termination as described in Section 13.2.2.1 exists, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, 7 days' written notice, terminate the Agreement in whole or in part and may:

- i. Exclude the Contractor from the site and take possession of all or a portion of the materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- ii. Accept assignment of some or all of the Subcontractors agreements

pursuant to Section 3.1.15; and

- iii. Finish the Work or portion thereof by whatever reasonable means and method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

**13.2.2.3** In the event of termination of the Agreement in whole or in part under Section 13.2.2.1, the compensation of the parties as to the terminated part of the Agreement shall be determined as follows:

- i. Add value of the Work performed as of the time of the termination, provided that this sum shall not exceed the Contract Sum for that Work as of the time of the termination. For purposes of this Section, the term “Terminated Contract Sum” shall mean the sum determined under this Item.
- ii. Determine the amount of all costs incurred by the Owner in completing the Work. For purposes of this Section, the term “Owner’s Costs” shall mean the sum determined under this Item .ii. The Owner’s Costs shall include, but not be limited to, the cost of labor, services, materials, equipment, supervision and “general conditions” to complete the Work; the cost of any additional design, construction management, and Project administrative costs required to facilitate completion; any costs incurred in retaining another contractor or subcontractors; any additional interest or other fees paid by the Owner; any attorneys’ fees and other legal expenses related to the termination of the Agreement and transactions to arrange for the completion of the Work; and all other costs, damages and expenses incurred by the Owner by reason of the termination of the Agreement, the completion of the Work and the Project, and delay in the completion of the Work and the Project.
- iii. Subtract the Terminated Contract Sum from the Contract Sum as of the time of the termination.
- iv. If the Owner’s Costs exceed the amount determined under Item .iii, then the Contractor shall pay the Owner the amount of the excess less the amount of the Terminated Contract Sum not previously paid, if any.
- v. If the amount determined under Item .iii exceeds the Owner’s Costs, then the Owner shall pay the Contractor the amount of the Terminated Contract Sum not paid, if any.

**13.2.2.4** Reserved

### **13.2.3 Suspension by the Owner for Convenience**

**13.2.3.1** The Owner may, with or without cause or prior notice, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

**13.2.3.2** The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 13.2.3.1. No adjustment shall be made to the extent

- i. that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- ii. that an equitable adjustment is made or denied under another provision of the Contract.

#### **13.2.4 Termination by the Owner for Convenience**

**13.2.4.1** The Owner may, at any time, terminate the Agreement in whole or in part for the Owner's convenience.

**13.2.4.2** Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- i. cease operations as directed by the Owner in the notice;
- ii. take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and,
- iii. except for Work directed to be performed prior to the effective date of termination stated in the notice, and also except for Work not covered by the termination, terminate all existing Project agreements, including agreements with the Subcontractors, and purchase orders, and enter into no further Project agreements and purchase orders.

**13.2.4.3** In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment as to the terminated part of the Agreement pursuant to the provisions of Article 13, but otherwise shall be paid the total of (1) the cost of the Work incurred by the Contractor to the date of termination, (2) an amount for overhead and profit on the Cost of the Work, or if no such amount is set forth, a reasonable amount, (3) fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Contractor which the Owner elects to retain and which is not otherwise included in the cost of the Work under subitem (1), and (4) fair compensation for the Contractor's demobilization costs and other costs directly incurred relating to the termination which are not otherwise included in the cost of the Work under subitem (1). In no event, however, shall Contractor be entitled to payment of its fee or other payment, including but not limited to lost profits or consequential damages on this Project or any other project, on account of Work not performed.

## **ARTICLE 14 CLAIMS AND DISPUTE RESOLUTION**

### **14.1 Claims**

**14.1.1 Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

**14.1.2 Time Limits on Claims.** The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other, arising out of or related to the Contract in accordance with the time period specified by applicable law.

#### **14.1.3 Notice of Claims**

**14.1.3.1 Prior To Final Payment.** Prior to Final Payment, Claims by Contractor must be initiated by written notice to the Owner (1) within 21 days after occurrence of the event giving rise to such Claim or (2) within 21 days after the Contractor first recognizes or, in the exercise of reasonable care, should have first recognized the condition giving rise to the Claim, whichever of (1) or (2) occurs later. Failure of the Contractor to deliver notice of a Claim within the time period required by this Section shall result in a waiver of the Claim and all rights and remedies arising from the Claim.

**14.1.3.2 Claims Arising After Final Payment.** After Final Payment, Claims by Contractor, that have not otherwise been waived pursuant to Section 9.10.5, must be initiated by prompt written notice to the Owner.

**14.1.4 Continuing Contract Performance.** Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Section 13.2.1, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

**14.1.5 Claims for Additional Cost.** If the Contractor knows or has a reason to know before performing a particular portion of the Work that it will have a Claim for an increase in the Contract Sum for performing that portion of the Work, written notice as provided herein shall be given by the Contractor before proceeding to execute the particular portion of the Work that relates to the Claim. Otherwise, notice of a Claim for an increase in the Contract Sum shall be made as required by Section 14.1.3. Within a reasonable time after delivery of notice of the Claim, Contractor shall submit to Owner substantiating data and other information sufficient, as determined by Owner, to permit evaluation of the Claim by Owner. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Sections 10.4 or 10.5.

#### **14.1.6 Claims for Additional Time**

**14.1.6.1** If the Contractor intends to make a Claim for an extension in the Contract Time, written notice as provided herein shall be given to the Owner. Such notice shall include detailed documentation of the cause or event resulting in the need for the extension of time, and a schedule analysis based upon the approved Contractor's construction schedule, showing the impact of the cause or event on the critical path of the approved Contractor's construction schedule. No Claim under this Section shall be valid unless so made. If a Claim for additional cost related to this Claim is to be asserted, it shall be made as provided in Section 14.1.5.

**14.1.6.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the critical path of scheduled construction.

## **14.2 Dispute Resolution**

**14.2.1 Mediation.** Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party. Request for mediation shall be filed in writing with the other party to this Agreement. The request may be made concurrently with the filing of a demand for arbitration or the institution of legal or equitable proceedings but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If the parties cannot agree on the choice of a mediator, the parties shall apply to the local state court to appoint a mediator. The mediator shall not also serve as an arbitrator. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Written and signed agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

**14.2.2 [Intentionally deleted.]**

### **14.2.3 Litigation**

1. **Jurisdiction / Venue.** Any claim, dispute or other matter in question arising out of or related to this Agreement not resolved by mediation shall be submitted to the Benton County Oregon Circuit Court and the Parties hereby consent to the jurisdiction of the same and waive any objection which it may now or later have to the laying of venue of any action or proceeding in such court; provided, however, notwithstanding the foregoing, if a legal action or proceeding must be brought in a federal forum, the Party bringing such action or proceeding shall do so in the United States District Court for the District of Oregon. This paragraph shall not be construed to (a) authorize Contractor to bring a legal action or proceeding

against Owner in a federal forum except to the extent Congress has validly abrogated Owner's sovereign immunity or (b) waive any form of Owner's immunity, including sovereign immunity and immunity based on the Eleventh Amendment to the United States Constitution.

2. **Appeal.** All rights of appeal are fully preserved unless the parties agree otherwise under a separate written, fully executed document clearly identified as a waiver of appeal.

**14.2.4 No Attorney Fees.** The parties to this Agreement expressly waive and release any rights either has to recover attorney fees and costs and, expert fees and costs incurred in connection with any and all disputes or claims of any kind arising out of the Project, including, without limitation, any rights to recover such fees and costs granted by any federal or state statute, regulation, or rule, including, but not limited to, lien statutes. This waiver and release applies to any and all claims of any kind, regardless of legal or equitable theory, and applies to fees and costs incurred before, during and after any mediation, arbitration, or court proceeding. Contractor shall include an equivalent waiver and release in each of its sSubcontractor agreements on the Project, and shall indemnify, defend, reimburse and hold Owner harmless against any claims for fees or costs and against any damages resulting from the failure to do so. This Section shall not be interpreted to prohibit recovery of attorney fees as indemnity damages as described in the indemnity or lien clause(s) of this Agreement.

1. If applicable law prevents either Party's or both parties' full waiver of attorney fees as provided in Section 14.2.4 above, then Section 14.2.4 shall be inapplicable and the prevailing party in any dispute shall be awarded their attorney fees and costs and expert fees and costs incurred pre-trial or arbitration, during trial or arbitration, upon any appeal, petition for reconsideration or petition for review, and upon any bankruptcy, insolvency or collection.

## **ARTICLE 15 MISCELLANEOUS PROVISIONS**

### **15.1 Governing Law**

This Contract thereto is entered into pursuant to and governed by the laws of the State of Oregon, without regard to its conflicts of laws provisions.

### **15.2 Successors and Assigns**

**15.2.1** The Owner and Contractor, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained in the Contract Documents. The Contractor shall not assign its rights or obligations under the Contract in whole or in part without prior written consent of the Owner. If Contractor attempts to make such an assignment without such consent, the Contractor shall nevertheless remain legally responsible for all obligations under the Contract and such assignment shall be void.

**15.2.2** The Owner may, without consent of the Contractor, assign the Contract and the Contractor shall execute all consents reasonably required to facilitate such assignment. If Owner assigns all of its rights and delegates all of its duties and gives written notice of the assignment to Contractor, Contractor agrees: (a) to regard the assignee as Owner's successor for all purposes of this Agreement, with all of the rights and duties that Owner had before the assignment was made; (b) not to look further to Owner for payment under this Agreement; (c) not to look further to Owner for satisfaction of any claims it may have asserted or will assert with regard to the Work; (d) without deleting Contractor's continuing indemnity obligation to Owner, Contractor will include the assignee as a beneficiary of the indemnity obligations that Contractor owes to Owner under this Agreement; and (e) without deleting Owner's additional insured status under this Contract, Contractor will include assignee as an additional insured under Contractor's liability insurance policies. The Contractor shall execute all consents reasonably required to facilitate such assignment. If requested by Contractor, Owner will provide reasonable evidence that the assignee has made financial arrangements or otherwise has the ability to fulfill the payment obligations under this Agreement.

**15.2.3** If the Owner requests the Contractor, Subcontractors to execute certificates, other than those required by Section 3.1.13, the Owner shall submit the proposed language of such certificates for review at least 14 days prior to the requested dates of execution. If the Owner requests the Contractor, Subcontractors to execute consents reasonably required to facilitate assignment to a lender, the Contractor, Subcontractors shall execute all such consents that are consistent with this Contract, provided the proposed consent is submitted to them for review at least 14 days prior to execution. The Contractor, Subcontractors shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of their services.

### **15.3 Written Notice**

A party giving or making any notice, request, demand or other communication (each a "Notice") pursuant to this Contract shall give the Notice in writing and use one of the following methods of delivery: personal delivery, United States Postal Service Registered or Certified Mail (return receipt requested and postage prepaid), overnight courier (with all fees prepaid), facsimile or e-mail to the other party's address as listed on the signature page of this Contract. Notice to Owner is to be delivered to those contacts as listed in Exhibit H 'Notice and Contact Information.'

Notice is effective: (i) if given by facsimile, upon receipt by the sending party of an appropriate facsimile confirmation; (ii) if given by e-mail, by confirmation of receipt by return e-mail, which is not satisfied by an automatically-generated message that the recipient is out of the office or otherwise unavailable; or (iii) if given by any other means, when delivered at the address specified in this Section.

### **15.4 Rights and Remedies**

**15.4.1** Duties and obligations imposed by the Contract Documents, and rights and remedies available thereunder, shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

**15.4.2** Except as otherwise provided in this Contract, no action or failure to act by the Owner or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

## **15.5 Tests and Inspections**

**15.5.1** Contractor shall conduct all tests, inspections, and approvals of the Portions of Work in compliance with all applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Owner timely notice of when and where tests and inspections are to be made so that the Owner may be present for such procedures. The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Contractor.

**15.5.2** If the Owner determines that portions of the Work require additional testing, inspection or approval not included under Section 15.5.1, the Owner will instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Owner of when and where tests and inspections are to be made so that the Owner may be present for such procedures. Such costs, except as provided in Section 15.5.3, shall be at the Owner's expense.

**15.5.3** If such procedures for testing, inspection or approval under Sections 15.5.1 and 15.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure shall be at the Contractor's expense.

**15.5.4** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Owner.

**15.5.5** If the Owner is to observe tests, inspections or approvals required by the Contract Documents, the Owner will do so promptly and, where practicable, at the normal place of testing.

**15.5.6** Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

## **15.6 Confidential Information**

If the Owner or Contractor transmits Confidential Information to the other Party or an agent of the other Party, the transmission of such Confidential Information constitutes a warranty to the party receiving such Confidential Information that the transmitting party is authorized to transmit the Confidential Information. If a Party receives Confidential Information, the receiving party shall use reasonable efforts to keep the Confidential Information confidential and shall not disclose it to any other person or entity except as set forth in Section 15.6.1.

**15.6.1** A party receiving Confidential Information may disclose the Confidential Information as required by law or court order, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, and the Party's reasonable interpretation of the law. A party receiving Confidential Information may also disclose the Confidential Information to its employees, Subcontractors in order to perform services or work solely and exclusively for the Project, provided those employees, Subcontractors are subject to the restrictions on the disclosure and use of Confidential Information as set forth in this Contract.

**15.6.2.** Without limiting the foregoing, Contractor, or any other entity or agency acting under Contractor's auspices (collectively, the "**Contractor Parties**") will not (i) make any public announcement regarding its association with Owner or disclose to any third party the existence of this Contract or the monetary value hereof; or (ii) identify Owner or any of its affiliates in any manner on Contractor's customer list or its web site (or on any third party web site identifying Contractor); or (iii) use Owner's name or any Owner trademark, trade name, logo, or service mark, whether registered or not, in connection with publicity, advertisements, or promotion, or in any other connection. Contractor is expressly prohibited from utilizing photographs, digital pictures, videos, depictions or images of the Project in Contractor's marketing materials and/or on Contractor's Internet web site, or for any other purpose.

**15.7 Capitalization.** Terms capitalized in the Contract include those that are (1) specifically defined or (2) the titles of numbered articles.

## **15.8 Interpretation**

**15.8.1** In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

**15.8.2** Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

**15.8.3** This Contract incorporates all provisions as required by law. Such incorporated provisions will have priority over any conflicting provision herein. Should any provision of the Contract, at any time, be in conflict with any law, statute, code, ordinance, rule, regulation or lawful order of a public authority, or be unenforceable or inoperative for any

reason, then the remaining provisions of the Contract nonetheless shall continue in full force and effect and the court shall give the offending provision the fullest meaning and effect allowed by law.

**15.9 Execution and Counterparts.** This Contract may be executed by facsimile or PDF and in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

**15.10 Survival.** The terms and conditions of this Contract that by their sense and context are intended to survive termination or expiration hereof shall so survive.

**15.11 Severability.** If any provision of this Contract is determined to be invalid, illegal or unenforceable, the remaining provisions of this Contract remain in full force and effect if the essential terms and conditions of this Contract for both parties remain valid, legal and enforceable.

**15.12 Merger.** This Contract, including all documents referred to herein and attached hereto, constitutes the entire agreement between the parties and supersedes all prior representations, understanding and agreements between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Contract. No amendment, consent, or waiver of terms of this Contract shall bind either party unless it is in writing and signed by authorized representatives of each of the parties. Any such amendment, consent, or waiver is effective only in the specific instance and for the specific purpose given.

**15.13 Order of Precedence.** In the event of a conflict, all the terms and conditions of this Contract, its exhibits, and any amendments thereto supersede all terms and conditions on any forms used by the Contractor. This Contract consists of the following documents in descending order of precedence:

[ ]

**15.14 No Third Party Beneficiary.** Owner and Contractor are the only parties to this Contract and are the only parties entitled to enforce its terms. Nothing in this Contract gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly, or otherwise, to third parties

**15.15 Assignment / Delegation.** Contractor shall not assign, delegate or otherwise transfer any of its rights or obligations under this Contract, without the prior written approval of OSU, clearly identified as a consent to assignment, delegation, or transfer. Any assignment of rights or delegation of duties is prohibited under this Section, whether by merger, consolidation, dissolution, operation of law or any other manner. Any purported assignment of rights or delegation of duties in violation of this Section is void. Owner's consent to delegation does not relieve Contractor of any of its performance obligations.

**15.16 Waiver.** No waiver of an obligation under this Contract is effective unless it is in writing and signed by the party granting the waiver, and clearly identified as a waiver to this Contract. No failure or delay in exercising any right or remedy, or in requiring the satisfaction

of any condition under this Contract operates as a waiver or estoppel of any right, remedy or condition.

**15.17 Access to Records, Records Retention and Audit.** Contractor shall provide any information, documents, site access, or other assistance requested by OSU, DOE, federal or state auditing agencies; or their authorized representatives, for the purpose of audits and investigations. Such assistance may include, but is not limited to, reasonable access to the Contractor's records relating to this Contract.

**15.18 Accounting; Audit Access.** The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under the Contract; the accounting and control systems shall be satisfactory to OSU. OSU, DOE and federal or state auditing agencies; or their authorized representatives, shall be afforded reasonable and regular access, including in-person access, to the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other electronic and hard copy data relating to the Contractor's right to payment under and the Contractor's compliance with the terms and conditions of this Contract, and the Contractor shall preserve these for a period of six years after final payment or for such longer period as may be required by law.

**15.19 Periodic and Final Audits.** Owner may, at its discretion, perform periodic audits of the Cost of the Work and any other reimbursable costs associated with the Project. Owner may conduct a final audit of all Project books and records prior to the Project closeout. The Contractor shall cooperate fully with OSU, DOE, and Federal Auditing Agencies in the performance of such audits.

**15.20 Allowable Costs.** All project costs must be allowable, allocable, and reasonable. The Contractor shall document and maintain records of all Contract related expenses, including, but not limited to in-kind contributions. The Contractor is responsible for maintaining records adequate to demonstrate that Contract expenses claimed have been incurred, are reasonable, allowable, and allocable, and comply with cost principles. Upon request, the Contractor is required to provide such records to OSU, DOE, or federal or state auditing agencies; or their authorized representatives. Such records are subject to audit. Failure to provide OSU, DOE or federal or state auditing agencies; or their authorized representatives, adequate supporting documentation may result in a determination by OSU, DOE or Federal Auditing Agencies that those costs are unallowable.

**15.21 Availability of Funds.** Owner certifies that sufficient funds are available and authorized for expenditure to finance costs of this Contract within its current biennial appropriation or expenditure limitation, provided, however, that continuation of the Contract, or any extension, after the end of the fiscal year or current expenditure limitation in which it is written, is contingent upon a new appropriation or limitation for each succeeding period for the purpose of this Contract. Funding for this project is contingent upon (1) availability of Federal funds appropriated by Congress for the purpose of this program; (2) the availability of future-year budget authority. Failure to receive funding for any of the stated reasons in this section may result in termination of the Contract, at Owner's discretion.

**15.22 Awards, Prizes, and Recognition.** As applicable, upon request by Owner or prior to completion of work under this Contract, Contractor shall provide the following related to any awards, prizes, or other recognition for project work or results, subject inventions, patents or patent applications, etc. as a result of work performed under this Contract. List name of award/recognition/prize, name of sponsoring organization, date of receipt, and subject of award/prize/recognition.

**15.23 Conference Spending.** The Contractor shall seek and obtain written approval from OSU prior to incurring conference expenses under this Contract. OSU will not pay to Contractor any payments for conference expenses without evidence of prior written approval from OSU to incur such expenses under the Contract.

**15.24 Contractor Performance Warranty.** Contractor represents and warrants to Owner that Contractor has the skill and knowledge possessed by well-informed members of its trade or profession, and Contractor shall apply that skill and knowledge with care and diligence so Contractor and Contractor's employees, agents, and any authorized subcontractors perform the services described in this Contract in accordance with standards prevalent in the industry or business most closely involved in providing the services.

**15.25 Conflict of Interest.** Contractor covenants that is presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services hereunder. Contractor further covenants that in the performance of this Contract no person having any such interest shall be employed.

**15.26 Covered Relationship.** The Contractor shall notify Owner of the existence of a 'covered relationship' as defined by 5 CFR 2635.502(a) & (b) between the Contractor and OSU which creates at a minimum an apparent conflict of interest. The Contractor shall notify OSU of the covered relationship and provide detailed information and justification (including, for example, mitigation measures) as to why the relationship under this Contract does not create an actual conflict of interest.

**15.27 Contractor Reporting.** As applicable, Contractor shall report to Owner on the following: a.) any notices or claims of violations of intellectual property rights arising out of or relating to the performance of the work performed under this Contract; b.) Potential or actual violations of foreign, federal, state, and municipal laws arising out of or relating to work performed under this contract, including but not limited to the Jones Act; c.) Potential or actual violations of U.S. export control laws and regulations arising out of or relating to the work under the Contract; d.) Any fatality or injuries requiring hospitalization arising out of or relating to the work under the Contract; d.) Potential or actual violations of environmental, health, or safety laws and regulations; e.) Any event which is anticipated to cause significant schedule slippage or cost increase; f.) any damage to Government owned equipment in excess of \$25,000.

**15.28 Equipment.** Title to equipment: Title to equipment ("property") acquired under this Contract will conditionally vest upon acquisition with OSU.

**15.29 Foreign Contractor.** If Contractor is not domiciled in or registered to do business in the State of Oregon, Contractor shall promptly provide to the Oregon Department of Revenue and the Secretary of State, Corporation Division, all information required by those agencies, subject to Oregon applicable law and relative to the services performed under this Contract. Subject to Oregon applicable law, if Contractor's services performed under this Contract qualify as doing business in the State of Oregon, Contractor shall demonstrate its legal capacity to perform these services in the State of Oregon prior to entering into this Contract.

**15.30 Media Reports.** For any media articles (e.g. newspapers, magazines, online media) produced by the Contractor after being granted permission by Owner to produce such media, the Contractor shall provide to Owner upon request or prior to the completion of work under this Contract, the following: list author, title publication or website, page number (if applicable), and date of publication.

**15.31 Networks / Collaborations.** Networks/Collaborations Fostered: As applicable, upon request by Owner or prior to completion of work under this Contract, Contractor shall provide information to Owner about partnerships and other arrangements concluded with respect to the project or technology area or work performed under this Contract. Contractor shall list name of network/collaboration (if any), name of entities involved, date of agreement (if any), brief description of network/collaboration, and technology area. Contractor shall clearly denote the partner organizations unique and distinguished contribution to the project as a result of work performed under this Contract.

**15.32 Other Products.** As applicable, upon request by Owner or prior to completion of work under this Contract, Contractor shall provide Owner the following information: additional projects output, such as data or databases, physical collections, audio or video, software or netware, models, educational aid or curricula, instruments or equipment. Contractor shall provide a brief description of additional project output, date of release, and entity to which output was provided.

**15.33 Publications.** Contractor shall include the following Acknowledgement and Disclaimer in publications arising out of, or relating to, work performed under this Contract:

Acknowledgement: "This material is based upon work supported by the U.S. Department of Energy's Office of Energy Efficiency and Renewable Energy ("EERE") under the Water Power Program Award Number DE-EE0007899."

Disclaimer: "This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or

any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof.”

**15.34 Technologies / Techniques.** As applicable, upon request by Owner or prior to completion of work under this Contract, Contractor shall briefly describe the new technologies or techniques [specific capabilities and performance improvements enabled], the pre-commercialization history of the technologies and their potential application to current and future projects.

**15.35 Patent Applications.** As applicable, upon request by Owner or prior to completion of work under this Contract, Contractor shall provide the following patent application information: list patent number, name of inventors, assignee, patent application number, date of filing, and title of patent application.

**15.36 Licensed Technologies.** As applicable, upon request by Owner or prior to completion of work under this Contract, Contractor shall provide the following information for subject inventions licensed to third parties as applicable; list name of licensee, domestic or foreign patent or patent application number, title, and expiration date of agreement.

**15.37 Protected Data and Limited Rights Data.** As applicable, the Contractor shall mark protected data and limited rights data for all deliverables provided under this Contract. Failure to properly mark data may result in its public disclosure under the Freedom of Information Act (FOIA, 5 U.S.C. Section 552) or otherwise. The work under this contract is funded by the U.S. Government. Therefore, unlimited rights are retained by the government, to any technical data or commercial or financial data produced under this Contract.

**15.38 Government Employment Status.** Contractor certifies that either (a) it is not currently employed by Owner or the federal government; or (b) if Contractor is so employed, Contractor has fully disclosed to Owner in writing such employment status, is in full compliance with any statutes, regulation, and Owner or the federal government policies regarding employee contracting, and agrees to indemnify and hold harmless Owner for any failure by Contractor to comply with such statutes, regulations, or policies.

**15.39 Independent Contractor Status.** The services to be rendered under this Contract are those of an independent contractor. Owner reserves the right (a) to determine and modify the delivery schedule for the services and (b) to evaluate the quality of the services; however, Owner may not and will not control the means or manner of Contractor's performance. Contractor is responsible for determining the appropriate means and manner of performing the services. Contractor is not an officer, employee or agent of Owner as those terms are used in ORS 30.265. Contractor has no authority to act on behalf of Owner and shall not purport to make any representation, contract, or commitment on behalf of Owner.

**15.40 OSU / PACWAVE Name and Trademark.** Contractor shall not identify this Contract, nor use OSU's or PacWave's names, trademarks, service marks, or other proprietary marks in any of Contractor's marketing material, advertising, press releases, publicity matters or other promotional materials without the prior written consent of the Owner Contract Administrator, which consent may be withheld in OSU's sole discretion.

**15.41 Recycled Products.** Contractors will use recycled products, as defined in ORS 279A.010(1)(ii), to the maximum extent economically feasible in the performance of the Contract.

**15.42 Sales and Use Taxes.** Owner shall pay all applicable sales, excise, or use taxes in connection with this Contract. Invoices shall separately identify all such taxes and shall include either Contractor's sales tax or use tax permit number. Contractor shall be responsible for all other taxes, including taxes based upon Contractor's income. Contractor shall indemnify, defend, and hold harmless Owner from and against any interest, penalties, or other charges resulting from the non-payment or late payment of taxes or other charges for which Contractor failed to invoice Owner or which Contractor otherwise failed to pay in a timely manner.

**15.43 MWESB Reporting.** Contractor is required to provide a report on the dollar volume of purchases provided under the Contract by the Contractor from firms which are defined as follows:

**15.43.1 Disabled Veteran Enterprise** means a business that is at least 51% owned by one or more disabled veterans. A disabled veteran is a veteran of the military, naval, or air service of the United States with a service connected disability who is a resident of the State of Oregon. To qualify as a veteran with a service connected disability, the person must be currently declared by the United States Veterans Administration to be 10% or more disabled as a result of service in the armed forces. The business must be licensed and registered in the state of Oregon.

**15.43.2 Disadvantaged Business Enterprise (DBE)** is a small business with average annual gross receipts less than \$17,420,000. The business must be owned and controlled by one or more socially and economically disadvantaged individual(s). The one or more socially and economically disadvantaged individual(s) must have made a contribution of capital to the business, which is commensurate with their ownership interest. Socially and economically disadvantaged individual(s) are people who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as members of a group without regard to their individual qualities. The business must be independent. The business must be licensed and registered in the state of Oregon.

**15.43.3 Emerging Small Business**, (defined in ORS 200.005), is a licensed and registered business located in Oregon for which the average annual gross receipts for the three previous tax years do not exceed \$3,266,219 for construction and \$1,088,740 for non-construction businesses. The business must have fewer than 29 employees.

**15.43.4 Minority Business Enterprise**, (defined in ORS 200.005), is a business which is at least 51% owned by one or more minority individuals or, in the case of any publicly owned business, at least 51% of the stock of which is owned by minority individuals. Minority individuals are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans. The business must be licensed and registered in the state of Oregon.

**15.43.5 Women Business Enterprise**, (defined in ORS 200.005), is a business which is at least 51% owned by one or more women. The woman or women must have managerial and operational control over all aspects of the business. The one or more women owner(s) must have made a real and substantial contribution of capital or expertise to the business, which is commensurate with their ownership interest. The business must be licensed and registered in the state of Oregon.

This report shall be in consolidated form showing all such purchases under the Contract. This report will provide a cumulative figure that shows year to date amounts for each supplier ownership category.

## **ARTICLE 16 LAWS AND POLICIES**

### **16.1 APPLICABLE LAW; JURISDICTION AND VENUE.**

**16.1.1** The laws of the State of Oregon (without giving effect to its conflict of laws principles or laws) govern all matters arising out of or relating to the Contract, including, without limitation, its validity, interpretation, construction, performance or enforcement. Any party bringing a legal action or proceeding against the other party arising out of or relating to this Contract shall bring the legal action or proceeding in the Circuit Court of Oregon for Benton County.

**16.1.2** If a legal action or proceeding must be brought in a federal forum, the party shall bring the legal action or proceeding in the United States District Court for the District of Oregon. This paragraph does not authorize Contractor to bring a legal action or proceeding against Owner in a federal forum except to the extent Congress has validly abrogated OSU's sovereign immunity. This paragraph is also not a waiver by Owner of any form of immunity, including without limitation sovereign immunity and immunity based on the Eleventh Amendment to the United States Constitution.

1. Except as set forth above, the parties consent to in personam jurisdiction in the above courts and waive any objection to venue and any objection that the forum is inconvenient.

### **16.2 COMPLIANCE WITH APPLICABLE LAWS AND POLICIES.**

**16.2.1** The parties shall at all times comply with all applicable federal, state and local laws, regulations, executive orders and ordinances pertaining to their respective businesses, products or services, employment obligations, and the subject matter of this Contract. The parties shall at all times comply with all applicable standards and policies of OSU, including without limitation any such laws or regulations regarding employment discrimination. If this Contract is being funded with federal funds, Contractor agrees to comply with all applicable federal contracting statutes, regulations and policies.

**16.2.2** Without limiting the generality of the foregoing, Contractor expressly agrees to comply with the following laws, regulations and executive orders to the extent they are applicable to the Contract: (i) Titles VI and VII of the Civil Rights Act of 1964, as amended; (ii) Paragraphs 503 and 504 of the Rehabilitation Act of 1973, as amended; (iii)

the Americans with Disabilities Act of 1990, as amended; (iv) Executive Order 11246, as amended; (v) the Health Insurance Portability and Accountability Act of 1996; (vi) the Age Discrimination in Employment Act of 1967, as amended, and the Age Discrimination Act of 1975, as amended; (vii) the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; (viii) ORS Chapter 659, as amended; (ix) the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g; (x) the Health Insurance Portability and Accountability Act requirements noted in OAR 125-055-0115; (xi) the Oregon Consumer Identity Theft Protection Act, ORS 646A.600-646A.628; (xii) all regulations and administrative rules established pursuant to the foregoing laws; (xiii) the Jones Act and related laws and regulations (including but not limited to 46 U.S.C. -55102, -55109, 55111, -55112, and -55103), and (xiv) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations. These laws, regulations and executive orders are incorporated by reference herein to the extent that they are applicable to the Contract and required by law to be so incorporated. Failure to comply with the laws specifically identified in this section is a material breach of this Contract.

### **16.3 PUBLIC WORKS**

**16.3.1 Government Employment Status.** If payment under the Agreement will be charged against federal funds, Contractor represents and warrants that it is not currently employed by the Federal Government. This does not preclude Contractor from holding another contract with the Federal Government. Contractor further represents and warrants that Contractor is not an employee of the State of Oregon for purposes of performing Work.

**16.3.2 Retirement System Status and Taxes.** Contractor represents and warrants that it is not a contributing member of the Oregon Public Employees' Retirement System and will be responsible for any federal or state taxes applicable to payment received under the Contract Documents. Contractor will not be eligible for any federal Social Security, employment insurance, workers' compensation or the Oregon Public Employees' Retirement System benefits from payments, except as a self-employed individual. Unless Contractor is subject to backup withholding, Owner will not withhold from its payments to Contractor federal or state tax obligations.

**16.3.3 Minimum Wages Rates on Public Works.** Contractor shall comply fully with the provisions of ORS Sections 279C.800 through 279C.870. Documents establishing those conditions, as determined by the Oregon Commissioner of the Bureau of Labor and Industries, are included as attachments to or are incorporated by reference in the Contract Documents. Pursuant to ORS 279C.830(1)(c), Contractor shall pay workers not less than the specified minimum hourly rate of wage, and shall include the same minimum hourly rate of wage requirement in all Subcontracts. If the Work is subject to the Davis-Bacon Act, or both the Oregon state prevailing wage rate law and the federal Davis-Bacon Act, Contractor shall pay the higher of the two prevailing rates. Contractor shall also provide written notice to all workers of the number of hours per day and days per week such workers may be required to work.

**16.3.4 Payroll Certification and Fee Requirements.** In accordance with ORS 279C.845, Contractor and every Subcontractor shall submit written certified statements to Owner

Parties, on the form prescribed by the Oregon Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid to each worker that Contractor or a Subcontractor has employed and further certifying that no worker employed has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the Contract Documents. Contractors and Subcontractors shall verify by oath that they have read the certified statement, that they know the contents of the certified statement, and that, to their best knowledge and belief, the certified statement is true. The certified statements shall set out accurately and completely the payroll records for the prior week, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid. Certified statements for each week during which the Contractor or Subcontractor has employed a worker shall be submitted each month, by the fifth business day of the succeeding month. The Contractor and Subcontractors shall preserve their certified statements for a period of ten (10) years from the date of Final Completion.

**16.3.5 Additional Retainage.** Pursuant to ORS 279C.845(7), Owner shall retain twenty-five (25) percent of any amount earned by Contractor on this public works Project until Contractor has filed the certified statements required by *Section 1.5.4* above. Owner shall pay to Contractor the amount retained under this *Section* within fourteen (14) Days after Contractor files the required certified statements, regardless whether a Subcontractor has failed to file certified statements. Pursuant to ORS 279C.845(8), Contractor shall retain twenty-five percent (25%) of any amount earned by a Subcontractor on this public works Project until that Subcontractor has filed with Owner Parties the certified statements required by *Section 1.5.4* above. Before paying any amount retained under this *Section*, Contractor shall verify that Subcontractor has filed the certified statement. Within fourteen (14) Days after Subcontractor files the required certified statement, Contractor shall pay Subcontractor any amount retained under this *Section*.

**16.3.6 Prevailing Wage Rates.** Contractor shall comply with all applicable requirements of ORS 279C.825. In compliance with Oregon Prevailing Wage Law, the following is incorporated into this Contract: Prevailing Wage Rates requirements apply to this Project. Contractor and all subcontractors shall comply with the provisions of ORS 279C.800 through 279C.870, relative to Prevailing Wage Rates and the required public works bond. The Bureau of Labor and Industries (BOLI) wage rates and requirements set forth in the following BOLI booklet (and any listed amendments to that booklet), which are incorporated herein by reference, apply to the Work authorized under this Contract: This Contract is subject to the following BOLI wage rate requirements, which are incorporated herein by reference: (i) July 1, 2019 PWR Apprenticeship Rates; (ii) July 1, 2019 Prevailing Wage Rates for Public Works Contracts in Oregon; (iii) July 1, 2018 Definitions of Covered Occupations for Public Works Contracts in Oregon. These BOLI wage rates are available here:

[https://www.oregon.gov/boli/WHD/PWR/Pages/pwr\\_state.aspx](https://www.oregon.gov/boli/WHD/PWR/Pages/pwr_state.aspx).

The Work will take place in Lincoln County, Oregon.

**16.3.7** Bureau of Labor and Industries Fee. In accordance with statutory requirements and administrative rules promulgated by the Oregon Commissioner of the Bureau of Labor and Industries, the fee required by ORS 279C.825(1) will be paid by Owner to the Commissioner.

**16.3.8** Labor Laws. Contractor shall comply with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations. Contractor shall not, in the awarding of Subcontracts, discriminate against businesses that have been certified by the State of Oregon Certification Office for Business Inclusion and Diversity under ORS 200.055. Contractor shall maintain, in current and valid form, all licenses and certificates required by Applicable Laws and by the Contract Documents when performing the Work.

**16.3.9** Contractor Certifications. Unless contrary to federal law, Contractor shall certify that it shall not accept a bid to perform Work from Subcontractors as described in ORS 701.005 unless such Subcontractors, if required, are registered with the Oregon Construction Contractors Board in accordance with ORS Sections 701.021 to 701.068 at the time they submit bids. Unless contrary to federal law, Contractor shall certify that each landscape contractor, as defined in ORS 671.520(2), performing Work holds a valid landscape contractor's license issued pursuant to ORS 671.560. The following notice is applicable to Contractors and Subcontractors who perform excavation Work: "ATTENTION: Oregon law requires you to follow rules adopted by the Oregon Utility Notification Center. Those rules are set forth in OAR 952-001-0010 through OAR 952-001-00100. You may obtain copies of the rules by calling (503) 232-1987."

**16.3.10** Dual Payment Sources. Contractor shall not be compensated for Work from any payment source other than Owner.

#### **16.4** FEDERALLY REQUIRED PROVISIONS.

**16.4.1** ANTI-KICKBACK ACT (40 U.S.C. 3145). Contractor certifies compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each Contractor or Subcontractor must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The Contractor must report all suspected or reported violations to OSU.

**16.4.2** BYRD ANTI-LOBBYING AMENDMENT (31 U.S.C. 1352). Contractors that apply or bid for a contract of \$100,000 or more, must file the required certification that it will not and has not used Federally appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Contractor must require any subcontractor who applies or bids for subcontract of \$100,000 or more to provide a similar certification to the next higher tier (Contractor or subcontractor as applicable). Each tier must also disclose any lobbying with

non-Federal funds that takes place in connection with obtaining any Federal award. Contractor or subcontractor must forward any disclosures from tier to tier up to OSU.

**16.4.3 CLEAN AIR ACT (42 U.S.C. 7401-7671q.) AND THE FEDERAL WATER POLLUTION CONTROL ACT (33 U.S.C. 1251-1387), AS AMENDED.** If this Contract provides for payments in excess of \$150,000, Contractor must comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (“EPA”).

**16.4.4 CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (40 U.S.C. 3701-3708).** For all contracts awarded in excess of \$100,000 that involve the employment of mechanics or laborers, the Contractor must comply with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each Contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

**16.4.5 DEBARMENT AND SUSPENSION EXECUTIVE ORDERS 12549 AND 12689.** A contract award (see 2 CFR 180.220) must not be made to parties listed on the government-wide Excluded Parties List System in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” The Excluded Parties List System in SAM contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549. Before a contract award of \$25,000 or more is made, verification is required that the intended awarded party is not on the government-wide exclusions in the SAM. Required verification must be made by checking the SAM Exclusions. Compliance with Subpart C of 2 CFR Part 180 by checking that the intended awarded party is not listed on the SAM Exclusions, before making a contract award, will flow down from tier to tier for contract awards of \$25,000 or more. Contractor must include a term or condition similar to this term, in any subsequent lower tier contract awards of \$25,000 or more. Contractor hereby certifies they are not listed on the government-wide exclusions in the SAM.

**16.4.6 ENERGY POLICY AND CONSERVATION ACT.** Contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. 6201).

**16.4.7 EQUAL EMPLOYMENT OPPORTUNITY.** Contractor must comply with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

**16.4.8 RIGHTS TO INVENTIONS MADE UNDER A CONTRACT OR AGREEMENT.** If this Contract is for the performance of experimental, developmental, or research work, the Federal Government and Owner have rights in any resulting invention in accordance with 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

**16.4.9 FLY AMERICA ACT.** To the extent applicable, this Contract is subject to the Fly America Act, Title 49 of the United States Code, Subtitle VII, Part A, subpart I, Chapter 401, 40118.

**16.4.10** To the extent applicable, this Contract is subject to the clauses, terms, and conditions (including those incorporated by reference) of Assistance Agreement DE-EE0007899, including all amendments and revisions issued there under. Assistance Agreement DE-EE0007899, is available upon request to OSU. If Contractor has a question regarding a potential conflict of provisions, it should be submitted to the Owner for resolution.

**16.4.11 PUBLIC RECORDS LAW NOTICE.** Owner advises Contractor that information Owner receives may be subject to public inspection under Oregon Public Records Law (ORS 192.311-192.355). All of Owner's obligations under this Agreement are subject to the Oregon Public Records Laws.

**16.4.12 SAFETY AND HEALTH REQUIREMENTS/HAZARD COMMUNICATION.** Services supplied under this Contract shall comply with all federal Occupational Safety and Health Administration (OSHA) requirements and with all Oregon safety and health requirements, including those of the State of Oregon Workers' Compensation Division. Contractor shall notify Owner prior to using products containing hazardous chemicals to which Owner employees may be exposed. Products containing hazardous chemicals are those products defined by Oregon Administrative Rules, Chapter 437. Upon OSU's request, Contractor shall immediately provide Material Safety Data Sheets, as required by OAR Chapter 437, for the products subject to this provision.

## **16.5 OSU REQUIRED POLICIES AND PROVISIONS**

**16.5.1 FIREARMS POLICY.** OSU has adopted a policy that prohibits Contractor and Contractor's employees, agents, and subcontractors from possessing firearms on Owner's property.

**16.5.2 PARKING.** Contractors doing business on the OSU property may be required to have a permit to park if utilizing restricted street parking or parking lots. Contractor parking permits may be obtained through OSU’s Office of Transit & Parking Services.

**16.5.3 SEXUAL HARASSMENT POLICY.** Owner has policies that prohibit sexual harassment of members of the OSU community and in keeping with those policies Contractor and Contractor’s employees, agents, and subcontractors are prohibited from engaging in sexual harassment of members of the OSU community.

**16.5.4 SMOKING POLICY.** Owner has a policy that prohibits Contractor and Contractor’s employees, agents, subcontractors from smoking on the OSU campus or other Owner owned property. The smoking prohibition includes all indoor and outdoor spaces.

**16.5.5 WEBSITE ACCESSIBILITY.** If Contractor is designing or developing web page(s) for Owner under this Contract, Contractor shall design and develop (as applicable) the web page(s) in conformance with Owner’s Policy on Information Technology Accessibility available at <http://oregonstate.edu/accessibility/ITpolicy>. Website Featuring Project Work or Results: As applicable, upon request by OSU or prior to completion of work under this contract, Contractor shall provide OSU the following information: website or other Internet sites that reflect the work or results of this project. List name of website, specific webpage(s) on which project work or results featured, and brief description of project work or results featured.

This Agreement entered into as of the day and year first written above.

**[INSERT LEGAL NAME OF OWNER ENTITY]**

**[INSERT LEGAL NAME OF CONTRACTOR ENTITY]**

\_\_\_\_\_  
**OWNER** *(Signature)*

\_\_\_\_\_  
**CONTRACTOR** *(Signature)*

\_\_\_\_\_  
*(Printed name and title)*

\_\_\_\_\_  
*(Printed name and title)*

## **EXHIBIT A-1**

### **OWNER'S CRITERIA**

**1.1** The Project's physical characteristics:

*(Identify or describe, if appropriate, size, location, dimensions, or other pertinent information, such as geotechnical reports; site, boundary and topographic surveys; traffic and utility studies; availability of public and private utilities and services; legal description of the site; etc.)*

**1.2** The Owner's budget for the Work to be provided by the Contractor is set forth below:

*(Provide total for Owner's budget, and if known, a line item breakdown of costs.)*

**1.3** The agreed-upon design and construction milestone dates:

- i. Design phase milestone dates:
- ii. Submission of Contractor Proposal:
- iii. Phased completion dates:
- iv. Substantial Completion date:
- v. Other milestone dates:

Final Completion shall be achieved no later than 30 days after the achievement of Substantial Completion.

[Insert additional design criteria]

**EXHIBIT A-2**

**SCOPE OF WORK**

**(To be developed by Contractor with approval of Owner)**

## **EXHIBIT A-3**

### **DEFINITIONS**

The following terms as used in the Agreement have the meanings set forth below:

“ADA” means the Americans with Disabilities Act of 1990, together with any amendments and rules, regulations, requirements, and best practices promulgated under the authority of the same.

“Agreement” shall mean the Engineering Procurement and Construction Agreement effective upon the date of the last signature after it has been signed by every party hereto, between Owner and Contractor as the same may be amended from time to time.

“Contract” standing alone where used shall have the same meaning as Agreement.

“Allowance” shall mean items of Work that Contractor offers to perform at a price that is reasonably estimated but not definitive.

“Alternate” means a scope of work that Contractor shall include in applicable budgets and estimates, such that Owner may, at its option and in its sole discretion, approve or disapprove the same as an additional component of the Work.

“Applicable Laws” shall mean federal, state and local laws, codes, rules, regulations, zoning and ordinances and university standards and policies applicable to the Project, including but not limited to: ADA; ORS Chapter 659, as amended; ORS Chapter 659A, as amended; subcontracting laws in ORS 701.005 and ORS Sections 701.021 to 701.068; landscape contractor laws in ORS Sections 671.520(2) and ORS 671.560; excavation notification laws in OAR Sections 952-001-0010 through OAR 952-001-00100; Jones Act 46 U.S.C, and all regulations and administrative rules established pursuant to the same.

“Application for Payment” shall mean Contractor’s certified request for Owner’s payment in the form required by the Contract Documents.

“As-Built Documents” shall mean the Drawings and Specifications revised by Contractor to show the as-built condition of the Work and other changes made during the construction process.

“Business Inclusion and Diversity Program” shall mean that program established in OSU Standard 03-010, Procurement Thresholds and Methods, and operated pursuant to the university’s Procurement and Contracts unit rules, policies and procedures.

“Certificate for Payment” shall mean each certificate, in the form prescribed in the Agreement, issued by Owner Parties subsequent to an Application for Payment and in accordance with the Contract Documents evidencing the amount of the Contract Sum then due to Contractor.

“Certified Diverse Business Report” shall mean an accurate report by Contractor delivered to Owner identifying all certified diverse business enterprises certified with the State of Oregon, in accordance with ORS 200.005, performing work associated with the Project. That report is a condition to Final Completion and shall include the total number of contracts and subcontracts awarded to certified diverse business enterprises and the dollar value of each, including all changes during the course of the Work.

“Change Order” shall mean Owner’s written order, signed by Owner and Contractor, authorizing and directing a modification to the Contract Documents due to a change to: (i) the scope of the Work, (ii) the Contract Time or a material change to the schedule of performance of the Work, or (iii) the Contract Sum or Contractor’s compensation.

“Claim” shall mean a party to the Contract Document’s request, demand, or assertion pertaining to: (i) a material change to the Contract Time or the schedule of performance of the Work, (ii) a change to the Contract Sum or Contractor’s compensation, (iii) a reasonable dispute concerning conformance with

the Contract Documents, (iv) damages suffered directly or indirectly by the act or omission of the other party; or (v) other relief from the terms of the Contract Documents.

“Close-Out” shall mean the process and plan prepared by Contractor that properly prepares the turnover from Contractor to Owner.

“Confidential Information.” Confidential Information is information containing confidential or business proprietary information that is clearly marked as “confidential.”

“Construction Change Directive” shall mean a written order prepared by Owner Parties and signed by Owner directing Contractor to perform a change in the Work prior to agreeing to a change, if any, to the Contract Time, schedule of performance of the Work, Contract Sum, or Contractor’s compensation.

“Construction Contingency” means separately identifiable contingency funds included in a Pricing Amendment as set forth in *Section 2.4* of this Agreement.

“Construction Documents” means the documents Contractor and Subcontractors prepare for use when performing construction of a Deliverable Portion of Work, or the Project, as the context requires.

“Construction Phase” means the phase of a Deliverable Portion of Work after Owner and Contractor enter into a Pricing Amendment for that Deliverable Portion of Work.

“Construction Plan” shall mean Contractor’s written and graphic plan for performance of the Work for each Deliverable Portion of Work including: (i) logistics; (ii) staging, storage, and office areas; (iii) pathways, ingress, and egress on the Site; and (iv) safety plans and managing personnel.

“Construction Schedule” shall mean Contractor’s comprehensive, detailed, updated, critical path method (CPM) schedule (the “critical path”) for each Deliverable Portion of Work, in conformance with accepted industry standards, that is consistent with the Project Schedule, and in a form and format approved in writing by Owner.

“Constructor’s Standard of Care” means the professional standard that prevails in comparable areas throughout the United States among construction professionals and construction firms experienced with, and performing the construction and management of, projects similar to the scope, quality, and complexity of the Project.

“Contract Documents” shall mean, collectively, this Agreement, as amended, and including exhibits; the original solicitation document(s) and the Contractor’s proposal response submitted in response to the solicitation; the Project Schedule, Design Schedules, and Construction , and including exhibitsSchedule; the Pricing Amendments, including the Pricing Amendment Documents; and all approved changes to the Work formalized as minor changes in the Work, Change Orders, and Construction Change Directives.

“Contract Sum” shall mean the total dollar amount payable by Owner to Contractor for the Work of a Deliverable Portion of Work, as set forth in the Agreement.

“Contract Time” shall mean the allotted time to complete the Work of a Deliverable Portion of Work as set forth in the applicable Construction Schedule or the allotted time to complete each Work phase or milestone as set forth in the Project Schedule.

“Day” shall mean a calendar day, including weekdays, weekends and holidays, unless otherwise defined.

“Default” shall mean: Contractor’s failure to perform the Work in conformance with the Contract Documents; Contractor’s failure to supply an adequate number of properly skilled workers or Materials; Contractor’s failure to make payments when due and payable for Work or Materials; Contractor’s insolvency; commencement of bankruptcy protection by or pertaining to Contractor; Contractor’s

voluntary bankruptcy action or an involuntary bankruptcy action commenced against Contractor; or Contractor's failure to comply with Applicable Laws.

"Defective Work" shall mean Work that fails to conform to the Contract Documents' requirements.

"Delay" shall mean delays in performance of the Work, or other execution of the Contract Documents.

"Deliverable Portion of Work" shall mean each portion of the Work, or all Work, as the case may be, that Owner agrees in writing to accept when such Work is Substantially Complete, all as set forth in the Contract Documents, including the Project Schedule and the Design and Construction Schedule for that Work.

"Design Phase" means the phase of a Deliverable Portion of Work prior to Owner and Contractor entering into a Pricing Amendment for that Deliverable Portion of Work.

"Design Professional" means any individual or professional organization that Contractor engages to perform Services, acting in accordance with ORS Chapter 671 (Architects) or ORS Chapter 672 (Engineers) and administrative rules adopted pursuant to the same.

"Design Professional's Standard of Care" means the professional standard that prevails in comparable areas throughout the United States among design professionals and design professional firms experienced with, and performing the design and administration of, projects similar to the scope, quality, and complexity of the Project.

"Design Schedule" means Contractor's comprehensive, detailed, updated, schedule for delivery of the Services of a Deliverable Portion of Work that is consistent with the Project Schedule, and approved by Owner in writing.

"Drawings" shall mean those documents issued to or on behalf of Contractor and approved by Owner showing the design, location and dimensions of the Work, known generally as but not limited to, plans, elevations, sections, details, and schedules.

"Early Work" means Work, including preparatory activities and long lead time materials, Contractor shall perform under an Early Work Amendment (defined below) prior to a Pricing Amendment that includes such Work.

"Early Work Amendment" means Owner's written order describing and authorizing Contractor to proceed with certain Early Work in a form substantially similar to attached *Exhibit* \_\_\_\_.

"Effective Date" means the date of the last signature after it has been signed by every party hereto.

"Estimated Pricing Amendment Sum" means Contractor's estimate of the total cost to Owner of each Deliverable Portion of Work.

"Final Completion" shall mean the complete execution of all Contract Documents' requirements for a Deliverable Portion of Work, as the Contract Documents require, including Close-Out but excluding warranty Work. The issuance of a final certificate of occupancy for a Deliverable Portion of Work, along with all final approvals from Governmental Authorities, shall be evidence of but not determinative of, Final Completion of that Work.

"Guaranteed Substantial Completion Date" means the date, as set forth in the applicable Pricing Amendment, by which Contractor shall achieve Substantial Completion of the applicable Deliverable Portion of Work.

"Governmental Approvals" shall mean all permits, licenses, approvals, and consents, of Governmental Authorities required to perform the Work, including performing or approving the Services, or complete the Work.

“Governmental Authority” shall mean any federal, state, county, municipal, local or other governmental body having jurisdiction over approval of Drawings, Specifications, the Work, or the Site.

“Indemnitees” as used in this Agreement shall mean Owner Parties, and their respective officers, board members, shareholders, members, partners, lenders, directors, affiliates, agents, assigns, attorneys, and employees.

“Instruments of Service” means the Drawings, Specifications, and other documents and information expressing the Project, whether in form, function, concept, or otherwise, produced by Contractor or its Subcontractors.

“Key Personnel” has the meaning given in this Agreement.

“Materials” shall mean all materials, supplies, appliances, equipment, fixtures, and other items that are part of the Work, necessary to complete the Work, or consumed during performance of the Work.

“Notice to Proceed” shall mean official written notice from Owner Parties to Contractor directing Contractor to commence activities described in such notice, including a notice of commencement for all or a portion of the Work.

“Owner Parties” means, individually or collectively, as the case may be, Owner or Owner’s Representative.

“Owner’s Separate Contractors” shall mean contractors hired by Owner other than Contractor’s contractors.

“Owner-Supplied Equipment and Materials” means equipment and materials Owner procures and supplies for Contractor’s incorporation in the Project as part of the Work.

“Preliminary Services Sum” means the lump sum amount payable by Owner to Contractor for Services rendered before Owner agrees to a Pricing Amendment applicable to those Services.

“Pricing Amendment” means an amendment to this Agreement, signed by Owner and Contractor, determined in accordance with the Agreement, issued in the form of *Exhibit B-2*, establishing the Pricing Amendment Sum, compensation method, Completion Date as updated and set forth in the Project Schedule, and Pricing Amendment Documents, for each Deliverable Portion of Work.

“Pricing Amendment Documents” means the Drawings, Specifications, clarifications, qualifications, assumptions, and other documents, upon which a Pricing Amendment is based, all as approved by Owner.

“Pricing Amendment Sum” means the maximum amount payable by Owner to Contractor for a Deliverable Portion of Work, whether a lump sum or a GMP, as set forth in a Pricing Amendment.

“Project” or “PacWave South” means the wave energy test facility located off Newport, Oregon. PacWave will be the Nation’s first grid-connected, pre-permitted wave energy test facility. PacWave is funded and supported by Department of Energy, the State of Oregon and various other public and private entities.

“Project Schedule” shall mean the overall schedule of the Work, as approved by Owner, including proposed activity sequences and durations, phases and milestone dates, preparation and processing of shop drawings and samples, Owner’s occupancy requirements, and pertinent information from Contractor’s Design and Construction Schedules, all as updated from time to time.

“Punch List” shall mean the list generated by Contractor and approved by Owner Parties of incomplete or Defective Work that must be corrected before the Final Completion is achieved.

“Quality Management and Control Plan” shall mean the Contractor’s comprehensive quality management and control plan.

“Record Document” shall mean Contractor’s As-Built Documents, testing and inspection records, product data, samples, manufacturer and distributor/supplier warranties evidencing transfer of ownership to Owner, operational and maintenance manuals, approved shop drawings, Certified Diverse Business Report, correspondence that is material to the Contract Documents, certificate(s) of occupancy, Close-Out documents, and other documents recording performance of the Work.

“Reimbursable Expenses” means Contractor’s contractors’ (including Design Professional) travel and subsistence expenses, communication services, approval fees of authorities have jurisdiction over the Services, document production fees, postage and shipping fees, Site office expenses, and other similar Owner-approved Project-related expenses.

“Samples” shall mean physical examples illustrating Materials or workmanship, and shall establish standards upon which the Work will be reviewed and approved.

“Schedule of Values” shall mean Contractor’s statement reflecting the portions of the Contract Sum allocated to the various portions of the Work and, when approved by Owner, used as the basis for reviewing and processing Applications for Payment.

“Services” means the design services Contractor furnishes to fulfill its obligations and execute the terms of the Contract Documents.

“Standard of Care” means Design Professional’s Standard of Care, or Constructor’s Standard of Care, as the context requires.

“Site” shall mean the physical sites or real property upon which the Work will assembled.

“Site Condition(s)” means the physical and other conditions at the Site and the surrounding area as a whole, including conditions relating to the environment, transportation, access, waste disposal, handling and storage of materials, the availability and quality of electric power, the availability and quality of water, the availability and quality of roads, the availability and quality of labor personnel and local work and labor rules, climatic conditions and seasons, topography, air and water (including raw water) quality conditions, ground surface conditions, surface soil conditions, sound attenuation, subsurface geology, nature and quantity of surface and subsurface materials to be encountered (including Hazardous Materials), the geological and subsurface conditions of the Site, all other local and other conditions which may be material to Contractor’s performance of its obligations under the Agreement, and the location of underground utilities, obstructions and equipment and facilities needed before and during performance of Contractor’s obligations under the Agreement.

“Specifications” shall mean those documents issued to or on behalf of Contractor and approved by Owner containing the written requirements for Materials, systems, and standards of the Work, including inspection, testing, and warranty requirements.

“Standard of Care” shall have the same meaning as in the Agreement.

“Subcontract” shall mean any agreement between Contractor and a Subcontractor for performance of Work or a Supplier for supplying Materials to the Project.

“Subcontractor” shall mean a Person having an agreement with Contractor to perform Work. Owner’s Separate Contractors are not Subcontractors unless Owner expressly assigns them in writing to Contractor.

“Submittal” shall mean any submission to Owner Parties demonstrating how Contractor proposes to conform the Work to the Contract Documents including Shop Drawings, Product Data, Samples, and other customary documents.

“Substantial Completion” and “Substantially Complete” shall mean a Deliverable Portion of Work is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the same for its intended purpose. In no event shall Work be deemed Substantially Complete unless a certificate of occupancy has been issued for the Work or Deliverable Portion of Work, as the case

may be, by the appropriate Governmental Authorities and such Work can be delivered to Owner with only Punch List items unfinished in the common areas that will not interfere with Owner's practical use.

"Substitution" shall mean any product or process Contractor proposes to substitute for one specified in the Contract Documents that completely fulfills the requirements of the Contract Documents and is approved by Owner Parties.

"Sub-subcontractor" shall mean a Person having an agreement with a Subcontractor to perform Work.

"Supplier" shall mean a Person having an agreement with Contractor, Subcontractors, or Sub-subcontractors, to supply Materials to the Project.

"Work" shall mean the furnishing of all Services, Materials, labor, transportation, facilities, management, and other reasonably necessary services and work, to perform and complete design and construction in accordance with, and reasonably inferable from, the Contract Documents. The Work may constitute the whole or a part of the Project.

**EXHIBIT B-1**

**FORM OF EARLY WORK AMENDMENT**

**PacWave Subsea Cable Project**

Date: [\_\_\_\_\_]

Early Work Amendment Number \_\_

[Contractor Name]

Attn: [\_\_\_\_\_]

[Address]

[Address]

with copy to:

[Name]

Attn: [\_\_\_\_\_]

[Address]

[Address]

RE: [Project Name], [Contract Number]

Contractor:

This Early Work Amendment is effective as of the first date above. Capitalized terms used but not defined in this Pricing Amendment have the meanings given in the Agreement.

In accordance with Section \_\_\_\_ of the EPC Agreement, Contractor is hereby authorized to commence the Early Work described in Section 1 below and Owner shall pay Contractor for such Early Work in accordance with the EPC Agreement, subject to the not to exceed price set forth in Section 2 below. In accordance with Section \_\_\_\_ of the Agreement, the Parties will include the amount paid on account of this Early Work Amendment Number \_\_ in the Pricing Amendment applicable to the Deliverable Portion of Work to which the Early Work relates.

1. The Early Work of this Early Work Amendment Number \_\_ consists of the following:  
[Note: Describe the Early Work in reasonable detail]

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2. The not to exceed price for the Early Work of this Early Work Amendment Number \_\_\_ is: [Note: Insert the Early Work NTE budget]

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Agreed upon by the Parties:

OWNER:

CONTRACTOR:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_



**EXHIBIT B-2**

**FORM OF PRICING AMENDMENT**

**Pricing Amendment**

**PacWave Subsea Cable Project**

Pursuant to Section \_\_\_ of the Agreement dated \_\_\_\_\_, 20\_\_\_, between Owner and Contractor, Owner and Contractor agree to the following terms and conditions for the \_\_\_\_\_ Deliverable Portion of Work (this “Pricing Amendment”). Capitalized terms used but not defined in this Pricing Amendment have the meanings given in the Agreement.

ARTICLE 1

DEFINITIONS AND GENERAL PROVISIONS

“Qualifications and Assumptions” means Contractor’s Owner Parties’ approved written statement of qualifications to, exceptions to, and assumptions in, a Pricing Amendment, all based upon the applicable Pricing Amendment Documents.

This Pricing Agreement is incorporated into Agreement as of this Pricing Agreement’s effective date.

ARTICLE 2

PRICING

1. Contractor’s Lump Sum for the \_\_\_\_\_ Deliverable Portion of Work is \_\_\_\_\_ Dollars (\$\_\_\_\_\_).
2. The Guaranteed Substantial Completion Date for the \_\_\_\_\_ Deliverable Portion of Work is \_\_\_\_\_, 20\_\_.
3. The following schedules are attached to and incorporated into this Pricing Agreement:

**Schedule 1** Pricing Amendment Documents, including the Qualifications and Assumptions, upon which Contractor's Lump Sum is based, dated \_\_\_\_\_, \_\_\_\_\_ pages.

**Schedule 2** Schedule of Values, dated \_\_\_\_\_, \_\_\_\_\_ pages.

**Schedule 3** Construction Schedule, dated \_\_\_\_\_, \_\_\_\_\_ pages.

**Schedule 4** Allowance items, dated \_\_\_\_\_, \_\_\_\_\_ pages.

**Schedule 5** Alternates, dated \_\_\_\_\_, \_\_\_\_\_ pages.

**Schedule 6** Unit Prices, dated \_\_\_\_\_, \_\_\_\_\_ pages.

**Schedule 7** Claims, if any, \_\_\_\_\_, \_\_\_\_\_ pages.

4. Except as set forth in this Pricing Amendment, the EPC Agreement remains in full force and effect. In the event of an irreconcilable conflict between the terms of the EPC Agreement and those of this Pricing Amendment, the terms of this Pricing Amendment, control.
5. As of the effective date of this Pricing Amendment, Contractor acknowledges it is neither aware of, nor has reserved, any Claim except as identified on **Schedule 7**.
6. This Pricing Amendment takes effect upon the date it is last signed and may be signed in separate counterparts, each of which when signed and delivered shall be an original, and all which when taken together, shall constitute one instrument.

This Pricing Amendment is entered as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

OWNER:

CONTRACTOR:

\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**EXHIBIT B-3**

**PRELIMINARY SERVICES SUM**

**Preliminary Services Sums**

1. For Deliverable Portion of Work \_\_\_\_, Contractor's not-to-exceed sum for the Services is \_\_\_\_\_ Dollars (\$\_\_\_\_\_).
2. For Deliverable Portion of Work \_\_\_\_, Contractor's not-to-exceed sum for the Services is \_\_\_\_\_ Dollars (\$\_\_\_\_\_).
3. For Deliverable Portion of Work \_\_\_\_, Contractor's not-to-exceed sum for the Services is \_\_\_\_\_ Dollars (\$\_\_\_\_\_).
4. For Deliverable Portion of Work \_\_\_\_, Contractor's not-to-exceed sum for the Services is \_\_\_\_\_ Dollars (\$\_\_\_\_\_).



## EXHIBIT C

### INSURANCE REQUIREMENTS

**(Insurance policy amounts to be determined. Owner requests Contractor review these Insurance Requirements and propose any additional insurance Contractor suggests is needed for the Project)**

#### 1. INSURANCE

##### 1.1 General.

**1.1.1** Contractor shall procure at its own expense and maintain in full force and effect as required under this Agreement, with responsible insurance companies authorized to do business in Oregon, the types, limits and requirements of insurance as set forth in Sections 1.2, 1.4 and 1.5 of this Exhibit C.

**1.1.2** Owner shall procure at its own expense and maintain in full force and effect as required under this Exhibit C, with responsible insurance companies authorized to do business in the United States, the types and limits of insurance as set forth in Section 1.3 of this Exhibit C.

**1.1.3** Such insurance companies shall have an A.M. Best Insurance financial strength and financial size rating category of A-VII or better or shall be of recognized responsibility satisfactory to the parties.

**1.1.4** Capitalized terms used in this Exhibit C and not otherwise defined in this Exhibit C shall have the meanings generally ascribed to them in the commercial insurance industry in the United States.

**1.1.5** Each Party, at its own cost, may purchase any additional insurance it believes necessary to protect its interests, but these costs cannot be passed on to the other Party.

**1.2** Contractor's Insurance. Contractor's obligations to obtain and maintain in full force and effect the insurance policies specified in this Exhibit C shall be subject to the specified coverage being available on commercially reasonable terms.

**1.2.1** Workers' Compensation and Employer's Liability Insurance. Contractor shall maintain workers' compensation insurance and such other forms of insurance which Contractor is required to maintain in order to comply with statutory requirements and limits under workers' compensation laws of Oregon, and employer's liability (including occupational disease) coverage with limits of One Million Dollars (\$1,000,000) per accident, One Million Dollars (\$1,000,000) for disease, and One Million Dollars (\$1,000,000) for each employee, which shall cover all of Contractor's employees, whether full-time, leased, temporary or casual, who are engaged in the Work. Such coverage shall include an alternate employer endorsement. Policy shall be endorsed to include Jones Act coverage and United States Longshore and Harbor Workers' Compensation Act coverage, as applicable. Policy shall also include Employer's Liability and Maritime Liability for applicable operations, such as but not limited to commercial diving.

**1.2.2 Commercial General Liability Insurance.** Contractor shall maintain commercial general liability insurance written on an occurrence basis with minimum limits of Two Million Dollars (\$2,000,000) per occurrence, Two Million Dollars (\$2,000,000) per project general aggregate or Four Million (\$4,000,000) general aggregate, and Four Million Dollars (\$4,000,000) products and completed operations aggregate. The coverage under the Commercial General Liability shall be on current Insurance Services Office Commercial General Liability Form CG 00 01 or substitutes providing equivalent coverage. Such insurance shall include coverage for products/completed operations, broad form/blanket contractual liability for written contracts, property damage, bodily injury, and personal injury liability, premises/operations explosion, independent contractor liability, and collapse and underground hazards coverage. The Commercial General Liability Insurance exclusion for explosion, collapse and underground (“XCU”) hazards shall be removed by endorsement. Coverage limits may be satisfied using an umbrella or excess liability policy. The Commercial General Liability Insurance exclusion for Care, Custody and Control and Watercraft shall be removed by endorsement.

**1.2.3 Automobile Liability Insurance.** Contractor shall maintain automobile liability insurance (including coverage for owned, non-owned, and hired automobiles) covering vehicles used by Contractor in connection with the Work with minimum limits of One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage. Contractor’s automobile liability insurance coverage shall contain appropriate no-fault insurance provisions or other endorsements in accordance with Applicable Laws. Coverage shall be at least as broad as the Insurance Services Office Business Auto Coverage form covering Automobile Liability, code 1 “any auto”. If the Statement of Work involves hauling hazardous materials, coverage shall be endorsed to include MCS 90 endorsement.

**1.2.4 Umbrella or Excess Liability Insurance.** Contractor shall maintain umbrella/excess insurance on an occurrence basis covering claims in excess of the underlying insurance described in Section 1.2.1, Section 1.2.2 and Section 1.2.3 of this Exhibit C, with minimum limits of Five Million Dollars (\$5,000,000) per occurrence, and on a following-form basis.

**1.2.5 Professional Liability Insurance.** When applicable, Contractor shall or shall cause its **Subcontractors** to secure and maintain professional liability insurance (errors and omissions) with minimum limit of Two Million Dollars (\$2,000,000) per claim and Two Million Dollars (\$2,000,000) per project aggregate. Coverage shall be for a professional error, act or omission arising out of the scope of services shown in the Agreement.

**1.2.6 Contractors Pollution Liability.** If applicable to the Statement of Work, Contractor shall or cause its Contractors to secure and maintain contractors pollution liability coverage for bodily injury, property damage, including cleanup costs and defense costs resulting from sudden, accidental and gradual pollution conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water. The minimum limit shall be Two Million (\$2,000,000) each occurrence or claim.

**1.2.7 Contractors Equipment, Tools Supplies and Materials.** All Property (a) belonging to Contractor or to any of its Contractors, whether owned, rented, leased or hired or (b) used by or on behalf of Contractor or any of its Contractors for its performance hereunder, shall be brought to and kept at the site at the sole cost, risk and expense of Contractor or such Contractor, and Owner shall not be liable for loss or damage thereto. Should such property be insured, said insurers shall waive rights of subrogation against Owner, and any insurance premium costs for such insurance, whether under the Builders' All-Risk policy in Section 1.5 of Exhibit C or a separate policy, shall not be passed along to Owner.

**1.2.8 Aircraft Liability.** If the Work involves the use of aircraft, Contractor shall or shall cause its Contractor to procure and maintain over the term of this Agreement, aircraft liability insurance covering third-party bodily injury and property damage exposure, including, but not limited to, passenger liability, property damage liability, and contractual liability insurance (with an express acknowledgement by the underwriters that the indemnification and hold harmless provisions of this Agreement are insured). Such insurance shall have a minimum of Five Million (\$5,000,000) Combined Single Limit per occurrence. There shall be no per passenger sublimit. The aircraft liability insurance policy shall not exclude fire suppression costs. Public Universities Risk Management and Insurance Trust, Owner, its trustees, officers, employees and agents shall be named as additional insured on said policy.

**1.2.9 Watercraft Liability.** If the Work involves the use of watercraft, Marine Protection and Indemnity or other liability coverage, including coverage for injury sustained by any passenger, shall be maintained and apply to all watercraft used in the performance of the Work. The minimum limit shall be Five Million (\$5,000,000) for each occurrence and Five Million (\$5,000,000) Aggregate. Coverage shall provide In rem protection. If the vessel is a tug or engaged in towing, the exclusion of claims arising out of or having relation to towage of any other vessel or craft shall be deleted. Policy shall also contain Collision Liability Insurance. If Marine Employers Liability is not provided elsewhere, then coverage for crew will be provided under the Marine Protection and Indemnity. Owner, its officers, trustees, employees and agents shall be named as additional assured, and policy shall contain a waiver of subrogation in favor of Owner. Policy shall include Protection and Indemnity Clauses Form SP-23, 1956 Edition, and AIMU Hull or Pacific Coast Tug and Barge Clauses without limitation of liability to the hull value. An excess policy or umbrella liability policy may be used to meet the minimum limit requirements provided that the coverage is written on a "following form" basis. Such policy shall include AIMU Following Form Excess Marine Liability Clauses.

**1.2.10 Marine Pollution Liability.** If the Work involves the use of watercraft, Marine Pollution Liability coverage shall be maintained with minimum limits of Five Million (\$5,000,000) for each occurrence and Five Million (\$5,000,000) Aggregate. The insurance must be broad in nature and cover marine pollution conditions to include clean-up of discharges or releases, third party property damage, defense, investigation and assessment of and damage to natural resources. Contractor must provide evidence of coverage under Water Quality Insurance Syndicate (WQIS) or equivalent (Protection & Indemnity Association), with at least the minimum statutory limits of coverage. This coverage must be in effect when the vessel enters the water. Owner, its officers, trustees, employees and agents shall be named as additional assured, and policy shall contain a waiver of subrogation in favor of Owner. An excess policy or umbrella liability

policy may be used to meet the minimum limit requirements provided that the coverage is written on a “following form” basis.

**1.2.11 Marine General Liability, as applicable.** If the Work involves the use of watercraft, Marine General Liability coverage shall be maintained with minimum limits of Two Million (\$2,000,000) for each occurrence and Four Million (\$4,000,000) general aggregate. This insurance must include premises-operations, independent contractors, products and completed operations, bodily injury, broad form property damage, blanket contractual, and personal and advertising injury endorsements.

**1.2.12 Liability Insurance.** If any of the required liability, umbrella, or excess liability insurances are written on a “claims made” basis, any retroactive date must coincide with or predate the Agreement effective date. Such insurances shall be maintained in full force and effect for no less than two (2) years after termination of this Agreement, such coverage may be in the form of tail coverage or extended reporting period coverage.

**1.2.13 Deductibles.** Contractor shall be responsible for deductibles, and self-insured retentions, if any, stated in policies. There should be disclosure and approval of deductibles in excess of \$50,000.

**1.2.14 Exchange Rate.** Notwithstanding any exchange rate fluctuation, the parties agree that the limits above shall be the equivalent of U.S. dollars, on the basis that \$1.00 U.S. dollar equals [XX] British pounds or [XX] Euros.

**1.3 Owner’s Insurance.** Owner’s obligation to obtain and maintain in full force and effect the insurance policies specified in this Exhibit C shall be subject to the specified coverage being available on commercially reasonable terms.

**1.3.1 Workers’ Compensation Insurance and Employers’ Liability Insurance.** In accordance with the laws of the State of Oregon, Owner shall maintain in force workers’ compensation insurance for all of its employees. Owner shall also maintain employer’s liability coverage in an amount of One Million Dollars (\$1,000,000) per accident and per employee for disease. In lieu of such insurance, Owner may maintain a self-insurance program meeting the requirements of the State of Oregon along with the required employer’s liability insurance.

**1.3.2 Commercial General Liability Insurance.** Owner shall maintain commercial general liability insurance in limits of Ten Million Dollars (\$10,000,000) per occurrence and Ten Million Dollars (\$10,000,000) annual aggregate. Such insurance shall include coverage for products/completed operations, broad form/blanket contractual liability for written contracts, broad form property damage, bodily injury, and personal injury liability, premises/operations explosion, independent contractor liability, and collapse and underground hazards coverage.

**1.3.3 Automobile Liability Insurance.** Owner shall maintain automobile liability insurance (including coverage for owned, non-owned, and hired automobiles) covering vehicles used by Owner, including the loading or unloading of such vehicles, in an amount of Ten Million Dollars (\$10,000,000) combined single limit per occurrence for bodily injury, and property damage.

**1.3.4 Self Insurance.** Owner shall have the right to self-insure all or a portion of the insurance provided under Section 1.3 of this Exhibit C.

**1.4 Endorsements.** All policies of liability insurance to be maintained by Contractor shall be written or endorsed to include the following:

**1.4.1** With respect to workers' compensation/employer's liability insurance, to provide that the insurer shall waive for the benefit of Owner and where permitted by law, all rights of subrogation against Owner, its trustees, officers, employees and agents.

**1.4.2** With respect to general liability, automobile liability, contractors pollution liability, aircraft liability, watercraft liability, marine pollution liability, and excess/umbrella insurance, to provide that the insurance shall waive any and all right of subrogation or recovery which the insurer may have or acquire against Owner, its trustees, officers, employees and agents.

**1.4.3** With respect to general liability, to provide a severability of interest and cross liability clause.

**1.4.4** With respect to general liability, automobile liability, contractors pollution liability, aircraft liability, watercraft liability and excess/umbrella insurance, that the insurance shall be primary and not excess to or contributing with any insurance or self-insurance maintained by such party.

**1.4.5** With respect to general liability, excess/umbrella insurance, contractors pollution liability, aircraft liability, watercraft liability to include the Owner, its trustees, officers, employees and agents as additional insureds for the legal liability arising out of the operations of Contractor, and such policies shall provide that such insurance will not be invalidated by any action or inaction of each such insured and will insure each such insured regardless of any breach or violation of any warranty, declaration or condition contained in such insurance by the primary named insured. This additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Agreement. The additional insured under the Commercial General Liability shall be on current Insurance Services Office Commercial General Liability Endorsement CG 20 10 11 85 or substitutes providing equivalent coverage.

**1.4.6** With respect to coverage for completed operations under the general liability insurance under Section 1.2.2 and Section 1.2.4 of this Exhibit C, to be in place throughout the performance of the Work and for ten (10) years after Final Completion.

**1.5 Builder's All-Risk Insurance.** *The parties hereby agree that each will provide an initial quote for the costs required to maintain Builder's All-Risk Insurance for the Project with the Owner having the authority to determine which party will carry such insurance. If Owner provides coverage, the Contractor shall adjust its Contract Price to exclude the cost of the Builder's All-Risk Insurance. Contractor, or Owner at Owner's discretion, shall obtain and thereafter at all times during performance of the Work on the Project up to Substantial Completion, maintain, or cause to be maintained, Builder's All-Risk insurance in relation to the Project. Contractor shall be responsible for any additional premium for any extensions of the Builders' All Risk Policy beyond the scheduled expiration date as well as any additional premium related to policy expiration audits. Such Builder's All-Risk insurance shall insure as named insureds Owner*

and Contractor's Designer, Consultants and Contractors of any tier, as such Contractor or Contractor's Designer, Consultants and Contractors interests may appear until Substantial Completion of the Project. Builder's All-Risk shall cover all property in the course of transit or construction, including all property stored at site or any temporary off-site storage locations, including the Work, Equipment and Materials (other than Equipment and Materials properly covered under Contractor's equipment floater), from physical loss or damage caused by perils covered by a builder's all-risk form or equivalent coverage for projects similar in size and scope similar to the Project. Should any property in transit by ocean, air, rail or road not be covered under the Builder's All-Risk policy, then Contractor shall obtain and maintain cargo insurance to provide coverage for all such property in transit, unless such property is insured for transit under purchase agreement terms. Such Builder's All-Risk insurance shall: (a) include "extended coverage" (including earthquake, flood, collapse, sinkhole, subsidence), (b) include mechanical and electrical breakdown coverage during start-up and testing, including Acceptance Tests and other operations of the Project prior to Substantial Completion, (c) cover the Project and the site for removal of debris and (d) otherwise cover damage to property and other claims arising out of the unloading, lifting, lowering or other handling of property at the site, in an amount to cover materials and equipment to be used by Contractor in performance of this Agreement. There shall be no waterborne exclusions. Coverage shall be on a full replacement cost valuation basis, and not on an actual costs valuation or depreciated basis. The limit of liability shall be the full replacement cost of the Work or the property in relation to the Project, as the case may be, then at risk, including primary cost of the Equipment and Materials plus freight. Except as set forth in the next sentence, all deductibles for Builder's All-Risk insurance shall be the responsibility of Contractor. Owner shall bear the deductible under the Builder's All-Risk insurance for damage to the Work caused by Owner or the Owner's separate contractors, or damage to the Work caused by Force Majeure Events (except to the extent that Contractor's actions or omissions result in or contributes to any loss or damage arising from Force Majeure Events). The Builder's All-Risk coverage shall not contain an exclusion for resultant damage caused by faulty workmanship, design or materials. Such insurance shall provide for a waiver of the underwriters' right to subrogation against Owner, Owner's separate contractors, Contractor, Designer, Consultants and Contractors. Contractor shall be responsible for preparing all claim forms and coordinating with the various underwriters with respect to all claims to be made under the Builder's All-Risk policy, all without increase to the Contract Price. Owner shall cooperate with the Contractor in preparing all such claims.

**1.6** Loss Payable. Losses if any, covered by Builder's All-Risk in Section 1.5 of this Exhibit C shall be payable to Owner, Contractor, Designer, Consultants and Contractors as loss payees, as their respective interests may appear. The policies shall be endorsed to state that, notwithstanding anything to the contrary, the interest of the aforementioned Persons, if any, shall not be invalidated by any act or failure to act on the part of Owner, Contractor or any other Person, and shall be insured regardless of any breach or violation by Owner, Contractor or any other Person, of any warranties, declarations or conditions contained in such insurance policies. The parties agree that, in the event of physical loss of any portion of the Project, any insurance proceeds under this Section 1.6 of this Exhibit C shall be reserved in a segregated account until such time as it has been determined whether or not to repair, replace or rebuild the damaged portions. With respect to the distribution of proceeds under the Builder's All-Risk policy, if Owner elects to repair, replace or rebuild the damaged portions of the Project, Owner shall not withhold its prompt endorsement of the applicable payment from the builder's risk underwriters so as to permit

Contractor to receive the distribution of such proceeds. Contractor and Owner shall both be responsible for signing proof of loss statements.

**1.7 Designer, Consultants and Contractors Insurance.** Contractor shall require its Designer, Consultants and Contractors performing to obtain, maintain and keep in force during the time during which they are involved in performance of the Work, insurance coverage in accordance with the insurance requirements of Contractor set forth in Sections 1.2.1, 1.2.2, 1.2.3, 1.2.4, and 1.4 of this Exhibit C; provided, however, that the limits of any such parties Umbrella Excess Liability Insurance policies otherwise maintained in accordance with the requirements under Section 1.2.4 of this Exhibit C, shall not be less than One Million Dollars (\$1,000,000).

**1.8 Contractor's Waiver; Waiver of Subrogation.** Except to the extent liability for deductibles is explicitly set forth herein, Contractor releases, assigns and waives any and all rights of recovery against Owner and its trustees, officers, employees and agents, successors, permitted assigns, insurers and underwriters, because of the existence of deductible clauses in, or inadequacy of limits of, any policies of insurance maintained or required to be maintained by Contractor pursuant to this Agreement in the amounts stated herein. The Contractor shall in all policies of insurance related to the Project maintained by Contractor include clauses providing that each underwriter shall release, assign to Owner, and its successors and assigns and waive all of its rights of recovery, under subrogation or otherwise, against Owner and its trustees, officers, employees and agents, successors, permitted assigns, insurers and underwriters.

**1.9 Contractor Certificates.** Prior to commencement of any Work required to be covered by Insurance under this Exhibit C, Contractor shall furnish to Owner certificates of insurance (including the declaration page) and any applicable endorsements evidencing that the above required insurance is in full force and effect, the amount of the carrier's liability thereunder, and further providing that the insurance will not be canceled, changed or not renewed until the expiration of at least thirty (30) days (or ten (10) days in the case of cancellation due to non-payment of premiums) after Notice of such cancellation, change or non-renewal has been received by Owner. Contractor shall also obtain certificates of insurance for the insurances required to be maintained by the Designer, all Consultants and all Contractors in accordance with Section 1.7 of this Exhibit C from each of those parties before they are allowed to commence Work. Certificates of each renewal of the insurance required hereunder shall also be delivered to Owner prior to or promptly after each renewal. At Owner's Request, Contractor shall deliver the Owner the actual insurance policies and any endorsements.

**1.10 Owner's Certificates.** Upon written request from Contractor, Owner shall furnish to Contractor certificates of insurance showing that the above required insurance is in full force and effect, the amount of the carrier's liability thereunder.

**1.11 Descriptions Not Limitations.** The insurances coverages referred to in this Exhibit C will be set forth in full in the respective policy forms, and the foregoing descriptions of such policies are not intended to be complete, nor to alter or amend any provision of the actual policies and in matters (if any) in which the said description may be conflicting with such instruments, the provisions of the policies of the insurance shall govern; provided, however, that neither the content of any insurance policy or certificate nor approval thereof shall relieve a Party of the Party's obligations under this Exhibit C.

**1.12 Cost of Premium.** It is expressly agreed and understood that:

(a) the cost of premiums and deductibles for insurance required to be maintained by Contractor as set forth in this Exhibit C shall be borne by Contractor, except with respect to the deductible for the builders all-risk insurance as provided in Section 1.5 of this Exhibit C, and shall be written or endorsed to provide that Owner shall have no liability for the payment of any premium thereon;

(b) that the cost of premiums and deductibles for insurance required to be maintained by Owner as set forth in this Exhibit C shall be borne by Owner (except as set forth in Section 2.4 of this Exhibit C with respect to the deductible), and shall be written or endorsed to provide that Contractor shall have no liability for the payment of any premium thereon; and

(c) If either Party fails to provide or maintain any insurance required of it hereunder (Failing Party), the other Party shall have the right, upon reasonable Notice, but not the obligation, to provide or maintain any such insurance, and to deduct the cost thereof from any amounts due and payable to the Failing Party (including, in the case of Owner, from any amounts due and payable to Contractor in respect of the Contract Price), or, in the event there are no such amounts due and payable to the Failing Party, the Failing Party shall reimburse the other Party for such costs on demand. Should any of the policies required to be maintained by either Party become commercially unavailable or be canceled for any reason during the period of this Agreement, such Party shall immediately procure replacement coverage. The failure of either Party to procure such replacement coverage which is within the reasonable control of such Party (so as to provide continuous coverage) shall constitute a material breach hereunder.

**1.13 No Limitation of Liability.** The insurance coverages required of Contractor set forth in this Exhibit C shall in no way affect, nor are they intended as a limitation of, Contractor's liability with respect to its performance of the Work. The insurance coverages required of Owner set forth in this Exhibit C shall in no way affect, nor are they intended as a limitation of, Owner's liability with respect to its performance of its obligations hereunder.

**1.14 Other Terms and Provisions.**

**1.14.1 Omissions; Errors.** It is hereby understood and agreed that the coverages afforded by the insurances required of either Party set forth in this Exhibit C shall not be invalidated or affected by any unintentional omissions or errors.

**1.14.2 Notification.** Contractor and Owner shall Notify the other Party of any and all incidents giving rise to an insurance claim, and otherwise keep the other Party timely apprised of insurance claim proceedings.

**1.14.3 Other Insurances.** Owner may elect at any time during the term of this Agreement to require Contractor to procure and maintain other or additional insurance, but only to the extent any such insurances are reasonably available. Notice of such election shall be given at least forty-five (45) days prior to the effective date of the required modifications. Any additional

costs incurred by these parties in securing insurance shall be reimbursed by Owner and shall be documented as a Change Order.

**EXHIBIT D**

**FORMS OF WAIVERS AND RELEASES**

**PacWave Subsea Cable Project**

CONDITIONAL RELEASE	UNCONDITIONAL RELEASE
---------------------	-----------------------

The undersigned does hereby acknowledge that upon receipt by the undersigned of a check from \_\_\_\_\_ in the sum of \$\_\_\_\_\_ and when the check has been properly endorsed and has been paid by the bank upon which it was drawn, this document shall become effective to release any and all rights of lien and claims of lien, and any and all other claims, including, but not limited to, negligence, breach of contract, delay and impact claims, or otherwise, which the undersigned has or may have, whether known or unknown, on the above-referenced job ("Claims"). This release covers a payment for labor, services, equipment, materials furnished and Claims through \_\_\_\_\_ (Date) only and does not cover (a) any retention or (b) any change order work approved in writing but not included in the progress or final pay request. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.

I CERTIFY UNDER PENALTY OF PERJURY UNDER LAWS OF THE STATE OF OREGON THAT THE ABOVE IS A TRUE AND CORRECT STATEMENT.

SIGNATURE:

\_\_\_\_\_  
(Authorized Corporate Officer/Partner/Owner)  
(Title) \_\_\_\_\_

Company Name: \_\_\_\_\_

Dated this \_\_\_ day of \_\_\_\_\_, 20\_\_

Project Name: Subsea power and data cable with dry mate connector system for the PacWave Project

The undersigned does hereby acknowledge that the undersigned has been paid and has received progress payments in the sum of \$\_\_\_\_\_ for, labor, services, equipment or materials furnished to the above-referenced job and does hereby release any and all rights of lien and claims of lien, and any and all other claims, including, but not limited to, negligence, breach of contract, delay and impact claims, or otherwise, which the undersigned has or may have, whether known or unknown, on the above-referenced job ("Claims") to the extent of payments made. This release covers payment for labor, services, equipment, materials furnished and Claims through \_\_\_\_\_ (Date) only and does not cover (a) any retention or (b) any change order work approved in writing but not included in the progress or final pay request.

NOTICE: THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

I CERTIFY UNDER PENALTY OF PERJURY UNDER LAWS OF THE STATE OF OREGON THAT THE ABOVE IS A TRUE AND CORRECT STATEMENT.

SIGNATURE:

\_\_\_\_\_  
(Authorized Corporate Officer/Partner/Owner)  
(Title) \_\_\_\_\_

Company Name: \_\_\_\_\_

Dated this \_\_\_ day of \_\_\_\_\_, 20\_\_

Project Name: Subsea power and data cable with dry mate connector system for the PacWave Project

**EXHIBIT E**

**FORMS OF PERFORMANCE AND PAYMENT BONDS**

**STANDARD FORM OF  
PERFORMANCE BOND**

Bond No. \_\_\_\_\_  
Contract \_\_\_\_\_  
Contract Date \_\_\_\_\_  
Project Name \_\_\_\_\_

\_\_\_\_\_ (Surety #1)                      Bond Amount No. 1:                      \$ \_\_\_\_\_  
\_\_\_\_\_ (Surety #2)\*                      Bond Amount No. 2:\*                      \$ \_\_\_\_\_  
*\* If using multiple sureties*                      Total Penal Sum of Bond:                      \$ \_\_\_\_\_

We, \_\_\_\_\_, as Principal, and the above identified Surety or Sureties, collectively as Surety, authorized to transact surety business in Oregon, hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors and assigns firmly by these presents and will pay unto [Oregon State University], as Obligee, the sum of (Total Penal Sum of Bond) \_\_\_\_\_, lawful money of the United States of America (provided, that we the Surety bind ourselves, and our heirs, executors, administrators, successors and assigns, in such sum “jointly and severally” as well as “severally” only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety), and

WHEREAS, the Principal has entered into the above-referenced written Contract with the Obligee;

WHEREAS, the terms and conditions of the Contract are made a part of this Performance Bond by reference, whether or not attached to the Contract; and

WHEREAS, the Principal has agreed to perform the Contract in accordance with its terms, conditions, requirements, plans and specifications, and all authorized modifications of the Contract which change the amount of the work, the amount of the Contract, or constitute an authorized extension of the time for performance;

NOW, THEREFORE, THE CONDITION OF THIS BOND IS SUCH that if the Principal herein shall faithfully and truly observe and comply with the terms, conditions and provisions of the Contract, in all respects, and shall well and truly and fully do and perform all matters and things undertaken by Contractor to be performed under the Contract, upon the terms set forth therein, and within the time prescribed therein, or as extended as provided in the Contract, with or without notice to the Surety, and shall indemnify and save harmless Obligee and the \_\_\_\_\_ (name of any other Owner agency), and

members thereof, their respective officers, employees and agents, from and against any direct or indirect damages of every kind and description, and claims of every kind and description, that shall be suffered or claimed to be suffered in connection with or arising out of performance of the Contract by the Principal or its subcontractors, and shall in all respects perform said Contract according to law, then this obligation is to be void; otherwise, it shall remain in full force and effect.

Surety hereby waives notice of all modifications and amendments to the Contract and agrees that the obligations undertaken by this Performance Bond shall not be impaired in any manner by reason of the same.

Surety hereby agrees this Performance Bond is deemed amended automatically and immediately, without formal or separate amendments hereto or notice to the Surety thereof, upon any amendment to the Contract, so as to bind the Principal and Surety, jointly and severally, to the full and faithful performance of the Contract as so amended or modified, provided only that the Surety shall not be liable for more than the Total Penal Sum of Bond.

Nonpayment of the bond premium will not invalidate this bond nor shall Obligee, [or the above-referenced agency(ies)], be obligated for the payment of any premiums.

This bond is given and received under authority of ORS Chapter 279C, the provisions of which are incorporated into this bond and made a part hereof.

No right of action shall accrue on this Performance Bond to any person or entity other than Obligee and its executors, administrators, successors and assigns.

IN WITNESS WHEREOF, WE HAVE CAUSED THIS INSTRUMENT TO BE SIGNED AND SEALED BY OUR DULY AUTHORIZED LEGAL REPRESENTATIVES.

*[Signature page follows]*

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

PRINCIPAL: \_\_\_\_\_

By \_\_\_\_\_  
Signature

\_\_\_\_\_  
Official Capacity

Attest: \_\_\_\_\_  
Corporation Secretary

SURETY: \_\_\_\_\_

*[Add signatures for each surety if using multiple*

*bonds]*

BY ATTORNEY-IN-FACT:

*[Power-of-Attorney must accompany each surety*

*bond]*

\_\_\_\_\_  
Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Phone

\_\_\_\_\_  
Fax

STANDARD FORM OF  
PAYMENT BOND

Bond No. \_\_\_\_\_  
Contract \_\_\_\_\_  
Contract Date \_\_\_\_\_  
Project Name \_\_\_\_\_

_____ (Surety #1)	Bond Amount No. 1:	\$ _____
_____ (Surety #2)*	Bond Amount No. 2:*	\$ _____
* <i>If using multiple sureties</i>	Total Penal Sum of Bond:	\$ _____

We, \_\_\_\_\_, as Principal, and the above identified Surety or Sureties, collectively as Surety, authorized to transact surety business in Oregon, hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors and assigns firmly by these presents and will pay unto [Oregon State University], as Oblige, the sum of (Total Penal Sum of Bond) \_\_\_\_\_ lawful money of the United States of America (provided, that we the Surety bind ourselves, and our heirs, executors, administrators, successors and assigns, in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety), and

WHEREAS, Principal has entered into the above-referenced written Contract with the Oblige;

WHEREAS, the terms and conditions of the Contract are made a part of this Payment Bond by reference, whether or not attached to the Contract; and

WHEREAS, the Principal has agreed to perform the Contract in accordance with its terms, conditions, requirements, plans and specifications, and all authorized modifications of the Contract which change the amount of the work, the amount of the Contract, or constitute an authorized extension of the time for performance;

NOW, THEREFORE, THE CONDITION OF THIS BOND IS SUCH that if the Principal shall faithfully and truly observe and comply with the terms, conditions and provisions of the Contract, in all respects, and shall well and truly and fully do and perform all matters and things by it undertaken to be performed under said Contract and any duly authorized modifications that are made, upon the terms set forth therein, and within the time prescribed therein, or as extended therein as provided in the Contract, with or without notice to the Sureties, and shall indemnify and save harmless Oblige and the \_\_\_\_\_ (name of any other Owner agency), and members thereof, their respective officers, employees and agents, against any claim for direct or indirect damages of every kind and description that shall be suffered or claimed to be suffered in connection with or arising out of the performance of the Contract by the Principal or its subcontractors, and shall promptly pay all persons supplying labor, materials, or services to the Principal or its subcontractors for prosecution of the work provided in the Contract; and shall promptly pay all contributions due the State Industrial Accident Fund and the State Unemployment

Compensation Fund from the Principal or its subcontractors in connection with the performance of the Contract; and shall pay over to the Oregon Department of Revenue all sums required to be deducted and retained from the wages of employees of the Principal and its subcontractors pursuant to ORS 316.167, and shall permit no lien nor claim to be filed or prosecuted against the Obligee, the State, Project or the work of the Contract, on account of any labor, materials, or services; and shall do all things required of the Principal by the laws of this State, then this obligation shall be void; otherwise, it shall remain in full force and effect.

Surety hereby waives notice of all modifications and amendments to the Contract and agrees that the obligations undertaken by this Payment Bond shall not be impaired in any manner by reason of the same.

Surety hereby agrees this Payment Bond is deemed amended automatically and immediately, without formal or separate amendments hereto or notice to the Surety thereof, upon any amendment to the Contract, so as to bind the Principal and Surety, jointly and severally, to the full and faithful performance of the Contract as so amended or modified, provided only that the Surety shall not be liable for more than the Total Penal Sum of Bond.

Nonpayment of the bond premium will not invalidate this bond nor shall the Obligee, [or the above-referenced agency(ies)], be obligated for the payment of any premiums.

This bond is given and received under authority of ORS Chapter 279C, the provisions of which hereby are incorporated into this bond and made a part hereof.

This Payment Bond is made for the use and benefit of all persons and entities who may furnish materials or perform labor or services on account of the construction to be performed or supplied in accordance with the Contract, and each of them may sue hereon.

IN WITNESS WHEREOF, WE HAVE CAUSED THIS INSTRUMENT TO BE EXECUTED AND SEALED BY OUR DULY AUTHORIZED LEGAL REPRESENTATIVES:

*[Signature page follows]*

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

PRINCIPAL: \_\_\_\_\_

By \_\_\_\_\_  
Signature

\_\_\_\_\_  
Official Capacity

Attest: \_\_\_\_\_  
Corporation Secretary

SURETY: \_\_\_\_\_

*[Add signatures for each surety if using multiple*

*bonds]*

BY ATTORNEY-IN-FACT:

*[Power-of-Attorney must accompany each surety*

*bond]*

\_\_\_\_\_  
Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Phone

\_\_\_\_\_  
Fax

**EXHIBIT F**  
**FORM OF CHANGE ORDER**

**CHANGE ORDER [#] TO PRICING AMENDMENT [#] TO AGREEMENT #XXXX**  
**PROJECT NAME: XXX**

This Change Order # (“CO”) to the Agreement entered into between **Oregon State University (“Owner”)**, and **Contractor Name (“Contractor”)**, individually the “Party” and collectively the “Parties”, shall become effective on the date this CO has been signed by the Parties (the “CO Effective Date”).

**1. SCOPE OF WORK AND COMPENSATION**

The “Work” shall be modified to add, delete or change the following as more specifically set out in **Exhibit 1, Scope of Work**, which is attached hereto and incorporated herein to this CO:

SCOPE OF WORK	COMPENSATION
	\$ 0.00 Fixed Fee
	\$ 0.00 Fixed Fee
	\$ 0.00 Time & Materials
<b>Change Order total</b>	<b>\$ 0.00</b>
Preliminary Services Sum	\$ 0.00
Change Order (1, 2, 3...) to Pricing Amendment (1,2,3..)	\$ 0.00
<b>New Agreement Price</b> (maximum compensation amount)	<b>\$ 0.00</b>

**2. AGREEMENT TERM**

The Final Completion date is changed from [Date range] due to (reason). No work shall take place after this date. This Change Order constitutes full compensation to the Contractor for all costs and delay, including without limitation, labor, material, equipment, supervision, subcontract, direct, indirect, delay, impact, overhead, profit and all other costs and damages whether known or unknown, arising from or relating to the subject matter of this Change Order or from the cumulative effect of all prior Change Orders. Unless expressly modified in this CO or prior CO’s, all terms and conditions of the Agreement remain unchanged and in full force and effect.

**In witness whereof, Oregon State University** executes this CO and the Contractor does execute the same.

**Contractor Name**

**Oregon State University**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Bruce Daley

\_\_\_\_\_  
Date

Associate Vice President

Printed Name

University Facilities, Infrastructure and  
Operations

Title

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**EXHIBIT 1 – CHANGE ORDER [#]  
SCOPE OF WORK**

DRAFT

**EXHIBIT G**

**FORM OF CONSTRUCTION CHANGE DIRECTIVE**

**CONSTRUCTION CHANGE DIRECTIVE [#] TO PRICING AMENDMENT [#] TO AGREEMENT [#XXXX]**

**PROJECT NAME:**

**SUBSEA POWER CABLE MANUFACTURE, DELIVERY AND INSTALLATION: PACWAVE SOUTH**

This Construction Change Directive [#] (“**CCD**”) to the above named Agreement entered into between **Oregon State University (“Owner”)**, and **Contractor Name (“Contractor”)**, individually the “Party” and collectively the “Parties”, is effective on the date this CCD has been signed by Owner (the “**CCD Effective Date**”), regardless of whether it is also signed by Contractor.

**3. SCOPE OF DIRECTIVE:**

The Owner directs the Contractor with the following additions, deletions, or other revisions to the “Work” of the Agreement: See **Exhibit A, Scope of Directive**, attached hereto and incorporated herein.

**2. ADJUSTMENT TO THE CONTRACT SUM, IF ANY:**

*[Per the terms of the Contract Section 6.3 and 6.3.7, identify this either as (i) a No-Cost Change, or (ii) any addition or deletion to the Contract Sum based on (1) Lump Sum pricing, (2) Unit Prices, or (3) Cost plus fee]*

**3. ADJUSTMENT TO THE CONTRACT TIME, IF ANY:**

The Contract Time and the date of Guaranteed Substantial Completion for this Pricing Amendment is adjusted, if any, as follows: [ \_\_\_\_\_ ]

**4. CONTRACTOR TO PROCEED WITH THE WORK:** Per the Agreement Section 6.3.5, upon receipt of this CCD, Contractor shall promptly proceed with and diligently continue performance of the change in the Work involved and advise the Owner of Contractor’s agreement or disagreement with the adjustments.

**5. COMPLETE DIRECTIVE.** Except as modified by this CCD or other modifications, all terms and conditions of the Agreement remain unchanged and in full force and effect.

**In witness whereof, Oregon State University** executes this CCD. If Contractor also executes this CCD, Contractor’s signature indicates Contractor’s agreement as of the CCD Effective Date with the adjustments made by this CCD, and per Agreement Section 6.3.6 the Parties’ agreement is a Change Order.

**Contractor Name**

**Oregon State University**

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Bruce Daley Date

\_\_\_\_\_  
Printed Name

Associate Vice President  
University Facilities, Infrastructure and  
Operations

\_\_\_\_\_  
Title

**EXHIBIT \_\_\_ – CONSTRUCTION CHANGE DIRECTIVE [#]**

**SCOPE OF DIRECTIVE**

**DRAFT**

**EXHIBIT H**  
**RATE SCHEDULE**

DRAFT

## **EXHIBIT I**

### **NOTICE AND CONTACT INFORMATION**

**Each Party shall provide notices required under the Agreement to the attention of the other Party's representative designated below using the following contact information.**

**Owner: College of Earth, Ocean and Atmospheric Sciences**

**ATTN: PacWave Administration**

**Oregon State University**

**370 Strand Hall**

**Corvallis, OR 97331**

**Attn: Dan Hellin**

**Email: Dan.Hellin@oregonstate.edu**

**with copy to: Capital Planning & Development**

**Oregon State University**

**3015 SW Western Blvd**

**Corvallis, OR 97333**

**Attn: Paul J. Odenthal, Senior VP for Administration**

**with copy to: Construction Contract Administration**

**644 SW 13th Ave.**

**Corvallis, OR 97333**

**Email: ConstructionContracts@oregonstate.edu**

**Contractor:**

**Attn:**

**Phone:**

**Email:**

**with copy to:**

**Email:**

## EXHIBIT J

### KEY PERSONNEL

#### Contractor's Key Personnel

The personnel indicated below shall commit to the Project and shall not be assigned any other work responsibilities that lessen or hinder their ability to perform their Project responsibilities:

Contractor's Representatives are named herein as follows:

1. Project Executive. Contractor shall assign \_\_\_\_\_ as Project Executive to supervise Contractor's services and the Work and be available to Owner at all reasonable times.
2. Senior Project Manager. Contractor shall assign \_\_\_\_\_ as Senior Project Manager to supervise the Work and be available to Owner at all reasonable times.
3. Project Manager. Contractor shall assign \_\_\_\_\_ as Project Manager to supervise the Work and be available to Owner at all reasonable times.
4. General Superintendent. Contractor shall assign \_\_\_\_\_ as General Superintendent to supervise the Work.
5. Design Manager. Contractor shall assign \_\_\_\_\_ as Design Manager to supervise Contractor's Design Services.
6. Submittals Coordinator. Contractor shall assign \_\_\_\_\_ as Contractor's Submittals Coordinator to coordinate all Submittals and shall check for conflicts, completeness, and accuracy, and confirm such Submittals conform to the requirements of the Contract Documents and are appropriate for Owner Parties' review.
7. Other Personnel. Contractor shall assign other persons as necessary who shall be responsible for the job descriptions set forth next to each of their names. [Note: Contractor to provide for Owner's approval.]