

**AGREEMENT BETWEEN OWNER AND
DESIGN/BUILD CONTRACTOR**

This Agreement is made as of _____, 20__ (the "Effective Date"), by and between

Owner:

The University of Texas M. D. Anderson Cancer Center
1515 Holcombe Boulevard
Houston, Texas 77030

and

Design/Build Contractor:

For the following:

MD Anderson Project Name: Inpatient Bed Tower

UTUGC Version: 2013, dated June 20, 2018

**Owner-Controlled
Insurance Program (OCIP):** YES

**Owner-Provided
Builder's Risk Insurance:** YES

Building Information Modeling: YES

This Project utilizes the BIM process for generating and managing building data. Refer to attached Exhibit for Owner's requirements.

Project Architect/Engineer: _____

Owner and Design/Build Contractor agree as follows:

This form of agreement for design/build services has been prepared by the Office of General Counsel for The University of Texas System for use on M. D. Anderson Cancer Center projects. The legal terms of this agreement should not be altered without the approval of the Office of General Counsel.

Use this form for all appropriate M.D. Anderson projects after September 27, 2018.

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ARTICLE 1 SCOPE OF WORK

Design/Build Contractor has overall responsibility for and shall provide complete Pre-Construction Phase Services and Construction Phase Services and furnish all Design Services, materials, equipment, tools and labor as necessary or reasonably inferable to complete the Project, or any phase of the Project, in accordance with Owner's requirements and the terms of this Agreement.

ARTICLE 2 CONTRACT DOCUMENTS

The Contract Documents form the entire and integrated contract between Owner and Design/Build Contractor and supersede all prior negotiations, representations or agreements, written or oral. The Contract Documents consist of:

- 2.1 This Agreement and all Exhibits and attachments thereto;
- 2.2 The 2013 Uniform General Conditions for University of Texas System Building Construction Contracts ("UTUGCs");
- 2.3 Division 00 and Division 01 Specifications prepared by Owner;
- 2.4 Project Manuals developed for the design or construction of the Project;
- 2.5 Owner's Design Guidelines;
- 2.6 The Campus Master Plan;
- 2.7 All Addenda issued prior to the Effective Date of this Agreement;
- 2.8 The HUB Subcontracting Plan for Pre-Construction Phase Services;
- 2.9 The Guaranteed Maximum Price Proposal as executed by the parties;
- 2.10 The HUB Subcontracting Plan for Construction Phase Services when accepted by Owner;
- 2.11 All Additional Services Proposals when accepted by Owner;
- 2.12 All Change Orders issued after the Effective Date of this Agreement;
- 2.13 The Drawings and Specifications developed by Design/Build Contractor and accepted by Owner;
- 2.14 The Drawings and Specifications developed or prepared by Owner's independent consultants, if any, that are included in the Guaranteed Maximum Price Proposal; and
- 2.15 Any other documents identified in this Agreement.

ARTICLE 3 DEFINITIONS

The terms, words and phrases used in the Contract Documents shall have the meanings given in the UTUGCs and as follows:

3.1 "**Construction Cost Limitation**" or "CCL" means the maximum monetary amount payable to Design/Build Contractor for all Construction Phase services, materials, labor and other work required for completion of the Work in accordance with the Contract Documents. The CCL includes, without limitation, the General Conditions Costs, the Cost of the Work, the Construction Phase Fee and Design/Build Contractor's Contingency. The CCL may be adjusted by the parties for changes in the scope of the Project before or after acceptance of the Guaranteed Maximum Price Proposal. The CCL does not include Design/Build Contractor's Pre-Construction Phase Fee, or Owner's Construction Contingency or Owner's Special Cash Allowance.

3.2 "**Construction Services**" means the implementation and execution of the construction work required by the Contract Documents. The construction phase of the Project may be divided into different stages, each with different start and completion dates.

3.3 “**Contract Sum**” means the total amount of all compensation payable to Design/Build Contractor for the Project and shall not exceed the sum total amount of the Pre-Construction Phase Services Fees plus the Guaranteed Maximum Price Proposal(s) accepted by Owner, subject to adjustment for Additional Services or Change Orders. Any costs that exceed the Contract Sum shall be borne solely by Design/Build Contractor without reimbursement by Owner.

3.4 “**Design Consultant**” means any licensed professionals or firms, other than Project Architect/Engineer, engaged by Owner as independent consultants for the Project.

3.5 “**Design Services**” means all professional services required to fulfill the Pre-Construction Phase and any and all additional design obligations of this Agreement, including, but not limited to, programming, schematic design, design development and construction documents.

3.6 “**Direct Construction Cost**” means the sum of the amounts that Design/Build Contractor actually and necessarily incurs for General Conditions Costs, Cost of the Work and Design/Build Contractor’s Contingency during the Construction Phase as allowed by this Agreement. Direct Construction Cost does not include Pre-Construction Phase Services Fees or Construction Phase Fees.

3.7 “**Direct Salary Expense**” or “DSE” means the actual gross salary, expressed on an hourly wage basis, of Design/Build Contractor’s and Project A/E’s employees and consultants directly engaged on the Project. For DSE purposes, Project A/E’s employees includes, but is not limited to, architects, officers, principals, engineers, designers, job captains, draftspersons, and specifications writers, who are performing consultation, research or design, or who are producing drawings, specifications, plans, or other documents pertaining to the Project, or who are performing services that are directly attributable to and necessary for the Project.

3.8 “**Estimated Construction Cost**” or “ECC” means the amount calculated by Design/Build Contractor for the total cost of all elements of the project, including, without limitation, all alternates, allowances and contingencies, designed and specified by Design/Build Contractor or reasonably inferable as a usual and customary component of the project or otherwise necessary for complete installation and operation of the project. The Estimated Construction Cost shall include, at current market rates with a reasonable allowance for overhead, profit and price escalation, the cost of labor and materials furnished by Design/Build Contractor and any equipment which has been shown in the plans, specified, and specially provided for by Design/Build Contractor. The Estimated Construction Cost shall include and consider the cost of labor and materials necessary for installation of Owner furnished equipment. The Estimated Construction Cost does not include Pre-Construction Phase Fees, Owner’s Construction Contingency, or Owner’s Special Cash Allowance. The Estimated Construction Cost does not include the cost of the land, rights-of-way, or any costs that are the responsibility of Owner.

3.9 “**General Conditions Costs**” means costs incurred and minor work performed on the jobsite by Design/Build Contractor without the need for soliciting competitive bids or competitive proposals. The allowable items for General Conditions Costs are further described in the Agreement and limited by attached exhibit.

3.10 “**Guaranteed Maximum Price**” or “GMP” means the amount proposed by Design/Build Contractor and accepted by Owner as the maximum cost to Owner for construction of the Work in accordance with the Contract Documents. The GMP includes Design/Build Contractor’s Construction Phase Fee, the General Conditions Costs, the Cost of the Work, Design/Build Contractor’s Construction Contingency amount, and Owner’s Construction Contingency amount and Owner’s Special Cash Allowance amount.

3.11 **“Monthly Salary Rate”** means the amount agreed to by Owner that can be used on Applications for Payment throughout the Construction Phase to account for the services of Design/Build Contractor’s salaried personnel assigned to the Project. A Monthly Salary Rate must be established for each salaried person and must be approved in writing by Owner in advance of any Application for Payment seeking reimbursement for that person. The Monthly Salary Rate is for convenience only and any payments made for Design/Build Contractor’s personnel are subject to audit to determine the actual cost of the wages and allowable employer contributions incurred by Design/Build Contractor for services performed for the Project.

3.12 **“Preliminary Project Cost”** or **“PPC”** means the total estimated cost of the entire Project, including design, construction, and other associated costs and services which is established prior to the commencement of design.

3.13 **“Project Architect/Engineer”** or **“Project A/E”** means the professional architect or engineer employed by Design/Build Contractor to perform all or part of the Design Services or the Construction Contract Administration Services in accordance with the Contract Documents. The Project A/E and its professional consultants must be qualified to perform the Design Services and the Construction Contract Administration Services and be licensed in the State of Texas in their respective professions.

3.14 **“Project Team”** means Owner, Design/Build Contractor, Project A/E, any separate contractors employed by Owner, and other consultants employed for the purpose of programming, design, and construction of the Project. The constitution of the Project Team may vary at different phases of the Project. The Project Team will be designated by Owner and may be modified from time to time by Owner.

3.15 **“Standards and Standard Specifications”** means the construction and design requirements and standards of Owner, and various building and life safety codes as specified in Owner’s Design Guidelines which are incorporated by reference.

3.16 **“Subcontractor”** means a person or entity who has an agreement with Design/Build Contractor to perform any portion of the Work. The term Subcontractor does not include Project A/E or any person or entity hired directly by Owner.

3.17 **“Total Project Cost”** or **“TPC”** means the total budget established for the Project by the Board of Regents or the Chancellor of The University of Texas System or Owner at the end of the design development phase (subject to subsequent modification by Owner), which includes but is not limited to professional services costs, Design/Build Contractor’s costs, the General Conditions Costs, furniture, fixtures and equipment costs, landscaping costs, moving costs, and other miscellaneous costs.

3.18 **“Work”** means the provision of all services, labor, materials, supplies, and equipment which are required or reasonably inferable to complete the Project in strict accordance with the requirements of the Contract Documents. Work includes, but is not limited to, the Pre-Construction Phase Services, Design Services, the GMP Proposal(s), the Construction Phase Services, and any Additional Services and other services required. The term “reasonably inferable” takes into consideration the understanding of the parties that not every detail will be shown on the Drawings and included in the Specifications.

3.19 **“Worker Wage Rate”** means the actual hourly wage of non-salaried persons performing work on the Project plus allowable employer contributions as established on the Worker Wage Rate Form required by the Construction Documents. The Worker Wage Rate for individual persons must be reasonable and customary for their industry and must be approved in writing by Owner in advance of any Application for Payment for that person. Any payments made for personnel are subject to audit to determine the actual cost

of the wages and allowable employer contributions incurred by Design/Build Contractor for services performed for the Project.

ARTICLE 4 DESIGN/BUILD CONTRACTOR'S GENERAL RESPONSIBILITIES

4.1 Design/Build Contractor shall perform all services specifically allocated to it by the Contract Documents as well as those services reasonably inferable from the Contract Documents as necessary for completion of the Work and the Project. Design/Build Contractor agrees to perform these services using its best efforts, skills, judgments and abilities.

4.2 Design/Build Contractor shall coordinate with Project A/E and endeavor to further the interests of Owner and the Project. Design/Build Contractor shall furnish Pre-Construction Phase Services and Construction Phase Services and complete the Project in an expeditious and economical manner consistent with the interests of Owner and in accordance with the Project Schedule.

4.3 Within seven (7) days of receipt of the Notice to Proceed with Pre-Construction Phase Services, Design/Build Contractor shall submit for Owner's review and acceptance a CPM Milestone Schedule in accordance with the Project Planning and Scheduling requirements of Owner's Specifications. The CPM Milestone Schedule shall encompass the entire Project duration, including performance of the both the Pre-Construction Phase Services and the Construction Phase Services with sufficient total Project float to allow for a minimum of Construction Phase float as specified.

4.4 The CPM Milestone Schedule for the Pre-Construction Phase of the Project shall include reasonable amounts of time for Owner's review and approval of design drawings and specifications, the GMP Proposal(s) and for approval of authorities having jurisdiction over the Project.

4.5 Upon acceptance of the CPM Milestone Schedule, it shall become the baseline for evaluating performance of the Project and Design/Build Contractor shall monitor the progress of the Project in relation to the CPM Milestone Schedule and provide Owner with at least monthly updates and status reports as outlined in Owner's Specifications. The time periods established in the CPM Milestone Schedule for the Pre-Construction Phase and the Construction Phase and the overall duration of the Project shall not be changed without written consent from Owner. Modifications to the CPM Milestone Schedule logic, coding, layouts and filters, detail, and activity durations shall be in accordance with Owner's Specifications.

4.6 Design/Build Contractor shall designate, in writing, a representative authorized to act on Design/Build Contractor's behalf with respect to the Project.

4.7 Design/Build Contractor shall establish procedures for communication and coordination among the Project Team, Subcontractors, separate contractors, and others with respect to all aspects of the construction of the Project, and implement such procedures.

4.8 Design/Build Contractor shall establish and maintain a numbering and tracking system for all Project records, including changes, requests for information, submittals, and supplementary instructions and shall provide updated records at each Owner's meeting and when requested.

4.9 Fast Track/Multiple Completion Times. If Owner elects to "fast-track" or develop the Project in multiple stages, Design/Build Contractor shall organize and perform its services as appropriate to each stage. Each stage of the Project may have a unique schedule for completion and a specific Construction Cost Limitation, at Owner's discretion.

4.10 Design/Build Contractor shall attend and participate in Owner's "Partnering" Program for all phases of the Project.

4.11 Design/Build Contractor shall identify to Owner the employees and other personnel that it will assign to the Project and provide the Monthly Salary Rate for each of them. Design/Build Contractor shall also identify any consultants that will be performing services for the Project. After execution of this Agreement by Owner, Design/Build Contractor shall not remove or replace the persons or entities assigned to the Project except with Owner's written consent, which consent shall not be unreasonably withheld. Design/Build Contractor shall not assign to the Project or contract with any person or entity to which Owner has a reasonable objection. Design/Build Contractor shall promptly update and resubmit the attached Exhibit, Design/Build Contractor's Personnel and Monthly Salary Rates form, indicating the list of persons by name and title and consultants if they change during the course of the Project. Design/Build Contractor's employees and other personnel that it assigns to the project shall be identified on the Schedule of Values by name and title.

4.12 Owner's Policy on the Utilization of Historically Underutilized Businesses ("Policy") is described in the attached Exhibit. Design/Build Contractor, as a provision of the Agreement, must comply with the requirements of the Policy and adhere to the HUB Subcontracting Plans submitted for Pre-Construction Phase and Construction Phase Services. No changes to the HUB Subcontracting Plans can be made by Design/Build Contractor without the written approval of Owner in accordance with the Policy.

ARTICLE 5 PRE-CONSTRUCTION PHASE

The Pre-Construction Phase shall be deemed to commence upon the date specified in a Notice to Proceed with Pre-Construction Phase Services issued by Owner and shall continue through completion of the Construction Documents and procurement of all major Subcontractor agreements. Design/Build Contractor is not entitled to reimbursement for any costs incurred for Pre-Construction Phase Services performed before issuance of the Notice to Proceed. Pre-Construction Phase Services may overlap Construction Phase Services. Design/Build Contractor shall perform the following Pre-Construction Phase Services.

5.1 PRE-CONSTRUCTION SERVICES

5.1.1 General Coordination

5.1.1.1 Design/Build Contractor's Pre-Construction Phase Services team, including Project A/E, shall attend Project Team meetings with Owner and Owner's representatives at regularly scheduled intervals throughout the Pre-Construction Phase. Frequent Project Team meetings are anticipated prior to Owner's acceptance of the GMP Proposal(s) and during completion of the Construction Documents.

5.1.1.2 Provide a preliminary evaluation of Owner's Design Criteria Package and the Construction Cost Limitation, each in terms of the other.

5.1.1.3 Review and understand the standards and requirements in Owner's Specifications and perform all services in accordance with those standards and requirements.

5.1.1.4 Visit the site and inspect the existing facilities, systems and conditions to insure an accurate understanding of the existing conditions as required.

5.1.1.5 Participate as a member of the Project Team in the development of the Project Pre-Design Phase Document if such document has not been developed prior to the Effective Date of this Agreement.

5.1.1.6 Provide recommendations and information to the Project Team on: site usage and site improvements; building systems, equipment and construction feasibility; selection and availability of materials and labor; time requirements for installation and construction; assignment of responsibilities for safety precautions and programs; temporary Project facilities; equipment, materials and services for common use of Design/Build Contractor and Owner's separate contractors, if any; cost factors, including costs of alternative materials or designs, preliminary budgets, and possible cost savings; recognizing and tracking the resolution of conflicts in the proposed Drawings and Specifications; methods of delivery of materials, systems, and equipment; and any other matters necessary to accomplish the Project in accordance with the Project Schedule (as defined below) and the CCL.

5.1.1.7 Assist Owner in selecting and directing the services of surveyors, soils engineers, existing facility surveys, testing and balancing, environmental surveys or other special consultants hired by Owner to develop additional information for the design or construction of the Project.

5.1.1.8 At Owner's request, attend public meetings and hearings concerning the development and schedule of the Project.

5.1.2 Constructability Program

5.1.2.1 Implement and conduct a constructability program to identify and document Project cost and schedule savings opportunities. The constructability program shall follow accepted industry practices and be in accordance with the requirements of the attached exhibit. Whenever the term "value engineering" is used in conjunction with this Agreement or the Project, it has its commonly accepted meaning within the construction industry and does not imply the practice of professional engineering without a license. If any value engineering activities constitute the professional practice of engineering, then such activities shall be performed by an engineer licensed in Texas.

5.1.2.2 Prepare a "Constructability Report" that identifies items that, in Design/Build Contractor's opinion, may negatively impact construction of the Project. The Constructability Report shall address the overall coordination of Project Drawings, Specifications, and details and identify discrepancies that may generate Change Orders or claims once Project construction commences. The Constructability Report shall be updated at least monthly during the Pre-Construction Phase.

5.1.2.3 Provide and implement a system for tracking questions, resolutions, decisions, directions and other information matters that arise during the development of the Drawings and Specifications for the Project. The decision tracking system shall be in a format approved by Owner and updated at least monthly during the Pre-Construction Phase.

5.1.3 Budget and Cost Consultation

5.1.3.1 Design/Build Contractor is responsible for preparing and updating all procurement and construction cost estimates and distributing them to the Project Team throughout the duration of the Project.

5.1.3.2 Design/Build Contractor shall provide updated and detailed Estimated Construction Cost reports at the required stages of completion of the schematic design, design development, and

construction document stages of the Project. The Estimated Construction Cost reports for the design development and construction document stages shall be detailed estimates derived from cost quantity surveys based on unit prices for labor, materials, overhead and profit, organized in Construction Specifications Institute MasterFormat™ format for each portion of the Work. If the Estimated Construction Cost exceeds the Construction Cost Limitation at any time, Owner will determine, solely at Owner's discretion, whether to increase the Construction Cost Limitation, or to instruct Design/Build Contractor to proceed to the next stage of design with no increase in the Construction Cost Limitation, or to require Design/Build Contractor to revise, at no charge to Owner, the Project scope or quality to comply with the Construction Cost Limitation. Reductions in Project scope or quality are subject to Owner's review and approval. If the Estimated Construction Cost is below the Construction Cost Limitation at any time, Owner may determine, solely at Owner's discretion, whether to reduce the Construction Cost Limitation, or to instruct Design/Build Contractor to proceed to the next stage of design with no decrease to the Construction Cost Limitation, or to require Design/Build Contractor to increase the Project scope or quality.

5.1.3.3 Provide continuous cost consultation services throughout the duration of the Project, including identification and tracking of decisions that affect the scope or quality of the Project and providing ongoing updates of their cost and budget impact. Advise the Project Team immediately if Design/Build Contractor has reason to believe that the most current ECC will exceed the Construction Cost Limitation (CCL) or not meet Project Schedule requirements and recommend reasonable strategies for bringing the Project in line with the CCL and the Project Schedule.

5.1.3.4 Design/Build Contractor shall promptly identify all variances between estimated costs and actual costs during the Pre-construction Phase and the Construction Phase, and shall promptly report such variances to the Project Team along with recommendations for action, but in any event no more than two (2) business days after acquiring such information.

5.1.4 Coordination of Design and Construction Contract Documents

5.1.4.1 Review all Drawings, Specifications, and other Construction Documents as they are developed by Project A/E during the schematic design, design development, and construction document design stages of the Project.

5.1.4.2 Consult with Owner and Project A/E on the selection of materials, equipment, component systems, and types of construction used on the Project. Advise Owner on site use, construction feasibility, availability of labor and materials, procurement time requirements, and construction coordination.

5.1.4.3 Advise Owner of any error, inconsistency or omission discovered in the Drawings, Specifications, and other Construction Documents.

5.1.4.4 Advise Owner on reasonable adjustments in the Project scope, quality or other options for keeping the Project within the CCL.

5.1.4.5 Review the Construction Documents for compliance with all applicable laws, rules and regulations and with Owner requirements.

5.1.5 Construction Planning and Procurement Strategy

5.1.5.1 Identify equipment or material requiring extended delivery times and advise Owner on expedited procurement of those items. Advise Owner and Project A/E on the preparation of performance specifications and requests for technical proposals for the procurement and installation of systems and components and for the procurement of long lead items. If requested by Owner, and subject to Owner's prior approval, issue requests for technical proposals to qualified sources and receive proposals and assist in their evaluation.

5.1.5.2 Make recommendations to the Project Team regarding organization of the Construction Documents to facilitate the soliciting of offers and the awarding of construction subcontracts in a manner that promotes the interests of the Project and Owner. These recommendations may include, but are not limited to, phased or staged construction or multiple separate contracts. The recommendations shall take into consideration such factors as time of performance, type and scope of work, availability of labor and materials, overlapping trade jurisdictions, provisions for temporary facilities, comparisons of factory and on-site production costs, shipping costs, code restrictions, Owner's goals for HUB contractor participation, and other constraints.

5.1.5.3 Review the Construction Documents with the Project Team to eliminate areas of conflict and overlap in the work to be performed by the various Subcontractors or Owner's separate contractors.

5.1.5.4 Develop a procurement package strategy in coordination with Project A/E that addresses the entire scope of Work for each phase and stage of the Project. In developing the procurement package strategy, Design/Build Contractor shall identify all procurement packages on which Design/Build Contractor intends to submit a self-performance bid or proposal. The procurement package strategy shall be reviewed with Owner on a regular basis and revised throughout the buyout of the Project so as to best promote the interests of the Project and Owner.

5.1.5.5 Assist Owner, Project A/E, Owner's other consultants, and Owner's separate contractors in obtaining all applicable risk management, code, and regulatory agency reviews and approvals for the Project including, without limitation, the Texas Higher Education Coordinating Board, the Texas Department of Licensing and Regulation, the State Fire Marshal, the local fire department, and Owner's insurance provider.

5.1.5.6 Refine, implement and monitor required HUB Subcontracting Plans to promote equal employment opportunity in the provision of goods and services to Owner for the Project.

5.1.5.7 Advise Owner of any tests to be performed, and assist Owner in selecting testing laboratories and consultants, without assuming direct responsibility for the work of such laboratories and consultants.

5.1.5.8 Design/Build Contractor shall review the Construction Documents to ensure that they contain adequate provision for all temporary facilities necessary for performance of the Work, and provisions for all of the job site facilities necessary to manage, inspect, and supervise construction of the Work.

5.1.5.9 Provide an analysis of the types and quantities of labor required for the Project and review the appropriate categories of labor required for critical phases and stages. Make recommendations that minimize adverse effects of labor shortages.

5.1.5.10 Furniture, Fixtures and Equipment. Consult with and make recommendations to Owner on the acquisition schedule for fixtures, furniture and equipment, and coordinate with Owner as may be required to meet the Project Schedule.

5.1.6 Obtaining Offers for the Work

5.1.6.1 Design/Build Contractor shall publicly advertise and solicit competitive lump sum bids or competitive lump sum proposals from trade contractors or subcontractors for the performance of all major elements of the Work other than the minor work that may be included in General Conditions. Subcontracts awarded on the basis of competitive bids shall be awarded to the lowest responsible bidder. For subcontracts awarded on the basis of competitive sealed proposals, criteria for determining the proposals that provide the best value to Owner shall be established by the Project Team and included in the request for proposals. Design/Build Contractor shall notify Owner in advance in writing of the date(s) it will receive bids and proposals.

5.1.6.2 Schedule and conduct pre-submittal conferences with interested offerors, subcontractors, material suppliers, and equipment suppliers, and record minutes of the conferences.

5.1.6.3 Design/Build Contractor and Owner shall review all trade contractor or subcontractor offers in a manner that does not disclose the contents of any bid or proposal to persons outside of the Project Team during the selection process. Based on the selection criteria included in the requests for bids or requests for proposals, Design/Build Contractor shall recommend to Owner the bid submitted by the lowest responsible bidder, if soliciting competitive bids, or the proposal that provides the best value for the Project, if soliciting competitive proposals. Upon Owner's concurrence in the recommendation, Design/Build Contractor may negotiate the terms of the subcontract with the apparent lowest responsible bidder or best value offeror.

5.1.6.4 All subcontracts must be on a lump sum basis unless other payment terms are approved in writing and in advance by Owner's Executive Director of Facilities Planning, Design and Construction. Upon Owner's concurrence in the final terms of the subcontract, Design/Build Contractor shall enter into a written subcontract for the subcontract work and provide a copy to Owner. All offers shall be publicly available after award of the subcontract or within seven (7) days after the date of final selection, whichever is later.

5.1.6.5 If Design/Build Contractor reviews, evaluates, and recommends to Owner an offer from a trade contractor or subcontractor, but Owner requires another offer to be accepted, Owner shall compensate Design/Build Contractor by a change in price, time, or Guaranteed Maximum Price for any additional cost and risk that Design/Build Contractor incurs because of Owner's requirement that the other offer be accepted.

5.1.6.6 Design/Build Contractor may seek to self-perform portions of the Work identified for self-performance in the procurement package strategy. Design/Build Contractor must submit an offer for the self-performance work in the same manner as all other trade contractors or subcontractors. Owner will determine whether Design/Build Contractor's offer provides the best value for Owner, which determination is final. Design/Build Contractor must perform approved self-performance work in accordance with the same terms and conditions as its other Subcontractors. For payment purposes, Design/Build Contractor shall account for self-performance work in the same manner as it does all other subcontract costs.

5.1.6.7 For scope of work procurement packages typically performed by subcontractors, Design/Build Contractors may "self-perform" such work on a cost-plus fee (Not-To-Exceed 7.5%)

basis subject to an agreed upon guaranteed maximum price for the “self-performed work”. Design/Build Contractor shall submit its Guaranteed Maximum Price for the work to be “self-performed” against at least three other interested trade contractors. Any subcontract for “self-performed work” will provide for payment in an amount equal to the Cost of the Work (as defined in this Agreement) and will not exceed the agreed upon subcontract guaranteed maximum price. All terms and provisions of any subcontract for “self-performed work” will be consistent with the terms and conditions of this Agreement with the exception of the agreed upon Fee percentage. All savings under any such subcontract for “self-performed work” shall be applied to reduce the Cost of the Work under this Agreement and the Guaranteed Maximum Price of this Agreement. For purposes of defining “self-performed work” subject to this provision, any division of Design/Build Contractor, or any separate design/build contractor or subcontractor that is partially owned or wholly owned by Design/Build Contractor or any of its employees or employee’s relatives will be considered a related party entity and will be subject to this provision regarding “self-performed work”. No self-performed work will be allowed to be performed on a lump sum basis.

5.1.6.8 Design/Build Contractor shall identify every subcontractor it intends to use on the Project, including subcontractors used for self-performed work, to Owner in writing at least ten (10) days before entering into any subcontract. Design/Build Contractor shall not use any subcontractor to which Owner has a reasonable objection. Design/Build Contractor shall not be required to subcontract with any subcontractor to which it has reasonable objection. Following Owner acceptance of a subcontractor, that subcontractor shall not be changed without Owner’s written consent, which shall not be unreasonably withheld.

5.1.6.9 If a selected trade contractor or subcontractor fails to execute a subcontract after being selected in accordance with this section or defaults in the performance of its work, Design/Build Contractor may, in consultation with Owner and without further advertising, fulfill the subcontract requirements itself or select a replacement trade contractor or subcontractor to do so.

5.1.7 Safety

5.1.7.1 In accordance with UTUGC’s, Design/Build Contractor is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. The safety program shall comply with all applicable requirements of the Occupational Safety and Health Act of 1970 and all other applicable federal, state and local laws and regulations and with the requirements of an Owner controlled insurance program, if any.

5.1.7.2 Design/Build Contractor shall provide recommendations and information to Owner and Project A/E regarding the assignment of responsibilities for safety precautions and programs, temporary Project facilities, and equipment, materials, and services for common use of the Subcontractors. Design/Build Contractor shall verify that appropriate safety provisions are included in the Construction Documents. The existence or creation of any Owner controlled insurance program in connection with the Work shall not lessen or reduce Design/Build Contractor’s safety responsibilities.

5.2 DESIGN SERVICES

5.2.1 General Responsibilities

5.2.1.1 Design/Build Contractor shall designate in writing a representative who is responsible for the day-to-day management of the Design Services. The designated representative shall be

Owner's primary contact during the design phase of the Project and shall be available as required for the benefit of the Project and Owner. The designated representative shall be authorized to act on behalf of and to bind Design/Build Contractor in all matters related to Design Services. The designated representative shall not be changed without advance written approval from Owner, which approval shall not be unreasonably withheld.

5.2.1.2 Design/Build Contractor shall engage the services of a Project A/E and other qualified professionals as required for performance of the Design Services. Design/Build Contractor certifies that Project A/E and all other professional consultants have been or will be selected on the basis of competence and qualifications pursuant to *Texas Education Code* section 51.780(f)(1). Design/Build Contractor shall not perform any architectural or engineering services directly unless Design/Build Contractor is licensed in Texas to perform such services. All drawings, specifications, change orders and other design documents shall bear the seal of the licensed professional who prepared them in accordance with the applicable laws and regulations of the State of Texas.

5.2.1.3 Design/Build Contractor shall be solely responsible for all obligations to Project A/E and shall pay for the services of Project A/E and all other professional service providers out of the fees for this Agreement. However, Owner shall be identified as an intended beneficiary in all such agreements and Project A/E and all other professional service providers shall acknowledge that they owe a duty of professional care to Owner for the Design Services provided for the Project. Nothing in this Agreement shall create any contractual obligation from Owner to Project A/E or other design professionals not hired directly by Owner.

5.2.1.4 Design/Build Contractor shall be responsible for managing the Design Services so as to ensure that the Project, as designed, can be constructed for an amount that is within the Construction Cost Limitation and will achieve the energy and operational savings required by the Contract Documents. The obligation to design the Project so as to achieve the program objectives of scope and cost shall continue through completion and acceptance of Construction Documents.

5.2.1.5 Design/Build Contractor shall submit the names of all proposed consultants for Design Services, including Project A/E and any of its consultants, for approval by Owner, which approval shall not be unreasonably withheld. Design/Build Contractor shall provide Owner with a copy of the fully executed contract or agreement authorizing services by any such consultant. All such contracts shall provide that the consultants are bound to Design/Build Contractor in the same manner and to the same extent as Design/Build Contractor is bound to Owner.

5.2.1.6 The Design Services shall incorporate current technology as appropriate to the stated mission of the institution and the programmed functional activities that is compatible with any existing facility and acceptable to Owner.

5.2.1.7 All Design Services for the Project shall be provided in accordance with Owner's Design Guidelines, Design Criteria Package and the Campus Master Plan Guidelines, which are incorporated herein by reference, and any other criteria applicable to the facility program and the needs of the institution.

5.2.1.8 Design/Build Contractor warrants to Owner the sufficiency and completeness of all Design Services performed and that all drawings, specifications, and other information furnished or provided by Design/Build Contractor shall be free from material errors and omissions. Approval or acceptance of any Design Services by Owner shall not in any way release Design/Build Contractor from any duty, responsibility or liability for such services, it being understood that

Owner is at all times relying upon Design/Build Contractor's skill and knowledge in performing the Design Services.

5.2.1.9 Owner shall have the right to reject any defective Design Services or other defective Work on the Project of which Owner becomes aware and Design/Build Contractor shall promptly correct any such defect at Design/Build Contractor's expense. Should any portion of the Project Work be damaged or defective due to an error or omission in the Design Services, including errors or omissions in any plans, drawings, specifications, and other construction document materials prepared or furnished by Design/Build Contractor, Design/Build Contractor shall promptly correct any such damage or defect at no additional cost to Owner. Should Design/Build Contractor refuse or neglect to correct any such damage or defect within a reasonable time after notice, Owner may cause the damage or defect to be corrected and withhold payment or collect monetary damages equal to the cost of replacing or repairing the defective Work.

5.2.1.10 Owner may elect, at its option, to stage or to "fast-track" construction of the Project in different stages. Such stages may or may not overlap. Design/Build Contractor shall perform Design Services in staged packages as appropriate to each stage of construction which may result in differing schedules and reviews for the completion of each design stage and for each stage of planned construction. Owner may elect, at its option, to establish a different Construction Cost Limitation for each such stage.

5.2.1.11 At each stage of the Design Services, as part of Basic Services, Design/Build Contractor shall provide the following services as appropriate:

- Architectural Services
- Landscape Architectural Services
- Civil Engineering Services
- Structural Engineering Services
- Mechanical Engineering Services
- Electrical Engineering Services
- Construction Cost Estimating
- Plumbing Engineering Services
- Scheduling Services
- Storm Water Pollution Prevention Plan Design Services
- Surveyor
- Lighting Consultant
- Elevator/Conveying Systems
- Acoustical Consultant
- Water proofing/Curtain Wall/Roofing
- Commissioning Coordination
- Data and Telecommunications Engineering Services
- Security Planning Services
- Life Safety Code Compliance
- Life Safety Engineering Services (responsible for Fire Alarm System design and third-party certification of installed system)
- Geotechnical Survey Services

Basic interior design services to include, but not necessarily be limited to, designing architectural elements and developing finish schedules for Owner's review and approval
Furniture and equipment planning services to include, but not necessarily be limited to, evaluations, programming, design, mock ups and developing schedules for Owner's review and approval

5.2.1.12 During the planning stage of the Project, the Design/Build Contractor shall, as part of Basic Services, assist the Owner in determining the economic feasibility of incorporating alternative energy devices for space heating and cooling functions, water heating functions, electrical load functions, and interior lighting functions into the Project design and proposed energy systems in accordance with Section 2166.403(c-1) *Texas Government Code*. At a minimum, Design/Build Contractor shall provide an economic evaluation for the potential of renewable energy applications pursuant to the legislative requirements. Guidelines are available from the State Energy Conservation Office, State Comptroller's Office.

5.2.1.13 Design/Build Contractor shall comply with the Energy Conservation Design Standard for New State buildings adopted by the State Energy Conservation Office, 34 *Texas Administrative Code*, Part 1, Chapter 19, and provide a Statement of Compliance certifying that the project design complies with the standards.

5.2.1.14 Design/Build Contractor shall employ a qualified Consultant (the "TPDES Consultant"), experienced in the Texas Pollutant Discharge Elimination System (TPDES) requirements and in the best management practices used at construction sites to control erosion and sediment, to prevent the discharge of pollutants and to prevent or mitigate the impacts of storm water runoff on water quality (collectively "BMPs"), which TPDES Consultant shall be approved in writing in advance by Owner, to provide expertise with respect to Texas Commission on Environmental Quality regulations and BMPs through all phases of the Project. The TPDES Consultant's services shall include, without limitation, (1) recommending structural and non-structural BMPs to Project A/E or other subcontractors under this Contract, (2) preparing of Storm Water Pollution Prevention Plans (SWPPPs) and, as requested in writing by Owner, assisting in the updating of SWPPPs and all other permit documentation required by the TCEQ for the Project, and (3) the drafting of technical specifications governing Design/Build Contractor's obligations under the applicable TPDES regulations and the TCEQ General Permit for Storm Water Discharges From Construction Sites ("General Permit") No. TXR 150000 and governing Design/Build Contractor's recommended courses of action under BMPs. The TPDES Consultant shall insure that the storm water pollution prevention plan has been prepared for the site in accordance with the General Permit and that such plan complies with approved State and/or local sediment and erosion plans or permits and/or storm water management plans or permits, including, without limitation, any TPDES permit issued to The University of Texas component on which the site is located. The TPDES Consultant, through Design/Build Contractor, shall determine whether General Permit coverage is required, and, if so, shall advise Owner of Owner's obligations under the General Permit and shall advise Owner of Design/Build Contractor's obligations under the General Permit. If there are multiple projects proposed to be conducted concurrently in contiguous areas and general permit coverage is required, the TPDES Consultant shall prepare one SWPPP for the entire area encompassing all projects and shall amend such SWPPP at the request of Owner to ensure that Design/Build Contractor of each project can comply with TPDES requirements and BMPs. DESIGN/BUILD CONTRACTOR SHALL INDEMNIFY AND HOLDS HARMLESS OWNER FROM ANY AND ALL LIABILITY, LOSS, DAMAGE, COST, AND EXPENSE ARISING OUT OF A VIOLATION OF THE APPLICABLE TCEQ TPDES REGULATIONS, BMPs, THIS PARAGRAPH OF THIS AGREEMENT, OR THE TERMS AND CONDITIONS OF THE

GENERAL PERMIT TO THE EXTENT ATTRIBUTABLE TO AN ACT OR OMISSION OF DESIGN/BUILD CONTRACTOR, ARCHITECT OR ITS CONSULTANTS.

5.2.1.15 Design/Build Contractor shall not proceed to any subsequent stage of Design Services until Owner has authorized Design/Build Contractor to proceed in writing, except at Design/Build Contractor's sole financial risk.

5.2.2 Pre-Design Stage

5.2.2.1 Design/Build Contractor shall provide a preliminary evaluation of Owner's Design Criteria Package and the Construction Cost Limitation, each in terms of the other.

5.2.2.2 Design/Build Contractor shall visit the site to become sufficiently familiar with the existing facilities, systems and conditions to ensure that the Project as designed will functionally interface with the existing conditions as required.

5.2.2.3 Design/Build Contractor shall review laws applicable to the design and construction of the Project and advise Owner if any program requirement may cause a violation of such laws.

5.2.2.4 Before proceeding to the Schematic Design Stage, Design/Build Contractor shall obtain Owner's written approval of the Facility Program and the Estimated Construction Cost and written authorization to proceed.

5.2.3 Schematic Design Stage

5.2.3.1 Based on the approved pre-design documents and any adjustments to the Facility Program or Construction Cost Limitation or the Project Schedule authorized by Owner, Design/Build Contractor shall develop sufficient alternative approaches to the design and construction of the Project and shall review them with Owner. Design/Build Contractor shall prepare Schematic Design documents and the Estimated Construction Cost and submit them to Owner for approval. The Estimated Construction Cost shall affirm adherence to the Construction Cost Limitation. Design/Build Contractor shall advise Owner of any adjustments to the project scope necessary to align the Estimated Construction Cost with the Construction Cost Limitation and shall revise the Schematic Design Documents, without charge to Owner, as may be required to comply with the Construction Cost Limitation. Owner may, solely at Owner's discretion and in writing, increase or decrease the Construction Cost Limitation to align with Design/Build Contractor's Estimated Construction Cost.

5.2.3.2 Design/Build Contractor shall furnish and deliver to Owner the number of complete printed sets of Schematic Design documents as required.

5.2.3.3 Before proceeding to the Design Development Stage, Design/Build Contractor shall obtain Owner's written authorization to proceed and Owner's acknowledgement of the Design/Build Contractor's submission of the Estimated Construction Cost. Owner's acknowledgement of Design/Build Contractor's submission of the Estimated Construction Cost prepared at the Schematic Design Phase does not relieve Design/Build Contractor of its obligation to design and construct the Project within the Construction Cost Limitation.

5.2.4 Design Development Stage

5.2.4.1 Based on the approved Schematic Design documents and any adjustments to the Facility Program or Construction Cost Limitation or Project Schedule authorized by Owner, Design/Build Contractor shall prepare Design Development documents and shall review and update the Estimated Construction Cost and submit them to Owner for approval. The Design Development documents shall fix and describe the size and character of the entire Project, including site work, architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate. The Estimated Construction Cost shall confirm adherence to the Construction Cost Limitation. Design/Build Contractor shall advise Owner of any adjustments to the project scope necessary to align the Estimated Construction Cost with the Construction Cost Limitation and shall revise the Design Development documents, without charge to Owner, as may be required to comply with the Construction Cost Limitation. Owner may, solely at Owner's discretion and in writing, increase or decrease the Construction Cost Limitation to align with Design/Build Contractor's Estimated Construction Cost.

5.2.4.2 Design/Build Contractor shall furnish and deliver to Owner the number of complete printed sets of Design Development documents as required.

5.2.4.3 Design/Build Contractor shall prepare presentation materials as described in Owner's Design Guidelines at completion of Design Development and, if requested, present them at a Board of Regents meeting, or other meeting as requested by Owner.

5.2.4.4 Before proceeding into the Construction Document Stage, Design/Build Contractor shall obtain Owner's written authorization to proceed and Owner's acknowledgement of Design/Build Contractor's submission of the Estimated Construction Cost. Owner's acknowledgement of Design/Build Contractor's submission of the Estimated Construction Cost prepared at the Design Development phase does not relieve Design/Build Contractor of its obligation to design and construct the Project within the Construction Cost Limitation.

5.2.5 Construction Documents Stage

5.2.5.1 Based on the approved Design Development documents and any further adjustments to the Facility Program, the Construction Cost Limitation or the Project Schedule as authorized by Owner, Design/Build Contractor shall prepare Construction Documents consisting of Drawings and Specifications and submit them to Owner for approval. The Construction Documents shall set forth in detail the requirements for construction of the Project. The Construction Documents shall provide for the construction of the Project within the approved Construction Cost Limitation. Design/Build Contractor shall advise Owner of any adjustments to the project scope necessary to align the Estimated Construction Cost with the established Construction Cost Limitation and shall revise the Construction Documents, without charge to Owner, as may be required to comply with the Construction Cost Limitation. Owner may, solely at Owner's discretion and in writing, increase or decrease the Construction Cost Limitation to align with Design/Build Contractor's Estimated Construction Cost.

5.2.5.2 The Construction Documents shall be consistent in all material respects with Design/Build Contractor's prior design proposals to Owner and with the approved Guaranteed Maximum Price proposal.

5.2.5.3 Design/Build Contractor shall advise Owner regarding construction phasing and scheduling, the construction contract time period, and such other construction conditions considered appropriate for the Project.

5.2.5.4 Design/Build Contractor shall assist and advise Owner in connection with Owner's responsibility and procedures for obtaining approval of authorities having jurisdiction over the Project.

5.2.5.5 Design/Build Contractor shall furnish and deliver to Owner the number of complete printed sets of Construction Documents as required.

5.2.5.6 Following Owner's written acceptance of the Construction Documents, Design/Build Contractor shall deliver to Owner Computer-aided Design and Drafting ("CADD") system copies of the Construction Documents in the format and media specified by Owner.

5.2.5.7 Following Owner's written acceptance of the Construction Documents, Design/Build Contractor shall not be entitled to any adjustment in the approved Construction Cost Limitation except for changes in Project scope or quality which materially increase or decrease the cost to construct the Project that are ordered by Owner in writing in accordance with the UTUGCs .

5.2.6 Review Drawings

5.2.6.1 Design/Build Contractor, at its sole expense, shall provide Owner with the required number of design document review sets at each required stage of completion:

5.2.6.2 Design/Build Contractor shall incorporate into the documents such corrections and amendments as Owner requests at each stage review, unless Design/Build Contractor objects to such changes in writing and Owner agrees to the objections. Any additional cost incurred due to Design/Build Contractor's failure to incorporate Owner's requested corrections and amendments shall be borne by Design/Build Contractor.

5.2.6.3 Design/Build Contractor shall identify to Owner in writing anything in Design/Build Contractor's drawings and specifications and any drawings, plans, sketches, instructions, information, requirements, procedures, requests for action, and other data supplied to Design/Build Contractor (by Owner or any other party) that Design/Build Contractor regards as unsuitable, improper, or inaccurate in connection with the purposes for which such documents or data are furnished. Design/Build Contractor shall be solely responsible for the use of such documents or data unless Design/Build Contractor advises Owner in writing that in its opinion such documents or data are unsuitable, improper, or inaccurate and Owner instructs Design/Build Contractor in writing to proceed in accordance with the documents or data as originally given.

5.2.6.4 Design/Build Contractor shall pay all costs for plans, specifications and other design and construction documents used by Design/Build Contractor and its consultants and Subcontractors, and all documents produced for review by Owner, except for changes generated solely by Owner.

5.2.6.5 If any of the plans, specifications and other design and construction documents or other work materials produced or used by Design/Build Contractor pursuant to this Agreement are damaged or destroyed by fire or other casualty, Design/Build Contractor shall prepare and provide Owner with new copies of any such documents or materials, at no additional cost to Owner, unless Design/Build Contractor or Owner has a complete and undamaged set thereof.

5.2.7 Additional Design Services

5.2.7.1 Additional Design Services shall be provided by Design/Build Contractor and paid for in accordance with this Agreement by Owner if authorized in writing by Owner. Prior to commencing any Additional Design Service, Design/Build Contractor shall submit to Owner an Additional Services Proposal in a form acceptable to Owner. The Additional Services Proposal shall describe in detail the nature or scope of the Additional Design Services, the basis upon which Design/Build Contractor believes that such services are Additional Services, the maximum amount of fees and reimbursable expenses for performance of the Additional Services, and a proposed schedule for the performance of the Additional Services. Design/Build Contractor shall proceed with the Additional Design Service only after written acceptance by Owner of the Additional Services Proposal.

5.2.7.2 Upon acceptance by Owner, each Additional Services Proposal and the services performed by Design/Build Contractor pursuant to such Additional Services Proposal shall become part of this Agreement and shall be subject to all the terms and conditions of this Agreement, as fully and completely as though the same had been included in this Agreement as a Basic Service at the original execution of this Agreement.

5.2.7.3 The following services, if requested by Owner, are Additional Design Services:

- a. Providing financial feasibility or other special studies other than as they relate to energy conservation and guaranteed savings, and the cost of the Project.
- b. Providing planning surveys, site evaluations, environmental studies or comparative studies of prospective sites.
- c. Providing services relative to future facilities, systems and equipment which are not intended to be constructed during the Construction Phase.
- d. Providing services to make detailed investigation of existing conditions or facilities or to make measured drawings thereof, other than to verify the accuracy of drawings or other information furnished by Owner.
- e. Providing coordination of Work performed by Owner's separate contractors or by Owner's own forces, when such coordination services are specifically requested by Owner to be provided by Project A/E or any of its consultants.
- f. Providing services in connection with the work of separate consultants retained by Owner.
- g. Providing services for planning tenant or rental spaces.
- h. Making revisions in Drawings, Specifications or other documents when such revisions are inconsistent with written approvals or instructions previously given by Owner or due to Changes approved by Owner and not due to errors or omissions by Project A/E.
- i. Making revisions in Drawings, Specifications or other documents when such revisions are required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents.
- j. Making investigations, surveys, valuations, inventories or detailed appraisals of existing facilities, except as necessary and appropriate for the performance of the Design Phase Services required in connection with construction performed by Owner.
- k. Providing consultation concerning replacement of any Work damaged by fire or other cause during construction, and furnishing services as may be required in connection with the replacement of such Work provided that the damage was not caused wholly or in part by Design/Build Contractor or a Subcontractor.
- l. Providing services after Final Payment or expiration of the Warranty, whichever is later, except as otherwise required by the Contract Documents.

- m. Preparing to serve or serving as an expert witness at the request of Owner in connection with any public hearing, arbitration proceeding or legal proceeding.
- n. Providing any other services not otherwise customarily furnished in accordance with generally accepted architectural or engineering practice.
- o. Providing a Hazardous Material Abatement Consultant to provide hazardous material abatement expertise (including, but not limited to, asbestos and lead) through the Program, Schematic Design, Design Development, Construction Document and Construction Service Phases of the Project. The Hazardous Material Abatement Consultant shall be selected on the basis of competence and qualifications pursuant to *Texas Education Code* section 51.780(f)(1) from a list of approved consultants provided by Owner. Consultant shall review Owner provided surveys, make recommendations regarding the need for additional surveys, develop design and cost alternatives for hazardous material abatement, prepare plans and specifications to include abatement in the general construction scope of work, provide a licensed individual to monitor hazardous material removal as required by State and EPA guidelines, and prepare a final abatement report. Design/Build Contractor shall provide Owner with a written itemized cost proposal to provide Hazardous Material Abatement Consulting services, including coordination of Design/Build Contractor. Hazardous Materials Abatement insurance shall be provided by Design/Build Contractor and coverage for this service will not be included in any Owner provided insurance program.
- p. Providing a Commissioning Consultant to provide commissioning expertise through the Pre-Design, Schematic Design, Design Development, Construction Document and Construction Services Phases of the Project. The Commissioning Consultant shall review input related to Project objectives, methods and concepts of commissioning.
- q. Providing comprehensive equipment planning and procurement services for all equipment, including but not necessarily limited to, architecturally significant equipment, contractor provided and installed minor, moveable equipment, and owner provided, contractor installed minor, moveable equipment.

ARTICLE 6 PRE-CONSTRUCTION PHASE FEE

6.1 The Pre-Construction Phase Fee is the total compensation payable to Design/Build Contractor for the performance of Pre-Construction Phase Services, except for Additional Pre-Construction Phase Services approved in advance and in writing by Owner.

6.2 Except as specifically allowed in paragraph 6.4, Design/Build Contractor shall not be entitled to any increase in the Pre-Construction Phase Fee for any costs, expenses, liabilities or other obligations arising from the performance of Pre-Construction Phase Services.

6.3 Costs associated with the following items are specifically, but not exclusively, in the establishment of the Pre-Construction Phase Fee: profit and profit sharing; general overhead; salaries and labor; housing and relocation; fees and other payments to Project A/E, its consultants and other professional service providers hired by Design/Build Contractor to perform the Design Services; estimating, scheduling and information management systems and software; contract administration; office expenses; printing and copying; consulting fees; legal or accounting fees; cost of money; taxes; insurance premiums and deductibles; bond costs; purchase or rental of equipment; utilities; travel; per diem; fines or penalties; and damage awards.

6.4 If the scope of the Pre-Construction Phase Services is changed materially, the Pre-Construction Phase Fee shall be equitably adjusted. If the CCL is changed materially, due to a change in the project scope, before

acceptance of the GMP Proposal, the Pre-Construction Phase Fee may be equitably adjusted solely at the discretion of Owner in proportion to the change in the CCL. There shall be no adjustments in the Pre-Construction Phase Fee following acceptance of the GMP Proposal.

6.5 For Additional Pre-Construction Phase Services that are approved in advance and in writing by Owner, Design/Build Contractor shall be entitled to additional compensation computed as a:

6.5.1 A pre-established lump sum amount; or

6.5.2 The hourly cost of Design/Build Contractor's employee's or consultants who actually perform the Additional Pre-Construction Phase Services based on the employee's Direct Salary Expense rate or prorated Monthly Salary Rate plus the actual cost of allowable expenses incurred in the performance of the Additional Pre-Construction Phase Services plus an overhead and profit markup of ten percent (10%) of the total cost; or

6.5.3 As otherwise agreed to by the parties in advance of performing the Additional Pre-Construction Phase Services.

ARTICLE 7 GUARANTEED MAXIMUM PRICE PROPOSAL

7.1 When the Parties agree that the design of the Project is sufficiently developed and documented to allow detailed pricing of its construction, Design/Build Contractor shall prepare and submit a Guaranteed Maximum Price ("GMP") Proposal to Owner. The GMP Proposal must be prepared in accordance with the guidelines and delivered in the format specified by Owner in the attached exhibits. Owner, at its sole option and discretion, may specify different requirements for the GMP Proposal. Design/Build Contractor shall not withdraw its Guaranteed Maximum Price Proposal for ninety (90) days following submission to Owner.

7.2 Design/Build Contractor shall review development of the GMP Proposal with Owner on an ongoing basis to address clarifications of scope and pricing, distribution of contingencies, schedule, assumptions, exclusions, and other matters relevant to the establishment of a GMP.

7.3 The GMP Proposal must include a written description of how it was derived that specifically identifies the clarifications and assumptions made by Design/Build Contractor in developing the proposed GMP and the monetary amounts attributable to them. The GMP Proposal shall include, without limitation, a breakdown of Design/Build Contractor's estimated General Conditions Costs and estimated Costs of the Work organized by trade; contingency amounts; the Construction Phase Fee; and the proposed Contract Time, including dates for Notice to Proceed, Substantial Completion and Final Completion.

7.4 The GMP Proposal shall allow for all changes and refinements in the drawings and specifications through completion of the Construction Documents, except for material changes in scope.

7.5 The GMP Proposal may include a Design/Build Contractor's Contingency amount as allowed under Direct Construction Cost.

7.6 Included with its GMP Proposal, Design/Build Contractor shall provide two complete, bound sets of the drawings, specifications, plans, sketches, instructions, requirements, materials, equipment specifications and other information or documents that fully describe the Project as developed at the time of the GMP Proposal and that are relevant to the establishment of the GMP. The bound supporting documents shall be referenced in and incorporated into the GMP Proposal.

7.7 The GMP Proposal and all supporting documents shall identify and describe all items, assumptions, costs, contingencies, schedules and other matters necessary and relevant for proper execution and completion of the Work and for establishment of the Guaranteed Maximum Price. The GMP Proposal and the supporting documents are complementary and, in the event of an irreconcilable conflict between or among them, the interpretation that provides for the higher quality of material and workmanship shall prevail over all other interpretations.

7.8 In submitting the GMP Proposal, Design/Build Contractor represents that it will provide every item, system or element of Work that is identified, shown or specified in the GMP Proposal or the supporting documents, along with all necessary or ancillary materials and equipment for their complete operating installation, unless specifically excepted by Owner. Upon Owner's acceptance of the GMP Proposal, Design/Build Contractor shall not be entitled to any increase in the GMP due to the continued refinement of the Construction Documents or the absence or addition of any detail or specification that may be required in order to complete the construction of the Project as described in and reasonably inferable from the GMP Proposal or the supporting documents used to establish the GMP. Any costs that exceed the GMP shall be borne solely by Design/Build Contractor without reimbursement by Owner. Design/Build Contractor is responsible for all design, including incidental designing, detailing or both as required by the Specifications for shop drawing purposes, except for design provided by Owner's independent Design Consultants, if any.

7.9 Prior to commencement of the Construction Phase Services and concurrently with submission of the GMP Proposal, Design/Build Contractor shall submit for Owner's acceptance a schedule for the performance of Construction Phase Services as specified. The Construction Phase Schedule shall include reasonable periods of time for Owner's review and acceptance of design drawings and submissions and for approval of authorities having jurisdiction over the Project. Upon acceptance of a GMP Proposal by Owner, the Construction Phase Schedule shall not be modified except for good cause as approved by Owner at Owner's sole option and discretion.

7.10 The GMP Proposal shall adopt and incorporate all of the terms and conditions of this Agreement and all attachments to this Agreement. Any proposed deviation from the terms and conditions of this Agreement must be clearly and conspicuously identified to Owner in writing and specifically accepted by Owner. In the event of a conflict between any term of the GMP Proposal that was not clearly and conspicuously identified and approved by Owner and the terms of this Agreement and its attachments, the terms of the Agreement and its attachments shall control.

7.11 Owner may accept or reject the GMP Proposal or attempt to negotiate its terms with Design/Build Contractor. Upon acceptance by Owner of the GMP Proposal in writing, both parties shall execute the GMP Proposal and the terms of the GMP Proposal, including the GMP and the supporting documents, shall become part of the Contract Documents. If Owner rejects the GMP Proposal or the parties are unable or unwilling to agree on a GMP, Owner may terminate this Agreement.

7.12 Following Owner acceptance of the GMP Proposal, Design/Build Contractor shall continue to monitor the development of the Construction Documents so that, when complete, the Construction Documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the GMP Proposal. During the Construction Documents stage, Design/Build Contractor and Project A/E shall jointly deliver a monthly status report to Owner describing the progress on the incorporation of all qualifications, assumptions, clarifications, exclusions, value engineering issues and all other matters relevant to the establishment of the GMP into the Construction Documents. The monthly status report shall also include an updated start-to-finish project schedule that encompasses Project A/E's activities, Design/Build Contractor's activities, and Owner's commissioning

and occupancy activities, short-term schedules, and production rates for key elements of the Project as determined by Owner.

7.13 Design/Build Contractor shall be entitled to an equitable adjustment of the GMP if it is required to pay or bear the burden of any new federal, state, or local tax, or any rate increase of an existing tax, except taxes on income, adopted through statute, court decision, written ruling, or regulation taking effect after acceptance of the GMP Proposal. This equitable adjustment does not apply to tax increases borne solely by Subcontractors.

7.14 The Parties may agree to convert the GMP to a lump sum contract amount at any time after Design/Build Contractor has received bids or proposals from trade contractors or Subcontractors for the performance of all major elements of the Work. In proposing a lump sum amount, Design/Build Contractor shall consider the buyout savings, any unused contingency amounts and the trade package contracts that have not been finalized. In preparing a lump sum conversion proposal, Design/Build Contractor must provide the following information:

- The stage of completion of the Project;
- The trade packages that have been completely bought out;
- The trade packages remaining that have not been bought out;
- A complete line item breakdown of the calculations used to establish a lump sum amount based on the GMP Schedule of Values;
- An accounting of all savings amounts that are to be returned to Owner as part of the lump sum calculation; and
- Any other Project information requested by Owner.

7.15 Design/Build Contractor shall document the actual Cost of the Work at buyout as compared to the Guaranteed Maximum Price proposal and shall report this information to Owner monthly with Design/Build Contractor's recommendation for selection of a bid or proposal for each subcontracting package.

ARTICLE 8 CONSTRUCTION PHASE SERVICES

The Construction Phase shall be deemed to commence upon the date specified in a Notice to Proceed issued by Owner after approval of the Guaranteed Maximum Price Proposal and shall continue until Final Completion of all Work. Pre-Construction Phase Services may overlap Construction Phase Services. Design/Build Contractor shall not incur any costs for construction of the Work prior to issuance by Owner of written authorization to commence such Work. Design/Build Contractor shall perform the following Construction Phase Services.

8.1 General Responsibilities

8.1.1 Construct the Work in strict accordance with the Construction Documents and as required by the UTUGCs and Owner's Specifications within the time required by the Project Schedule approved by Owner.

8.1.2 Organize and maintain a competent, full-time staff at the Project site with clearly defined lines of authority and communication as necessary to coordinate construction activities, monitor and direct progress of the Work, and further the goals of the Project Team.

8.1.3 Designate in writing a representative who is responsible for the day-to-day management of the Construction Phase Services. The designated representative shall be Owner's primary contact

during the Construction Phase and shall be available as required for the benefit of the Project and Owner. The designated representative shall be authorized to act on behalf of and bind Design/Build Contractor in all matters related to Construction Phase Services including, but not limited to, execution of Change Orders and Applications for Payment.

8.1.4 Attend Owner's regularly scheduled Project progress meetings and fully advise the Project Team of the Project status including schedule, costs, quality and changes.

8.1.5 In addition to attending Owner's regularly scheduled Project progress meetings, Design/Build Contractor shall schedule, direct and attend interim progress meetings with other members of the Project Team as required to maintain Project progress. Design/Build Contractor shall record and distribute the minutes of each meeting to each Project Team member. The minutes shall identify critical activities that require action and the dates by which each activity must be completed.

8.1.6 Coordinate delivery, storage (if necessary) and installation of Owner-procured material, furnishings and equipment.

8.1.7 In accordance with the UTUGCs, provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation, and all other facilities and services necessary for the proper execution and completion of the Work in strict accordance with the requirements of the Construction Documents.

8.1.8 Obtain building permits and special permits for permanent improvements as required by law or the Construction Documents. Assist Owner or Project A/E in obtaining all approvals required from authorities having jurisdiction over the Project.

8.1.9 Coordinate, monitor and inspect the work of Subcontractors to ensure conformance with the Construction Documents.

8.1.10 Be responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work. Design/Build Contractor shall keep Owner informed of the progress and quality of the Work.

8.1.11 Design/Build Contractor shall promptly correct any defective Work at Design/Build Contractor's sole expense, unless Owner specifically agrees to accept the Work.

8.1.12 Warrant that the materials and equipment provided for the Project will be of good quality and new unless otherwise required or permitted by the Construction Documents; that the construction will be free from faults and defects; and that the construction will conform with the requirements of the Construction Documents. Design/Build Contractor shall be responsible for correcting Work that does not comply with the Construction Documents at its sole expense without cost to Owner.

8.1.13 In accordance with the UTUGCs regarding Record Documents and Owner's Project Closeout Specification, Design/Build Contractor shall maintain and deliver the required documents that describe changes or deviations from the Construction Documents that occurred during construction and that reflect the actual "As Built" conditions of the completed Work.

8.2 Construction Contract Administration

8.2.1 Design/Build Contractor, through Project A/E, shall furnish the following Contract Administration Services during the Construction Phase. Fees for these services are included in Design/Build Contractor's Construction Phase Fee.

8.2.2 Project A/E shall assist in the administration of the construction as set forth below and in the project manual and the current edition of Owner's A/E Design Guidelines and Owner's Design Criteria Package.

8.2.3 Project A/E, and its related consultants, shall inspect the Project site at intervals appropriate to the type and stage of construction progress and as otherwise required by this Agreement to observe the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. On the basis of such onsite observations, Project A/E shall observe the progress and quality of the Work, and shall endeavor to guard Owner against defects and deficiencies in the Work.

8.2.4 In addition to site visits for general inspection and observation, Project A/E shall visit the site for specific purposes related to certification of progress payments, start-up or mock-up reviews for significant work activities and for formal inspections of the Work. Project A/E shall provide written reports of all site visits to Owner and the Design-Build Contractor within three business days.

8.2.5 Design/Build Contractor shall work with the owner on establishing and maintaining a numbering and tracking system for all project records, including changes, requests for information, submittals, and supplementary instructions shall provide updated records at each Owner's meeting and when requested.

8.2.6 Design/Build Contractor shall administer all regular progress and special meetings scheduled by Owner and shall promptly provide meeting minutes to all parties within seven days. Project A/E shall attend Design/Build Contractor's regularly scheduled planning meetings.

8.2.7 Design/Build Contractor shall prepare an agenda for and conduct job conferences for attendance by representatives of Design/Build Contractor, major trade contractors and Subcontractors, Project A/E and Owner, and prepare and distribute minutes of the meetings and a construction status report.

8.2.8 Project A/E's certification of Design/Build Contractor's Estimate for Partial Payment for Construction Phase Services shall constitute a representation by Project A/E to Owner, based on Project A/E's observations at the site as provided in this Agreement and on the data comprising Design/Build Contractor's Estimate for Partial Payment that the Work has progressed to the point indicated; that, to the best of Project A/E's knowledge, information and belief, the quality of the work is in accordance with the Contract Documents. However, the certification of a Design/Build Contractor's Estimate for Partial Payment shall not be a representation that Project A/E has made any examination to ascertain how and for what purpose Design/Build Contractor has used the moneys paid on account of the Contract Sum.

8.2.9 Project A/E, with the approval of Owner, shall interpret the technical requirements of the Contract Documents. Project A/E shall render interpretations necessary for the proper execution or progress of the Work with reasonable promptness on written request of either Owner or the Design-Build Contractor, and shall render written recommendations to Owner within a reasonable time on matters relating to the execution or progress of the Work or the interpretation of the Contract Documents.

8.2.10 Project A/E shall provide consultation for the purpose of clarification and interpretation of the intent and scope of the Construction Documents. Project A/E's interpretations and recommendations shall be consistent with the intent of and reasonably inferable from the Contract Documents. Project A/E's interpretations shall be made in written and/or graphic form including, if necessary or appropriate, supplemental documents to amplify or clarify portions of the Construction Documents.

8.2.11 Project A/E shall review and approve or take other appropriate action upon Design/Build Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for conformance with the design concept of the Work set forth in the Contract Documents, and shall respond to Design/Build Contractor's inquiries and questions and provide such supplemental information as appropriate. One copy of each submittal, shop drawing, product data, etc., shall be provided to Owner.

8.2.12 Project A/E shall provide assistance to Owner in the review of Design/Build Contractor's requests for change orders and pricing thereof.

8.2.13 Project A/E shall prepare Change Orders for Owner's approval and execution in accordance with the Contract Documents, and shall, with Owner's approval, have authority to order minor changes in the Work not involving an adjustment in the Contract Sum or an extension of the Contract Time, which are not inconsistent with the intent of the Contract Documents. In conjunction with each proposed change, Project A/E shall review the cost and time estimate and recommend to Owner whether the proposal is appropriate. Project A/E shall prepare revised Contract Drawings, where appropriate, to illustrate and document the work required by the Change Order.

8.2.14 All proposed changes to drawings, plans and specifications, regardless of how initiated, shall be fully described in the document depicting them as to scope of work added, removed, or changed. The original copies of the Construction Documents may be revised to show such changes, provided that all such revisions shall be separately recorded on media acceptable to Owner, including, without limitation, design software. Such revisions shall be clearly indicated and a current revision date shall be included on the reproducible copy. Changes to the specifications shall be made by consecutively numbered and dated revision addenda. All changes to design documents or specifications will be identified by date of change, revision number and other customary identification references. Areas changed on drawings will be "clouded" to show each change. Clouds designating previous changes will be removed so that only the most recent changes will be clouded.

8.2.15 Project A/E shall participate in concealed space inspections, systems start-up inspections, Substantial Completion and Pre-Final Completion Inspections to determine the Dates of Substantial Completion, and Final Acceptance. Project A/E shall also participate in Owner's final walk thru inspection one year after Final Completion.

8.2.16 Project A/E shall review, for conformance with the Contract Documents, Design/Build Contractor's submission of guarantees and warranties.

8.2.17 Project A/E shall assist Owner in checking as-built drawings during the course of the Work in association with certifying progress payments and shall review final as-built documents for completeness and compliance with the requirements of the Contract Documents.

8.2.18 The Design /Build Contractor shall provide "record" record drawings as described in this Agreement and in Owner's Specification 01 77 00 Project Closeout Procedures.

8.2.19 Project A/E shall prepare and administer the construction punch list until all punch list items have been resolved to Owner's satisfaction.

8.2.20 Project A/E shall review Design/Build Contractor's submission of operating and maintenance instructions, and all manuals, brochures, drawings, and other close-out documentation furnished by Design/Build Contractor for conformance with the requirements of the construction documents.

ARTICLE 9 OWNER'S RESPONSIBILITIES

9.1 Owner will provide the Design Criteria Package for the Project pursuant to *Texas Education Code* section 51.780(a)(3).

9.2 Owner has prepared a pre-design phase summary document ("Pre-Design Phase Document" in the form of either a "Facility Program" or a "Pre-Design Report"), which is attached hereto as an Exhibit, or Owner and Design/Build Contractor may agree that Project A/E shall prepare the Pre-Design Phase Document as an Additional Service as set forth in Article 25 of this Agreement. The Pre-Design Phase Document sets forth, or will set forth, the description of the project scope, preliminary project cost, schedule, criteria for design objectives, characteristics and constraints, space requirements and relationships, site requirements, information related to existing facilities, and desired special components, systems and equipment. If Project A/E prepares the Pre-Design Phase Document, then Owner will review the Pre-Design Phase Document when completed and then determine whether to proceed with the Project and authorize commencement of Design Services. Owner reserves the right to terminate the Agreement following completion of the Pre-Design Phase, and shall have no further obligation to Design/Build Contractor other than payment for services authorized by Owner and provided by Design/Build Contractor prior to such termination in accordance with the terms and conditions of this Agreement.

9.3 Owner will provide a preliminary project budget and schedule for the Project. The budget will include the Construction Cost Limitation, contingencies for changes in the Work during construction, and other costs which are the responsibility of Owner. The schedule will set forth Owner's plan for milestone dates and completion of the Project.

9.4 Owner will designate a representative authorized to act in Owner's behalf with respect to the Project. Owner's Designated Representative shall examine the documents submitted by Design/Build Contractor and shall render decisions pertaining thereto.

9.5 Owner, at Owner's cost, will secure the services of soils engineers, existing facility surveys, testing and balancing, hazardous materials surveys, laboratory testing, environmental or other special consultants to develop such additional information as may be necessary for the design of the Project. Design/Build Contractor shall provide Owner with parameters for inclusion in Owner's instructions to such providers.

9.6 Owner shall arrange and pay for materials, structural, mechanical, chemical and other laboratory tests as required by the Construction Documents.

9.7 Owner shall furnish all legal, accounting, auditing and insurance counseling services for itself as may be necessary for the Project.

9.8 Owner shall examine the design documents submitted by Design/Build Contractor and provide comments concerning corrections or amendments to such documents in writing to Design/Build Contractor.

Owner may obtain independent review of the design documents by its own Design Consultant. Owner may require Design/Build Contractor to halt production during design review.

9.9 Owner shall furnish required information and services and shall render approvals and decisions as expeditiously as is consistent with reasonable skill and care and the orderly progress of Design/Build Contractor's services and of the Work.

9.10 Owner may designate one or more inspectors of its own who shall be given access to the Work as requested or needed. The provision of such inspectors by Owner shall not reduce or lessen in any respect Design/Build Contractor's responsibilities for the Work. Design/Build Contractor shall remain fully and solely responsible for the Drawings, Specifications, and other Contract Documents furnished or provided by Design/Build Contractor, and for constructing the Project in strict accordance with the Contract Documents.

9.11 Owner shall have the right to reject any defective Work on the Project. Should Design/Build Contractor refuse or neglect to correct any such Work within a reasonable time after notice, Owner may have the Work corrected and recover all expenses incurred from Design/Build Contractor on demand.

ARTICLE 10 OWNERSHIP AND USE OF DOCUMENTS

10.1 Drawings, Specifications and other documents as instruments of service are and shall remain property of Design/Build Contractor or Project A/E whether the Project for which they are made is executed or not. Owner shall be permitted to retain copies, including reproducible files in Owner's native software, of Drawings, Specifications and other documents for information and reference in connection with Owner's use and occupancy of the Project. Owner shall have an irrevocable, paid-up, and perpetual non-exclusive license and right, which shall survive the termination of this Agreement, to use the Drawings, Specifications and other documents, including the originals thereof, and the ideas and designs contained therein, for any purpose, regardless of whether Design/Build Contractor or Project A/E remains as Design/Build Contractor or Project A/E, has resigned, this Agreement has been terminated, Design/Build Contractor's or Project A/E's scope of services has been modified, or the services herein have been completed.

10.2 Submission or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of Design/Build Contractor's or Project A/E's rights.

ARTICLE 11 TIME

11.1 Unless otherwise approved, Owner and Design/Build Contractor shall perform their respective obligations under the Contract as expeditiously as is consistent with reasonable skill and care and the orderly progress of the Work.

11.2 Time limits stated in the Contract Documents are of the essence of this Agreement. Design/Build Contractor shall be responsible for schedule development, updating and reporting throughout the entire Project, including Pre-Construction Phase Services and Construction Phase Services. Design/Build Contractor shall comply in all regards with requirements set forth in Owner's Project Planning and Scheduling Specifications.

ARTICLE 12 PAYMENTS

12.1 General Requirements

12.1.1 All Applications for Payment shall be submitted formally in accordance with Owner's Rider 116, Invoice Payment Requirements (a copy of which is included as an Exhibit hereto) but shall be presented to Owner for review and approval prior to formally being submitted.

12.1.2 Each Schedule of Values submitted with an Application for Payment shall include the originally established value for each work classification line item or subcontract and shall identify, by the addition of new data rows immediately below the previously accepted data rows, any revisions to the costs or cost estimates for each work classification or subcontract. The format and tracking method of the original Schedule of Values and of all updates shall be subject to approval by Owner. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work, including Design/Build Contractor's overhead and profit, shall not exceed the unpaid balance of the Guaranteed Maximum Price, less retainage on Work previously completed.

12.1.3 Pre-Construction Phase expenses of transportation and overnight living expenses in connection with Owner approved out-of-state travel shall be identified separately in each Application for Payment. All travel must be approved in writing and in advance by Owner to be eligible for payment. Allowable expenses are limited to the reimbursable items and amounts described in Article 24, Compensation.

12.1.4 Retainage as specified in the UTUGCs will be withheld from the entire amount approved in an Application for Payment including the Cost of the Work, General Conditions, and Design/Build Contractor's Construction Phase Fee. Retainage will not be withheld from payments for Pre-Construction Phase Services.

12.1.5 Owner is an agency of the State of Texas and materials and services utilized in the construction of the Project may be exempted from state and local taxes. Design/Build Contractor is responsible for taking full advantage of all tax exemptions applicable to the Project. Owner will deduct from the Applications for Payment and from the Request for Final Payment any taxes paid for materials or services that were entitled to tax exemption.

12.1.6 This Agreement is subject to the assessment of liquidated damages against Design/Build Contractor. Amounts assessed as liquidated damages, and other amounts to which Owner is entitled by way of setoff or recovery, may be deducted from any moneys due Design/Build Contractor.

12.1.7 Owner shall have the right to withhold from payments due Design/Build Contractor such sums as are necessary to protect Owner against any loss or damage which may result from negligence by Design/Build Contractor or any Subcontractor or failure of Design/Build Contractor or any Subcontractor to perform their obligations under this Agreement.

12.1.8 Notwithstanding any contractual provision to the contrary, Owner shall not be obligated to make any payment, to Design/Build Contractor under any of the following circumstances:

12.1.8.1 Design/Build Contractor persistently fails to perform the Work in accordance with the Contract Documents or is otherwise in material breach or default under this Agreement;

12.1.8.2 The payment request includes services that are not performed in accordance with the Construction Documents; provided, however, Owner shall pay for those services performed in accordance with the Construction Documents;

12.1.8.3 The payment request has insufficient documentation to support the amount of payment requested for Project costs; provided, however, Owner shall pay for allowable Project costs for which there is sufficient documentation;

12.1.8.4 Design/Build Contractor is in violation of the Prevailing Wage requirements or has failed to make payments promptly to Subcontractors or other third parties used in connection with any services or materials for which Owner has made payment to Design/Build Contractor;

12.1.8.5 If Owner, in its good faith judgment, determines that the unpaid balance of the GMP is not sufficient to complete the Work in accordance with the Construction Documents;

12.1.8.6 Design/Build Contractor has persistently failed to complete the Work in accordance with the Critical Path Milestone Schedule requirements or if Owner, in its good faith judgment, determines that the remaining Work will not be completed within the Contract Time;

12.1.8.7 Design/Build Contractor is insolvent, makes a general assignment for the benefit of its creditors or otherwise seeks protection under the laws and regulations of the bankruptcy courts; or

12.1.8.8 Design/Build Contractor fails to obtain, maintain or renew insurance coverage as required by the Contract Documents.

12.1.9 No partial payment made by Owner shall constitute, or be construed to constitute, final acceptance or approval of the work to which the partial payment relates or of the documentation provided in support of the partial payment. No partial payment made by Owner shall constitute, or be construed to constitute, a release of Design/Build Contractor from any of its obligations or liabilities with respect to the Work.

12.2 Pre-Construction Phase Payments

12.2.1 Payments for Pre-Construction Phase Services shall be made monthly based on the percentage completion of Design/Build Contractor's required services for each stage of development of the Construction Documents and the procurement of Subcontractor goods or services in accordance with the schedule in Article 24, Compensation.

12.2.2 All payment requests for Pre-Construction Phase Services shall be submitted on an Application for Payment and Schedule of Values approved by Owner and includes all required attachments identifying payments to Project A/E, Historically Underutilized Businesses and to all Subcontractors.

12.3 Construction Phase Payments

12.3.1 Payments for Construction Phase Services shall be made as provided for in the UTUGC's and Owner's Specifications. All payment requests shall be submitted on an Application for Payment with a Schedule of Values approved by Owner and include all required attachments identifying payments to Historically Underutilized Businesses and to all Subcontractors. Payment for approved Change Orders shall be made as part of Design/Build Contractor's Application for Payment. Failure to submit "HUB Progress Assessment Report Documentations of Subcontracted Work" form(s) with each Application for Payment will cause rejection of the application by Owner and its return to Design/Build Contractor.

12.3.2 Design/Build Contractor's Construction Phase Fee and Construction Contract Administration Fee shall each be shown as separate line items on the Schedule of Values. Payment of Design/Build Contractor's Construction Phase Fee shall be made with each Application for Payment in the same proportion as the percentage completion of the Cost of the Work of the Project.

12.3.3 For General Conditions Costs, Design/Build Contractor's Application for Payment shall include complete copies of all receipts, invoices with check vouchers or other evidence of payment, payrolls, and any and all other evidence which Owner or its designated representatives shall deem necessary to support the amount requested. This information is subject to audit and payment for these costs is dependent on Owner's receipt of accurate and complete records of all transactions. Owner may reduce the amount requested for General Conditions Costs in any Application for Payment if Owner, in its good faith judgment, determines that the unpaid balance of the General Conditions line item in the Schedule of Values is not sufficient to fund necessary General Conditions Costs for the remainder of the Project.

12.3.4 Pay requests for Subcontractor work included in an Application for Payment shall not exceed the percentage of Work allocated to that Subcontractor for each respective Schedule of Values work classification which has been actually completed and shall not exceed the total value of the subcontract amount.

12.3.5 Design/Build Contractor's Request for Final Payment shall not be made until all Work is completed and all requirements of the Contract Documents have been satisfied including, without limitation: delivery to Owner of a complete release of all liens and claims arising out of the Work; written consent of surety to release of final payment; and an affidavit that, to the best of Design/Build Contractor's information, knowledge and belief, the release includes and covers all materials and services over which Design/Build Contractor has control and for which a lien could be filed and that all known debts and claims arising from the Project have been satisfied. Alternatively, Design/Build Contractor may, at its sole expense, furnish a bond satisfactory to Owner to indemnify Owner against any lien arising out of the Work. If any lien is asserted against Owner after all payments are made, Design/Build Contractor shall reimburse Owner for all damages and costs Owner may incur in discharging such lien, including all costs of court and reasonable attorneys' fees, and Owner shall retain all other remedies available to it at law and in equity.

12.3.6 Owner shall have no obligation to make Final Payment until a complete and final accounting of the Direct Construction Cost has been submitted by Design/Build Contractor and has been audited and verified by Owner or Owner's representatives.

12.3.7 Nothing contained herein shall require Owner to pay Design/Build Contractor an aggregate amount for Construction Phase Services that exceeds the Guaranteed Maximum Price or to make any payment if, in Owner's belief, the cost to complete the Work would exceed the Guaranteed Maximum Price less previous payments to Design/Build Contractor. The total amount of all Construction Phase payments to Design/Build Contractor shall not exceed the actual verified Direct Construction Cost for the Project plus Design/Build Contractor's Construction Phase Fee.

12.3.8 The acceptance by Design/Build Contractor or Design/Build Contractor's successors of Final Payment under this Agreement, shall constitute a full and complete release of Owner from any and all claims, demands, and causes of action whatsoever that Design/Build Contractor, its Subcontractors, suppliers and consultants or any of their successors or assigns have or may have against Owner arising from the Project or any provision(s) of this Agreement except for those previously made in writing and identified by Design/Build Contractor as unsettled at the time of the Request for Final Payment.

ARTICLE 13 DIRECT CONSTRUCTION COST

Direct Construction Cost is defined in paragraph 3.6 and is the sum of the amounts that Design/Build Contractor actually and necessarily incurs constructing the Work in strict compliance with the Construction Documents. Direct Construction Cost includes only the cost categories set forth in this Article and does not include the Pre-Construction Phase Fee or the Construction Phase Fee unless specifically noted. References in the UTUGCs to adjustments in “cost” or “costs” mean the Direct Construction Cost.

13.1 General Conditions Costs

13.1.1 Design/Build Contractor is entitled to receive payment for the actual cost of the allowable General Conditions items incurred after receipt of a Notice to Proceed with Construction from Owner through Substantial Completion of the Project plus thirty (30) calendar days. Design/Build Contractor is not entitled to reimbursement for General Conditions Costs incurred before receipt of the Notice to Proceed. General Conditions Costs incurred after Substantial Completion must be approved in advance by Owner.

13.1.2 Allowable General Conditions items are identified below and further detailed in the attached Exhibit. These items shall be included in the General Conditions cost amount shown as a line item in the Guaranteed Maximum Price Proposal and as detailed on the Schedule of Values. Items not specifically included below or in the exhibit will not be allowed as a General Conditions Costs.

13.1.3 Personnel Costs. The actual Worker Wage Rate for Design/Build Contractor’s hourly employees and the Monthly Salary Rate of Design/Build Contractor’s salaried personnel who are identified to Owner in advance and in writing but only for the time actually stationed at the Project site with Owner’s prior consent. The Project Manager’s Monthly Salary Rate may be included in the General Conditions Costs only when the Project Manager is directly managing the Project. All personnel costs are subject to audit to determine the actual cost of the wages, salaries and allowable employer contributions incurred by Design/Build Contractor for services performed for the Project.

13.1.4 Costs of long-distance telephone calls, telegrams, postage, package delivery and courier service, hardwired telephone service, and reasonable expenses of Design/Build Contractor’s jobsite office if incurred at the Project site and directly and solely in support of the Work.

13.1.5 Costs of materials, supplies, temporary facilities, equipment, and hand tools (except those customarily owned by construction workers), supplied to the Project site by Design/Build Contractor, if such items are fully consumed in the construction of the Work and are included in the list of allowable General Condition Line Items. Cost for used items shall be based on fair market value and may include transportation, installation, and minor maintenance costs, and removal costs. If an item is not fully consumed in the construction of the Work, its cost shall be based on actual cost of the item less its fair market salvage value.

13.1.6 Rental charges for temporary facilities, equipment, and hand tools (except those customarily owned by construction workers), supplied to the Project site by Design/Build Contractor, provided they are included in the list of allowable General Condition Line Items and Owner has approved the rentals and the rental rates in advance and in writing. Rental rates may include transportation, installation, and minor maintenance costs, and removal costs. For tools, machinery or construction equipment rented directly from Design/Build Contractor, the rental rate, including freight

and delivery costs and all operating expenses except labor, shall be approved in advance by Owner and shall be in accordance with the “Rental Rate Blue Book for Construction Mobilization Costs” published by Primedia, latest edition, but no higher than the prevailing competitive rates for rental of similar equipment in the Project vicinity.

13.1.7 The aggregate rental cost of any item charged to Owner shall not exceed ninety percent (90%) of the purchase price and maintenance cost of the item. If the anticipated aggregate rental cost for an item of equipment exceeds ninety percent (90%) of the purchase and maintenance price, Design/Build Contractor shall purchase the equipment and turn it over to Owner upon final completion of the Work or, at Owner’s option, credit Owner with the fair market resale value of the item.

13.1.8 Permit and inspection fees that are not subject to exemption.

13.1.9 Premiums for insurance and bonds to the extent directly attributable to this Project. Premiums for Subcontractor bonds and/or Subcontractor default insurance purchased for subcontracted work are excluded from General Conditions Costs.

13.1.10 Governmental sales and use taxes directly attributable to the General Conditions Line Items that are not subject to exemption. Taxes paid on materials or services that were entitled to tax exemption will not be reimbursed by Owner.

13.2 Cost of the Work

13.2.1 Design/Build Contractor is entitled to receive payment for the actual cost of the allowable Cost of the Work items incurred after receipt of Owner’s written authorization to commence the Construction Phase Work through Final Completion of the Project. Design/Build Contractor is not entitled to reimbursement for Cost of the Work costs incurred before receipt of Owner’s written authorization.

13.2.2 Cost of the Work includes the following:

13.2.2.1 Costs of materials and equipment purchased directly by Design/Build Contractor and incorporated into or consumed in the performance of the Work, including transportation charges, and a reasonable and customary allowance for waste and spoilage. Payment for stored materials is subject to the requirements set forth in the UTUGCs.

13.2.2.2 Costs of site debris removal and disposal in accordance with all applicable laws and regulations if not otherwise included in General Conditions Costs.

13.2.2.3 Payments made to Subcontractors and their vendors or suppliers by Design/Build Contractor for the subcontract work in accordance with the Construction Documents and the requirements of the subcontracts with the Subcontractors, vendors or suppliers. However, the cost of Subcontractor payment and performance bonds, if any, are specifically excluded from the Cost of the Work.

13.2.2.4 Payments earned by Design/Build Contractor for self-performed subcontract work, other than General Conditions work, in accordance with the Construction Documents and the terms of this Agreement and approved by Owner.

13.2.2.5 Testing fees pursuant to the UTUGCs.

13.2.2.6 Intellectual property royalties and licenses for items specifically required by the Construction Documents which are, or will be, incorporated into the Work.

13.2.2.7 Costs associated with any Subcontractor default insurance program (sometimes referred to as SUBGUARD) provided or required by Design/Build Contractor ARE EXPLICITLY EXCLUDED from the Cost of the Work.

13.3 Design/Build Contractor's Contingency

13.3.1 The Guaranteed Maximum Price Proposal may include a Design/Build Contractor's Contingency amount to be used to fund increases in the Direct Construction Cost of the Project identified through the refinement, development and completion of the Construction Documents or procurement of the Work.

13.3.2 Any re-allocation of funds from Design/Build Contractor's Contingency to cover increases in the Direct Construction Cost must be approved by Owner in advance and in writing, such approval not to be unreasonably withheld. In written requests to use Design/Build Contractor's Contingency, Design/Build Contractor shall provide detailed documentation of the scope of work affected and the bases for any increases in costs.

13.3.3 Design/Build Contractor's Contingency is specifically not to be used for Contractor rework, unforeseen conditions, cost increases caused by lack of coordination or communication with Project A/E or trade Subcontractors, or to correct errors or omissions in the Construction Documents.

13.3.4 As the Construction Documents are finalized and the Buyout of the Work progresses Design/Build Contractor's Contingency amount shall be reduced by mutual agreement of Owner and Contractor. Any balance in Design/Build Contractor's Contingency fund remaining at the end of the Project shall be returned to Owner as savings.

ARTICLE 14 CONSTRUCTION PHASE FEE

14.1 Design/Build Contractor's Construction Phase Fee is the maximum amount payable to Design/Build Contractor for any cost or profit expectation incurred in the performance of the Work that is not specifically identified as being eligible for reimbursement by Owner elsewhere in the Agreement. References in the UTUGCs to Design/Build Contractor's "overhead" and "profit" mean Design/Build Contractor's Construction Phase Fee. The Construction Phase Fee includes, but is not limited to, the following items.

14.2 All profit, profit expectations and costs associated with profit sharing plans such as personnel bonuses, incentives, and rewards; company stock options; or any other like expenses of Design/Build Contractor.

14.3 Salaries of Design/Build Contractor's officers, project manager(s), estimators, schedulers and all other employees not stationed at the Project site and performing services directly related to the Project.

14.4 Any and all overhead, labor or general expenses of any kind unless specifically allowed as General Conditions Costs. These costs include, but are not limited to: costs for the purchase, lease, rental, allowance, or maintenance of vehicles; jobsite computers, copiers and other business equipment;

specialized telephone systems and cellular/digital phones; trade or professional association dues; cost for hiring and/or relocation of any of Design/Build Contractor's personnel; and travel, per diem and subsistence expense of Design/Build Contractor, its officers or employees except as specifically allowed as General Conditions Costs.

14.5 In the event that Design/Build Contractor elects to provide or require participation in a subcontractor default insurance program (sometimes referred to as SUBGUARD), the entire cost of the insurance program and all costs related to the administration of the program shall be included in the Construction Phase Fee.

14.6 All costs associated with payment and performance bonds obtained from trade contractors or Subcontractors, including Subcontractors bonds for change orders to subcontracts and the cost of any Subcontractor bonds for minor work that might be included in the General Conditions Costs.

14.7 All costs associated with Construction Contract Administration Services including those provided by Project A/E or other consultants.

14.8 Any financial costs incurred by Design/Build Contractor including the cost of capital or interest on capital, regardless of whether it is related to the Project, and costs associated with construction warranty reserves.

14.9 Any legal, accounting, professional or other similar costs incurred by Design/Build Contractor, including costs incurred in connection with the prosecution or defense of any dispute, mediation, arbitration, litigation or other such proceeding related to or arising from the Project.

14.10 Any Federal and/or State income and franchise taxes paid by Design/Build Contractor. Any fines, penalties, sanctions or other levies assessed by any governmental body against Design/Build Contractor.

14.11 Any cost arising out of a breach of this Contract or the fault, failure or negligence of Design/Build Contractor, its Subcontractors, or any person or entity for whom they may be liable. These costs include, without limitation: costs to remedy defective, rejected, or nonconforming work, materials or equipment; costs due to failure to coordinate the Work or meet CPM Schedule milestones; costs arising from Design/Build Contractor's contractual indemnification obligations; liquidated or actual damages imposed by Owner for failure to complete the Work within the Contract Time; costs due to the bankruptcy or insolvency of any Subcontractor; and damage or losses to persons or property.

14.12 The cost of any and all insurance deductibles payable by Design/Build Contractor and costs due to the failure of Design/Build Contractor or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents.

14.13 Any and all costs that would cause the Guaranteed Maximum Price, minus the amounts allocated in the GMP for Owner's Contingency and Owner's Special Cash Allowance, to be exceeded.

14.14 Any and all costs not specifically identified as an element of the Direct Construction Cost.

ARTICLE 15 CONTRACT SAVINGS, ALLOWANCES, REBATES AND REFUNDS

15.1 If the allowable, final, verified, audited amount of the General Conditions Costs, Cost of the Work, allowance items and Design/Build Contractor's Contingency is less than the amount

established for each of those categories in the originally accepted Guaranteed Maximum Price Proposal, the entire difference shall be credited to Owner as savings and the Contract Sum shall be adjusted accordingly. When buyout of the Project is at least 85% complete, Owner may recognize any savings achieved to that point by issuing a deductive change order for the saved amount.

15.2 Items to be provided for through Owner's Special Cash Allowances shall be clearly identified in the Construction Documents and the Guaranteed Maximum Price Proposal. The Cost of the Work included in the allowances shall be determined in accordance with the UTUGCs. Any claim by Design/Build Contractor for an adjustment to an allowance amount included in the Guaranteed Maximum Price based on the cost of allowance work shall be made within a reasonable time after the issuance of the Construction Documents for the allowance items. Design/Build Contractor shall not be entitled to any increase in its Construction Phase Fee for increases to allowance amounts that were initially based on estimates provided by Design/Build Contractor. Owner shall be entitled to retain 100% of the balance of any unused allowance amount.

15.3 Owner shall be entitled to deduct amounts for the following items from any Application for Payment or from the Request for Final Payment submitted by Design/Build Contractor:

15.3.1 The fair market value of all tools, surplus materials, construction equipment, and temporary structures that were charged to the Work (other than rental items) but were not consumed during construction or retained by Owner. Upon completion of the Work or when no longer required, Design/Build Contractor shall either credit Owner for the fair market value (as approved by Owner) for all surplus tools, construction equipment and materials retained by Design/Build Contractor or, at Owner's option, use commercially reasonable efforts to sell the surplus tools, construction equipment and materials for the highest available price and credit the proceeds to Owner's account.

15.3.2 Discounts earned by Design/Build Contractor through advance or prompt payments funded by Owner. Design/Build Contractor shall obtain all possible trade and time discounts on bills for material furnished, and shall pay bills within the highest discount periods. Design/Build Contractor shall purchase materials for the Project in quantities that provide the most advantageous prices to Owner.

15.3.3 Rebates, discounts, or commissions obtained by Design/Build Contractor from material suppliers or Subcontractors, together with all other refunds, returns, or credits received for materials, bond premiums, insurance and sales taxes.

15.3.4 Deposits made by Owner and forfeited due to the fault of Design/Build Contractor.

15.3.5 Balances remaining on any and all allowances, Design/Build Contractor's Contingency, or any other identified contract savings.

15.4 Owner shall be entitled to recover any savings realized between the Guaranteed Maximum Price and the buyout price for subcontracted work, provided however, that Design/Build Contractor may use such savings to offset other procurement packages that exceed the amounts identified in the initial Guaranteed Maximum Price, so long as the total Cost of the Work proposed in the Guaranteed Maximum Price does not increase.

15.5 Owner shall be entitled to recognize and recover 100% of any and all savings identified by cost review or audit at any time, before or after Final Payment.

ARTICLE 16 PRE-EXISTING CONDITIONS; DESIGN ERRORS AND OMMISIONS

16.1 Design/Build Contractor acknowledges and understands that it will be afforded reasonable access to the existing improvements and conditions on the Project site. Design/Build Contractor represents that it shall thoroughly investigate those conditions and that the results of Design/Build Contractor's investigation shall be taken into account in establishing the Guaranteed Maximum Price of the Work. Design/Build Contractor shall not make nor be entitled to any claim for any adjustment to the Contract Time or the Contract Sum for Design Phase Services or for Construction Phase Services arising from Project conditions that Design/Build Contractor discovered or, in the exercise of reasonable care, should have discovered in Design/Build Contractor's investigation.

16.2 Before proceeding with the Work, Design/Build Contractor shall review the drawings, specifications and other Construction Documents and notify Owner of any errors, omissions or discrepancies in the documents of which it is aware. Design/Build Contractor is responsible for discovering and correcting any error, omission, conflict, inconsistency or lack of clarity, in the Construction Documents prepared by Design/Build Contractor or its Project A/E. Design/Build Contractor shall be responsible for all costs, including the cost of redoing or remedying the Work and time delays, resulting from any error or omission in the Contract Documents.

ARTICLE 17 BONDS AND INSURANCE

17.1 **Security Bond;** Within ten (10) days of the date that Design/Build Contractor executes this Agreement, Design/Build Contractor shall provide a security bond on a form provided by Owner in the amount of 5% of the anticipated GMP as set forth in Design/Build Contractor's Pricing and Delivery Proposal, a copy of which is included as an Exhibit hereto. The surety for a security bond shall meet the same requirements as set forth for payment and performance bonds.

17.2 **Payment and Performance Bonds;** upon acceptance by Owner of a GMP Proposal, Design/Build Contractor shall provide payment and performance bonds on forms prescribed by Owner and in accordance with the requirements set forth in the UTUGC's. The penal sum of the payment bond and of the performance bond shall be equal to the GMP. If construction is phased or staged with different GMP's established at different times, the penal sum of the payment bond and of the performance bond shall be increased at the start of each stage or phase based on the cumulative total value of all GMP's in effect.

17.3 **Owner Controlled Insurance Program (OCIP);** Owner has elected to enroll the Project in the University of Texas System Rolling Owner's Controlled Insurance Program ("ROCIP" or "OCIP"). In addition to the requirements set forth herein, Design/Build Contractor shall adhere to the OCIP requirements set forth in the UTUGC's and Owner's Specifications 00 73 16, Project Insurance (OCIP) and 00 35 23, Project Safety (OCIP). In addition, the Design/Build Contractor **will be required to provide** the following additional insurance coverages:

17.3.1 **Pre-Construction Phase:** Design/Build Contractor shall provide Professional Liability and Errors and Omissions for Project A/E and Contractor's Errors and Omissions for itself, Workers' Compensation, Comprehensive General Liability and Comprehensive Automobile Liability in the amounts as set forth in the UTUGC's.

17.3.2 Design/Build Contractor hereby acknowledges that the OCIP does not provide coverage during the Pre-Construction Phase.

17.3.3 **Construction Phase:** Design/Build Contractor shall provide, Professional Liability and Errors and Omissions for Project A/E and Contractor's Errors and Omissions for itself and Comprehensive Automobile Liability, as set forth in the UTUGCs.

17.3.4 Design/Build Contractor shall provide the required Pre-Construction Phase insurance for the Project and additional Construction Phase insurance coverages in coordination with Owner's Specifications 00 73 16 and 01 35 23.

17.3.5 Design/Build Contractor's GMP Proposal shall exclude the cost of premiums for insurance coverage provided through the OCIP. The GMP Proposal shall only include the cost of premiums of all other insurance required by the Contract Documents.

17.3.6 The cost of premiums for any additional insurance coverage desired by Design/Build Contractor in excess of that required by the Contract Documents shall be borne solely by Design/Build Contractor out of its fees and not included in the GMP Proposal as a Direct Construction Cost.

17.3.7 Design/Build Contractor shall include required OCIP insurance information in trade packages and indicate on offer forms the insurance that respondents are to include and exclude in their offers and shall refer to Owner's OCIP-related specification for a complete listing of the specific coverages that Design/Build Contractor shall exclude from proposal(s) and contract(s).

17.3.8 During construction, Owner may audit the Design/Build Contractor's and Subcontractors' labor hours and certified payroll reports to determine actual insurance costs.

17.3.9 By signature hereon, Design/Build Contractor agrees that this project will utilize the Owner Controlled Insurance Program (OCIP) and will bind all trade contractors and Subcontractors to participate in the program. The Design/Build Contractor acknowledges that it has received and reviewed information required to be provided about the OCIP at least ten (10) days before entering into this Agreement, and will provide this information to all trade contractors and subcontractors at least ten (10) days before entering into a contract with them.

17.4 **Owner Provided Builders Risk Insurance;** Owner has elected to implement an Owner Provided Builders Risk Insurance Program. Design Refer to the Owner's Specification 00 25 00, Owner's Special Conditions for Design/Build Contractor's requirements. In addition, the Design/Build Contractor will be required to provide the following additional insurance coverages:

17.4.1 Design/Build Contractor shall provide Professional Liability and Errors and Omissions for Project A/E and Contractor's Errors and Omissions itself, Workers' Compensation, Comprehensive General Liability and Comprehensive Automobile Liability in the amounts as set forth in the UTUGCs.

17.4.2 Design/Build Contractor hereby acknowledges that the Owner-provided builder's Risk Insurance does not provide coverage during the Pre-Construction Phase.

17.4.3 **Construction Phase:** Design/Build Contractor shall provide Comprehensive Automobile Liability, Professional Liability and Errors and Omissions for Project A/E and Contractor's Errors and Omissions for itself as set forth in the UTUGCs.

17.4.4 Design/Build Contractor's GMP Proposal shall exclude the cost of premiums for builder's risk insurance coverage provided by Owner. The GMP Proposal shall only include the cost of premiums of all other insurance coverages described herein and as required by the Contract Documents.

17.4.5 The cost of premiums for any additional insurance coverage desired by Design/Build Contractor in excess of that required by the Contract Documents shall be borne solely by Design/Build Contractor out of its fees and not included in the GMP Proposal as a Direct Construction Cost.

17.4.6 Design/Build Contractor shall include required Owner provided builders risk insurance information in trade packages and indicate on offer forms the insurance that respondents are to include and exclude in their offers.

17.5 Design/Build Contractor shall carry professional liability and errors and omissions insurance, covering the Design Services provided under this Agreement, as is acceptable to and approved by Owner. Such insurance shall have minimum policy limits of One Million Dollars (\$1,000,000) in the aggregate and One Million Dollars (\$1,000,000) per claim. The fees for such insurance will be at the expense of Design/Build Contractor. Design/Build Contractor shall maintain such insurance throughout the course of the Work and for a minimum of one (1) year following Substantial Completion of the Work. A Certificate of Insurance indicating the expiration date of Design/Build Contractor's professional liability insurance is required. No policy providing such insurance shall be cancelled without thirty (30) days prior written notice to Owner. If Design/Build Contractor is performing the Design Services, then the professional liability insurance shall be in Design/Build Contractor's name and shall include a Design/Build Endorsement in form acceptable to Owner. If Design/Build Contractor is furnishing the Design Services through others, then the professional liability policy or policies shall be in the name of the respective professionals performing such services, which shall include all architects and engineers furnishing services for the Project, and Design/Build Contractor shall also provide a Contractor's Errors and Omissions policy naming it as the insured. If Design/Build Contractor is performing some design services and furnishing others, then the insurance policies shall be provided covering all design entities in accordance with the previously stated requirements.

17.6 Design/Build Contractor shall not cause or allow any of its required insurance to be canceled nor permit any insurance to lapse during the term of the Agreement or as required in this Agreement. If Design/Build Contractor fails to obtain, maintain or renew any insurance required by this Agreement, Owner may obtain insurance coverage directly and recover the cost of that insurance from Design/Build Contractor.

17.7 Owner reserves the right to review the insurance requirements set forth in this Article during the effective period of this Agreement and to make reasonable adjustments to the insurance coverages and their limits when deemed necessary and prudent by Owner based upon changes in statutory law, court decisions, or the claims history of the industry as well as Design/Build Contractor.

17.8 Owner shall be entitled, upon request, and without expense, to receive complete copies of the policies with all endorsements and may make any reasonable requests for deletion, or revision or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon the parties or the underwriter of any of such policies. Damages caused by Design/Build Contractor and not covered by insurance shall be paid by Design/Build Contractor.

17.9 The cost of premiums for any additional insurance coverage, subcontractor default insurance programs or subcontractor payment and performance bonds, desired by Design/Build Contractor in excess of that required by the Contract Documents shall be borne solely by Design/Build Contractor out of its fees and not included in the GMP Proposal as a Direct Construction Cost.

ARTICLE 18 DISPUTE RESOLUTION

18.1 To the extent that Chapter 2260, Texas Government Code, as it may be amended from time to time (“Chapter 2260”), is applicable to this Agreement and is not preempted by other applicable law, the dispute resolution process provided for in Chapter 2260 will be used by Owner and Design/Build Contractor to attempt to resolve any claim for breach of contract made by Design/Build Contractor.

18.2 Neither the occurrence of an event giving rise to a breach of contract claim nor the pendency of a claim constitute grounds for the suspension of performance by Design/Build Contractor, in whole or in part, except as permitted by Subchapter D, Chapter 2251 of the Texas Government Code. Any periods set forth in this Agreement for notice and cure of defaults are not waived.

18.3 It is agreed that such process is not invoked if Owner initiates the dispute by first bringing a claim against Design/Build Contractor, except at Owner’s sole option. If Owner makes a claim against Design/Build Contractor and Design/Build Contractor then makes a counterclaim against Owner as a claim under Chapter 2260 and in compliance therewith, Owner’s original claim against Design/Build Contractor does not become a counterclaim and is not subject to the mandatory counterclaim provisions of Chapter 2260 of the *Texas Government Code*, except at the sole option of Owner.

18.4 In any litigation between the Owner and the Design/Build Contractor arising from this Agreement or this Project, neither party will be entitled to an award of legal fees or costs in any judgment regardless which one is deemed the prevailing party.

ARTICLE 19 PROJECT TERMINATION AND SUSPENSION

19.1 This Agreement may be terminated during the Pre-Construction Phase by either party upon fifteen (15) days written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination, and such failure to perform is not cured within such fifteen (15) day period.

19.2 This Agreement may be terminated by Owner during the Pre-Construction Phase upon at least three (3) days written notice to Design/Build Contractor in the event that the Project is to be temporarily or permanently abandoned.

19.3 At its sole discretion and option, Owner may terminate this Agreement after the conclusion of the Pre-Design Stage, Schematic Design Stage, Design Development Stage, or the Construction Documents Stage of the Pre-Construction Phase or any time prior to acceptance of a Guaranteed Maximum Price Proposal.

19.4 In the event of termination that is not the fault of Design/Build Contractor, Design/Build Contractor shall be entitled to compensation for all services performed to the termination date together with Reimbursable Expenses then due provided, however, Design/Build Contractor has delivered to Owner such statements, accounts, reports and other materials as required below together with all reports, documents and other materials prepared by Design/Build Contractor, Project A/E,

Subcontractors, and consultants, either individually or jointly, prior to termination. Upon such payment, Owner shall have no further obligation to Design/Build Contractor.

19.5 Termination of this Agreement shall not relieve Design/Build Contractor or any of its employees, Subcontractors, or consultants of liability for violations of this Agreement or for any act or omission, or negligence, of Design/Build Contractor. In the event of a termination, (i) Design/Build Contractor hereby consents to employment by Owner of a substitute Design/Build Contractor to complete the services under this Agreement, with the substitute Design/Build Contractor having all rights and privileges of the original Design/Build Contractor of the Project, and (ii) Design/Build Contractor and Project A/E hereby expressly consent to the engagement by Owner of a substitute architect/engineer to complete the Design Services under this Agreement, with the substitute architect/engineer having all of the rights and privileges of the original Project A/E.

19.6 As of the date of any termination of this Agreement, Design/Build Contractor shall furnish to Owner all statements, accounts, reports and other materials as are required hereunder or as have been prepared by Design/Build Contractor, Project A/E, Subcontractors, and consultants in connection with Design/Build Contractor's responsibilities hereunder. Owner shall have the right to use the ideas and designs therein contained for the completion of the services described by this Agreement, and for completion of the Project, or otherwise.

19.7 If the Project is suspended or abandoned in whole or in part for more than three months, Design/Build Contractor shall be compensated for all services performed prior to receipt of written notice from Owner of such suspension or abandonment, together with Reimbursable Expenses then due. If the Project is resumed after being suspended for more than three months, Design/Build Contractor's compensation for Pre-Construction Phase Services shall be equitably adjusted if, in Owner's reasonable opinion, such adjustment is warranted.

ARTICLE 20 INDEMNITY

20.1 SEE ARTICLE 3 OF THE UNIFORM GENERAL CONDITIONS FOR UNIVERSITY OF TEXAS SYSTEM BUILDING CONSTRUCTION CONTRACTS FOR DESIGN/BUILD CONTRACTOR'S GENERAL INDEMNIFICATION OBLIGATIONS.

20.2 The indemnities contained herein shall survive the termination of this Agreement for any reason whatsoever.

ARTICLE 21 SPECIAL WARRANTIES

21.1 Owner and Design/Build Contractor agree and acknowledge that Owner is entering into this Agreement in reliance on Design/Build Contractor's represented expertise and ability to provide design/build services. Design/Build Contractor agrees to use its best efforts, skill, judgment, and abilities to perform its obligations and to further the interests of Owner in accordance with Owner's requirements and procedures.

21.2 Design/Build Contractor represents, and agrees that it will perform its services in accordance with the usual and customary standards of Design/Build Contractor's profession or business and in compliance with all applicable national, federal, state, municipal, laws, regulations, codes, ordinances, orders and with those of any other body having jurisdiction over the Project. Design/Build Contractor agrees to bear the

full cost of correcting Design/Build Contractor's negligent or improper work and services, those of its consultants, and any harm caused by the negligent or improper work or services.

21.3 Design/Build Contractor's duties shall not be diminished by any approval by Owner nor shall Design/Build Contractor be released from any liability by any approval by Owner, it being understood that Owner is ultimately relying upon Design/Build Contractor's skill and knowledge in performing the services required hereunder.

21.4 Design/Build Contractor represents and agrees that all persons connected with Design/Build Contractor directly in charge of its services are duly registered and/or licensed under the laws, rules and regulations of any authority having jurisdiction over the Project if registration is required.

21.5 Design/Build Contractor represents and agrees to advise Owner of anything of any nature in any drawings, specifications, plans, sketches, instructions, information, requirements, procedures, and other data supplied to Design/Build Contractor (by Owner or any other party) that is, in its opinion, unsuitable, improper, or inaccurate for the purposes for which the document or data is furnished.

21.6 Design/Build Contractor represents and agrees to perform its services under this Agreement in an expeditious and economical manner consistent with good business practices and the interests of Owner.

21.7 Design/Build Contractor represents and agrees that there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of its obligations under this Agreement.

21.8 Design/Build Contractor represents and agrees that the individual executing this Agreement on behalf of Design/Build Contractor has been duly authorized to act for and to bind Design/Build Contractor to its terms.

21.9 Except for the obligation of Owner to pay Design/Build Contractor certain fees, costs, and expenses pursuant to the terms of this Agreement, Owner shall have no liability to Design/Build Contractor or to anyone claiming through or under Design/Build Contractor by reason of the execution or performance of this Agreement. Notwithstanding any obligation or liability of Owner to Design/Build Contractor, no present or future partner or affiliate of Owner or any agent, officer, director, employee, or regent of Owner, The University of Texas System, or of the components comprising The University of Texas System, or anyone claiming under Owner has or shall have any personal liability to Design/Build Contractor or to anyone claiming through or under Design/Build Contractor by reason of the execution or performance of this Agreement.

ARTICLE 22 CERTIFICATION OF NO ASBESTOS CONTAINING MATERIALS OR WORK

22.1 With each material submittal for the Project, Design/Build Contractor shall provide a material Safety Data Sheet (SDS) and a statement certifying that no asbestos containing materials or work is included within the scope of the proposed submittal.

22.2 Design/Build Contractor shall ensure that Texas Department of Health licensed individuals, consultants or companies are used for any required asbestos work including asbestos inspection, asbestos abatement plans/specifications, asbestos abatement, asbestos project management and third-party asbestos monitoring.

22.3 Design/Build Contractor shall provide at Substantial Completion, a notarized affidavit to Owner and the Architect stating that no asbestos containing materials or work was provided, installed, furnished or added to the Project.

22.4 Design/Build Contractor shall take whatever measures it deems necessary to ensure that all employees, suppliers, fabricators, materialmen, Subcontractors, or their assigns, comply with this requirement.

22.5 All materials used on this Project shall be certified as non-Asbestos Containing Building Materials (ACBM). Design/Build Contractor shall insure compliance with the following acts from all of its Subcontractors and assigns:

22.5.1 Asbestos Hazard Emergency Response Act (AHERA—40 CFR 763-99 (7));

22.5.2 National Emission Standards for Hazardous Air Pollutants (NESHAP—EPA 40 CFR 61, National Emission Standard for Asbestos);

22.5.3 Texas Asbestos Health Protection Rules, 25 Tex. Admin. Code Ch. 295 Subchapter C;

22.5.4 Every Subcontractor shall provide a notarized statement that no ACBM has been used, provided, or left on this Project.

22.6 Design/Build Contractor shall provide, in hard copy and electronic form, all necessary material Safety Data Sheets (SDS) of all products used in the construction of the Project to the Texas Department of Health licensed inspector or Project A/E who will compile the information from the SDS and, finding no asbestos in any of the product, make a certification statement.

22.7 At Final Completion, Design/Build Contractor shall provide a notarized certification statement per 25 Tex. Admin. Code § 295.34c.1 that no ACBM was used during construction of the Project.

ARTICLE 23 MISCELLANEOUS PROVISIONS

23.1 **Assignment.** This Agreement is a personal service contract for the services of Design/Build Contractor, and Design/Build Contractor's interest in this Agreement, duties hereunder and/or fees due hereunder may not be assigned or delegated to a third party.

23.2 **Design/Build Contractor's Accounting Records.** Records of Design/Build Contractor's and Project A/E's costs, Reimbursable Expenses, expenses pertaining to Additional Pre-Construction Phase Services, Additional Design Services, and services performed on the basis of a Worker Wage Rate, Direct Salary Expense or Monthly Salary Rate (individually and collectively "Project Financial Records") shall be kept on the basis of generally accepted accounting principles and in accordance with cost accounting standards promulgated by the Federal Office of Management and Budget Cost Accounting Standards Board. Project Financial Records shall be available for audit by Owner or Owner's authorized representative during normal business hours upon reasonable notice, and shall be retained for four (4) years after Final Payment or abandonment of the Project, unless Owner otherwise instructs Design/Build Contractor in writing.

23.3 **Owner's Right to Audit.** Owner shall have the right to verify and audit the details of Design/Build Contractor's billings, certificates, accountings, cost data, and statements, either before or after payment, by (1) inspecting the books and records of Design/Build Contractor; (2) examining any

reports with respect to this Project; (3) interviewing Design/Build Contractor's employees; (4) visiting the Project site; and (5) any other reasonable action.

23.4 Child Support Certification. Pursuant to Section 231.006, *Texas Family Code*, Design/Build Contractor certifies that it is not ineligible to receive the award of or payments under this Agreement and acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.

23.5 Franchise Tax Certification. If a corporate or limited liability company, Design/Build Contractor certifies that it is not currently delinquent in the payment of any Franchise Taxes due under Chapter 171 of the *Texas Tax Code*, or that the corporation or limited liability company is exempt from the payment of such taxes, or that the corporation or limited liability company is an out-of-state corporation or limited liability company that is not subject to the Texas Franchise Tax, whichever is applicable.

23.6 Payment of Debt or Delinquency to the State. Pursuant to Sections 2107.008 and 2252.903, *Texas Government Code*, Design/Build Contractor agrees that any payments owing to Design/Build Contractor under this Agreement may be applied directly toward any debt or delinquency that Design/Build Contractor owes the State of Texas or any agency of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.

23.7 Loss of Funding. Performance by Owner under this Agreement may be dependent upon the appropriation and allotment of funds by the Texas State Legislature (the "Legislature") and/or allocation of funds by the Board of Regents of The University of Texas System (the "Board"). If the Legislature fails to appropriate or allot the necessary funds, or the Board fails to allocate the necessary funds, then Owner shall issue written notice to Design/Build Contractor and Owner may terminate this Agreement in accordance with Article 10. Design/Build Contractor acknowledges that appropriation, allotment, and allocation of funds are beyond the control of Owner.

23.8 Proprietary Interests. All information owned, possessed or used by Owner which is communicated to, learned, developed or otherwise acquired by Design/Build Contractor in the performance of services for Owner, which is not generally known to the public, shall be confidential. Design/Build Contractor shall not, beginning on the date of first association or communication between Owner and Design/Build Contractor and continuing through the term of this Agreement and any time thereafter, disclose, communicate or divulge, or permit disclosure, communication or divulgence, to another or use for Design/Build Contractor's own benefit or the benefit of another, any such confidential information, unless required by law. Except when defined as part of the Work, Design/Build Contractor shall not make any press releases, public statements, or advertisement referring to the Project or the engagement of Design/Build Contractor as an independent contractor of Owner in connection with the Project, or release any information relative to the Project for publications, advertisement or any other purpose without the prior written approval of Owner. Design/Build Contractor shall obtain assurances similar to those contained in this subparagraph from persons, vendors and consultants retained by Design/Build Contractor. Design/Build Contractor acknowledges and agrees that a breach by Design/Build Contractor of the provisions hereof will cause Owner irreparable injury and damage. Design/Build Contractor, therefore, expressly agrees that Owner shall be entitled to injunctive and/or other equitable relief in any court of competent jurisdiction to prevent or otherwise restrain a breach of this Agreement.

23.9 Entire Agreement; Modifications. This Agreement supersedes all prior agreements, written or oral, between Design/Build Contractor and Owner and shall constitute the entire Agreement and understanding between the parties with respect to the Project. This Agreement and each of its provisions

shall be binding upon the parties and may not be waived, modified, amended or altered except by a writing signed by Design/Build Contractor and Owner.

23.10 **Authority to Act.** Design/Build Contractor warrants, represents, and agrees that (1) it is a duly organized and validly existing legal entity in good standing under the laws of the state of its incorporation or organization; (2) it is duly authorized and in good standing to conduct business in the State of Texas; (3) it has all necessary power and has received all necessary approvals to execute and deliver this Agreement; and (4) the individual executing this Agreement on behalf of Design/Build Contractor has been duly authorized to act for and bind Design/Build Contractor.

23.11 **Captions.** The captions of paragraphs in this Agreement are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction.

23.12 **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed, construed and considered to be an original, but all of which shall constitute one and the same instrument.

23.13 **Governing Law and Venue.** This Agreement and all of the rights and obligations of the parties and all of the terms and conditions shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas without reference to its conflicts of law provisions. The county where the Project is located shall be the sole place of venue for any legal action arising from or related to this Agreement or the Project in which Owner is a party.

23.14 **Waivers.** No delay or omission by either party in exercising any right or power arising from non-compliance or failure of performance by the other party with any of the provisions of this Agreement shall impair or constitute a waiver of any such right or power. A waiver by either party of any covenant or condition of this Agreement shall not be construed as a waiver of any subsequent breach of that or of any other covenant or condition of the Agreement.

23.15 **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective permitted assigns and successors.

23.16 **Appointment.** Owner hereby expressly reserves the right from time to time to designate by notice to Design/Build Contractor a representative(s) to act partially or wholly for Owner in connection with the performance of Owner's obligations. Design/Build Contractor shall act only upon instructions from the designated representative(s) unless otherwise specifically notified to the contrary.

23.17 **Severability.** Should any term or provision of this Agreement be held invalid or unenforceable in any respect, the remaining terms and provisions shall not be affected and this Agreement shall be construed as if the invalid or unenforceable term or provision had never been included.

23.18 **Illegal Dumping.** Design/Build Contractor shall ensure that it and all of its Subcontractors and assigns prevent illegal dumping of litter in accordance with Title 5, *Texas Health and Safety Code*, Chapter 365.

23.19 **Ethics Matters; No Financial Interest.** Design/Build Contractor and its employees, agents, representatives, Project A/E and Subcontractors have read and understand the following prior to performing Work under this Agreement: MD Anderson's Ethics Policy, Conflicts of Interest Policy and Standards of Conduct Guide available at <http://www.mdanderson.org/about-us/doing-business/vendors-and-suppliers/index.html> and _____ at _____

<https://www.mdanderson.org/about-md-anderson/business-legal/conflict-of-interest.html>, and applicable state ethics laws and rules available at <https://www.utsystem.edu/offices/general-counsel/ethics>. Neither Design/Build Contractor nor its employees, agents, representatives, Project A/E or Subcontractors will assist or cause Owner's employees to violate Owner's Conflicts of Interest Policy, provisions described by Owner's Standards of Conduct Guide, or applicable state ethics laws or rules. Design/Build Contractor represents and warrants that no member of the Board of Regents of The University of Texas System, or Executive Officers, including component institutions, has a direct or indirect financial interest in the transaction that is the subject of this Agreement.

23.20 **179 D Benefit Allocation.**

23.20.1 Owner may decide to seek the allocation of certain tax benefits pursuant to Section 179D of the Internal Revenue Code of 1986, as amended, (the "Code") through this Agreement with Design/Build Contractor.

23.20.2 If the Owner and the Internal Revenue Service (IRS) determine that the Design/Build Contractor is eligible to receive the 179D deduction allocation as a "Designer" for the purposes of Section 179D of the Code or that Design/Build Contractor could otherwise profit financially from the monetization of the benefit (separately and collectively, the "Rebate"), Design/Build Contractor hereby agrees to allocate to the Owner a portion of the Rebate in an amount to be determined and contracted for on mutually agreeable terms when the value of the Rebate becomes ascertainable, net of associated costs realized by the Owner and Project A/E. At its sole discretion, the Owner shall determine whether to receive its portion of the Rebate in cash, discounted Design/Build Contractor fees or both.

23.20.3 Owner reserves the right to retain a third-party consultant (the "Consultant") to manage and administer the process of obtaining and monetizing the Rebate derived from the Project(s).

23.20.4 Design/Build Contractor agrees to cooperate in all reasonable respects with the Consultant's efforts to obtain and monetize any such Rebates derived from the Project(s) on behalf of the Owner. Certification of eligibility and negotiation of the Rebates should be facilitated by the Owner's 179D Consultant.

23.21 **Disclosure of Interested Parties.** By signature hereon, Design/Build Contractor certifies that, if the value of this agreement exceeds \$1 Million, it has complied with Section 2252.908 of the Texas Government Code and Part 1 Texas Administrative Code Sections 46.1 through 46.3 as implemented by the Texas Ethics Commission (TEC), if applicable, and has provided the Owner with a fully executed TEC Form 1295, certified by the TEC and signed and notarized by the Design/Build Contractor.

23.22 **Contractor Certification Regarding Boycotting Israel.** Pursuant to Chapter 2270, *Texas Government Code*, Contractor certifies Contractor (1) does not currently boycott Israel; and (2) will not boycott Israel during the Term of this Agreement. Contractor acknowledges this Agreement may be terminated and payment withheld if this certification is inaccurate.

23.23 **Contractor Certification Regarding Business with Certain Countries and Organizations.** Pursuant to Subchapter F, Chapter 2252, *Texas Government Code*], Contractor certifies Contractor is not engaged in business with Iran, Sudan, or a foreign terrorist organization. Contractor acknowledges this Agreement may be terminated and payment withheld if this certification is inaccurate.

23.24 **Domestic Iron and Steel Certification.** Pursuant to Sections 2252.201-2252.205 of the Government Code, Service Provider certifies that it is in compliance with the requirement that any iron or

steel product produced through a manufacturing process and used in the project is produced in the United States.

23.25 Drug Testing Requirements. Prior to commencing any Work under this Agreement, Design/Build Contractor will ensure that all Design/Build Contractor Personnel have tested negative on a five (5) panel drug test. The test must include the following: (a) Amphetamines, (b) Cocaine, (c) Opiates (2000 ng/ml), (d) PCP, and (e) THC. “Design/Build Contractor Personnel” includes any individual who is compensated by Design/Build Contractor, or by the Project A/E or a Subcontractor engaged by Design/Build Contractor, for providing a service directly to Owner, whether or not that individual is present on Owner’s premises. Design/Build Contractor Personnel may include consultants (including the Project A/E and its personnel and consultants), service vendor employees, construction workers, and temporary personnel needed for staff augmentation.

23.26 Responsibility for Individuals Performing Work; Criminal Background Checks: Each Design/Build Contractor Personnel who is assigned to perform Work under this Agreement will be an employee of Design/Build Contractor or an employee of Project A/E or one of its consultants or an employee of a Subcontractor engaged by Design/Build Contractor. Design/Build Contractor is responsible for the performance of all Design/Build Contractor Personnel performing Work under this Agreement. Prior to any Design/Build Contractor Personnel commencing Work, Design/Build Contractor will have the following criminal background checks and screenings performed on the Design/Build Contractor Personnel assigned: (1) Positive Identification Check– Social Security Number Trace, Maiden & Alias Name Search; (2) Criminal Record Search – County, Statewide and Nationwide Level (past 15 years); (3) Employment Verification (all previous employers for past 15 years); and (4) Sex Offender Registry Search. Design/Build Contractor will be provided The University of Texas Police at Houston (the “UTP-H”) Security Sensitive Investigations Criminal Background Manual (the “Manual”). Design/Build Contractor will maintain all documentation, including the results of any background checks, during the Term of this Agreement and will provide The University of Texas Police Department investigators copies of such documentation upon request. Design/Build Contractor will determine on a case-by-case basis whether each Design/Build Contractor Personnel assigned to perform Work is qualified to do so. Design/Build Contractor will not assign any Design/Build Contractor Personnel to perform Work under this Agreement who has a felony conviction or convictions of theft, embezzlement, fraud or property crime offenses of any grade, or a history of criminal conduct, or who does not otherwise comply with the Manual or MD Anderson’s Criminal and Personal Background Check Policy (ADM0312). Upon request, Design/Build Contractor will provide MD Anderson a letter signed by an authorized officer of Design/Build Contractor that certifies compliance with this provision. Design/Build Contractor should send any questions regarding investigations to the UTP-H at UTPD-SSR@mdanderson.org.

ARTICLE 24 COMPENSATION

24.1 Construction Cost Limitation

As of the Effective Date of this Agreement, the anticipated Design Build Budget Limitation for the Project is stipulated to be:

Forty-Eight Million, Five Hundred Thousand Dollars (\$48,500,000.00)

Owner and Design/Build Contractor agree and acknowledge that this Construction Cost Limitation may be subject to adjustment as set forth in this Agreement.

24.2 Pre-Construction Phase Services Fee

24.2.1 For Pre-Construction Phase Services, Owner shall pay Design/Build Contractor a Pre-Construction Phase Fee in accordance with the following schedule:

Pre-Design Stage (5%)	\$ _____
Schematic Design Stage (10%)	\$ _____
Design Development Stage (20%)	\$ _____
GMP Development Stage (20%)	\$ _____
Construction Documents Stage (40%)	\$ _____
Buyout Stage (5%)	\$ _____
Total	\$ _____

24.2.2 The Pre-Construction Phase Services fee includes a fee for Project A/E’s Design Services in the amount of \$_____.

24.2.3 Owner may elect, at its option, to stage or “fast-track” portions of the work. If Owner elects to implement the Project in multiple stages, Design/Build Contractor shall allocate the Pre-Construction Phase Fee across all stages of the Project pursuant to the schedule set forth above, unless Owner and Design/Build Contractor agree otherwise.

24.3 Construction Phase Services Fee

24.3.1 For Construction Phase Services, Owner shall pay Design/Build Contractor a stipulated Construction Phase Fee equal to _____percent (_____%) of the Construction Cost Limitation for the Project.

24.3.2 Based on the Construction Cost Limitation set forth in paragraph 24.1 above, , the Construction Phase Fee would be the total stipulated amount of:

_____ Dollars (\$ _____).

24.3.3 The Construction Phase Fee includes a fee for Construction Contract Administration Services in the amount of:

_____ Dollars (\$ _____).

24.3.4 If Owner agrees to an increase in the Construction Cost Limitation during the Construction Phase, the Construction Phase Fee shall be equitably adjusted by applying the percentage established in paragraph 24.3.1 to the amount of the increase in the Construction Cost Limitation.

24.3.5 For the purpose of pricing Change Order Work as provided in Section 11.8 of the UTUGCs, Owner and Design/Build Contractor hereby agree that the allowable percentage to be added to the sum of the Cost of Work and Design/Build Contractor’s Contingency, if any, for the Construction Phase Fee associated with the change will not exceed _____ percent (_____%) as established in Design/Build Contractor’s Pricing and Delivery Proposal, a copy of which is included as an Exhibit

hereto. Owner and Design/Build Contractor further agree that this percentage shall be used in lieu of the percentages set forth in Section 11.8 of the UTUGCs and that this percentage will be used in addition to the percentage set forth in paragraph 24.4.4, below.

24.3.6 The percentage rate established in paragraph 24.3.1 of this Agreement for calculation of the Construction Phase Fee cannot be increased except with the express written approval of Owner's Vice President for Operations and Facilities Management.

24.4 Limitation on General Conditions Costs

24.4.1 The maximum allowable amount of General Conditions Costs payable to Design/Build Contractor during the Construction Phase of the Project shall not exceed

_____ percent (_____%) of the Construction Cost Limitation for the Project.

24.4.2 Based on the Construction Cost Limitation set forth in paragraph 24.1, above, the maximum allowable amount of General Conditions Costs would be the total amount of:

_____ Dollars (\$_____).

24.4.3 If Owner agrees to an increase in the Construction Cost Limitation during the Construction Phase the maximum allowable amount of General Conditions Costs shall be equitably adjusted by applying the percentage established in paragraph 24.4.1 to the amount of the increase in the Construction Cost Limitation.

24.4.4 For the purpose of pricing Change Order Work as provided in Section 11.8 of the UTUGCs, Owner and Design/Build Contractor hereby agree that the allowable percentage to be added to the sum of the Cost of Work and Design/Build Contractor's Contingency, if any, to adjust the Limitation on General Conditions Costs associated with the change will not exceed _____ percent (____%) as established in Design/Build Contractor's Pricing and Delivery Proposal, a copy of which is included as an Exhibit hereto. Owner and Design/Build Contractor further agree that this percentage shall be used in lieu of the percentages set forth in Section 11.8 of the UTUGCs and that this percentage will be used in addition to the percentage set forth in paragraph 24.3.5, above.

24.4.5 The percentage rate established in paragraph 24.4.1 of this Agreement for calculation of the maximum allowable amount of General Conditions Costs cannot be increased except with the express written approval of Owner's Vice President for Operations and Facilities Management.

24.5 Additional Design Services Fee

24.5.1 For Additional Design Services of Project A/E, its consultants or any other person performing Additional Design Services that are approved in advance by Owner, the Additional Design Services Fee shall be established by one of the following methods:

- a. A pre-established lump sum amount.
- b. Compensation by the hour for time expended at an amount not to exceed 2.75 times the Direct Salary Expense for each person performing services.
- c. As a pre-established percent of the cost of the item in question.

24.5.2 For Additional Design Services approved in advance by Owner, Design/Build Contractor shall be entitled to a maximum five-percent (5%) markup on the established Additional Design Services Fees that are billed to Design/Build Contractor. Project A/E is not entitled to any markup on services provided by its consultants except as that markup is paid out of Design/Build Contractor's allowed markup.

24.6 Reimbursable Expenses

24.6.1 Reimbursable expenses for Pre-Construction Phase Services are in addition to the Compensation for Basic Design Services and Additional Pre-Construction Phase Services. These include actual out-of-pocket reasonable expenditures made by Design/Build Contractor, Project A/E and Project A/E's employees and design consultants incurred solely and directly in connection with the Project Team's performance of its Pre-Construction Phase Services hereunder for the following expenses:

24.6.1.1 Fees paid for securing approval of authorities having jurisdiction over the Project for Pre-Construction Phase Services.

24.6.1.2 Professional models, mockups, photography and renderings related to building design as requested by Owner.

24.6.1.3 When expressly directed and approved in advance by Owner, reproductions, printing, binding, collating and handling of reports, drawings, specifications, and associated shipping and mailing, or other project-related work product, other than that used solely in-house for Project Team and its consultants or for project progress/review meetings.

24.6.1.4 Expense of any additional insurance coverage or limits, requested by Owner in addition to the coverage required by this Agreement.

24.6.2 Expense of transportation and living expenses in connection with out-of-state travel approved in advance in writing by Owner and directly associated with the Project will be reimbursed in accordance with Owner's Current Employee's Travel Policy. Owner's Current Employee's Travel Policy is attached as an Exhibit to this Agreement. Unless expressly directed, and approved in advance, by Owner, transportation (including mileage and parking expenses) and living expenses incurred within the State of Texas will not be reimbursed.

24.6.3 Expenses not allowed for reimbursement include telephone charges, FAX service, alcoholic beverages, laundry, valet service, entertainment or any non-project related items. Tips are included within the per diem allowances.

24.6.4 Owner shall not pay a mark-up on reimbursable expenses. Design/Build Contractor shall submit receipts for all proposed reimbursable expenses along with any reimbursement request.

24.6.5 Unless expressly directed and approved in advance in writing by Owner, Design/Build Contractor shall not seek reimbursement for or invoice Owner for any expense which is not listed in this Article 24.

ARTICLE 25 OTHER TERMS AND CONDITIONS

25.1 Time of Completion

25.1.1 *As of the Effective Date of this Agreement, the anticipated date for achieving Substantial Completion of the Project is:*

April 4, 2024

25.1.2 The Construction Phase shall be deemed to commence on the date specified in a Notice to Proceed issued by Owner after acceptance of the Guaranteed Maximum Price Proposal.

25.1.3 Design/Build Contractor shall achieve Substantial Completion of the Work and Final Completion of the Work on or before the dates agreed to in the Guaranteed Maximum Price Proposal, subject to time extensions granted by Change Order.

25.1.4 THE TIMES SET FORTH FOR COMPLETION OF THE WORK IN THE NOTICE TO PROCEED WITH CONSTRUCTION AND THE GUARANTEED MAXIMUM PRICE PROPOSAL ARE AN ESSENTIAL ELEMENT OF THE AGREEMENT. Owner may elect, at its option, to stage or “fast-track” portions of the work. Owner shall issue a separate Notice to Proceed or Change Order for each such stage and each such stage shall have a separate substantial completion date and a separate liquidated damages amount.

25.2 Liquidated Damages

25.2.1 For each consecutive calendar day after the Substantial Completion Date that the Work is not substantially completed, Owner may deduct the amount of:

TEN THOUSAND AND NO/100 DOLLARS per day (\$10,000.00 per day)

from any money due or that becomes due Design/Build Contractor, not as a penalty but as liquidated damages representing the parties' estimate at the time of contract execution of the damages that Owner will sustain for late completion.

25.2.2 The parties stipulate and agree that calculating Owner’s actual damages for late completion of the Project would be impractical, unduly burdensome, and cause unnecessary delay and that the amount of daily liquidated damages set forth is reasonable.

25.3 Design Document Review Sets and Estimated Construction Cost Reports.

Unless the parties agree otherwise, in addition to providing documents electronically, Design/Build Contractor shall provide the following design review document sets along with the Estimated Construction Cost report at the indicated stage of completion as part of Pre-Construction Services and at no cost to Owner:

Stage	Percent Completion	Number of Sets
Schematic Design:	95%	3 (full size) 8 (1/2 Size)
Design Development	95%	3 (full size) 8 (1/2 Size)
Construction Documents	50% and 95%	3 (full size) 8 (1/2 Size)

25.4 **Notices.** All notices, consents, approvals, demands, requests or other communications provided for or permitted to be given under any of the provisions of this Agreement shall be in writing and shall be deemed to have been duly given or served when delivered by hand delivery or when deposited in the U.S. mail by registered or certified mail, return receipt requested, postage prepaid, and addressed as follows:

If to Owner: Ben Melson
Senior Vice President and Chief Financial Officer
1515 Holcombe Blvd., Unit 0050
Houston, Texas 77030

With Copies to: James Waters, J.D., P.E.
Director, Facilities Contract and Project Financial Services
Operations and Facilities Management
6900 Fannin, Suite 11.1024
Houston, Texas 77030

If to Design/Build Contractor: _____

_____[Telephone Number]_____
_____[Email]_____

The parties may make reasonable changes in the person or place designated for receipt of notices upon advance written notice to the other party.

25.5 Party Representatives

25.5.1 Owner's Designated Representative authorized to act in Owner's behalf with respect to the Project is:

Karen J. Mooney
Associate Vice President, Facilities Planning, Design and Construction
1515 Holcombe Blvd., Box 703
Houston, Texas 77030

25.5.2 Design/Build Contractor's designated representative authorized to act on Design/Build Contractor's behalf and bind Design/Build Contractor with respect to the Project is:

_____[Name]_____
_____[Company Name]_____
_____[Street Address]_____
_____[City, State, Zip]_____
_____[Telephone Number]_____
_____[Email]_____

25.5.3 The parties may make reasonable changes in their designated representatives upon advance written notice to the other party and in accordance with Paragraph 4.11.

25.6 **Site Observation Requirements.** Project A/E, and its related consultants, shall inspect the Project site at intervals appropriate to the type and stage of construction progress but at least **four (4)** times each month during the entire Construction Phase to observe the progress and quality of the Work. In addition, each consultant shall visit the site at least one (1) times each month to observe construction activities related to the consultant's discipline.

25.7 **Job Conferences.** Design/Build Contractor shall conduct a minimum of four (4) job conferences each month.

25.8 **Partnering.** For the benefit of all parties, as a part of Basic Services, Design/Build Contractor and its entire consultant team shall attend two (2) full day Partnering session(s) in Houston, Texas; the first at the beginning of the Pre-Construction Phase and the second at the beginning of the Construction Phase.

25.9 **Pre-Design Phase.** Design/Build Contractor in consultation with Owner and Design/Build Contractor's entire consultant team (including, but not limited to, Project A/E, the Mechanical/Electrical/Plumbing Engineer, the Civil Engineer, and the Commissioning Consultant, as appropriate) shall develop a comprehensive Pre-Design Phase Document for the Project. At Owner's sole discretion the Pre-Design Phase document shall be a Facility Program, prepared in accordance with the Facility Programming Guidelines promulgated by The University of Texas, Office of Facilities Planning & Construction (a copy of which is included as an Exhibit hereto), or a Pre-Design Report, prepared in accordance with the requirements set forth in Owner's standard Pre-Design Report template (a copy of which is included as an Exhibit hereto). Design/Build Contractor shall meet with representatives of Owner as required during development of the Pre-Design Phase Document and shall revise the Pre-Design Phase Document as necessary to incorporate Owner's comments and requirements.

25.10 **CADD Standard.** Project A/E shall utilize a CADD drawing-layering standard that matches Owner's CADD drawing-layering and shall review the proposed standard with Owner prior to commencing drawing preparation.

25.11 **Preliminary "As-Built" Drawings.** Project A/E shall provide Owner, at between one month and three months prior to Substantial Completion, with a complete current electronic set of the architectural floor plan drawings with room names, room numbers, and room square footages indicated. Project A/E shall provide 2 copies of electronic media on readable, re-writable digital video discs (DVDs). Project A/E shall not be relieved of responsibility when files are delivered if the files do not meet established requirements or are defective. Owner shall verify all files and Project A/E will be notified of acceptance.

25.11.1 Room names, Room numbers, and square footage shall be linked to data fields using appropriate attributes for text and number fields. A relational database, such as Microsoft Access or other sequel server application, shall be used to manage the room data. Project A/E shall provide a data management proposal for approval.

25.11.2 Alternately design software functionality such as rooms and spaces can be used to achieve desired room data outcomes. Project A/E shall provide a data management proposal for approval.

25.11.3 Provide floor plans in electronic format using AutoCAD 2014 or other agreed upon AutoCAD version shall also be accepted, but Microstation users shall be required to save to AutoCAD format. Database files shall be verified for correctness prior to delivering data files.

25.12 **Final "As-Built" Drawings.** Project A/E shall revise the drawings and specifications upon Final Completion of the construction, to incorporate all Addenda, all Change Orders for the Work and any modifications recorded by Design/Build Contractor on the As-Built Drawings and Specifications

maintained at the job site. Project A/E shall label the revised drawings and specifications as “Record Drawings” and “Record Specifications” and shall deliver copies to Owner for record purposes, as follows:

- 25.12.1 All project drawings/models in Owner’s designated electronic format on media appropriate for the file sizes
- 25.12.2 All project specifications in Microsoft Word format on media appropriate for the file sizes.
- 25.12.3 “Record Drawings” –organized in vector based, text searchable PDF format
- 25.12.4 “Record Specifications” –in text searchable PDF format

25.14 As-built Telecommunication Drawings and Telecommunication Port Log. Design/Build Contractor shall provide Owner, at between one month and three months prior to Substantial Completion, with a complete set of the as-built Telecommunication Drawings and Telecommunication Port Log for Owner’s use in coordinating selection and procurement of telephone/data equipment.

25.15 Interim Record Drawings and Specifications. As a requirement for acceptance of Substantial Completion, Design/Build Contractor shall reproduce one (1) scanned pdf and one (1) scanned hardcopy of the current As-Built Drawings and Specifications maintained at the job site and provide these copies to Owner. These documents shall be labeled “Interim Record Drawings and Specifications”, and are required to assist Owner in the operation of the facility until Final Completion is accomplished and the final As-Built Drawings and Specifications are provided to Project A/E to prepare the final “Record Drawings” and “Record Specifications”.

ARTICLE 26 EXHIBITS

The following exhibits are incorporated into this Agreement:

Exhibit A	Design Criteria Package
Exhibit B	Owner's Building Information Modeling (BIM) Requirements
Exhibit C	Additional Services Proposal Form
Exhibit D	Project A/E's Personnel, Titles and Direct Salary Expense Rates
Exhibit E	Design/Build Contractor's Personnel and Monthly Salary Rates
Exhibit F	2013 Uniform General Conditions for University of Texas System Building Construction Contracts
Exhibit G	Owner's Division 00 and Division 01 Specifications
Exhibit H	Allowable Line Items for General Conditions Costs
Exhibit I	Guaranteed Maximum Price Proposal Form
Attachment 1	Guidelines for the Preparation of the GMP Proposal
Attachment 2	Forms for Payment and Performance Bonds
Exhibit J	Security Bond
Exhibit K	Constructability Implementation Program
Exhibit L	Rider 104; Policy on Utilization of Historically Underutilized Businesses
Exhibit M	Design/Build Contractor's Approved HUB Subcontracting Plan for Pre-Construction Phase Services
Exhibit N	Rider 105; Contractor's Affirmations and Warranties
Exhibit O	Rider 106; Premises Rules
Exhibit P	Rider 107; Travel Policy
Exhibit Q	Rider 116; Invoice Payment Requirements
Exhibit R	Rider 117; Institutional Policies
Exhibit S	Owner's Sales and Use Tax Exemption Certification
Exhibit T	Design/Build Contractor's Execution of Offer
Exhibit U	Design/Build Contractor's Pricing and Delivery Proposal

[Balance of page intentionally left blank. Signature page follows.]

BY SIGNING BELOW, Design/Build Contractor has executed and bound itself to this Agreement upon the execution of the Agreement by both parties. Changes in the terms and conditions under which Design/Build Contractor must perform the services to be provided hereunder shall become effective only upon the execution of a written Amendment to this Agreement. Changes in the Work to be provided hereunder for the Pre-Construction Phase or the Pre-Construction Phase Fee shall become effective upon Owner's acceptance of an Additional Services Proposal. Changes in the Work to be provided hereunder for the Construction Phase, the Contract Time, the Guaranteed Maximum Price, following its acceptance, or the Contract Sum shall become effective upon the execution of a Change Order, signed by duly authorized representatives of the parties, except as otherwise provided in the UTUGCs. Design/Build Contractor shall be authorized to proceed with a change as of the date set forth in the Notice to Proceed with Additional Services or the Notice to Proceed date set forth in the Change Order. Subsequent to such acceptance or issuance, Owner will issue a revised Purchase Order. Design/Build Contractor must receive the revised Purchase Order prior to requesting compensation for the changed Work in its Application for Payment. Only duly authorized representatives of MD Anderson's Supply Chain Management department are authorized to execute amendments to this Agreement and issue Purchase Orders to bind MD Anderson for any payment to be made to Design/Build Contractor pursuant to the terms of this Agreement.

[Design/Build Contractor's Name]

By: _____
(original signature)

Name: _____
Title: _____

Date: _____

CONTENT APPROVED:

Office of VP & Chief Facilities Officer
Operations and Facilities Management

By: _____
(original signature)

Name: Spencer Moore
Title: Vice President and Chief Facilities Officer

Date: _____

THE UNIVERSITY OF TEXAS
M. D. ANDERSON CANCER CENTER

Office of the Sr. VP & Chief Financial Officer

By: _____
(original signature)

Name: Ben Melson
Title: Sr. Vice President and CFO

Date: _____