

## DESIGN-BUILDER TERMS AND CONDITIONS (Fixed Price)

### Article 1 GENERAL PROVISIONS AND DEFINITIONS

1.1 Design-Builder will perform the services and provide the labor, materials, and equipment described in the AEC Project Manual with respect to the Project. The relationship between Owner and Design-Builder with respect to the Project will be governed by the Contract Documents.

1.2 Design-Builder accepts the relationship of trust and confidence established between it and Owner by the Contract Documents. It covenants with Owner to furnish its best skill and judgment to further Owner's interests.

1.2.1 Design-Builder will perform all duties and services promptly in accordance with the Contract Time.

1.2.2 Design-Builder will use its best efforts to efficiently perform, administer and supervise the Work, to complete the Project with the highest possible quality and to perform the Work as expeditiously and economically as possible, consistent with the best interests, and to the full satisfaction, of Owner.

1.3 Design-Builder will be compensated under the Agreement, and payments will be made, as provided in [Article 7](#) below.

1.4 Owner may from time to time review or observe or take other appropriate action concerning the Work, any plans, drawings, specifications, documents, the selection of Subcontractors and Suppliers, or other matters pertaining to the Project. Owner's doing so will be solely for the limited purpose of providing Design-Builder with information as to how those items relate solely to Owner's objectives and goals with respect to the Project and not for the purpose of determining their correctness, accuracy or completeness and will in no way create any responsibility on the part of Owner for or complicity by Owner in errors, inconsistencies, or omissions, nor will any review, approval, other action or payment of Design-Builder alter or in any way reduce Design-Builder's obligations under the Agreement.

1.5 All design and construction services will be performed by Design-Builder and qualified Subcontractors and Suppliers. All Subcontractors will possess the skill and experience appropriate to the services to be provided. Each subcontract will require the Subcontractor to comply with and be bound by the terms and conditions of the Agreement and, with respect to any services it provides, to fulfill the requirements of Design-Builder under the Agreement. Design-Builder will pay all Subcontractors. Design-Builder will coordinate and monitor the performance of all Subcontractors to insure that the Project remains on schedule and that all Work is performed in accordance with the requirements of the Agreement. Design-Builder will be responsible for the Work of all Subcontractors.

### 1.6 DEFINITIONS

1.6.1 "**Addenda**" are written or graphic instruments issued by Owner prior to the execution of the Agreement, which modify or interpret the performance specifications, by addition, deletion, clarification, or correction.

1.6.2 The "**AEC Project Manual**" is that volume, if any, assembled by Owner to define the work assembled for the Work which may include the bidding requirements, the Performance Specification, sample forms, and portions of the Contract Documents.

1.6.3 The "**Agreement**" is that portion of the Contract Documents consisting of the written Agreement between Design-Builder and Owner for Design and Construction services, the AEC Project

Manual (excluding bidding requirements) and these Design-Builder Terms and Conditions, as amended by Modifications.

1.6.4 “**Applicable Law**” means all laws, ordinances, rules, regulations and orders applicable to the Project.

1.6.5 The “**As-constructed Record Drawings**” are the record of the Project, prepared by Design-Builder based upon the field mark-up set of the Construction Documents.

1.6.6 A “**Change Order**” is a written instrument in a form provided by the Owner, and signed by Owner and Design-Builder, stating their agreement upon a change in one or more of the following: (i) the Work; (ii) the Contract Time; (iii) the Fixed Price; and/or (iv) other Agreement terms or conditions. A change to one or more of the forgoing will be issued for two reasons only: (i) to execute an Owner’s Performance Specification Change that resulted in such a change; or (ii) a Design-Builder request for such a change due to a field condition that the Owner agrees could not be reasonably foreseen. If any one or more of the foregoing is not specifically addressed in a Change Order, the parties will be deemed to have agreed that it is unaffected by the Change Order. For example, if a Change Order modifies the Work and the Contract Time but is silent as to the Fixed Price, the parties will be deemed to have agreed that the Fixed Price is not affected by the Change Order.

1.6.7 The “**Construction Documents**” consist of all Drawings and specifications necessary or appropriate to obtain the required permits and approvals for the Work and to properly execute and complete the Project. The Construction Documents will be complete, consistent, accurate, adequate, unambiguous and buildable and will be in compliance with all Applicable Law and include technical drawings, schedules, diagrams and specifications, setting forth in detail the requirements for construction of the Work properly in light of the site conditions, will depict a Project that when constructed will fully comply with all applicable laws, statutes, ordinances, codes, orders and regulations. A word or abbreviation that is used in the Construction Documents and that has a well-known technical or trade meaning will have that meaning in the Construction Documents and will reflect the Project fully and completely establish the scope of the Work in detail; and provide information necessary for the use of those in the building trades.

1.6.8 The “**Construction Schedule**” is the Critical Path Method (“CPM”) schedule for construction of the Work.

1.6.9 The “**Construction Team**” includes Design-Builder, its Subcontractors and Suppliers, and (i) all other persons in privity of contract with any of them in connection with the Work (except Owner), (ii) anyone else providing labor, materials, supplies, equipment or services as part of or in connection with the Work (except those, if any, hired directly by Owner), and (iii) all of their officers, employees, agents, and independent contractors.

1.6.10 The “**Contract Documents**” consist of: the Agreement, the AEC Project Manual as issued by Owner, Addenda, the Construction Schedule, other documents so designated in the Agreement, all Modifications issued after the date of the Agreement including Change Orders and Performance Specification Changes and any documents incorporated by reference into any of the foregoing. The Contract Documents do not include any other documents not issued by Owner as a part of the AEC Project Manual unless specifically included in the Agreement. The Contract Documents form the “Contract” between Owner and Design-Builder. The Contract may be modified only by a written Modification.

1.6.11 The “**Contract Time**” is the number of calendar days described in the Construction Schedule in which Substantial Completion will be achieved, subject to any extensions granted in executed Change Orders or otherwise specifically permitted by the Contract Documents.

1.6.12 The “**Design-Builder**” is the party named in the Agreement who is responsible for the design and execution of the Work and who is, except as expressly provided in the Contract Documents, in every way responsible to Owner for the timely and proper performance of the Work.

1.6.13 The “**Drawings**” are the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the scope, design, location, arrangement and dimensions of the Project, generally including plans, elevations, sections, details, schedules and diagrams in any or all of civil, structural, architectural, mechanical, fire protection, plumbing, electrical, or any other related drawings.

1.6.14 “**Final Completion**” is the time when Final Payment is due pursuant to [§6.5](#).

1.6.15 “**Final Payment**” is the last payment due to Design-Builder under [§7.2.1\(b\)](#).

1.6.16 “**Fixed Price**” means the price identified in the Agreement and defined in [§7.1](#). Such amount may be modified from time to time with a Change Order pursuant to the terms and provisions of the Contract Documents.

1.6.17 The “**Indemnitees**” are Owner, including its Regents, officers, agents and employees.

1.6.18 A “**Modification**” is (i) a written amendment to one or more of the Contract Documents signed by both parties, (ii) a Change Order, or (iii) a Performance Specification Change. Modifications do not include minor changes in the Work.

1.6.19 The “**Owner**” is the Regents of the University of Michigan, a Michigan constitutional corporation.

1.6.20 The “**Performance Specification**” is that portion of the Contract Documents consisting of the written performance-based requirements describing Owner’s required outcome of the Project which may include a scope of Work, Owner’s program, and requirements for materials, equipment, structures, systems, standards, quality, workmanship for the Work, as well as other criteria.

1.6.21 A “**Performance Specification Change**” (“**PSC**”) is a written order signed by Owner requesting a change in the Performance Specification and which will state a proposed basis for adjustment in the Fixed Price and/or the Contract Time.

1.6.22 The “**Project**” is described in the Project Manual. The Work may be the whole or a part of the Project, and the Project may include construction by Owner or contractors not hired by Design-Builder.

1.6.23 The “**Project Site**” is the place where the Work is being carried on as indicated in the Contract Documents.

1.6.24 The “**Record Documents**” will include: a record copy of all logs, reports, Contract Documents, and As-constructed Record Drawings, in good order and marked to record all changes made during construction; all approved shop drawings, product data, samples, and other submittals; applicable handbooks; maintenance and operating manuals and instructions; and other related documents and revisions which arise out of the Contract Documents or the Work. As part of the Record Documents, Design-Builder will maintain records of principal building layout lines, elevations of the bottoms of footings, project floor levels and key site elevations certified by a qualified surveyor.

1.6.25 The “**Schedule of Values**” is a document allocating the Fixed Price, or a portion of the Work, over its component parts.

1.6.26 A “**Subcontractor**” is a person who is hired by Design-Builder, not Owner, to perform a portion of the Work at the Project Site, under a subcontract. Where it would be reasonable in the context of its usage, the term “Subcontractor” will include subcontractors of all tiers.

1.6.27 “**Substantial Completion**” is that stage in the progress of the Work when the Work or designated portion of the Work is sufficiently complete and functional, with all systems and components approved and operational, in accordance with the requirements of the Contract Documents so Owner can legally use and occupy it for its intended purposes without material interference from unfinished or improperly finished items of Work and subject only to punchlist items which do not preclude occupancy.

1.6.28 A “**Supplier**” is a person who is hired under a supply contract solely to provide materials, equipment or supplies in connection with the Work and who does not provide labor at the Project Site.

1.6.29 The “**Work**” consists of all goods and services, such as labor, transportation, materials, tools, and equipment (i) to be incorporated into the Project (or Design-Builder’s portion of the Project if Design-Builder is not responsible for the entire Project), (ii) required of Design-Builder under the Contract Documents, and (iii) necessary or appropriate to fully design, construct, fixture, operate and maintain the Project (or Design-Builder’s portion of the Project if Design-Builder is not responsible for the entire Project). The Work will be performed strictly in accordance with the Contract Documents. The Work may constitute the whole or a part of the Project.

1.7 Unless Owner directs otherwise, forms that are designated as being “provided by Owner” within the Contract Documents will be downloaded for use by Design-Builder from Owner’s website: <http://www.umaec.umich.edu/for-vendors/project-documents/bid-resources/>.

## **Article 2 DESIGN SERVICES**

2.1 The design services required to deliver the Project will be provided by or for Design-Builder by the person or firm identified in the Agreement (the “**Design Professional**”). All design services will be performed by qualified architects, engineers and other professionals (licensed when required by law), selected and paid by Design-Builder. The Design Professional represents that it holds all licenses required to perform the design services contemplated by the Agreement. Design-Builder will be responsible for all design services provided, including the quality and timeliness of all Work and the professional quality, technical accuracy, compliance with all applicable sections of Owner’s U-M Design Guidelines (<https://umaec.umich.edu/for-vendors/design-guidelines/>), and the coordination of all plans and specifications. The Design Professional has executed the Agreement for the purpose of acknowledging its role and Owner’s reliance upon its services.

2.2 Design-Builder’s design services consist of all architectural and engineering work necessary or appropriate to present the full intent of the design of the Project as set forth in the Performance Specification that were presented to Design-Builder, which may include civil, mechanical, electrical, plumbing, structural and all other engineering work, fire protection, security, energy management, vertical transportation, interior design, exterior landscape design, building storage and any other engineering or design services.

2.2.1 Design-Builder will review the Performance Specification to ascertain the objectives and requirements of the Project and will discuss these requirements with Owner. Design-Builder will provide, after consultation with Owner, a preliminary evaluation of the Performance Specification, a preliminary Project schedule and a Project budget, each in terms of the others. Design-Builder will review Applicable Law, correlate such laws with the Performance Specification requirements, and advise Owner if any Performance Specification requirement may cause a violation of such laws.

2.2.2 Design-Builder will review with Owner alternative approaches to design and construction of the Project.

2.2.3 Design-Builder will examine the condition of the Project Site and the surrounding areas, become familiar with local conditions, and design and build the Project in a manner appropriate to site and local conditions.

2.2.4 Design-Builder will carefully study the physical condition of the Project Site. Design-Builder will take field measurements and verify field conditions and underground utility locations and will carefully compare such field measurements and conditions and other information known to Design-Builder (or reasonably discoverable by Design-Builder with the exercise of appropriate due diligence) with the Contract Documents before the Work is commenced. The Project design will be suited to the condition of the Project Site.

2.3 Design-Builder will prepare preliminary design documents, which are Drawings and specifications lacking the complete details and schedules that would be incorporated in construction drawings for the Project.

2.3.1 Design-Builder will periodically submit preliminary design documents for Owner's review. If Owner requests modification to or refinements in the preliminary design documents to bring them into compliance with the Performance Specification, then Design-Builder will make them promptly with no cost increase to the Project. If Owner requests modifications to or refinements in the preliminary design documents that modify the Performance Specification, Design-Builder is to follow procedure outlined in [Article 5](#).

2.4 Once Owner is satisfied with preliminary design documents pertaining to any portion of the Project, including any requested adjustments in the scope or quality of the Project or in the Project budget authorized by Owner, Owner will direct Design-Builder to prepare, for review by Owner, Construction Documents setting forth in detail the requirements for the construction of that portion of the Project. Construction Documents will be prepared in a sequence so as to permit construction of the Project in accordance with the Construction Schedule.

2.4.1 The Design-Builder acknowledges that there may be items of the Work which the Design-Builder is responsible to provide under the Agreement which are not drawn or specified in the Construction Documents but which are necessary for the proper execution and completion of the Work and are consistent with and reasonably inferable from the Performance Specification. All such items will be provided as part of the Work without delay in its progress and without any increase in the Fixed Price

2.5 Owner's review of preliminary design documents and Construction Documents will not constitute an acknowledgement by Owner that all requirements of the Performance Specification have been met, and Design-Builder will remain responsible for meeting those requirements.

2.5.1 Design-Builder acknowledges that Owner, in entering into the Agreement, is relying on Design-Builder to prepare Construction Documents that are sufficiently complete, coordinated, constructible and otherwise adequate to prepare the As-constructed Record Drawings upon completion of the Project.

2.5.2 All Drawings, specifications, and other documents relating to the design and construction of the Project belong to Owner, whether or not construction of the Project commences. Design-Builder will not, without the prior written consent of Owner, use or permit anyone to use any of the design, or any concepts or ideas developed in connection with the Project, for any purpose other than the Work.

2.5.3 Should Owner discover any error or inconsistency in the Construction Documents, Design-Builder will not proceed with the affected Work and will promptly make the appropriate revisions to the Construction Documents.

2.6 Where necessary to meet the requirements of the Performance Specification, Design-Builder will furnish a survey describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the Project Site. The surveys and legal information will include grades and lines of streets, alleys, pavements, and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey will be referenced to a Project benchmark. The survey will be certified to Owner and Owner's title company and lender to have been prepared in accordance with the most recent standards for "Land Title Surveys" jointly adopted by the American Land Title Association and the National Association of Professional Land Surveyors, Inc., including Table A information. The cost of such services will be included in the Fixed Price.

2.7 Where necessary to meet the requirements of the Performance Specification, Design-Builder will furnish the services of geotechnical engineers when such services are stipulated in the Agreement, or

deemed reasonably necessary by Design-Builder. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, test pits, and necessary operations for anticipating subsoil conditions. The services of geotechnical engineer(s) or other consultants will include preparation and submission of all appropriate reports and professional recommendations. The cost of such services will be included in the Fixed Price.

### **Article 3 CONSTRUCTION SERVICES**

3.1 Except as otherwise provided in the Contract Documents, Design-Builder will hire, contract, coordinate, administer, supervise, and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, light, power, utilities, transportation, and other goods, facilities and services necessary for, or appropriate to, the proper and timely execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work, including any temporary heat, any temporary utilities, scaffolding, bracing, barricades, structures and the like. If the Work is to be performed in phases, the provisions of the Contract Documents will apply fully to each phase.

3.2 Design-Builder will construct the Project strictly in accordance with the Contract Documents and will provide everything required by the Contract Documents, including all things indicated by or reasonably inferable therefrom, so as to bring the Project to completion on time, and within the Fixed Price in accordance with Applicable Law.

3.2.1 Design-Builder will employ a project manager, superintendent, necessary assistants and an adequate staff to be present at the Project Site at appropriate intervals, and for whatever duration may be necessary, during performance of the Work. Design-Builder is not permitted to change the project manager or superintendent it assigns to the Project without Owner's written consent.

3.2.2 Design-Builder will be responsible for managing the Work and will have control over the Project Site.

3.2.3 Design-Builder will coordinate all construction means, methods, techniques, sequences, procedures, local requirements, planning/zoning procedures, and the safety programs of its Subcontractors.

3.2.4 Design-Builder will provide all of its services in a manner consistent with the orderly progress of construction and with the skill and care that would be exercised by a design-builder experienced in projects similar in scope, size and complexity to the Project.

3.3 During the progress of the construction of the Project, Design-Builder will:

- (a) pay all sales and employment taxes applicable to the Work;
- (b) pay all required bonds and insurance costs;
- (c) obtain all permits, licenses, certificates, and approvals necessary or appropriate for the Project and will see that all required inspections and tests are carried out by appropriate authorities on a timely basis;
- (d) give all required notices and comply with all laws, ordinances, rules, regulations, and lawful orders of public authorities applicable to the Work;
- (e) furnish temporary utilities and weather protection for its own use;
- (f) maintain the Project Site in a clean and orderly condition and upon completion of the Work, remove its tools, equipment, machinery, surplus materials, and all debris in order for the site and any disturbed adjacent areas to be in a finished state; and

(g) maintain and update a rolling punch list throughout the course of the Work, and act to address the matters it contains as promptly as possible.

3.4 At or before Final Completion, Design-Builder will:

(a) provide all closeout documentation including but not limited to As-constructed Record Drawings and specifications, warranties, manufacturers' equipment manuals, product manuals, operating manuals, cleaning instructions, and any related training media in the digital format set forth in the AEC [Design Guidelines Section 2.4.2](#);

(b) collect all written warranties and equipment manuals with respect to the Work and deliver or assign them to Owner; and

(c) also pass through to Owner any assignable Subcontractor's or manufacturers' warranties applicable to components of the Project.

3.5 Design-Builder warrants that materials and equipment furnished under the Agreement will be of good quality and new unless the Contract Documents require or permit otherwise, that the Work will be performed in accordance with the Construction Documents and all performance specifications, that the Work will not infringe upon or violate any right held by a third party, such as a patent or copyright, and that the Work will be of good quality, free from faults and defects, fit for its intended purpose, and will be in compliance with all Applicable Law. Design-Builder further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Other warranties may be set forth elsewhere in the Contract Documents. Work, materials, or equipment not conforming to these requirements will be considered defective.

#### **Article 4 OWNER RESPONSIBILITIES AND PRIVILEGES**

4.1 At the time the Agreement is executed, Owner will designate an "**Owner's Representative**" to act on Owner's behalf with respect to the Work. Upon notice, Owner may, at any time and from time to time, in its sole and absolute discretion, change its representative.

4.2 Owner may at any time and from time to time designate a third-party, such as an architect or engineer or other professional consultant, to perform any of its duties under the Agreement. In the event of any designation, Owner will provide written notice to Design-Builder.

4.3 Design-Builder will be entitled to rely upon only those instructions and directions provided by Owner's authorized representative.

4.4 Owner will:

(a) periodically consult with Design-Builder and provide information regarding its requirements including, but not limited to, Performance Specification, and make the Project Site available for the Work;

(b) prior to any default by Design-Builder, communicate with Subcontractors and Suppliers only through Design-Builder;

(c) promptly (within a reasonable period of time that will not result in any delay of the Work) make all decisions and provide all information reasonably requested by Design-Builder;

(d) designate a Project Representative who will serve as Owner's point of contact with Design-Builder. Design-Builder will be entitled to rely upon all decisions made and all instructions given by this person or this person's designee; and

(e) abide by all Project Site rules established by Design-Builder.

## Article 5 CHANGES IN THE WORK

5.1 Owner may order changes in the Performance Specification or the Work, either during design or during construction.

5.1.1 When a change is requested, Design-Builder will submit a quote for Owner's review and acceptance.

5.1.2 All quotes must be submitted with a summarized detailing of labor, materials, equipment, overhead and profit to the extent that a reasonable determination of the values of the changes in the Work can be made by Owner. All Subcontract Work listed in the summary must be supported with similarly detailed Subcontractor quotes. All quotes will be prepared and submitted by Design-Builder using the current contractor quotation spreadsheet template form provided by Owner in accordance with [§1.7](#).

5.1.3 Labor rates must match those on the *Labor Rate Calculation Sheets* (provided by the Owner in accordance with [§1.7](#)), submitted by Design-Builder and approved by the Owner prior to the submittal of any quote, proposal or invoice. No Change Order, quote, proposal or invoice involving labor will be approved until all applicable labor rates are approved by the Owner.

5.1.4 Upon review and acceptance of the quote, Owner will issue a Change Order.

5.1.5 Changes to the Work that are necessary to meet the Performance Specification or applicable codes are not compensable. Design-Builder will not be compensated for changes in the Work as required to perform work as described the Agreement except in the case of Owner changes, or in the case of differing conditions that could not reasonably have been known or discovered.

## Article 6 TIME FOR PERFORMANCE

6.1 Design-Builder will, subject to extensions of time granted pursuant to the Agreement, complete all Work within the timeframe specified in the Contract Documents. Time is of the essence of the Agreement. Design-Builder acknowledges and agrees that (i) Owner is entitled to full and beneficial occupancy and use of the completed Work within the timeframe specified in the Contract Documents, and (ii) Owner has scheduled the commencement of its business activities based upon Design-Builder's achieving Substantial Completion of the Work within the timeframe specified in the Contract Documents.

6.2 Design-Builder further acknowledges and agrees that if Design-Builder fails to achieve Substantial Completion of the Work within the timeframe specified in the Agreement, Owner will suffer substantial damages that may be difficult to calculate. Hence, liquidated damages will apply if, and in the amounts, indicated on the Agreement. The parties agree that if liquidated damages have been elected, that is because of the impracticality and extreme difficulty of ascertaining and calculating Owner's actual damages, and such liquidated damages have been agreed to be a reasonable pre-estimate of and reasonable just compensation for the damages Owner will incur as a result of the delayed completion of the Work.

6.3 That portion of the Work constituting construction services on the Project Site will commence upon submittal of insurance, bonds, safety plans, and permits. This date is referred to as the "**Commencement Date**" and, subject to extensions of time granted pursuant to the Agreement, Substantial Completion will be achieved within the time set forth in the Agreement.

6.4 "**Substantial Completion**" will not be achieved until (i) all system training, operation and maintenance manuals have been submitted to Owner, (ii) Design-Builder has certified that the Work is



substantially complete and (iii) Owner has executed a Certificate of Substantial Completion pursuant to [§6.4.1](#).

6.4.1 When Design-Builder has performed all tasks necessary to achieve Substantial Completion of the entire Work, or designated portion(s) thereof, Design-Builder will notify Owner and request that a “**Certificate of Substantial Completion**” be issued. Along with this notification, Design-Builder will submit a list of all Work not completed or Work that Design-Builder believes to not be completed in accordance with the requirements of the Contract Documents. Within a reasonable time after being notified, Owner will review, and may amend, the list of Work not completed and make a preliminary inspection of the Work to determine if it is substantially complete. If in the opinion of Owner the Work is not substantially complete, Design-Builder will be so notified and will be required to bring the Work to a state of Substantial Completion and have it re-inspected by Owner at no increase in the Fixed Price. Upon notification from Design-Builder that the Work is Substantially Complete, Owner will execute a Certificate of Substantial Completion to Design-Builder.

6.4.2 Upon the issuance of a Certificate of Substantial Completion of the entire Work, or a portion thereof, Owner will be responsible for security, maintenance, damages to the completed Work, utility costs, and operations of the plant or facility. Design-Builder, however, will be responsible for any damages caused by Design-Builder's efforts to complete the Work, including any clean-up costs. Design-Builder will also remain responsible for any safety precautions associated with Design-Builder's completion of any Work.

6.5 Upon agreement that Substantial Completion has been achieved, the parties will visit the Project Site and prepare a final punch list of items still requiring modification, completion or repair. “Final Completion” will have occurred when all punch list items have been completed and the requirements of [§3.4](#) have been met.

6.6 If Design-Builder is delayed in the performance of the Work by Owner Delay, the Contract Time will be appropriately extended. For purposes of the Agreement, “**Owner Delay**” means, and is limited to, delay to Design-Builder's completion of the Work caused by: (i) changes in the Work as requested by Owner thru [Article 5](#) that would unavoidably and materially adversely affect the Construction Time, (ii) Owner's failure to provide in a timely manner any data or information requested by Design-Builder, or to otherwise comply with the terms of the Agreement, (iii) active interference by Owner with Design-Builder's performance of the Work.

6.6.1 In the event of Owner Delay, and Design-Builder provides notice within 30 days of the delay event, Design-Builder will be entitled to an equitable adjustment in the Fixed Price. This adjustment will be based solely upon and limited to additional direct out-of-pocket expenses to the extent they are incurred directly as a result of Owner Delay. Without limiting the generality of the foregoing, such out-of-pocket expenses will be calculated on an actual out-of-pocket cost basis, and will exclude home office expense and other overhead, profit and the value of lost opportunities. Design-Builder will furnish such documentation as may be requested by Owner, including, without limitation, cost records, to substantiate its claim and allow Owner to evaluate it.

6.6.2 Subject to, and in accordance with the provisions of, [§6.6.1](#), Design-Builder will also be entitled to schedule relief in the case of Owner Delay.

6.6.3 Failure of Design-Builder to timely assert any alleged Owner Delay or claim for an equitable adjustment to the Fixed Price or schedule relief strictly (not substantially) in accordance with the provisions of this [§6.6](#) will constitute a waiver of and will forever bar that claim, even if Owner was not prejudiced thereby.

6.6.4 Design-Builder will use its best efforts to avoid or reduce delay damages to any member of the Construction Team caused by Owner Delay.

6.7 Design-Builder will not be responsible for any delay in or failure to complete the Work if such delay or failure is due to Force Majeure. The term “**Force Majeure**” means, and is limited to, the following:

(a) strikes, lockouts, or picketing (legal or illegal) of an area-wide, trade-wide, Owner-wide, or industry-wide nature (a strike, lockout or picket [legal or illegal] specific to the Project Site, or directed at Design-Builder or a Subcontractor or Supplier will not be considered an area-wide, trade-wide or industry-wide strike, and does not constitute Force Majeure);

(b) governmental action (other than green building laws, regulations or like actions) and condemnation;

(c) riot, civil commotion, insurrection, and war;

(d) fire or other casualty not the fault of Design-Builder, accident, acts of God or the public enemy;

(e) unusual adverse weather conditions not reasonably expected for the location of the Work and the time of the year in question;

(f) unavailability of fuel, power, supplies or materials that is not the fault of Design-Builder (nor one that could have been avoided or mitigated with prior knowledge of the event);

(g) the passage or unexpected interpretation or application of any statute, law, regulation or moratorium of any governmental authority that has the effect of delaying the Work, excluding any green building statute, law, or regulation as to which any public or advance notice was available prior to its adoption or issuance; or

(h) epidemics or pandemics that have resulted in the issuance of a stay-at-home order applicable to the Project Site by the local unit of government having jurisdiction causing it to be impossible to continue full or partial performance of the Work.

6.8 Force Majeure does not (except to the extent caused by an event described in 6.7(a) – 6.7(h) above) include the unavailability of any building material, equipment or supply which is specified for the Project or Work, nor of any specialized Supplier, Subcontractor, laborer or other entity or person.

6.9 The remedies provided in §6.6 and §6.7, respectively, will be the sole and exclusive remedies (in lieu of all other remedies whatsoever) of Design-Builder for any delay, interference, hindrances in the performance of the Work, loss of productivity, impact damages and similar claims and damages, whether or not contemplated by the parties. Except only as specifically provided in §6.6, in no event will Design-Builder be entitled to any compensation or recovery of any damages in connection with any delay, including, without limitation, all direct costs, indirect costs, overhead costs, taxes, interest, general and administrative expenses, profit and all effects (direct, indirect and consequential, such as impacts, delay, acceleration [actual or constructive], hindrance, disruption, interference, loss of productivity, impairment, manpower inefficiencies, lost opportunity, and “ripple effects”), consequential damages, lost opportunity costs, impact damages or other similar remuneration.

## **Article 7            COMPENSATION; PAYMENTS**

7.1 The “**Fixed Price**” is the total amount payable by Owner to Design-Builder for the design and construction of the Project under the Agreement, inclusive of all fees, costs, expenses, overhead and profit.

7.2 Design-Builder will make monthly “**Applications for Payment**” describing the Work for which payment is sought. Applications for Payment will be submitted on AIA Documents G742 and G743, or such other form as Owner may reasonably require. Applications for Payment will be notarized if required by Owner, and will be based upon the applicable approved Schedule of Values. Submission of an Application for Payment will constitute a representation and warranty by Design-Builder that the Work for which payment is sought has been properly performed to the degree of completion indicated in the Application.

7.2.1 Each Application for Payment will be accompanied by the following, all in form and substance provided by Owner in accordance with §1.7 or other Michigan statutory form reasonably satisfactory to Owner:

(a) a duly executed and acknowledged sworn statement with all information provided, together with sworn statements, current through the previous draw, from Design-Builder and all of the Subcontractors; and

(b) except as otherwise provided, a duly executed Acknowledgement of Payment establishing payment or satisfaction of all obligations as reflected on the sworn statements referred to in (a), provided, however, that Design-Builder will furnish with each Application for Payment applicable Acknowledgement of Payments and sworn statements covering the immediately preceding Application for Payment, and provided "**Final Payment**" will not be forthcoming until the Acknowledgement of Payment of all funds due has been received from Design-Builder and all of the Subcontractors.

7.2.2 Owner, will, within seven (7) days after receipt of Design-Builder's Application for Payment, either certify the Application for Payment with an authorized signature for such amount as Owner determines is properly due, or notify Design-Builder in writing of the reasons for withholding certification in whole or in part.

7.2.3 Payment will not be a representation that Owner has (i) made inspections to check the quality or quantity of the Work; (ii) reviewed construction means, methods, techniques, sequences or procedures; (iii) reviewed copies of requisitions received from vendors and other data requested by Owner to substantiate Design-Builder's right to payment; or (iv) made examination to ascertain how or for what purpose Design-Builder has used money previously paid on account of the Work.

7.3 To assure proper performance of the Work by Design-Builder, Owner may retain out of each progress payment a "**Retainage**" equal to ten percent (10%) of the dollar value of the Work in place until the Work is fifty percent (50%) in place, excluding any portion paid for Design-Builder personnel costs and general conditions costs. After the Work is fifty percent (50%) in place, additional retainage will not be withheld unless Owner determines that Design-Builder is not making satisfactory progress or for another specific cause relating to Design-Builder's performance under the Contract Documents. If Owner so determines, it may retain not more than ten percent (10%) of the dollar value of Work more than fifty percent (50%) in place. Retainage will be released to Design-Builder not later than the time of Final Payment.

7.4 At any time after ninety four percent (94%) of Work under the Contract Documents is in place and at the request of Design-Builder, Owner will release the Retainage to Design-Builder.

7.5 For itself and on behalf of all members of the Construction Team, Design-Builder releases Owner from the obligation to have Retainage funds deposited in an interest bearing account and permits Owner to commingle Retainage funds with Owner's other funds.

7.6 Owner may at any time require Design-Builder to provide evidence, reasonably satisfactory to Owner that Design-Builder has paid or will for all Work, materials, equipment, services, and subcontracts in connection with the Work for which payment is sought, and that it has fully complied with all Applicable Law.

7.7 Title to the Work, materials, and equipment will pass to Owner upon incorporation in construction.

7.8 Acceptance of final payment will constitute a waiver of all claims by Design-Builder.

## **Article 8 PROTECTION OF PERSONS AND PROPERTY**

8.1 Design-Builder represents to Owner that Design-Builder regards the health and safety of those exposed to Design-Builder's Work or Work-related activities as an overriding priority. Design-Builder will perform all Work in a manner that will ensure protection of the health and safety of all persons that are present on the Project Site or otherwise exposed to Design-Builder's Work product or Work-related activities, including, without limitation, Owner's employees and consultants, Design-Builder's employees, Subcontractors, Suppliers, vendors, visitors, other contractors, or others. Design-Builder is solely responsible to Owner and all third parties for health and safety at the Project Site and, accordingly, will be solely responsible for initiating, monitoring, maintaining and supervising all safety precautions and programs in connection with the performance of the Work. Design-Builder will comply with and be governed by all acts that pertain to the safety of its employees.

8.2 Design-Builder will develop, implement and adhere to a project-specific health and safety plan and program to be titled the "(Project Name) Jobsite Safety Plan" ("Safety Plan"). Design-Builder warrants that it will read, understand and incorporate in its plan, at a minimum, the requirements set forth in Owner's current Construction Safety Guidelines (provided by Owner).

8.3 Design-Builder acknowledges that Owner's submission of its Construction Safety Guidelines and any Owner's review and acceptance of the Safety Plan is not intended to, and does not constitute an expression by Owner that the Safety Plan is adequate to protect persons or property from loss, damage or injury. Owner will assume no duty by reviewing the proposed Safety Plan.

8.4 Design-Builder acknowledges that it, and not Owner, is solely in control of the Project Site and solely responsible, not only for implementing and assuring compliance with the Safety Plan as defined in [§8.2](#), but also for taking, at its expense, whatever action may be necessary or appropriate to fully protect persons and property from any and all loss, damage or injury that may arise out of, or in connection with the Work. Design-Builder will take all necessary precautions to ensure the safety of passersby, employees, and visitors on, about or adjacent to the Project Site.

8.5 Design-Builder's failure to implement, adhere to or assure compliance with the Safety Plan will constitute an event of default under the Agreement. Design-Builder will erect and properly maintain at all times, as required by the conditions and progress of the Work, all necessary safeguards for the protection of workers, the Indemnitees and the public, including passersby.

8.6 Design-Builder will designate a member of its organization whose responsibility will include the administration of Design-Builder's safety program, and the prevention of accidents. The name and position of this person will be reported to Owner at the start of the Work and will not be changed unless notice is given to Owner.

8.7 Design-Builder will cause its Subcontractors to initiate and maintain appropriate safety precautions and programs in connection with the Work. Design-Builder will provide a general review of safety programs developed by each of the Subcontractors, including a verification that each Subcontractor has submitted its report of the recommended safety precautions and programs, as required by the Contract Documents. If Design-Builder observes a safety violation, Design-Builder will require a Subcontractor to correct it. After written notification to the Subcontractor to correct the safety violation, if the Subcontractor does not correct the problem in a timely fashion, Design-Builder will cause the Work to be corrected by other means. The performance of such services by Design-Builder will not relieve the Subcontractors of their responsibilities for performance of the Work and for the safety of persons and property, and for compliance with all federal, state and local statutes, rules, regulations and orders applicable to the conduct of the Work. Design-Builder will conduct regular safety meetings with Subcontractors' superintendents to ensure the Subcontractors'

compliance with federal, state or local statutes, rules, and regulations relating to the workers' safety or any other aspect of the Work.

8.8 In an emergency affecting the safety of persons or property, Design-Builder will take whatever action may be necessary to prevent such threatened loss, damage or injury.

8.9 In the event of any accident or occurrence resulting in damages to any property, Design-Builder will immediately notify Owner of the accident or occurrence and will submit a written and photographic report regarding the property damage within forty-eight (48) hours.

8.9.1 Design-Builder will take adequate measures to protect the Project and property of Owner and others. Except for proceeds actually received from insurers, Design-Builder assumes all risks of loss or damage to property, wherever located, resulting from any act or omission of Design-Builder or its Subcontractors and Suppliers, or by anyone for whose acts any of them may be liable. All damage to or loss of any property caused in whole or in part by Design-Builder, any Subcontractor or Supplier, or by anyone for whose acts any of them may be liable, will be remedied by Design-Builder.

8.10 The following provisions will apply with respect to hazardous materials:

8.10.1 No member of the Construction Team will bring on, keep, store, use, release, or dispose of any hazardous or potentially hazardous material on, in, or about the Project Site, except in quantities permitted by, and used for their intended purpose under, Applicable Law.

8.10.2 If any member of the Construction Team discovers any spill, discharge, or leakage of hazardous materials on the Project Site, Design-Builder will immediately stop all Work in the area where the discovery is made and notify Owner as expeditiously as possible and provide Owner with written and photographic reports of the hazardous materials.

8.10.3 If Design-Builder will receive any notice, whether oral or written, of any inquiry, test, investigation, enforcement proceeding, environmental audit, or the like by or against Design-Builder or the Project with regard to any hazardous materials, Design-Builder will immediately notify Owner of such notice.

## **Article 9 INSURANCE AND INDEMNIFICATION; BONDS**

9.1 Prior to commencing any Work at the Project Site, Design-Builder will submit to Owner or Owner's designee one or more certificates of insurance (in forms reasonably acceptable to Owner) evidencing both the coverage and coverage limits required for itself (initially) and each Subcontractor (subsequently) scheduled to be active on the Project Site. All such insurance policies and each certificate will include a provision that coverage will not be amended, modified, canceled or terminated except upon thirty (30) days prior written notice to Owner.

9.1.1 Waiver of Subrogation—Each policy, or an endorsement thereto, will contain a waiver of subrogation in favor of: "The Regents of the University of Michigan, a Michigan Constitutional Corporation, including its board members, officers, employees and agents."

9.1.2 Additional Insureds—Other than policies of insurance for worker's compensation and professional liability, each policy will be endorsed to name "The Regents of the University of Michigan, a Michigan Constitutional Corporation, including its board members, officers, employees and agents" as "Additional Insureds."

9.1.3 Primary Insurance—All policies, or endorsements thereto, will contain language that such insurance coverage will be primary to and will seek no contribution from any insurance available to Owner, with any insurance procured or maintained by or on behalf of Owner being excess, secondary and noncontributing. It is the specific intent that all insurance held by Owner will be excess, secondary and not contribute to any insurance provided by any member of the Construction Team.

9.1.4 Separation of Insureds—Each policy, or an endorsement thereto, will contain wording such that the insurance afforded by the policy will apply separately to each insured against whom claim is made or suit is brought, subject to the policy limits.

9.1.5 Prohibited Endorsements—Exclusions or limitations that would in any way reduce the availability of the insurance coverage required by the Contract Documents.

9.2 MINIMUM INSURANCE REQUIREMENTS FOR DESIGN-BUILDER

9.2.1 Design-Builder will, during the continuance of the Work under the Contract Documents, including any extra or changed Work, maintain insurance coverage as described below. Such insurance will protect the named insured from claims which may arise out of or result from Design-Builder's operations under the Contract Documents, including extra or changed Work in connection therewith, whether such operations be by Design-Builder or by a Subcontractor or by a Sub-subcontractor or by anyone directly or indirectly employed by Design-Builder or any Subcontractor or any Sub-subcontractor.

9.2.1.1 Workers' Compensation & Employer's Liability insurance and any insurance required by any employee benefit acts or other statutes applicable where the Work is to be performed. All such insurance limits will be statutory. The Employer's Liability limits will not be less than:

- (a) \$500,000 Each Accident
- (b) \$500,000 Disease - Policy Limit
- (c) \$500,000 Disease - Each Employee

9.2.1.2 Commercial General Liability and Property Damage insurance (including Design-Builder's protective), which may be satisfied by a combination of Primary General Liability insurance coverage together with a following form Umbrella/Excess Liability insurance coverage, in any amounts required by Owner on an occurrence form (not claims made) but not less than the following limits of liability:

<u>Contract Sum</u>	<u>Item</u>	<u>Minimum</u>
<\$5 million	General Aggregate	\$ 5,000,000
	Products/Completed-Operations Aggregate	\$ 5,000,000
	Personal & Advertising Injury	\$ 1,000,000
	Each Occurrence	\$ 1,000,000
≥\$5 million	General Aggregate	\$10,000,000
	Products/Completed-Operations Aggregate	\$10,000,000
	Personal & Advertising Injury	\$ 5,000,000
	Each Occurrence	\$ 5,000,000

and affording insurance for the protection against all risks of damage or destruction of property or bodily injury, wherever located, resulting from any action, omission or operation under the Contract Documents or in connection with the Work. Such insurance will be primary and non-contributory.

9.2.1.3 Comprehensive Automobile Liability insurance, covering all liability arising out of any vehicle operations, covering all owned or rented equipment used in connection with the Work, in amounts not less than:

Combined Single Limit \$ 1,000,000

including death resulting at any time therefrom.

9.2.1.4 Professional Liability—Design-Builder will maintain professional liability insurance meeting at least the following specifications:

(a) Limits. The minimum limits of coverage are not to be less than the following amounts:

\$2,000,000	Per Claim
\$4,000,000	General Aggregate

(b) Scope of Coverage. Such insurance will cover all Services rendered by Design-Builder and its Subcontractors under the Contract Documents. This insurance will not include any type of exclusion or limitation of coverage applicable to claims arising from Bodily Injury or Property Damage unless coverage therefore is provided in Design-Builder's Commercial General Liability policy.

(c) Coverage Period. Coverage is to be retroactive to the earlier of the date of the Agreement or the commencement of Design-Builder's Services for the Project.

(d) Post-Completion Coverage. "Claims Made" policies must be renewed annually to show evidence of insurance coverage for the Post-Completion Period, and if the insured changes insurance carriers during its engagement for the Project or thereafter, it will obtain either "tail coverage" from its former carrier or "prior acts" coverage from the new carrier so as to assure that continuing insurance, at the levels required herein, is available in respect of the Project. The professional liability coverage is to continue for six (6) years following the date final payment under the Contract Documents is made by Owner to Design-Builder, so long as similar coverage remains commercially available to five or more of the top ten architectural firms (based upon gross revenues) in the United States.

9.2.2 Except as specifically provided with respect to property damage only under this [§9.2](#), Design-Builder will specifically and distinctly assume, and does so assume, all risk of damage or destruction of property or of bodily injury, occupational sickness or disease of persons (including death resulting at any time therefrom) used or employed on or in connection with the Work, and of all damages or destruction of property or of bodily injury, occupational sickness or disease of persons (including death resulting therefrom), wherever located, resulting from any action, omission or operation under the Contract Documents or in connection with the Work.

9.2.3 Compliance by Design-Builder with the foregoing requirements as to carrying insurance and furnishing certificates will not relieve Design-Builder of Design-Builder's liabilities and obligations under this [Article 9](#) or any other portion of the Contract Documents.

9.2.4 In the event that any class of employees is engaged in hazardous Work under the Contract Documents and such class is not included under the Workers' Compensation Acts, Design-Builder will maintain Special Hazards Insurance of a nature and in limits as approved by Owner.

9.2.5 Design-Builder will maintain all insurance coverage for a period not less than two (2) years following the date final payment under the Contract Documents is made by Owner to Design-Builder.

9.2.6 All insurance policies will be endorsed to cover the liabilities assumed under the Contract Documents.

### 9.3 OWNER'S CASUALTY INSURANCE

9.3.1 Owner will effect and maintain insurance against loss or damage arising from fire or other perils normally insured against by standard "All Risk" property insurance policies to cover not less than the value of Work performed and materials delivered to the site of the Project which are to be included in and remain a part of the permanent construction whether or not installed, only while on the premises described or within one hundred (100) feet thereof, except as otherwise provided in [§9.3.4](#).

9.3.2 Losses, if any, under such insurance will be payable to Owner.

9.3.3 Design-Builder will be responsible for any and all loss of materials, equipment and tools connected with the construction due to unexplainable disappearance, theft or misappropriation of any kind or nature and any other loss that may be excluded in Owner's property insurance policy.

9.3.4 The foregoing provisions will not operate to relieve Design-Builder of the responsibility for insuring against any loss or damage to owned or borrowed or rented property or property of employees, of whatever kind or nature occurring from the above named causes or due to any other cause, including but not limited to tools, materials, supplies, equipment, forms, scaffolding, towers, staging, bunkhouses and other temporary structures including their contents, regardless of Ownership of such contents, except for such contents as are to be included in and remain a part of the permanent construction. Owner will in no event be liable for any loss or damage to any of the aforementioned items, or the work connected with Design-Builder or the Design Professional, or employees, agents or servants of same, which is not to be included in and remain a part of the permanent construction.

9.3.5 Owner's property insurance policy excludes losses on account of faulty workmanship, faulty material, faulty construction and/or faulty design, from any cause. Design-Builder is liable for and indemnify Owner against all loss under the Contract Documents, as outlined within [§9.2.2](#).

9.3.6 Design-Builder will report to Owner each claim immediately after an occurrence of a loss.

9.3.7 Compliance by Design-Builder with the foregoing requirements will not relieve Design-Builder of Design-Builder's liabilities or obligations under this [§9.3](#) or any other portion of the Contract Documents.

#### 9.4 WAIVER OF RIGHTS OF RECOVERY

Design-Builder, Subcontractors, and Sub-subcontractors severally waive any rights of recovery they may have against Owner for damage or destruction of their own or borrowed or rented property, or property of their employees, of whatever kind or nature.

#### 9.5 INDEMNIFICATION

9.5.1 To the fullest extent permitted by law, Design-Builder agrees to defend and indemnify the Indemnitees against and hold them harmless from any and all losses, claims, liabilities, injuries, damages, and expenses whatsoever, including attorneys' fees and costs, that the Indemnitees may incur by reason of (i) the breach of the Agreement or the Contract Documents by Design-Builder or any member of the Construction Team; (ii) any injury to or damage sustained by any person or property (including, but not limited to, any one or more of the Indemnitees) to the extent arising out of, or occurring in connection with, (a) Design-Builder's errors, omissions, intentional misconduct or negligent acts or those of any member of the Construction Team, or (b) the performance or lack of performance by Design-Builder or any member of the Construction Team of its or their duties and obligations under or pursuant to the Agreement or the Contract Documents; or (iii) the assertion of any claim or lien whatsoever against Owner by any member of the Construction Team, except only claims or liens caused by Owner's failure to pay Design-Builder funds to which it is entitled under the Agreement. This obligation will not be construed to negate, abridge or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to any party or person.

9.5.2 The indemnification obligations under this [§9.5](#) will not apply to loss of or damage to the Project (including Work in progress) to the extent (i) there is recovery under Design-Builder's policies of insurance, or (ii) the loss or damage in any one occurrence exceeds Two Hundred Fifty Thousand Dollars (\$250,000) per occurrence excluding those items applicable in [§9.3.4](#).

9.5.3 The indemnification obligations under this [§9.5](#) will not be limited by any assertion or finding that the person or entity indemnified is liable by reason of a non-delegable duty.



9.5.4 In the cases of claims against any Indemnitee by an employee of Design-Builder or any member of the Construction Team, Design-Builder's indemnification obligation will not be reduced by a limitation on amount or type of damages, compensation or benefits payable by insurance or by Design-Builder or one of the Construction Team under workers' compensation acts, disability benefit acts or other employee benefit acts.

9.5.5 If any claim of lien or stop-notice or any other demand for payment or security therefor, including claims or demands upon performance and payment bond sureties, is made or filed with Owner, any surety, or the Work by any person claiming that Design-Builder or any of the Construction Team has failed to perform its contractual obligations or to make payment for any labor, services, trust fund contribution, materials, equipment, taxes, or other item furnished or obligation incurred for, or in connection with, the Work, or if at any time there will be reasonable evidence of such nonperformance or nonpayment of any claim or lien or stop-notice or other demand for which, if established, Owner or the Work might become liable (and in either case so long as Owner has discharged its payment obligations to Design-Builder in connection with the matter which is the subject of the lien or other demand), then Owner will have the right to retain from any payment then or thereafter due under the Contract Documents or to be reimbursed to Design-Builder an amount sufficient to satisfy or discharge any such lien or other demand.

9.5.6 If Design-Builder or Subcontractor, Supplier or other member of the Construction Team makes, records, or files, or maintains any action on or respecting a claim of construction or mechanic's lien, stop-notice, equitable lien, payment, or performance bond, or a lis pendens, relating to the Work, Design-Builder will promptly and without increase in the Fixed Price, procure, furnish, and record appropriate statutory release bonds, in order to extinguish or expunge said claim, stop-notice, lien, or lis pendens, except to the extent caused by Owner's failure to pay Design-Builder amounts to which it is entitled under the Agreement.

9.5.7 If Design-Builder fails to honor its obligation to defend and indemnify any Indemnitee, as required in the Contract Documents, the Indemnitee may defend itself with counsel of its choosing, but at Design-Builder's expense, without recovery from Owner, under any contingency or otherwise. The Indemnitee may also under such circumstances settle any claim upon whatever terms as it in its reasonable judgment deems appropriate. Design-Builder will be bound by any defense asserted by the Indemnitee, any settlement reached, or any judgment or award entered.

## 9.6 PERFORMANCE BOND AND PAYMENT BONDS

9.6.1 Design-Builder will furnish a Performance Bond and Labor and Material Payment Bond (Bonds) meeting all statutory requirements of the State of Michigan and complying with the following specific requirements:

(a) Except as otherwise required by statute, the form and substance of such bonds will be reasonably satisfactory to Owner;

(b) Bonds will be executed by a responsible surety licensed in the State of Michigan with a Best's rating of no less than A/XII;

(c) Bonds will remain in effect until the following conditions have been met: (i) final payment has been made, (ii) the time required to resolve any items of incomplete Work and the payment of any disputed amounts and (iii) until such period that claimants have no statutory right to make a claim;

(d) Bonds will each be in an amount sufficient to comply with all statutory requirements;

(e) Design-Builder will cause the attorney-in-fact who executes the required bonds on behalf of its surety to affix thereto a certified and current copy of his or her power of attorney indicating the monetary limit of such power; and

(f) Every bond under this [§9.6](#) must display the surety's bond number. A rider including substantially the following provisions will be attached to each bond:

- (1) Surety hereby agrees that it consents to and waives notice of any addition, alteration, omission, change, or other Modification of the Contract Documents and the Subcontracts. Any addition, alteration, change, extension of time, or other Modification of the Contract Documents or the Subcontracts, or a forbearance on the part of either Owner, Design-Builder or one or more Subcontractors to one or more of the others, will not release the Surety of its obligations, and notice to the Surety of such matters is hereby waived. Capitalized words and terms will have the meanings given them in the Contract Documents.
- (2) Surety agrees that it is obligated under the bonds to any successor, grantee or assignee of Owner or Design-Builder.

9.6.1.1 Design-Builder's surety will also agree, in the form of a rider to each bond or via a separate agreement, that before it may seek exoneration, release, or any kind of relief from its obligations under the bond as a result of any default by Owner or Design-Builder in the performance of any obligations to Design-Builder under the Agreement, the surety will cause written notice of such default (specifying said default in detail) to be given to Owner and Design-Builder, and both of them will have thirty (30) days from the date of receipt of such notice within which to cure such default or cause it to be cured, or such additional reasonable period of time as may be required if the nature of such default is such that it cannot be cured immediately. Such Notice of Default will be sent by certified or registered U.S. Mail, return receipt requested, first class postage prepaid, to Owner and Design-Builder.

9.6.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract Documents or any Subcontract, Design-Builder will promptly furnish a copy of the bonds or will permit copies to be made.

9.6.3 Design-Builder will keep the surety informed of the progress of the Work, and, without limiting the requirements and effect of [§9.6.1\(f\)](#), where necessary, obtain the surety's consent to, or waiver of: (i) notice of changes in the Work; (ii) request for reduction or release of retainage; (iii) request for Final Payment; and (iv) any other material required by the surety. Design-Builder will promptly give Owner copies of all communications with the surety requesting or pertaining to consents or waivers. Owner may, in Owner's sole discretion, inform the surety of the progress of the Work and obtain consents as necessary to protect Owner's rights, interest, privileges and benefits under or pursuant to any bond issued in connection with the Work.

## **Article 10      CORRECTION PERIOD**

10.1 If within two (2) years of Substantial Completion, (the "Correction Period"), any of the Work is found by Owner to be Defective, Design-Builder will, without interfering materially with Owner's facilities, personnel or operations, promptly cause it to be corrected, unless Owner has previously specifically accepted the defect in writing. Design-Builder will bear all costs of correcting Defective Work, without increase in the Fixed Price, and without use of any contingency. Upon completion of any Work under or pursuant to the Section, the Correction Period will begin anew with respect to the Work requiring correction. Nothing contained in the Agreement will be construed to establish a period of limitations with respect to any other obligation that Design-Builder might have under the Contract Documents. The establishment of the Correction Period or such longer correction period as may be prescribed by law or by the terms of any warranty required by the Contract Documents relates only to the specific obligation of Design-Builder to correct the Work, and has no relationship to the time within which its obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish Design-Builder's liability with respect to its obligations other than specifically to correct the Work.

## **Article 11      TERM AND SUSPENSION**

11.1      The term of the Agreement will be the amount of time necessary to complete the Work. However, Owner may terminate the Agreement and discharge Design-Builder in the event of a default by Design-Builder. If Owner does so, Design-Builder will be liable for all costs, expenses, and losses caused by its default.

11.2      As an inducement to encourage Owner to hire Design-Builder, Design-Builder agrees that Owner may terminate the Agreement at any time without cause for its convenience. If Owner does so, its sole obligation to Design-Builder will be to pay for all Work properly performed to the date of termination.

## **Article 12      MISCELLANEOUS PROVISIONS**

12.1      The Agreement will be governed by the laws of the State of Michigan that are applied to contracts made and to be performed in that state.

12.2      Neither Owner nor Design-Builder will assign the Agreement nor transfer any of the rights, privileges or obligations it contains without the written consent of the other; provided, however, that (i) no consent of Design-Builder will be required for Owner's assignment of the Agreement to an affiliate (but Owner will continue to guarantee prompt payment and performance of Owner's obligations under the Agreement), and (ii) Design-Builder will consent to and execute all documents reasonably requested by Owner allowing its institutional lender to elect at a later date to take an assignment of the Agreement and the plans and specifications for the Project, so long as the documents require the lender to honor the Agreement if it elects to take the assignment.

12.3      The Agreement represents the entire agreement between Owner and Design-Builder and supersedes all prior negotiations, representations, or agreements, either written or oral. The Agreement may be amended only by written instrument signed by both parties.

12.4      There are no third-party beneficiaries to the Agreement. Nothing contained in the Agreement will create a contractual relationship with or a cause of action in favor of a third party against either party.

12.5      In case a provision of the Agreement is held to be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions will not be affected.

12.6      The headings of articles and sections are for convenience only and will not modify rights and obligations created by the Agreement.

12.7      The failure of any party to insist upon strict compliance by another party will not be deemed a waiver of its right to do so in the future.

12.8      The obligations of either party under the Agreement that are of a continuing nature will survive termination of the Agreement or final completion of the Project.

12.9      Design-Builder hereby assigns to Owner, as security for Design-Builder's performance hereunder, all Subcontracts, purchase orders and all other contracts and agreements entered into in connection with the Project, and appoints Owner its attorney to enforce said contracts according to their terms. This assignment will be operative only upon notice by Owner in the event of default by, or termination of, Design-Builder under the Agreement. All Subcontracts will provide that the Subcontractor consents to the assignment of the Subcontract to Owner pursuant to this Subsection 10.10 and agrees, in the event such assignment becomes effective, to recognize Owner as the successor to Design-Builder and to complete the Work under the Subcontract.

**Article 13      OWNER'S RIGHT TO PERFORM WORK AND TO AWARD SEPARATE CONTRACTS**

13.1      Owner reserves the right to (i) perform work related to the Project with its own forces; and (ii) award separate contracts in connection with other portions of the Project or other work on the Project Site. Owner reserves the right to award other contracts for other work on the premises, even if of similar nature, character or trade.

13.2      Design-Builder will provide for the coordination of the work of Owner's forces and of each separate contractor with the Work of Design-Builder, provided the work of Owner's own forces does not materially adversely impact the harmony, labor relations, schedule or logistics of Design-Builder's Work.