

AMENDED AND RESTATED DESIGN-BUILD CONTRACT
FOR THE HEADWORKS FACILITY (CPMS NO. 7477 AND 7701)
AT THE
SAN JOSE – SANTA CLARA
REGIONAL WASTEWATER FACILITY

between

THE CITY OF SAN JOSE, CALIFORNIA,
as administering agency of
The Regional Wastewater Facility

and

CH2M HILL ENGINEERS, INC.

Dated

_____, 2020

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REFERENCE DOCUMENTS

1. Basis of Design Report – 2 volumes, 10 appendices (Jacobs, May 2019)
2. Computerized Maintenance Management System Plan (Jacobs, January 2020)
3. Facility Condition Assessment Report (Jacobs, January 2020)
4. Geotechnical Report (Jacobs, January 2020)
5. Pipeline Excavation Regulated Site Conditions Investigation Report (Jacobs, October 2019)
6. Subsurface Utilities Investigation Report (Jacobs, January 2020)
7. Training Plan (Jacobs, January 2020)
8. Permitting & Specifications Plan (Jacobs, November 2019)
9. Reference Document Technical Memorandum (January 2020) and All Documents Listed in Appendix A to such Technical Memorandum

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AMENDED AND RESTATED DESIGN-BUILD CONTRACT
FOR THE HEADWORKS FACILITY (CPMS NO. 7477 AND 7701)
AT THE
SAN JOSE-SANTA CLARA
REGIONAL WASTEWATER FACILITY

THIS AMENDED AND RESTATED DESIGN-BUILD CONTRACT (“Amended and Restated Design-Build Contract”) is made and entered into as of _____, 2020 between the City of San Jose, California (the “City”), as administering agency of the Regional Wastewater Facility, and CH2M HILL Engineers, Inc., a corporation organized and existing under the laws of the State of Delaware and authorized to do business in the State of California (the “Design-Builder”).

RECITALS

WHEREAS, the City of San Jose and the City of Santa Clara jointly own a regional wastewater facility through a joint exercise of powers agreement.

WHEREAS, the City, as the administering agency under the joint exercise of powers agreement, manages and operates the regional wastewater facility.

WHEREAS, the existing headworks facility at the regional wastewater facility contains aging equipment.

WHEREAS, the City has determined to contract with a private entity to design, construct, commission, acceptance test and obtain certain governmental approvals for a new, replacement headworks facility and as more specifically defined herein, (the “Project”).

WHEREAS, pursuant to Section 22164 of the California Public Contract Code, the City issued a request for qualifications on May 24, 2017, as amended on June 15, 2017, June 21, 2017 and July 7, 2017, in order to prequalify or short-list the design-build entities whose proposals would be compared, selected or rejected on a best value basis.

WHEREAS, based on the evaluation of the statements of qualifications submitted in response to the request for qualifications and using the criteria set forth in the request for qualifications, the City’s selection committee short-listed three firms deemed to be the most qualified to submit proposals from among four teams submitting statements of qualifications.

WHEREAS, on November 8, 2017, the City undertook the second phase of the competitive process by issuing to the proposers a request for proposals for the Project.

WHEREAS, proposals submitted in response to the request for proposals were received on December 21, 2017 from each of the proposers.

WHEREAS, the proposals were reviewed by the selection committee and assigned a score based on the evaluation criteria and scoring method set forth in the request for proposals.

WHEREAS, based on the evaluations and scoring of the proposals, the selection committee determined that the proposal submitted by the Design-Builder was the highest scored proposal received in response to the City’s request for proposals.

WHEREAS, in February 2018, negotiations were initiated with the Design-Builder.

WHEREAS, on June 19, 2018, the City Council authorized the execution and delivery of a design-build contract for the Project with the Design-Builder (the "Design-Build Contract").

WHEREAS, the Design-Build Contract contemplated that following the completion of specified preliminary services, the Design-Builder would make a definitive project submittal to the City containing among other things a guaranteed maximum price for the Design-Build Work necessary to complete the Project.

WHEREAS, on December 6th, 2019, the Design-Builder provided the City with its definitive project submittal, which submittal has been negotiated and accepted by the City.

WHEREAS, the Design-Build Contract is hereby amended and restated to reflect the agreements of the parties regarding the Design-Builder's definitive project submittal as well as to reflect the current status of the Project.

WHEREAS, Jacobs Engineering Group Inc., an affiliate of the Design-Builder, has guaranteed the performance of the obligations of the Design-Builder under the Design-Build Contract as such contract may be amended, including by this Amended and Restated Design-Build Contract, pursuant to a guaranty agreement executed on June 19, 2018.

WHEREAS, the headworks facility will be designed, constructed, started-up, functionally tested and acceptance tested, and certain governmental approvals obtained therefor, by the Design-Builder pursuant to the terms of this Amended and Restated Design-Build Contract, including the appendices attached hereto.

WHEREAS, payment of amounts payable hereunder by the City to the Design-Builder will be made solely from revenues of the City's wastewater system, and shall not be an obligation of the City's general fund, any other City enterprise fund or any other asset or revenue of the City.

WHEREAS, the City desires to receive, and the Design-Builder desires to provide design and construction services under the terms of this Amended and Restated Design-Build Contract.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto, intending to be legally bound, agree as follows:

ARTICLE 1

DEFINITIONS AND INTERPRETATION

SECTION 1.1. DEFINITIONS.

As used in this Amended and Restated Design-Build Contract, the following terms shall have the meanings set forth below:

“60% Design Completion Documents” has the meaning set forth in Appendix 4 (Technical Specifications).

“Acceptance Standards” means the standards set forth in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing) that the Headworks 3 Facility must meet during the performance of the Acceptance Test, including the Performance Guarantees.

“Acceptance Test” and **“Acceptance Testing”** means the test and testing of the Headworks 3 Facility required in order to achieve Substantial Completion, as more particularly described in Article 8 (Testing, Substantial Completion and Final Completion) and Appendix 9 (Pre-Acceptance Testing and Acceptance Testing).

“Acceptance Test Plan” means the plans, protocols, procedures and processes for the performance of Acceptance Testing to be prepared and documented by the Design-Builder and approved by the City in accordance with subsection 6.19(A) (Testing Plans) and Appendix 9 (Pre-Acceptance Testing and Acceptance Testing).

“Additional Insurance Required From Enrolled Parties and Excluded Parties” means the insurance policies and coverages required pursuant to Section 9 of Appendix 12 (Insurance Requirements) hereto.

“Affiliate” means any person directly or indirectly controlling or controlled by another person, corporation or other entity or under direct or indirect common control with such person, corporation or other entity.

“Air Quality Permit to Construct” means the Governmental Approval to be issued by the BAAQMD under the Clean Air Act authorizing the construction of the Headworks 3 Facility.

“Air Quality Permit to Operate” means the Governmental Approval to be issued by the BAAQMD under the Clean Air Act authorizing the operation of the Headworks 3 Facility.

“Allowance” has the meaning set forth in Appendix 8 (Allowances) of Appendix 8.

“Amended and Restated Design-Build Contract” means this Amended and Restated Design-Build Contract for Headworks Facility at the San Jose – Santa Clara Regional Wastewater Facility between the Design-Builder and the City, including the Appendices, as the same may be amended or modified from time to time in accordance herewith.

“Amended and Restated Design-Build Contract Date” means [_____], 2020, the date this Amended and Restated Design-Build Contract was executed and delivered by the parties hereto.

“Amendment No. 1” means the amendment to the Design-Build Contract executed between the parties on April 17, 2019, the terms of which have been incorporated into Appendix 2 (Preliminary Services) as of the Amended and Restated Design-Build Contract Date.

“Appendix” means any of the Appendices and, as applicable, any attachments thereto, that are appended to this Amended and Restated Design-Build Contract and identified as such in the table of contents to this Amended and Restated Design-Build Contract.

“Applicable Law” means (1) any federal, state, City or local law, code or regulation, including all City rules and regulations; (2) any formally adopted and generally applicable rule, requirement, determination, standard, policy, implementation schedule, or other order of any Governmental Body having appropriate jurisdiction; (3) any established interpretation of law or regulation utilized by an appropriate Governmental Body if such interpretation is documented by such Governmental Body and generally applicable; (4) any Governmental Approval; and (5) any consent order or decree, settlement agreement or similar agreement between the City and any Governmental Body, in each case having the force of law and applicable from time to time, over the Project, the Contract Services or any other transaction contemplated hereby.

“Approved Subcontractors” means the subcontractors identified in Appendix 13 (Key Personnel and Approved Subcontractors).

“Assumed Approval Issuance Date” has the meaning specified in subsection 6.5(F) (Assumed Approval Issuance Dates for the Design-Builder Managed Governmental Approvals).

“BAAQMD” means the Bay Area Air Quality Management District.

“Bankruptcy Code” means the United States Bankruptcy Code, 11 U.S.C. 101 *et seq.*, as amended from time to time and any successor statute thereto. “Bankruptcy Code” shall also include any similar state law relating to bankruptcy, insolvency, the rights and remedies of creditors, the appointment of receivers or the liquidation of companies and estates that are unable to pay their debts when due.

“Base Guaranteed Maximum Price” means the initial amount approved by the City as the Guaranteed Maximum Price pursuant to Appendix 8 (Design-Build Price).

“Base Guaranteed Maximum Price Adjustment” means an adjustment to the Base Guaranteed Maximum Price made in accordance with and subject to the terms and conditions of Appendix 8 (Design-Build Price).

“Books and Records” has the meaning specified in subsection 4.11(A) (Books and Records).

“Business Day” means all calendar days except for weekends and holidays for which City offices are closed.

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*, and applicable regulations promulgated thereunder, each as amended from time to time.

“Change in Law” means any of the following acts, events or circumstances to the extent that compliance with the change materially expands the scope, interferes with, delays or increases the cost of performing the obligations of the Design-Builder:

(1) except as provided below in items (a) through (d) with respect to the exclusions from the definition of “Change in Law”, the adoption, amendment, promulgation, issuance, modification, repeal or written change in administrative or judicial interpretation of any Applicable Law on or after the Change in Law Baseline Date, unless such Applicable Law was on or prior to the Change in Law Baseline Date duly adopted, promulgated, issued or otherwise officially modified or changed in interpretation, in each case in final form, to become effective without any further action by any Governmental Body;

(2) except as provided below in items (a) through (d) with respect to the exclusions from the definition of “Change in Law”, the order or judgment of any Governmental Body issued on or after the Change in Law Baseline Date (unless such order or judgment is issued to enforce compliance with Applicable Law which was effective as of the Change in Law Baseline Date) to the extent such order or judgment is not the result of willful or negligent action, error or omission or lack of reasonable diligence of the Design-Builder; provided, however, that the contesting in good faith or the failure in good faith to contest any such order or judgment shall not constitute or be construed as such a willful or negligent action, error or omission or lack of reasonable diligence; or

(3) except as provided below in items (a) through (d) with respect to the exclusions from the definition of “Change in Law”, the denial of an application for, a delay in the review, issuance or renewal of, or the suspension, termination or interruption of any Governmental Approvals, or the imposition of a term, condition or requirement on or after the Change in Law Baseline Date in connection with the issuance, renewal or failure of issuance or renewal of any Governmental Approval, to the extent that such occurrence is not the result of willful or negligent action, error or omission or a lack of reasonable diligence of the Design-Builder; provided, however, that the contesting in good faith or the failure in good faith to contest any such occurrence shall not be construed as such a willful or negligent action or lack of reasonable diligence.

It is specifically understood, however, that none of the following shall constitute a “Change in Law”:

(a) any Change in Law relating to Taxes, except: (i) for sales or use Taxes imposed in the United States on materials and equipment incorporated in the Project (or equivalent Taxes imposed by an international taxing jurisdiction), (ii) the imposition of any gross receipts tax, or (iii) Tariffs imposed in the United States on materials and equipment incorporated into the Project (or equivalent Tariffs imposed by an international jurisdiction);

(b) a change in the nature or severity of the actions typically taken by a Governmental Body to enforce compliance with Applicable Law that was in effect as of the Contract Date;

(c) any increase in any fines or penalties provided for under Applicable Law in effect as of the Change in Law Baseline Date; or

(d) any Change in Law (including the enactment of any statute, or the promulgation of any regulation) the terms and conditions of which do not impose more stringent or burdensome requirements on the Design-Builder than are imposed by the Contract Standards in effect as of the Change in Law Baseline Date.

“Change in Law Baseline Date” means the Amended and Restated Design-Build Contract Date; except that notwithstanding such Change in Law Baseline Date:

- (1) the design of the Project shall be based upon and subject to the 2016 California Standards Code and any requirement by a Governmental Body to comply with more recent building code standards shall constitute a Change in Law; and
- (2) the Change in Law Baseline Date with regard to the imposition or change to any Tariff shall be December 6, 2019.

“Change Order” means a written order issued by the City and agreed to in writing by the Design-Builder prior to Substantial Completion making a Technical Specifications Change, whether made at Design-Builder request, due to Uncontrollable Circumstances, as a result of a term or condition imposed by a Governmental Body, or at the direction of the City, or otherwise making a Base Guaranteed Maximum Price Adjustment, adjustment to the Scheduled Substantial Completion Date or any other change to the terms and conditions of this Amended and Restated Design-Build Contract. A Change Order shall be deemed to constitute a Contract Amendment.

“City” means the City of San Jose, a municipal corporation of the State of California, acting in its capacity as administering agency of the Regional Wastewater Facility.

“City Contract Representative” has the meaning specified in subsection 18.5(B) (City Contract Representative).

“City Fault” means any breach (including the untruth or breach at the time made of any City representation or warranty herein set forth), failure, non-performance or non-compliance by the City under this Amended and Restated Design-Build Contract with respect to its obligations and responsibilities under this Amended and Restated Design-Build Contract to the extent not directly attributable to any Uncontrollable Circumstance and which materially and adversely affects the Design-Builder’s rights, obligations or ability or costs to perform under this Amended and Restated Design-Build Contract.

“City Indemnitee” has the meaning specified in Section 16.1 (Design-Builder’s Obligation to Indemnify).

“City Managed Governmental Approvals” means those Governmental Approvals for which the City is the application manager, as designated in Appendix 3 (Governmental Approvals).

“City Property” means any structures, improvements, equipment, or other real or personal property owned, leased, operated, maintained, or occupied by the City.

“City Technical Representative” means an engineer or construction management or technical professional employed by the City and designated by the City from time to time as a City Technical Representative.

“Computerized Maintenance Management System Plan” or **“CMMS Plan”** means the plan so designated prepared by the Design-Builder pursuant to Preliminary Services Task 1 and set forth as Reference Document 6.

“Construction” means that part of the Design-Build Work consisting of the construction of the Project as required by this Amended and Restated Design-Build Contract, including furnishing, installing or incorporating Supplies into the Project.

“Construction Commencement Date” means the date, following satisfaction of the Construction Commencement Date Conditions by the Design-Builder, upon which the Design-Builder shall have the right to proceed with the physical construction of the Project, as determined in accordance with subsection 6.2(B) (Construction Commencement Date Conditions).

“Construction Commencement Date Conditions” has the meaning specified in subsection 6.2(A) (Construction Commencement Date Generally).

“Construction Enabling Site” means that area within the Regional Wastewater Facility, as indicated and described in Appendix 1 (Headworks Facility, Headworks Facility Site and Related Projects Description).

“Construction Notice to Proceed” has the meaning specified in subsection 6.2(C) (Establishment of the Construction Commencement Date).

“Construction Submittal Protocol” means the protocol for the submittal of construction documents by the Design-Builder to the City to be developed by the Design-Builder in accordance with the requirements set forth in Appendix 7 (Design-Build Work Review Procedures).

“Contract Administration Memorandum” has the meaning specified in Section 18.3(B) (Contract Administration Memoranda).

“Contract Amendment” has the meaning specified in subsection 18.4(A) (Amendments Generally).

“Contract Compensation” means the Preliminary Services Fee, the Design-Build Price and the Transition Services Fee, as applicable.

“Contract Date” means June 19, 2018, the date the Design-Build Contract was executed and delivered by the parties hereto.

“Contract Obligations” means everything required to be furnished and done for and relating to the permitting, design, construction, Pre-Acceptance Testing and Acceptance Testing of the Project pursuant to this Amended and Restated Design-Build Contract.

“Contract Representative” means, in the case of the Design-Builder, the Design-Builder Contract Representative and, in the case of the City, the City Contract Representative.

“Contract Services” means the Preliminary Services, the Design-Build Work (including the Warranty Work), the Post-Acceptance Performance Tests and the Transition Services, as applicable.

“Contract Standards” means the standards, terms, conditions, methods, techniques and practices imposed or required by: (1) Applicable Law; (2) the Technical Specifications; (3) the Acceptance Standards; (4) Good Engineering and Construction Practice; (5) the Design-Build Quality Management Plan; (6) the Maintenance of Operations During Construction Plan, (7) the Health and Safety Plan; (8) the Testing Plans; (9) the Operation and Maintenance Manual; (10) the Insurance Requirements; (11) the City of San Jose, Department of Public Works Standard Specifications (revised 1992); and (12) any other standard, term, condition or requirement specifically provided in this Amended and Restated Design-Build Contract to be observed by the Design-Builder. Subsection 1.2(V) (Applicability, Stringency and Consistency of the Contract Standards) shall govern issues of interpretation related to the applicability, stringency and consistency of the Contract Standards.

“**CONTRACTOR**” means the Design-Builder for purposes of the Division 01 Specifications, unless a contrary intent is clearly evident.

“**Cost Substantiation**” means the process of providing evidence of actual costs in accordance with Section 4.8 (Cost Substantiation).

“**DCS System**” means the distributed control systems required for the Project, as described in Appendix 4 (Technical Specifications).

“**Definitive Contract Amendment**” means the Contract Amendment authorizing the Design-Build Work associated with the Definitive Project Submittal, as agreed upon by the parties in accordance with the Design-Build Contract (prior to amendment by this Amended and Restated Design-Build Contract). This Amended and Restated Design-Build Contract constitutes the Definitive Contract Amendment.

“**Definitive Project Submittal**” means the submittal made by the Design-Builder pursuant to Preliminary Services Task #6, as described in Appendix 2 (Preliminary Services), and in accordance with the Design-Build Contract (prior to amendment by this Amended and Restated Design-Build Contract).

“**Deliverable Material**” means the Preliminary Services Deliverable Material and the Design-Build Work Deliverable Material.

“**Design-Build Contract**” means the Design-Build Contract for the Headworks Facility at the San Jose – Santa Clara Regional Wastewater Facility between the Design-Builder and the City, including the Appendices, dated June 19, 2018, as the same has been amended or modified from time to time, including by this Amended and Restated Design-Build Contract.

“**Design-Build Costs**” has the meaning specified in Appendix 8 (Design-Build Price).

“**Design-Build Manager**” has the meaning specified in subsection 7.1(A) (Design-Build Manager).

“**Design-Build Period**” means the period from and including the Amended and Restated Design-Build Contract Date through the date Final Completion is achieved.

“**Design-Build Price**” has the meaning specified in Appendix 8 (Design-Build Price).

“**Design-Build Quality Management Plan**” means the Design-Builder’s plan for quality assurance and quality control in implementing the Design-Build Work to be developed in accordance with the requirements set forth in Appendix 6 (Design-Build Quality Assurance and Quality Control Requirements).

“**Design-Build Schedule**” means the Design-Builder’s critical path method completion schedule for the performance of the Design-Build Work, as set forth as an attachment to Appendix 5 (General Design-Build Work Requirements) and as updated and maintained by the Design-Builder in accordance with subsection 6.1(F) (Design-Build Schedule and Reports).

“**Design-Build Work**” means everything required to be furnished and done for and relating to the design and construction of the Project pursuant to this Amended and Restated Design-Build Contract, other than the Preliminary Services and the Transition Services. Design-Build Work includes the employment and furnishing of all labor, materials, equipment, supplies, tools, scaffolding, transportation, Utilities, insurance, temporary facilities

and other things and services of every kind whatsoever necessary for the full performance and completion of the Design-Builder's design, engineering, permitting, procurement, construction, testing, and related obligations with respect to the construction of the Project under this Amended and Restated Design-Build Contract, including all completed structures, assemblies, fabrications, acquisitions and installations, all testing, and all of the Design-Builder's administrative, accounting, recordkeeping, notification and similar responsibilities of every kind whatsoever under this Amended and Restated Design-Build Contract pertaining to such obligations, as well as the Warranty Work. A reference to Design-Build Work shall mean any part and all of the Design-Build Work unless the context otherwise requires, and shall include all Design-Build Work authorized by Change Order or Unilateral Change Directive.

"Design-Build Work Deliverable Material" means all documents, reports, studies, surveys, computer programs, warranties, manuals, submittals, licenses and other documents and materials required to be delivered by the Design-Builder to the City in the performance of the Design-Build Work pursuant to this Amended and Restated Design-Build Contract, including the Final Design Documents.

"Design-Build Work Notice-to-Proceed" has the meaning set forth in subsection 6.1(B).

"Design-Builder" means CH2M HILL Engineers, Inc., a corporation organized and existing under the laws of Delaware, and its permitted successors and assigns.

"Design-Builder Contingency" has the meaning specified in Appendix 8 (Design-Build Price).

"Design-Builder Contract Representative" has the meaning specified in subsection 18.5(A) (Design-Builder Contract Representative and Senior Supervisors).

"Design-Builder Fault" means any breach (including the untruth or breach at the time made of any Design-Builder representation or warranty herein set forth), failure, non-performance or non-compliance by the Design-Builder with respect to its obligations and responsibilities under this Amended and Restated Design-Build Contract to the extent not directly attributable to any Uncontrollable Circumstance and which materially and adversely affects the City's rights, obligations or ability or costs to perform under this Amended and Restated Design-Build Contract.

"Design-Builder Fee" has the meaning specified in Appendix 8 (Design-Build Price).

"Design-Builder Managed Governmental Approvals" means those Governmental Approvals for which the Design-Builder is the application manager, as designated in Appendix 3 (Governmental Approvals).

"Design Services" means that part of the Design-Build Work consisting of the preparation of plans, drawings and specifications for the Project by licensed professional engineering, architectural and land surveying firms.

"Design Services Firm" means any person providing Design Services.

"Differing Site Conditions" means (a) actual subsurface or latent physical conditions at the Headworks Facility Site that differ materially from those indicated in the Reference Documents or (b) unknown physical conditions at the Headworks Facility Site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character required herein; provided, however, that the term "Differing Site Conditions" excludes: (1) conditions of which the Design-Builder had actual

or constructive knowledge as of the Amended and Restated Design-Build Contract Date, including through the performance of Preliminary Services Tasks; (2) conditions that should have been discovered through a reasonable Headworks Facility Site investigation performed prior to the Amended and Restated Design-Build Contract Date; and (3) conditions (excluding man-made conditions) that come into existence after the Amended and Restated Design-Build Contract Date.

“Division 01 Specifications” means the specifications so designated and set forth in Appendix 4 (Technical Specifications).

“Early Work Package Amendment No. 1” means the amendment to the Design-Build Contract executed between the parties on May 14, 2019.

“Encumbrances” means any Lien, lease, mortgage, security interest, charge, judgment, judicial award, attachment or encumbrance of any kind with respect to the Project or the Headworks Facility Site.

“ENGINEER” means the City’s Department of Public Works for purposes of the Division 01 Specifications, unless a contrary intent is clearly evident.

“Engineer-of-Record” means the professional engineer licensed in the State in good standing who is designated by the Design-Builder and acceptable to the City, acting reasonably, as the engineer responsible for the preparation, signing, dating, sealing and issuing of the engineering documents relating to a portion of or all of the Design-Build Work.

“Environmental Mitigation Measures” has the meaning set forth in Section 4.3 (Environmental Review).

“ESD” means the Environmental Services Department of the City.

“Event of Default” means, with respect to the Design-Builder, those items specified in Section 13.2 (Events of Default by the Design-Builder) and, with respect to the City, those items specified in Section 13.5 (Events of Default by the City).

“Existing Headworks Facility” means the existing headworks facilities equipment, buildings and structures as well as influent structures, emergency overflow structure, emergency overflow basin, and piping that serve to deliver raw sewage, plant drainage, stormwater, and plant recycle flows to the headworks currently operated by the City at the Regional Wastewater Facility, as more particularly described in Appendix 1 (Headworks and Headworks Facility Site, and Related Projects Description).

“Existing Headworks Facility Improvements” means the improvements to the Existing Headworks Facility to be designed and constructed by the Design-Builder pursuant to this Amended and Restated Design-Build Contract after Headworks 3 Facility Acceptance Testing, including improvements to the existing facilities known as Headworks 1 and Headworks 2, and (i) pipelines to convey raw sewage from the new headworks facility into the Regional Wastewater Facility and (ii) rerouting of existing Plant drainage, recycle and stormwater flows, all as more fully described in Appendix 1 (Headworks Facility, Headworks Facility Site, and Related Projects Description) and Appendix 4 (Technical Specifications; provided, however, that with respect to (i) and (ii) above, only to the extent not required prior to Acceptance Testing).

“Existing Headworks Facility Improvements Completion Date” has the meaning specified in subsection 6.21(B) (Completion of Existing Headworks Facility Improvements).

“Expiration Date” means the latest to occur of the last day of the:

- (1) Warranty Period; or
- (2) Transition Period.

“Extension Period” means the period commencing on the day after the Scheduled Substantial Completion Date and ending 120 days following the Scheduled Substantial Completion Date, as such period may be adjusted due to one or more delays caused by Uncontrollable Circumstances occurring during such 120-day period.

“Fees and Costs” means reasonable fees and expenses of employees, attorneys, architects, engineers, expert witnesses, contractors, consultants and other persons, and costs of transcripts, printing of briefs and records on appeal, copying and other reimbursed expenses, and expenses reasonably incurred in connection with investigating, preparing for, defending or otherwise appropriately responding to any Legal Proceeding.

“Final Completion” means completion of the Design-Build Work, including physical construction (including all Punch List items and the Existing Headworks Facility Improvements), Substantial Completion and the Post-Acceptance Performance Tests, in compliance with the Technical Specifications and the requirements of Section 8.7 (Final Completion).

“Final Design Documents” means the Design-Builder’s plans, technical specifications, drawings, record drawings and other design documents prepared following the Amended and Restated Design-Build Contract Date in connection with the Design-Build Work.

“Final Design Submittal Protocol” means the protocol for the submittal of Final Design Documents by the Design-Builder to the City to be developed by the Design-Builder in accordance with the requirements set forth in Appendix 7 (Design-Build Work Review Procedures).

“Functional Testing” means testing of the systems and subsystems of the Headworks 3 Facility to confirm capability to operate as intended without quantitative measurement of capacity, efficiency or effectiveness, as more particularly described in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing).

“General Conditions Costs” has the meaning specified in Appendix 8 (Design-Build Price).

“General Conditions Fee” has the meaning specified in Appendix 8 (Design-Build Price).

“General Contractor” means Kiewit Infrastructure West Co., a corporation organized and existing under the laws of the State of Delaware.

“Geotechnical Report” means the report so designated prepared by the Design-Builder pursuant to Preliminary Services Task 2 and set forth as Reference Document 8.

“Good Engineering and Construction Practice” means those methods, techniques, standards and practices which, at the time they are to be employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good design, engineering, equipping, installation, construction, Pre-Acceptance Testing and Acceptance Testing practices for the design, construction and improvement of capital assets in the wastewater treatment industry using the design-build

delivery method as followed in the United States, including those standards set forth in Appendix 4 (Technical Specifications).

“Governmental Approval” means any permit, license, authorization, consent, certification, exemption, ruling, entitlement or approval issued by a Governmental Body of whatever kind and however described, which is required under Applicable Law to be obtained or maintained by any person with respect to the Design-Build Work, including City-Managed Governmental Approvals.

“Governmental Approval Application Date” means the applicable date set forth in the Governmental Approvals Schedule Table.

“Governmental Approvals Responsibility Table” means Table 3-1 (Governmental Approvals Responsibility) of Appendix 3 (Governmental Approvals).

“Governmental Approvals Schedule Table” means Table 3-2 (Governmental Approvals Schedule) of Appendix 3 (Governmental Approvals).

“Governmental Body” means any federal, state, City, regional or local legislative, executive, judicial or other governmental board, agency, authority, commission, administration, court or other body, or any official thereof having jurisdiction, including the various departments of the City.

“Guaranteed Maximum Price” has the meaning specified in Appendix 8 (Design-Build Price).

“Guarantor” means Jacobs Engineering Group Inc., a corporation organized and existing under the laws of the State of Delaware, and its permitted successors and assigns.

“Guaranty Agreement” means the Guaranty Agreement entered into concurrently with the Design-Build Contract from the Guarantor to the City in the form set forth in the Transaction Forms, as the same may be amended from time to time in accordance therewith.

“Hazardous Material” means any waste, substance, object or material deemed hazardous under Applicable Law, including “hazardous substances” as defined under CERCLA, “hazardous waste” as defined under RCRA and in California Health and Safety Code Section 25117, and “hazardous material” as defined under US DOT regulations (49 CFR 100-180).

“Headworks 3 Facility” or **“HW3”** means the new headworks facility to be designed and constructed by the Design-Builder pursuant to this Amended and Restated Design-Build Contract, including pipelines to convey raw sewage into the headworks facility; pipelines to convey raw sewage from the new headworks facility into the Regional Wastewater Facility; improvements to the emergency basin overflow structure, emergency basin, and influent structures; expansion of influent piping system; rerouting of existing plant drainage, recycle and stormwater flows; construction of new screenings removal system, grit removal system, influent pumping, and odor control system, all as more fully described in Appendix 1 (Headworks Facility, Headworks Facility Site, and Related Projects Description) and Appendix 4 (Technical Specifications; provided, however that with respect to (i) pipelines to convey raw sewage from the new headworks facility into the Regional Wastewater Facility and (ii) rerouting of existing plant drainage, recycle and stormwater flows, only to the extent they are required prior to Acceptance Testing).

“Headworks Facility Site” means the parcel of real property on which the Project is to be constructed by the Design-Builder, as more particularly described in Appendix 4 (Technical Specifications).

“Health and Safety Plan” has the meaning specified in subsection 6.14(D) (Health and Safety Plan) and Appendix 5 (General Design-Build Work Requirements).

“Health and Safety Representative” has the meaning specified in subsection 6.14(A) (Health and Safety Representative).

“Intellectual Property” means any trade secrets, proprietary rights, patents, copyrights or trademarks recognized under Applicable Law.

“Insurance Requirement” means any rule, regulation, code, or requirement issued by any insurance company that has issued a policy, certificate, or endorsement of Required Insurance, compliance with which is a condition to the effectiveness of such policy.

“Legal Proceeding” means every action, suit, litigation, arbitration, administrative proceeding, and other legal or equitable proceeding having a bearing upon this Amended and Restated Design-Build Contract, and all appeals therefrom.

“Lien” means any and every lien against the Project or the Headworks Facility Site or against any monies due or to become due from the City to the Design-Builder under this Amended and Restated Design-Build Contract, for or on account of the Contract Services, including mechanics’, materialmen’s, laborers’ and lenders’ liens.

“Loss-and-Expense” means and is limited to any and all actual losses, liabilities, forfeitures, obligations, damages, fines, penalties, judgments, deposits, Taxes, charges, costs or expenses, including all Fees and Costs, except as explicitly excluded or limited under any provision of this Amended and Restated Design-Build Contract, relating to third party claims for which the Design-Builder is obligated to indemnify the City Indemnitees pursuant to this Amended and Restated Design-Build Contract.

“Maintenance of Operations During Construction Plan” has the meaning specified in subsection 6.11(A) (Maintenance of Operations During Construction).

“Manufacturer’s Standard Factory O&M Manuals” means the manuals describing the operation and maintenance requirements for each equipment system, package and unit incorporated into the Headworks 3 Facility, as required by Appendix 5 (General Design-Build Work Requirements).

“Material Subcontract” means any Subcontract for the construction of the mechanical, electrical and plumbing systems and equipment comprising the Project, and any other Subcontract with a contract value exceeding \$300,000.

“Material Subcontractor” means any Subcontractor that is party to a Material Subcontract.

“Mediator” means any person serving as a third-party mediator of disputes hereunder pursuant to Section 12.2 (Non-Binding Mediation).

“Minimum Acceptance Standard” means the Acceptance Standards, except that with respect to the following Performance Guarantee, Minimum Acceptance Standard shall mean 5% below the required pump efficiency per Raw Sewage Pump for the pump efficiency as demonstrated in the factory performance testing.

“Monthly Design-Build Work Report” has the meaning specified in subsection 6.1(F) (Design-Build Schedule and Reports).

“Non-Binding Mediation” means the voluntary system of dispute resolution through third-party mediation established by Section 12.2 (Non-Binding Mediation) for the resolution of any dispute arising under this Amended and Restated Design-Build Contract.

“OCIP Coverages” means the OCIP Coverages described in Section 6 of Appendix 12 (Insurance Requirements) hereto.

“Operations and Maintenance Manual” means the manual and related computer programs prepared by the Design-Builder containing detailed standard operating and maintenance procedures and other specific instructions, policies, directives, routines, schedules and other matters relating to the Headworks 3 Facility, developed and maintained as required by Section 6.18 (Operations and Maintenance Manual), Appendix 4 (Technical Specifications) and Appendix 5 (General Design-Build Work Requirements). The Manufacturer’s Standard Factory O&M Manuals shall be included in the Operations and Maintenance Manual.

“OSHA” means both the California Occupational Safety and Health Act, Chapter 3.2, Division 1, Title 8 of the California Code of Regulations, including all applicable regulations promulgated thereunder, and the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 650 *et seq.*, including the applicable regulations promulgated thereunder, each as amended or superseded from time to time.

“Other Coverages Provided by the City” means the Other Coverages Provided by the City described in Section 6 of Appendix 12 (Insurance Requirements) hereto.

“Overdue Rate” means the maximum rate of interest permitted by the laws of the State, if applicable, or the Prime Rate, whichever is lower.

“Owner Controlled Insurance Program” or **“OCIP”** means the owner controlled insurance program sponsored by the City for the projects identified as capital improvement projects to be performed at the Regional Wastewater Facility, including the Project.

“Owner’s Advisor” means CDM Smith, Inc. or any other individual or firm, or team of individuals or firms under contract with the City, including subcontractors, designated by the City from time to time as part of the City’s management-consulting, engineering or construction management team for purposes of administering this Amended and Restated Design-Build Contract on behalf of the City.

“Payment Bond” means the labor and materials payment bond provided by the Design-Builder as described in and maintained pursuant to Section 17.2 of this Amended and Restated Design-Build Contract and in the form set forth in the Transaction Forms.

“Payment Request” means a written submission by the Design-Builder in the form approved by the City and accompanied by all required supporting documentation, requesting payment hereunder of any portion of the Contract Compensation.

“Performance Bond” means the performance bond provided by the Design-Builder as described in and maintained pursuant to Section 17.2 of this Amended and Restated Design-Build Contract and in the form set forth in the Transaction Forms.

“Performance Guarantees” means the Design-Builder’s performance guarantees for the systems, subsystems and processes of the Headworks 3 Facility, which are described in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing).

“Permitted Encumbrances” means, as of any particular time, any one or more of the following:

(1) Encumbrances for utility charges, taxes, rates and assessments not yet delinquent or, if delinquent, the validity of which is being contested diligently and in good faith by the Design-Builder and against which the Design-Builder has established appropriate reserves in accordance with generally accepted accounting principles;

(2) any Encumbrance arising out of any judgment rendered that is being contested diligently and in good faith by the Design-Builder, the execution of which has been stayed or against which a bond or bonds in the aggregate principal amount equal to such judgments shall have been posted with a financially-sound insurer and which does not have a material and adverse effect on the ability to construct, or the ongoing operations of, the Project;

(3) any Encumbrance arising in the ordinary course of business imposed by law dealing with materialmen's, mechanics', workmen's, repairmen's, warehousemen's, landlords', vendors' or carriers' encumbrances created by law, or deposits or pledges which are not yet due or, if due, the validity of which is being contested diligently and in good faith by the Design-Builder and against which the Design-Builder has established appropriate reserves;

(4) servitudes, licenses, easements, Encumbrances, restrictions, rights-of-way and rights in the nature of easements or similar charges which will not in the aggregate materially and adversely impair the construction or the ongoing operations of the Project;

(5) zoning and building bylaws and ordinances, municipal bylaws and regulations, and restrictive covenants, which do not materially interfere with the construction of the Project by the Design-Builder;

(6) Encumbrances which are created on or before the Contract Date;

(7) Encumbrances which are created by a Change in Law on or after the Contract Date; and

(8) any Encumbrance created by an act or omission of the City.

"Post-Acceptance Performance Tests" has the meaning specified in Section 8.6 (Post-Acceptance Performance Tests).

"Post-Acceptance Performance Tests Plan" means the plans, protocols, procedures and processes for the performance of Post-Acceptance Performance Tests to be prepared and documented by the Design-Builder and approved by the City in accordance with subsection 6.19(A) (Testing Plans) and Appendix 10 (Post-Acceptance Performance Tests).

"Pre-Acceptance Testing" means starting up, Functional Testing, operating and maintaining the Headworks 3 Facility prior to the introduction of wastewater and prior to performance of the Acceptance Test in order to tune and adjust the systems, subsystems and processes comprising the Headworks 3 Facility to achieve stable operating conditions.

"Pre-Acceptance Testing Plan" means the plans, protocols, procedures and processes for the performance of Pre-Acceptance Testing to be prepared and documented by the Design-Builder and approved by the City in accordance with subsection 6.19(A) (Testing Plans) and Appendix 9 (Pre-Acceptance Testing and Acceptance Testing).

"Preliminary Design Documents" means the Design-Builder's plans, technical specifications, drawings and other documents prepared in connection with the Preliminary Services.

“Preliminary Services” means those services designated as Base Preliminary Services in Appendix 2 (Preliminary Services) and any expansion of the scope thereof by Additional Preliminary Services in accordance with the Design-Build Contract (prior to amendment by this Amended and Restated Design-Build Contract).

“Preliminary Services Deliverable Material” means all documents, reports, studies, surveys, computer programs, warranties, manuals, submittals, licenses and other documents and materials required to be delivered by the Design-Builder to the City in the performance of the Preliminary Services.

“Preliminary Services Fee” has the meaning specified in Appendix 2 (Preliminary Services).

“Preliminary Services Period” means the period between the Contract Date and the Amended and Restated Design-Build Contract Date.

“Preliminary Services Tasks” means the tasks specified in Appendix 2 (Preliminary Services).

“Prime Rate” means the prime rate as published in The Wall Street Journal (Eastern Edition), or a mutually agreeable alternative source of the prime rate if it is no longer published in The Wall Street Journal (Eastern Edition) or the method of computation thereof is substantially modified.

“Project” means the Headworks 3 Facility and the Existing Headworks Facility Improvements.

“Project Definition Report” or **“PDR”** means the report developed by the Owner’s Advisor that provides technical and background information on existing conditions for the Project and Headworks Facility Site and an indicative design that served as the baseline concept and scope of the Project used to obtain environmental permits and funding approval.

“Project Warranties” has the meaning specified in subsection 10.1(A) (Project Warranties Defined).

“Proposal” means the proposal submitted by the Design-Builder on December 21, 2017 in response to the RFP.

“Punch List” has the meaning specified in subsection 6.20(A) (Punch List Requirements).

“RCRA” means the Resource Conservation and Recovery Act, 42 U.S.C.A. 6901 *et seq.*, and applicable regulations promulgated thereunder, each as amended from time to time.

“Reference Documents” means the documents listed as reference documents in the table of contents to this Amended and Restated Design-Build Contract.

“Regional Communities” means the following cities and special districts: San Jose, Santa Clara, Milpitas, Cupertino Sanitary District, West Valley Sanitation District, County Sanitation Districts 2-3 and Burbank Sanitary District.

“Regional Wastewater Facility” or **“RWF”** means the San Jose-Santa Clara Regional Wastewater Facility, formally known as the San Jose/Santa Clara Water Pollution Control Plant, located at 700 Los Esteros Road, San Jose, California and serving the Regional Communities.

“Regional Wastewater Facility Site” means the real property constituting the site on which the Regional Wastewater Facility is located.

“Regulated Site Condition” means, and is limited to, (1) surface or subsurface structures, materials or conditions having historical, archaeological, religious or similar significance that are regulated under Applicable Law; (2) the presence or habitat of a species that is classified under Applicable Law as endangered, rare, threatened, of special concern, or similarly subject to the protections of Applicable Law; (3) the presence anywhere in, on or under the Headworks Facility Site on the Amended and Restated Design-Build Contract Date of wells or underground storage tanks for the storage of chemicals, petroleum products or Regulated Substances; and (4) the presence of Regulated Substances in environmental media anywhere in, on or under the Headworks Facility Site (including presence in surface water, groundwater, soils or subsurface strata or airborne that originated from within the site), whether or not disclosed to the Design-Builder, but not including Regulated Substances used, stored or otherwise brought to the Headworks Facility Site by the Design-Builder or any Subcontractor as provided in subsection 6.4(E) (Design-Builder Responsibilities).

“Regulated Site Conditions Investigations and Remediation Protocols Report” means the report so designated prepared by the Design-Builder pursuant to Preliminary Services Task 2 and set forth as Reference Document 9.

“Regulated Substance” means (1) any oil, petroleum or petroleum product and (2) any pollutant, contaminant, hazardous substance, hazardous material, toxic substance, toxic pollutant, solid waste, municipal waste, industrial waste or hazardous waste that is defined as such by and is subject to regulation under any Applicable Law. Regulated Substances include Hazardous Materials.

“Related Projects” has the meaning specified in subsection 6.11(B) (Related Projects).

“Related Projects Coordination Protocol” means the protocol set forth in Section 2.3.2.4 (Proposed Construction Organization, Work Plan and Schedule) of Appendix 2 (Preliminary Services), which is binding on the Design-Builder and all Separate Contractors, shall be submitted with the BDR and shall provide the framework for the coordination of the Project with the Related Projects.

“Request for Proposals” or **“RFP”** means the City’s Request for Proposals for the Headworks Facility at the San Jose – Santa Clara Regional Wastewater Project, City of San Jose CPMS Project No. 7701, issued in November 8, 2017, as amended.

“Request for Qualifications” or **“RFQ”** means the City’s Request for Qualifications of Design-Build Entities for the San Jose-Santa Clara Regional Wastewater Facility Headworks Project, City of San Jose CPMS Project No. 7701, issued on May 24, 2017, as amended.

“Required Insurance” means the Additional Insurance Required From Enrolled Parties and Excluded Parties, and, upon the Design-Builder’s enrollment in the OCIP, the OCIP Coverages and Other Coverages Provided by the City, all such policies and coverages as set forth and described in Section 14.1 (Insurance) and Appendix 12 (Insurance Requirements). The Required Insurance is subject to waiver or amendment if so approved in writing by the City Risk Manager.

“Required Subcontract” means the Subcontract with the Required Subcontractor.

“Required Subcontractor” means ABB Inc., a corporation organized and existing under the laws of the State of Delaware.

“Response Action” means any action taken in the investigation, removal, confinement, remediation or cleanup of a release of any Regulated Substance. “Response Actions” include any action which constitutes a “removal”, “response”, or “remedial action” as defined by Section 101 of the CERCLA.

“Restricted Person” means any person who (or any member of a group of persons acting together, any one of which):

(1) Is disbarred, suspended, or otherwise disqualified from federal, State, or City contracting for any services similar in nature to the Design-Build Work (including those debarred by the California Division of Labor Standards Enforcement; see www.dir.ca.gov/dlse/debar.html);

(2) Was or is subject to any material claim of the United States, State or City in any proceedings (including regulatory proceedings) which have been concluded or are pending at the time at which the determination of whether the person falls within this definition is being made, and which (in respect of any such pending claim, if it were to be successful) would, in the City’s view, in either case, be reasonably likely to materially affect the ability of the Design-Builder to perform its obligations under this Amended and Restated Design-Build Contract;

(3) In the case of an individual, he or she (or in the case of a legal entity, any of the members of the board of directors or its senior executive managers) has been sentenced to imprisonment or otherwise given a custodial sentence for any criminal offense (other than minor traffic offenses or misdemeanor) less than 5 years prior to the date at which the determination of whether the person falls within this definition is being made;

(4) Has, directly or indirectly, its principal or controlling office in a country that is subject to any economic or political sanctions imposed by the United States for reasons other than its trade or economic policies; or

(5) Has as its primary business the illegal manufacture, sale, distribution or promotion of narcotic substances or arms, or is or has been involved in terrorism.

“Schedule of Values” means the detailed, itemized list of prices and costs that establishes the value of each part or component of the Design-Build Work, that shall serve as the basis for progress payments of the Design-Build Price during the Design-Build Period, set forth in Attachment 8C (Schedule of Values and Design-Builder Contingency) of Appendix 8 (Design-Build Price).

“Scheduled Existing Headworks Facility Improvements Completion Date” has the meaning specified in subsection 6.21(B) (Completion of Existing Headworks Facility Improvements).

“Scheduled Substantial Completion Date” means the date which is 1,050 days following the date of the Design-Build Work Notice-to-Proceed, as such Scheduled Substantial Completion Date may be adjusted in accordance with subsection 8.5(A) (Schedule for Completing the Design-Build Work).

“Security Instruments” means the Guaranty Agreement, the Performance Bond and the Payment Bond.

“Senior Supervisors” has the meaning specified in Section 18.5(A) (Design-Builder Contract Representative and Senior Supervisors).

“Separate Contractor” means any person or entity under contract with the City for the performance of work associated with the Related Projects.

“Shared Savings Amount” has the meaning specified in Appendix 8 (Design-Build Price).

“Shop Drawings” means the drawings, diagrams, illustrations, brochures, schedules or other data prepared by the Design-Builder or any Subcontractor to illustrate specific portions of the Design-Build Work.

“Sub-Allowance” has the meaning set forth in Appendix 8 (Design-Build Price).

“Subcontract” means any contract entered into by the Design-Builder, or a Subcontractor of the Design-Builder of any tier, with one or more persons in connection with the carrying out of the Design-Builder’s obligations under this Amended and Restated Design-Build Contract, whether for the furnishing of labor, materials, equipment, supplies, services or otherwise, including Construction Subcontracts, Design Services Subcontracts, Supplier Subcontracts and the Required Subcontract.

“Subcontracting Plan” means the Design-Builder’s plan for entering into Subcontracts, attached as Attachment 13B to Appendix 13 (Key Personnel and Approved Subcontractors).

“Subcontractor” means any person, other than the Design-Builder or the Guarantor, that enters into a Subcontract, including Construction Subcontractors, Design Services Firms, Suppliers and the Required Subcontractor.

“Subcontractor Default Insurance” means a subcontractor or contractor default insurance (collectively CDI) policy insuring against the default of the Construction Subcontractors.

“Substantial Completion” means demonstration by the Design-Builder in accordance with Article 8 (Testing, Substantial Completion and Final Completion) and Appendix 9 (Pre-Acceptance Testing and Acceptance Testing) that the Acceptance Test has been conducted, the Acceptance Standards have been demonstrated and all other Substantial Completion Date Conditions have been achieved.

“Substantial Completion Date” means the date on which Substantial Completion of the Headworks 3 Facility occurs or is deemed to have occurred under Article 8 (Testing, Substantial Completion and Final Completion).

“Substantial Completion Date Conditions” means the preconditions for the achievement of Substantial Completion by the Design-Builder, as set forth in Section 8.3 (Substantial Completion Date Conditions).

“Subsurface Utilities Investigation Report” means the report so designated prepared by the Design-Builder pursuant to Preliminary Services Task 2 and set forth as Reference Document 10.

“Supplier” means a manufacturer, distributor, materialman, fabricator, distributor, vendor or other supplier having a Subcontract to furnish Supplies.

“Supplies” means materials, equipment or other supplies furnished in connection with the Design-Build Work.

“Surety” means the surety company issuing the Performance Bond or the Payment Bond, as applicable.

“Tariff” means a custom, duty or tax imposed upon the importation of specified equipment or materials into the United States.

“Tax” means any tax, fee, levy, duty, impost, charge, surcharge, assessment or withholding, or any payment-in-lieu thereof, and any related interest, penalty or addition to tax.

“Technical Memorandum on Existing Headworks Facility Condition Assessments” means the report so designated prepared by the Design-Builder pursuant to Preliminary Services Task 2 and set forth as Reference Document 7.

“Technical Specifications” means the technical specifications, designs and drawings set forth in Appendix 4 (Technical Specifications) constituting the design and construction requirements for the Design-Build Work.

“Technical Specifications Change” means a change in the Technical Specifications made by a Change Order pursuant to Section 6.7 (Changes to the Technical Specifications at Design-Builder Request), Section 6.8 (Other Changes to the Technical Specifications) or a Unilateral Change Directive pursuant to Section 6.9 (Unilateral Change Directives), (1) as a result of a Design-Builder request agreed to by the City, (2) due to Uncontrollable Circumstances, (3) as a result of a term or condition imposed by a Governmental Body, or (4) at the direction of the City.

“Term” has the meaning set forth in Section 3.1 (Effective Date and Term).

“Termination Date” means the last day of this Amended and Restated Design-Build Contract resulting from a termination under any provision hereof.

“Testing Plans” means the Pre-Acceptance Testing Plan, the Acceptance Test Plan and the Post-Acceptance Performance Tests Plan.

“Testing Readiness” has the meaning specified in Section 6.19 (Testing Readiness).

“Training Plan” means the Design-Builder’s plan for the training of City employees in the long-term operations and maintenance of the Headworks 3 Facility, prepared by the Design-Builder pursuant to Preliminary Services Task 5, and executed as part of the Design-Build Work.

“Transaction Form” means any of the transaction forms identified in the table of contents to this Amended and Restated Design-Build Contract.

“Transition Period” means the period during which Transition Services are performed as set forth in Section 11.1 (Transition Services) and Appendix 11 (Transition Services), as applicable.

“Transition Services” means everything required to be furnished and done by the Design-Builder relating to the Project during the Transition Period, as applicable.

“Transition Services Fee” has the meaning specified in Section 11.2 (Compensation for Transition Services).

“Uncontrollable Circumstance” means any act, event or condition that (1) is beyond the reasonable control of the party relying on it as a justification for not performing an obligation or complying with any condition required of the party under this Amended and Restated Design-Build Contract, and (2) materially expands the scope, interferes with, delays or increases the cost of performing the party’s obligations under this Amended and Restated Design-Build Contract, to the extent that such act, event or condition is not the result of the willful or negligent act, error or omission, failure to exercise reasonable diligence, or breach of this Amended and Restated Design-Build Contract on the part of the party claiming the occurrence of an Uncontrollable Circumstance.

(1) Inclusions. Subject to the foregoing, Uncontrollable Circumstances may include the following:

- (a) a Change in Law;
- (b) the existence of a Differing Site Condition, as and to the extent provided in Section 6.3 (Differing Site Conditions);
- (c) the existence of a Regulated Site Condition, as and to the extent provided in Section 6.4 (Regulated Site Conditions);
- (d) acts, events or circumstances associated with the Separate Contractors, as and to the extent provided in subsection 6.11(E) (Interrelated Work);
- (e) naturally occurring events, including unusually severe and abnormal climactic conditions (as compared with the five-year average weather statistics compiled by the United States National Oceanic and Atmospheric Administration for the time of year and locality of the Headworks Facility Site), landslides, underground movement, earthquakes, fires, tornadoes, hurricanes, floods, lightning, epidemics and other acts of God;
- (f) explosion, terrorism, sabotage or similar occurrence, acts of a declared public enemy, extortion, war, blockade or insurrection, riot or civil disturbance;
- (g) labor disputes, strikes, slowdowns, stoppages, boycotts or disruption (1) affecting a specific trade on a national or regional level, or (2) involving City employees at the Regional Wastewater Facility, each to the extent not caused by the improper acts or omissions of the Design-Builder or any Subcontractor;
- (h) the failure of any Subcontractor (other than the Design-Builder or any Affiliate of the Design-Builder) to furnish services, materials, chemicals or equipment on the dates agreed to, but only if such failure is the result of an event which would constitute an Uncontrollable Circumstance if it affected the Design-Builder directly, and the Design-Builder is not able after exercising all reasonable efforts to timely obtain substitutes;
- (i) the failure of the City to provide and maintain the Utilities required to be provided and maintained by the City in accordance with subsection 6.1(I) (Utilities);

(j) any failure of title to the Project or the Headworks Facility Site or any placement or enforcement of any Encumbrance on the Project or the Headworks Facility Site not consented to in writing by, or arising out of any action, omission or agreement entered into by, the party adversely affected thereby, other than Permitted Encumbrances;

(k) the preemption, confiscation, diversion, destruction or other interference in possession or performance of materials or services by a Governmental Body in connection with a public emergency or any condemnation or other taking by eminent domain of any material portion of the Project or the Headworks Facility Site;

(l) an act, event or circumstance occurring outside of the United States only to the extent that such act, event or circumstance (1) directly impacts the Design-Builder's foreign suppliers or vendors with respect to the performance of the Design-Build Work, and (2) would otherwise constitute an Uncontrollable Circumstance affecting the Design-Builder directly, as determined in accordance with Article 15 (Uncontrollable Circumstances);

(m) with respect to the Design-Builder, any City Fault or Change Order not due to Design-Builder Fault;

(n) with respect to the City, any Design-Builder Fault;

(o) any other act, event or circumstance specifically identified herein as providing a basis for Uncontrollable Circumstance relief;

(p) influent parameters outside the range specified in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing), relating to the performance of the Acceptance Test and the achievement of the Acceptance Standards;

(q) the City's determination to delay the commencement of the Acceptance Test, as and to the extent provided in subsection 8.2(B) (Notice of Commencement of the Acceptance Test);

(r) the failure to meet the Acceptance Standards during the Acceptance Test due to City personnel, as and to the extent provided in subsection 8.2(E) (Relief from Acceptance Standards During Acceptance Test); or

(s) any delays in performance of Acceptance Testing attributable to the inoperability of the improvements at the Existing Headworks Facility known as Headworks 2, to the extent such inoperability is not due to Design-Builder Fault.

(2) Exclusions. It is specifically understood that, without limitation, none of the following acts, events or circumstances shall constitute Uncontrollable Circumstances:

(a) any act, event or circumstance that would not have occurred but for the affected party's failure to comply with its obligations hereunder;

(b) changes in interest rates, inflation rates, wage rates, insurance premiums, commodity prices (except to the extent due to a Change in Law related to Taxes permitted under items (a)(i), (a)(ii) or (a)(iii) under the definition of Change in Law set forth in this Section), labor availability, currency values, exchange rates or other economic conditions;

(c) changes in the financial condition of the City, the Design-Builder or their Affiliates or Subcontractors affecting the ability to perform their respective obligations;

(d) the consequences of error, neglect or omissions by the Design-Builder, any Subcontractor, any of their Affiliates or any other person in the performance of the Design-Build Work;

(e) union or labor work rules, requirements or demands which have the effect of increasing the number of employees employed at the Project or the Headworks Facility Site or otherwise increasing the cost to the Design-Builder of performing the Design-Build Work;

(f) strikes, labor disputes, work slowdowns, work stoppages, boycotts or other similar labor disruptions, unless such strikes, disputes, slowdowns, stoppages, boycotts or disruptions (1) affect a specific trade on a national or regional level, or (2) involve City employees at the Regional Wastewater Facility, each to the extent not caused by the improper acts or omissions of the Design-Builder or any Subcontractor;

(g) weather conditions that do not constitute unusually severe and abnormal climactic conditions, as determined in accordance with the "Inclusions" of clause (1) of this definition;

(h) except as specifically provided in Section 6.3 (Differing Site Conditions) and Section 6.4 (Regulated Site Conditions), any surface or subsurface conditions affecting the Headworks Facility Site;

(i) except as specifically provided in the "Inclusions" of clause (1) of this definition, any act, event, circumstance or Change in Law occurring outside of the United States;

(j) mechanical failure of equipment to the extent not resulting from a condition that is listed in the "Inclusions" of clause (1) of this definition;

(k) the failure of the Design-Builder to secure any patent or other intellectual property right which is or may be necessary for the performance of the Design-Build Work; or

(l) the receipt of influent, the parameters of which do not fall outside of the range specified in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing), relating to the Performance of the Acceptance Test and the achievement of the Acceptance Standard

"Unilateral Change Directive" has the meaning specified in Section 6.9 (Unilateral Change Directives).

"Utilities" means any and all utility services and installations whatsoever (including gas, water, sewer, electricity, telephone, and telecommunications), and all piping, wiring, conduit, and other fixtures of every kind whatsoever related thereto or used in connection therewith.

"Warranty Period" has the meaning specified in subsection 10.1(B) (Term of the Project Warranties).

“Warranty Work” means all work and services required to be performed or provided by the Design-Builder pursuant to the Project Warranties in accordance with Article 10 (Project Warranties).

SECTION 1.2. INTERPRETATION.

This Amended and Restated Design-Build Contract shall be interpreted according to the following provisions, except to the extent the context or the express provisions of this Amended and Restated Design-Build Contract otherwise require:

(A) Gender and Plurality. Words of the masculine gender mean and include correlative words of the feminine and neuter genders and words importing the singular number mean and include the plural number and vice versa.

(B) Persons. Words importing persons include firms, individuals, legal personal representatives, companies, associations, joint ventures, general partnerships, limited partnerships, limited liability corporations, trusts, business trusts, corporations, Governmental Bodies and other legal entities.

(C) Headings. The table of contents and any headings preceding the text of the Articles, Sections and subsections of this Amended and Restated Design-Build Contract shall be solely for convenience of reference and shall not affect its meaning, construction or effect.

(D) References Hereto. The terms “hereto”, “hereby,” “hereof,” “herein,” “hereunder” and any similar terms refer to this Amended and Restated Design-Build Contract.

(E) References to Days and Time of Day. All references to days herein are references to calendar days, unless otherwise indicated, such as by reference to Business Days. Each reference to time of day is a reference to Pacific Standard time or Pacific Daylight Saving time, as the case may be.

(F) References to Including. The words “include,” “includes” and “including” are to be construed as meaning “include without limitation,” “includes without limitation” and “including without limitation,” respectively.

(G) References to Statutes. Each reference to a statute or statutory provision includes any statute or statutory provision which amends, extends, consolidates or replaces the statute or statutory provision or which has been amended, extended, consolidated or replaced by the statute or statutory provision and includes any orders, regulations, by-laws, ordinances, codes of practice or instruments made under the relevant statute.

(H) References to the City, Governmental Bodies and Private Persons. Each reference to the City or a Governmental Body is deemed to include a reference to any successor to the City or such Governmental Body or any organization or entity or organizations or entities which has or have taken over the functions or responsibilities of the City or such Governmental Body. Each reference to a private person that is not an individual is deemed to include a reference to its successors and permitted assigns.

(I) References to Business Days. If the time for doing an act falls or expires on a day that is not a Business Day, the time for doing such act shall be extended to the next Business Day.

(J) References to Documents and Standards. Each reference to an agreement, document, standard, principle or other instrument includes a reference to that

agreement, document, standard, principle or instrument as amended, supplemented, substituted, novated or assigned.

(K) References to All Reasonable Efforts. The expression “all reasonable efforts” and expressions of like import, when used in connection with an obligation of either party, means taking in good faith and with due diligence all commercially reasonable steps to achieve the objective and to perform the obligation, including doing all that can reasonably be done in the circumstances taking into account each party’s obligations hereunder to mitigate delays and additional costs to the other party, and in any event taking no less steps and efforts than those that would be taken by a commercially reasonable and prudent person in comparable circumstances but where the whole of the benefit of the obligation and where all the results of taking such steps and efforts accrued solely to that person’s own benefit.

(L) References to Knowledge. All references to “knowledge”, “knowing”, “know” or “knew” shall be interpreted as references to a party having actual knowledge.

(M) Entire Contract. This Amended and Restated Design-Build Contract contains the entire agreement between the parties hereto with respect to the transactions contemplated by this Amended and Restated Design-Build Contract. Without limiting the generality of the foregoing, this Amended and Restated Design-Build Contract shall completely and fully supersede all other understandings and agreements among the parties with respect to such transactions, including those contained in the RFQ, the submittal made by the Design-Builder in response thereto, the RFP, the Proposal, the Definitive Project Submittal and any amendments or supplements to any such documents.

(N) Technical Specifications. The Technical Specifications are intended to include the basic design principles, concepts and requirements for the Design-Build Work but do not include the final, detailed designs, plans or specifications or indicate or describe each and every item required for full performance of the physical Design-Build Work and for achieving Substantial Completion. The Design-Builder agrees to prepare all necessary and required complete and detailed designs, plans, drawings and specifications and to furnish and perform, without additional compensation of any kind, all Design-Build Work in conformity with the Technical Specifications and the final designs, plans, drawings and specifications based thereon. The Design-Builder further agrees that it shall not have the right to bring any claim whatsoever against the City or any of its consultants or subcontractors, arising out of any design drawings, specifications or design and construction requirements included in the RFP or made available during the procurement process.

(O) Standards of Workmanship and Materials. Any reference in this Amended and Restated Design-Build Contract to materials, equipment, systems or supplies (whether such references are in lists, notes, specifications, schedules, or otherwise) shall be construed to require the Design-Builder to furnish the same in accordance with the grades and standards therefor indicated in this Amended and Restated Design-Build Contract. Where this Amended and Restated Design-Build Contract does not specify any explicit quality or standard for construction materials or workmanship, the Design-Builder shall use only workmanship and new materials of a quality consistent with that of construction workmanship and materials specified elsewhere in the Technical Specifications, and the Technical Specifications are to be interpreted accordingly.

(P) Technical Standards and Codes. References in this Amended and Restated Design-Build Contract to all professional and technical standards, codes and specifications are to the most recently published professional and technical standards, codes and specifications of the institute, organization, association, authority or society specified, all as in effect as of the Contract Date. Unless otherwise specified to the contrary, (1) all such professional and technical standards, codes and specifications shall apply as if incorporated in the Technical Specifications, and (2) if any material revision occurs, to the Design-Builder’s

knowledge, after the Contract Date, and prior to completion of the applicable Design-Build Work, the Design-Builder shall notify the City. If so directed by the City through a Unilateral Change Directive or Change Order, the Design-Builder shall perform the applicable Design-Build Work in accordance with the revised professional and technical standard, code, or specification, subject to the Design-Builder's rights under this Amended and Restated Design-Build Contract with respect to Unilateral Change Directives and Change Orders at the direction of the City.

(Q) Liquidated Damages. This Amended and Restated Design-Build Contract provides for the payment by the Design-Builder of liquidated damages in certain circumstances associated with: (1) the replacement of the Design-Build Manager and other key personnel, as and to the extent provided in Section 7.1 (Management); (2) unexcused delays in achieving Substantial Completion, as and to the extent provided in Section 8.5 (Effect of Unexcused Delay; Extension Period); (3) unexcused delays in completion of the Construction of the Existing Headworks Facilities Improvements, as and to the extent provided in Section 6.21 (Existing Headworks Facility Improvements); and (4) achieving Substantial Completion at less than the Acceptance Standard as set forth in subsection 8.5(E) (Performance Liquidated Damages). Each party agrees that the City's actual damages in each such circumstance of replacement or unexcused delay would be difficult or impossible to ascertain, and that the liquidated damages provided for herein with respect to each such circumstance of replacement or unexcused delay are intended to place the City in the same economic position as it would have been in had the replacement or unexcused delay not occurred. Such liquidated damages shall constitute the only damages payable by the Design-Builder to the City to compensate the City for such replacement or for unexcused delays in achieving Substantial Completion by the Scheduled Substantial Completion Date, as applicable, regardless of legal theory. This limitation, however, is not intended to limit any of the other remedies for breach specifically provided for in this Amended and Restated Design-Build Contract, including the City's remedies associated with an Event of Default by the Design-Builder under Section 13.2 (Events of Default by the Design-Builder). The parties acknowledge and agree that the additional remedies specifically provided for in this Amended and Restated Design-Build Contract are intended to address harms and damages which are separate and distinct from those which the liquidated damages are meant to remedy. In addition, the parties agree as follows:

(1) that the liquidated damages payable under this Amended and Restated Design-Build Contract are not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from the circumstances of unexcused delay; and

(2) that, in recognition of the acknowledgments above, the Design-Builder is expressly estopped from arguing, and waives any rights it may have to argue, that the liquidated damages provided for herein are a penalty and that they are not enforceable.

(R) Causing Performance. A party shall itself perform, or shall cause to be performed, subject to any limitations specifically imposed hereby with respect to Subcontractors or otherwise, the obligations affirmatively undertaken by such party under this Amended and Restated Design-Build Contract.

(S) Party Bearing Cost of Performance. All obligations undertaken by each party hereto shall be performed at the cost of the party undertaking the obligation or responsibility, unless the other party has explicitly agreed herein to bear all or a portion of the cost either directly, by reimbursement to the other party or through an adjustment to the Guaranteed Maximum Price.

(T) Assistance. The obligations of a party to cooperate with, to assist or to provide assistance to the other party hereunder shall be construed as an obligation to use the party's personnel resources to the extent reasonably available in the context of performance of

their normal duties, and not to incur material additional overtime or third party expense unless requested and reimbursed by the assisted party.

(U) Good Engineering and Construction Practice. Good Engineering and Construction Practice shall be utilized hereunder, among other things, to implement and in no event displace or lessen the stringency of, the Contract Standards.

(V) Applicability, Stringency and Consistency of Contract Standards. The Design-Builder shall be obligated to comply only with those Contract Standards which are applicable in any particular case. Where more than one Contract Standard applies to any particular performance obligation of the Design-Builder hereunder, each such applicable Contract Standard shall be complied with. In the event there are different levels of stringency among such applicable Contract Standards, the most stringent of the applicable Contract Standards shall govern; provided, however, that in the event there are inconsistencies between technical standards or requirements, the technical standards or requirements set forth in Section 4.3 of Appendix 4 (Technical Specifications) shall have precedence and govern over any more stringent or different applicable standards or requirements included in:

(1) the design guidance documents identified in Section 4.2 (Design Guidance Documents) of Appendix 4 (Technical Specifications); and

(2) the City of San Jose, Department of Public Works Standard Specifications (revised 1992).

In the event of an inconsistency between item (1) and item (2) above, item (1) shall take precedence. Except as otherwise provided in the two preceding sentences with regard to Contract Standards established pursuant to the Technical Specifications set forth in Appendix 4 (Technical Specifications), in the event of any inconsistency among the Contract Standards, the City's determination, acting reasonably, as to the applicable standard shall be binding.

(W) Delivery of Documents in Digital and Printed Format. In this Amended and Restated Design-Build Contract, the Design-Builder is obligated to deliver reports, records, designs, plans, drawings, specifications, proposals and other documentary submittals in connection with the performance of its duties hereunder. The Design-Builder agrees that all such documents shall be submitted to the City in digital form, and at the City's request, in printed form (in the number of copies requested). Digital copies shall consist of computer readable data submitted in any standard interchange format which the City may reasonably request to facilitate the administration and enforcement of this Amended and Restated Design-Build Contract. In the event that a conflict exists between the signed or the signed and stamped hard copy of any document and the digital copy thereof, the signed or the signed and stamped hard copy shall govern.

(X) Severability. Each provision of this Amended and Restated Design-Build Contract shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Amended and Restated Design-Build Contract is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Amended and Restated Design-Build Contract, unless such continued effectiveness as modified would be contrary to the basic understandings and intentions of the parties as expressed herein. If any provision of this Amended and Restated Design-Build Contract is held to be invalid, unenforceable or illegal, the parties will promptly endeavor in good faith to negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Amended and Restated Design-Build Contract as nearly as possible to its original intent and effect.

(Y) Drafting Responsibility. The parties waive the application of any rule of law which otherwise would be applicable in connection with the construction of this Amended and Restated Design-Build Contract to the effect that ambiguous or conflicting terms or provisions should be construed against the party who (or whose counsel) prepared the executed agreement or any earlier draft of the same.

(Z) No Third-Party Rights. This Amended and Restated Design-Build Contract is exclusively for the benefit of the City and the Design-Builder and, except as specifically provided in Article 16 (Indemnification) with respect to City Indemnitees, shall not provide any third parties with any remedy, claim, liability, reimbursement, cause of action or other rights.

(AA) Acting Reasonably and in Good Faith; Discretion. Each party shall act reasonably and in good faith in the exercise of its rights hereunder, except where a party has the right to act in its “discretion” by the express terms hereof. When a party has “discretion”, it means that party has the sole, absolute and unfettered discretion, with no requirement to act reasonably or provide reasons unless specifically required under the provisions of this Amended and Restated Design-Build Contract. When a party does not have “discretion” it means that the party shall act reasonably.

(BB) Convenience Termination. The City may exercise its right of convenience termination under this Amended and Restated Design-Build Contract in its discretion. The exercise by the City of its right of convenience termination under any provision of this Amended and Restated Design-Build Contract shall not be deemed a breach of any implied duty of good faith dealing or a City Event of Default, nor shall any damages be payable by the City on account thereof. The only compensation payable by the City upon the exercise of its convenience termination option shall be any amounts specified herein in connection therewith.

(CC) Counterparts. This Amended and Restated Design-Build Contract may be executed in any number of original counterparts. All such counterparts shall constitute but one and the same Amended and Restated Design-Build Contract.

(DD) Governing Law. This Amended and Restated Design-Build Contract shall be governed by and construed in accordance with the applicable laws of the State.

(EE) Defined Terms. The definitions set forth in Section 1.1 (Definitions) shall control in the event of any conflict with any definitions used in the recitals hereto.

(FF) Interpolation. If any calculation hereunder is to be made by reference to a chart or table of values, and the reference calculation falls between two stated values, the calculation shall be made on the basis of linear interpolation.

(GG) Accounting and Financial Terms. All accounting and financial terms used herein are, unless otherwise indicated, to be interpreted and applied in accordance with GAAP.

(HH) Payments. All payments required to be made by either party hereunder shall be made in lawful money of the United States of America.

ARTICLE 2

REPRESENTATIONS AND WARRANTIES

SECTION 2.1. REPRESENTATIONS AND WARRANTIES OF THE CITY.

The City represents and warrants that:

(A) Existence and Powers. The City is a municipal corporation of the State, with full legal right, power and authority to enter into and to perform its obligations under this Amended and Restated Design-Build Contract.

(B) Due Authorization and Binding Obligation. This Amended and Restated Design-Build Contract has been duly authorized, executed and delivered by all necessary action of the City and constitutes a legal, valid and binding obligation of the City, enforceable against the City in accordance with its terms, except to the extent that its enforceability may be limited by the Bankruptcy Code and by equitable principles of general application.

SECTION 2.2. REPRESENTATIONS AND WARRANTIES OF THE DESIGN-BUILDER.

In addition to any other representations and warranties made by the Design-Builder in this Amended and Restated Design-Build Contract, the Design-Builder represents and warrants that:

(A) Existence and Powers. The Design-Builder is a corporation, duly organized, validly existing and in good standing under the laws of Delaware and has the authority to do business in the State and in any state in which it conducts its activities, with the full legal right, power and authority to enter into and perform its obligations under this Amended and Restated Design-Build Contract.

(B) Due Authorization and Binding Obligation. This Amended and Restated Design-Build Contract has been duly authorized, executed and delivered by all necessary corporate action of the Design-Builder and constitutes a legal, valid and binding obligation of the Design-Builder, enforceable against the Design-Builder in accordance with its terms, except to the extent that its enforceability may be limited by the Bankruptcy Code or by equitable principles of general application.

(C) No Conflict. To the best of its knowledge after due inquiry, neither the execution nor delivery by the Design-Builder of this Amended and Restated Design-Build Contract nor the performance by the Design-Builder of its obligations in connection with the transactions contemplated hereby nor the fulfillment by the Design-Builder of the terms or conditions hereof (1) conflicts with, violates or results in a breach of any constitution, law, governmental regulation, by-laws or certificates of incorporation applicable to the Design-Builder or (2) conflicts with, violates or results in a breach of any order, judgment or decree, or any contract, agreement or instrument to which the Design-Builder is a party or by which the Design-Builder or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

(D) No Approvals Required. No approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Body is required for the valid execution and delivery of this Amended and Restated Design-Build Contract by the Design-Builder except as such have been duly obtained or made.

(E) City Licensing and Registration Requirements. The Design-Builder possesses a valid Class “A” general contractor/construction manager license issued by the State and is not in violation of any of the terms or conditions of such license.

(F) No Litigation. Except as disclosed in writing to the City, there is no Legal Proceeding, at law or in equity, before or by any court, arbitral tribunal or other Governmental Body pending or, to the best of the Design-Builder’s knowledge after due inquiry, overtly threatened or publicly announced against the Design-Builder, in which an unfavorable decision, ruling or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Amended and Restated Design-Build Contract by the Design-Builder or the validity, legality or enforceability of this Amended and Restated Design-Build Contract against the Design-Builder, or any other agreement or instrument entered into by the Design-Builder in connection with the transactions contemplated hereby, or on the ability of the Design-Builder to perform its obligations hereunder or under any such other agreement or instrument.

(G) Claims and Demands. There are no material and adverse claims or demands based in environmental, contract or tort law pending or threatened against the Design-Builder or any of its Affiliates with respect to any facilities designed or constructed by the Design-Builder or any of its Affiliates that would have a material and adverse effect upon the ability of the Design-Builder to perform the Contract Services.

(H) Applicable Law Compliance. Except as disclosed in writing to the City, the Design-Builder does not have knowledge of any material violation of any law, order, rule or regulation with respect to any facilities designed or constructed by the Design-Builder.

(I) Intellectual Property. The Design-Builder owns, or has sufficient rights to use, all Intellectual Property necessary for the Project without any known material conflict with the rights of others.

(J) Practicability of Performance. Subject to, and in accordance with, the terms of this Amended and Restated Design-Build Contract, the Design-Builder assumes the risk of the practicability and possibility of performance of the Contract Services in compliance with the requirements of the Contract Standards on the scale, within the time for completion, and in the manner required hereunder, and agrees that sufficient consideration for the assumption of such risk is included in the Contract Compensation.

(K) Information Supplied by the Design-Builder. The information supplied and representations and warranties made by the Design-Builder in all submittals made in response to the RFQ and RFP and in its Definitive Project Submittal with respect to the Design-Builder (and to its knowledge, all information supplied in such submittals with respect to any Affiliate or Subcontractor) are true, correct and complete in all material respects.

ARTICLE 3

TERM

SECTION 3.1. EFFECTIVE DATE AND TERM.

(A) Term. The term of this Amended and Restated Design-Build Contract (the "Term") shall be deemed to have commenced on the Contract Date. The Term shall continue to the Expiration Date or, if this Amended and Restated Design-Build Contract is earlier terminated by either party in accordance with their respective termination rights under Article 13 (Breach, Default, Remedies and Termination), to the Termination Date.

(B) Accrued Rights. No termination of this Amended and Restated Design-Build Contract shall:

(1) Limit or otherwise affect the respective rights and obligations of the parties hereto accrued prior to the date of such termination; or

(2) Preclude either party from impleading the other party in any Legal Proceeding originated by a third-party as to any matter occurring during the Term.

SECTION 3.2. SURVIVAL.

Notwithstanding any other provision of this Amended and Restated Design-Build Contract, this Section and the following provisions hereof shall survive the expiration or any earlier termination of this Amended and Restated Design-Build Contract:

(1) Article 2 (Representations and Warranties);

(2) Section 4.11(E) (Preservation of Books and Records);

(3) Section 6.10 (Design-Build Work Deliverable Material);

(4) Section 10.3 (Project Warranties Not Exclusive);

(5) Article 12 (Dispute Resolution);

(6) Article 13 (Breach, Default, Remedies and Termination), as applicable to the obligations of the parties following the Termination Date;

(7) Article 16 (Indemnification), including all of the indemnities referred to therein;

(8) Section 18.6 (Property Rights);

(9) Attachment 8C (Schedule of Values and Design-Builder Contingency) of Appendix 8 (Design-Build Price);

(10) Appendix 12 (Insurance Requirements)

(11) All provisions of this Amended and Restated Design-Build Contract with respect to payment obligations of the Design-Builder or the City accrued prior to the Termination Date; and

(12) Any other provision of this Amended and Restated Design-Build Contract providing for survival by its express terms;

together with any provisions necessary to give effect to the above provisions.

ARTICLE 4

GENERAL PERFORMANCE AND PAYMENT REQUIREMENTS

SECTION 4.1. PROJECT SCOPE.

The Project and the Headworks Facility Site are described generally in Appendix 1 (Headworks Facility, Headworks Facility Site, and Related Projects Description) and in detail in Appendix 4 (Technical Specifications). The Design-Builder recognizes that the City intends to provide for the design and construction of certain projects related to the Project through Separate Contractors. These projects are identified in Appendix 1 (Headworks Facility, Headworks Facility Site, and Related Projects Description) and are not included within the scope of the Design-Build Work, except as specifically provided in Section 6.11 (Interface and Coordination).

SECTION 4.2. DESIGN-BUILDER RESPONSIBILITIES GENERALLY.

(A) Reliance. The Design-Builder acknowledges and agrees that the City is entering into this Amended and Restated Design-Build Contract in reliance on the Design-Builder's expertise with respect to the performance of the Contract Services. The Design-Builder recognizes that the Project will serve an essential public service and is critically important in order to enable the City to continue to meet its wastewater treatment needs. The Design-Builder agrees that it will be relieved of its performance obligations under this Amended and Restated Design-Build Contract solely to the extent provided in Section 15.1 (Uncontrollable Circumstances Generally) with respect to the occurrence of Uncontrollable Circumstances.

(B) Scope of the Contract Services. The Contract Services are divided into the Preliminary Services, the Design-Build Work (including the Warranty Work) and the Transition Services, as applicable, each as more particularly described in Article 5 (Preliminary Services), Article 6 (Design-Build Work), Article 8 (Testing, Substantial Completion and Final Completion), Article 10 (Project Warranties) and Article 11 (Post-Acceptance Performance Tests and Transition Period). The Design-Builder recognizes that, notwithstanding this division, the Contract Services may overlap and agrees to perform all Contract Services in accordance with the Contract Standards. In no event shall the Design-Builder commence with the Design-Build Work prior to the Amended and Restated Design-Build Contract Date. Following the Amended and Restated Design-Build Contract Date, the Design-Builder shall be solely responsible for completing the design and for the construction of the Project in accordance with the Technical Specifications and this Amended and Restated Design-Build Contract, including supervision, coordination and administration of all remaining design work and of all construction work, and all other work reasonably inferable from the Technical Specifications.

(C) City Input as to Operating and Maintenance Considerations. The Design-Builder shall give due consideration to all comments received from the City concerning operation, maintenance, repair and replacement matters and related costs in developing the design of the Project. The City shall be responsible for coordinating comments made by various City departments and individuals regarding such matters so as to communicate such comments to the Design-Builder in a timely and efficient manner.

(D) Cooperation. The Design-Builder agrees to cooperate with the City and any other contractor engaged by the City in connection with the work to be performed toward completion of the Project and any Related Project, including the Owner's Advisor and any Separate Contractor. The Design-Builder recognizes that a cooperative and collaborative environment among all persons engaged in performing such work is essential to the successful

implementation of the Project and agrees to use its best efforts to work with all such other persons toward fostering such an environment.

(E) Responsibility for Personnel and Subcontractors. All obligations of the Design-Builder under this Amended and Restated Design-Build Contract shall be performed by Design-Builder employees, agents or Subcontractors (subject to the limitations set forth in Article 7 (Management, Labor and Subcontractors)) who are qualified to perform the specific services and meet all licensing and certification requirements of Applicable Law. The Design-Builder shall be fully responsible, in accordance with the terms and conditions of this Amended and Restated Design-Build Contract, for all Contract Services performed by its employees, agents or Subcontractors. The parties acknowledge that beginning when wastewater is introduced to the Headworks 3 Facility, the City operations and maintenance staff will operate the Headworks 3 Facility including during performance of the Acceptance Test, as further described in subsection 8.2(D) (Conduct of the Acceptance Test) and while the Design-Builder completes work on the Existing Headworks Facility Improvements; provided that the Design-Builder shall be responsible for maintenance other than routine maintenance on the Headworks 3 Facility prior to Substantial Completion and on the Existing Headworks Facility Improvements prior to Final Completion. During this period in which the City is operating the Headworks 3 Facility prior to Final Completion, the Design-Builder shall have the supervision responsibilities as set forth in Section 8.2(D).

(F) Stationing of Key Personnel. Whenever the Design-Builder or any Subcontractor is performing Construction, the Design-Builder's On-Site Construction Manager, as defined in Section 7.1(A) (On-Site Construction Manager), shall on a full-time basis be stationed at the Headworks Facility Site, and the Design-Build Manager and other appropriate Key Personnel shall also be stationed at the Headworks Facility Site or be available as required for video or telephonic communications with the City.

SECTION 4.3. ENVIRONMENTAL REVIEW.

(A) EIR Addendum. The City has prepared and certified an Addendum to the Plant Master Plan EIR for the Project under the California Environmental Quality Act. The EIR Addendum requires specific environmental mitigation measures to be completed in connection with the Project (the "Environmental Mitigation Measures"), which are set forth as Reference Document 5 to this Amended and Restated Design-Build Contract. The Environmental Mitigation Measures constitute part of the Technical Specifications, which the Design-Builder is obligated to perform hereunder, and the Base Guaranteed Maximum Price has been determined taking such Environmental Mitigation Measures into account.

(B) Changes to Environmental Mitigation Measures. In the event any change to the Project approved by the City results in a determination that further Project environmental mitigation measures are necessary or appropriate, such measures shall be incorporated in the Environmental Mitigation Measures as part of a Change Order entered into by the parties in accordance with Section 6.8 (Other Changes to the Technical Specifications) and any Base Guaranteed Maximum Price Adjustment provided pursuant to such Change Order shall be determined taking such additional measures into account.

SECTION 4.4. ACCESS TO AND SUITABILITY OF THE HEADWORKS FACILITY SITE.

(A) Familiarity with the Headworks Facility Site. The Design-Builder agrees that, as of the Amended and Restated Design-Build Contract Date, the Design-Builder's agents and representatives have visited, inspected and become familiar with the Headworks Facility Site, its physical condition relevant to the obligations of the Design-Builder pursuant to this

Amended and Restated Design-Build Contract, including surface conditions, normal and usual soil conditions, roads, Utilities, topographical conditions and air and water quality conditions; that the Design-Builder is familiar with all local and other conditions which may be material to the Design-Builder's performance of the Design-Build Work (including transportation; seasons and climate; access, availability, disposal, handling and storage of materials and equipment; and availability and quality of labor and Utilities); that the Design-Builder has received and reviewed all information regarding the Headworks Facility Site provided to or developed by it in connection with the RFP and the Preliminary Services; that the Design-Builder has made all other site investigations that it deems necessary to make a determination as to the suitability of the Headworks Facility Site; and that, based on the foregoing, the Design-Builder acknowledges that the Headworks Facility Site constitutes an acceptable and suitable site for the construction of the Project in accordance herewith.

(B) Independent Verification of City-Provided Headworks Facility Site Information. The Design-Builder acknowledges that it is responsible for the independent verification and confirmation of all information supplied to it by or on behalf of the City relating to the Headworks Facility Site, and upon which it elects to rely in connection herewith. Except as specifically provided in Section 6.3 (Differing Site Conditions) and Section 6.4 (Regulated Site Conditions), no error or omission in any such information shall constitute an Uncontrollable Circumstance, or relieve the Design-Builder from the Contract Obligations. Notwithstanding any factual statement, conclusion, or any language or recommendation contained in any information supplied to the Design-Builder by or on behalf of the City, the Design-Builder assumes full responsibility for inspecting the Headworks Facility Site and for the means and methods of construction that it employs when performing the Design-Build Work

(C) Access to the Headworks Facility Site. The execution of this Amended and Restated Design-Build Contract shall be deemed to constitute the granting of a license to the Design-Builder to access the Headworks Facility Site for the purposes of performing the Contract Services, including performing engineering, analysis and such additional surface, subsurface and geotechnical studies or tests as deemed necessary by the Design-Builder prior to the commencement of Construction, as determined in accordance with Good Engineering and Construction Practice. Such access shall be subject to the City's prior approval prior to the issuance of the Construction Notice to Proceed, which shall not be unreasonably withheld, as to time and scope. The Design-Builder shall perform all such activities in accordance with the Contract Standards, including the specific requirements set forth in Appendix 5 (General Design-Build Work Requirements), and shall provide the City with all reports or analyses generated by such activities promptly after such reports or analyses are generated. Except and to the extent provided in Section 6.4 (Regulated Site Conditions) with respect to Regulated Site Conditions, the Design-Builder shall assume all risks associated with such activities and shall indemnify, defend and hold harmless the City Indemnitees in accordance with and to the extent provided in Article 16 (Indemnification) from and against all Loss-and-Expense resulting therefrom. Subject to Section 6.2 (Construction Commencement Date), following the Amended and Restated Design-Build Contract Date and for the duration of the Term, the Design-Builder shall have all Headworks Facility Site access rights as are necessary for the performance of the Design-Build Work and the Transition Services, as applicable, in accordance with this Amended and Restated Design-Build Contract and such access rights shall not be subject to prior City approval. Notwithstanding any of the foregoing, the Design-Builder shall at all times comply with the Headworks Facility Site access requirements and restrictions set forth in Appendix 5 (General Design-Build Work Requirements) and shall coordinate the Design-Build Work and interface with all Separate Contractors in accordance with Section 6.11 (Interface and Coordination).

SECTION 4.5. COMPLIANCE WITH APPLICABLE LAW.

(A) Compliance with Applicable Law Generally. The Design-Builder shall, and shall cause all Subcontractors to, perform the Contract Services in accordance with Applicable Law and all other applicable Contract Standards. The Design-Builder shall provide all notices required by Applicable Law and the Contract Standards. The incorporation, reference or citation of specific statutes or other parts of Applicable Law in this Amended and Restated Design-Build Contract is not intended, nor shall it be construed, to limit the generality of the Design-Builder's and all Subcontractors' obligations to comply with Applicable Law (whether or not specifically incorporated or referenced in this Amended and Restated Design-Build Contract). The Design-Builder shall be entitled to Change in Law relief only to the extent provided in Section 15.1 (Uncontrollable Circumstances Generally).

(B) Compliance with Conditions in Governmental Approvals. The Design-Builder shall comply with all conditions and requirements of all Governmental Approvals required to be made, obtained or maintained under Applicable Law in connection with the performance of the Contract Services, including City-Managed Governmental Approvals. The Design-Builder shall report to the City, immediately upon obtaining knowledge thereof, all violations of the terms and conditions of any Governmental Approval or Applicable Law pertaining to the Project. The City, in its capacity as the counterparty to the Design-Builder under this Amended and Restated Design-Build Contract, shall have the right independently to enforce compliance with this Amended and Restated Design-Build Contract regarding the requirements of any Governmental Approval regardless of whether a concurrent or different regulatory enforcement action has been undertaken by any other Governmental Body. Any violations of or noncompliance with any Governmental Approval, including suspensions caused by the Design-Builder violating or not being in compliance with a Governmental Approval, shall be at the sole risk of the Design-Builder, and shall not be a basis for Uncontrollable Circumstance relief under this Amended and Restated Design-Build Contract.

(C) Fines, Penalties and Remediation. In the event that the Design-Builder or any Subcontractor fails at any time to comply with Applicable Law with respect to the Design-Build Work, the Design-Builder shall: (1) promptly respond to any notice of non-compliance, warning letter, notice of violation or other enforcement action and seek amicable resolution of the issues; (2) immediately correct or, if such failure to comply with Applicable Law cannot be immediately corrected, immediately initiate correction of, and continue in good faith to complete correction of such failure (as soon as reasonably practicable) and resume compliance with Applicable Law; (3) pay any resulting fines, assessments, levies, impositions, penalties or other charges; (4) indemnify, defend and hold harmless the City Indemnitees in accordance with and to the extent provided in Article 16 (Indemnification) from and against all Loss-and-Expense resulting therefrom; (5) make all changes in performing the Contract Services which are necessary to assure that the failure of compliance with Applicable Law will not recur; and (6) comply with any corrective action plan filed with or mandated by any Governmental Body in order to remedy a failure of the Design-Builder to comply with Applicable Law. The Design-Builder's obligations under this subsection shall be subject to Uncontrollable Circumstance relief as and to the extent provided in this Amended and Restated Design-Build Contract.

SECTION 4.6. OWNERSHIP AND USE OF DOCUMENTS AND INFORMATION.

The Design-Builder acknowledges and agrees that the City shall own exclusively the Deliverable Material and any and all other documents and information in whatsoever form and character produced or maintained in accordance with, pursuant to, or as a result of the Design-Build Contract as amended by this Amended and Restated Design-Build Contract. All

such documents and information may be used as the City determines and shall be delivered to the City at no additional cost to the City as required hereunder, upon request, upon Project completion or upon termination of this Amended and Restated Design-Build Contract. If the City uses any such documents and material for a purpose other than the Project, such use shall be at the City's sole risk and liability.

SECTION 4.7. CITY PAYMENT OBLIGATIONS GENERALLY.

(A) Design-Build Price and Transition Services Fee. The City shall pay the Design-Builder: (1) the Design-Build Price for the Design-Build Work as provided in Article 9 (Compensation for Design-Build Work) and Appendix 8 (Design-Build Price); and (2) the Transition Services Fee for the Transition Services as provided in Section 11.2 (Compensation for Transition Services) and Appendix 11 (Transition Services), to the extent applicable.

(B) Interest On Overdue Obligations. Except as otherwise provided for herein, all amounts due hereunder, whether as damages, credits, revenue, charges or reimbursements, that are not paid when due shall bear interest at the rate of interest which is the Overdue Rate, on the amount outstanding from time to time, on the basis of a 365-day year, counting the actual number of days elapsed, and such interest accrued at any time shall, to the extent permitted by Applicable Law, be deemed added to the amount due as accrued.

SECTION 4.8. COST SUBSTANTIATION.

(A) Required Substantiation. The Design-Builder shall substantiate the Design-Build Costs and any other costs for which it claims compensation hereunder, other than (1) the Design-Builder Fee, which was proposed and negotiated on a fixed percentage basis, and (2) the General Conditions Fee and other costs that are part of a lump sum price negotiated between the City and the Design-Builder.

(B) Cost Substantiation Certificate. Any Payment Request for compensation relating to costs requiring Cost Substantiation shall be accompanied by a certificate stating that the Design-Build Costs or other costs being invoiced (1) are properly payable under this Amended and Restated Design-Build Contract, and specifying the provisions of this Amended and Restated Design-Build Contract under which compensation is due; and (2) are equal to amounts paid by the Design-Builder for Design-Build Work that has been properly performed. Each Cost Substantiation certificate shall be accompanied by copies of all documentation reasonably necessary to demonstrate that the Design-Build Costs have been paid and are reasonable. Such documentation shall be in a format and level of detail reasonably acceptable to the City. To the extent reasonably necessary to confirm the payment of costs that are subject to Cost Substantiation, copies of timesheets, invoices, canceled checks, expense reports, receipts and other documents, as appropriate, shall be provided.

SECTION 4.9. CITY'S RIGHT OF SET OFF.

Once the City determines that any credits, payments, reimbursements or liquidated damages are owed to the City in accordance with the terms and conditions of this Amended and Restated Design-Build Contract and have not been reflected in any previously submitted Payment Request, the City shall notify the Design-Builder and the Design-Builder shall include such amounts as an extraordinary item in the next Payment Request provided to the City. In the event the Design-Builder does not include such amounts in the next Payment Request provided to the City in accordance with this Section, the City shall have the right to offset the amount otherwise payable for such Payment Request by the amount of such credits, payments, reimbursements or liquidated damages.

SECTION 4.10. BILLING STATEMENT DISPUTES.

If the City disputes in good faith any amount billed by the Design-Builder, the City shall pay all undisputed amounts when due but may withhold payment of the disputed amount, and shall provide the Design-Builder with a written objection indicating the amount being disputed and the reasons then known to the City for the dispute. In the event that the Design-Builder disputes any amounts offset by the City, it shall provide the City with a written objection indicating the amount being disputed and the reasons then known to the Design-Builder. When any billing dispute is finally resolved, if payment by the City to the Design-Builder of amounts withheld is required, such payment shall be made within 30 days of the date of resolution of the dispute, together with interest thereon, from the date originally due, determined as provided in subsection 4.7(B) (Interest on Overdue Obligations).

SECTION 4.11. RETENTION AND AUDIT OF BOOKS AND RECORDS.

(A) Books and Records. The Design-Builder shall prepare and maintain proper, accurate and complete books and records regarding the Contract Services and all transactions related thereto, including all books of account, bills, vouchers, invoices, personnel rate sheets, cost estimates and bid computations and analyses, Subcontracts, time books, daily job diaries and reports, correspondence, and any other documents showing all acts and transactions in connection with or relating to or arising by reason of the Contract Services, any Subcontract or any operations or transactions in which the City has or may have a financial or other material interest hereunder (collectively, “Books and Records”). The Design-Builder and its Subcontractors shall produce such Books and Records for inspection, audit and reproduction for all such purposes within 15 days of request by the City. All financial records of the Design-Builder and its Subcontractors shall be maintained in accordance with generally accepted accounting principles and generally accepted auditing standards. The Design-Builder and its Subcontractors shall maintain such Books and Records in accordance with subsection (E) (Preservation of Books and Records) of this Section.

(B) City Rights to Audit and Examine. All payments whatsoever by the City (other than lump sum payments, including the Preliminary Services Fee or any lump sum elements of the Design-Build Price) to the Design-Builder and all Contract Services shall be subject to audit at any time by the City; provided, however, that the City reserves the right to review any lump sum Subcontract or lump sum elements of a Subcontract. The Design-Builder shall provide all evidence necessary to support Cost Substantiation as required under this Amended and Restated Design-Build Contract, and allow the City access to the Design-Builder’s Books and Records. The Design-Builder shall require all Subcontractors to comply with the provisions of this Section and include the requirements hereof in the written contract between the Design-Builder and the Subcontractor. The Design-Builder shall also require all Subcontractors to include the requirements of this Section in any lower tier Subcontracts relating to the Project. In the event that the Design-Builder is a joint venture, such right to examine, copy and audit shall apply collaterally and to the same extent to the Books and Records of the joint venture sponsor, and those of each individual joint venture member.

(C) Notice and Process. Upon written notice by the City, the Design-Builder and its Subcontractors shall promptly (in no event later than 15 days following the notice) make available at its office at all reasonable times the Books and Records for examination, audit, or reproduction. Notice shall be in writing, delivered by hand or by certified mail, and shall provide not fewer than five days’ prior notice of the examination or audit. Except for those Books and Records that are required by Applicable Law to remain at the Headworks Facility Site (which the City may photocopy at the Headworks Facility Site), the City may take possession of such Books and Records by reproducing such Books and Records for off-site review or audit. When requested in the City’s written notice of examination or audit, the

Design-Builder shall provide the City with copies of electronic and electronically stored Books and Records in a reasonably usable format that allows the City to access and analyze all such Books and Records. For Books and Records that require proprietary software to access and analyze, the Design-Builder shall provide the City with two licenses with maintenance agreements authorizing the City to access and analyze all such Books and Records. If the Design-Builder is unable to provide the licenses, the Design-Builder shall provide the City with access to the Design-Builder's accounting system whereby the City can obtain applicable Books and Records, including job cost reports, material distribution reports, labor cost reports, labor productivity reports, standard time/overtime analysis reports, manhour reports, and the like.

(D) Selection of Auditor or Examiner and Determination of Scope. The City has discretion as to the selection of an examiner or auditor and the scope of the examination or audit.

(E) Preservation of Books and Records. The Design-Builder shall preserve all of its Books and Records, and the City may examine, audit, or reproduce Books and Records, from the Contract Date until the later of four years after: (1) final payment under this Amended and Restated Design-Build Contract; (2) final settlement of a termination for convenience under Section 13.6 (City Convenience Termination Rights); or (3) the final resolution of any dispute. The failure by the Design-Builder to make available to the City Books and Records in accordance with this Section or the Design-Builder's refusal to cooperate with a notice of audit or examination shall be deemed a material breach of this Amended and Restated Design-Build Contract and grounds for termination.

(F) Overpayment. In the event an audit by the City determines that the Design-Builder cannot document a cost or expense for which payment has been made, or that the City has overpaid the Design-Builder, the Design-Builder, upon demand, shall refund to the City the amounts overpaid or undocumented. If the overpayment exceeds 1% of the total amount that should have been properly paid by the City during the period audited, then the Design-Builder shall, in addition, reimburse the City for any and all fees and costs incurred in connection with the inspection or audit. Payments to the Design-Builder, or approval by the City of any requisition for payment submitted by the Design-Builder, shall in no way affect the Design-Builder's obligation hereunder or the right of the City to obtain a refund of any payment to the Design-Builder which is in excess of that to which it was lawfully entitled.

ARTICLE 5

PRELIMINARY SERVICES

SECTION 5.1. PRELIMINARY SERVICES.

(A) Completion of Preliminary Services. As of the Amended and Restated Design-Build Contract Date, the Design-Builder has completed the Preliminary Services described in Appendix 2 (Preliminary Services). In performing such Preliminary Services, the Design-Builder acknowledges and agrees that it employed or subcontracted all necessary professionals, technicians and engineers, properly qualified, licensed and skilled in the various aspects of the Preliminary Services, and the performance of all services reasonably inferable from the Preliminary Services. The Design-Builder has been paid the Preliminary Services Fee by the City in accordance with Section 5.3 (Compensation for Preliminary Services) of the Design-Build Contract (prior to amendment by this Amended and Restated Design-Build Contract) and Appendix 2 (Preliminary Services), which is Design-Builder's entire compensation and reimbursement for the performance of the Preliminary Services, inclusive of all costs, expenses and disbursements paid or incurred by the Design-Builder, as well as all overhead, administration, risk and profit for the Preliminary Services.

(B) Definitive Project Submittal and Definitive Contract Amendment. Pursuant to the provisions of Section 5.9 (Definitive Project Submittal) of the Design-Build Contract (prior to amendment by this Amended and Restated Design-Build Contract) and Appendix 2 (Preliminary Services), the Design-Builder submitted its Definitive Project Submittal to the City addressing each item listed in such Section and Appendix. The Definitive Project Submittal has been reviewed by the City and negotiated in accordance with Section 5.10 (Definitive Contract Amendment) of the Design-Build Contract (prior to amendment by this Amended and Restated Design-Build Contract). The parties have agreed to the terms and conditions of a Definitive Contract Amendment and such terms and conditions are reflected in this Amended and Restated Design-Build Contract (which constitutes the Definitive Contract Amendment contemplated under the Design-Build Contract, prior to its amendment by this Amended and Restated Design-Build Contract).

SECTION 5.2. PROJECT DESIGN.

(A) Design Considerations. The Design-Builder acknowledges and agrees that, during the performance of the Preliminary Services, the design for the Project was undertaken and performed:

(1) by a design team exercising such degree of care, skill and diligence as would reasonably be expected from consultants qualified to perform services similar in scope, nature and complexity to the design, and the Design-Builder appointed a design team that:

(a) is so qualified;

(b) includes (as required by Applicable Law) licensed or registered professional engineers and architects; and

(c) has sufficient expertise and experience to expeditiously and efficiently perform all of the design in a proper and professional manner to the standard set out in this Amended and Restated Design-Build Contract;

(2) including specific consideration of "constructability" and "life cycle" cost issues at all stages of design, as appropriate; and

(3) including consideration of efficient and cost-effective operation and maintenance.

(B) Design-Builder Assumption of Full Design Liability. The Design-Builder acknowledges and agrees that, as provided in Section 6.6 (Final Design Responsibilities and Risk Assumption), and notwithstanding the standard of care provisions of subsection (A) (Design Considerations) of this Section, the Design-Builder has the sole and exclusive responsibility and liability for the design, construction and performance of the Project in accordance with this Amended and Restated Design-Build Contract. Accordingly, the Design-Builder had the right and the responsibility to develop and provide the Preliminary Design Documents and to perform the Preliminary Services in a manner that would permit a design-build contractor, acting reasonably and having the experience and qualifications required to successfully undertake and complete the design and construction of a project similar in scale and complexity to the Project, to assume such responsibility and liability. In particular, the Design-Builder acknowledges and agrees that it has not proposed or agreed to any element of the Technical Specifications or other work product incorporated in this Amended and Restated Design-Build Contract that would, in its reasonable judgment, be inconsistent with the assumption of such responsibility and liability.

SECTION 5.3. EARLY WORK PACKAGE AMENDMENT NO. 1.

Prior to the Amended and Restated Design-Build Contract Date, the parties have negotiated and executed Early Work Package Amendment No. 1. The parties acknowledge and agree, however, that the Design-Builder was not released by the City to perform any Design-Build Work under Early Work Package Amendment No. 1. Accordingly, it is the parties' intent that: (1) no Design-Build Work included in Early Work Package Amendment No. 1 will be performed by the Design-Builder pursuant to Early Work Package Amendment No. 1; and (2) the Design-Builder shall not be entitled to payment for any Design-Build Work pursuant to Early Work Package Amendment No. 1. Based on the foregoing and notwithstanding the fact that Early Work Package Amendment No. 1 was entered into prior to the Amended and Restated Design-Build Contract Date, the terms and conditions set forth in Early Work Package Amendment No. 1 have not been expressly incorporated into this Amended and Restated Design-Build Contract and Early Work Package Amendment No. 1 is no longer effective and is superseded by the terms and conditions set forth herein.

SECTION 5.4. DESIGN-BUILDER REPRESENTATIONS ON AMENDED AND RESTATED CONTRACT DATE.

In executing this Amended and Restated Design-Build Contract, the Design-Builder represents, as of the Amended and Restated Design-Build Contract Date, that:

(1) it has examined, carefully studied, and thoroughly understands the Amended and Restated Design-Build Contract terms and conditions associated with the Design-Build Work;

(2) it has thoroughly reviewed and verified of all information provided to or obtained by the Design-Builder through the performance of the Preliminary Services, including:

(a) reports of explorations and tests of subsurface conditions at or contiguous to the Headworks Facility Site and all drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Headworks Facility Site; and

(b) reports as to Regulated Substances, if any, at the Headworks Facility Site;

(3) it has become familiar with and is satisfied as to the general, local, and Headworks Facility Site conditions that may affect cost, progress, and performance of the Project;

(4) it is familiar with and is satisfied as to all Applicable Law that may affect cost, progress, and performance of the Design-Build Work;

(5) it is aware of the nature of the Related Projects and is satisfied that the Design-Build Work can be performed in accordance with the requirements concerning the Related Projects, as set forth in this Amended and Restated Design-Build Contract;

(6) it has considered the information known to Design-Builder, including information commonly known to designers and contractors doing business in the locality of the Headworks Facility Site; information and observations obtained from visits to the Headworks Facility Site; and the Headworks Facility Site-related reports and drawings identified in this Amended and Restated Design-Build Contract, with respect to the effect of such information, observations, and documents on:

(a) the cost, progress, and performance of the Project;

(b) the means, methods, techniques, sequences, and procedures of construction to be employed by Design-Builder, including any specific means, methods, techniques, sequences, and procedures of construction expressly required by this Amended and Restated Design-Build Contract; and

(c) the Design-Builder's health and safety precautions and programs;

(7) based on all of the foregoing and the performance of the Preliminary Services, the Headworks Facility Site constitutes an acceptable and suitable site for the performance of the Design-Build Work;

(8) it does not consider that further examinations, investigations, explorations, tests, studies, or data are necessary for it to enter into this Amended and Restated Design-Build Contract for the performance of the Design-Build Work for the Base Guaranteed Maximum Price on or before the Scheduled Substantial Completion Date, and in accordance with the other terms and conditions of this Amended and Restated Design-Build Contract;

(9) the Technical Specifications and Acceptance Standards are sufficient to enable the Design-Builder to determine the Base Guaranteed Maximum Price; and

(10) subject to the terms and conditions of this Amended and Restated Design-Build Contract, the Design-Build Work can be completed in accordance with the Contract Standards for the Base Guaranteed Maximum Price.

ARTICLE 6

DESIGN-BUILD WORK

SECTION 6.1. DESIGN-BUILD WORK GENERALLY.

(A) Completion of Preliminary Services and Preliminary Design Documents.

All Preliminary Services have been completed prior to the Amended and Restated Design-Build Contract Date. The parties acknowledge that:

- (1) the Preliminary Services included preparation of the Preliminary Design Documents;
- (2) the Preliminary Design Documents form the basis of the Technical Specifications;
- (3) the Design-Build Work includes preparation of the Final Design Documents; and
- (4) the City's rights with respect to the preparation of the Final Design Documents shall be as set forth in this Article.

(B) Commencement and Completion of the Design-Build Work. On or promptly following the Amended and Restated Design-Build Contract Date, the City shall issue a notice-to-proceed with Design-Build Work (the "Design-Build Work Notice-to-Proceed") and the Design-Builder shall promptly proceed to undertake, perform and complete the Design-Build Work in accordance with the Contract Standards; provided, however, that the Design-Builder shall not commence physical construction of the Headworks 3 Facility until the Construction Commencement Date. The Design-Builder shall be paid the Design-Build Price pursuant to Article 9 (Compensation for Design-Build Work) as its entitlement to payment of portions of the Design-Build Price arise thereunder. The Design-Builder's failure to achieve Substantial Completion on or before the Scheduled Substantial Completion Date shall result in the assessment of delay liquidated damages under Section 8.5 (Effect of Unexcused Delay; Extension Period). The Design-Builder's failure to complete Construction of the Existing Headworks Facility Improvements on or before the Scheduled Existing Headworks Facility Improvements Completion Date shall result in the assessment of delay liquidated damages under Section 6.21 (Existing Headworks Facility Improvements). Failure to achieve Substantial Completion of the Headworks 3 Facility by the end of the Extension Period shall constitute a Design-Builder Event of Default upon which the City may terminate this Amended and Restated Design-Build Contract for cause in accordance with Section 13.2 (Events of Default by the Design-Builder). Failure to achieve Final Completion of the Project by the date specified in Section 8.7 (Final Completion) shall constitute a Design-Builder Event of Default upon which the City may terminate this Amended and Restated Design-Build Contract for cause in accordance with Section 13.2 (Events of Default by the Design-Builder).

(C) Elements of the Design-Build Work. In performing the Design-Build Work generally, the Design-Builder shall, in accordance with the Contract Standards:

- (1) apply for, obtain and maintain all Governmental Approvals required for the Design-Build Work (other than City-Managed Governmental Approvals), and assist the City in obtaining City-Managed Governmental Approvals;
- (2) perform all necessary Headworks Facility Site preparation and excavation activities;

- (3) demolish and remove any existing improvements at the Headworks Facility Site, as and to the extent required by the Technical Specifications;
- (4) modify, re-route, repair or replace any Utilities, as and to the extent required by the Technical Specifications;
- (5) remove from the Headworks Facility Site and dispose of any demolition or construction debris resulting from the Design-Build Work in an environmentally safe manner;
- (6) dispose of clean, unused soil excavated from the Headworks Facility Site on the Regional Wastewater Facility site at a location agreed upon by the City, unless otherwise directed by the City, and dispose of soil constituting Regulated Substances in accordance with Applicable Law subject to Section 6.4 (Regulated Site Conditions);
- (7) complete the design and construct the Project;
- (8) conduct Pre-Acceptance Testing, including compliance with the Pre-Acceptance Testing Plan and training of City employees in accordance with the Training Plan;
- (9) prepare and provide the Operation and Maintenance Manual;
- (10) operate and maintain the Headworks 3 Facility throughout Pre-Acceptance Testing and until the commencement of the Acceptance Test and the transfer of such obligations to City operations and maintenance staff, as further described in subsection 8.2(D) (Conduct of the Acceptance Test);
- (11) provide oversight and general guidance direction to City operations and maintenance staff during performance of the Acceptance Test until the achievement of Substantial Completion, as further described in subsection 8.2(D) (Conduct of the Acceptance Test); and
- (12) achieve Final Completion,

all so that the Project is suitable and adequate for the purposes hereof. The Technical Specifications include certain criteria and features to facilitate the long term maintenance of the Project, and also include requirements associated with connections and tie-ins to the Regional Wastewater Facility.

(D) Sequencing and Staging of Design-Build Work. The Design-Builder shall not be limited in the sequencing or staging of the Design-Build Work, except to the extent that the Contract Standards impose limitations. The City understands and acknowledges that the Design-Builder intends to complete the Design-Build Work in stages, whereby particular segments of the Design-Build Work will be designed and built prior to the completion of the design of the Project as a whole. Although this Amended and Restated Design-Build Contract does not require the Design-Builder to fully complete the entire design of the Project prior to proceeding with particular segments of the physical construction of the Project, the Design-Builder shall comply with all requirements of Applicable Law in performing the Design-Build Work and shall further comply with the design submittal requirements set forth in subsection 6.6(C) (City Review and Comment on Final Design Documents).

(E) Laydown Areas. Laydown and staging areas for construction materials, field offices, employee parking and construction equipment required for the Design-Build Work shall be located at the Construction Enabling Site, as indicated in Appendix 1 (Headworks

Facility, Headworks Facility Site and Related Projects Description), or at other locations shown in the Technical Specifications or on the Regional Wastewater Facility Site approved by the City.

(F) Design-Build Schedule and Reports. The Design-Build Schedule anticipated as of the Amended and Restated Design-Build Contract Date is attached as Attachment 5A to Appendix 5 (General Design-Build Work Requirements). Such schedule represents an updated Design-Build Schedule based on and reflecting the Scheduled Substantial Completion Date proposed by the Design-Builder as part of the Definitive Project Submittal, and negotiated and agreed upon by the parties as part of this Amended and Restated Design-Build Contract. All activities of the Design-Build Work shall be scheduled and monitored by use of a Gantt or bar chart which presents all tasks and key subtasks in a logical and efficient work sequence that the Design-Builder intends to use in advancing the Project from 60% Design Completion to Substantial Completion and City operation. Throughout the Design-Build Period, the Design-Builder shall further update and maintain the Design-Build Schedule in accordance with Appendix 5 (General Design-Build Work Requirements). Throughout the Design-Build Period, the Design-Builder shall submit to the City and the Owner's Advisor a Monthly Design-Build Work Report, including an update to the Design-Build Schedule (the "Monthly Design-Build Work Report") in accordance with the requirements of Appendix 5 (General Design-Build Work Requirements). The Design-Builder agrees that the Design-Builder's submittal of the Monthly Design-Build Work Report (or any revised progress schedule or report) is for the City's and the Owner's Advisors' information only and shall not limit or otherwise affect the Design-Builder's obligations to achieve Substantial Completion by the Scheduled Substantial Completion Date. The City's and the Owner's Advisors' receipt or acceptance of the Monthly Design-Build Work Report (or any revised progress schedule or report) shall not bind the City in any manner. Thus, the City's and the Owner's Advisors' receipt or acceptance of the Monthly Design-Build Work Report (or any revised monthly progress schedule or report) shall not imply City approval or consent to any of the matters set forth therein. Notwithstanding any of the foregoing, the Design-Builder acknowledges and agrees that it has a material obligation to provide the City with, and to update, maintain and revise, the Design-Build Schedule throughout the Design-Build Period in accordance with the Contract Standards.

(G) Monthly On-Site Meetings and Design and Construction Review. During the Design-Build Period, the Design-Builder, the City and the Owner's Advisor shall conduct construction progress and management meetings as set forth in Appendix 5 (General Design-Build Work Requirements). Such meetings shall take place on the Headworks Facility Site in a field office to be provided by the Design-Builder in accordance with Appendix 5 (General Design-Build Work Requirements) or as otherwise directed by the City. At such meetings, discussions will be held concerning all aspects of the Design-Build Work, including the construction schedule, progress payments, any Change Orders or Unilateral Change Directives, Shop Drawings, progress photographs, and any soil boring data and shop test results. The Monthly Design-Build Work Report shall be prepared by the Design-Builder and provided to the City and the Owner's Advisor at least five days prior to each monthly meeting.

(H) Engagement of City Representatives. The Design-Builder shall fully cooperate with all Owner's Advisors and the City Technical Representatives designated by the City from time to time. The services of the Owner's Advisors and the City Technical Representatives may include the following:

- (1) reviewing drawings, plans and specifications for compliance with the Technical Specifications;
- (2) reviewing proposed changes to the Technical Specifications;

- (3) determining the completion of specified portions of the Design-Build Work and review the release of funds to the Design-Builder pursuant hereto;
- (4) reviewing and monitoring construction progress, scheduling, payments and procedures;
- (5) monitoring Pre-Acceptance Testing activities and the Acceptance Test undertaken by the Design-Builder to determine whether any Acceptance Standard has been satisfied;
- (6) assisting the City in reviewing the validity of the Design-Builder's written notice that an Uncontrollable Circumstance has occurred; and
- (7) reviewing and advising the City with respect to material changes to the Project during the Term.

It is understood that the services intended to be provided by the Owner's Advisors and City Technical Representatives shall be of an observational and review nature only, and that the Owner's Advisors and City Technical Representatives shall not have authority to interfere with, halt or delay in any way the construction of the Project or to require or approve changes to the Technical Specifications or the Design-Builder's plans and specifications made in accordance therewith. Any fees of the Owner's Advisors shall be paid by the City. Nothing in this subsection shall be construed to limit the right of any City personnel or representative having the authority to protect the health and safety from inspecting the Project or otherwise exercising any power permitted under Applicable Law.

(I) Utilities. The City shall provide certain Utilities necessary for the performance of the Design-Build Work, including electrical power, water, gas and certain chemical feeds, as and to the extent identified in Appendix 4 (Technical Specifications) and subject to the limitations set forth in Appendix 5 (General Design-Build Work Requirements). The Design-Builder shall make all arrangements necessary to secure the availability of all other Utilities necessary for the performance of the Design-Build Work and shall be responsible for modifying all existing Utilities at the Headworks Facility Site in order to support the construction, testing and operations of the Project in the capacities required hereunder in accordance with the specific requirements set forth in Appendix 4 (Technical Specifications).

(J) Process Control Systems. The Design-Builder's obligation to perform the Design-Build Work includes the obligation to design, construct and program functional, reliable and maintainable instrumentation and control systems for the Headworks 3 Facility in accordance with the Technical Specifications. The Design-Builder shall be responsible for ensuring that all instrumentation and controls connect to and are fully compatible with the City's existing, plant-wide process control system, as more particularly described in Appendix 4 (Technical Specifications).

(K) Quality Assurance and Quality Control. The Design-Builder shall develop the Design-Build Quality Management Plan in accordance with the requirements set forth in Appendix 6 (Design-Build Quality Assurance and Quality Control Requirements), and have full responsibility for quality assurance and quality control for the Design-Build Work, including compliance with the Design-Build Quality Management Plan.

(L) Payment of Costs. The Design-Builder shall pay directly all costs and expenses of the Design-Build Work of any kind or nature whatsoever, including all costs of obtaining and maintaining Governmental Approvals (regardless of permittee but excluding (1) permitting fees relating to, and other City costs associated with, City-Managed Governmental Approvals, and (2) building permit application fees); regulatory compliance and

Legal Proceedings brought against the Design-Builder; obtaining and maintaining the Security Instruments and Additional Insurance Required From Enrolled Parties and Excluded Parties, as set forth in Article 14 (Insurance) and Appendix 12 (Insurance Requirements) hereto; payments due under the Subcontracts with Subcontractors or otherwise for all labor and materials; legal, financial, engineering, architectural and other professional services of the Design-Builder; Taxes, including all sales, use and similar Taxes on building supplies, materials and equipment; Utilities required for the performance of the Design-Build Work; general supervision by the Design-Builder of all Design-Build Work, including all work performed by Subcontractors; Design-Builder preparation of schedules, budgets and reports; keeping all construction accounts and cost records; and all other costs required to complete Pre-Acceptance Testing and to supervise Acceptance Testing, achieve Substantial Completion and Final Completion, and to provide and perform the Warranty Work and the Transition Services, as applicable. The only compensation payable by the City for the Design-Build Work and the Transition Services, as applicable, shall be the Design-Build Price and the Transition Services Fee, as applicable.

(M) Sales Tax. Prior to making any purchase of materials, machinery, tools, fixtures, or equipment in excess of \$1,000,000, the Design-Builder and its Subcontractors shall obtain a jobsite sub-permit of the seller's permit designating the Headworks Facility Site as the place of use or sale, and designate the Headworks Facility Site as the place of sale and or place of use for all fixtures and equipment furnished and installed as part of the Project using the State of California Board of Equalization form BOE-530 (Schedule C – Detailed Allocation by Suboutlet of Combined State and Uniform Local Sales and Use Tax). The Design-Builder shall include this provision in all of its Construction Subcontracts for the Project.

(N) Title and Risk of Loss. Title to the structures, improvements, fixtures, machinery, equipment and materials constituting the Project shall pass to the City upon incorporation in the Project or payment therefor by the City, whichever first occurs, free and clear of all Encumbrances as provided in subsection (O) (Encumbrances) of this Section. Except to the extent provided in subsection 6.17(E) (Payment for Restoration Work and Uninsured Costs), however, the Design-Builder shall bear all risk of loss concerning such structures, improvements, fixtures, machinery, equipment and materials until the Substantial Completion Date with respect to the Headworks 3 Facility and the Final Completion Date with respect to the Existing Headworks Facility Improvements, regardless of the extent to which the loss was insured or the availability of insurance proceeds. The procedures set forth in Section 6.17 (Property Damage During the Design-Build Period) shall be applicable in the event of any damage to, loss or the destruction of the Design-Build Work at the Headworks Facility Site. Notwithstanding anything set forth in this subsection or Section 6.17, the Design-Builder shall bear all risk of loss concerning any structures, improvements, fixtures, machinery, equipment or materials required for the Design-Build Work and stored at any location other than the Headworks Facility Site, regardless of whether the City has paid for any such structures, improvements, fixtures, machinery, equipment or materials.

(O) Encumbrances. The Design-Builder shall not directly or indirectly create or permit to be created or to remain, and shall promptly discharge or bond any Encumbrance or Lien (other than Permitted Encumbrances) arising in relation to the Project or the Design-Build Work. The Design-Builder's Subcontracts with all materialmen, suppliers, and Subcontractors shall provide that the sole recourse for such materialmen, suppliers, and Subcontractors for non-payment shall be against the Payment Bond.

(P) Notice of Default. The Design-Builder shall provide to the City, promptly following the receipt thereof, copies of any notice of default, breach or non-compliance received under or in connection with any Governmental Approval, Subcontract, Security Instrument or other transaction agreement pertaining to the Project.

(Q) Required Design-Build Manager Certification. Any notice, certification, report or application delivered by the Design-Builder to the City in connection with the Design-Build Work, or payment therefor, under this Article, Article 8 (Testing, Substantial Completion and Final Completion); Article 9 (Compensation for Design-Build Work) or any Appendix relating to the performance of the Design-Build Work shall be accompanied by a signed certificate of the Design-Build Manager affirming the accuracy thereof to the best of his or her knowledge. The form of certification required pursuant to this subsection shall comply with all requirements of Applicable Law.

(R) Partnering Requirements. The Design-Build Work shall be subject to the City’s formal partnering requirements, as set forth in Appendix 5 (General Design-Build Work Requirements). The Design-Builder shall be responsible for all costs associated with the facilitator, venue, catering and similar administrative costs, as well as the Design-Builder’s participation, in the formal partnering workshops required pursuant to Appendix 5 (General Design-Build Work Requirements) and shall be compensated for such costs through the applicable Sub-Allowance established in Appendix 8 (Design-Build Price).

(S) Temporary Headworks Facility Site Facilities. The Design-Builder shall be responsible for ensuring that adequate temporary facilities are provided as necessary to enable Subcontractors to perform their work and that provisions have been made for all Headworks Facility Site facilities necessary for the Design-Builder to manage, inspect and supervise the Design-Build Work, including all facilities and services the cost of which constitutes a General Conditions Cost.

SECTION 6.2. CONSTRUCTION COMMENCEMENT DATE.

(A) Construction Commencement Date Generally. The “Construction Commencement Date” shall be established pursuant to subsection (C) (Establishment of the Construction Commencement Date) of this Section following satisfaction by the Design-Builder of its obligations pursuant to subsection (B) (Construction Commencement Date Conditions) of this Section. The requirements and conditions set forth in subsection (B) of this Section shall be the “Construction Commencement Date Conditions” hereunder.

(B) Construction Commencement Date Conditions. In no event shall the Design-Builder commence with the physical Construction of the Headworks 3 Facility prior to the satisfaction of the following Construction Commencement Date Conditions, each of which must be and remain satisfied as of the Construction Commencement Date:

(1) The Design-Builder shall have certified that it has completed all pre-construction requirements set forth in Appendix 5 (General Design-Build Work Requirements) and shall have provided the City with an updated Design-Build Schedule in accordance with Appendix 5 (General Design-Build Work Requirements), a final, approved Maintenance of Operations During Construction Plan in accordance with subsection 6.11(A) (Maintenance of Operations During Construction) and a final Health and Safety Plan in accordance with subsection 6.14(D) (Health and Safety Plan).

(2) The Design-Builder shall have satisfied all requirements of Applicable Law with respect to the commencement of Construction (unless authorized by the City under a limited Construction Notice to Proceed) and shall have obtained all Governmental Approvals required for the commencement of the physical Construction of the Headworks 3 Facility. All such Governmental Approvals shall be in full force and effect.

(3) The Design-Builder shall have submitted the Final Design Submittal Protocol and the Construction Submittal Protocol in accordance with the requirements

of Appendix 7 (Design-Build Work Review Procedures) and shall have complied with the design submittal requirements set forth in subsection 6.6(C) (City Review and Comment on Final Design Documents) to the extent necessary to commence with the physical Construction of the Headworks 3 Facility.

(4) The Design-Builder shall have held a pre-Construction conference with the City and its representatives in accordance with Appendix 5 (General Design-Build Work Requirements).

(5) The Design-Builder shall have provided the City with amended or replacement Performance and Payment Bonds in accordance with Section 17.2 (Performance and Payment Bonds).

(6) The Design-Builder shall have provided the City with evidence that all Required Insurance has been obtained and remains in effect.

(C) Establishment of the Construction Commencement Date. The Design-Builder shall provide 10 days' written notice to the City as to the satisfaction of the Construction Commencement Date Conditions and the date it proposes to establish as the Construction Commencement Date hereunder. The date proposed by the Design-Builder shall constitute the Construction Commencement Date hereunder unless the City, by written notice to the Design-Builder delivered not later than three days prior to the Construction Commencement Date proposed by the Design-Builder, determines that the Construction Commencement Date Conditions have not been satisfied or that the City has determined, in its discretion, to delay the Construction Commencement Date notwithstanding the satisfaction of the Construction Commencement Date Conditions until the City delivers a subsequent written notice to the Design-Builder (the "Construction Notice to Proceed"). In the event the City determines to delay the Construction Commencement Date notwithstanding the satisfaction of the Construction Commencement Date Conditions, (1) the Construction Commencement Date shall be the date stipulated as such by the City in the Construction Notice to Proceed, (2) the Scheduled Substantial Completion Date shall be extended by the number of days between the Construction Commencement Date proposed by the Design-Builder and the actual Construction Commencement Date established by the City in its Construction Notice to Proceed, and (3) the Design-Builder shall be entitled to a Base Guaranteed Maximum Price Adjustment in accordance with and subject to the limitations set forth in Appendix 8 (Design-Build Price). In no event shall the Construction Commencement Date be established prior to the satisfaction by the Design-Builder of the Construction Commencement Date Conditions. In the event the City determines that the Design-Builder has not satisfied the Construction Commencement Date Conditions, notwithstanding the Design-Builder's notice pursuant to this Section, the City shall state which conditions the Design-Builder has failed to satisfy in its notice to the Design-Builder pursuant to this subsection, the Design-Builder shall satisfy all such conditions prior to the establishment of the Construction Commencement Date and there shall be no adjustment to the Scheduled Substantial Completion Date or a Base Guaranteed Maximum Price Adjustment under this subsection.

(D) Effect of the Establishment of the Construction Commencement Date. Upon the establishment of the Construction Commencement Date, the Design-Builder shall have the right to proceed with the physical Construction of the Headworks 3 Facility. Absent the occurrence of Uncontrollable Circumstances as and to the extent provided in this Amended and Restated Design-Build Contract and except as provided in subsection (C) (Establishment of the Construction Commencement Date) of this Section with respect to the City's right to delay the establishment of the Construction Commencement Date notwithstanding the satisfaction of the Construction Commencement Date Conditions, no delay in the establishment of the Construction Commencement Date shall entitle the Design-Builder to any price, schedule or performance relief hereunder.

SECTION 6.3. DIFFERING SITE CONDITIONS.

(A) Preliminary Services Relating to Differing Site Conditions. The Design-Builder has reviewed all available information and undertaken all soils and other site conditions investigations required with respect to the Headworks Facility Site as provided in Preliminary Services Task 2 and has furnished the City with the Geotechnical Report, the Regulated Site Conditions Investigations and Remediation Protocols Report and the Subsurface Utilities Investigation Report as provided therein.

(B) Commencing Subsurface Excavations. Prior to commencing any trenching or excavations, the Design-Builder shall, taking into account the information in the Reference Documents and other subsurface investigation work performed during the Preliminary Services and in compliance with Good Engineering and Construction Practice, conduct further site investigations in accordance with Appendix 5 (General Design-Build Work Requirements), including exploratory excavations and further borings, to confirm the location and type of underground structures that could be damaged as a result of the excavations. Such underground structures include all sewer, water, gas, and other piping, and manholes, chambers, electrical conduits, wires, tunnels and other existing subsurface work located within or adjacent to the Headworks Facility Site. The Design-Builder shall carefully sustain in their places and support, or if necessary relocate, all underground and surface structures located within or adjacent to the Headworks Facility Site and as required by the party owning or controlling such structure. Existing surface facilities which are temporarily removed to facilitate installation of the Design-Build Work shall be replaced and restored to their original condition. The Design-Builder shall notify the City five Business Days in advance of any work that might impact Utilities of business or residents in the area surrounding the Headworks Facility Site so that the City can notify such businesses or residents of such work.

(C) Discovery of Differing Site Conditions. Upon discovering an alleged Differing Site Condition and before the condition is further disturbed, the Design-Builder shall immediately, after taking appropriate measures to secure the affected Design-Build Work: (1) stop work in and secure the affected area; and (2) notify the City of the alleged Differing Site Condition. The Design-Builder's notice to the City shall be issued by telephone or in person and followed within 24 hours thereafter by written notice, providing a brief description of why the condition encountered is considered a Differing Site Condition. Promptly upon receipt of the Design-Builder's notice, the City will investigate the Headworks Facility Site conditions. Immediate written notice shall describe the specific ground conditions encountered and the measures taken to deal with the ground conditions. Notwithstanding anything set forth in subsection 6.3(D) (Relief for Differing Site Conditions) or in Article 15 (Uncontrollable Circumstances), no Uncontrollable Circumstance relief shall be allowed for any alleged Differing Site Condition unless the Design-Builder provides the City with notice in accordance with this subsection.

(D) Relief for Differing Site Conditions. If the Design-Builder establishes that the actual conditions encountered during Construction: (1) meet the criteria for a Differing Site Condition, and (2) directly and materially impact the Design-Builder's cost or time of performance, then the Design-Builder shall be entitled to Uncontrollable Circumstance relief as and to the extent provided in Section 15.1 (Uncontrollable Circumstances Generally).

SECTION 6.4. REGULATED SITE CONDITIONS.

(A) Known Regulated Site Conditions and Regulated Substances. It is the understanding of the parties that there are potentially Regulated Site Conditions and Regulated Substances at the Headworks Facility Site as of the Contract Date, as described in the Reference Documents, including the potential presence of naturally occurring asbestos and diesel contaminated soils. The Design-Builder has developed protocols for identifying and

addressing encountered Regulated Site Conditions in accordance with the requirements set forth in Appendix 2 (Preliminary Services), as set forth in the Regulated Site Conditions Investigations and Remediation Protocols Report. The Design-Builder shall comply with such protocols upon encountering such Regulated Site Conditions and Regulated Substances. Sub-Allowances have been included within the Base Guaranteed Maximum Price on account of Design-Build Costs that may be incurred by the Design-Builder in order to comply with such protocols in connection with the potential presence of naturally occurring asbestos and diesel contaminated soils, as more particularly described in Appendix 8 (Design-Build Price).

(B) Unknown Regulated Site Conditions. If the Design-Builder encounters any unknown Regulated Site Conditions at the Headworks Facility Site for which no protocol has been established, it shall stop work immediately in the affected part of the Design-Build Work to the extent required to avoid any safety or health hazard until it has taken such action as is necessary, in accordance with Applicable Law, to protect the interests of any affected person. The Design-Builder shall, immediately upon encountering any Regulated Site Conditions at the Headworks Facility Site, notify the City and, if required by Applicable Law, all Governmental Bodies with jurisdiction over the Project or the Headworks Facility Site.

(C) Remediation of Regulated Substances. The Design-Builder shall take, or cause a Subcontractor to take, subject to subsection (D) (Uncontrollable Circumstance Relief) of this Section and in accordance with any applicable protocols established as a Preliminary Service, all necessary measures required to ensure that Regulated Substances are remediated or rendered harmless in accordance with Applicable Law. The Design-Builder shall, prior to proceeding with any such work: (1) obtain all environmental site assessments of the affected property and submit copies of such assessments to the City for its approval; (2) develop remediation plans for the Regulated Substances, subject to the City's approval; and (3) obtain all applicable Governmental Approvals to implement such plans. During the period of any investigation and remediation efforts, the Design-Builder shall take all necessary measures to isolate and contain such Regulated Substances from the unaffected parts of the Design-Build Work, and shall continue the Design-Build Work to the maximum extent possible on unaffected parts of the Design-Build Work.

(D) Uncontrollable Circumstance Relief. Except for those Regulated Substances identified in subsection (E) (Design-Builder Responsibilities) of this Section and without limiting the Design-Builder's obligations under subsection (C) (Remediation of Regulated Substances) of this Section, if the Design-Builder establishes that the actual conditions encountered during Construction: (1) meet the criteria for Regulated Site Conditions, (2) is not a Regulated Site Condition, the existence of which the Design-Builder was, or reasonably should have been, aware of prior to encountering such Regulated Site Condition, including through the investigation required to be performed by the Design-Builder as part of the Preliminary Services, and (3) directly and materially impact the Design-Builder's cost or time of performance, then the Design-Builder shall be entitled to Uncontrollable Circumstance relief as and to the extent provided in Section 15.1 (Uncontrollable Circumstances Generally); except that, with respect to items (1), (2) and (3) in the definition of Regulated Site Conditions, Uncontrollable Circumstance relief shall be provided only to the extent not disclosed to the Design-Builder as of the Amended and Restated Design-Build Contract Date; provided that with respect to the presence of diesel oil in the soil and naturally occurring asbestos, which the parties are aware are present at the site, the Design-Builder may be compensated for the reasonable costs associated with such substances (that constitute Allowable Costs) to the extent such costs exceed the amount of the Allowance allocated for such costs as described in Appendix 8. To the fullest extent permitted by Applicable Law, the City shall indemnify and hold harmless the Design-Builder from and against all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from Regulated Site Conditions to the extent not caused or due to Design-Builder fault.

(E) Design-Builder Responsibilities. In performing the Design-Build Work, the Design-Builder shall exercise due care, in light of all relevant facts and circumstances, to avoid exacerbating any Regulated Site Condition after the location and existence of such Regulated Site Condition has been disclosed to the Design-Builder or becomes actually known by the Design-Builder through physical observation. Upon encountering a Regulated Site Condition, the Design-Builder shall provide prompt written notice to the City of such condition, which notice shall not be later than five days after such condition is first known to the Design-Builder. The Design-Builder shall, to the extent reasonably possible, provide such notice before the Regulated Site Condition has been disturbed or altered. Notwithstanding anything to the contrary in this Section, the Design-Builder shall bear full responsibility for the handling, treatment, storage, removal, remediation, avoidance, or other appropriate action (if any), with respect to: (1) any Regulated Substance present at, on, in or under, or migrating or emanating to or from the Headworks Facility Site, that were generated by or brought or caused to be brought on the Headworks Facility Site by any act or omission of the Design-Builder or any Subcontractor; and (2) the creation or exacerbation of any Regulated Site Condition due to Design-Builder Fault or the negligence, recklessness or willful misconduct of the Design-Builder or any Subcontractor; and all costs resulting from any of the foregoing shall constitute Unallowable Costs. The Design-Builder shall indemnify, defend and hold harmless the City Indemnitees in accordance with and to the extent provided in Article 16 (Indemnification) from and against all Loss-and-Expense resulting from Regulated Substances or Regulated Site Conditions for which the Design-Builder bears responsibility pursuant to this subsection.

(F) Generator Liability. Nothing contained herein is intended to identify the Design-Builder as the generator of any pre-existing Regulated Substance, except as provided by Applicable Law. Except with respect to those Regulated Substances identified in subsection (E) (Design-Builder Responsibilities) of this Section, as to which the Design-Builder bears responsibility, the City shall execute, as generator, Hazardous Waste manifests required in order for the Design-Builder to fulfill its obligations under this Section, as and to the extent required under Applicable Law.

SECTION 6.5. PERMITTING RESPONSIBILITIES AND SCHEDULE.

(A) Governmental Approvals Responsibility and Schedule Tables. The Design-Builder has performed the services relating to Governmental Approvals set forth in Preliminary Services Task 5, including identifying all Governmental Approvals required for the Design-Build Work by name, issuing agency and permittee/approval holder. Based on such services and discussions with the City, and the Definitive Project Submittal, the parties have negotiated and finalized the terms of the Governmental Approvals Responsibility Table and the Governmental Approvals Schedule Table and such tables are set forth in Appendix 3 (Governmental Approvals).

(B) Design-Builder Governmental Approval Responsibility. The Design-Builder shall, except as otherwise provided in the Governmental Approval Responsibility Table, obtain and maintain all Governmental Approvals necessary to commence, continue and complete the Design-Build Work and achieve Substantial Completion and Final Completion. In connection therewith, the Design-Builder, in accordance with the Contract Standards and irrespective of the permittee under or holder of the Governmental Approval (except as provided in the Governmental Approvals Responsibility Table) shall:

- (1) prepare and complete all required filings, applications and reports;
- (2) develop and furnish all necessary data, information, plans, documentation and supporting material;
- (3) familiarize itself with all applicable terms and conditions;

- (4) attend all required meetings and hearings;
- (5) cooperate with and assist the City in carrying out any responsibilities designated as City responsibilities in the Governmental Approval Responsibility Table; and
- (6) pay all required permit and filing fees.

The Design-Builder shall be responsible for identifying, obtaining and maintaining any Governmental Approvals required for the performance of the Design-Build Work that are not listed in the Governmental Approvals Responsibility Table. The costs incurred by the Design-Builder under this subsection are Design-Build Costs, and are subject to the Guaranteed Maximum Price.

(C) Application Process. The City shall be notified by the Design-Builder prior to any application, data submittal, or other communication by the Design-Builder with any Governmental Body regarding Governmental Approvals. The Design-Builder shall not knowingly take any action in any application, data submittal or other communication with any Governmental Body regarding Governmental Approvals or the terms and conditions thereof that would impose any unreasonable cost or unreasonable burden on the City or that would materially contravene any City policies with respect to the matters contained therein. The City reserves the right, after reasonable notification and consultation with the Design-Builder, to modify, alter, amend, delete or supplement any information supplied, or term or condition proposed, by the Design-Builder which would have the effect described in the preceding sentence. The final terms and conditions of any Governmental Approval shall be subject to the City's approval, which approval shall not be unreasonably withheld or delayed. The Design-Builder shall deliver to the City, promptly after the Design-Builder's receipt, a copy of each Governmental Approval, and shall provide a listing of the status of all Governmental Approvals in its monthly Design-Build Work report

(D) City Governmental Approval Responsibility. The City shall perform all of its responsibilities set forth in the Governmental Approval Responsibility Table. Further, the City shall provide reasonable assistance to the Design-Builder in connection with the Design-Builder's obligations with respect to the Governmental Approvals including, as appropriate, signing permit applications, attending public hearings and meetings of the Governmental Bodies charged with issuing the Governmental Approvals, and providing the Design-Builder with existing relevant data and documents that are within the City's custody or control or are reasonably obtainable by the City and which are reasonably required for such purpose; provided, however, that the City's obligation to provide such reasonable assistance shall be limited, in light of the Design-Builder's primary role in the permitting and development of the Project, only to those actions which are legally required to be taken by the City as permittee or co-permittee or which involve providing information which is in the possession of or reasonably obtainable by the City. Any such assistance shall be provided only upon the reasonable request of the Design-Builder made directly to the City, and the City shall have no affirmative obligation independently to initiate or to provide such assistance. This covenant shall not obligate the City to staff the Design-Builder's permitting or development efforts, to undertake any new studies or investigations with respect to the Project, or to affirmatively seek to obtain the issuance of the Governmental Approvals required to be obtained by the Design-Builder pursuant the Governmental Approval Responsibility Table.

(E) Adjustment to Scheduled Substantial Completion Date Based on Delays Affecting Design-Builder Managed Governmental Approvals. If in seeking to obtain a Governmental Approval, (1) the Design-Builder has complied with the requirements of this Amended and Restated Design-Build Contract; (2) the Design-Builder has submitted all applications, data, studies, reports, responses and other information required under Applicable

Law and the adopted administrative practice of the Governmental Body in order to obtain the Governmental Approval; (3) the Design-Builder has in all respects used its best efforts to obtain the Governmental Approval; (4) the Design-Builder has consistently maintained a fully responsive, engaged and respectful professional relationship with the staff and management of the Governmental Body in a manner that, while not expressly required under Applicable Law, is generally recognized among regular practitioners in the permitting field as necessary on a practical level to secure similar permits in a timely manner in light of the discretion accorded Governmental Bodies under administrative law; and (5) there has been a failure to issue the Governmental Approval by the “Assumed Approval Issuance Date” set forth in the Governmental Approvals Schedule Table, then an Uncontrollable Circumstance shall be deemed to have occurred and the Design-Builder shall be entitled to an adjustment to the Scheduled Substantial Completion Date in accordance with Article 15 (Uncontrollable Circumstances) and to the extent provided therein and in subsection (F) (Assumed Approval Issuance Dates for Design-Builder Managed Governmental Approvals) of this Section.

(F) Assumed Approval Issuance Dates for Design-Builder Managed Governmental Approvals. The Design-Builder shall submit completed applications for each of the Governmental Approvals listed in the Governmental Approvals Schedule Table by the applicable “Governmental Approval Application Date”. Each such date shall be the date which is the number of days indicated in such table following the Contract Date. The “Assumed Approval Issuance Date” is the date by which the applicable Governmental Approval is expected to be obtained, as measured from the Contract Date and assuming completed application submittals in accordance with Applicable Law and the adopted administrative practice of the applicable Governmental Body by the applicable Governmental Approval Application Date. The Scheduled Substantial Completion Date shall be adjusted to account for the number of days of delay by a Governmental Body in issuing any required Governmental Approval listed in the Governmental Approvals Schedule Table beyond the Assumed Approval Issuance Date, reduced by (1) the number of days of Design-Builder delay in submitting a complete application in accordance with this Section beyond the applicable Governmental Approval Application Date, and (2) the number of days of delay by any Governmental Body in issuing the required Governmental Approval due to the failure of the Design-Builder to exercise reasonable diligence in accordance with this Section in securing the Governmental Approval following submittal of the complete application, but only to the extent any such Governmental Body delay actually causes delay in the Design-Builder’s critical path completion schedule after the exercise of all reasonable mitigation efforts by the Design-Builder. The Design-Builder shall not be entitled to an adjustment of the Base Guaranteed Maximum Price in connection with any delay caused by the applicable Governmental Body in accordance with this subsection. The Design-Builder shall bear the burden of proving any claim of entitlement to an adjustment to the Scheduled Substantial Completion Date under this Section, and shall promptly and regularly inform the City as matters arise which may culminate in any such claim in order to permit timely intervention by the City should it so elect.

(G) Adjustment to the Scheduled Substantial Completion Date Based on Delays Affecting the City Managed Governmental Approvals. In the event any delay in the issuance of a City Managed Governmental Approval, if any (as indicated in the Governmental Approvals Responsibility Table), materially delays the achievement of Testing Readiness and Substantial Completion, an Uncontrollable Circumstance shall be deemed to have occurred and the Design-Builder shall be entitled to an adjustment to the Scheduled Substantial Completion Date as and to the extent provided in Article 15 (Uncontrollable Circumstances), except to the extent the Design-Builder fails to comply with its obligations with respect thereto under this Section, under the Governmental Approvals Responsibility Table, or under Section 18.7 (General Duty to Mitigate). Relief shall be granted under this subsection only if the delay in issuance of a City Managed Governmental Approval adds a material activity to, or materially affects an activity that is on, the Design-Build Schedule’s critical path.

(H) Relief Based on Certain Permitting Terms and Conditions. In the event that a Governmental Body imposes terms and conditions in connection with a Governmental Approval that require material changes to the Technical Specifications or the Acceptance Standards, an Uncontrollable Circumstance shall be deemed to have occurred and the Design-Builder shall be entitled to a Base Guaranteed Maximum Price Adjustment as and to the extent provided in Article 15 (Uncontrollable Circumstances).

SECTION 6.6. FINAL DESIGN RESPONSIBILITIES AND RISK ASSUMPTION.

(A) Performance of the Design Work. Following the Amended and Restated Design-Build Contract Date, the Design-Builder agrees to undertake, perform, and complete the designs and plans for the Project in accordance with the Contract Standards and to prepare all Final Design Documents necessary or appropriate to carry out and complete the Design-Build Work. All Design-Builder working design documents and Final Design Documents shall comply with the Technical Specifications set forth in Appendix 4 (Technical Specifications) and shall ensure that the Project is constructed to a standard of quality, integrity, durability and reliability which is equal to or better than the standard established by the Technical Specifications. The Design-Builder shall be responsible for the professional quality, technical accuracy, timely completion and coordination of all Final Design Documents and shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in the Technical Specifications or the Final Design Documents.

(B) Sole Responsibility and Liability. The Design-Builder shall have the sole and exclusive responsibility and liability for the design, construction, and performance capability of the Project hereunder in accordance with the Contract Standards, notwithstanding the fact that (1) the RFP and the PDR included certain design criteria and requirements for the Design-Build Work and certain performance standards that the Project would be required to meet, (2) the City may have provided input on operations and maintenance considerations that may bear on the design, and (3) the City's role in defining the nature and extent of the Preliminary Services, reviewing and commenting on the Preliminary Services Deliverable Material, and negotiating and agreeing upon this Amended and Restated Design-Build Contract. The Design-Builder acknowledges that, in the RFP process, the performance of the Preliminary Services, the delivery of the Definitive Project Submittal and the negotiation of this Amended and Restated Design-Build Contract, the Design-Builder had the unrestricted right and opportunity not to submit its Proposal or Definitive Project Submittal and not to execute the Design-Build Contract or this Amended and Restated Design-Build Contract if the Design-Builder had determined that such design criteria and requirements or the establishment of the Contract Standards would in any manner or to any degree impair the Design-Builder's ability to perform the Design-Build Work in compliance herewith. Without limiting the Design-Builder's right to claim relief in the event of Uncontrollable Circumstances as and to the extent provided in this Amended and Restated Design-Build Contract, all risks relating to the design, construction and performance capability of the Project, as demonstrated through the Acceptance Test, including all risks of design defects, constructability and efficacy, have been transferred to the Design-Builder under this Amended and Restated Design-Build Contract.

(C) City Review and Comment on Final Design Documents. The Design-Builder shall provide the City with the Final Design Submittal Protocol in accordance with the specific requirements set forth in Appendix 7 (Design-Build Work Review Procedures). The City shall have the right to review and comment on all Final Design Documents within the time frames specified in Appendix 7 (Design-Build Work Review Procedures) in order to confirm the compliance and consistency of the Final Design Documents with the Technical Specifications. In no event shall the Design-Builder proceed with the physical Construction of any particular segment of the Design-Build Work without first complying with the requirements of the Final Design Submittal Protocol and Appendix 7 (Design-Build Work Review Procedures). The

Design-Builder shall give due consideration and provide written responses, in the time and manner provided in Appendix 7 (Design-Build Work Review Procedures), to any comments delivered by the City or its representatives as to the Design-Builder's design submittals. Neither compliance by the Design-Builder with the Technical Specifications, nor review and comment by the City, any City Technical Representative or the Owner's Advisor on the Design-Builder's Preliminary or Final Design Documents, nor any failure by the City, any City Technical Representative or the Owner's Advisor to comment on any design submittals shall in any way relieve the Design-Builder of full responsibility for the design, construction and performance capability of the Project, as demonstrated through the Acceptance Test, in accordance with the Contract Standards. The parties acknowledge and agree that the review and comment rights of the City under this subsection are intended for the informational purposes of the City and for the City to determine whether the Final Design Documents comply with the Technical Specifications. Without limiting the City's review and comment rights under this subsection, the City's approval of any Final Design Document shall not be required in order for the Design-Builder to proceed with the performance of the Design-Build Work.

(D) Documents at the Headworks Facility Site. The Design-Builder shall maintain at the Headworks Facility Site all Final Design Documents, including a complete set of record drawings, in accordance with the Contract Standards. These documents shall be available to the City for reference, copying and use, and a complete set thereof shall be delivered to the City upon completion of the Design-Build Work.

(E) Licensing Requirements. Architects and engineers engaged by the Design-Builder for design services shall be licensed and registered in good standing to practice in the City and shall be experienced and qualified to perform such services.

SECTION 6.7. CHANGES TO THE TECHNICAL SPECIFICATIONS AT DESIGN-BUILDER REQUEST.

(A) City Consent Required; Exceptions. The Design-Builder acknowledges the City's material interest in each provision of the Technical Specifications, and agrees that, subject to Section 6.8 (Other Changes to the Technical Specifications), no material change to the Technical Specifications shall be made except with the consent of the City, which may be withheld or conditioned in its discretion taking into account the standards of quality, integrity, durability and reliability established for the Project by the Contract Standards. Any such changes shall be evidenced by a Contract Administration Memorandum, Contract Amendment or Change Order, as applicable. The City reserves the right to review and comment upon the Final Design Documents insofar as they relate to all matters of architectural treatment and exterior visual aesthetics, so as to assure that the appearance of the Project is in compliance with the Technical Specifications applicable to such matters. The parties acknowledge that reasonable, minor variations from the Technical Specifications shall be permitted in the Final Design Documents without the need for City consent to the extent such variations do not diminish the quality, integrity, durability, functionality and reliability of the Project. Examples of elements of the Technical Specifications from which there may be reasonable, minor variations in the Final Design Documents include thickness, level and composition of individual structural members; exact dimensions of rooms and buildings (to the extent overall functionality, accessibility, and maintainability are not impaired); routes and depths of pipe work; exact size, weight and height of mechanical components; and dimensions, ratings and positions of electrical cables, switch gear, transformers and control panels.

(B) Notice and Information as to Proposed Change. The Design-Builder shall give the City written notice of, and reasonable opportunity to review and comment upon, any Technical Specifications Change proposed to be made at the Design-Builder's request. The notice shall contain sufficient information for the City to determine that the proposed Technical Specifications Change:

- (1) Does not diminish the capacity of the Project to be operated so as to meet the Contract Standards;
- (2) Does not impair the quality, integrity, durability and reliability of the Project;
- (3) Is reasonably necessary or is advantageous for the Design-Builder to fulfill its obligations under this Amended and Restated Design-Build Contract; and
- (4) Is feasible.

SECTION 6.8. OTHER CHANGES TO THE TECHNICAL SPECIFICATIONS.

(A) Changes Made Due to Uncontrollable Circumstances. Upon the occurrence of an Uncontrollable Circumstance after the Amended and Restated Design-Build Contract Date, the Design-Builder shall promptly proceed, subject to the terms, conditions and procedures set forth in Article 15 (Uncontrollable Circumstances) and subject to the City's approval, to make or cause to be made all Technical Specifications Changes reasonably necessary to address the Uncontrollable Circumstance. The Design-Builder shall consult with the City concerning possible means of addressing and mitigating the effect of any Uncontrollable Circumstance, and the Design-Builder and the City shall cooperate in order to minimize any delay, lessen any additional cost and modify the Design-Build Work so as to permit the Design-Builder to continue performing the Design-Build Work in light of such Uncontrollable Circumstance. The Design-Build Costs resulting from any such Technical Specifications Change shall result in a Base Guaranteed Maximum Price Adjustment. The Design-Builder shall be entitled to schedule relief resulting from any such Technical Specifications Change to the extent provided in Article 15 (Uncontrollable Circumstances). Without limiting the right of the City to issue a Unilateral Change Directive under Section 6.9 (Unilateral Change Directives), any Technical Specifications Change made on account of Uncontrollable Circumstances, and any related change in the terms and conditions of this Amended and Restated Design-Build Contract, shall be reflected in a Change Order.

(B) Changes Required by Governmental Bodies. The parties recognize that a Governmental Body may impose terms and conditions in connection with a Governmental Approval after the Amended and Restated Design-Build Contract Date that require a Technical Specifications Change. In the event of the imposition of any such additional terms and conditions imposed by a Governmental Body, the Design-Builder shall promptly proceed, subject to the City's approval, to make or cause to be made all Technical Specifications Changes reasonably necessary to comply with such additional terms and conditions, or the City may elect to contest any such additional terms and conditions if such terms and conditions are not acceptable to the City; provided that, if such contest by the City delays the performance of the Design-Build Work, the Design-Builder shall be entitled to Uncontrollable Circumstance relief as and to the extent provided in Article 15 (Uncontrollable Circumstances). Pursuant to and to the extent provided in subsection 6.5(H) (Relief Based on Certain Permitting Terms and Conditions), the City shall bear the risk of the imposition of any such additional terms and conditions imposed by a Governmental Body in connection with a Governmental Approval. Accordingly, the Design-Build Costs paid in connection with any Technical Specifications Change required under this subsection shall result in a Base Guaranteed Maximum Price Adjustment. Without limiting the right of the City to issue a Unilateral Change Directive under Section 6.9 (Unilateral Change Directives), any such Technical Specifications Change and any related change in the terms and conditions of this Amended and Restated Design-Build Contract shall be reflected in a Change Order.

(C) Changes Required by the City. The City shall have the right to require the Design-Builder to make Technical Specifications Changes at any time prior to Final

Completion in its discretion for any reason whatsoever, whether and however the exercise of such rights affects this Amended and Restated Design-Build Contract so long as the Design-Builder's rights are protected as provided in this subsection. The Design-Builder shall be entitled to a Change Order providing appropriate price, schedule, performance and other relief in the event of a Technical Specifications Change made at the direction of the City under this subsection, and the Design-Build Costs paid in connection therewith shall result in a Base Guaranteed Maximum Price Adjustment; provided, however, that the Design-Builder shall not be entitled to any such price, schedule, performance or other relief to the extent that any such Technical Specifications Change is required due to Design-Builder Fault. The City shall have no obligation to make any Technical Specifications Change on account of its rights under this subsection.

SECTION 6.9. UNILATERAL CHANGE DIRECTIVES.

(A) City Right to Issue. The parties intend to negotiate the terms of any Change Order providing for a Technical Specifications Change pursuant to Section 6.8 (Other Changes to the Technical Specifications) prior to the Design-Builder incurring any costs with respect to any such change or adjustment. The Design-Builder shall consult with the City concerning possible means of addressing any proposed Technical Specifications Change pursuant to Section 6.8 (Other Changes to the Technical Specifications) and, without limiting any of the rights of the City under Section 6.7 (Changes to the Technical Specifications at Design-Builder Request), the Design-Builder and the City shall cooperate in order to minimize any delay and lessen any additional cost in light of such proposed Technical Specifications Change. However, notwithstanding the foregoing, the City shall have the right to issue a written order directing a Technical Specifications Change pursuant to this subsection, which order shall specify any appropriate price, performance or schedule relief, if any, associated with the Technical Specifications Change (a "Unilateral Change Directive"). No Unilateral Change Directive shall be made that would be contrary to Applicable Law. Upon receipt of a Unilateral Change Directive, the Design-Builder shall promptly proceed with the performance of any change in the Design-Build Work as instructed and shall promptly advise the City in writing of the Design-Builder's agreement (or disagreement) with any price, performance or schedule relief, if any, as may be proposed by the City in the Unilateral Change Directive. If the Design-Builder receives a written communication signed on behalf of the City, which the Design-Builder believes is a Unilateral Change Directive that is not so identified, it shall not proceed with the purported change in the Design-Build Work until it receives written confirmation from the City that such communication is in fact a Unilateral Change Directive. A Unilateral Change Directive that is signed by the Design-Builder and approved by the City in accordance with its procurement rules and regulations, reflecting the scope of work and any price, schedule and performance relief, if any, shall be deemed a Change Order, and the Design-Build Costs paid in connection therewith shall result in a Base Guaranteed Maximum Price Adjustment.

(B) Disagreement with Terms of a Unilateral Change Directive. If the Design-Builder disagrees in writing with the suggested price, schedule or performance relief, if any, set out in the Unilateral Change Directive, the Design-Builder may elect to initiate dispute resolution procedures in accordance with Section 12.2 (Non-Binding Mediation). In such case, the Design-Builder shall proceed with the performance of the Design-Build Work in accordance with the Unilateral Change Directive and shall keep and present, in such form as the City may request, an itemized accounting to go with the appropriate supporting data with respect to the Design-Builder's position, including all information necessary to support Cost Substantiation. The Design-Builder shall provide notice of any disagreement pursuant to this subsection within 15 days after receipt of the Unilateral Change Directive.

SECTION 6.10. DESIGN-BUILD WORK DELIVERABLE MATERIAL.

As the Design-Build Work progresses (or upon the termination of the Design-Builder's right to perform the Design-Build Work), the Design-Builder shall deliver to the City all Design-Build Work Deliverable Material. The provisions of Section 18.6 (Property Rights) shall apply to any Design-Build Work Deliverable Material used by the Design-Builder in the Design-Build Work that is proprietary in nature or otherwise subject to the property rights of a third party. The City shall have the right from and after the Contract Date to use (or permit use of) all such Design-Build Work Deliverable Material, all oral information received by the City in connection with the Design-Build Work, and all ideas or methods represented by such Design-Build Work Deliverable Material, without additional compensation; provided, however, that the City shall not publish, distribute, or sell such Design-Build Work Deliverable Material to third parties not employed by or under contract to the City, except as required by Applicable Law with respect to public records requests or in connection with requests for proposals to perform construction work or design, or consulting services on behalf of the City and in connection with the performance of such work. The City's use of any such Design-Build Work Deliverable Material for any purpose other than the Project shall be at its own risk and the Design-Builder shall have no liability therefor.

SECTION 6.11. INTERFACE AND COORDINATION.

(A) Maintenance of Operations During Construction. The Design-Builder shall undertake and execute the Design-Build Work in a manner which does not interfere with or impair the ongoing operations of the Regional Wastewater Facility, including the continued operations of the Existing Headworks Facility. Within 30 days following the Amended and Restated Design-Build Contract Date, the Design-Builder shall provide, for the City's review and approval, a plan for the maintenance of operations during Construction (including Construction of the Existing Headworks Facility Improvements following Acceptance Testing), Pre-Acceptance Testing, Acceptance Testing and the Post-Acceptance Performance Tests (the "Maintenance of Operations During Construction Plan") in accordance with Appendix 5 (General Design-Build Work Requirements). The Design-Builder shall provide a final Maintenance of Operations During Construction Plan, approved by the City, as a precondition to the establishment of the Construction Commencement Date under Section 6.2 (Construction Commencement Date). The Design-Builder shall coordinate all Design-Build Work with the City in accordance with the Contract Standards, including the approved Maintenance of Operations During Construction Plan. The Design-Builder acknowledges that the operation of the Regional Wastewater Facility may require a stoppage of Design-Build Work on all or a portion of the Headworks Facility Site from time-to-time, subject to Section 6.12 (Suspension of Work). The Design-Builder assumes the risk that the Design-Build Work can be accomplished in accordance with the Contract Standards in the manner required by this subsection.

(B) Related Projects. The Design-Builder acknowledges that the City is undertaking several other projects at the Regional Wastewater Facility and agrees to coordinate the Design-Build Work with the work associated with such other projects in accordance with this Section. The other projects the City is undertaking at the Regional Wastewater Facility are referred to herein as the "Related Projects" and are further described in Appendix 1 (Headworks Facility and Headworks Facility Site Description). Nothing in this Amended and Restated Design-Build Contract shall be interpreted as granting the Design-Builder exclusive occupancy of the Headworks Facility Site. The Design-Builder must ascertain to its own satisfaction the scope of the Project and the nature of any other contracts that have been or may be awarded by the City in relation to its overall capital improvement program. The Design-Builder shall not cause any unnecessary hindrance or delay to any other contractors working at the Headworks Facility Site. The Design-Builder agrees to reasonably cooperate and coordinate its activities with those of all Separate Contractors so that the Project can be completed in an orderly and

coordinated manner without unreasonable disruption. Without limiting any of the foregoing, the Design-Builder shall comply with the Related Projects Coordination Protocol, which is intended to establish a management framework for creating a cooperative and collaborative project environment among the Design-Builder and the Separate Contractors. Notwithstanding anything to the contrary in the Related Projects Coordination Protocol or this Amended and Restated Design-Build Contract, the Design-Builder's agreement to comply with the Related Projects Coordination Protocol shall not be construed to: (1) confer upon the Design-Builder any liability for the acts or omissions of the Separate Contractors; (2) impose upon the Design-Builder joint or several liability for the acts or omissions of the Separate Contractors; (3) create a partnership, consortium or joint venture relationship among the Design-Builder and any Separate Contractor; or (4) expand the Design-Builder's liabilities beyond those set forth in this Amended and Restated Design-Build Contract.

(C) Coordination Meetings. The City intends to have coordination meetings among the Design-Builder and the various Separate Contractors in an effort to manage the overall program associated with the work being performed at the Headworks Facility Site and to avoid or mitigate cost and time impacts to the overall capital improvements program. The Design-Builder agrees that it will attend and participate in these logistics meetings and shall cooperate with the City and the Separate Contractors to the extent reasonably necessary for the performance by such other contractors of their work.

(D) Equipment and Materials Storage at Construction Enabling Site and Headworks Facility Site. The Design-Builder shall afford the City and any Separate Contractors reasonable opportunity for the introduction and storage of their equipment and materials and the execution of their work at the Construction Enabling Site and Headworks Facility Site and shall properly connect and coordinate the Design-Build Work with such other work. The Design-Builder shall coordinate with the City and any Separate Contractors to store apparatus, materials, supplies and equipment in such orderly fashion at the Construction Enabling Site and Headworks Facility Site or any other site provided by the City as will not unduly interfere with the progress of the Design-Build Work or the work of the City or any Separate Contractors.

(E) Interrelated Work. If the execution or result of any part of the Design-Build Work depends upon any work of any Separate Contractor, the Design-Builder shall, prior to proceeding with the particular Design-Build Work, inspect and promptly notify the City of any apparent discrepancies or defects in such work that render it unsuitable for the proper execution or result of any part of the Design-Build Work. The Design-Builder shall be entitled to Uncontrollable Circumstance relief as and to the extent provided in Article 15 (Uncontrollable Circumstances) in the event that defects in the work of any Separate Contractor render the work unsuitable for the proper execution or result of any part of the Design-Build Work. However, failure of the Design-Builder to inspect and report any apparent discrepancies or defects in the work of any Separate Contractor pursuant to this subsection shall constitute an acceptance of such Separate Contractor's work as fit and proper to receive the Design-Build Work, except as to defects which may develop in such Separate Contractor's work after completion of the Design-Build Work and which Design-Builder could not have reasonably discovered by its inspection prior to completion of the Design-Build Work. The Design-Builder shall be entitled to Uncontrollable Circumstance relief in accordance with and to the extent provided in Article 15 (Uncontrollable Circumstances) in the event of the failure of a Separate Contractor to achieve substantial completion of a Related Project by the applicable date set forth in Appendix 4 (Technical Specifications).

(F) Disputes Associated with Separate Work. If the performance of any work by the City or a Separate Contractor is likely to be interfered with by the simultaneous performance of some other contract or contracts, the City shall decide which contractor shall cease work temporarily and which contractor shall continue or whether the work under the

contracts can be coordinated so that the contractors may proceed simultaneously. On all questions concerning conflicting interest of contractors performing related work, the decision of the City shall be binding upon the Design-Builder and all contractors concerned and the City shall not be responsible for any damages suffered or extra costs incurred by the Design-Builder resulting directly or indirectly from the award or performance or attempted performance of any other contract or contracts at the Headworks Facility Site or, except as specifically provided in the next sentence of this subsection, caused by a decision or omission of the City respecting the order of precedence in the performance of all such contracts. Any decision by the City to halt or delay the performance of the Design-Build Work by the Design-Builder pursuant to this Section shall be made in accordance with Section 6.12 (Suspension of Work), and the Design-Builder shall be entitled to Uncontrollable Circumstance relief as and to the extent provided therein.

SECTION 6.12. SUSPENSION OF WORK.

(A) Generally. The City may, through a written notice executed by the City Contract Representative, order the Design-Builder to suspend, delay or interrupt all or any part of the Design-Build Work for such period of time as the City Contract Representative may determine to be appropriate for the coordination of the Related Projects or otherwise for the convenience of the City.

(B) Uncontrollable Circumstance Relief. In the event the City exercises its right to suspend, delay or interrupt all or any part of the Design-Build Work pursuant to this Section, the Design-Builder shall be entitled to Uncontrollable Circumstance relief as and to the extent provided in Article 15 (Uncontrollable Circumstances). However, no adjustment will be made pursuant to this Section or Article 15 for any suspension, delay or interruption to the extent caused by Design-Builder Fault, including any failure of the Design-Builder to comply with the Maintenance of Operations During Construction Plan or suspension under subsection 6.14(E) (Health and Safety Compliance Requirements). Any adjustment under this subsection shall be subject to the terms and conditions of Article 15 (Uncontrollable Circumstances), including, in particular, subsection 15.1(A) (Extent of Relief Available to the Design-Builder), so that the Design-Builder shall not be entitled to any relief pursuant to this Section absent the required demonstration of the impact of the suspension, delay or interruption on the critical path of the Design-Build Schedule.

SECTION 6.13. CONSTRUCTION PRACTICE.

(A) Exclusive Responsibility of Design-Builder. The Design-Builder shall perform the Design-Build Work in accordance with the Contract Standards and shall have exclusive responsibility for all construction means, methods, techniques, sequences, and procedures necessary or desirable for the correct, prompt, and orderly prosecution and completion of the Design-Build Work as required by this Amended and Restated Design-Build Contract. The responsibility to provide the construction means, methods, techniques, sequences and procedures referred to above shall include the obligation of the Design-Builder to provide the following construction requirements: temporary offices and construction trailers; required design certifications; required approvals; weather protection; clean-up and housekeeping of the Headworks Facility Site; construction trade management; temporary parking; vehicle traffic; health, safety and first aid facilities and equipment; correction of or compensation for defective work or equipment; Subcontractors' insurance; storage areas; workshops and warehouses; temporary fire protection; security of the Headworks Facility Site; temporary utilities; Utility relocations necessary or convenient to its performance of the Design-Build Work; potable water; sanitary services; Subcontractor and vendor qualification; receipt and unloading of delivered materials and equipment; erection rigging; temporary supports; and construction coordination.

(B) Headworks Facility Site Debris, Trash and Waste. The Design-Builder shall keep the Headworks Facility Site reasonably free from debris, trash and construction wastes to permit the Design-Builder to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas and without causing complaints from Separate Contractors, adjacent property owners, local public officials or members of the public. Upon Substantial Completion and prior to Final Completion, the Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Design-Build Work or applicable portions thereof (and not otherwise incorporated into the Project in accordance with the Technical Specifications) to permit the City to occupy the Project for its intended use.

SECTION 6.14. RESPONSIBILITY FOR HEALTH AND SAFETY.

(A) Health and Safety Representative. The Design-Builder recognizes the importance of performing the Design-Build Work in a safe manner so as to prevent damage, injury or loss to: (1) all individuals at the Headworks Facility Site, whether working or visiting; (2) the Design-Build Work, including equipment and materials stored on or off the Headworks Facility Site; and (3) all other property at the Headworks Facility Site or adjacent thereto. The Design-Builder assumes responsibility for implementing and monitoring all health and safety precautions and programs related to the performance of the Design-Build Work. The Design-Builder shall, prior to commencing construction, designate an individual with the qualifications and experience necessary under Good Engineering and Construction Practice to supervise the implementation and monitoring of all health and safety precautions and programs related to the Design-Build Work (the “Health and Safety Representative”). Subject to compliance with Applicable Law, prior to the Project reaching 45 craft, the Health and Safety Representative may be an individual stationed at the Headworks Facility Site that has other responsibilities on the Project. Once the Project reaches 45 craft, the Health and Safety Representative shall be an individual stationed at the Headworks Facility Site who shall have no other responsibilities with respect to the Project other than supervising the implementation and monitoring of all health and safety precautions and programs related to the Design-Build Work. The Health and Safety Representative shall make routine daily inspections of the Headworks Facility Site and shall hold weekly health and safety meetings with the Design-Builder’s personnel, Subcontractors and others as applicable. The Design-Builder shall provide minutes of each health and safety meeting to the City within five days of such meeting.

(B) Precautions and Protection. The Design-Builder shall take all reasonable precautions for the health and safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

(1) All employees on the Headworks Facility Site and all other persons who may be affected thereby;

(2) All the Design-Build Work, whether in storage on or off the Headworks Facility Site, under the care, custody or control of Design-Builder or any of its Subcontractors. Machinery and equipment shall have proper guards in place and all hazards shall be eliminated in accordance with the latest health and safety provisions of the OSHA Construction Industry Regulations 29 CFR, Parts 1910 and 1926; and

(3) Other property at the Headworks Facility Site or adjacent thereto, including plant facilities, trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

(C) Health and Safety Inspections. The Design-Builder is solely responsible to inspect, survey, and assess the Headworks Facility Site and identify the existence of all

permit-required confined spaces and non-permit confined spaces and comply with applicable OSHA regulations and standards. The Design-Builder's Headworks Facility Site assessment shall begin upon the initiation of Design-Build Work and continue throughout the duration of the Design-Build Period. The Design-Builder shall comply with the City of San Jose Occupational Safety and Health Regulations, and 29 CFR 1910.146 in the performance of the Design-Build Work.

(D) Health and Safety Plan. Within 30 days following the Contract Date, the Design-Builder shall provide, for the City's review and comment, a Health and Safety Plan in accordance with the Contract Standards (the "Health and Safety Plan"). The Health and Safety Plan shall include electrical safety, lock-out/tag-out, arc flash safety personal protection equipment while working in vicinity of energized electrical equipment, hazard communication, fire protection plan, emergency access plan, health and safety inspections of mechanized equipment, machinery, hoists, cranes, scaffolding, excavations, shoring, traffic control, and related items. The Design-Builder shall not perform any construction-related activity (including any activity that disturbs the Headworks Facility Site) until the City has had an opportunity to review and comment on the Health and Safety Plan in accordance with the timeframes set forth in this subsection. The Design-Builder shall provide a final Health and Safety Plan, having addressed any comments provided by the City, as a pre-condition to the establishment of the Construction Commencement Date under Section 6.2 (Construction Commencement Date).

(E) Health and Safety Compliance Requirements. The Design-Builder and all Subcontractors shall comply with: (1) all Applicable Law relating to safety; (2) the Health and Safety Plan; and (3) any City-specific health and safety requirements provided to the Design-Builder, provided that such City-specific requirements do not violate any Applicable Law. The Design-Builder shall immediately report (no later than within 12 hours after its occurrence), in writing, any health and safety-related injury, loss, damage, accident or near miss arising from the Design-Build Work to the City and, to the extent mandated by Applicable Law, to all Governmental Bodies having jurisdiction over health and safety-related matters involving the Project. The City, through the City Contract Representative, shall have the right to suspend any or all Design-Build Work if the Design-Builder fails to comply with its obligations hereunder without any requirements of providing the Design-Builder with Uncontrollable Circumstance relief hereunder.

(F) Emergencies. The Design-Builder shall develop an emergency response plan in accordance with the requirements set forth in Appendix 5 (General Design-Build Work Requirements). The emergency response plan shall be subject to the approval of the City and shall establish the protocols for the Design-Builder in dealing with emergencies impacting the performance of the Design-Build Work. In case of an emergency which threatens immediate loss or damage to property or health and safety of life, the Design-Builder shall act immediately to prevent threatened loss, damage, injury or death. The Design-Builder shall notify the City of the situation and all actions taken immediately thereafter. If, in the opinion of the Design-Builder, immediate action is not required, the Design-Builder shall notify the City of the emergency situation and proceed in accordance with the City's instructions. However, if any loss, damage, injury or death occurs that could have been prevented by the Design-Builder's prompt and immediate action, Design-Builder shall be fully liable for all costs, damages, claims, actions, suits, attorneys' fees and all other expenses arising therefrom or relating thereto. Prior to commencing its Design-Build Work and at all times during the performance of the Design-Build Work, the Design-Builder shall provide the City with two 24 hour emergency phone numbers where its representatives can be contacted.

SECTION 6.15. CONSTRUCTION MONITORING, OBSERVATIONS, TESTING AND UNCOVERING OF WORK.

(A) Observations and Design-Build Work Review Protocol. During the progress of the Design-Build Work through Final Completion, the Design-Builder shall at all times during normal working hours afford the City and its designated representative every reasonable opportunity for observing all Design-Build Work at the Headworks Facility Site, and shall comply with the Design-Build Work review procedures set forth in Appendix 7 (Design-Build Work Review Procedures). During any such observation, all representatives of the City, including any City Technical Representative or Owner’s Advisor, shall comply with all reasonable health and safety and other rules and regulations applicable to presence in or upon the Headworks Facility Site, and shall in no material way interfere with the Design-Builder’s performance of any Design-Build Work.

(B) Factory Fabrication and Testing. The City reserves the right to have its designated representatives witness any factory fabrication or testing. The Design-Builder shall provide the City with its anticipated schedule for such fabrication and testing at the initial Project meeting and shall provide 45 days advanced written notice of any actual factory test. Concurrent with such notification, the Design-Builder shall provide the City with its plan for the performance of the factory test for the City’s review and approval. The City’s approval of the factory test plan shall be a condition precedent to the performance of the factory test and such City approval shall not be unreasonably withheld or delayed. The factory test plan shall describe the equipment to be tested, the testing procedures to be followed, the criteria that must be demonstrated for a successful test and any other information required by the Division 01 Specifications or reasonably requested by the City. The City shall be responsible for its costs associated with witnessing any factory fabrication or testing, including travel costs; provided however, the Design-Builder shall reimburse the City for its reasonable costs in connection with witnessing any re-testing unless such re-testing is due to Uncontrollable Circumstances. The City shall provide the Design-Builder with reasonable advance notice (at least 10 Business Days) of its intention to witness any factory fabrication or test pursuant to this subsection, which notice shall indicate the identity and number of designated representatives of the City who will witness the fabrication or test and any limitations associated with the reimbursable costs to be incurred by such designated representatives. The Design-Builder shall not ship equipment until certified copies of factory test results have been received and approved by the Design-Builder.

(C) Design-Builder Tests. The Design-Builder shall conduct all tests of the Design-Build Work (including shop tests) or inspections required by the Contract Standards. The Design-Builder shall give the City and the Owner’s Advisor reasonable advance notice (consistent with the approved Design-Build Quality Management Plan described in Appendix 6 (Design-Build Quality Assurance and Quality Control Requirements) of tests or inspections required by the Contract Standards prior to the conduct thereof. In no event shall the inability, failure, or refusal of the City or any of its representatives to attend or be present at or during any such test or inspection delay the conduct of such test or inspection, delay the performance of the Design-Build Work, or otherwise serve as the basis for relief from the Design-Builder’s obligations hereunder, unless otherwise agreed upon by the parties in writing. The Engineer-of-Record shall conduct or witness any such test or inspection to the extent required by the Contract Standards. All analyses of test samples shall be conducted by persons appearing on lists of laboratories authorized to perform such tests by the City or federal agency having jurisdiction or, in the absence of such an authorized list in any particular case, shall be subject to the approval of the City, which approval shall not be unreasonably withheld or delayed. Acceptance Testing shall be conducted in accordance with Article 8 (Testing, Substantial Completion and Final Completion).

(D) Certificates and Reports. The Design-Builder shall secure and deliver to the City promptly all required certificates of inspection, test reports, work logs, or approvals with respect to the Design-Build Work as and when required by the Contract Standards.

(E) City Tests, Observations and Inspections. The City, its employees, agents, representatives and contractors (which may be selected in the City's discretion), and all Governmental Bodies having lawful jurisdiction, may at any reasonable time and with reasonable notice conduct such on-site observations and inspections, and such civil, structural, mechanical, electrical or other tests as the City deems necessary or desirable to ascertain whether the Design-Build Work complies with the Contract Standards. If any such observations, inspections or tests result in the City having a reasonable concern regarding noncompliance with the Contract Standards, the parties will promptly endeavor in good faith to review the basis of the concern and agree on any necessary measures that will be taken to rectify and prevent reoccurrence of any actual instances of noncompliance with the Contract Standards. The Design-Build Costs paid in connection with any of such test, observation or inspection shall result in a Base Guaranteed Maximum Price Adjustment unless such test, observation or inspection reveals a material failure of the Design-Build Work to comply with this Amended and Restated Design-Build Contract or Applicable Law, in which event the costs and expenses of such observation, inspection or test shall be Unallowable Costs. The Design-Builder shall be entitled to Uncontrollable Circumstance relief as and to the extent provided in Article 15 (Uncontrollable Circumstances) in the event that any requested test, observation or inspection causes a delay in the critical path of the Design-Build Schedule, but only if such testing, observation or inspection does not reveal any material failure or non-compliance as set forth herein.

(F) Notice of Covering Design-Build Work. The Design-Builder shall give the City notice in the Monthly Design-Build Work Report of its upcoming schedule with respect to the covering and completion of any Design-Build Work, and shall update such notice, if necessary, within a reasonable time period (at least five business days) before such covering and completion. The City shall give the Design-Builder reasonable notice (a minimum of 48 hours) of any intended inspection or testing of such Design-Build Work in progress prior to its covering or completion. If the City provides such notice, the Design-Builder shall afford the City a reasonable opportunity to conduct such tests or inspections, which the City shall promptly complete. At the City's written request, the Design-Builder shall take apart or uncover for inspection or testing any previously-covered or completed Design-Build Work; provided, however, that the City's right to make such requests shall be limited to circumstances where there is a reasonable basis for concern by the City as to whether the disputed Design-Build Work complies with the requirements of this Amended and Restated Design-Build Contract. The cost of uncovering, taking apart, or replacing such Design-Build Work along with the costs related to any delay in performing Design-Build Work caused by such actions, shall:

(1) be Unallowable Costs, if such Design-Build Work was covered prior to any observation or test required by the Contract Standards or for which the City was not provided reasonable advance notice hereunder, or prior to the date on which the City was to conduct any observation or test as to which the City has provided notice of its intention to conduct in accordance with this subsection; and

(2) in all other cases, as follows:

(a) be Unallowable Costs, if such observation or test reveals that the Design-Build Work does not comply with this Amended and Restated Design-Build Contract; or

(b) be Design-Build Costs, if such observation or test reveals that the Design-Build Work complies with this Amended and Restated Design-Build Contract, and shall result in a Base Guaranteed Maximum Price Adjustment.

Except as provided in item (1) of this subsection, in the event such Design-Build Work does not comply with this Amended and Restated Design-Build Contract, the delay caused by such observation or test shall be treated as having been caused by an Uncontrollable Circumstance and any costs incurred with respect to such observation or test shall be costs for the account of the City in accordance with Article 15 (Uncontrollable Circumstances).

SECTION 6.16. CORRECTION OF WORK.

(A) Correction of Non-Conforming Design-Build Work. The Design-Builder shall complete, repair, replace, restore, re-perform, rebuild and correct promptly any Design-Build Work that does not conform with the Contract Standards. If the non-conformance with the Contract Standards of such Design-Build Work is due to the Design-Builder's or its Subcontractors' negligence or willful misconduct, then the costs to complete, repair, replace, restore, re-perform, rebuild and correct such work shall be Unallowable Costs. If the non-conformance is not due to negligence or willful misconduct, the cost to bring such work into compliance shall be a Design-Build Cost, provided, however, that the City may elect, at its sole discretion, to withhold the Design-Builder Fee associated with such work in accordance with Appendix 8 (Design-Build Price). In the event of a failure of the Design-Builder to correct any such nonconforming Design-Build Work in a timely manner, the City shall have the right, but not the obligation, to correct or provide for the correction of such nonconforming Design-Build Work and the costs and expenses reasonably incurred by the City in connection therewith shall be reimbursed by the Design-Builder to the City, subject to Cost Substantiation. The City shall provide the Design-Builder with seven days' advance written notice prior to exercising its right to correct or provide for the correction of any nonconforming Design-Build Work pursuant to this subsection.

(B) Election to Accept Non-Conforming Design-Build Work. The City may elect by Change Order, at the Design-Builder's request, to accept non-conforming Design-Build Work and charge the Design-Builder for the amount agreed upon by the parties as reflecting the reduction in value of the Design-Build Work. The City shall have no obligation to accept non-conforming Design-Build Work pursuant to this subsection.

(C) Relation to Other Obligations. The obligations specified in this Section establish only the Design-Builder's specific obligation to correct the Design-Build Work and shall not be construed to establish any limitation with respect to any other obligations or liabilities of the Design-Builder under this Amended and Restated Design-Build Contract. This Section is intended to supplement (and not to limit) the Design-Builder's obligations under the Acceptance Standards and any other provisions of this Amended and Restated Design-Build Contract or Applicable Law.

SECTION 6.17. PROPERTY DAMAGE.

(A) Damage Prevention. In performing the Design-Build Work, the Design-Builder shall use care and diligence, and shall take all appropriate precautions in accordance with Good Engineering and Construction Practice, Applicable Law and the Insurance Requirements to protect the Design-Build Work from loss, damage or destruction.

(B) Restoration. In case of damage to the Design-Build Work, and regardless of the extent thereof or the estimated cost of restoration, and whether or not any insurance proceeds are sufficient or available for the purpose, the Design-Builder shall promptly undertake and complete restoration of the damage to the Design-Build Work to the character

and condition existing immediately prior to the damage and in accordance with the procedures set forth herein, as applicable, regarding Uncontrollable Circumstances, Change Orders and Unilateral Change Directives. The City shall have the right to monitor, review and inspect the performance of any repair, replacement and restoration work by the Design-Builder in accordance with this Article. If the Design-Builder fails to undertake restoration of the damage, or having so commenced fails to complete restoration in accordance with this Amended and Restated Design-Build Contract, the City may (but shall not be obligated to) undertake or complete restoration at the Design-Builder's expense to the extent applicable in accordance with this Section. The City shall provide the Design-Builder with seven days' advance written notice prior to exercising its right to undertake or complete restoration pursuant to this subsection. Notwithstanding any of the foregoing, to the extent that Uncontrollable Circumstances cause damage to the Design-Build Work and insurance proceeds or other third-party payments are not sufficiently available to pay for restoration work pursuant to this subsection, the Design-Builder's obligation to perform such restoration work shall be subject to the receipt of reasonable assurances from the City of its ability to pay the costs for which it is financially responsible under this Section.

(C) Notice and Reports. In addition to the notification requirements set forth in subsection 6.14(E) (Health and Safety Compliance Requirements), the Design-Builder shall notify the appropriate parties in compliance with the OCIP Manual included in Appendix 12 (Insurance Requirements) to this Contract. of any incident causing property damage to the Design-Build Work in excess of \$5,000 or of any OSHA recordable injury accident on the Headworks Facility Site related to the Design-Build Work, as promptly as reasonably possible after the Design-Builder learns of any such damage or accident. As soon as practicable after learning of any such incident or accident (but in no event later than 72 hours), the Design-Builder shall submit a written report to the City. Such report shall be updated on a weekly basis and upon culmination of all tests, analysis and reviews, a final report incorporating all of the tests, analysis and reviews and the findings thereof shall be submitted to the City. The Design-Builder shall also submit to the City copies of all accident and other reports filed with (or given to the Design-Builder by) any insurance company, adjuster, or Governmental Body or otherwise prepared or filed in connection with the damage or accident.

(D) Insurance and Other Third-Party Payments. To the extent that any repair, replacement or restoration costs incurred pursuant to this Section can be recovered from any insurer or from another third party, each party shall assist each other in exercising such rights as it may have to effectuate such recovery. Each party shall provide the other with copies of all relevant documentation, and shall cooperate with and assist the other party upon request by participating in conferences, negotiations and litigation regarding insurance claims; provided, however, that neither party shall be obligated pursuant to this subsection to provide the other party with documents subject to the attorney-client privilege under the laws of the State.

(E) Payment for Restoration Work and Uninsured Costs. All insurance proceeds and recoveries from third parties resulting from damage to or the loss or destruction of the Design-Build Work, including proceeds from all policies of Required Insurance, shall be for the benefit of the City. The City shall pay the Design-Builder for restoration work required pursuant to this Section with such proceeds and recoveries and, as necessary, other funds of the City obtained pursuant to the Change Order provisions of this Article and the payment provisions of Article 9 (Compensation for Design-Build Work), as applicable. All costs not covered by insurance proceeds or third-party payments shall constitute Design-Build Costs; provided, however, that such costs be Unallowable Costs to the extent the loss, damage or destruction was caused by Design-Builder Fault or to the extent insurance proceeds are not available due to a failure of the Design-Builder to obtain or maintain any applicable policy of Additional Insurance Required From Enrolled Parties and Excluded Parties, as set forth in Article 14 (Insurance) and Appendix 12 (Insurance Requirements) hereto.

(F) Repair of City and Private Property. The Design-Builder shall promptly repair or replace all City Property and all private property damaged by the Design-Builder or any officer, director, employee, representative, agent or Subcontractor of the Design-Builder in connection with the performance of, or the failure to perform, the Design-Build Work. The repair and replacement work shall restore the damaged property, to the maximum extent reasonably practicable, to its character and condition existing immediately prior to the damage. Nothing in this subsection is intended to waive any rights of recovery under applicable policies of insurance.

SECTION 6.18. OPERATIONS AND MAINTENANCE MANUAL.

The Design-Builder shall develop a comprehensive Operations and Maintenance Manual in accordance with the Contract Standards, including the specific requirements set forth in Appendix 5 (General Design-Build Work Requirements) and the Division 01 Specifications. The Operations and Maintenance Manual shall contain a detailed description of the means and methods of properly operating and maintaining the Headworks 3 Facility; shall integrate all equipment and systems Manufacturer’s Standard Factory O&M Manuals; shall document standard operating procedures and predictive, preventive and corrective maintenance procedures, practices and schedules; and shall otherwise be sufficiently detailed to permit the Headworks 3 Facility to be operated and maintained by the City operations and maintenance staff. The Design-Builder shall submit draft and final versions of the Operations and Maintenance Manual for the City’s review, comment and approval in accordance with Appendix 5 (General Design-Build Work Requirements). A draft Operations and Maintenance Manual meeting the specific requirements set forth in Appendix 5 (General Design-Build Work Requirements) and the Division 01 Specifications shall be submitted to and approved by the City as a condition precedent to the achievement of Testing Readiness in accordance with Section 6.19 (Testing Readiness). A final Operations and Maintenance Manual meeting the specific requirements set forth in Appendix 5 (General Design-Build Work Requirements) and the Division 01 Specifications shall be submitted to and approved by the City as a condition precedent to the achievement of Substantial Completion in accordance with Section 8.3 (Substantial Completion Date Conditions).

SECTION 6.19. TESTING READINESS.

(A) Testing Plans. The Design-Builder shall prepare and submit to the City for its approval a detailed Pre-Acceptance Testing Plan and Acceptance Test Plan in accordance with the requirements of Appendix 9 (Pre-Acceptance Testing and Acceptance Testing) and the Post-Acceptance Tests Plan in accordance with the requirements of Appendix 10 (Post-Acceptance Performance Tests). The schedule requirements for the submittal and review of each of the Testing Plans are set forth in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing) and Appendix 10 (Post-Acceptance Performance Tests). City approval of the Pre-Acceptance Testing Plan, however, is a condition precedent to certain testing required for the achievement of Testing Readiness in accordance with this Section, including Functional Testing. If the Design-Builder and the City are unable to agree upon any of the Testing Plans within a reasonable period following submittal (not to exceed 45 days), either party may elect to initiate dispute resolution procedures in accordance with Section 12.2 (Non-Binding Mediation).

(B) Conditions Precedent to Testing Readiness. “Testing Readiness” shall be deemed to have occurred only when all of the following conditions have been satisfied:

(1) Construction Complete. The Design-Builder has submitted and the City has approved in writing, such approval not to be unreasonably withheld or delayed, a certification by the Design-Builder that Construction of the Headworks 3 Facility is physically complete and all other Design-Build Work pertaining to the Headworks 3

Facility (and for clarification, not including Design-Build Work associated with the Existing Headworks Facility Improvements), excepting Pre-Acceptance Testing, Acceptance Testing, the Post-Acceptance Performance Tests and the items on the Punch List, is complete and in all respects is in compliance with this Amended and Restated Design-Build Contract;

(2) Testing Plans. The Design-Builder has submitted and the City has approved in writing, such approval not to be unreasonably withheld or delayed, each of the Testing Plans in accordance with subsection (A) (Testing Plans) of this Section;

(3) Functional Testing Complete. The Design-Builder has submitted and the City has approved in writing, such approval not to be unreasonably withheld or delayed, a certification by the Design-Builder, along with all required test reports, that Functional Testing has been completed in accordance with the Pre-Acceptance Testing Plan and the specific requirements set forth in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing);

(4) Pre-Conditions to Pre-Acceptance Testing Satisfied. The Design-Builder has completed all other obligations set forth in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing) with respect to the achievement of Testing Readiness, including all pre-conditions to the commencement of Pre-Acceptance Testing (other than Functional Testing);

(5) Punch List. The Design-Builder and the City have agreed in writing upon the Punch List (or, if they are unable to agree, the City shall have prepared and issued the Punch List to the Design-Builder within 30 days of the Design-Builder having submitted its proposed Punch List to the City);

(6) Equipment Manufacturer Certifications. The Design-Builder has delivered to the City written certification from the equipment manufacturers (including information technology systems and instrumentation and controls) that all major items of machinery and equipment included in the Headworks 3 Facility have been properly installed and tested in accordance with the manufacturers' recommendations and requirements;

(7) Training Plan. The Design-Builder has delivered to the City and the City has approved in writing, such approval not to be unreasonably withheld or delayed, the Training Plan;

(8) Training Complete. The Design-Builder shall have satisfied its training obligations with respect to the City operations and maintenance staff in accordance with the approved Training Plan and the specific requirements of Appendix 5 (General Design-Build Work Requirements);

(9) Draft Operations and Maintenance Manual. The Design-Builder has delivered to the City and the City has approved in writing, such approval not to be unreasonably withheld or delayed, the draft Operations and Maintenance Manual in accordance with the requirements set forth in Appendix 5 (General Design-Build Work Requirements);

(10) Spare Parts In Storage. All spare parts required by the applicable Technical Specifications have been delivered, are in storage at the Headworks Facility Site or other area designated by the City at the Design-Builder's cost (which would be a Design-Build Cost);

(11) Input into Asset Management Database. The Design-Builder shall have provided a complete list of all mechanical, electrical and instrumentation equipment incorporated into the Headworks 3 Facility and shall have submitted equipment data sheets in an electronic format compatible with the City’s asset management system in accordance with the requirements set forth in Appendix 4 (Technical Specifications);

(12) Governmental Approvals. The Design-Builder is authorized by all appropriate Governmental Bodies to commence Acceptance Testing under Applicable Law, and such authorization has not been withdrawn, revoked, suspended, superseded, or materially impaired or amended; and

(13) Certification. The Design-Builder has submitted written certification that all of the foregoing conditions have been satisfied and the City has approved the Design-Builder’s certification, which approval shall be effective as of the date of the Design-Builder’s certification.

The City shall have the right, in its discretion, to waive any of the foregoing conditions.

(C) Notice of Testing Readiness. The Design-Builder shall give the City at least 30 days’ prior written notice of the expected date of Testing Readiness.

SECTION 6.20. PUNCH LIST ITEMS.

(A) Punch List Requirements. The Design-Builder shall submit a proposed Punch List to the City and the Owner’s Advisor when the Design-Builder believes that the Design-Build Work for the Headworks 3 Facility, has been substantially completed in compliance with this Amended and Restated Design-Build Contract. The “Punch List” shall be a statement of repairs, corrections and adjustments to such Design-Build Work, and incomplete aspects of such Design-Build Work (excluding Pre-Acceptance Testing and Acceptance Test activities), which in the Design-Builder’s opinion:

(1) the Design-Builder can complete before the date specified in subsection (B) (Completion of Punch List Items) of this Section, and with minimal interference to the occupancy, use and lawful operation of the Headworks 3 Facility; and

(2) would represent, to perform or complete, a total cost of not more than 0.5% of the portion of the Guaranteed Maximum Price applicable to the Construction of the Headworks 3 Facility (unless the City determines that a higher percentage is acceptable, as evidenced by the written approval of the City Contract Representative).

In no event shall the Punch List contain any incomplete items necessary for Pre-Acceptance Testing or the performance of the Acceptance Test. The City shall have the right to approve the Punch List in its discretion.

(B) Completion of Punch List Items. The Design-Builder shall complete all items on the Punch List within 90 days following the Substantial Completion Date. The Design-Builder acknowledges the long-term nature of the Pre-Acceptance Testing and Acceptance Test activities required under this Amended and Restated Design-Build Contract and agrees that the City has a material interest in the completion of the items to be included on the Punch List by the date established in this subsection, notwithstanding the schedule requirements in this Amended and Restated Design-Build Contract concerning Substantial Completion, completion of Construction of the Existing Headworks Facility Improvements and Final Completion. The Design-Builder shall be required to provide corrective maintenance, while the City provides preventative maintenance, to maintain the Headworks 3 Facility

following the occurrence of Testing Readiness, including during Pre-Acceptance Testing and Acceptance Testing, and the Design-Builder shall be required to achieve Final Completion in accordance with Section 8.5(F) (Final Completion). All work associated with the Punch List items shall constitute Design-Build Work hereunder and shall be performed by the Design-Builder in accordance with the Contract Standards.

SECTION 6.21. EXISTING HEADWORKS FACILITY IMPROVEMENTS.

(A) Existing Headworks Facility Improvements. The Existing Headworks Facility Improvements are not integral to the operations of the Headworks 3 Facility and it is the expectation of the parties that the Construction work associated with the Existing Headworks Facility Improvements will occur subsequent to the Substantial Completion Date. Accordingly, the completion of the Existing Headworks Facility Improvements shall not be a precondition to Pre-Acceptance Testing, Acceptance Testing or Substantial Completion of the Headworks 3 Facility. Completion of the Existing Headworks Facility Improvements, however, shall be a precondition to the achievement of Final Completion under Section 8.7(A) (Requirements).

(B) Completion of Existing Headworks Facility Improvements. The Design-Builder shall complete Construction of the Existing Headworks Facility Improvements within 130 days following the Substantial Completion Date (the “Scheduled Existing Headworks Facility Improvements Completion Date”). Completion of Construction of the Existing Headworks Facility Improvements shall be deemed to have occurred only when the Design-Builder has submitted and the City has approved in writing in accordance with this subsection, a certification by the Design-Builder that Construction of the Existing Headworks Facility Improvements is physically complete and all other Design-Build Work pertaining to the Existing Headworks Facility Improvements is complete and in all respects is in compliance with this Amended and Restated Design-Build Contract. Within 10 Business Days of receipt of the certification of the Design-Builder described in the preceding sentence, the City shall inspect the Existing Headworks Facility Improvements and notify the Design-Builder, in writing: (1) confirming completion of the Existing Headworks Facility Improvements in compliance with this Amended and Restated Design-Build Contract; or (2) that the Existing Headworks Facility Improvements are not in compliance with this Amended and Restated Design-Build Contract, including the reasons therefore. In case of notification of noncompliance under clause (2) of the preceding sentence, the Design-Builder, shall remedy any shortcomings identified by the City, and the City shall re-inspect the Existing Headworks Facility Improvements pursuant to this subsection. Either party may elect to initiate dispute resolution procedures in accordance with Section 12.2 (Non-Binding Mediation) if a resolution cannot be reached. The date upon which Completion of Construction of the Existing Headworks Facility Improvements is deemed to have occurred in accordance with this subsection shall constitute the “Existing Headworks Facility Improvements Completion Date”.

(C) Delay Liquidated Damages. Subject to relief in accordance with the terms and conditions of this Amended and Restated Design-Build Contract in the event of Uncontrollable Circumstances, if the Existing Headworks Facility Improvements Completion Date has not been established in accordance with subsection (B) (Completion of Existing Headworks Facility Improvements) of this Section on or before the Scheduled Existing Headworks Facility Improvements Completion Date, the Design-Builder shall pay to the City delay liquidated damages in the amount of \$3,424 per day for each day that the Existing Headworks Facility Improvements Completion Date falls after the Scheduled Existing Headworks Facility Improvements Completion Date until any termination of this Amended and Restated Design-Build Contract for an Event of Default; except that, such liquidated damages shall not be payable on any day during which the Design-Builder is also subject to payment of delay liquidated damages pursuant to subsection 8.5(C) (Delay Liquidated Damages).

ARTICLE 7

MANAGEMENT, LABOR AND SUBCONTRACTORS

SECTION 7.1. MANAGEMENT.

(A) On-Site Construction Manager. The Design-Builder shall designate an employee of the Design-Builder, any Affiliate of the Design-Builder, or the General Contractor as the "On-Site Construction Manager". When the Design-Builder or any Subcontractor is performing Construction, the On-Site Construction Manager (or his designee if approved by the City) shall be present at the Headworks Facility Site.

(B) Design-Build Manager. The Design-Builder shall designate an employee of the Design-Builder or any Affiliate of the Design-Builder as the "Design-Build Manager". If the Design-Builder formally or informally replaces the Design-Build Manager absent the City's request and absent good cause shown (as defined in subsection (C) (City Rights With Respect to Key Personnel) of this Section) or unless otherwise approved by the City in writing, a deduction of \$150,000 shall be applied against the Design-Builder's next Payment Request. Any successor Design-Build Manager shall be subject to the approval of the City in its discretion. When the Design-Builder or any Subcontractor is performing Construction, the Design-Build Manager shall be at the Headworks Facility Site or available for video and/or telephonic communications with the City. The Design-Build Manager shall, among other things:

- (1) be familiar with the Contract Services and all requirements of this Amended and Restated Design-Build Contract;
- (2) coordinate the Contract Services and give the Contract Services regular and careful attention and supervision;
- (3) maintain a daily status log of the Design-Build Work when being performed; and
- (4) attend all Project meetings (including meetings concerning scope, review, pre-bid, pre-construction, and construction matters) with the City and its representatives.

The Design-Builder represents and warrants that the Design-Build Manager shall be vested with the authority to act on behalf of the Design-Builder in connection with the performance of the Contract Services and to bind the Design-Builder with respect to any certification required under this Amended and Restated Design-Build Contract to be made by the Design-Build Manager. If the Design-Builder is comprised of two or more persons functioning as a joint venture, the Design-Builder shall have the authority to represent and act for the joint venture. The Design-Build Manager may be a different individual for the Preliminary Services Period, the Design-Build Period and the Transition Period. The Design-Builder may change the person assigned as the Design-Build Manager solely in accordance with the provisions of subsection (C) (City Rights With Respect to Key Personnel) of this Section.

(C) City Rights With Respect to Key Personnel. The Design-Builder acknowledges that the identity of the Design-Build Manager and the other key management and supervisory personnel proposed by the Design-Builder and its Subcontractors in its Proposal was a material factor in the selection of the Design-Builder to perform this Amended and Restated Design-Build Contract. Such personnel, their affiliations and their anticipated roles in the performance of the Contract Services are set forth in Appendix 13 (Key Personnel and Approved Subcontractors). The Design-Builder shall utilize such personnel to perform

such services unless (i) such personnel are unavailable for good cause shown or (ii) the City has approved in writing the utilization of other personnel for such services. “Good cause shown” shall not include performing services on other projects for the Design-Builder or any of its Affiliates, but shall include termination for cause, employee death, disability, retirement or resignation. In the event of any such permissible unavailability, the Design-Builder shall utilize replacement key management and supervisory personnel of equivalent skill, experience and reputation. Any on-site personnel change shall be proposed to the City with reasonable advance notice for its review and approval, which shall not be unreasonably withheld or delayed. The Design-Builder shall remove or replace, or have removed or replaced, any personnel performing the Contract Services if the City, acting reasonably, determines that an unworkable relationship has developed between the City and the individual.

SECTION 7.2. LABOR.

(A) Personnel Performance. The Design-Builder shall enforce discipline and good order at all times among the Design-Builder’s employees and all Subcontractors. All persons engaged by the Design-Builder for performance of the Contract Services shall have requisite skills for the tasks assigned. The Design-Builder shall employ or engage and compensate engineers and other consultants to perform all engineering and other services required for the Contract Services. The Design-Builder shall ensure that all persons performing Contract Services, including all Subcontractors, comply with all registration, licensing and certification requirements imposed by any Governmental Body or otherwise under Applicable Law.

(B) Labor Relations. The Design-Builder shall furnish labor that can work in harmony with all other elements of labor employed for the performance of the Design-Build Work. The Design-Builder shall have exclusive responsibility for disputes or jurisdictional issues among unions or trade organizations representing employees of the Design-Builder or its Subcontractors, whether pertaining to organization of the Design-Build Work, arrangement or subdivision of the Technical Specifications, employee hiring, or any other matters. The City shall have no responsibility whatsoever for any such disputes or issues and the Design-Builder shall indemnify, defend and hold harmless the City and the City Indemnitees in accordance with and to the extent provided in Section 16.1 (Design-Builder’s Obligation to Indemnify) from and against all Loss-and-Expense resulting from any such labor dispute.

(C) Notice of Labor Disputes. If the Design-Builder has knowledge of an actual or potential labor dispute that may affect any of the Contract Services, the Design-Builder shall promptly:

- (1) Give notice thereof to the City, including all relevant information related to the dispute of which the Design-Builder has knowledge; and
- (2) Take all reasonable steps to ensure that such labor dispute does not affect the performance of any of the Contract Services including by applying for relief to appropriate forums or courts.

(D) Prevailing Wage Rate. The Design-Builder shall, and shall cause all Subcontractors to, pay not less than the prevailing wage rate for all types and classifications of any of the Design-Build Work specified in Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the California Labor Code or workers at the Headworks Facility Site in job classifications covered thereby, including all applicable shift, weekend, holiday, foreman, health and welfare, pension, vacation, travel, training, subsistence and other pay established for each classification of work. The Design-Builder shall cause a copy of the prevailing rates of wages to be posted at the Headworks Facility Site, shall keep and maintain payroll and other

relevant information in order to permit the City to monitor compliance with this requirement, and shall furnish certified copies of such payrolls and other information to the City or its designee upon request. The prevailing wage rates must be posted at the Headworks Facility Site. Failure to pay the prevailing wage rate is a material breach of this Amended and Restated Design-Build Contract.

(E) Non-Discrimination in Employment. During the performance of the Contract Services, the Design-Builder agrees as follows:

(1) The Design-Builder will not discriminate against any employee or applicant for employment because of race, religion, color, gender, sexual orientation or national origin, except where religion, gender, sexual orientation or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the Design-Builder, and the Design-Builder agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause;

(2) The Design-Builder, in all solicitations or advertisements for employees placed by or on behalf of the Design-Builder, will state that the Design-Builder is an equal opportunity employer;

(3) Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation, shall be deemed sufficient for the purpose of meeting the requirements of this provision; and

(4) The Design-Builder shall include the provisions of items (1), (2) and (3) above in every Subcontract of over \$10,000 so that the provisions will be binding upon every Subcontractor or vendor.

(F) Skilled Workforce Requirements. The Design-Builder shall comply with the requirements of Section 22164(c) of the California Public Contract Code obligating the Design-Builder to use a skilled workforce in performing the Design-Build Work, and shall report to the City monthly on actions taken to achieve such compliance.

(G) Drug-Free Workplace. During the performance of this Amended and Restated Design-Build Contract, the Design-Builder agrees to (1) provide a drug-free workplace for the Design-Builder's employees; (2) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the Design-Builder's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (3) state in all solicitations or advertisements for employees placed by or on behalf of the Design-Builder that the Design-Builder maintains a drug-free workplace; and (4) include the provisions of the foregoing clauses in every Subcontract of over \$10,000, so that the provisions will be binding upon each Subcontractor. For the purposes of this Section, "drug-free workplace" means a site for the performance of Contract Services performed in conjunction with this Amended and Restated Design-Build Contract. The Design-Builder's employees, in accordance with this Section, are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of this Amended and Restated Design-Build Contract. The Design-Builder shall adhere to and certify that its employees comply with this substance abuse program.

SECTION 7.3. SUBCONTRACTING GENERALLY.

(A) Right to Subcontract. The Design-Builder may carry out the Design-Build Work and other Contract Services by contracting such obligations to one or more Subcontractors in accordance with the requirements of this Article. The Design-Builder shall retain full responsibility to the City under this Amended and Restated Design-Build Contract for all matters related to the Contract Services, notwithstanding the execution of, or the terms and conditions contained in, any Subcontract. Subcontracts entered into by the Design-Builder for the performance of the Contract Services shall neither supersede nor abrogate any of the terms or provisions of this Amended and Restated Design-Build Contract.

(B) Performance Failure. No failure of any Subcontractor used by the Design-Builder in connection with the provision of the Contract Services shall constitute an Uncontrollable Circumstance or otherwise relieve the Design-Builder from its obligations hereunder to perform the Contract Services, except as provided in items (k) and (l) of the list of “Inclusions” in the definition of Uncontrollable Circumstances. The Design-Builder shall be responsible for settling and resolving with all Subcontractors all claims (1) arising out of delay, disruption, interference, hindrance, schedule extension caused by the Design-Builder, (2) arising from the actions or inactions of the Design-Builder or a Subcontractor, or (3) inflicted on the Design-Builder or a Subcontractor by the actions of another Subcontractor.

(C) Restricted Persons. In providing the Contract Services, the Design-Builder shall not contract with, or allow any of its Subcontractors to contract with, any person that, in the reasonable opinion of the City, is a Restricted Person.

(D) Subcontractor Licensing. All trade Subcontractors shall possess a valid contractor license as required by Applicable Law for the classification required for the work to be performed by the Subcontractor at the time of the Subcontract and throughout the duration of the Subcontract. Subsection 6.6(E) (Licensing Requirements) shall be applicable to all Subcontractors performing design services.

(E) Availability of Material Subcontractors and Key Personnel. At the request of the City, the Design-Builder shall make the key representatives of Material Subcontractors available for meetings between the City and the Design-Builder concerning design review, construction progress, Pre-Acceptance Testing, Acceptance Testing or any other matter relating to the performance of the Design-Build Work.

(F) Indemnity for Subcontractor Claims. The Design-Builder shall pay or cause to be paid to all Subcontractors all amounts due in accordance with their respective Subcontracts and the requirements of this Article. No Subcontractor shall have any right or claim against the City for labor, services, materials or equipment furnished for the Contract Services. The Design-Builder acknowledges that its indemnity obligations under Article 16 (Indemnification) shall extend to all claims for payment or damages by any Subcontractor who furnishes or claims to have furnished any labor, services, materials or equipment in connection with the Design-Build Work.

(G) Assignability. All Subcontracts entered into by the Design-Builder with respect to the Project shall be assignable to the City, solely at the City’s election and without cost or penalty, upon any termination of this Amended and Restated Design-Build Contract, including convenience termination under Section 13.6 (City Convenience Termination Rights).

SECTION 7.4. SELF-PERFORMANCE AND SUBCONTRACTOR SELECTION.

(A) Self-Performed Construction Work Generally. Construction work on the Project shall not be performed by the Design-Builder or its Affiliates, except with the approval of the City given in its discretion pursuant to subsection (G) (Alternative Procedures for Construction Work) of this Section.

(B) Subcontractor Selection Generally. Subcontractors shall be selected on a competitive basis, unless the City approves otherwise in accordance with subsection (G) (Alternative Procedures for Construction Work) of this Section. Upon the request of the City, any Subcontract awarded for the performance of Construction work shall be subject to the City's review.

(C) Subcontracting Plan. The Design-Builder shall comply with the Subcontracting Plan set forth as Attachment 13B (Subcontracting Plan) to Appendix 13 (Key Personnel and Approved Subcontractors).

(D) Division of Work. The Design-Builder shall coordinate and develop with the City Contract Representative bid packages and work scope descriptions for each separate bid category that represents the entirety of the scope of the Design-Build Work for each phase and stage of the Project. The Design-Builder shall be responsible for determining the Technical Specifications that are applicable to each Subcontractor performing Design-Build Work, including all trade Subcontractors and Suppliers. The Design-Builder shall be responsible for the assembly, reproduction and distribution of all documents defining the scope of work for each Subcontractor.

(E) Pre-Bid Conferences. The Design-Builder shall schedule and conduct pre-bid or pre-proposed conferences with trade Subcontractors and Suppliers for the purpose of generating interest in the Project among potential Subcontractors. The Design-Builder shall coordinate such pre-bid conferences with the City Representative and shall record and preserve conference minutes.

(F) Competitive Procedures for Construction Work. Except as may otherwise be approved in writing by the City Contract Representative in accordance with subsection (G) (Alternative Procedures for Construction Work) of this Section, the Design-Builder shall enter into Subcontracts for the performance of all Construction work and, in connection therewith, shall utilize a competitive bidding or competitive proposal process approved by the City in its discretion. In connection with any such procurement, the Design-Builder shall, in accordance with the Contract Standards:

- (1) develop procurement procedures in consultation with the City Contract Representative and prepare all necessary procurement documents;
- (2) publicly advertise and receive bids or proposals;
- (3) unless waived by the City, require bid forms with sufficient detail, line-item bids or proposals based on unit pricing for Construction work to be performed pursuant to a Material Subcontract;
- (4) open and review all bids or proposals in a manner that does not disclose the contents of the bids or proposals to persons not employed by the Design-Builder, the City or Owner's Advisor;

(5) evaluate the bids or proposals in accordance with the selection criteria established in the procurement documents; and

(6) recommend a bid or proposal for approval by the City Contract Representative in accordance with such evaluation.

Any Subcontract awarded for the performance of Construction work shall be subject to the City's approval and shall have terms and conditions and a risk allocation substantially identical to that established by this Amended and Restated Design-Build Contract. The City Contract Representative's approval of a bid or proposal recommended by the Design-Builder in accordance with this Section shall not be unreasonably withheld.

(G) Alternative Procedures for Construction Work. The Design-Builder may propose to the City Contract Representative alternative procedures for the procurement of Construction work, including performance of Construction work by labor forces of the Design-Builder, any Affiliate of the Design-Builder or by an Approved Subcontractor. The City Contract Representative's approval of any such alternative procedure shall be in the City Contract Representative's discretion. The Design-Builder recognizes that, if the Design-Builder wishes to perform Construction work with its own labor forces or the labor forces of an Affiliate or an Approved Subcontractor, the City Contract Representative may, but is not obligated to, require that the Design-Builder, Affiliate of the Design-Builder or Approved Subcontractor submit a bid or proposal for the work on a competitive basis, as contemplated by subsection (F) (Competitive Procedures for Construction Work) of this Section. If the Design-Builder or any Affiliate of the Design-Builder intends to submit a competitive bid or proposal for construction work, the Design-Builder shall notify the City Contract Representative in writing prior to the issuance of procurement documents for the work, and the City Contract Representative shall have the right to require the submittal of all bids or proposals directly to the City (and not to the Design-Builder) for review, evaluation and selection. Any decision by the City Contract Representative to approve the performance of construction work without obtaining competitive bids or proposals shall be:

(1) subject to an "open book" process to provide the City Contract Representative with sufficient information to determine whether the proposed pricing of the work is fair, reasonable and consistent with industry standards for similar services; and

(2) supported by a written determination by the City Contract Representative that the proposed pricing is fair, reasonable and consistent with industry standards for similar services.

(H) Procurement of Subcontractors Prior to the Amended and Restated Design-Build Contract Date. The Design-Builder, during the Preliminary Services Period, in the development of the proposed Base Guaranteed Maximum Price submitted to the City in the Definitive Project Submittal was permitted to: (1) conduct discussions with and obtain indicative pricing information from potential Construction Subcontractors; and (2) initiate, subject to the approval of the City given in its discretion, the formal procurement process for selecting Construction Subcontractors. Any such formal procurement process was required to be conducted in accordance with the requirements of this Section. No Subcontract resulting from such procurement process was executed prior to the Amended and Restated Design-Build Contract Date.

(I) Inapplicability of Construction Subcontractor Non-Substitution Requirements. The Design-Builder acknowledges that no Construction Subcontractors were proposed as part of the Proposal to which, by operation of Section 22166(a) of the California

Public Contract Code, the anti-substitution requirements set forth in Chapter 4 (commencing with Section 4100) of Part 1 of Division 2 of the California Public Contract Code (the “Subletting and Subcontracting Fair Practices Act”) would apply.

(J) General Contractor. The parties acknowledge and agree that: (1) in its Proposal the Design-Builder proposed the use of the General Contractor for the performance of a portion of the Design-Build Work, as such portion is described in the Subcontracting Plan (the “General Contractor Work”); (2) as a general contractor, the General Contractor is not entitled to the protections of the Subletting and Subcontracting Fair Practices Act; (3) the Design-Builder has, as part of the Definitive Project Submittal, proposed that the General Contractor Work be performed by the General Contractor pursuant to a Subcontract negotiated between the Design-Builder and the General Contractor and approved by the City, without the requirement that such work be procured through competitive procedures as otherwise required by this Section or the Applicable Law with respect to Construction Subcontracts; and (4) the City has consented to allow the Design-Builder to contract with the General Contractor for the performance of the General Contractor Work in such manner.

(K) Systems Integration Subcontractor. In subcontracting for systems integration services, the Design-Builder shall enter into the Required Subcontract with the pre-qualified systems integration firm designated by the City as a Required Subcontractor. Systems integration work shall be performed by such third party Required Subcontractor, unless the City agrees, in its discretion, to have such work performed by the Design-Builder or another Subcontractor.

(L) Required Subcontractor. The Design-Builder acknowledges that it is responsible for the performance of the Required Subcontractor, in accordance with the terms and conditions of this Amended and Restated Design-Build Contract, notwithstanding the fact that the City required the Design-Builder to enter into a Subcontract with the Required Subcontractor for the performance of certain aspects of the Design-Build Work. The Design-Builder represents and warrants that it entered into this Amended and Restated Design-Build Contract with the full understanding that the Design-Builder would be required to assume responsibility for the performance of the Required Subcontractor in accordance with this Amended and Restated Design-Build Contract, having performed all necessary due diligence with respect to the Required Subcontractor.

(M) Security for Construction Subcontractor Performance. Security for the performance of Subcontractors under Construction Subcontracts shall be provided in a manner agreed to by the parties, and the costs thereof shall constitute Design-Build Costs. Such security may include Subcontractor Default Insurance.

SECTION 7.5. TERMINATION, AMENDMENT, ASSIGNMENT AND REPLACEMENT OF MATERIAL SUBCONTRACTS.

(A) Termination, Amendment and Assignment. Unless the Design-Builder has, at its earliest practicable opportunity, submitted to the City notice of the proposed course of action (and any relevant documentation) and the City has consented in writing to such course of action, such consent not to be unreasonably withheld or delayed, the Design-Builder shall not:

- (1) Terminate, or agree to, or permit the termination of, any Material Subcontract;

(2) Make, or agree to, or permit the making of (a) any material amendment of any Material Subcontract; or (b) any departure by any party from any material provision of any Material Subcontract; or

(3) Permit any Material Subcontract party to assign or transfer to any person any of such Material Subcontract party's rights or obligations under a Material Subcontract.

(B) Replacement. Without limiting anything set forth in Section 7.4 (Self-Performance and Subcontractor Selection), if any Material Subcontract at any time lapses, terminates, or otherwise ceases to be in full force and effect (whether by reason of expiration or otherwise), unless the goods, services or rights which were the subject matter of such Material Subcontract are no longer reasonably required for the Project, the Design-Builder will forthwith enter into, or cause to be entered into, a replacement contract or contracts upon the same or substantially similar terms as the contract so replaced (to the extent reasonably practicable). If at any time any amendment is made to any Material Subcontract, or a replacement Material Subcontract (or any agreement which materially affects the interpretation or application of any Material Subcontract) is entered into, the Design-Builder shall deliver to the City a copy of each such amendment or agreement within 10 Business Days of the date of its execution or creation, certified as a true copy by an officer of the Design-Builder.

ARTICLE 8

TESTING, SUBSTANTIAL COMPLETION AND FINAL COMPLETION

SECTION 8.1. PRE-ACCEPTANCE TESTING.

(A) Commencement of Pre-Acceptance Testing. The Design-Builder may commence Pre-Acceptance Testing on elements of the Headworks 3 Facility at its election at any time, whether prior to or subsequent to the achievement of Testing Readiness; provided, however, that, prior to the commencement of Pre-Acceptance Testing, the Design-Builder shall: (1) have obtained City approval of the Pre-Acceptance Testing Plan in accordance with subsection 6.19(A) (Testing Plans); (2) have satisfied all preconditions to the commencement of Pre-Acceptance Testing set forth in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing); and (3) be authorized by all appropriate Governmental Bodies to commence Pre-Acceptance Testing under Applicable Law. The Design-Builder shall give the City at least 14 days' prior written notice of the expected date of commencement of Pre-Acceptance Testing, which notice shall include a certification of compliance with this subsection.

(B) Performance of Pre-Acceptance Testing. During Pre-Acceptance Testing and until the introduction of wastewater to the Headworks 3 Facility, the Design-Builder shall be responsible for operating and maintaining the Headworks 3 Facility and training the City operations and maintenance staff in accordance with the Training Plan. The Design-Builder shall perform all Pre-Acceptance Testing activities in accordance with the Contract Standards, including the Pre-Acceptance Testing Plan and all requirements set forth in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing).

(C) Maintenance of Operations During Construction. The Design-Builder shall be responsible for sequencing, staging and performing Pre-Acceptance Testing and the Acceptance Test in a manner that enables the City to continue to operate the Regional Wastewater Facility (including the Existing Headworks Facility) during Construction of the Project. Specific requirements and constraints associated with the City's continued operation of the Existing Headworks Facility are set forth in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing). The Design-Builder shall comply with the approved Maintenance of Operations During Construction Plan in the performance of all Pre-Acceptance Testing and Acceptance Test activities.

(D) Training of City Employees. The Design-Builder shall prepare and submit the Training Plan to the City for its review and approval. The City's approval of the Training Plan shall be a condition precedent to the achievement of Testing Readiness. During Pre-Acceptance Testing, the Design-Builder shall train designated City employees in accordance with the Contract Standards, including the approved Training Plan, in order to enable such City employees to assume operation and maintenance responsibility for the Headworks 3 Facility in accordance with paragraph (E) below upon introduction of wastewater flow to the Headworks 3 Facility.

(E) City Operations during Pre-Acceptance Testing. The parties acknowledge that there is a period of time that the Headworks 3 Facility will be operated with wastewater prior to initiation of the Acceptance Test. The City will perform operations and routine maintenance at any time that wastewater is flowing through the Headworks 3 Facility. The Design-Builder will perform all other maintenance as necessary. The Design-Builder shall provide oversight and general guidance direction to such City operations and maintenance staff in the operation and maintenance of the Headworks 3 Facility during such period.

SECTION 8.2. ACCEPTANCE TESTING.

(A) Submittal of Acceptance Test Plan. The Design-Builder shall submit the Acceptance Test Plan to the City and the Owner’s Advisor pertaining to each system or subsystem of the Headworks 3 Facility in accordance with Appendix 9 (Pre-Acceptance Testing and Acceptance Testing). In no event may the Design-Builder commence with the performance of the Acceptance Test prior to City approval of the Acceptance Test Plan. If the Design-Builder and the City are unable to agree upon an Acceptance Test Plan within 45 days following submission, either party may elect to initiate dispute resolution procedures in accordance with Section 12.2 (Non-Binding Mediation).

(B) Notice of Commencement of the Acceptance Test. The Design-Builder shall provide the City with at least 28 days’ prior written notice of the expected initiation of any portion of Acceptance Testing in accordance with the requirements of Appendix 9 (Pre-Acceptance Testing and Acceptance Testing). At least seven days prior to the actual commencement of the Acceptance Test, the Design-Builder shall certify in writing that it is ready to begin the Acceptance Test in accordance with the requirements of this Section and the applicable Acceptance Test requirements and Appendix 9 (Pre-Acceptance Testing and Acceptance Testing). Subject to satisfaction of the conditions specified in subsection (C) (Conditions to Commencement of the Acceptance Test) of this Section, the Acceptance Test shall commence on the date proposed by the Design-Builder as set forth in this subsection unless the City, by written notice to the Design-Builder delivered not later than three days prior to such date, determines, in its discretion, to delay the Acceptance Test notwithstanding the satisfaction of the conditions specified in subsection (C) (Conditions to Commencement of the Acceptance Test) of this Section, until the City delivers a subsequent written notice to the Design-Builder informing the Design-Builder that the Acceptance Test may proceed. In the event the City determines to delay the commencement of the Acceptance Test notwithstanding the satisfaction of the conditions specified in subsection (C) (Conditions to Commencement of the Acceptance Test) of this Section: (1) the Scheduled Substantial Completion Date shall be extended by the number of days between the date initially proposed by the Design-Builder as the commencement of the Acceptance Test and the date designated by the City for commencement of the Acceptance Date; and (2) the Design-Builder shall be entitled to a Base Guaranteed Maximum Price Adjustment in accordance with and subject to the limitations set forth in Appendix 8 (Design-Build Price). In no event shall the Acceptance Test commence prior to the satisfaction by the Design-Builder of the conditions specified in subsection (C) (Conditions to Commencement of the Acceptance Test) of this Section.

(C) Conditions to Commencement of the Acceptance Test. The Design-Builder shall not commence the Acceptance Test until the following events have occurred:

(1) The requirements of subsections (A) (Submittal of Acceptance Test Plan) and (B) (Notice of Commencement of the Acceptance Test) of this Section have been met and the City has approved the Acceptance Test Plan and the applicable system and subsystem tests in the Acceptance Test Plan, as required by Appendix 9 (Pre-Acceptance Testing and Acceptance Testing);

(2) Testing Readiness has occurred;

(3) The Design-Builder has completed Pre-Acceptance Testing of the applicable components of the Headworks 3 Facility in accordance with Appendix 9 (Pre-Acceptance Testing and Acceptance Testing);

(4) The Design-Builder is authorized by all appropriate Governmental Bodies to perform the procedures necessary to achieve Substantial Completion and to conduct

the Acceptance Tests under Applicable Law, and such authorization has not been withdrawn, revoked, suspended, superseded, or materially impaired or amended; and

(5) The Design-Builder has certified that it has complied with all pre-Acceptance Test requirements included in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing).

(D) Conduct of the Acceptance Test. Except as otherwise provided in this subsection, in accordance with the Acceptance Test Plan and Appendix 9 (Pre-Acceptance Testing and Acceptance Testing), City operations and routine maintenance staff will be responsible for the operation and maintenance of the Headworks 3 Facility commencing with the receipt of wastewater at the Headworks 3 Facility and including during Acceptance Testing and the Design-Builder, until successful completion of the Acceptance Tests, shall perform maintenance other than routine maintenance and shall provide oversight and general guidance direction to such City operations and maintenance staff in the operation and maintenance of the Headworks 3 Facility and the conduct of the Acceptance Test during such period. Specifically, during the day shift (7:00 am – 4:00 pm Monday through Friday), the Design-Builder shall be present during the testing and shall direct, instruct and supervise City personnel when immediately present for that given task and when requested by the City. The Design-Builder is not expected to be present during the night shift and prior to leaving the test, shall instruct City personnel regarding expected operation and maintenance activities during the night shift and weekends. The Design-Builder shall be on call to provide guidance to the City during the night shift and weekends. The Owner's Advisors, the City Technical Representatives and any other designated representatives of the City may inspect the preparations for the Acceptance Test and be present for the conduct of the Acceptance Test for purposes of ensuring compliance with the Acceptance Test Plan and the integrity of the Acceptance Test results. Upon any failure of the Acceptance Test where wastewater flow to the Headworks 3 Facility is stopped, the Design-Builder shall re-assume responsibility for operations and maintenance of the Headworks 3 Facility until wastewater is rerouted to the Headworks 3 Facility and/or any repetition of the Acceptance Test is initiated in accordance with Section 8.4(B) (Substantial Completion Date Disagreement), unless otherwise agreed to by the parties, in writing. Repetition of the Acceptance Test shall be initiated in accordance with Section 8.4(B) (Substantial Completion Date Disagreement), unless otherwise agreed to by the parties in writing.

(E) Relief from Acceptance Standards During Acceptance Test. The Design-Builder shall be provided relief from the requirement that the Headworks 3 Facility meet the Acceptance Standards, including the Performance Guarantees, during the Acceptance Test, based upon the occurrence of an Uncontrollable Circumstance, in the event any failure to meet any Acceptance Standards is due to: (1) the failure of City operations and maintenance staff to operate and perform routine maintenance of the Headworks 3 Facility in accordance with the instructions or general oversight direction (as applicable) of the Design-Builder during the Acceptance Test; or (2) the City's negligence or willful misconduct; provided, however, that the Design-Builder shall not be provided relief to the extent that any such City failure to properly operate or maintain the Headworks 3 Facility is attributable to any errors or defects in the Acceptance Test Plan, the Operation and Maintenance Manual or the direction, instruction or supervision (as applicable) of the Design-Builder.

(F) Acceptance Test Report. Within 45 days following completion of the Acceptance Test, the Design-Builder shall furnish the City and the Owner's Advisor with an Acceptance Test report, in digital format, consistent with the requirements specified in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing), certified as true, complete and correct by the Design-Build Manager and the Engineer-of-Record. The Acceptance Test report shall describe and certify: (1) each system and subsystem test conducted; (2) the results of the

Acceptance Test; (3) the extent to which the results met or exceeded the Acceptance Standards relating thereto; and (4) the level of satisfaction of all Substantial Completion Date Conditions set forth in Section 8.3 (Substantial Completion Date Conditions). The Acceptance Test report shall include copies of the original data sheets, log sheets and all calculations used to determine performance during the Acceptance Test, and copies of laboratory reports conducted in conjunction with the Acceptance Test, including all laboratory sampling and test results. No failure of the Design-Builder to furnish the certified Acceptance Test report within the 45-day period following the conclusion of the Acceptance Test shall operate to adjust the Scheduled Substantial Completion Date or extend the Extension Period.

SECTION 8.3. SUBSTANTIAL COMPLETION DATE CONDITIONS.

The following conditions shall constitute the “Substantial Completion Date Conditions”, each of which must be satisfied in all material respects by the Design-Builder in order for the Substantial Completion Date to occur, and each of which must be and remain satisfied as of the Substantial Completion Date:

(1) Achievement of Acceptance Standards. The Design-Builder shall have completed the Acceptance Test and such test shall have demonstrated that the Headworks 3 Facility has met the full Acceptance Standards or the Minimum Acceptance Standards pursuant to subsection 8.5(D) (Option to Establish Substantial Completion of a Reduced Acceptance Standard), as certified by the Design-Builder pursuant to subsection 8.2(F) (Acceptance Test Report) and agreed to by the City pursuant to subsection 8.4(A) (Substantial Completion Date Concurrence);

(2) Governmental Approvals. All Governmental Approvals required under Applicable Law and this Amended and Restated Design-Build Contract to be obtained by the Design-Builder which are necessary for the continued routine operation of the Headworks 3 Facility shall be in full force and effect and certified copies of all such Governmental Approvals shall have been delivered to the City;

(3) Equipment Warranties and Manuals. The Design-Builder shall be in possession of, and shall have delivered to the City, copies of the warranties of machinery, equipment and fixtures constituting a part of the Headworks Facility, together with copies of all related operating manuals supplied by the equipment supplier;

(4) Final Operations and Maintenance Manual. The Design-Builder shall have delivered to the City the final Operations and Maintenance Manual in accordance with Section 6.18 (Operations and Maintenance Manual) and Appendix 5 (General Design-Build Work Requirements);

(5) Draft Record Drawings. The Design-Builder shall have delivered to the City a draft set of “as-built” construction record drawings, as required by Appendix 7 (Design-Build Work Review Procedures); and

(6) No Default. The Design-Builder shall have certified that there is no Event of Default by the Design-Builder existing under this Amended and Restated Design-Build Contract, or event which with the giving of notice or the passage of time would constitute an Event of Default by the Design-Builder hereunder.

SECTION 8.4. CONCURRENCE OR DISAGREEMENT WITH TEST RESULTS.

(A) Substantial Completion Date Concurrence. The Substantial Completion Date shall be the day on which the Substantial Completion Date Conditions have been achieved, as determined in accordance with this Section. If the Design-Builder certifies in its written report delivered pursuant to subsection 8.2(F) (Acceptance Test Report) that the Substantial Completion Date Conditions have been achieved, the City shall determine, within 30 days following its receipt of such report, whether it concurs in such certification. If the City states in writing that it concurs with the Design-Builder's certification, the Headworks 3 Facility shall be deemed to have achieved Substantial Completion and the Substantial Completion Date shall be deemed to have been established on the date of the Design-Builder's original certification.

(B) Substantial Completion Date Disagreement. If the City determines at any time during such 30-day review period that it does not concur with the Design-Builder's certification of Substantial Completion, the City shall immediately send written notice to the Design-Builder of the basis for its disagreement. In the event of any such non-concurrence by the City, either party may elect to initiate dispute resolution procedures in accordance with Section 12.2 (Non-Binding Mediation). Substantial Completion shall not be deemed to have been achieved unless the Acceptance Test, conducted in a unified and continuous manner as provided in the Acceptance Test Plan and in Appendix 9 (Pre-Acceptance Testing and Acceptance Testing), demonstrates that all of the Acceptance Standards have been met, including the Performance Guarantees, except to the extent provided in subsection 8.2(E) (Relief from Acceptance Standards During Acceptance Test). In the event the Design-Builder, in conducting the Acceptance Test, does not successfully meet the Acceptance Standards, the Design-Builder shall, at its sole cost and expense, take all action necessary (including making all capital investments, improvements or modifications, repairs and replacements and operating and management practices changes) in order for the Headworks 3 Facility to comply with the Acceptance Standards and shall re-test the Headworks 3 Facility in accordance with Appendix 9 (Pre-Acceptance Testing and Acceptance Testing). The Design-Builder shall provide the City with at least three days' written notice of any repetition of the Acceptance Test. Any capital investment, improvement or modification required to be made pursuant to this subsection and reasonably expected to result in a change to the Technical Specifications, shall be subject to the City's rights under Section 6.7 (Changes to the Technical Specifications at Design-Builder Request).

SECTION 8.5. EFFECT OF UNEXCUSED DELAY; EXTENSION PERIOD.

(A) Schedule for Completing the Design-Build Work. The Design-Builder shall achieve Substantial Completion by the Scheduled Substantial Completion Date, as such date may be extended in accordance with this Section. In the event one or more delays in the Design-Build Work caused by an Uncontrollable Circumstance or a Change Order, occurring during the Design-Build Period, the Scheduled Substantial Completion Date shall be the date determined by adding to the Scheduled Substantial Completion Date the aggregate number of days of delay in the performance of the Design-Build Work by the Design-Builder caused by such occurrence.

(B) Unexcused Delay. It is agreed that time is of the essence in the performance of the Design-Build Work. If Substantial Completion has not occurred on or before the Scheduled Substantial Completion Date, the Design-Builder shall be entitled to conduct or repeat the Acceptance Test as often as it desires in order to secure Substantial Completion of the Headworks 3 Facility during the Extension Period in accordance with Appendix 9 (Pre-Acceptance Testing and Acceptance Testing), subject to the City's right to terminate this Amended and Restated Design-Build Contract in accordance with subsection (F)

(Failure to Achieve Substantial Completion by End of Extension Period) of this Section. During the Extension Period, the Design-Builder shall pay delay liquidated damages, as and to the extent provided in subsection (C) (Delay Liquidated Damages) of this Section.

(C) Delay Liquidated Damages. Subject to relief in accordance with the terms and conditions of this Amended and Restated Design-Build Contract in the event of Uncontrollable Circumstances, if the Substantial Completion Date occurs subsequent to the Scheduled Substantial Completion Date, the Design-Builder shall pay to the City delay liquidated damages in the amount of 3,800 per day for each day that the Substantial Completion Date falls after the Scheduled Substantial Completion Date, up to the end of the Extension Period and thereafter until any termination of this Amended and Restated Design-Build Contract for an Event of Default.

(D) Option to Establish Substantial Completion Date at a Reduced Acceptance Standard. The Design-Builder shall have the option to establish the Substantial Completion Date notwithstanding the failure of the Headworks 3 Facility to meet the full Acceptance Standard if, at any time during the Extension Period, (1) the Design-Builder, in accordance with the procedures set forth in Section 8.4 (Concurrence or Disagreement with Test Results) hereof, certifies and calls for concurrence by the City that the Acceptance Tests have demonstrated that the Headworks 3 Facility meets or exceeds the Minimum Acceptance Standard, and the City concurs with such certification, (2) all other conditions for Substantial Completion set forth in Section 8.3 (Substantial Completion Date Conditions) have been achieved and (3) the Design-Builder pays the City the damages amount calculated pursuant to subsection (E) (Performance Liquidated Damages) of this Section.

(E) Performance Liquidated Damages. To the extent that Substantial Completion was demonstrated only at a reduced Acceptance Standard, the Design-Builder shall pay the City damages in an amount calculated in accordance with Attachment 9C (Performance Liquidated Damages) to Appendix 9 (Pre-Acceptance Testing and Acceptance Testing) and such payment shall be a condition to Substantial Completion.

(F) Failure to Achieve Substantial Completion by End of Extension Period. If, as of the last day of the Extension Period, the Design-Builder has not achieved Substantial Completion at or above the Minimum Acceptance Standard in accordance with this Article, an Event of Default by the Design-Builder shall be deemed to have occurred under Section 13.2 (Events of Default by the Design-Builder), notwithstanding any absence of notice, further cure opportunity or other procedural rights accorded the Design-Builder thereunder, and the City shall thereupon have the right to terminate this Amended and Restated Design-Build Contract upon written notice to the Design-Builder. Upon any such termination, the City shall have all of the rights provided in Article 13 (Breach, Default, Remedies and Termination) upon a termination of this Amended and Restated Design-Build Contract for cause.

SECTION 8.6. POST-ACCEPTANCE PERFORMANCE TESTS.

(A) Post-Acceptance Performance Tests Plan. The Design-Builder will prepare and submit to the City a Post-Acceptance Performance Tests Plan as provided in subsection 6.19(A)) (Testing Plans) and Appendix 10 (Post-Acceptance Performance Tests). The City shall indicate to the Design-Builder whether the proposed plan is acceptable in terms of testing procedures and dates for completion, and if not acceptable, what changes the City requires. The Design-Builder shall revise its plan to meet City requirements. The Design-Builder shall perform the obligations set forth in the Post-Acceptance Performance Tests Plan and Appendix 10 (Post-Acceptance Performance Tests), including the provision of direction and oversight to City operations and maintenance staff during performance of the Post-Acceptance Performance Tests.

(B) Conduct of the Post-Acceptance Performance Tests. The Design-Builder shall perform all of its obligations set forth in the Post-Acceptance Performance Tests Plan and Appendix 10 (Post-Acceptance Performance Tests) during performance of the Post-Acceptance Performance Tests. In accordance with the Post-Acceptance Performance Tests Plan and Appendix 10 (Post-Acceptance Performance Tests), City operations and maintenance staff will be responsible for the operation and maintenance of the Headworks 3 Facility during the Post-Acceptance Performance Tests and the Design-Builder shall provide oversight as described in subsection 8.2(E) to such City operations and maintenance staff in the operation and maintenance of the Headworks 3 Facility and the conduct of the Post-Acceptance Performance Tests. The Design-Builder shall permit the Owner’s Advisors, the City Technical Representatives and any other designated representatives of the City to inspect the preparations for the Post-Acceptance Performance Tests and to be present for the conduct of the Post-Acceptance Performance Tests for purposes of ensuring compliance with the Post-Acceptance Performance Tests Plan and the integrity of the Post-Acceptance Performance Tests results. Completion of the Post-Acceptance Performance Tests shall be a precondition to the achievement of Final Completion under Section 8.7(A) (Requirements).

(C) Compensation for Post-Acceptance Performance Test. The costs incurred by the Design-Builder for the performance of the Post-Acceptance Performance Tests are Design-Build Costs, and are subject to the Guaranteed Maximum Price.

SECTION 8.7. FINAL COMPLETION.

(A) Requirements. The Design-Builder shall achieve Final Completion of the Project within 130 days following the Substantial Completion Date. “Final Completion” shall be deemed to have occurred when all of the following conditions have been satisfied:

(1) Substantial Completion Achieved. The Design-Builder has achieved Substantial Completion of the Headworks 3 Facility in accordance with this Article, including full compliance with the Performance Guarantees;

(2) Design-Build Work Completed. All Design-Build Work for the Project (including all work associated with the Existing Headworks Facility Improvements, all repairs identified during or required due to the performance of Pre-Acceptance Testing, Acceptance Testing and the Post-Acceptance Performance Tests, all items on the Punch Lists and all clean up and removal of construction materials, demolition debris and temporary facilities) is complete and in all respects is in compliance with this Amended and Restated Design-Build Contract;

(3) Design-Build Work Deliverable Material. The Design-Builder shall have delivered to the City all Design-Build Work Deliverable Material required by Section 6.10 (Design-Build Work Deliverable Material);

(4) Final Record Drawings. The Design-Builder shall have delivered to the City a final and complete reproducible set of “as-built” construction record drawings, as required by Appendix 7 (Design-Build Work Review Procedures);

(5) Consent of Surety. The Surety has consented to the release of final payment to the Design-Builder as provided in subsection 9.4(A) (Final Completion Payment Request);

(6) Payment of Claims. The Design-Builder has certified to the City that all of its claims against the City have been paid as provided in subsection 9.4(A) (Final Completion Payment Request); and

(7) Certification. The Design-Builder has submitted written certification that all of the foregoing conditions have been satisfied and the City has approved the Design-Builder's certification, which approval shall be effective as of the date of the Design-Builder's certification.

(B) Failure to Achieve Final Completion. The Design-Builder shall achieve Final Completion of the Project by the date specified in subsection (A) (Requirements) of this Section. If Final Completion of the Project has not been achieved by such date, the Design-Builder shall pay to the City delay liquidated damages in the amount of \$3,424 per day for each day that the Final Completion Date falls after the date specified in subsection 8.7(A) (Requirements) hereof; provided, however, that if at any time during such period the Design-Builder is required to pay delay liquidated damages pursuant to subsection 6.21(C) (Delay Liquidated Damages), the Design-Builder shall not be required to pay damages required under this subsection for those days during which damages are payable pursuant to subsection 6.21(C) (Delay Liquidated Damages). If Final Completion has not occurred within 90 days following the date specified in subsection 8.7(A) (Requirements), an Event of Default by the Design-Builder shall be deemed to have occurred under Section 13.2 (Events of Default by the Design-Builder), notwithstanding any absence of notice, further cure opportunity or other procedural rights accorded the Design-Builder thereunder, and the City shall thereupon have the right to terminate this Amended and Restated Design-Build Contract upon written notice to the Design-Builder. Upon any such termination, the City shall have all of the rights provided in Article 13 (Breach, Default, Remedies and Termination) upon a termination of this Amended and Restated Design-Build Contract for cause.

ARTICLE 9

COMPENSATION FOR DESIGN-BUILD WORK

SECTION 9.1. DESIGN-BUILD PRICE.

The City shall pay the Design-Builder the Design-Build Price for properly performed and completed Design-Build Work. The Design-Build Price and the components thereof are defined in Appendix 8 (Design-Build Price). The City's obligation to pay the Design-Build Price is subject to the Guaranteed Maximum Price and the terms and conditions of this Article and Appendix 8 (Design-Build Price). The parties acknowledge and agree that there are no amounts payable for Design-Build Work performed pursuant to Early Work Package Amendment No. 1 and no such amounts are part of the Design-Build Price or the Guaranteed Maximum Price.

SECTION 9.2. DESIGN-BUILD PRICE PAYMENT PROCEDURE.

(A) Progress Payments. The Design-Builder shall be paid the Design-Build Price on a progress payment basis in accordance with the Schedule of Values and the terms and conditions of this Section. The Design-Builder shall prepare and submit to the City for its approval preliminary and final drafts of the Schedule of Values in accordance with the Contract Standards. After the final Schedule of Values is accepted by the City, it shall be used to assist in the estimating of the value of the Design-Build Work performed for payment purposes. The Design-Builder shall not submit requests for progress payments of the Design-Build Price unless a final Schedule of Values has been approved.

(B) Payment Request. The Design-Builder shall be entitled to submit Payment Requests to the City on a monthly basis and to receive from the City the payments, which (1) shall be made on a percent complete basis in accordance with the Schedule of Values; (2) shall be subject to the Guaranteed Maximum Price limitations; and (3) shall be subject to the conditions to payment set forth in this Article. Each Payment Request shall be in a form reasonably acceptable to the City and must be accompanied by a monthly requisition report, which shall include:

(1) a reasonably detailed description of all Design-Build Work actually completed to date;

(2) revisions to the Design-Build Schedule, which shall reflect changes in the Design-Builder's cost loaded, critical path schedule since the date of the last Payment Request and any changes to the Schedule of Values;

(3) a certificate of the Design-Build Manager and Design-Builder Contract Representative certifying (1) the portion of the Design-Build Price payable to the Design-Builder for completed Design-Build Work; (2) that the Design-Builder is neither in default under this Amended and Restated Design-Build Contract nor in breach of any material provision of this Amended and Restated Design-Build Contract such that the breach would, with the giving of notice or passage of time, constitute an Event of Default; and (3) that all items applicable to the Design-Build Work entitling the Design-Builder to the requested payment under the Schedule of Values have been completed in accordance therewith and with the Technical Specifications;

(4) notice of any Encumbrances which have been filed together with evidence that the Design-Builder has discharged any such Encumbrances or made timely notification to the Payment Bond Surety regarding such Encumbrances; and

(5) any other documents or information relating to the Design-Build Work or this Amended and Restated Design-Build Contract reasonably requested by the City or the Owner's Advisor or as may be required by Applicable Law, this Amended and Restated Design-Build Contract or generally accepted accounting practices or principles, including payrolls, receipts, invoices with check vouchers or other evidence of Design-Build Costs incurred which deems necessary to support the amount requested in the Payment Request.

The General Conditions Fee shall be shown as a separate line item on each Payment Request in accordance with Appendix 8 (Design-Build Price). In determining the percentage of completion of the Design-Build Work, the parties shall use the lesser of the percentage of the Design-Build Work actually completed for each classification on the Schedule of Values or the percentage of the Guaranteed Maximum Price allocable to that item which has been actually incurred and demonstrated as a Design-Build Cost by the Design-Builder. The Design-Builder Fee shall also be shown as a separate line item on each Payment Request. The Design-Builder shall identify the dollar amount of the total expected Design-Builder Fee in each Payment Request based on the total expected Design-Build Costs to which the Design-Builder Fee applies in accordance with Appendix 8 (Design-Build Price). The amount requested for the Design-Builder Fee in each Payment Request shall be in the same proportion to the total expected Design-Builder Fee as the amount requested for the applicable Design-Build Costs bears to the total expected Design-Build Costs to which the Design-Builder Fee applies, subject to the Guaranteed Maximum Price.

(C) Review and Payment. Prior to submitting a Payment Request for the Design-Build Price to the City, the Design-Builder shall submit a draft Payment Request to the City, including all information required pursuant to this Section. The City shall have no fewer than 10 days to review each draft Payment Request. Within such 10-day period, the City shall verify or dispute in writing (or by telecommunication promptly confirmed in writing) the Design-Builder's certification that the Design-Builder has achieved the level of progress indicated and is entitled to payment. If the City determines that the Design-Build Work has progressed as indicated in the draft Payment Request, the City shall notify the Design-Builder, and the Design-Builder shall submit a final, certified Payment Request to the City, which may not contain any material change from the draft Payment Request reviewed by the City. The City shall pay the Design-Builder the requisitioned amount included in the final, certified Payment Request within 30 days following receipt, subject to the City's rights to withhold payments under Section 9.3 (Permissible Withholdings). Disputes regarding payments of the Design-Build Price shall be resolved in accordance with subsection (D) (Payment Dispute Procedures) of this Section. Any undisputed amounts of the Design-Build Price shall be paid within 30 days after receipt of the Design-Builder's final, certified Payment Request.

(D) Payment Dispute Procedures. If the City determines, pursuant to subsection (C) (Review and Payment) of this Section, that the Design-Build Work required for any payment has not progressed as indicated by the Design-Builder in the draft Payment Request, or otherwise disputes any draft Payment Request, the City shall provide prompt written notice to the Design-Builder as to the City's reasons, in reasonable detail, for such determination or the basis for such dispute. After receiving such determination notice, the Design-Builder may make the necessary corrections and resubmit a draft Payment Request to the City, or the City may agree on a revised amount or draft Payment Request, as applicable, in which case the Design-Builder shall promptly notify the City of such agreement and submit a final, certified Payment Request to the City as to any undisputed amount. If the Design-Builder is unable to reach agreement with the City as to the progress of the Design-Build Work and the draft Payment Request, the Design-Builder may exercise its right to contest the City's determination in accordance with the dispute resolution procedures set forth in Article 12 (Dispute Resolution). Any proceedings undertaken to resolve a dispute arising under this

subsection shall immediately terminate if (1) the Design-Builder demonstrates to the City that the Design-Build Work has progressed as indicated in the draft Payment Request giving rise to the dispute and that the disputed draft Payment Request is correct, and (2) the City concurs with such demonstration. The Design-Builder shall not be entitled to payment of the amount so requisitioned and disputed except upon resolution of the dispute in accordance with this subsection; provided, however, that the City shall pay all requisitioned amounts which are not in dispute in accordance with subsection (C) (Review and Payment) of this Section. In the event that upon resolution of any such dispute, it is determined that the Design-Builder was properly entitled to the disputed amount as of a date earlier than the date on which payment is actually made, the Design-Builder shall be entitled to receive, promptly following such resolution, such disputed amount plus interest on such disputed amount as and to the extent provided under Applicable Law.

(E) Retainage. Each Design-Build Price payment will be subject to a 5% retainage holdback. Pursuant to Section 22300 of the California Public Contract Code, the Design-Builder shall have the option to request in writing that the City make payments of all retained funds directly to an escrow agent, or to deposit securities valued in an amount equal to 5% of each Design-Build Price payment with an escrow agent or the City as a substitute for retained funds. The parties acknowledge that a “retainage bond” shall not constitute “securities” for purposes of the preceding sentence. The City shall release to the Design-Builder or the escrow agent, as applicable, all of the accumulated funds retained from all prior drawdown payments or the escrow agent shall release all of the securities deposited with the escrow agent upon Substantial Completion; except that, the City shall be entitled to withhold from such payment an amount equal to 150% of the value of any outstanding Punch List items. The Design-Builder acknowledges and agrees that the performance of the Design-Build Work and the Warranty Work under this Amended and Restated Design-Build Contract is not complete until the expiration of the Warranty Period. In the event the Design-Builder deposits securities in lieu of retained funds or requests that the City make payments of all retained funds to an escrow agent, the Design-Builder shall be responsible for paying all fees incurred by the escrow agent. Any interest earned on the retainage held by the City shall be for the City’s benefit only. Any interest earned on securities or retained funds held in escrow pursuant to Section 22300 of the California Public Contract Code shall be for the Design-Builder’s benefit only.

(F) Cost Control and Reporting. The Design-Builder shall develop and monitor an effective system of Design-Build Work cost control, which system shall be disclosed to and reviewed and approved by the City and the Owner’s Advisor. The Design-Builder shall develop cash flow reports and forecasts as reasonably requested or required by the City and the Owner’s Advisor, including a good faith calendar quarterly estimate of payments of the Design-Build Price throughout the Design-Build Period, specifying the range of minimum and maximum monthly payments, which shall not exceed the Guaranteed Maximum Price or any line item on the Schedule of Values. The Design-Builder shall promptly (within seven days) after acquiring such information, identify and report to the City and the Owner’s Advisor all variances between estimated costs and actual costs of the Design-Build Work, including any proposed corrective action to be taken by the Design-Builder.

(G) Certification of Amounts Due. Whenever requested by the City or the Owner’s Advisor, the Design-Builder shall submit a sworn statement certifying all amounts then due (or yet to become due) the Design-Builder for the Design-Build Work (or any portion thereof) and describing any payment or other dispute which may exist between the Design-Builder and any Subcontractor.

SECTION 9.3. PERMISSIBLE WITHHOLDINGS.

In addition to the amounts required to be retained pursuant to subsection 9.2(E) (Retainage), the City may disapprove and withhold and retain all or any portion of any payment requested in any Payment Request for Design-Build Work in an amount equal to the sum of:

- (1) any liquidated damages or reimbursement payments which are due and owing to the City hereunder;
- (2) any indemnification amounts which are due and owing to the City hereunder and with respect to which a claim has been filed against a City Indemnitee by a third party in accordance with Applicable Law;
- (3) any amount determined pursuant to subsection 14.1(D) (Failure to Provide Insurance Coverage) of Appendix 12 (Insurance Requirements);
- (4) any other deductions which are required by Applicable Law;
- (5) any payments with respect to which documents to be delivered in connection therewith are not correct and complete;
- (6) any payments with respect to which the Design-Build Work covered by such Payment Request (or any previous Payment Request) does not comply with this Amended and Restated Design-Build Contract;
- (7) damage to the work of a Separate Contractor to the extent caused by the Design-Builder or any Subcontractor;
- (8) any payments with respect to which any person has filed a Lien resulting from the acts or omissions of the Design-Builder in performing the Design-Build Work and such Lien remains unreleased or unbonded;
- (9) all requisitioned payments if an Event of Default of the Design-Builder has occurred under Section 13.2 (Events of Default by the Design-Builder); and
- (10) in the event the Design-Builder fails to pay any Taxes, assessments, penalties or fees imposed by any Governmental Body, then the Design-Builder authorizes the City to deduct and withhold or pay over to the appropriate Governmental Body those unpaid amounts upon demand by the Governmental Body.

In addition, the City may withhold payment for persistent and uncured Design-Builder noncompliance with the administrative provisions of this Amended and Restated Design-Build Contract, including failure to electronically submit monthly Subcontractor payment information. In the event of any permissible withholding under this Section, the City shall notify the Design-Builder in writing at least seven days prior to the date payment is otherwise due. The notice shall indicate the specific amounts the City intends to withhold, the reasons and contractual basis for the withholding, and the specific measures the Design-Builder must take to rectify the City's concerns. Any dispute associated with any such withholding shall be handled in accordance with subsection 9.2(D) (Payment Dispute Procedures).

SECTION 9.4. PAYMENT UPON FINAL COMPLETION.

(A) Final Completion Payment Request. In connection with the achievement of Final Completion in accordance with Section 8.7 (Final Completion), the Design-Builder shall

prepare and submit to the City and the Owner’s Advisor a Final Completion Payment Request. The Final Completion Payment Request shall enclose:

(1) A notarized affidavit in duplicate stating under oath that all Subcontractors, vendors, and other persons or firms who have furnished or performed labor or furnished materials for the Design-Build Work have been fully paid or satisfactorily secured;

(2) A certificate of the Surety for both the Performance Bond and the Payment Bond certifying that the Surety consents to payment for Final Completion and agrees that such payment shall not relieve the Surety of any of its obligations under the Performance Bond or the Payment Bond;

(3) A general release executed by the Design-Builder waiving, upon receipt of payment for Final Completion, all claims arising out of or resulting from the Design-Build Work, except those claims made in writing to the City and remaining unsettled at the time of such payment, which claims shall be specifically listed in an attachment to the general release, identifying the claimant and the nature of the claim; and

(4) Certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of this Amended and Restated Design-Build Contract.

(B) Final Completion Payment. If based on the Owner’s Advisor’s (1) observation of the Design-Build Work, (2) final inspection, and (3) review of the Final Completion Payment Request and other documents required by subsections (A) (Final Completion Payment Request) and (C) (Final Determination and Approval of Design-Build Price) of this Section and Section 8.7 (Final Completion), the Owner’s Advisor is satisfied that the conditions for Final Completion have been achieved, the Owner’s Advisor shall, within 15 days after receipt of the Final Completion Payment Request, furnish to the City and the Design-Builder the Owner’s Advisor’s recommendation of payment for Final Completion. If the Owner’s Advisor is not satisfied, the Owner’s Advisor shall return the Final Completion Payment Request to the Design-Builder, indicating in writing the reasons for not recommending payment, in which case the Design-Builder shall either (1) exercise its right to contest the Owner’s Advisor’s determination in accordance with subsection 9.2(D) (Payment Dispute Procedures), or (2) make the necessary corrections and resubmit the Final Completion Payment Request.

(1) City Concurrence. If the City concurs with the Owner’s Advisor’s recommendation of payment for Final Completion, the City shall, within 15 days, file a written notice of Final Completion and notify the Design-Builder of such concurrence. As soon as reasonably practicable (but in no event later than 45 days after the City’s original receipt of the Design-Builder’s Final Completion Payment Request, subject to the City’s right to dispute payment in accordance with this Amended and Restated Design-Build Contract and Applicable Law) after filing such notice, the City shall pay to the Design-Builder the balance of the Design-Build Price, subject to any withholdings and any other provisions governing final payment specified herein.

(2) City Non-Concurrence. If the City does not concur with the Owner’s Advisor’s determination, the City shall return the Payment Request to the Design-Builder, indicating in writing its reasons for refusing payment for Final Completion. The Design-Builder shall promptly make the necessary corrections and resubmit the Payment Request to the City and the Owner’s Advisor. The City’s written determination

shall bind the Design-Builder, unless the Design-Builder delivers to the City written notice of a claim within 30 days after receipt of the City's determination.

Payment for Final Completion does not constitute a waiver by the City of any rights relating to the Design-Builder's obligations under this Amended and Restated Design-Build Contract. Except as specifically provided in subsection (A) (Final Completion Payment Request) of this Section with respect to exceptions taken in the Design-Builder's general release, payment for Final Completion constitutes a waiver of all claims by the Design-Builder against the City, including all claims associated with Uncontrollable Circumstances, relating to the Design-Build Work, the payment of the Design-Build Costs or otherwise in connection with the Design-Build Period.

(C) Final Determination and Approval of Design-Build Price. Notwithstanding any of the foregoing, the City shall have no obligation to make payment for Final Completion hereunder until a final accounting of the Design-Build Costs has been submitted by the Design-Builder and has been verified by the City and the Owner's Advisor. Such accounting shall be provided by the Design-Builder in connection with the Final Completion Payment Request. The aggregate total of payments to the Design-Builder with respect to the Design-Build Price (including amounts retained pursuant to subsection 9.2(E) (Retainage)) shall not exceed the total of the actual Design-Build Costs, as verified by the City and the Owner's Advisor from the Design-Builder's final accounting, plus the Design-Builder Fee and the General Conditions Fee, which together shall not exceed the Guaranteed Maximum Price. If payments to the Design-Builder exceed that which is due and owing the Design-Builder pursuant to this Article, the Design-Builder shall promptly refund the excess to the City. The Design-Builder acknowledges and agrees that the City shall have the right to withhold and retain amounts from payment for Final Completion in accordance with Section 9.3 (Permissible Withholdings).

(D) Completion of Design-Build Work. Notwithstanding payment for Final Completion pursuant to this Section, the Design-Builder acknowledges and agrees that the performance of the Design-Build Work is not complete until the expiration of the Warranty Period, and that the Design-Builder shall have the continuing obligation to perform Warranty Work pursuant to the terms and conditions of Article 10 (Project Warranties) until the expiration of the Warranty Period. Final payment of any amount retained by the City as of the expiration of the Warranty Period shall be made in accordance with and subject to the terms and conditions of subsection 9.2(E) (Retainage). To the extent the Design-Builder is entitled to payment in accordance with subsection 9.2(E) (Retainage) upon expiration of the Warranty Period, the Design-Builder shall provide the City with a final Payment Request in a form reasonably acceptable to the City, and the City shall pay the amount due within 30 days following receipt of the final Payment Request.

SECTION 9.5. NO ACCEPTANCE, WAIVER OR RELEASE.

Unless other provisions of this Amended and Restated Design-Build Contract specifically provide to the contrary, none of the following, without limitation, shall be construed as (i) the City's acceptance of any Design-Build Work which is defective, incomplete, or otherwise not in compliance with this Amended and Restated Design-Build Contract, (ii) the City's release of the Design-Builder from any obligation under this Amended and Restated Design-Build Contract, (iii) the City's extension of the Design-Builder's time for performance, (iv) an estoppel against the City, or (v) the City's acceptance of any claim by the Design-Builder:

- (1) the City's payment to the Design-Builder or any other person with respect to performance of the Design-Build Work;

(2) the review, consent, approval or acceptance, as applicable, of any submissions, permit applications, punch lists, other documents, certifications, or Design-Build Work of the Design-Builder or any Subcontractor by the City, the Owner's Advisor or any other person;

(3) the review of (or failure to prohibit) any construction applications, means, methods, techniques, sequences, or procedures for the Design-Build Work by the City, the Owner's Advisor or any other person;

(4) the entry at any time on the Headworks Facility Site (including any area in which the Design-Build Work is being performed) by the City, the Owner's Advisor or any other person;

(5) any observation, inspection or testing of (or failure to observe, inspect or test) any Design-Build Work (whether finished or in progress) by the City, the Owner's Advisor or any other person;

(6) the failure of the City, the Owner's Advisor or any other person to respond in writing to any notice or other communication of the Design-Builder; or

(7) any other exercise of rights or failure to exercise rights by the City hereunder.

ARTICLE 10

PROJECT WARRANTIES

SECTION 10.1. PROJECT WARRANTIES.

(A) Project Warranties Defined. The Design-Builder warrants to the City that the Design-Build Work, including all completed materials, equipment, systems and structures comprising the Project, shall: (i) be new, of recent manufacture and of good quality; (ii) conform to the requirements of this Amended and Restated Design-Build Contract; (iii) be free of material faults or defects; and (iv) be suitable for its intended purposes, as established by the Technical Specifications (the "Project Warranties"). The Project Warranties are further subject to the following:

(1) Inclusions. The Project Warranties include remedy for damage or defect caused by (a) Pre-Acceptance Testing and Acceptance Test performed by the Design-Builder; and (b) any defects or errors in the Operations and Maintenance Manual prepared by the Design-Builder pursuant to this Amended and Restated Design-Build Contract.

(2) Exclusions. The Project Warranties exclude remedy for damage or defect caused by capital modifications not undertaken or executed by the Design-Builder under this Amended and Restated Design-Build Contract. In addition, except as provided in Item (1), above, the Project Warranties exclude remedy for damage or defect caused by improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.

(B) Term of the Project Warranties. The Project Warranties set forth in this Article shall be in full force and effect for the period of time beginning on the Substantial Completion Date and, subject to subsection 10.2(D) (Extension of Warranties), continuing for one year following the Substantial Completion Date (the "Warranty Period"). The term of the Warranty Period shall not, however, operate in any manner to limit the Design-Builder's Transition Period obligations or Performance Guarantees.

SECTION 10.2. WARRANTY WORK.

(A) "Call-Back" Obligations. If, at any time during the Warranty Period, the Project or any of the Design-Build Work is found to be malfunctioning, defective or otherwise not in accordance with the requirements of the Project Warranties, the Design-Builder shall correct the condition promptly after receipt of written notice from the City to do so. The City shall provide such notice promptly after discovery of the condition. The Design-Builder shall respond to critical or emergency service calls from the City within 24 hours and to non-critical or non-emergency calls within two Business Days. Such response shall require that a competent representative or representatives of the Design-Builder familiar with the Project, including its specific equipment, design and operational requirements, create a response plan to inspect the Project and, while on site, either correct the problem or initiate a course of action that will fully correct the problem within a reasonable period of time in accordance with Good Engineering and Construction Practice and the specific requirements of this subsection. In critical or emergency situations, the time period for correction shall not exceed one Business Day after the on-site inspection, and, for non-emergencies, the time period for correction shall not exceed seven Business Days; provided, however, that if such time periods are not practicable in accordance with Good Engineering and Construction Practice, then the time

period for correction shall be the minimum amount of time required in accordance with Good Engineering and Construction Practice.

(B) Right of the City to Proceed with Corrective Action; Design-Builder Liability. If the Design-Builder fails to commence and complete the steps set forth in subsection (A) (“Call-Back” Obligations) of this Section within the required time frames, in addition to any other remedies provided under this Amended and Restated Design-Build Contract, the Security Instruments or Applicable Law, the City may commence and complete the correction of such nonconforming Design-Build Work with its own forces or with third party contractors. If the City does perform such corrective work, the Design-Builder shall be responsible for all costs reasonably incurred in performing such correction, subject to Cost Substantiation in accordance with this Amended and Restated Design-Build Contract.

(C) No Period of Limitation on Other Obligations. Nothing contained in this Section shall be construed to establish a period of limitation with respect to other obligations that the Design-Builder has under this Amended and Restated Design-Build Contract or under Applicable Law with respect to the Design-Build Work, including warranties and obligations with respect to latent defects. The Warranty Period relates only to the specific obligations of the Design-Builder to respond to notices from the City under the Project Warranties, and has no relationship to the time within which the obligation of the Design-Builder to comply with this Amended and Restated Design-Build Contract may be enforced, nor the time within which proceedings may be commenced to establish the Design-Builder’s liability with respect to its obligations under this Amended and Restated Design-Build Contract.

(D) Extension of Warranties. The “call-back” obligations set forth in this Section shall apply to all Design-Build Work re-done or corrected pursuant to this Amended and Restated Design-Build Contract. The “call-back” obligations for re-done or corrected elements of the Design-Build Work shall extend beyond the Warranty Period, if necessary, to provide a one-year period following acceptance by the City of such re-done or corrected Design-Build Work; provided, however, that in no event shall such “call-back” obligations extend beyond one year following the expiration of the Warranty Period.

(E) Manufacturers’ Warranties. During the Warranty Period, the Design-Builder (or the City) shall be permitted to enforce all warranties provided by manufacturers, suppliers and other third parties with respect to the Design-Build Work. However, as provided in subsection 10.4(A) (Manufacturers’ Warranties Generally), no such warranty shall relieve the Design-Builder of any obligation with respect to the Project Warranties.

(F) Performance of Warranty Work. The Design-Builder acknowledges that time is of the essence in the performance of all Warranty Work required under this Section in light of the Project’s essential public purpose. Accordingly, all Warranty Work shall be performed in accordance with the Contract Standards and, without limiting any of the specific time requirements set forth in subsection (A) (“Call-Back” Obligations) of this Section, within the minimum amount of time required in accordance with Good Engineering and Construction Practice. The Design-Builder shall perform or cause to be performed all Warranty Work performed under this Section in a manner that will minimize interference with the ongoing operations of the Project and the Regional Wastewater Facility. The Design-Builder shall provide a written plan for all proposed Warranty Work (unless expressly waived by the City).

(G) Responsibility for Costs. The Design-Builder shall be fully responsible for the costs associated with all Warranty Work (which costs shall constitute Design-Build Costs, subject to the Guaranteed Maximum Price), and shall reimburse the City for its costs

resulting from a breach of the Project Warranties, subject to the terms and conditions of this Amended and Restated Design-Build Contract.

SECTION 10.3. PROJECT WARRANTIES NOT EXCLUSIVE.

The Design-Builder acknowledges and agrees that the Project Warranties are in addition to, and not in limitation of, any other warranties, rights and remedies available under this Amended and Restated Design-Build Contract or Applicable Law, and shall not limit the Design-Builder's liability or responsibility imposed by this Amended and Restated Design-Build Contract or Applicable Law with respect to the Design-Build Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud.

SECTION 10.4. MANUFACTURERS' WARRANTIES.

(A) Manufacturers' Warranties Generally. Without limiting any of the Project Warranties, the Design-Builder shall, for the protection of the City, obtain from all Subcontractors, vendors, suppliers and other persons from which the Design-Builder procures structures, improvements, fixtures, machinery, equipment and materials such warranties and guarantees as are normally provided with respect thereto and as may be specifically required by the Contract Standards, each of which is hereby assigned to the City to the full extent of the terms thereof. No such warranty or guarantee shall relieve the Design-Builder of any obligation hereunder, and no failure of any warranted or guaranteed structures, improvements, fixtures, machinery, equipment or material shall be the cause for any increase in the Guaranteed Maximum Price or otherwise excuse the Design-Builder from the performance of any Design-Build Work or Warranty Work obligations, unless such failure is itself attributable to an Uncontrollable Circumstance.

(B) No Limitation on Third Party Warranties. Nothing in this Amended and Restated Design-Build Contract is intended to limit any third party warranty that provides the City with greater warranty rights than those provided under the Project Warranties, as set forth in this Amended and Restated Design-Build Contract.

ARTICLE 11

TRANSITION SERVICES

SECTION 11.1. TRANSITION SERVICES.

The Design-Builder shall, following the Substantial Completion Date, provide Transition Services if requested by the City. These services are anticipated to generally consist of monitoring and advising on the City's operations and maintenance of the Headworks 3 Facility and assisting the City in training City staff as well as the services described in Appendix 11 (Transition Services).

SECTION 11.2. COMPENSATION FOR TRANSITION SERVICES.

(A) Transition Services Fee. Payment for the Transition Services, if any, are not included in the Base Guaranteed Maximum Price and shall be included in the future Contract Amendment based upon a compensation methodology to be agreed upon by the parties (the "Transition Services Fee"). The Design-Builder agrees that the Transition Services Fee shall be the Design-Builder's entire compensation and reimbursement for the performance of the Transition Services, inclusive of all costs, expenses and disbursements paid or incurred by the Design-Builder, as well as all overhead, administration, risk and profit. The Design-Builder shall not be entitled to any payment in excess of the Transition Services Fee, notwithstanding any cost overruns the Design-Builder may incur.

(B) Payment Procedures. The Transition Services Fee shall be payable on a monthly basis for Transition Services performed during the Transition Period. The amount payable each month shall be on account of Transition Services rendered during the prior month. The Design-Builder shall provide the City with a Payment Request in a form reasonably acceptable to the City by the fifteenth day of each month, which shall state the amount payable for the month and the total amount paid against the Transition Services Fee through the date of the Payment Request, along with a monthly Transition Period report and such other information or documentation as the City may reasonably require. The City shall pay the amount due in accordance with this Section within 30 days following receipt of the Payment Request. The Transition Services Fee is not included in the Design-Build Price and is not subject to retainage holdback; provided, however, that the City shall have the right to withhold payment for Transition Services that are not performed in accordance with the Contract Standards and otherwise as provided in Section 9.3 (Permissible Withholdings). The City shall not be required to make any payment to the Design-Builder at any time the Design-Builder is in breach or default under this Amended and Restated Design-Build Contract.

SECTION 11.3. LABOR AND WAGE REQUIREMENTS.

The Design-Builder acknowledges that the prevailing wage and related requirements of the California Labor Code apply to "maintenance work" as defined at California Code of Regulations Title 8, Section 16000 and that the Transition Services may include such maintenance work. Therefore, the Design-Builder shall comply with the Labor Code provisions concerning payment of prevailing wage rates, penalties, and retention of payroll records, and related requirements with regard to any employees performing maintenance work as part of the Transition Services, as may be required by Labor Code section 1771 and California Code of Regulations title 8, chapter 8, subchapter 3.

ARTICLE 12

DISPUTE RESOLUTION

SECTION 12.1. FORUM FOR DISPUTE RESOLUTION.

It is the express intention of the parties that all Legal Proceedings related to this Amended and Restated Design-Build Contract or to the Project or to any rights or any relationship between the parties arising therefrom shall be solely and exclusively initiated and maintained in State or federal courts located in the County of Santa Clara, California. The Design-Builder and the City each irrevocably consents to the jurisdiction of such courts in any such Legal Proceeding and waives any objection it may have to the laying of the jurisdiction of any such Legal Proceeding.

SECTION 12.2. NON-BINDING MEDIATION.

(A) Rights to Request and Decline. Either party may request Non-Binding Mediation of any dispute arising under this Amended and Restated Design-Build Contract. The non-requesting party may decline the request in its discretion. If there is concurrence that any particular matter shall be mediated, the provisions of this Section shall apply. The costs of the Mediator shall be divided equally between the City and the Design-Builder.

(B) Procedure. The Mediator shall be a professional mutually acceptable to the parties who has no current or on-going relationship to either party. The Mediator shall have full discretion as to the conduct of the mediation. Each party shall participate in the Mediator's program to resolve the dispute until and unless the parties reach agreement with respect to the disputed matter or one party determines in its discretion that its interests are not being served by the mediation.

(C) Non-Binding Effect. Mediation is intended to assist the parties in resolving disputes over the correct interpretation of this Amended and Restated Design-Build Contract. No Mediator shall be empowered to render a binding decision.

(D) Relation to Judicial Legal Proceedings. Nothing in this Section shall operate to limit, interfere with or delay the right of either party under this Article to commence judicial Legal Proceedings upon a breach of this Amended and Restated Design-Build Contract by the other party, whether in lieu of, concurrently with, or at the conclusion of any Non-Binding Mediation.

SECTION 12.3. CONTINUANCE OF PERFORMANCE DURING DISPUTE.

Unless otherwise directed in writing by the City, at all times during the course of any dispute resolution procedure or Legal Proceeding, the Design-Builder shall continue with the performance of the Contract Services in a diligent manner and in accordance with the applicable provisions of this Amended and Restated Design-Build Contract. The City shall continue to satisfy its uncontested payment obligations to the Design-Builder during the pendency of any such dispute, subject to the terms and conditions of this Amended and Restated Design-Build Contract. Records of the Contract Services performed during such time shall be kept in accordance with the applicable provisions of this Amended and Restated Design-Build Contract.

ARTICLE 13

BREACH, DEFAULT, REMEDIES AND TERMINATION

SECTION 13.1. REMEDIES FOR BREACH.

(A) Generally. The parties agree that in the event that either party breaches this Amended and Restated Design-Build Contract, the other party may exercise any legal rights it may have under this Amended and Restated Design-Build Contract and under Applicable Law to recover damages or to secure specific performance, and that such rights to recover damages and to secure specific performance shall ordinarily constitute adequate remedies for any such breach. Neither party shall have the right to terminate this Amended and Restated Design-Build Contract except as expressly provided in this Article.

(B) No Effect On Contract Obligations. The exercise by the City of any of its rights under this Article shall not reduce or affect in any way the Design-Builder's responsibility hereunder to perform the Contract Obligations.

(C) Waiver of Remedies. No failure to exercise, and no delay in exercising, any right or remedy under this Amended and Restated Design-Build Contract will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this Amended and Restated Design-Build Contract will be deemed to be a waiver of any subsequent breach of that provision or of any similar provision.

(D) Exercise of Remedies. The rights and remedies of the parties under this Amended and Restated Design-Build Contract are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise. A party will not be prevented from enforcing a right or remedy on the basis that another right or remedy hereunder deals with the same or similar subject matter. No single or partial exercise by a party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that party may be entitled.

(E) No Duplicative Recovery or Claims Outside Contract. Every right to claim compensation, indemnification or reimbursement under this Amended and Restated Design-Build Contract shall be construed so that recovery is without duplication to any other amount recoverable under this Amended and Restated Design-Build Contract. Neither party shall be entitled to make any claim against the other party for compensation, indemnification or reimbursement other than as provided under this Amended and Restated Design-Build Contract.

SECTION 13.2. EVENTS OF DEFAULT BY THE DESIGN-BUILDER.

(A) Events of Default Not Requiring Previous Notice or Cure Opportunity for Termination. Each of the following shall constitute an Event of Default by the Design-Builder upon which the City, by notice to the Design-Builder, may terminate this Amended and Restated Design-Build Contract without any requirement of having given notice previously or of providing any further cure opportunity:

(1) Failure to Achieve Substantial Completion. Except to the extent excused due to the occurrence of Uncontrollable Circumstances, the failure of the Design-Builder to achieve Substantial Completion of the Headworks 3 Facility prior to the end of the Extension Period;

(2) Failure to Achieve Final Completion. Except to the extent excused due to the occurrence of Uncontrollable Circumstances, the failure of the Design-Builder to

achieve Final Completion of the Project by the date that is 90 days after the date set forth in Section 8.7(A) (Requirements);

(3) Security for Performance. The failure of the Design-Builder to obtain and maintain in full force and effect in accordance with the requirements of this Amended and Restated Design-Build Contract any Security Instrument required by Article 17 (Security for Performance) as security for the performance of this Amended and Restated Design-Build Contract;

(4) Insolvency. The insolvency of the Design-Builder or the Guarantor, as determined under the Bankruptcy Code;

(5) Voluntary Bankruptcy. The filing by the Design-Builder or the Guarantor of a petition of voluntary bankruptcy under the Bankruptcy Code; the consenting of the Design-Builder or the Guarantor to the filing of any bankruptcy or reorganization petition against the Design-Builder or the Guarantor under the Bankruptcy Code; or the filing by the Design-Builder or the Guarantor of a petition to reorganize the Design-Builder or the Guarantor pursuant to the Bankruptcy Code; or

(6) Involuntary Bankruptcy. The issuance of an order of a court of competent jurisdiction appointing a receiver, liquidator, custodian or trustee of the Design-Builder or the Guarantor or of a major part of the property of the Design-Builder or the Guarantor, or the filing against the Design-Builder or the Guarantor of a petition to reorganize the Design-Builder or the Guarantor pursuant to the Bankruptcy Code, which order shall not have been discharged or which filing shall not have been dismissed within 90 days after such issuance or filing.

(B) Events of Default Requiring Previous Notice and Cure Opportunity for Termination. It shall be an Event of Default by the Design-Builder upon which the City may terminate this Amended and Restated Design-Build Contract, by notice to the Design-Builder and subject to the Design-Builder's cure rights set forth in subsection (C) (Notice and Cure Opportunity) of this Section, if:

(1) Any representation or warranty of the Design-Builder hereunder was false or inaccurate in any material respect when made, and the legality of this Amended and Restated Design-Build Contract or the ability of the Design-Builder to carry out its obligations hereunder is thereby materially and adversely affected;

(2) The Design-Builder fails, refuses or otherwise defaults in its duty to pay any amount required to be paid to the City under this Amended and Restated Design-Build Contract within 60 days following the due date for such payment;

(3) The Design-Builder suspends, ceases, stops or abandons the Design-Build Work or fails to continuously and diligently prosecute the Design-Build Work, exclusive of work stoppages due to an Uncontrollable Circumstance;

(4) The Design-Builder fails to resume performance of the Design-Build Work which has been suspended or stopped within a reasonable time after receipt of notice from the City to do so or (if applicable) after cessation of the event preventing performance;

(5) The Design-Builder fails materially to comply with any Applicable Law or fails unreasonably to comply with the instructions of the City consistent with this Amended and Restated Design-Build Contract;

(6) The Design-Builder assigns or transfers (or attempts to assign or transfer) this Amended and Restated Design-Build Contract or any right or interest therein without the City's prior written consent; or

(7) The Design-Builder otherwise fails to perform any other material obligation under this Amended and Restated Design-Build Contract (unless such default is excused by an Uncontrollable Circumstance as and to the extent provided herein).

(C) Notice and Cure Opportunity. The Design-Builder acknowledges that the City has an immediate termination right upon the occurrence of any of the defaults listed in subsection (A) (Events of Default Not Requiring Previous Notice or Cure Opportunity for Termination) of this Section and that the Design-Builder has no further right of notice or cure in such circumstances of default. Conversely, no default listed in subsection (B) (Events of Default Requiring Previous Notice and Cure Opportunity for Termination) of this Section shall constitute an Event of Default giving the City the right to terminate this Amended and Restated Design-Build Contract for cause under this Section unless:

(1) The City has given prior written notice to the Design-Builder stating that a specified default has occurred which gives the City a right to terminate this Amended and Restated Design-Build Contract for cause under this Section, and describing the default in reasonable detail; and

(2) The Design-Builder has not initiated within a reasonable time (in any event not more than 20 days from the initial default notice) and continued with due diligence to carry out to completion all actions reasonably necessary to correct the default and prevent its recurrence.

If the Design-Builder shall have initiated and continued with due diligence to carry out to completion all actions required under item (2), above, the default shall not constitute an Event of Default during such period of time (in any event not more than 60 days from the initial default notice) as the Design-Builder shall continue with due diligence to carry out to completion all such actions.

(D) Other Remedies Upon Design-Builder Event of Default. The right of termination provided under this Section upon an Event of Default by the Design-Builder is not exclusive. If this Amended and Restated Design-Build Contract is terminated by the City for an Event of Default by the Design-Builder, the City shall have the right to pursue a cause of action for actual damages and to exercise all other remedies which are available to it under this Amended and Restated Design-Build Contract, under the Security Instruments and under Applicable Law. The Design-Builder shall not be entitled to any compensation for services provided subsequent to receiving any notice of termination for an Event of Default under this Section.

(E) Relationship to Liquidated Damages. Termination by the City pursuant to this Section shall not relieve the Design-Builder or its Surety from liability for the liquidated damages provided for under this Amended and Restated Design-Build Contract. The parties acknowledge and agree that such liquidated damages are intended solely to compensate the City for costs and expenses associated with unexcused delay in the specific circumstances identified in the specific provisions providing for such liquidated damages and are not intended to liquidate all damages that the City is likely to suffer in the event of a Design-Builder Event of Default under this Article. Accordingly, except with respect to damages relating solely to the specific circumstances of unexcused delay for which liquidated damages are provided under this Amended and Restated Design-Build Contract, the payment of any such liquidated damages by the Design-Builder shall not serve to limit or otherwise affect the City's right to

pursue and recover damages under subsection (D) (Other Remedies upon Design-Builder Event of Default) of this Section.

SECTION 13.3. LIMITATION ON DESIGN-BUILDER LIABILITY.

(A) Design-Builder Liability Limit. Subject to subsection (B) (Liquidated Damages Sub-Limit) of this Section, the Design-Builder's aggregate liability under this Amended and Restated Design-Build Contract and, accordingly, the liability of the Guarantor under the Guaranty Agreement, with respect to damages of any kind payable to the City arising out of the performance or unexcused nonperformance of the Design-Build Work as a consequence of a claim or suit initiated by the Owner shall not exceed an amount equal to 100% of the Design-Build Price.

(B) Liquidated Damages Sub-Limit. The aggregate liability of the Design-Builder, with respect to any liquidated damages payable pursuant Section 8.5 (Effect of Unexcused Delay; Extension Period) and Section 6.21 (Existing Headworks Facility Improvements), shall not exceed an amount equal to 25% of the Design-Build Price. The payment by the Design-Builder of any such liquidated damages shall reduce commensurately the liability limit set forth in subsection (A) (Design-Builder Liability Limit) of this Section.

SECTION 13.4. APPLICABILITY AND INTERPRETATION OF THE LIMITATION ON LIABILITY.

The limitation on Design-Builder liability provided for in Section 13.3 (Limitation on Design-Builder Liability) applies solely to the liability of the Design-Builder and the Guarantor for damages to the City arising out of the performance or unexcused nonperformance of this Amended and Restated Design-Build Contract as a consequence of a claim or suit initiated by the City. The limitation on liability provided for in Section 13.3 (Limitation on Design-Builder Liability) shall not apply in the event the Design-Builder abandons the Project, and does not apply to any other liability, loss, damage, cost or expense that may be incurred by the Design-Builder or the Guarantor in connection with this Amended and Restated Design-Build Contract, including any of the following liabilities, losses, damages, costs or expenses:

- (1) Any loss, cost or expense sustained by the Design-Builder in the performance of the Design-Build Work or any other loss sustained by the Design-Builder, the Guarantor, or any other party in connection with this Amended and Restated Design-Build Contract, the Guaranty Agreement or other agreement relating to the Project;
- (2) Any loss, cost or expense sustained by the Design-Builder, the Guarantor, or the Design-Builder's surety in seeking to cure or prevent any breach of this Amended and Restated Design-Build Contract by the Design-Builder;
- (3) Any fines or penalties levied or imposed by any Governmental Body;
- (4) Any claims, losses or penalties incurred by the Design-Builder or the Guarantor to third parties in any Legal Proceedings;
- (5) Any indemnity payment (resulting from third party claims) made by the Design-Builder or the Guarantor to the City;
- (6) Payment of any defense costs, including attorney's fees, to, for, or on behalf of the City with respect to any third party claim; and

(7) Any claims, losses, penalties or settlement payments paid to the Owner in connection with any tort claim by the City against the Design-Builder based on gross negligence, willful misconduct, fraud, misrepresentation or false claims.

SECTION 13.5. EVENTS OF DEFAULT BY THE CITY.

(A) Events of Default Permitting Termination. The failure, refusal or other default by the City in its duty: (1) to pay any undisputed amount required to be paid to the Design-Builder under this Amended and Restated Design-Build Contract within 60 days following the due date for such payment; or (2) to perform any other material obligation under this Amended and Restated Design-Build Contract (unless such default is excused by an Uncontrollable Circumstance as and to the extent provided herein), shall constitute an Event of Default by the City upon which the Design-Builder, by notice to the City, may terminate this Amended and Restated Design-Build Contract.

(B) Notice and Cure Opportunity. No such default described in subsection (A) (Events of Default Permitting Termination) of this Section shall constitute an Event of Default giving the Design-Builder the right to terminate this Amended and Restated Design-Build Contract for cause under this subsection unless:

(1) The Design-Builder has given prior written notice to the City stating that a specified default has occurred which gives the Design-Builder a right to terminate this Amended and Restated Design-Build Contract for cause under this Section, and describing the default in reasonable detail; and

(2) The City has neither challenged in an appropriate forum the Design-Builder's conclusion that such default has occurred or constitutes a material breach of this Amended and Restated Design-Build Contract nor initiated within a reasonable time (in any event not more than 30 days from the initial default notice) and continued with due diligence to carry out to completion all actions reasonably necessary to correct the default and prevent its recurrence.

If the City shall have initiated and continued with due diligence to carry out to completion all actions required under item (2), above, the default shall not constitute an Event of Default during such period of time (in any event not more than 60 days from the initial default notice) as the City shall continue with due diligence to carry out to completion all such actions.

(C) Termination Liquidated Damages. If this Amended and Restated Design-Build Contract is terminated by the Design-Builder for cause as a result of an Event of Default by the City, the City shall pay the Design-Builder, as liquidated damages upon any such termination, the same amount which would be payable under Section 13.6 (City Convenience Termination Rights) if this Amended and Restated Design-Build Contract were terminated at the election of the City for convenience and without cause. Such damages shall be the only amounts payable by the City upon any such termination.

(D) Payment of Amounts Owning Through the Termination Date. Without duplicating any amount required to be paid pursuant to subsection (C) (Termination Liquidated Damages) of this Section, upon any termination pursuant to this Section, the Design-Builder shall be paid all amounts due for the Design-Build Work performed prior to the Termination Date to be paid as part of the Design-Build Price but not yet paid as of the Termination Date.

SECTION 13.6. CITY CONVENIENCE TERMINATION RIGHTS.

(A) Convenience Termination Right and Payment. The City shall have the right at any time following the Contract Date, exercisable in its discretion for any reason upon

30 days' written notice to the Design-Builder, to terminate this Amended and Restated Design-Build Contract.

(B) Convenience Termination Payment for Preliminary Services and Transition Services. In the event of a convenience termination pursuant to this Section of the Preliminary Services or the Transition Services, as applicable, the Design-Builder shall not be entitled to a convenience termination settlement payment, but shall be entitled to payment of that portion of the Preliminary Services Fee or the Transition Service Fee, as applicable, that has been earned by the terms hereof as of the Termination Date but not yet paid by the City. No other compensation shall be payable by the City on account of the City's convenience termination of the Preliminary Services or the Transition Services.

(C) Convenience Termination Payment for Design-Build Work. In the event of a convenience termination pursuant to this Section of the Design-Build Work, the Design-Builder shall be entitled to a convenience termination settlement payment in an amount equal to the sum of: (1) the difference between, (a) the value of all Design-Build Work performed up to the Termination Date, and (b) all payments already made to the Design-Builder pursuant to this Amended and Restated Design-Build Contract; and (2) the reasonable costs incurred by the Design-Builder in connection with the termination, including all actual and reasonable demobilization costs and amounts due in settlement of terminated Subcontracts. The amount payable to the Design-Builder pursuant to this subsection may include a reasonable allowance for profit solely on Design-Build Work that has been performed as of the Termination Date. In the event of a termination for convenience under this Section, the Design-Builder acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Design-Build Work performed plus its settlement and closeout costs. Under no circumstances shall the Design-Builder or any Subcontractor be entitled to anticipatory or unearned profits, unabsorbed overhead, opportunity costs, or consequential or other damages as a result of a termination for convenience under this Section.

(D) Settlement of Subcontracts. The obligation of the City to pay amounts due in settlement of Subcontracts under subsection 13.6(C) (Convenience Termination Payment for Design-Build Work) shall be limited to the reasonable costs incurred by the Design-Builder in settling and closing out Subcontracts that the City does not elect to have assigned to it pursuant to Section 13.7 (Obligations of the Design-Builder Upon Termination) and shall be subject to Cost Substantiation. Any convenience termination settlement payment under any Subcontract shall be calculated in the same manner as provided in subsection 13.6(C) (Convenience Termination Payment for Design-Build Work) with respect to the convenience termination settlement payment to the Design-Builder. In no event shall the City be responsible for anticipatory or unearned profits, unabsorbed overhead, opportunity costs, or consequential or other damages payable to any Subcontractor as a result of the termination of any Subcontract.

(E) Payment of Amounts Due as a Result of Convenience Termination. The Design-Builder shall submit a termination for convenience claim, in the form and with the certification prescribed by the City, promptly following the Termination Date but in any event not later than 60 days following the Termination Date. In the event of a failure of the Design-Builder to submit a termination for convenience claim within the time allowed pursuant to this subsection, the City may determine, on the basis of information available to the City, the amount, if any, due to the Design-Builder by reason of the convenience termination and shall thereupon pay to the Design-Builder the amount so determined, if any. Notwithstanding the fact that the amount payable to the Design-Builder pursuant to subsection 13.6(C) (Convenience Termination Payment for Design-Build Work) may include a reasonable allowance for profit solely on Design-Build Work that has been performed as of the Termination Date, in no event shall the amount payable to the Design-Builder pursuant to this Section, exclusive of reasonable demobilization and settlement costs, exceed the Guaranteed Maximum Price as

reduced by the amount of payments otherwise made. In addition, any amount payable to the Design-Builder pursuant to this Section shall be reduced in the amount of (1) any claim the City may have against the Design-Builder under this Amended and Restated Design-Build Contract, and (2) the fair value, as determined by the City, of property which is destroyed, lost, stolen or damaged so as to become undeliverable to the City, excluding normal spoilage and except to the extent that the City shall have otherwise expressly assumed the risk of loss with respect to such property. Any payment required to be made to the Design-Builder pursuant to this Section shall be made within 120 days following the Termination Date, subject to compliance by the Design-Builder with its obligations under Section 13.7 (Obligations of the Design-Builder Upon Termination). Any payment required to be made by the Design-Builder to the City pursuant to this Section shall be made within 120 days following the Termination Date. In the event of a dispute between the parties as to the amount of any payment required to be made pursuant to this Section, either party may elect to initiate dispute resolution procedures in accordance with Section 12.2 (Non-Binding Mediation).

(F) Delivery of Design-Build Work to the City. Upon any termination of this Amended and Restated Design-Build Contract under this Section, the Design-Builder shall deliver to the City all of its work product produced during the period commencing on the Contract Date to the Termination Date hereunder, which work product immediately shall become the property of the City. The City's use of any such work product for any purpose other than the continuation of the Design-Build Work and the ongoing operations of the Project shall be at its own risk and the Design-Builder shall have no liability therefor.

(G) Completion or Continuance by the City. After the date of any termination under this Section, the City may at any time (but without any obligation to do so) take any and all actions necessary or desirable to continue and complete the Contract Services so terminated, including entering into contracts with other contractors.

SECTION 13.7. OBLIGATIONS OF THE DESIGN-BUILDER UPON TERMINATION.

Upon any termination of the Design-Builder's right to perform this Amended and Restated Design-Build Contract, the Design-Builder shall, as applicable and as set forth in any written directions provided by the City:

- (1) Stop any further Contract Services at the Headworks Facility Site or otherwise in connection with the Project;
- (2) Cease incurring any further obligations or liabilities pertaining to the Contract Services;
- (3) Promptly take all action as necessary to protect and preserve all materials, equipment, tools, facilities, and other property pertaining to the Project;
- (4) Vacate possession of the Headworks Facility Site and turn possession of the Headworks Facility Site over to the City;
- (5) Clean up and remove all debris and trash from the Headworks Facility Site;
- (6) Promptly remove from the Headworks Facility Site all equipment, tools, or material owned by the Design-Builder, or its Subcontractors, agents or representatives;

(7) Promptly deliver a list of all suppliers, materials, machinery, equipment, property or other pending items being fabricated or on order for delivery to the Project but not yet delivered to the Headworks Facility Site or incorporated into the Design-Build Work, and comply with the written instructions of the City with respect to such matters;

(8) Deliver a complete copy of all books, notes, and records of the Design-Builder pertaining to this Amended and Restated Design-Build Contract performance or planned construction or design activities;

(9) Promptly provide a list of all files (and make available to the City for review or copying) all files pertaining to the Design-Build Work, including any and all access and security codes, and including instructions and demonstrations that show how to open and modify such codes;

(10) Promptly deliver complete copies of all Subcontracts to the City, together with a detailed report on the status of such Subcontracts (status of orders and work performed and not performed or delivered under each Subcontract); a record of proposals made and balances due under each Subcontract; any cancellation penalties pertaining thereto; and any further information required by the City, and furthermore assist the City in contacting such Subcontractors to verify such information or answer any questions of the City;

(11) assign to the City any Subcontract that the City elects in writing, at its sole election and without obligation, to have assigned to it, with the City assuming, and the Design-Builder being relieved of, all obligations under the Subcontract from the date of the assignment;

(12) cancel or terminate all Subcontracts that the City does not elect to have assigned to the City, in accordance with the written instructions of the City;

(13) Promptly assign and transfer to the City all right, title, and interest of Design-Builder to any items ordered for the Contract Services (but not yet delivered to the Headworks Facility Site or incorporated into the Project) as requested by the City; provided the City (or Surety) assumes responsibility for payment thereof;

(14) Promptly deliver and assign to the City all warranties or guarantees by any vendor, supplier, manufacturer, or subcontractor pertaining to the Project;

(15) Promptly notify the City (in writing) of any Legal Proceedings against the Design-Builder pending or threatening relating to the Project or the Contract Services;

(16) Promptly assist the City in the modification to any of the OCIP Coverages and other Coverages provided by the City required under this Amended and Restated Design-Build Contract appropriate or necessary by reason of the termination;

(17) Make arrangements with its employees to avoid any "successor clauses" or other similar provisions with respect to salaries or benefits, to allow the City to enter into new employment or independent contractor agreements with employees of the Design-Builder deemed available or necessary by the City to complete (or correct defects) in the Design-Build Work; and

(18) Promptly take such other action and execute such documents as requested by the City, and to assist in the transition of the Contract Services to the Surety or the City, or as reasonably deemed necessary or appropriate by the City, and

avoid any action or conduct that would increase any expense or cost that would become an obligation or liability to the City unless requested or directed by the City Contract Representative in writing.

With respect to any of the foregoing obligations that cannot reasonably be completed by the Termination Date, the Design-Builder shall complete such obligations as promptly as is practicable, but in no event later than 30 days following the Termination Date. Compliance with these obligations shall be conditions precedent to the payment of any sums otherwise due the Design-Builder by reason of the termination. If any Subcontracts are assigned to the City under this Section, the City shall not be directly liable to any Subcontractors for amounts owed to such parties for Design-Build Work performed prior to termination, and the Design-Builder shall remain liable to any such parties for such amounts.

SECTION 13.8. NO WAIVERS.

No action of the City or the Design-Builder pursuant to this Amended and Restated Design-Build Contract (including any investigation or payment), and no failure to act, shall constitute a waiver by either party of the other party's compliance with any term or provision of this Amended and Restated Design-Build Contract. No course of dealing or delay by the City or the Design-Builder in exercising any right, power or remedy under this Amended and Restated Design-Build Contract shall operate as a waiver thereof or otherwise prejudice such party's rights, powers and remedies. No single or partial exercise of (or failure to exercise) any right, power or remedy of the City or the Design-Builder under this Amended and Restated Design-Build Contract shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

SECTION 13.9. WAIVER OF CONSEQUENTIAL AND PUNITIVE DAMAGES.

In no event shall either party hereto be liable to the other or obligated in any manner to pay to the other any consequential or punitive damages based upon claims arising out of or in connection with the performance or non-performance of its obligations or otherwise under this Amended and Restated Design-Build Contract, or the material falsity or inaccuracy of any representation made in this Amended and Restated Design-Build Contract, whether such claims are based upon contract, tort, negligence, warranty or other legal theory; provided, however, that the waiver of the foregoing damages under this Section is intended to apply only to disputes and claims as between the City and the Design-Builder. Nothing in this Section shall limit the obligation of the Design-Builder to indemnify, defend and hold harmless the City Indemnitees for any consequential or punitive damages payable to third parties resulting from any act or circumstance for which the Design-Builder is obligated to indemnify the City Indemnitees hereunder. In addition, the parties acknowledge and agree that nothing in this Section shall serve as a limitation or defense with respect to any obligation of a party to pay any liquidated damages specifically provided for under this Amended and Restated Design-Build Contract.

ARTICLE 14

INSURANCE

SECTION 14.1. INSURANCE.

(A) Required Insurance. At all times during the Term, the Design-Builder shall comply with the insurance requirements set forth in this Article 14 (Insurance) and Appendix 12 (Insurance Requirements) hereto. Such insurance requirements include (1) enrollment in the City's OCIP, which will provide the OCIP Coverages and Other Coverages Provided by the City, as such coverages are described in Appendix 12 (Insurance Requirements) hereto, and (2) obtaining and maintaining Additional Insurance Required From Enrolled Parties and Excluded Parties, as such coverages are described in Appendix 12 (Insurance Requirements) (collectively, the "Required Insurance"). The City shall pay all premiums associated with the OCIP Coverages and the Other Coverages Provided by the City. The Design-Builder shall pay all other premiums, including the premiums for the Additional Insurance Required From Enrolled Parties and Excluded Parties. The Required Insurance shall be in place concurrent with the execution and delivery of this Amended and Restated Design-Build Contract (or as otherwise specified in Appendix 12 (Insurance Requirements) and remain in effect for the periods specified in Appendix 12 (Insurance Requirements). The Design-Builder's liability insurance, including professional liability, shall not include any exclusions that would compromise coverages because of the design-build nature of the work to be performed pursuant to this Amended and Restated Design-Build Contract. Within 7 days following the Amended and Restated Contract Date, the Design-Builder shall provide the City with evidence that all Required Insurance has been obtained and is in effect.

(B) Subcontractors. The Design-Builder shall ensure that all eligible Subcontractors enroll in the City's OCIP and secure and maintain all insurance coverage and other financial sureties pursuant to and as required by Appendix 12 (Insurance Requirements) and by Applicable Law in connection with their presence and the performance of their duties at or concerning the Project and the Contract Services.

(C) Compliance with Insurer Requirements. The Design-Builder shall comply promptly with the requirements of all insurers providing the Required Insurance pertaining to the Project and the Contract Services. The Design-Builder shall not knowingly do or permit anything to be done that results in the cancellation or the reduction of coverage under any policy of Required Insurance.

(D) Proof of Insurance Coverage for Additional Insurance Required From Enrolled Parties and Excluded Parties. Annually, the Design-Builder shall furnish, or shall cause a Subcontractor to furnish, the City with (1) additional insured, waiver of subrogation, and primary/non-contributory endorsements to the Additional Insurance Required From Enrolled Parties and Excluded Parties policies for the Project and the Contract Services, and (2) certificates of insurance from each insurance carrier showing that the insurance obtained by the Design-Builder is in force, 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 30 days (or 10 days in the case of cancellation due to non-payment of premiums after written notice (by certified mail, return receipt requested) of such cancellation, change or non-renewal has been received by the City). With the exception of workers' compensation/employer's liability and professional liability, each policy of Additional Insurance Required From Enrolled Parties and Excluded Parties (or renewal policy of insurance) maintained hereunder shall show the City as an "additional insured" as required by Appendix 12 (Insurance Requirements) for the particular policy with coverage being primary and non-contributory to any of the OCIP Coverages and Other Coverages Provided by the City.

(E) Failure to Provide Insurance Coverage. If the Design-Builder fails to pay or cause to be paid any premium for Additional Insurance Required From Enrolled Parties and Excluded Parties, or if any insurer cancels any policy of Additional Insurance Required From Enrolled Parties and Excluded Parties and the Design-Builder fails to obtain replacement coverage so that the Required Insurance is maintained on a continuous basis, the City may, but is not obligated to, pay such premium or procure similar insurance coverage from another insurer and upon such payment by the City the amount thereof shall be immediately reimbursable to the City by the Design-Builder. The failure of the Design-Builder to obtain and maintain any Additional Insurance Required From Enrolled Parties and Excluded Parties shall not relieve the Design-Builder of its liability for any losses, be a satisfaction of any Design-Builder liability under this Amended and Restated Design-Build Contract or in any way limit, modify or satisfy the Design-Builder's indemnity obligations hereunder.

ARTICLE 15

UNCONTROLLABLE CIRCUMSTANCES

SECTION 15.1. UNCONTROLLABLE CIRCUMSTANCES GENERALLY.

(A) Extent of Relief Available to the Design-Builder. If an Uncontrollable Circumstance occurs, the Design-Builder may be entitled to relief from its obligations and extensions of time, and may claim compensation, but only as and to the extent provided in Section 15.3 (Uncontrollable Circumstances Relief). Such relief shall be available irrespective of whether an obligation of this Amended and Restated Design-Build Contract expressly states that it is excused by Uncontrollable Circumstances.

(B) Mitigation Given Effect. Any relief to which the Design-Builder is entitled under this Article on account of Uncontrollable Circumstances shall be adjusted to account for the effect of the mitigation measures which were or should have been taken by the Design-Builder in compliance with its duty to mitigate under Section 18.7 (General Duty to Mitigate).

(C) Applicable Law Compliance. Nothing in this Article shall be interpreted as relieving the Design-Builder of its obligation, following any and all Uncontrollable Circumstances, to perform its obligations under this Amended and Restated Design-Build Contract in compliance with Applicable Law.

SECTION 15.2. UNCONTROLLABLE CIRCUMSTANCE CLAIM PROCEDURES.

(A) Notice and Written Report. In order to assert an entitlement based on the occurrence of an Uncontrollable Circumstance, the Design-Builder shall give notice of the occurrence of the Uncontrollable Circumstance to the City as soon as practicable, and in any event within ten Business Days of the date the Design-Builder has knowledge that the Uncontrollable Circumstance has caused or is likely to cause an entitlement under this Amended and Restated Design-Build Contract. The Design-Builder's notice shall include a written report:

- (1) Describing the Uncontrollable Circumstance and the cause thereof, to the extent known;
- (2) Stating the date on which the Uncontrollable Circumstance began and its estimated duration, to the extent known;
- (3) Summarizing the consequences of the Uncontrollable Circumstance and the expected impact on the performance of the Design-Builder's obligations under this Amended and Restated Design-Build Contract; and
- (4) Indicating the nature and scope of the Design-Builder's potential entitlement to relief.

(B) Updates. The Design-Builder shall provide the City with periodic updates, together with further details and supporting documentation, as it receives or develops additional information pertaining to the Uncontrollable Circumstance and the matters described in subsection 15.2(A) (Notice and Written Report). In particular, the Design-Builder shall notify the City as soon as the Uncontrollable Circumstance has ceased and of the time when performance of its affected obligations can be resumed.

(C) Submittal of Relief Request. The Design-Builder shall submit to the City a further notice making its request for specific relief, the basis therefor and the event giving

rise to the requested relief within 30 days after the notice referred to in subsection 15.2(A) (Notice and Written Report). If the specific relief cannot reasonably be ascertained within such 30-day period, the Design-Builder shall furnish such notice within such longer period as necessary to detail the event and ascertain such relief.

(D) Delay in Notification. If any Uncontrollable Circumstance notice or any required information is submitted by the Design-Builder to the City after the dates required under this Section, then the Design-Builder shall be entitled to relief provided due to the occurrence of the Uncontrollable Circumstance except to the extent that the ability to mitigate was adversely affected as a result of the delay in providing such notice or information.

(E) Multiple and Overlapping Claims. The Design-Builder may make multiple but not duplicative claims with respect to an Uncontrollable Circumstance.

(F) Burden of Proof and Mitigation. The Design-Builder shall bear the burden of proof in establishing the occurrence of an Uncontrollable Circumstance and the entitlement to relief based thereon, and shall demonstrate that the Design-Builder complied with its mitigation obligations under Section 18.7 (General Duty to Mitigate).

(G) Resumption of Performance. Promptly following the occurrence of an Uncontrollable Circumstance, the Design-Builder shall use all reasonable efforts to eliminate the cause thereof and resume performance of this Amended and Restated Design-Build Contract.

(H) Design-Builder Information. The City shall provide the Design-Builder information reasonably requested in order for the Design-Builder to reasonably assert an Uncontrollable Circumstance claim.

(I) City Response. Within 30 days after receipt of a relief request by the Design-Builder pursuant to subsection 15.2(C) (Submittal of Relief Request), the City shall issue a written determination as to the extent, if any, to which it concurs with the Design-Builder's request, and the reasons therefor.

(J) Agreement or Dispute. The agreement of the parties as to the specific relief to be given the Design-Builder on account of an Uncontrollable Circumstance shall be evidenced by a Contract Administration Memorandum or a Contract Amendment, as applicable. Either party may refer any dispute for resolution pursuant to Article 12 (Dispute Resolution).

(K) Certifications. Each submittal made under this Section by the Design-Builder shall be accompanied by a certification of the Design-Builder Representative that the submittal is made in good faith; that the supporting data are complete and accurate at the time of the submittal to the best knowledge of the Design-Builder; and that the requested relief accurately reflects the relief to which the Design-Builder reasonably believes it is entitled. The Design-Builder shall have no entitlement to relief for uncertified claims.

SECTION 15.3. UNCONTROLLABLE CIRCUMSTANCES RELIEF.

If and to the extent that an Uncontrollable Circumstance interferes with, delays or increases the cost to the Design-Builder performing the Design-Build Work in accordance herewith, the Design-Builder shall be entitled to: (1) relief from its performance obligations; (2) a delay in the Design-Build Schedule and the Scheduled Substantial Completion Date; (3) compensation for such costs, which shall constitute Design-Build Costs; or (4) a Base Guaranteed Maximum Price Adjustment (except as and to the extent provided in this Section, Section 15.2 (Uncontrollable Circumstance Claim Procedures) and Article 16 (Indemnification)), or any combination thereof, each of which properly reflects the interference with performance,

the time lost as a result thereof, or the amount of the increased cost, in each case only to the minimum extent necessary to compensate the Design-Builder or provide performance or schedule relief and only to the extent directly attributable to the Uncontrollable Circumstance. The Design-Builder shall perform all other Design-Build Work not affected by the Uncontrollable Circumstances. Any cost reduction achieved, or which should have been achieved, through the mitigation measures undertaken by the Design-Builder pursuant to Section 18.7 (General Duty to Mitigate) shall be reflected in a reduction of the amount of the additional Design-Build Costs and Base Guaranteed Maximum Price Adjustment as appropriate to reflect such mitigation measures. The Design-Builder shall not be entitled to any price relief on account of any costs incurred as the result of an act, event or circumstance that the Design-Builder is obligated to insure against under Article 14 (Insurance), if such coverage is available in the commercial insurance market, irrespective of any limits of coverage and of any deductible applicable under any policy of insurance maintained or required to be maintained thereunder.

ARTICLE 16

INDEMNIFICATION

SECTION 16.1. DESIGN-BUILDER'S OBLIGATION TO INDEMNIFY.

The Design-Builder shall indemnify and keep elected officials, members, appointed officers, employees, representatives, agents and contractors of the City (each a "City Indemnatee") indemnified at all times from and against all Loss-and-Expense that any City Indemnatee may sustain in connection with any loss of or physical damage to property or assets of any City Indemnatee, or any claim made by one or more third parties (including for loss of or physical damage to property or assets), or any claim for, or in respect of, the death, personal injury, disease or illness of any person, including any City Indemnatee, arising by reason of any:

- (1) Breach of any representation or warranty by the Design-Builder under this Amended and Restated Design-Build Contract;
- (2) Negligent act or omission of the Design-Builder;
- (3) Willful misconduct of the Design-Builder;
- (4) Non-compliance by the Design-Builder with any of the provisions of this Amended and Restated Design-Build Contract or any document, instrument or agreement delivered to the City as required under this Amended and Restated Design-Build Contract;
- (5) Activities on the Headworks Facility Site, as provided in subsection 4.4(C) (Access to the Headworks Facility Site);
- (6) Non-compliance with Applicable Law, as provided in subsection 4.5(C) (Fines, Penalties and Remediation);
- (7) Release of Regulated Substances by the Design-Builder, as provided in subsection 6.4(E) (Design-Builder Responsibilities);
- (8) Labor disputes, as provided in subsection 7.2(B) (Labor Relations);
- (9) Subcontractor claims, as provided in subsection 7.3(F) (Indemnity for Subcontractor Claims);
- (10) Intellectual Property claims, as provided in subsection 18.6(A) (Protection from Infringement);
- (11) Failure by the Design-Builder to advise the City of any potential infringement or unauthorized use resulting from a City-directed Change Order, as provided in subsection 18.6(C) (Exceptions to Infringement Protection);
- (12) Any claims of harassment arising from the conduct of the Design-Builder or any Design-Builder Person;
- (13) Breach by the Design-Builder of, or non-compliance by the Design-Builder with, any Governmental Approval or Applicable Law, or the failure of the Design-Builder Company to obtain all necessary Governmental Approvals in accordance with this Amended and Restated Design-Build Contract; or

(14) Any other act, event or circumstance as to which the Design-Builder is obligated to provide an indemnity hereunder;

except to the extent caused by City Fault. The Design-Builder's indemnity obligations under this Section shall not be limited by any coverage exclusions or other provisions in any policy of Required Insurance or other insurance maintained by the Design-Builder which is intended to respond to such events. Notwithstanding the foregoing, the City Indemnitees' right to indemnification pursuant to this Section shall be reduced by all insurance, settlement proceeds or third party indemnification proceeds actually received by the City Indemnitees. This Section may be relied upon by the City Indemnitees and may be enforced directly by any of them against the Design-Builder in the same manner and for the same purpose as if pursuant to a contractual indemnity directly between them and the Design-Builder.

SECTION 16.2. INDEMNIFICATION PROCEDURES.

(A) Notice. If a City Indemnitee receives any notice, demand, letter or other document concerning any claim for which it appears that the City Indemnitee is, or may become entitled to, indemnification or compensation under this Amended and Restated Design-Build Contract in respect of the entire claim, the City Indemnitee shall give notice in writing to the Design-Builder as soon as reasonably practicable and in any event within 10 Business Days of receipt thereof.

(B) Design-Builder Right to Dispute Claim. If notice is given as provided in subsection 16.2(A) (Indemnification Procedures - Notice), the Design-Builder shall be entitled to dispute the claim in the name of the City Indemnitee at the Design-Builder's own expense and take conduct of any defense, dispute, compromise, or appeal of the claim and of any incidental negotiations. The City Indemnitee will give the Design-Builder all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim.

(C) Conflicts of Interest. In defending any claim as described in subsection 16.2(B) (Indemnification Procedures - Design-Builder Right to Dispute Claim) in which there is a conflict of interest between the Design-Builder and the City Indemnitee, the City Indemnitee may appoint independent legal counsel in respect of such claim and, if it is determined that the City Indemnitee is entitled to indemnification by or compensation from the Design-Builder, all reasonable costs and expenses incurred by the City Indemnitee in so doing will be included in the indemnity or compensation from the Design-Builder.

(D) Rights and Duties of the Parties. With respect to any claim conducted by the Design-Builder pursuant to subsection 16.2(B) (Indemnification Procedures - Design-Builder Right to Dispute Claim):

(1) The Design-Builder shall keep the City Indemnitee fully informed and consult with it about material elements of the conduct of such defense;

(2) The Design-Builder shall demonstrate to the City Indemnitee, at the reasonable request of the City Indemnitee, that the Design-Builder has sufficient means to pay all costs and expenses that it may incur by reason of conducting such defense; and

(3) The Design-Builder shall have full control of such defense and proceedings, including any compromise or settlement thereof; provided, however, that any such compromise or settlement involving non-monetary obligations of the City, or otherwise having a direct effect upon its continuing operations, shall (1) contain a full release of the City and (2) be subject to the consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed. If requested by the Design-Builder, the City Indemnitee shall, at the sole cost and expense of the Design-Builder, cooperate

with the Design-Builder and its counsel in contesting any claim which the Design-Builder elects to contest, including the making of any related counterclaim against the person asserting the claim or any cross-complaint against any person.

(E) City Indemnatee Rights to Conduct Defense. The City Indemnatee may take conduct of any defense, dispute, compromise or appeal of the claim and of any incidental negotiations if:

(1) The Design-Builder is not entitled to take conduct of the claim in accordance with subsection 16.2(B) (Indemnification Procedures – Design-Builder Right to Dispute Claim); or

(2) The Design-Builder fails to notify the City Indemnatee of its intention to take conduct of the relevant claim within 10 Business Days of the notice from the City Indemnatee under subsection 16.2(B) (Indemnification Procedures – Design-Builder Right to Dispute Claim) or notifies the City Indemnatee that it does not intend to take conduct of the claim; or

(3) The Design-Builder fails to comply in any material respect with subsection 16.2(D) (Indemnification Procedures - Rights and Duties of the Parties).

(F) Transfer of Conduct of Claim to City Indemnatee. The City Indemnatee may at any time give notice to the Design-Builder that it is retaining or taking over, as the case may be, the conduct of any defense, dispute, compromise, settlement or appeal of any claim, or of any incidental negotiations, to which subsection 16.2(E) (Indemnification Procedures – City Indemnatee Rights to Conduct Defense) applies. On receipt of such notice the Design-Builder will promptly take all steps necessary to transfer the conduct of such claim to the City Indemnatee, and will provide to the City Indemnatee all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim.

ARTICLE 17

SECURITY FOR PERFORMANCE

SECTION 17.1. GUARANTOR

(A) Guarantor Agreement. The Design-Builder, concurrently with the execution and delivery of the Design-Build Contract, caused the Guaranty Agreement to be provided by the Guarantor in the form attached hereto as a Transaction Form. Pursuant to the Guaranty Agreement, the Guarantor has guaranteed the performance of the obligations of the Design-Builder under the Design-Build Contract as such contract may be amended, including by this Amended and Restated Design-Build Contract.

(B) Reports and Notifications Concerning the Financial Condition of the Guarantor. The Design-Builder shall provide to the City, within 180 days after the end of each fiscal year of the Guarantor, the consolidated balance sheet and income statement for the Guarantor attached to the audited year-end financial statements for that fiscal year reported upon by the independent public accountant of the Guarantor. If applicable, the Design-Builder shall also furnish the City with copies of the quarterly and annual reports and other filings of the Guarantor filed with the Securities and Exchange Commission. If the Guarantor is not required to file quarterly reports with the Securities and Exchange Commission, the Design-Builder, at the request of the City, shall provide the City with unaudited quarterly financial statements of the Guarantor within 60 days following the end of each quarter based on the fiscal year of the Guarantor. In addition, the Design-Builder shall provide reasonable notice to the City of any change to the financial condition of the Guarantor that would reasonably be anticipated to impair the ability of the Guarantor to meet its obligations under the Guaranty Agreement.

SECTION 17.2. PERFORMANCE AND PAYMENT BONDS.

(A) Requirements. In connection with the execution of Early Work Package Amendment No. 1, the Design-Builder has provided the City with Payment and Performance Bonds as required by such amendment. Within 7 days following the Amended and Restated Contract Date, the Design-Builder, as financial security for the faithful performance of its obligations hereunder, shall provide the City with an amendment or replacement to such Performance Bond and Payment Bond, that: (1) increases the penal sum of such Performance Bond and the Payment Bond to an amount equal to the Base Guaranteed Maximum Price; and (2) affirmatively states that such Performance Bond and Payment Bond cover faithful performance of this Amended and Restated Design-Build Contract and the payment obligations arising hereunder. The amount of the Performance Bond and Payment Bond shall be increased by the Design-Builder to reflect any Base Guaranteed Maximum Price Adjustment at the time such adjustment is implemented by the parties and as a condition to its entitlement to the adjustment. The Performance Bond and the Payment Bond shall be in the forms set forth in the Transaction Forms and shall be issued by a surety company: (1) approved by the City having a rating of "A" in the latest revision of the A.M. Best Company's Insurance Report; (2) be listed in the United States Treasury Department's Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsurance Companies"; and (3) holding a certificate of authority to transact surety business in the City. The Payment Bond shall remain open until Final Completion. The Performance Bond shall secure the performance of the Warranty Work as well as the Design-Build Work and shall remain in place through the end of the Warranty Period. To the extent required by Applicable Law, the Design-Builder shall provide such further performance and payment bonds as may be necessary under Applicable Law to secure the performance of any Warranty Work;

and such performance and payment bonds shall comply with the requirements of Applicable Law and this Section.

(B) Monitoring of Sureties. The Design-Builder shall be responsible throughout the Term for monitoring the financial condition of any surety company issuing bonds under this Amended and Restated Design-Build Contract and for making inquiries no less often than annually to confirm that each such surety company maintains at least the minimum rating level specified in this Section. In the event the rating of any issuing surety company falls below such minimum level, or if any surety company is declared bankrupt or becomes insolvent or has the rights to do business in the City terminated, the Design-Builder shall promptly notify the City of such event and shall promptly take steps to ensure continued compliance with this Section. In the event the rating of any issuing surety company falls below such minimum level, or if any surety company is declared bankrupt or becomes insolvent or has the rights to do business in the City terminated, the Design-Builder shall promptly notify the City of such event and shall promptly take steps to ensure continued compliance with this Section by furnishing or arranging for the furnishing of a substitute or additional bond of a surety company whose rating and other qualifications satisfy all above requirements, unless the City agrees to accept the surety company that no longer satisfies the minimum rating level specified above, or agrees to an alternative method of assurance. Upon such notice by the Design-Builder of such an event, the City shall not unreasonably withhold its approval of such assurance. The City recognizes that the Design-Builder intends to provide the bonds required under this Section pursuant to a co-surety arrangement whereby three surety companies meeting the qualifications specified in this Section as of the Contract Date will be jointly and severally liable for the obligations of the surety under the bond. Accordingly, it shall not be an Event of Default by the Design-Builder under subsection 13.2(A)(3) (Security for Performance) if one or more of the three surety companies continues to meet such qualifications and to maintain the bond in accordance with this Section.

SECTION 17.3. COSTS OF PROVIDING SECURITY INSTRUMENTS.

The cost and expense of obtaining and maintaining the Security Instruments required under this Article as security for the performance of the Design-Builder's obligations hereunder shall be borne by the Design-Builder. Premiums for the Performance Bonds and the Payment Bonds shall be Design-Build Costs that may be requisitioned by the Design-Builder in accordance with the provisions of Appendix 8 (Design-Build Price). Premiums or payments for the Guaranty Agreement are Unallowable Costs which cannot be requisitioned.

ARTICLE 18

MISCELLANEOUS PROVISIONS

SECTION 18.1. OWNERSHIP OF THE REGIONAL WASTEWATER FACILITY AND THE PROJECT.

The Regional Wastewater Facility is and shall be owned by the City of San Jose and the City of Santa Clara at all times; title to the Project shall pass to the City as provided in subsection 6.1(N) (Title and Risk of Loss).

SECTION 18.2. RELATIONSHIP OF THE PARTIES.

The Design-Builder is an independent contractor of the City and the relationship between the parties shall be limited to performance of this Amended and Restated Design-Build Contract in accordance with its terms. Neither party shall have any responsibility with respect to the services to be provided or contractual benefits assumed by the other party. Nothing in this Amended and Restated Design-Build Contract shall be deemed to constitute either party a partner, agent or legal representative of the other party. No liability or benefits, such as workers compensation, pension rights or liabilities, or other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship shall arise or accrue to any party's agent or employee as a result of this Amended and Restated Design-Build Contract or the performance thereof.

SECTION 18.3. CONTRACT ADMINISTRATION.

(A) Administrative Communications. The parties recognize that a variety of contract administrative matters will routinely arise throughout the performance of this Amended and Restated Design-Build Contract. These matters will by their nature involve requests, notices, questions, assertions, responses, objections, reports, claims, and other communications made personally, in meetings, by phone, by mail and by electronic and computer communications. The purpose of this Section is to set forth a process by which the resolution of the matters at issue in such communications, once resolution is reached, can be formally reflected in the common records of the parties so as to permit the orderly and effective administration of this Amended and Restated Design-Build Contract.

(B) Contract Administration Memoranda. The principal formal tool for the administration of routine matters arising under this Amended and Restated Design-Build Contract between the parties that do not require a Contract Amendment shall be a "Contract Administration Memorandum." A Contract Administration Memorandum shall be prepared, once all preliminary communications have been concluded, to evidence the resolution reached by the City and the Design-Builder as to matters of interpretation and application arising during the course of the performance of their obligations hereunder. Such matters may include, for example: (1) issues as to the meaning, interpretation or application of this Amended and Restated Design-Build Contract in particular circumstances or conditions; (2) calculations required to be made; (3) notices, waivers, releases, satisfactions, confirmations, further assurances, consents and approvals given hereunder; and (4) other similar routine contract administration matters.

(C) Procedure. Either party may request the execution of a Contract Administration Memorandum. When resolution of the matter is reached, a Contract Administration Memorandum shall be prepared by or at the direction of the City reflecting the resolution. Contract Administration Memoranda shall be serially numbered, dated, signed by the Contract Representative of each party, and, at the request of the City, co-signed by a Senior Supervisor for the Design-Builder. The City and the Design-Builder each shall maintain a

parallel, identical file of all Contract Administration Memoranda, separate and distinct from the Contract Amendments and all other documents relating to the administration and performance of this Amended and Restated Design-Build Contract.

(D) Effect. Executed Contract Administration Memoranda shall serve to guide the ongoing interpretation and application of the terms and conditions of this Amended and Restated Design-Build Contract. Any material change, alteration, revision or modification of this Amended and Restated Design-Build Contract, however, shall be effectuated only through a formal Contract Amendment authorized, approved or ratified by resolution of the governing body of the City and properly authorized by the Design-Builder.

SECTION 18.4. CONTRACT AMENDMENTS.

(A) Amendments Generally. Notwithstanding the provisions of Section 18.3 (Contract Administration), no material change, alteration, revision or modification of the terms and conditions of this Amended and Restated Design-Build Contract shall be made except through a written amendment to this Amended and Restated Design-Build Contract, duly authorized, approved or ratified by the City Council (as and to the extent required by the laws governing the City) and duly authorized by the Design-Builder (a “Contract Amendment”).

(B) Procedure. Contract Amendments shall be serially numbered, dated and signed by a Senior Supervisor for the Design-Builder and by the City Contract Representative, as determined in accordance with subsection 18.5(B) (City Contract Representative). The City and the Design-Builder each shall maintain a parallel, identical file of all Contract Amendments, separate and distinct from the Contract Administration Memoranda and all other documents relating to the administration and performance of this Amended and Restated Design-Build Contract.

SECTION 18.5. CONTRACT REPRESENTATIVES.

(A) Design-Builder Contract Representative and Senior Supervisors. The Design-Builder shall appoint and inform the City in writing from time to time of the identity of (1) the individual with the responsibility and power from time to time to administer this Amended and Restated Design-Build Contract and to bind the Design-Builder with respect to any Contract Administration Memorandum and Contract Amendment (which may be the same or different individual with respect to the Preliminary Services, the Design-Build Work and the Transition Services) (the “Design-Builder Contract Representative”), and (2) the corporate officials of the Design-Builder with senior supervisory responsibility for the Project, the Contract Services and the performance of this Amended and Restated Design-Build Contract (the “Senior Supervisors”). The Design-Builder shall promptly notify the City in writing of the appointment of any successor Senior Supervisors. The Senior Supervisors shall cooperate with the City in any reviews of the performance of the Design-Build Manager and the Design-Builder Contract Representative which the City may undertake from time to time, and shall give full consideration to any issues raised by the City in conducting such performance reviews.

(B) City Contract Representative. The City shall appoint an individual or individuals to act as “City Contract Representative” for this Amended and Restated Design-Build Contract. Such appointment shall be in writing and include a specific description of the extent of the Contract Representative’s power to administer this Amended and Restated Design-Build Contract, including specific dollar limitations of his or her authority. The Design-Builder shall be entitled to a copy of any such written appointment. The Design-Builder understands and agrees that any such delegation may provide only limited authority with respect to the implementation of this Amended and Restated Design-Build Contract, which may or may not include the authority to bind the City with respect to any Contract Amendment. Within such limitations, the Design-Builder shall be entitled to rely on the written directions of any City Contract Representative. The City Contract Representative shall

have the right at any time to issue the Design-Builder a written request for information relating to this Amended and Restated Design-Build Contract. Any written request designated as a “priority request” shall be responded to by the Design-Builder within three business days.

(C) City Approvals and Consents. When this Amended and Restated Design-Build Contract requires any approval or consent by the City to a Design-Builder submission, request or report, the approval or consent shall, within the limits of the authority of subsection (B) (City Contract Representative) of this Section, be given by the City Contract Representative in writing and such writing shall be conclusive evidence of such approval or consent, subject only to compliance by the City with the Applicable Law that generally governs its affairs. Unless expressly stated otherwise in this Amended and Restated Design-Build Contract, and except for requests, reports and submittals made by the Design-Builder that do not, by their terms or the terms of this Amended and Restated Design-Build Contract, require a response or action, if the City does not find a request, report or submittal acceptable, it shall provide written response to the Design-Builder describing its objections and the reasons therefor within 14 days of the City’s receipt thereof. If no response is received, the request, report or submittal shall be deemed rejected unless the City’s approval or consent may not be unreasonably delayed by the express terms hereof, and the Design-Builder may resubmit the same, with or without modification. Requests, reports and submittals that do not require a response or other action by the City pursuant to some specific term of this Amended and Restated Design-Build Contract shall be deemed acceptable to the City if the City shall not have objected thereto within 30 days of the receipt thereof.

SECTION 18.6. PROPERTY RIGHTS.

(A) Protection from Infringement. The Design-Builder shall pay all royalties and license fees in connection with the Contract Services during the Term. Except as provided in subsections (C) (Exceptions to the Infringement Protection) and (D) (Intellectual Property Developed by the Design-Builder) of this Section, the Design-Builder shall indemnify, defend and hold harmless the City Indemnities in accordance with and to the extent provided in Section 16.1 (Design-Builder’s Obligation to Indemnify) from and against all Loss-and-Expense arising out of or related to the infringement or unauthorized use of any patent, trademark, copyright or trade secret relating to, or for the Contract Services. The Design-Builder’s indemnity pursuant to this Section shall apply only when infringement occurs or is alleged to occur from the intended use for which the Deliverable Material, process or equipment was provided by the Design-Builder pursuant to this Amended and Restated Design-Build Contract.

(B) Substitutes for Deliverable Material, Process or Equipment. Except as provided in subsection (D) (Intellectual Property Developed by the Design-Builder) of this Section, in the event the Design-Builder or the City is enjoined from using any Deliverable Material, process or equipment, the Design-Builder, at its sole cost and expense, shall:

(1) acquire the right to legally use such infringing Deliverable Material, process or equipment (or any affected Design-Build Work) under infringed patents or copyrights; or

(2) modify or replace such Deliverable Material, process or equipment (or any affected Design-Build Work) with un-infringed Deliverable Material, process or equipment (or any affected Design-Build Work) equivalent in quality, performance, useful life and technical characteristics and development; provided, however, that any such modification or replacement shall be subject to the City’s approval, which shall not be unreasonably withheld or delayed.

(C) Exceptions to Infringement Protection. Unless otherwise agreed to by the parties, the Design-Builder’s obligations under this Section shall not apply to:

- (1) infringement resulting from City-directed Change Orders issued under subsection 6.8(C) (Changes Required by the City) or Section 6.9 (Unilateral Change Directives);
- (2) infringement resulting from unauthorized additions, changes or modifications to the Deliverable Material, process or equipment made or caused to be made by the City subsequent to delivery by the Design-Builder; or
- (3) any claimed infringement which is settled without the consent of the Design-Builder.

The Design-Builder shall promptly advise the City as to whether any City-directed Change Order issued under subsection 6.8(C) (Changes Required by the City) or Section 6.9 (Unilateral Change Directives) may result in any infringement or unauthorized use and, in the event of any failure by the Design-Builder to so advise the City, the Design-Builder will indemnify the City for any Loss-and-Expense resulting from any such infringement or unauthorized use.

(D) Intellectual Property Developed by the Design-Builder. All Intellectual Property developed by the Design-Builder at or through the use of the Project or otherwise in connection with the performance of the Contract Services shall be owned by the Design-Builder subject to the terms and conditions of this Section, and is hereby licensed to the City on a non-exclusive, cost free, perpetual basis for use by the City and any successor operator of the Project (but, with respect to any successor operator, only in connection with the operation of the Project). Such Intellectual Property shall include technology, inventions, innovations, processes, know-how, formulas and software, whether protected as proprietary information, trade secrets, or patents. The City shall have an irrevocable, perpetual and unrestricted right to use such Intellectual Property for any City purpose, whether before or following the Termination Date. The City shall not license, transfer or otherwise make available such Intellectual Property to any third-party without the written consent of the Design-Builder, which consent is hereby granted for purposes of operating the Project following the Termination Date. The City's use of any such Intellectual Property for purposes other than in connection with the Project shall be at its own risk and the Design-Builder shall have no liability therefor.

SECTION 18.7. GENERAL DUTY TO MITIGATE.

(A) Mitigation by the Design-Builder. In all cases where the Design-Builder is entitled to receive any relief from the City or exercise any rights, including the right to receive any payments, costs, damages or extensions of time, whether on account of Uncontrollable Circumstance or otherwise, the Design-Builder shall use all reasonable efforts to mitigate such amount required to be paid by the City to the Design-Builder under this Amended and Restated Design-Build Contract, or the length of the extension of time. Upon request from the City, the Design-Builder shall promptly submit a detailed description, supported by all such documentation as the City may reasonably require, of the measures and steps taken by the Design-Builder to mitigate and meet its obligations under this Section.

(B) Mitigation by the City. In all cases where the City is entitled to receive from the Design-Builder any compensation, costs or damages, but not in any other cases, the City shall use all reasonable efforts to mitigate such amount required to be paid by the Design-Builder to the City under this Amended and Restated Design-Build Contract, provided that such obligation shall not require the City to:

- (1) Take any action which is contrary to the public interest, as determined by the City in its discretion;

(2) Undertake any mitigation measures that might be available arising out of its status as a Governmental Body, but which measure would not normally be available to a private commercial party; or

(3) Alter the amount of liquidated damages it is entitled to receive in accordance with subsection 1.2(Q) (Liquidated Damages).

The City shall have no obligation to mitigate, implied or otherwise, except as set forth in this Section or otherwise as expressly provided in this Amended and Restated Design-Build Contract. Upon request by the Design-Builder, the City shall promptly submit a detailed description, supported by all such documentation as the Design-Builder may reasonably require, of the measures and steps taken by the City to mitigate and meet its obligations under this Section.

SECTION 18.8. ASSIGNMENT OF ANTI-TRUST CLAIMS.

Upon final Completion and final payment of the Design-Build Price by the City the Design-Builder agrees to assign to the City all rights, title and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) arising from purchases of goods, services, or materials pursuant to this Amended and Restated Design-Build Contract.

SECTION 18.9. ACTIONS OF THE CITY IN ITS GOVERNMENTAL CAPACITY.

Nothing in this Amended and Restated Design-Build Contract shall be interpreted as limiting the rights and obligations of the City under Applicable Law in its governmental capacity (including police power actions to protect health, safety and welfare or to protect the environment), or as limiting the right of the Design-Builder to bring any action against the City, not based on this Amended and Restated Design-Build Contract, arising out of any act or omission of the City in its governmental capacity.

SECTION 18.10. ASSIGNMENT.

The Design-Builder shall not assign, transfer, convey, lease, encumber or otherwise dispose of this Amended and Restated Design-Build Contract, its right to execute the same, or its right, title or interest in all or any part of this Amended and Restated Design-Build Contract or any monies due hereunder whatsoever prior to their payment to the Design-Builder, whether legally or equitably, by power of attorney or otherwise, without the prior written consent of the City. Any such approval given in one instance shall not relieve the Design-Builder of its obligation to obtain the prior written approval of the City to any further assignment. Any such assignment of this Amended and Restated Design-Build Contract which is approved by the City, shall require the assignee of the Design-Builder to assume the performance of and observe all obligations, representations and warranties of the Design-Builder under this Amended and Restated Design-Build Contract which shall remain in full force and effect during this Amended and Restated Design-Build Contract. The approval of any assignment, transfer or conveyance shall not operate to release the Design-Builder in any way from any of its obligations under this Amended and Restated Design-Build Contract unless such approval specifically provides otherwise.

SECTION 18.11. COMPLIANCE WITH MATERIAL AGREEMENTS.

The Design-Builder shall comply with its obligations under agreements of the Design-Builder, which are material to the performance of its obligations under this Amended and Restated Design-Build Contract. The City shall comply with its obligations under agreements of the City, which are material to the performance of its obligations hereunder.

SECTION 18.12. BINDING EFFECT.

This Amended and Restated Design-Build Contract shall inure to the benefit of and shall be binding upon the City and the Design-Builder and any assignee acquiring an interest hereunder consistent with Section 18.10 (Assignment).

SECTION 18.13. AMENDMENT AND WAIVER.

This Amended and Restated Design-Build Contract may not be amended except by a written agreement signed by the parties in accordance with Section 18.4 (Contract Amendments). Any of the terms, covenants, and conditions of this Amended and Restated Design-Build Contract may be waived at any time by the party entitled to the benefit of such term, covenant or condition if such waiver is in writing and executed by the party against whom such waiver is asserted.

SECTION 18.14. NOTICES.

(A) Procedure. All notices, consents, approvals or written communications (unless otherwise provided in the communication plan required to be developed pursuant to Appendix 2 (Preliminary Services) given pursuant to the terms of this Amended and Restated Design-Build Contract shall be: (1) in writing and delivered in person; (2) transmitted by certified mail, return, receipt requested, postage prepaid or by overnight courier utilizing the services of a nationally-recognized overnight courier service with signed verification of delivery; or (3) given by email transmission, if a signed original of the emailed letter or other communication is deposited in the United States Mail within two days after transmission. Notices shall be deemed given only when actually received at the address first given below with respect to each party. Either party may, by like notice, designate further or different addresses to which subsequent notices shall be sent.

(B) City Notice Address. Notices required to be given to the City shall be addressed as follows:

City of San Jose
700 Los Esteros Road, ESB
San Jose, CA 95134
Attn: Kapil Verma
Telephone No.: (408) 635-4045
Facsimile No.: (408) 586-8446

with a copy to:

City of San Jose
City Hall
200 East Santa Clara Street, T-16
San Jose, CA 95113
Attn: City Attorney – Jennifer Pousho
Telephone No.: (408) 535-1922
Facsimile No.: (408) 998-3131

(C) Owner’s Advisor Notice Address. Notices required to be given to the Owner’s Advisor shall be addressed as follows:

CDM Smith
2300 Clayton Rd., Suite 950
Concord, CA 94520
Attn: Hala Titus
Telephone No.: (925) 296-8055
Facsimile No.: (925) 246-9819

With copies to the City at the addresses provided in (B) above.

(D) Design-Builder Notice Address. Notices required to be given to the Design-Builder shall be addressed as follows:

Jacobs
1737 N 1st St, Suite 300
San Jose, CA 95112
Attn: Joe Broughton
Telephone No.: (303) 570-3813
Email: joe.broughton@jacobs.com

With a copies to:

Jacobs
1737 N 1st St, Suite 300
San Jose, CA 95112
Attn: Dennis Nelson
Telephone No.: (408) 471-1713
Email: Dennis.Nelson@jacobs.com

Jacobs
9191 South Jamaica Street
Englewood, CO 80112
Attn: Jason Adkisson, Associate General Counsel
Telephone No.: (720) 286-1278
Email: Jason.Adkisson@jacobs.com

SECTION 18.15. NOTICE OF LITIGATION.

In the event the Design-Builder or the City receives notice of or undertakes the defense or the prosecution of any Legal Proceedings, claims, or investigations in connection with the Project or the Contract Services, the party receiving such notice or undertaking such defense or prosecution shall give the other party timely notice of such proceedings and shall inform the other party in advance of all hearings regarding such proceedings. For purposes of this Section only, “timely notice” shall be deemed given if the receiving party has a reasonable opportunity to provide objections or comments or to proffer to assume the defense or prosecution of the matter in question, given the deadlines for response established by the relevant rules of procedure.

SECTION 18.16. FURTHER ASSURANCES.

The City and Design-Builder each agree to execute and deliver such further instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Amended and Restated Design-Build Contract. The City and the

Design-Builder, in order to carry out this Amended and Restated Design-Build Contract, each shall use all commercially reasonable efforts to provide such information, execute such further instruments and documents and take such actions as may be reasonably requested by the other and not inconsistent with the provisions of this Amended and Restated Design-Build Contract and not involving the assumption of obligations or liabilities different from or in excess of or in addition to those expressly provided for herein.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have caused this Amended and Restated Design-Build Contract to be executed by their duly authorized representatives as of the day and year first above written.

THE CITY OF SAN JOSE,
a municipal corporation

CH2M HILL ENGINEERS, INC.

By: _____

By: _____

Printed Name: Toni J. Taber, CMC

Printed Name: _____

Title: City Clerk

Title: _____

Date: _____

Date: _____

APPROVED AS TO FORM:

By: _____

Printed Name: Egan Hill

Title: Senior Deputy City Attorney

TRANSACTION FORMS
TO THE
AMENDED AND RESTATED DESIGN-BUILD CONTRACT
FOR THE HEADWORKS FACILITY (CPMS NO. 7477 AND 7701)
AT THE
SAN JOSE – SANTA CLARA
REGIONAL WASTEWATER FACILITY

between

THE CITY OF SAN JOSE,
as administering agency of
The Regional Wastewater Facility

and

CH2M HILL ENGINEERS, INC.

Dated

_____, 2020

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TRANSACTION FORM A
FORM OF GUARANTY AGREEMENT

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GUARANTY AGREEMENT

from

[GUARANTOR]

to

THE CITY OF SAN JOSE, CALIFORNIA

Dated as of

_____, 2018

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GUARANTY AGREEMENT

THIS GUARANTY AGREEMENT is made and dated as of _____, 2018, between _____, a _____ organized and existing under the laws of the State of _____ (together with any permitted successors and assigns hereunder, the “Guarantor”), and the City of San Jose, California (the “City”).

RECITALS

The City and _____, a _____ organized and existing under the laws of the State of _____ (the “Design-Builder”), have entered into a Design-Build Contract for the Headworks Facility at the San Jose – Santa Clara Regional Wastewater Facility, dated as of _____, 2018, as amended from time to time (the “Design-Build Contract”), whereby the Design-Builder has agreed to obtain governmental approvals for, design, construct, start up, commission, and acceptance test, certain upgrades and improvements to the City’s San Jose – Santa Clara Regional Wastewater Facility in San Jose, California, all as more particularly described therein.

The Design-Builder is an indirect subsidiary of the Guarantor.

Performance by the City and the Design-Builder of their obligations under the Design-Build Contract will result in a direct and substantial benefit to the Guarantor.

The City will enter into the Design-Build Contract only if, concurrently with its execution and delivery by the Design-Builder, the Guarantor guarantees the performance by the Design-Builder of all of the Design-Builder’s Obligations under the Design-Build Contract as set forth in this Guaranty Agreement.

In order to induce the execution and delivery of the Design-Build Contract by the City and in consideration thereof, the Guarantor agrees as follows:

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ARTICLE 1

DEFINITIONS AND INTERPRETATION

SECTION 1.1. DEFINITIONS.

For the purposes of this Guaranty, the following words and terms shall have the respective meanings set forth as follows. Any other capitalized word or term used but not defined herein is used as defined in the Design-Build Contract.

“Obligations” means the amounts payable by, and the covenants and agreements of, the Design-Builder pursuant to the terms of the Design-Build Contract.

“Transaction Agreement” means any agreement entered into by the Design-Builder or the City in connection with the transactions contemplated by the Design-Build Contract, including the Design-Build Contract, and any supplements thereto.

SECTION 1.2. INTERPRETATION.

In this Guaranty, unless the context otherwise requires:

(A) References Hereto. The terms “hereby”, “hereof”, “herein”, “hereunder” and any similar terms refer to this Guaranty, and the term “hereafter” means after, and the term “heretofore” means before, the date of execution and delivery of this Guaranty.

(B) Plurality. Words importing the singular number mean and include the plural number and vice versa.

(C) Persons. Words importing persons include firms, companies, associations, general partnerships, limited partnerships, trusts, business trusts, corporations and other legal entities, including public bodies, as well as individuals.

(D) Headings. The table of contents and any headings preceding the text of the Articles, Sections and subsections of this Guaranty shall be solely for convenience of reference and shall not constitute a part of this Guaranty, nor shall they affect its meaning, construction or effect.

(E) Entire Agreement. This Guaranty constitutes the entire agreement between the parties hereto with respect to the transactions contemplated by this Guaranty. Nothing in this Guaranty is intended to confer on any person other than the Guarantor, the City and their permitted successors and assigns hereunder any rights or remedies under or by reason of this Guaranty.

(F) Counterparts. This Guaranty may be executed in any number of original counterparts. All such counterparts shall constitute but one and the same Guaranty.

(G) Applicable Law. This Guaranty shall be governed by and construed in accordance with the applicable laws of the State of California.

(H) Severability. If any clause, provision, subsection, Section or Article of this Guaranty shall be ruled invalid by any court of competent jurisdiction, the invalidity of any such clause, provision, subsection, Section or Article shall not affect any of the remaining provisions hereof, and this Guaranty shall be construed and enforced as if such invalid portion did not exist provided that such construction and enforcement shall not increase the Guarantor’s liability beyond that expressly set forth herein.

(I) Approvals. All approvals, consents and acceptances required to be given or made by any party hereto shall be at the discretion of the party whose approval, consent or acceptance is required.

(J) Payments. All payments required to be made by the Guarantor hereunder shall be made in lawful money of the United States of America.

ARTICLE 2

REPRESENTATIONS AND WARRANTIES OF THE GUARANTOR

SECTION 2.1. REPRESENTATIONS AND WARRANTIES OF THE GUARANTOR.

The Guarantor hereby represents and warrants that:

(A) Existence and Powers. The Guarantor is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, with the full legal right, power and authority to enter into and perform its obligations under this Guaranty

(B) Due Authorization and Binding Obligation. This Guaranty has been duly authorized, executed and delivered by all necessary corporate action of the Guarantor and constitutes the legal, valid and binding obligation of the Guarantor, enforceable against the Guarantor in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application.

(C) No Conflict. To the best of its knowledge, neither the execution nor delivery by the Guarantor of this Guaranty nor the performance by the Guarantor of its obligations in connection with the transaction contemplated hereby or the fulfillment by the Guarantor of the terms and conditions hereof: (a) conflicts with, violates or results in a breach of any law or governmental regulation applicable to the Guarantor; (b) conflicts with, violates or results in a breach of any term or condition of the Guarantor's corporate charter or by-laws or any order, judgment or decree, or any contract, agreement or instrument to which the Guarantor is a party or by which the Guarantor or any of its properties or assets are bound, or constitutes a default under any of the foregoing; or (c) will result in the creation or imposition of any material encumbrance of any nature whatsoever upon any of the properties or assets of the Guarantor except as permitted hereby.

(D) No Approvals Required. No approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Body is required for the valid execution and delivery of this Guaranty by the Guarantor or the performance of its payment or other obligations hereunder, except as such shall have been duly obtained or made.

(E) No Litigation. Except as disclosed in writing to the City, there is no Legal Proceeding, at law or in equity, before or by any Governmental Body pending or, to the best of the Guarantor's knowledge, overtly threatened or publicly announced against the Guarantor, in which an unfavorable decision, ruling or finding could reasonably be expected to have a material and adverse effect on the validity, legality or enforceability of this Guaranty against the Guarantor, or on the ability of the Guarantor to perform its obligations hereunder.

(F) No Legal Prohibition. The Guarantor has no knowledge of any Applicable Law in effect on the date as of which this representation is being made which would prohibit the performance by the Guarantor of this Guaranty and the transactions contemplated by this Guaranty.

(G) Consent to Agreements. The Guarantor is fully aware of and consents to the terms and conditions of the Design-Build Contract.

(H) Consideration. This Guaranty is made in furtherance of the purposes for which the Guarantor has been organized, and the assumption by the Guarantor of its obligations hereunder will result in a material benefit to the Guarantor.

(I) Applicable Law Compliance. Except as disclosed in writing to the City, the Guarantor does not have knowledge of any material violation of any law, order, rule or regulation with respect to any facilities designed or constructed by the Guarantor, Design-Builder or any of their Affiliates.

ARTICLE 3

GUARANTY COVENANTS

SECTION 3.1. GUARANTY TO THE CITY.

The Guarantor hereby absolutely, presently, irrevocably and unconditionally guarantees to the City for the benefit of the City (1) the full and prompt payment when due of each and all of the payments required to be credited or made by the Design-Builder under the Design-Build Contract (including all amendments and supplements thereto) to, or for the account of, the City, when the same shall become due and payable pursuant to this Guaranty, and (2) the full and prompt performance and observance of each and all of the Obligations. Notwithstanding the unconditional nature of the Guarantor's obligations as set forth herein, the Guarantor shall have the right to assert the defenses provided in Section 3.4 hereof against claims made under this Guaranty. The combined liability of the Guarantor under this Guaranty and the Design-Builder under the Design-Build Contract shall be subject to the applicable limitations set forth in the Design-Build Contract.

SECTION 3.2. RIGHT OF CITY TO PROCEED AGAINST GUARANTOR.

This Guaranty shall constitute a guaranty of payment and of performance and not of collection, and the Guarantor specifically agrees that in the event of a failure by the Design-Builder to pay or perform any Obligation guaranteed hereunder, the City shall have the right to proceed first and directly against the Guarantor under this Guaranty and without proceeding against the Design-Builder or exhausting any other remedies against the Design-Builder which the City may have. Without limiting the foregoing, the Guarantor agrees that it shall not be necessary, and that the Guarantor shall not be entitled to require, as a condition of enforcing the liability of the Guarantor hereunder, that the City: (1) file suit or proceed to obtain a personal judgment against the Design-Builder or any other person that may be liable for the Obligations or any part of the Obligations; (2) make any other effort to obtain payment or performance of the Obligations from the Design-Builder other than providing the Design-Builder with any notice of such payment or performance as may be required by the terms of the Design-Build Contract or required to be given to the Design-Builder under Applicable Law; (3) foreclose against or seek to realize upon any security for the Obligations; or (4) exercise any other right or remedy to which the City is or may be entitled in connection with the Obligations or any security therefor or any other guarantee thereof, except to the extent that any such exercise of such other right or remedy may be a condition to the Obligations of the Design-Builder or to the enforcement of remedies under the Design-Build Contract. Upon any unexcused failure by the Design-Builder in the payment or performance of any Obligation and the giving of such notice or demand, if any, to the Design-Builder and the Guarantor as may be required in connection with such Obligation and this Guaranty, the liability of the Guarantor shall be effective and shall immediately be paid or performed. Notwithstanding the City's right to proceed directly against the Guarantor, the City (or any successor) shall not be entitled to more than a single full performance of the Obligations in regard to any breach or non-performance thereof.

SECTION 3.3. GUARANTY ABSOLUTE AND UNCONDITIONAL.

The obligations of the Guarantor hereunder are absolute, present, irrevocable and unconditional and shall remain in full force and effect until the Design-Builder shall have fully discharged the Obligations in accordance with their respective terms and conditions, and, except as provided in Section 3.4, shall not be subject to any counterclaim, set-off, deduction or defense (other than full and strict compliance with, or release, discharge or satisfaction of, such Obligations) based on any claim that the Guarantor may have against the Design-Builder, the City or any other person. Without limiting the foregoing, and except as otherwise provided in Section 3.4, the obligations of the Guarantor hereunder shall not be released, discharged or in

any way modified by reason of any of the following (whether with or without notice to, knowledge by, or further consent, of the Guarantor):

- (1) the extension or renewal of this Guaranty or the Design-Build Contract up to the specified Terms of each agreement;
- (2) any exercise or failure, omission or delay by the City in the exercise of any right, power or remedy conferred on the City with respect to this Guaranty or the Design-Build Contract except to the extent such failure, omission or delay gives rise to an applicable statute of limitations defense with respect to a specific claim;
- (3) any permitted transfer or assignment of rights or obligations under the Design-Build Contract or under any other Transaction Agreement by any party thereto, or any permitted assignment, conveyance or other transfer of any of their respective interests in the Project Improvements or in, to or under any of the Transaction Agreements;
- (4) any permitted assignment for the purpose of creating a security interest or mortgage of all or any part of the respective interests of the City or any other person in any Transaction Agreement or in the Project Improvements;
- (5) any renewal, amendment, change or modification in respect of any of the Obligations or terms or conditions of any Transaction Agreement;
- (6) any failure of title with respect to all or any part of the respective interests of any person in the Project Site or the Project Improvements;
- (7) the voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all the assets, marshalling of assets and liabilities, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, moratorium, arrangement, composition with creditors or readjustment of, or other similar proceedings against the Design-Builder or the Guarantor, or any of the property of either of them, or any allegation or contest of the validity of this Guaranty or any other Transaction Agreement in any such proceeding (it is specifically understood, consented and agreed to that, to the extent permitted by law, this Guaranty shall remain and continue in full force and effect and shall be enforceable against the Guarantor to the same extent and with the same force and effect as if any such proceeding had not been instituted and as if no rejection, stay, termination, assumption or modification has occurred as a result thereof, it being the intent and purpose of this Guaranty that the Guarantor shall and does hereby waive all rights and benefits which might accrue to it by reason of any such proceeding);
- (8) except as permitted by Section 4.1 or 4.2 hereof, any sale or other transfer by the Guarantor or any Affiliate of any of the capital stock or other interest of the Guarantor or any Affiliate in the Design-Builder now or hereafter owned, directly or indirectly, by the Guarantor or any Affiliate, or any change in composition of the interests in the Design-Builder;
- (9) any failure on the part of the Design-Builder for any reason to perform or comply with any agreement with the Guarantor;
- (10) the failure on the part of the City to provide any notice to the Guarantor which is not required to be given to the Guarantor pursuant to this Guaranty and to the

Design-Builder as a condition to the enforcement of Obligations pursuant to the Design-Build Contract;

(11) any failure of any party to the Transaction Agreements to mitigate damages resulting from any default by the Design-Builder or the Guarantor under any Transaction Agreement;

(12) the merger or consolidation of any party to the Transaction Agreements into or with any other person, or any sale, lease, transfer, abandonment or other disposition of any or all of the property of any of the foregoing to any person;

(13) any legal disability or incapacity of any party to the Transaction Agreements; or

(14) the fact that entering into any Transaction Agreement by the Design-Builder or the Guarantor was invalid or in excess of the powers of such party.

Should any money due or owing under this Guaranty not be recoverable from the Guarantor due to any of the matters specified in subparagraphs (1) through (14) above, then, in any such case, such money, together with all additional sums due hereunder, shall nevertheless be recoverable from the Guarantor as though the Guarantor were principal obligor in place of the Design-Builder pursuant to the terms of the Design-Build Contract and not merely a guarantor and shall be paid by the Guarantor forthwith subject to the terms of this Guaranty. Notwithstanding anything to the contrary expressed in this Guaranty, nothing in this Guaranty shall be deemed to amend, modify, clarify, expand or reduce the Design-Builder's rights, benefits, duties or obligations under the Design-Build Contract. To the extent that any of the matters specified in subparagraphs (1) through (6) and (8) through (14) would provide a defense to, release, discharge or otherwise affect the Design-Builder's Obligations, the Guarantor's obligations under this Guaranty shall be treated the same.

SECTION 3.4. DEFENSES, SET-OFFS AND COUNTERCLAIMS.

Notwithstanding any provision contained herein to the contrary, the Guarantor shall be entitled to exercise or assert any and all legal or equitable rights or defenses which the Design-Builder may have under the Design-Build Contract or under Applicable Law (other than bankruptcy or insolvency of the Design-Builder and other than any defense which the Design-Builder has expressly waived in the Design-Build Contract or the Guarantor has expressly waived in Section 3.5 hereof or elsewhere hereunder), and the obligations of the Guarantor hereunder are subject to such counterclaims, set-offs or deductions which the Design-Builder is permitted to assert pursuant to the Design-Build Contract, if any.

SECTION 3.5. WAIVERS BY THE GUARANTOR.

The Guarantor hereby unconditionally and irrevocably waives:

- (i) notice from the City of its acceptance of this Guaranty;
- (ii) notice of any of the events referred to in Section 3.3 hereof, except to the extent that notice is required to be given as a condition to the enforcement of the Obligations;
- (iii) to the fullest extent lawfully possible, all notices which may be required by statute, rule of law or otherwise to preserve intact any rights against the Guarantor, except any notice to the Design-Builder required

pursuant to the Design-Build Contract or Applicable Law as a condition to the performance of any Obligation;

- (iv) to the fullest extent lawfully possible, any statute of limitations defense based on a statute of limitations period which may be applicable to guarantors (or parties in similar relationships) which would be shorter than the applicable statute of limitations period for the underlying claim;
- (v) any right to require a proceeding first against the Design-Builder;
- (vi) any right to require a proceeding first against any person or the security provided by or under any Transaction Agreement except to the extent such Transaction Agreement specifically requires a proceeding first against any person (except the Design-Builder) or security;
- (vii) any requirement that the Design-Builder be joined as a party to any proceeding for the enforcement of any term of any Transaction Agreement;
- (viii) the requirement of, or the notice of, the filing of claims by the City in the event of the receivership or bankruptcy of the Design-Builder; and
- (ix) all demands upon the Design-Builder or any other person and all other formalities the omission of any of which, or delay in performance of which, might, but for the provisions of this Section 3.5, by rule of law or otherwise, constitute grounds for relieving or discharging the Guarantor in whole or in part from its absolute, present, irrevocable, unconditional and continuing obligations hereunder, unless such omission or delay would relieve or otherwise discharge the Design-Builder from such obligations under the Design-Build Contract.

SECTION 3.6. PAYMENT OF COSTS AND EXPENSES.

The Guarantor agrees to pay the City on demand all Fees and Costs incurred by or on behalf of the City to enforce observance of the covenants, agreements and obligations contained in this Guaranty against the Guarantor, other than the Fees and Costs that the City incurs in performing any of its obligations under the Design-Build Contract, or other applicable Transaction Agreement where such obligations are a condition to performance by the Design-Builder of its Obligations.

SECTION 3.7. SUBORDINATION OF RIGHTS.

The Guarantor agrees that any right of subrogation or contribution which it may have against the Design-Builder as a result of any payment or performance hereunder is hereby fully subordinated to the rights of the City hereunder and under the Transaction Agreements and that the Guarantor shall not recover or seek to recover any payment made by it hereunder from the Design-Builder until the Design-Builder and the Guarantor shall have fully and satisfactorily paid or performed and discharged the Obligations giving rise to a claim under this Guaranty.

SECTION 3.8. SEPARATE OBLIGATIONS; REINSTATEMENT.

The obligations of the Guarantor to make any payment or to perform and discharge any other duties, agreements, covenants, undertakings or obligations hereunder shall: (1) to the extent permitted by applicable law, constitute separate and independent obligations of

the Guarantor from its other obligations under this Guaranty; (2) give rise to separate and independent causes of action against the Guarantor; and (3) apply irrespective of any indulgence granted from time to time by the City. The Guarantor agrees that this Guaranty shall be automatically reinstated if and to the extent that for any reason any payment or performance by or on behalf of the Design-Builder is rescinded or must be otherwise restored by the City, whether as a result of any proceedings in bankruptcy, reorganization or similar proceeding, unless such rescission or restoration is pursuant to the terms of the Design-Build Contract, or any applicable Transaction Agreement or the Design-Builder's enforcement of such terms under Applicable Law.

SECTION 3.9. TERM.

This Guaranty shall remain in full force and effect from the date of execution and delivery hereof until all of the Obligations of the Design-Builder have been fully paid and performed.

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ARTICLE 4

GENERAL COVENANTS

SECTION 4.1. MAINTENANCE OF CORPORATE EXISTENCE.

(A) Consolidation, Merger, Sale or Transfer. The Guarantor covenants that during the term of this Guaranty it will maintain its corporate existence, will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another entity or permit one or more other entities to consolidate with or merge into it unless the successor is the Guarantor; provided, however, that the Guarantor may consolidate with or merge into another entity, or permit one or more other entities to consolidate with or merge into it, or sell or otherwise transfer to another entity all or substantially all of its assets as an entirety and thereafter dissolve if the successor entity (if other than the Guarantor) (a) assumes in writing all the obligations of the Guarantor hereunder and, if required by law, is duly qualified to do business in the State of California, (b) delivers to the City an opinion of counsel to the effect that its obligations under this Guaranty are legal, valid, binding and enforceable subject to applicable bankruptcy and similar insolvency or moratorium laws; and (c) has a net worth at the time of any such transaction at least equal to the net worth of the Guarantor immediately prior to such time

(B) Continuance of Obligations. If a consolidation, merger or sale or other transfer is made as permitted by this Section, the provisions of this Section shall continue in full force and effect and no further consolidation, merger or sale or other transfer shall be made except in compliance with the provisions of this Section. No such consolidation, merger or sale or other transfer shall have the effect of releasing the initial Guarantor from its liability hereunder unless a successor entity has assumed responsibility for this Guaranty as provided in this Section.

SECTION 4.2. ASSIGNMENT.

Except as provided in Section 4.1, this Guaranty may not be assigned by the Guarantor without the prior written consent of the City.

SECTION 4.3. QUALIFICATION IN CALIFORNIA.

The Guarantor agrees that, so long as this Guaranty is in effect, if required by law, the Guarantor will be duly qualified to do business in the State of California.

SECTION 4.4. CONSENT TO JURISDICTION.

The Guarantor irrevocably: (1) agrees that any Legal Proceeding related to this Guaranty or to any rights or relationship between the parties arising therefrom shall be solely and exclusively initiated and maintained in State courts located in Santa Clara County, California or in federal courts located in the Northern District of California, having appropriate jurisdiction therefor; (2) consents to the jurisdiction of such courts in any such Legal Proceeding; and (3) waives any objection which it may have to the laying of the jurisdiction of any such Legal Proceeding in any such court.

SECTION 4.5. BINDING EFFECT.

This Guaranty shall inure to the benefit of the City and its permitted successors and assigns and shall be binding upon the Guarantor and its successors and assigns.

SECTION 4.6. AMENDMENTS, CHANGES AND MODIFICATIONS.

This Guaranty may not be amended, changed or modified or terminated and none of its provisions may be waived, except with the prior written consent of the City and the Guarantor.

SECTION 4.7. LIABILITY.

It is understood and agreed to by the City that nothing contained herein shall create any obligation of, or right to look, to any director, officer, employee or stockholder of the Guarantor (or any Affiliate of the Guarantor) for the satisfaction of any obligations hereunder, and no judgment, order or execution with respect to or in connection with this Guaranty shall be taken against any such director, officer, employee or stockholder.

SECTION 4.8. NOTICES.

Procedure. All notices, demands or written communications given pursuant to the terms of this Guaranty shall be: (1) in writing and delivered in person; (2) transmitted by certified mail, return, receipt requested, postage prepaid or by overnight courier utilizing the services of a nationally-recognized overnight courier service with signed verification of delivery; or (3) given by email transmission, if a signed original of the emailed letter or other communication is deposited in the United States mail within two days after transmission. Notices shall be deemed given only when actually received at the address first given below with respect to each party. Either party may, by like notice, designate further or different addresses to which subsequent notices shall be sent.

City Notice Address. Notices required to be given to the City shall be addressed as follows:

City of San Jose
700 Los Esteros Road, ESB
San Jose, CA 95134
Attn: Kapil Verma
Telephone No.: (408) 635-4045
Facsimile No.: (408) 586-8446

with a copy to:

City of San Jose
City Hall
200 East Santa Clara Street, T-16
San Jose, CA 95113
Attn: City Attorney – Jennifer Pousho
Telephone No.: (408) 535-1922

Guarantor Notice Address. Notices required to be given to the Guarantor shall be addressed as follows:

Jacobs
3161 Michelson Drive, Suite 500
Irvine, CA 92612
Attn: Jeffrey Higgins
Telephone No.: 949-224-7681
Email: Jeffrey.Higgins@jacobs.com

with a copy to:

Jacobs
1737 N 1st St, Suite 300
San Jose, CA 95112
Attn: Joe Broughton
Telephone No.: (408) 436-4936
Email: joe.broughton@ch2m.com

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Guarantor has caused this Guaranty to be executed in its name and on its behalf by its duly authorized officer as of the date first above written.

[GUARANTOR], as Guarantor

By: _____

Name: _____

Title: _____

ACCEPTED AND AGREED TO BY:

THE CITY OF SAN JOSE

By: _____

Name: _____

Title: _____

TRANSACTION FORM B
FORM OF PERFORMANCE BOND

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FORM OF PERFORMANCE BOND

KNOW ALL PERSONS BY THESE PRESENTS:

That we, _____, hereinafter referred to as “Design-Builder”, as principal, and _____ as surety, are held and firmly bound unto the City of San Jose, California (the “Owner”), in the sum of _____ dollars (\$_____) lawful money of the United States of America, for the payment of which sum, well and truly to be made, we bind ourselves, heirs, executors, administrators, successors, and assigns jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

WHEREAS, the Design-Builder has been awarded and entered into the Design-Build Contract with the Owner for the Headworks Facility at the San Jose – Santa Clara Regional Wastewater Facility, dated as of June 19, 2018, as amended, including by the annexed Amended and Restated Design-Build Contract with the Owner for the Headworks Facility at the San Jose – Santa Clara Regional Wastewater Facility, dated as of _____, 2020, as amended from time to time (the “Design-Build Contract”), whereby the Design-Builder has agreed to obtain governmental approvals for, design, construct, commission, and acceptance test, improvements to the existing, and a new, replacement, headworks facility in San Jose, California, all as more particularly described therein, and is required by the Owner to give this bond on the Amended and Restated Design-Build Contract Date (as defined in the Design-Build Contract) pursuant to said Design-Build Contract; [Note: Jacobs to review with Kevin Shane.]

NOW, THEREFORE, if the Design-Builder, its heirs, executors, administrators, successors, and assigns shall well and truly do and perform all of the covenants and obligations of the Design-Build Contract and any alteration thereof made as therein provided, on its part to be done and performed at the times and in the manner specified therein, then this obligation shall be null and void, otherwise it shall be and remain in full force and effect inclusive of any period of any guarantees or warranties required under the Design-Build Contract.

Any alterations in the work to be done or the material to be furnished, which may be made pursuant to the terms of the Design-Build Contract, shall not in any way release either the Design-Builder or the surety, nor shall any extensions of time granted under the provisions of the Design-Build Contract release either the Design-Builder or the surety, and notice of such alterations or extensions of the Design-Build Contract is hereby waived by the surety.

The surety hereby waives the provisions of California Civil Code Sections 2819 (regarding exoneration of sureties in certain circumstances), 2845 (regarding certain limitations on remedies against sureties) and 2849 (regarding a surety’s rights as to other security held by the creditor).

In the event suit is brought upon this bond by the Owner and judgment is recovered, the surety shall pay all costs incurred by the Owner in such suit, including reasonable attorneys’ fees and administrative and consultant costs to be fixed by the court. Any proceeding, legal or equitable, under this bond shall be instituted in State courts located in Santa Clara County, California or in federal courts located in the Northern District of California.

The address or addresses at which the principal and surety may be served with notices, papers and other documents under the California Bond and Undertaking Law (California Code of Civil Procedure Section 995.010 et seq.) is the following: _____.

WITNESS our hands this _____ day of _____, 2020.

(Seal)

Design-Builder

By _____

Title

(Surety's Corporate Seal)

Surety

By _____

Title

Address of Surety

Notice: No substitution or revision to this bond form will be accepted.

ACKNOWLEDGMENT BY NOTARY PUBLIC

[Cal. Civ. Code, § 1189]

State of California)
County of)

On _____ before me, _____, a notary public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

[Any acknowledgement taken in another state shall be sufficient if it is taken in accordance with the laws of the state where the acknowledgement is made.]

(Attach proof of authority of attorney in fact of surety.)

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TRANSACTION FORM C
FORM OF PAYMENT BOND

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FORM OF PAYMENT BOND FOR MATERIALS AND LABOR

KNOW ALL PERSONS BY THESE PRESENTS:

That we, _____, hereinafter referred to as "Design-Builder", as principal, and _____ as surety, are held and firmly bound unto the City of San Jose, California (the "Owner"), in the sum of _____ dollars (\$_____) lawful money of United States of America, for the payment of which sum, well and truly to be made, we bind ourselves, heirs, executors, administrators, successors, and assigns jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

WHEREAS, the Design-Builder has been awarded and entered into the Design-Build Contract with the Owner for the Headworks Facility at the San Jose – Santa Clara Regional Wastewater Facility, dated as of June 19, 2018, as amended, including by the annexed Amended and Restated Design-Build Contract with the Owner for the Headworks Facility at the San Jose – Santa Clara Regional Wastewater Facility, dated as of _____, 2020, as amended from time to time (the "Design-Build Contract"), whereby the Design-Builder has agreed to obtain governmental approvals for, design, construct, commission, and acceptance test, improvements to the existing, and a new, replacement, headworks facility in San Jose, California, all as more particularly described therein, and is required by the Owner to give this bond on the Amended and Restated Design-Build Contract Date (as defined in the Design-Build Contract) pursuant to said Design-Build Contract; [Note: Jacobs to review with Kevin Shane.]

NOW, THEREFORE, if Design-Builder, or its subcontractors, fails to pay any of the persons referred to in Section 9100 of the Civil Code of the State of California for any materials, provisions, provender, equipment, or other supplies, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor thereon of any kind, or for amounts due under the Unemployment Insurance Code or for any amounts required to be deducted, withheld and paid over to the Employment Development Department from the wages of employees of the Design-Builder and its subcontractors pursuant to Section 13020 of the Unemployment Insurance Code with respect to such work and labor, the surety will pay for the same, in an amount not exceeding the sum specified above, and also, in case suit is brought upon this bond, reasonable attorneys' fees, to be fixed by the court. This bond shall inure to the benefit of any and all persons entitled to file claims under Section 9100 of the Civil Code of the State of California so as to give a right of action to them or their assigns in any suit brought upon this bond.

Any alterations in the work to be done, or the materials to be furnished, which may be made pursuant to the terms of the Design-Build Contract, shall not in any way release either the Design-Builder or the surety, nor shall any extensions of time granted under the provisions of the Design-Build Contract release either Design-Builder or the surety, and notice of such alterations or extensions of the Design-Build Contract is hereby waived by the surety.

The surety hereby waives the provisions of California Civil Code Sections 2819 (regarding exoneration of sureties in certain circumstances), 2845 (regarding certain limitations on remedies against sureties) and 2849 (regarding a surety's rights as to other security held by the creditor).

The address or addresses at which the Design-Builder and surety may be served with notices, papers and other documents under the California Bond and Undertaking Law

(California Code of Civil Procedure Section 995.010 et seq.) is the following:
_____.

WITNESS our hands this _____ day of _____, 2020.

(Seal)

Design-Builder

By _____

Title

(Surety's Corporate Seal)

Surety

By _____

Title

Address of Surety

Notice: No substitution or revision to this bond form will be accepted.

ACKNOWLEDGMENT BY NOTARY PUBLIC

[Cal. Civ. Code, § 1189]

State of California)
County of)

On _____ before me, _____, a notary public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

[Any acknowledgement taken in another state shall be sufficient if it is taken in accordance with the laws of the state where the acknowledgement is made.]

(Attach proof of authority of attorney in fact of surety.)

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REFERENCE DOCUMENTS
TO THE
DESIGN-BUILD CONTRACT
FOR THE HEADWORKS FACILITY (CPMS NO. 7477 AND 7701)
AT THE
SAN JOSE – SANTA CLARA
REGIONAL WASTEWATER FACILITY

between

THE CITY OF SAN JOSE,
as administering agency of
The Regional Wastewater Facility

and

CH2M HILL ENGINEERS, INC.

Dated as of

_____, 2020

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REFERENCE DOCUMENT 1

BASIS OF DESIGN REPORT

The Basis of Design Report is on file with the City.

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REFERENCE DOCUMENT 2

COMPUTERIZED MAINTENANCE MANAGEMENT SYSTEM PLAN

The Computerized Maintenance Management System Plan is on file with the City.

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REFERENCE DOCUMENT 3

FACILITY CONDITION ASSESSMENT REPORT

The Facility Condition Assessment Report is on file with the City.

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REFERENCE DOCUMENT 4

GEOTECHNICAL REPORT

The Geotechnical Report is on file with the City.

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REFERENCE DOCUMENT 5

PIPELINE EXCAVATION REGULATED SITE CONDITIONS INVESTIGATION REPORT

The Pipeline Excavation Regulated Site Conditions Investigation Report is on file with the City.

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REFERENCE DOCUMENT 6

SUBSURFACE UTILITIES INVESTIGATION REPORT

The Subsurface Utilities Investigation Report is on file with the City.

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REFERENCE DOCUMENT 7

TRAINING PLAN

The Training Plan is on file with the City.

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REFERENCE DOCUMENT 8

PERMITTING AND SPECIFICATIONS PLAN

The Permitting and Specifications Plan is on file with the City.

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REFERENCE DOCUMENT 9

REFERENCE DOCUMENT TECHNICAL MEMORANDUM AND ALL DOCUMENTS LISTED IN
APPENDIX A TO SUCH TECHNICAL MEMORANDUM

The Reference Document Technical Memorandum is on file with the City.

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