

## RESOLUTION R-126-17

### A RESOLUTION AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH BURKE, LLC, FOR DESIGN/BUILD SERVICES FOR LORRAINE-EATON SEWAGE LIFT STATION IMPROVEMENTS

**WHEREAS**, the City of Wheaton, DuPage County, Illinois finds it reasonable, necessary and appropriate to enter into an agreement for design/build services for Lorraine/Eaton sewage lift station improvements; and

**WHEREAS**, the Consultant has previously provided the City with similar professional engineering services and the City has a satisfactory relationship with the Consultant for those services; and

**WHEREAS**, the City finds it reasonable, necessary and appropriate to engage the Consultant to provide professional engineering services based upon Consultant's demonstrated competency and qualifications for the type of professional engineering services required herein at a fair and reasonable price; and

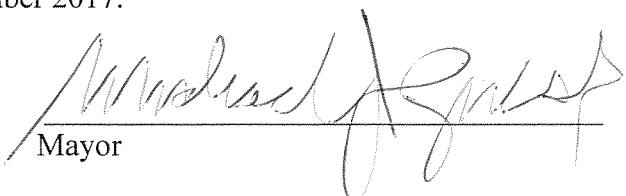
**WHEREAS**, the City received a proposal from Burke, LLC, for design/build services for Lorraine/Eaton sewage lift station improvements; and

**WHEREAS**, it is determined by the City that the proposal received from Burke, LLC, meets the City's needs; and

**WHEREAS**, it is necessary for the City to enter into an agreement with Burke, LLC, for the purpose of providing design/build services for Lorraine/Eaton sewage lift station improvements.

**NOW, THEREFORE, BE IT RESOLVED** by the Mayor and City Council of the City of Wheaton, Illinois that the Mayor is hereby authorized to execute and the City Clerk is hereby directed to attest to an agreement between the City of Wheaton and Burke, LLC, Rosemont, Illinois, for design/build services for Lorraine/Eaton sewage lift station improvements.

ADOPTED this 18<sup>th</sup> day of December 2017.



\_\_\_\_\_  
Mayor

ATTEST:



\_\_\_\_\_  
Aaron Bennett Hagan  
City Clerk

Roll Call Vote:

Councilman Suess  
Councilman Barbier  
Councilwoman Fitch  
Councilman Prendiville  
Mayor Gresk  
Councilman Rutledge  
Councilman Scalzo

Ayes: None

Nays: None

Absent:

Motion Carried Unanimously



## EXHIBIT 1

This number must appear on the  
face of all invoices and  
documents related to this  
Agreement **No. C 36990**

### **CITY OF WHEATON, ILLINOIS DESIGN/BUILD SERVICES AGREEMENT FOR LORRAINE-EATON SEWAGE LIFT STATION IMPROVEMENTS**

**THIS AGREEMENT** is made and entered into this 18<sup>th</sup> day of December 2017, by and between the **CITY OF WHEATON**, an Illinois municipal corporation (“**City**”), located at 303 W. Wesley Street, Wheaton, Illinois, 60187 and **BURKE, L.L.C.**, (“**Design-Build Firm**”), located at 9575 West Higgins Road, Suite 600, Rosemont, Illinois, 60018-4920.

WHEREAS, the City has determined that it is reasonable and necessary to engage a professional engineering design-build firm or team to provide engineering design and construction services for improvements to the Lorraine Eaton sewage lift station; and

WHEREAS, the Design-Build Firm has provided the City with similar professional engineering design-build services and the City has a satisfactory relationship with the Design-Build Firm for those services; and

WHEREAS, the Design-Build Firm has proposed by letter to provide engineering design and construction services for the improvements to the Lorraine Eaton sewage lift station, a copy of which is attached hereto and incorporated herein as if fully set forth as **Exhibit A**, and Design-Build Firm represents that it has the necessary expertise and experience to furnish such design-build services upon the terms and conditions set forth herein below.

NOW THEREFORE, in consideration of the recitals and mutual covenants, agreements, and conditions set forth in the Agreement, the parties agree as follows:

#### **ARTICLE 1 – RELATIONSHIP OF THE PARTIES**

- 1.1 City’s Relationship with Design-Build Firm.** The relationship between the City and the Design-Build Firm with regard to the Project shall be one of good faith and fair dealing. The Design-Build Firm agrees to provide the design, construction, management and administration services as set forth in greater detail below.
- 1.2 Engineer.** The Engineer for the Project is Christopher B. Burke Engineering, Ltd., a separate company and legal entity closely affiliated with the Design-Build Firm.
- 1.3 General Description of Services.** The Design-Build Firm agrees to furnish or arrange for the engineering design and construction services set forth herein and required for completion of the Lorraine Eaton sewage lift station improvements (hereinafter “**Project**”) on a Guaranteed Maximum Price basis. The Design-Build Firm represents that it is thoroughly familiar with and understands the requirements of the Project scope and is experienced in the design, administration and construction of building projects of the type and scope contemplated by the City for the Project. The Design-Build Firm represents to the City that it has all necessary engineering and construction education, skill, knowledge and experience required for the Project, and will maintain at all times

during the term of this Agreement such personnel on its staff to provide the services contemplated hereby within the time periods required hereby. In addition, the Design-Build Firm represents that it, and any subcontractors performing services under this Agreement, have all applicable licenses required by the State of Illinois to perform such services.

## **ARTICLE 2 – DEFINITIONS**

- 2.1 Addenda.** Written or graphic instruments which make additions, deletions, or revisions to the Contract Documents.
- 2.2 Agreement.** The written contract between the City and the Design-Build Firm covering the Work to be performed, which includes all other documents that are attached to the Agreement or incorporated by reference and made a part thereof. It shall be understood that the words “contract” and “Agreement” are synonymous in these documents.
- 2.3 Amendment.** Any written change made to the terms and conditions of the Agreement.
- 2.4 City.** The City of Wheaton, Illinois, an Illinois home rule municipality.
- 2.5 Commencement Date.** The date upon which the Work is authorized to proceed.
- 2.6 Completion Date.** The date upon which the Work is to be completed.
- 2.7 Contract Documents.** The Contract Documents consist of:
  - .1 Change Orders and written amendments to this Contract signed by both the City and the Design-Build Firm;
  - .2 This Agreement;
  - .3 Surveys, geo-technical information and other information provided by the City pursuant to this Agreement;
  - .4 The concept plans and rendering, including any Addenda thereto
  - .5 The Design-Build Firm’s proposal titled “Design-Build Approach to Lorraine Eaton Lift Station Improvements” dated August 31, 2017, Revised September 19, 2017, identified as **Exhibit A**.
- 2.8 City Representative.** The City Manager or his designee, who shall be specified in writing and who shall be responsible on behalf of the City to interface with the Design Builder on all elements of the Work. The Design Builder shall be provided with the City Representative’s City and City cell phone number prior to commencement of the Work.
- 2.9 Day.** Each day shown on the calendar.

2.10 **Deliverables.** All Work that is to be performed pursuant to the Statement of Work and the Contract Documents, in whole or in part, including, but not limited to, all equipment or materials that are incorporated within the Work.

2.11 **Design-Build Firm.** Burke, LLC, located at 9575 West Higgins Road, Suite 600, Rosemont, IL 60018

2.12 **Design Builder Representative.** The Design Builder representative who shall be responsible on a day to day basis to interface with the City and its representatives on all elements of the Work. The City shall be provided with the Design Builders Representative's work and work cell phone numbers prior to commencement of the Work.

2.13 **Hazardous Material.** A Hazardous Material is any substance or material identified now or in the future as hazardous under any federal, state or local law or regulation, or any other substance or material which may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal and/or cleanup.

2.14 **Subcontractor.** A Subcontractor is a person or entity who has an agreement with the Design-Build Firm to perform any portion of the Work, and includes vendors or material suppliers but does not include the Engineer, any separate contractor employed by the City or any separate contractor's subcontractor.

2.15 **Substantial Completion.** Substantial Completion of the Work, or of a designated portion of the Work, occurs on the date when construction is sufficiently complete in accordance with the Contract Documents so that the City can begin to occupy or utilize the Project, or the designated portion, for the use for which it is intended.

2.16 **Subsubcontractor.** A Subsubcontractor is a person or entity who has an agreement with a Subcontractor to perform any portion of the Subcontractor's work.

2.17 **Work.** The Work consists of all of the engineering, design, construction, procurement, and administration services to be performed by the Design-Build Firm and the Subcontractors under this Contract and includes labor, materials, equipment, transportation, supporting documentation, and all other products, services, facilities and satisfaction of obligations which are necessary for the Design-Build Firm's complete performance pursuant to the Contract Documents.

### **ARTICLE 3 – CONTRACT TIME**

3.1 **Execution Date.** The parties contemplate that this Contract will be fully executed on or before December 26, 2017 and the project shall commence by January 2, 2018. A delay in the City's execution of this Contract which postpones the commencement of the Work may require a Change Order equitably adjusting the date of Substantial Completion.

3.2 **Substantial Completion.** The date of Substantial Completion of the Work shall be August 1, 2018 as adjusted in accordance with the provisions of this Contract. Time shall be the essence of this Contract.

3.3 **Delays.** If causes beyond the Design-Build Firm's control delay the progress of the Work, then the Contract Price and/or the date of Substantial Completion shall be modified by Change Order as appropriate. Such causes shall include but not be limited to: changes ordered in the Work, acts or

omissions of the City or separate contractors employed by the City, the City's preventing the Design-Build Firm from performing the Work pending dispute resolution, Hazardous Materials, unknown differing site conditions, adverse weather conditions not reasonably anticipated, fire, unusual transportation delays, labor disputes, or unavoidable accidents or circumstances. In the event that delays to the Project are encountered for any reason, the City and the Design-Build Firm both agree to undertake reasonable steps to mitigate the effect of such delays.

**3.4 Inclement Weather.** The Contract Time shall not be extended due to normal inclement weather. Unless the Design-Build Firm can substantiate to the satisfaction of the City that there was greater than normal inclement weather considering the full term of the Contract Time and using the most recent ten-year average of accumulated record mean values from climatological data compiled by the United States Department of Commerce National Oceanic and Atmospheric Administration for the locale of the Project and that such alleged greater than normal inclement weather actually delayed the Work of portions thereof which had an adverse material effect on the Contract Time, the Design-Build Firm shall not be entitled to an extension of the Contract Time. If the total accumulated number of calendar days lost due to inclement weather from the start of Work until substantial completion exceeds the total accumulated number to be expected for the same time period from the aforesaid data and the City grants the Design-Build Firm an extension of time, the Contract Time shall be extended by the appropriate number of calendar days.

**3.5 Responsibility for Completion.** The Design-Build Firm, through its Subcontracts, shall furnish such employees, materials, and equipment as may be necessary to ensure the prosecution and completion of the Work in accordance with the construction schedule. If the Work is not being performed in accordance with the construction schedule and it becomes apparent from the schedule that the Work will not be completed within the Contract Time, the Design-Build Firm shall, as necessary to improve the progress of the Work, take some or all of the following actions, at no additional cost to the City:

- .1 Increase the number of workers in such crafts as necessary to regain the lost progress;
- .2 Increase the number of working hours per shift, shifts per working day, working days per week, the amount of equipment or any combination of the foregoing, upon approval of the City, to regain the lost progress.

In addition, the City may require the Design-Build Firm to prepare and submit a recovery schedule demonstrating the Design-Build Firm's plan to regain the lost progress and to ensure completion within the Contract Time. If the City finds the proposed recovery plan is not satisfactory, the City may require the Design-Build Firm to undertake any of the actions set forth in this paragraph 3.5, without additional cost to the City.

## **ARTICLE 4 – DESIGN-BUILD FIRM'S RESPONSIBILITIES**

**4.1 Commencement.** The Design-Build Firm may commence the Work upon execution of this Contract. The parties contemplate that by mutual agreement, the Design-Build Firm may commence certain portions of the Work, such as procurement of long lead-time items and site preparation, prior to execution of this Contract in reliance on the Price/Schedule Guarantee.

**4.2 Independent Contractor.** The Design-Build Firm is an independent contractor. Neither Design-Build Firm nor Design-Build Firm's employees are employees of the City. The Design-Build Firm shall have the right to control and direct the means and methods by which the Work is accomplished. The Design-Build Firm is solely responsible for compliance with all labor and tax

laws pertaining to Design-Build Firm, its officers, agents, and employees, and shall indemnify and hold the City harmless from any failure to comply with such laws. In the event that the City provides training, equipment, materials, or facilities or otherwise facilitates performance of the Work, this shall not alter the Design-Build Firm's status as an independent contractor.

4.3 **General Requirements.** The Design-Build Firm shall perform those portions of the Work that the Design-Build Firm customarily performs with its own personnel. All other portions of the Work shall be performed by Subcontractors or under other appropriate agreements with the Design-Build Firm. The Subcontractor selection process shall be as set forth in Article 5 of this Agreement. The Design-Build Firm shall exercise reasonable skill and judgment in the performance of the Work. The Design-Build Firm shall give all notices and comply with all federal, state, and local laws applicable to the Project and the Design-Build Firm's work product shall fully conform with all federal, state, and local laws applicable to the Project.

4.4 **Deliverables.** The Design-Build Firm shall deliver all products and services in accordance with the requirements stipulated in the Contract Documents. The Design-Build Firm is responsible for the professional quality, technical accuracy, constructability, construction materials, workmanship, and timely completion of the Work in accordance with the agreed schedule. Both workmanship and materials shall be of best quality and consistent with the professional skill and care ordinarily provided by professional engineers in Illinois and General Contractors on projects similar to the Work. The Design-Build Firm shall correct any and all errors, omissions or deletions in the Work performed without additional compensation from the City. Unless otherwise specifically provided for herein, the Design-Build Firm shall provide and pay for all materials, labor, and other facilities and equipment as are necessary for the performance of the Work. The City's representative shall make a final acceptance inspection of the deliverables when they are completed and finished in all respects in accordance herewith. The parties may agree, at any time, in the form of a written amendment, to make changes within the general scope of this Agreement to the Work to be provided hereunder.

4.5 **Schedule.** The Design-Build Firm shall maintain in written form a schedule of the Work. The Schedule shall indicate the dates for the start and completion of the various stages of the construction and shall be revised as required by the conditions of the Work. The schedule may contain dates when information, decisions, and approvals are required from the City; and both the City and the Design-Build Firm agree to use their best efforts to comply with the time requirements of the schedule. The Design-Build Firm shall provide an updated progress schedule with each payment request, taking into account all delays, Change Orders, etc. Failure to provide an updated progress schedule will be cause to withhold payment to the Design-Build Firm until such time as the updated schedule is received.

4.6 **Meetings.** The Design-Build Firm shall schedule and conduct meetings at which the appropriate parties can discuss the status of the Work. The Design-Build Firm shall prepare and promptly distribute meeting minutes.

4.7 **Reports.** The Design-Build Firm shall provide monthly written reports to the City on the progress of the Work which shall include the current status of the Work in relation to the construction schedule as well as adjustments to the construction schedule necessary to meet the Substantial Completion date. The Design-Build Firm shall maintain a daily log containing a record of the weather conditions, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the City may reasonably require. The log shall be available to the City upon reasonable advance notice.

4.8 **Cost Control.** The Design-Build Firm shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities and progress and estimates for uncompleted tasks and proposed changes. The Design-Build Firm shall identify variances between actual and estimated costs and report the variances to the City in the monthly written reports.

4.9 **Permits.** The Design-Build Firm shall obtain all required permits. The Design-Build Firm shall prepare all necessary sketches, permit application drawings, and complete all application forms for any required federal, state, or local permits. The Design-Build Firm shall reply to all permitting agency's requests for additional information related to a permit application. The Design-Build Firm shall send the appropriate and complete sets of documents to any city, county, state or federal regulatory agency from which a permit or other approval is required, and shall coordinate the project requirements with all agencies.

4.10 **Safety.** The Design-Build Firm shall take necessary precautions for the safety of its employees and subcontractor's employees on the Project and shall comply with all applicable provisions of federal, state, and local safety laws and regulations to prevent accidents or injuries to persons on or adjacent to the Project site. The Design-Build Firm, directly or through its Subcontractors, shall erect and properly maintain necessary safeguards for the protection of workers and the public. However, the Design-Build Firm shall not be responsible for the elimination or abatement of safety hazards created or otherwise resulting from any work at the Project site being performed by someone other than the Design-Build Firm, a Subcontractor or Subsubcontractor. The Engineer shall have no responsibility for safety programs or precautions in connection with the Work and shall not be in charge of or have any control over any construction means, methods, techniques, sequences or procedures.

4.11 **Protection of the Work, Equipment, and Property.** The Design-Build Firm shall be responsible for the proper care and protection of all the material delivered and work performed until completion and final acceptance by the City, whether or not the same has been covered by partial payments made by the City. The Design-Build Firm shall continuously maintain adequate protection of the Work from damage and shall protect public and private property, structures, utilities, landscaping, and work of any kind against damage or interruptions of service that may result from its activities. The Design-Build Firm shall be solely responsible for all City-owned equipment in its possession. The Design-Build Firm shall repair, replace or restore any damage, injury, or loss to any of the above public or private property at its expense and to the City's satisfaction. Should the Design-Build Firm fail to perform its obligations hereunder, the City may make good any damage to public or private property caused by the Design-Build Firm. The cost thereof shall be deducted from the Design-Build Firm's final payment application.

4.12 **Parking.** The Design-Build Firm shall not permit its employees to park their vehicles or store equipment or materials adjacent to the traveled way or right-of-way where it may be a hazard to traffic. A clear distance of at least thirty (30) feet from the edge of the pavement or right-of-way shall be kept free of any obstacles unless otherwise authorized by the City.

4.13 **Cleanup.** The Design-Build Firm shall keep the site of the Work free from debris and waste materials resulting from the Work. At the completion of the Work, the Design-Build Firm or its Subcontractors shall remove from the site of the Work all construction equipment, tools, surplus materials, waste materials and debris.

4.14 **Hazardous Materials.** The Design-Build Firm shall not be obligated to commence or continue Work, until any known or suspected Hazardous Material discovered at the Project site has been removed or rendered or determined to be harmless by the City as certified by any independent

testing laboratory and approved by the appropriate government agency. The Design-Build Firm shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether it is a Hazardous Material. The Design-Build Firm shall not be required to perform any Work relating to or in the area of known or suspected Hazardous Material without written mutual agreement and shall resume Work in the area affected by any Hazardous Material only upon written agreement between the parties after the Hazardous Material has been removed or rendered harmless. If the Design-Build Firm incurs additional costs and/or is delayed due to the presence of known or suspected Hazardous Material, the Design-Build Firm shall be entitled to a Change Order equitably adjusting the Guaranteed Maximum Price and/or the date of Substantial Completion. To the fullest extent permitted by law, the City shall indemnify and hold harmless, regardless of fault, negligence or other liability, the Design-Build Firm, Engineer, all Subcontractors and any and all claims, damages, losses, costs and expenses, whether direct, indirect or consequential including but not limited to attorneys' fees, arising out of or relating to the performance of the Work in any area affected by Hazardous Material. The terms of this indemnification shall survive completion or termination of this Contract.

4.15 **Intellectual Property.** The Design-Build Firm shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods or systems selected by the Design-Build Firm and incorporated in the Work. The Design-Build Firm shall defend, indemnify and hold the City harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection. The City agrees to defend indemnify and hold the Design-Build Firm harmless from any suits or claims of infringement of any patent rights arising out any patented materials, methods or systems required or specified by the City.

4.16 **Completion.** At or promptly after the date of Substantial Completion, the Design-Build Firm shall secure required certificates of inspection, testing or approval and deliver them to the City; collect all written warranties and equipment manuals and deliver them to the City; with the assistance of the City's maintenance personnel, direct the checkout of utilities and operations of systems and equipment for readiness, and assist in their initial start-up and testing; provide the City with a set of record drawings which the Design-Build Firm shall have maintained throughout the Project; and prepare and forward to the City a punch list of items of Work yet to be completed.

4.17 **Indemnification.** The Design-Build Firm agrees to indemnify and hold harmless the City and its officials, directors, officers, employees, agents, and attorneys, in whole or in part, from and against any liabilities, lawsuits, damages, losses, fines, claims, demands, judgments, settlements, penalties, costs and expenses, including but not limited to reasonable expert witness and attorneys' fees, as well as costs of litigation, to the extent caused by any act or omission of the Design-Build Firm or any Subconsultant, Subcontractor, supplier or other person employed or utilized by the Design-Build Firm in the performance of this contract, or because of or as a consequence of any negligence, recklessness, or intentionally wrongful conduct of the Design-Build Firm, or any Subconsultants, Subcontractors, supplier or other person employed or utilized by the Design-Build Firm in the performance of this contract.

In the event that any claim for indemnification hereunder arises from the negligence or willful misconduct of both the Design-Build Firm and the City, the parties agree that any and all lawsuits, claims, demands, damages, liabilities, losses, fines, judgments, settlements, penalties, costs, and expenses shall be apportioned between the parties on the basis of their comparative degrees of fault, except as otherwise herein provided.

All subcontractors shall execute an indemnification in favor of the Design Builder and City similar in form to this Section 4.17.

4.18 **Overtime Work.** Except in connection with the safety or protection of persons, or the Work, or property at the site or adjacent thereto, all Work at the site shall be performed during regular working hours; and the Design-Build Firm shall not permit overtime work or the performance of work on Saturday, Sunday or any legal holiday without the City's written consent given after prior written notice. Regular working hours shall be a consecutive eight-hour period between the hours of seven o'clock (7:00) A.M. and five o'clock (5:00) P.M., Monday through Friday. No loading, unloading, opening, closing or other handling of crates, containers, building materials or the performance of construction work shall be performed before the hour of seven o'clock (7:00) A.M. and after the hour of nine o'clock (9:00) P.M.

4.19 **Selection of Labor.** The Design-Build Firm shall comply with all Illinois statutes pertaining to the selection of labor.

4.20 **Employment of Illinois Workers During Periods of Excessive Unemployment.** Whenever there is a period of excessive unemployment in Illinois, which is defined herein as any month immediately following two consecutive calendar months during which the level of unemployment in the State of Illinois has exceeded five percent (5%) as measured by the United States Bureau of Labor Statistics in its monthly publication of employment and unemployment figures, the Design-Build Firm shall employ only Illinois laborers. "Illinois laborer" means any person who has resided in Illinois for at least thirty (30) days and intends to become or remain an Illinois resident.

Other laborers may be used when Illinois laborers as defined herein are not available, or are incapable of performing the particular type of work involved, if so certified by the Design-Build Firm and approved by the City. The Design-Build Firm may place no more than three (3) of his regularly employed non-resident executive and technical experts, who do not qualify as Illinois laborers, to do work encompassed by this Contract during a period of excessive unemployment.

This provision applies to all labor, whether skilled, semi-skilled or unskilled, whether manual or nonmanual.

4.21 **No Delinquent Taxes.** The Design-Build Firm represents and certifies that the Design-Build Firm is not barred from contracting with a unit of state or local government as a result of a delinquency in the payment of any tax administered by the Illinois Department of Revenue unless the Design-Build Firm is contesting, in accordance with the procedures established by the appropriate revenue act, its liability for the tax, or has entered into an agreement with Department of Revenue for payment of all taxes due and is currently in compliance with that agreement, as set forth in 11-42.1-1 et seq. of the Illinois Municipal Code, 65 ILCS 5/11-42.1-1 et seq.

4.22 **No Collusion.** The Design-Build Firm represents and certifies that the Design-Build Firm is not barred from contracting with a unit of state or local government as a result of a violation of either Section 33E-3 or Section 33E-4 of Article 33E of the Criminal Code of 2012, 720 ILCS 5/33E-1 et seq. The Design-Build Firm represents that the only persons, firms, or corporations interested in this Agreement as principals are those disclosed to the City prior to the execution of this Agreement, and that this Agreement is made without collusion with any other person,

firm, or corporation. If at any time it shall be found that the Design-Build Firm has, in procuring this Agreement, colluded with any other person, firm, or corporation, then the Design-Build Firm shall be liable to the City for all loss or damage that the City may suffer, and this Agreement shall, at the City's option, be null and void.

4.23 **Sexual Harassment Policy.** The Design-Build Firm shall certify that it has a written sexual harassment policy in full compliance with Section 2-105(A)(4) of the Illinois Human Rights Act, 755 ILCS 5/2-105(A)(4).

4.24 **Patriot Act (USA Freedom Act) Compliance.** The Design-Build Firm represents and warrants to the City that neither it nor any of its principals, shareholders, members, partners, or affiliates, as applicable, is a person or entity named as a Specially Designated National and Blocked Person (as defined in Presidential Executive Order 13224) and that it is not acting, directly or indirectly for or on behalf of a Specially Designated National and Blocked Person. The Design-Build Firm further represents and warrants to the City that the Design-Build Firm and its principals, shareholders, members, partners, or affiliates, as applicable, are not directly or indirectly, engaged in, and are not facilitating, the transactions contemplated by this Agreement on behalf of any person or entity named as a Specially Designated National and Blocked Person. The Design-Build Firm hereby agrees to defend, indemnify and hold harmless the City, its corporate authorities, and all City elected or appointed officials, officers, employees, agents, representatives, engineers, and attorneys, from and against any and all claims, damages, losses, risks, liabilities, and expenses (including reasonable attorneys' fees and costs) arising from or related to any breach of the representations and warranties in this subsection.

4.25 **Anti-Discrimination Laws.** Design-Build Firm shall comply with all federal and state laws prohibiting discrimination because of, or requiring affirmative action based on race, color, religion, sex, sexual orientation, marital status, order of protection status, national origin or ancestry, citizenship status, age, physical or mental disability unrelated to ability, military status or an unfavorable discharge from military service, and shall execute the Equal Employment Opportunity Clause compliance certification attached to this Agreement in **Group Exhibit B.**

4.26 **Americans with Disabilities Act.** Design-Build Firm shall utilize standards and/or methods that do not discriminate against the disabled in compliance with the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq.

4.27 **Drug Free Workplace Act.** Design-Build Firm shall comply with all conditions of the Illinois Drug Free Workplace Act, 30 ILCS 580/3 et seq.

4.28 **CDL Driver Controlled Substances and Alcohol Use and Testing.** To the extent that the Design-Build Firm and any employees, agents, or subcontractors thereof, will operate any commercial vehicles requiring the necessity for a state issued Commercial Driver's License, Design-Build Firm shall comply with Federal Highway Authority Rules on Controlled Substances and Alcohol Use and Testing, 49 CFR Parts 40 and 382 and shall notify the City of any employee, agents, or subcontractor driver participating in a drug and alcohol testing program pursuant to the aforementioned rules during the term of this Agreement.

4.29 **Employment of Illinois Workers on Public Works Projects Act.** When applicable, Design-Build Firm shall comply with the Illinois labor employment requirements as set forth in the Employment of Illinois Workers on Public Works Projects Act, 30 ILCS 570/1 et seq.

4.30 **Public Works Employment Discrimination Act.** Design-Build Firm shall comply with all conditions and requirements of the Illinois Public Works Employment Discrimination Act, 775 ILCS 10/0.01 et seq.

4.31 **Steel Products Procurement Act.** When applicable, any steel product used or supplied in the performance of the contract or any subcontract thereto, shall be manufactured or produced in the United States, as required by the Illinois Steel Products Procurement Act, 30 ILCS 565/1 et seq.

4.32 **Substance Abuse Prevention.** Pursuant to the Substance Abuse Prevention on Public Works Projects ("SAPPWP") 820 ILCS 265/1 et seq., employees of the Design-Build Firm and employees of any SubDesign-Build Firm are prohibited from the use of drugs or alcohol, as defined in the SAPPWP, while performing work on any public works project. The Design-Build Firm certifies that it has a written Substance Abuse Prevention Program for the prevention of substance abuse among its employees which meets or exceed the requirements of the SAPPWP or shall have a collective bargaining agreement in effect dealing with the subject matter.

4.33 **Prevailing Wage Act.** Some the Work herein required under this Agreement is a "public work," within the meaning of the Illinois Prevailing Wage Act, 820 ILCS 130/0.01 et seq. ("the Act"). The Act requires Design-Build Firms and subcontractors to pay laborers, workers and mechanics performing services on public works projects no less than the "prevailing rate of wages" (hourly cash wages plus fringe benefits) in the county where the work is performed. For information regarding current prevailing wage rates, please refer to the Illinois Department of Labor's website at: <http://www.state.il.us/agency/idol/rates/rates.HTM>. All Design-Build Firms and subcontractors rendering work under this contract shall comply with all requirements of the Act, including but not limited to, all wage, notice and record keeping duties, as more fully set forth in the "Special Provisions for: Wages of Employees on Public Works" contained in Exhibit C to this Agreement. The Design-Build Firm shall indemnify the City for any and all violations of the prevailing wage laws and any rules and regulations now and hereafter issued pursuant to said laws.

4.34 **Veterans Preference Act.** When applicable, Design-Build Firm shall comply with all employment preference requirements of the Illinois Veterans Preference Act, 330 ILCS 55/0.01 et seq.

4.35 **Educational Loan.** The Design-Build Firm shall certify that its members holding more than five percent (5%) of the outstanding membership interest of the limited liability company, its officers and managers are, not in default, as defined in 5 ILCS 385/2, on an educational loan, as defined in 5 ILCS 385/1.

4.36 **Freedom of Information Act.** The Design-Build Firm shall, within four (4) business days of the City's request, provide any documents in the Design-Build Firm's possession related to this Agreement which the City is required to disclose to a requester under the Illinois Freedom of Information Act ("FOIA"). This provision is a material covenant of this Agreement. Design-

Build Firm agrees to not apply any costs or charge any fees to the City regarding the procurement of records required pursuant to an FOIA request. Should Design-Build Firm request that the City utilize a lawful exemption under FOIA in relation to any FOIA request thereby denying that request, Design-Build Firm agrees to pay all costs connected therewith (such as reasonable attorneys' fees and witness fees, filing fees, and any other expenses) to defend the denial of the request. The defense shall include, but not be limited to, challenged or appealed denials of FOIA requests to either the Illinois Attorney General or a court of competent jurisdiction. Design-Build Firm agrees to defend, indemnify, and hold harmless the City, and agrees to pay all costs in connection therewith (such as reasonable attorneys' and witness fees, filing fees, and any other expenses) to defend any denial of a FOIA request by Design-Build Firm's request to utilize a lawful exemption to the City.

4.37 **Execution of Certifications.** Design-Build Firm shall execute the legal certifications and compliance with laws documentation which is attached hereto and incorporated herein as if fully set forth in **Group Exhibit B.**

## **ARTICLE 5 – SUBCONTRACTS**

5.1 **General.** Work not performed by the Design-Build Firm with its own forces shall be performed by Subcontractors or Subsubcontractors. The Design-Build Firm shall be responsible for management of the Subcontractors in the performance of their Work. These subcontracts and sub-subcontracts are subject to the Prevailing Wage Act (820 ILCS 130/0.01 *et seq.*), as amended, except that where a prevailing wage violates a Federal law, order, or ruling, the rate conforming to the federal law, order, or ruling shall govern.

5.2 **Selection.** The Design-Build Firm shall obtain bids from Subcontractors and/or from suppliers of materials or equipment fabricated to a special design for the Work and, shall manage the delivery of the Work to the City. The City may designate specific persons or entities from whom the Design-Build Firm shall subcontract. However, the City may not prohibit the Design-Build Firm from subcontracting with other qualified bidders.

- .1 If the Design-Build Firm recommends to the City the acceptance of a particular subcontractor who is qualified to perform that portion of the Work and has submitted a price which conforms to the requirements of the Contract Documents without reservations or exceptions, and the City requires that a different price be accepted, then a Change Order shall be issued adjusting the Contract Time and the Guaranteed Maximum Price by the difference between the price of the subcontract recommended by the Design-Build Firm and the subcontract that the City has required to be accepted.
- .2 The Design-Build Firm shall not be required to contract with anyone to whom the Design-Build Firm has a reasonable objection.

5.3 **Assignment.** The Design-Build Firm shall not sublet, assign, or transfer any Work in whole or in part, or assign any moneys due or to become due hereunder, without the prior written consent of the City. The Design-Build Firm shall notify the City's Representative in writing of the names of subcontractors proposed for the Work. Neither the City's approval of subcontractor nor any other provision of this Agreement shall create a contractual relationship between any subcontractor and the City. The Design-Build Firm shall be responsible for the fulfillment of all Work elements included in the subcontracts and shall be responsible for the payment of all

monies due under any subcontract. The Design-Build Firm agrees that final payment shall be conditioned on the receipt by the City of duly executed and acknowledged statements showing that all subcontractors and suppliers have been paid in full and each has duly executed lien waivers or waivers of right to claim against any payment bond that ensure the release of any and all claims or liens against the City and any owner of property upon which the Work has been located. The Design-Build Firm shall be as fully responsible to the City for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by them, as it is for its own acts and omissions.

- 5.4 **Subcontracts.** The Design-Build Firm shall prepare all Subcontracts and shall have full discretion to negotiate their terms, subject to mandatory legal requirements, the terms of this Agreement and the City's reasonable requirements or objections as to the form and content.
- 5.5 **Foreign Corporation.** Foreign (non-Illinois) corporations shall procure from the Illinois Secretary of State a certificate of authority to transact business in Illinois in accordance with 805 ILCS 5/13.

## **ARTICLE 6 – DESIGN-BUILD FIRM'S WARRANTIES**

- 6.1 **One-Year Warranty.** The Design-Build Firm warrants that all materials and equipment furnished under this Contract shall be new unless otherwise specified, of best quality, in conformance with the Contract Documents, and free from defective workmanship and materials; and the Design-Build Firm agrees to correct all construction performed under this Contract which proves to be defective in workmanship or materials. These warranties shall commence on the date of Substantial Completion of the Work or of a designated portion thereof and shall continue for a period of one (1) year therefrom or for such longer periods of time as may be set forth with respect to specific warranties required by the Contract Documents.
- 6.2 **Materials Specified by City.** The products, equipment, systems or materials incorporated in the Work at the direction or upon the specific request of the City shall be covered exclusively by the warranty of the manufacturer and are not otherwise warranted under this Contract.
- 6.3 **Other Warranties.** ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY DISCLAIMED.

## **ARTICLE 7 – CITY'S RESPONSIBILITIES**

- 7.1 **Information and Services.** The City shall provide:
  - .1 All necessary information describing the physical characteristics of the site, including surveys, site evaluations, legal descriptions, existing conditions, subsurface and environmental studies, reports and investigations;
  - .2 Inspection and testing services during construction as required by the law or as mutually agreed;
  - .3 Any necessary approvals, rezoning, easements and assessments, fees and charges required for the construction, use, occupancy or renovation of permanent structures, including any legal and other required services; and

.4 Any other information or services stated in the Contract Documents as being provided by the City.

7.2 **Reliance.** The Design-Build Firm shall be entitled to rely on the completeness and accuracy of the information and services required by paragraph 7.1 above, and the City agrees to provide such information and services in a timely manner so as not to delay the Work, unless a reasonably well-qualified Design-Build firm would have identified incompleteness or inaccuracies and the Design-Build firm fails to bring the incompleteness or inaccuracy to the City's attention.

7.3 **Notice of Defect.** If the City becomes aware of any error, omission or other inadequacy in the Contract Documents or of the Design-Build Firm failure to meet any of the requirements of the Contract Documents, or of any other fault or defect in the Work, the City shall give prompt written notice to the Design-Build Firm; however, the City's failure to provide notice shall not relieve the Design-Build Firm of its obligations under this Contract.

7.4 **Communications.** The City shall communicate with the Subcontractors and Subsubcontractors only through the Design-Build Firm. The City shall have no contractual obligations to any Subcontractors or Subsubcontractors.

7.5 **City's Representative.** The City's Representative for this Project is the City Manager who shall be fully acquainted with the Project; shall be the conduit by which the City furnishes the information and services required of the City; and shall have authority to bind the City in all matters requiring the City's approval, authorization or written notice, provided, however, that the City Manager shall not have the authority to increase the Contract Price by more than \$20,000.00 nor to extend the Contract Time. Authority to increase the Contract Price by more than \$20,000.00 or to extend the Contract Time may only be exercised by written Change Order signed the City's Mayor and authorized by a due and proper vote of the City of Wheaton City Council. If the City changes its representative, the City shall notify the Design-Build Firm in advance in writing.

7.6 **Technical Assistance.** The City may elect to provide technical assistance to the Design-Build Firm in order to complete satisfactory performance of the Work. If the City is performing the function that the Design-Build Firm is required to perform pursuant to this Agreement, the City may deduct the cost of providing such technical assistance from the total compensation. Prior to providing any such extraordinary technical assistance, the City shall notify the Design-Build Firm that it considers such assistance to be above and beyond its duties hereunder and of its intention to deduct the cost of providing such assistance from the total compensation. The Design-Build Firm shall not be entitled to reject technical assistance when the City determines that such assistance is necessary for the successful completion of the Work.

7.7 **Inspections.** The City shall be authorized to inspect all Work done and material furnished. Such inspections may extend to all or any part of the Work and to the preparation or manufacture of material to be used. City designated inspectors are authorized to report to the City's Representative as to the progress of the Work and manner in which it is being performed and to report whenever it appears that materials furnished and Work performed by the Design-Build Firm fail to fulfill requirements of the specifications and contract. City inspectors shall call to the attention of the Design-Build Firm any such failures or default, but no inspection nor any failure to inspect at any time or place shall relieve the Design-Build Firm from any obligation to perform all of the Work strictly in accordance with the requirements of the drawings and specifications. In case of any dispute arising between the Design-Build Firm and the City Inspector as to the materials furnished

or manner of performing Work, the Inspector shall have the authority to reject materials or temporarily suspend the Work until the issue can be decided on by the City Representative.

If the Design-Build Firm refuses to suspend operations on verbal order, the City inspector shall issue a written order giving the reason for shutting down the Work. After placing the order in the hands of the person in charge, the City inspector shall immediately leave the Work site. Work performed during the absence of the City inspector, after such notice, will not be accepted or compensable.

City inspectors shall not be authorized to revoke, alter, enlarge, relax, or release any requirements of the plans and specifications. City inspectors shall in no case act as foremen or perform other duties for the Design-Build Firm, nor interfere with management of the Work by the latter. Any instructions, which City inspectors may give the Design-Build Firm shall in no way be construed as releasing the Design-Build Firm from fulfillment of the terms of the Contract Documents.

The Design-Build Firm shall furnish the City's Representative and/or City inspector with every reasonable facility for ascertaining whether or not the Work as performed is in accordance with the requirements and intent of the plans, specifications, and contract. If the City's Representative or City inspector requests it, the Design-Build Firm shall at any time before final acceptance of the Work, remove or uncover such portions of the finished Work as may be directed. After examination, the Design-Build Firm shall restore said portions of the Work to the standard requirements of and by these specifications. Should the Work thus exposed or examined prove acceptable, the uncovering or removing and the replacing of the covering or making good of the parts removed shall be paid as "extra Work," but should the Work so exposed or examined prove unacceptable, the uncovering or removing should be paid at the Design-Build Firm's expense.

## **ARTICLE 8 – COMPENSATION**

- 8.1 Guaranteed Maximum Price.** The Guaranteed Maximum Price for the performance of the Work pursuant to the Contract Documents is **\$500,000.00**, subject to adjustment in accordance with the provisions of this Agreement.
- 8.2 Compensation.** The City shall pay, and the Design-Build Firm shall accept, as full and complete payment for the Work, only the sum of the following items, which sum shall not exceed the Guaranteed Maximum Price for the Work:
  - .1 the aggregate net cost directly paid by the Design-Build Firm to subcontractors pursuant to written subcontracts to perform the Work (the "Cost of the Work"), not to exceed the guaranteed maximum of **\$450,000.00** as set forth in **Exhibit A**;
  - .2 the compensation for the Design-Build Firm's provision of construction management services ("Construction Management Fee"), not to exceed the guaranteed maximum of **\$25,000.00** as set forth in **Exhibit A**;
  - .3 the compensation for the Design-Build Firm's provision of professional engineering design services ("Engineering Design Costs"), not to exceed the guaranteed maximum of **\$20,000.00** as set forth in **Exhibit A**;
  - .4 the aggregate net cost of the Design-Build Firm's General Conditions (the "General Conditions Cost"), not to exceed the guaranteed maximum of **\$5,000.00** as set forth in **Exhibit A**.

The total cost of the Project will be the Guaranteed Maximum Price of **\$500,000.00**. In the event the Cost of the Work shall total less than the Guaranteed Maximum Price as adjusted by Change Orders, the resulting savings shall be shared equally between the City and the Design-Build Firm, and the City shall make payment of the Design-Build Firm's portion upon Final Completion of the Work. In the event that the Cost of the Work exceeds the Maximum Guaranteed Price as adjusted by Change Orders, then the City shall pay no more than the Guaranteed Maximum Price as adjusted by Change Orders.

**8.3 Cost of the Work.** The term "Cost of the Work" shall mean costs incurred by the Design-Build Firm in the proper performance of the Work and shall include all labor, materials, and equipment required to perform the Work. The Cost of the Work shall be the sum of the Design-Build Firm's subcontracts identified in the Schedule of Values. The Cost of the Work shall include the items set forth below.

.1 **Labor Costs.** Wages of construction workers directly employed by the Design-Build Firm to perform the construction of the Work at the site or, with the City's agreement, at off-site locations.

.2 **Subcontract Costs.** Payments made by the Design-Build Firm to Subcontractors in accordance with the requirements of the subcontracts.

.3 **Cost of Materials and Equipment Incorporated in the Completed Construction.**

.1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.

.2 Costs of materials described above in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be delivered to the City at the completion of the Work or, at City's option, shall be sold by the Design-Build Firm, with the amounts realized, if any, from such sales credited to the City as a deduction from the Cost of the Work.

**8.4 Design-Build Firm's Construction Management Fee.** The term "Construction Management Fee" shall mean actual expenditures or negotiated amounts approved by the City for the following items:

.1 The cost of the Design-Build Firm's supervisory, technical, administrative and clerical personnel engaged in supervision and management of the Work on the Project site.

.2 Direct costs incurred in the Work with the exception of those specifically enumerated compensable as a General Conditions Cost or a Cost of the Work;

.3 That portion of the reasonable travel and subsistence expenses of the Design-Build Firm's personnel incurred while traveling in discharge of duties directly connected with the Work.

.4 Expenses incurred in accordance with the Design-Build Firm's standard personnel policy for relocation and temporary living allowances of personnel

required for the Work, in case it is necessary to relocate such personnel from distant locations.

- .5 Any costs or expenses incurred by the Design-Build Firm, not included in the General Conditions Cost, for provision of management services necessary to complete the Project in an expeditious and economical manner consistent with this Agreement and the best interests of the City.
- .6 Costs paid or incurred by the Design-Build Firm for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Construction Management Fee.

**8.5 Engineering Design Costs.** The term “Engineering Design Costs” shall mean actual expenditures or negotiated amounts approved by the City for the costs of surveys, measurements, sizing, design, preparation of construction drawings and plans, coordination of new electrical service, and layout work reasonably required for the execution of the Work or by the Construction Documents.

**8.6 General Conditions Costs.** The term “General Conditions Costs” shall mean actual expenditures or negotiated amounts approved by the City for the following items:

- .1 Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery equipment, and hand tools not customarily owned by the construction workers, which are provided by the Design-Build Firm at the site and fully consumed in the performance of the Work, and costs less salvage value on such items if not fully consumed, whether sold to others or retained by Design-Build Firm.
- .2 Rental charges for temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Design-Build Firm at the site, whether rented from the Design-Build Firm or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof.
- .3 Costs of removal of debris from the site.
- .4 Printing and document reproduction costs, including bid sets; costs of facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone service at the site and reasonable petty cash expenses of the site office.
- .5 That portion directly attributable to this Contract for premiums for insurance and bonds.
- .6 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Design-Build Firm is liable.
- .7 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Design-Build Firm has paid or is required by the Contract Documents to pay.

- .8 Fees of testing laboratories for tests required by the Contract Documents or advisable in the Design-Build Firm's discretion.
- .9 Expenses and time incurred investigating potential changes in the Work.
- .10 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Design-Build Firm resulting from such suits or claims and payments of settlements made with the City's consent.
- .11 Data processing costs related to the Work.
- .12 Costs incurred to provide site safety.
- .13 The cost of obtaining and using all utility services required for the Work;
- .14 The cost of crossing or protecting any public utility, if required, and as directed by the City.
- .15 The cost of secure off-site storage space or facilities approved in advance by the City.
- .16 Deposits lost for causes other than those associated with the Design-Build Firm's negligence or failure to fulfill a specific responsibility to the City set forth in this Agreement, excluding any legal costs and expenses, including attorneys' fees and costs, associated with the Project.
- .17 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property.
- .18 Costs incurred in repairing or correcting damaged or nonconforming Work executed by the Design-Build Firm or the Design-Build Firm's Subcontractors or suppliers.
- .19 Other expenses or charges properly incurred and paid in the prosecution of the Work, with the prior written approval of the City, but specifically excluding legal costs, including attorneys' fees and court costs.

#### **8.7 Non-Reimbursable Costs.**

- .1 The Cost of the Work, Construction Management Fee, Engineering Design Costs and General Conditions Costs shall not include any of the following.
  - .1 Salaries and other compensation of the Design-Build Firm's personnel stationed at the Design-Build Firm's principal office or offices other than the site office, except as specifically provided in paragraph 3.4, unless such personnel are directly engaged in the performance of the Work.
  - .2 Expenses of the Design-Build Firm's principal office and offices other than the site office, except as specifically provided in paragraph 3.6.

- .3 Overhead and general expenses.
- .4 The Design-Build Firm's capital expenses, including interest on the Design-Build Firm's capital employed for the Work.
- .5 The payment of Retailers' Occupation Tax, the Service Occupation Tax (both state and local), the Use Tax and the Service Use Tax in Illinois from which the City as a unit of local government is exempt.
- .6 Costs which would cause the Guaranteed Maximum Price to be exceeded.

.2 Cash discounts obtained on payments made by the Design-Build Firm shall accrue to the City if (1) before making the payment, the Design-Build Firm included them in an Application for Payment and received payment therefor from the City, or (2) the City has deposited funds with the Design-Build Firm with which to make payments; otherwise, cash discounts shall accrue to the Design-Build Firm. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the City, and the Design-Build Firm shall make provisions so that they can be secured. Amounts which accrue to the City shall be credited to the City as a deduction from the Cost of the Work.

**8.8 Progress Payments.** Prior to submitting the first Application for Payment, the Design-Build Firm shall provide a Schedule of Values reasonably satisfactory to the City consisting of a breakdown of the Contract Price by trade or appropriate category. On or before the fifteenth (15<sup>th</sup>) day of each month after the Work has been commenced, the Design-Build Firm shall submit to the City an Application for Payment in accordance with the Schedule of Values and the Illinois Mechanic's Lien Act based upon the Work completed and materials stored on the site or at other locations approved by the City. Within thirty (30) days after receipt of each monthly Application for Payment, the City shall approve or disapprove the Application for Payment. When safety or quality assurance testing is necessary before consideration of the Application for Payment, and such testing cannot be completed within thirty (30) days after receipt of the Application for Payment, approval or disapproval of the Application for Payment shall be made upon completion of the testing or within sixty (60) days after receipt of the Application of Payment, whichever occurs first. If an Application for Payment is disapproved, the City shall notify the Design-Build Firm in writing. If an Application for Payment is approved, the City shall pay directly to the Design-Build Firm the appropriate amount for which Application for Payment was made, less amounts previously paid by the City. The City's progress payment, occupancy or use of the Project, whether in whole or in part, shall not be deemed to be an acceptance of any Work not conforming to the requirements of the Contract Documents.

- .1 With each Application for Payment the Design-Build Firm shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence reasonably required by the City to demonstrate that cash disbursements or obligations already made or incurred by the Design-Build Firm on account of the "Costs of Work" which equal or exceed (1) progress payments already received by the Design-Build Firm less (2) that portion of those payments attributable to Construction Management Fees plus (3) Engineering Design Costs and General Conditions Costs.
- .2 Each Application for Payment shall be based upon the most recent Schedule of Values submitted by the Design-Build Firm in accordance with the Contract Documents. The

Schedule of Values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, with separate line items for engineering design, construction management and general conditions. The Schedule of Values shall be prepared in such form and supported by such data to substantiate its accuracy as the City may reasonably require and shall be used as a basis for reviewing the Design-Build Firm's Applications for Payment.

- .3 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Design-Build Firm on account of that portion of the Work for which the Design-Build Firm has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.
- .4 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:
  - a. Take that portion of the Guaranteed Maximum Price properly allocable to "Cost of the Work" for completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to "Cost of the Work" for that portion of the Work in the Schedule of Values. Pending final determination of cost to the City of changes in the Work, amounts not in dispute may be included, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
  - b. Add that portion of the Guaranteed Maximum Price properly allocable to "Cost of the Work" for materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the City, suitably stored off the site at a location agreed upon in writing.
  - c. Add the Construction Management Fee. The Construction Management Fee, shall be an amount which bears the same ratio to that fixed sum Fee as the Cost of the Work in the two preceding clauses bears to a reasonable estimate of the probable Cost of the Work upon its completion.
  - d. Add the Engineering Design Costs. The Engineering Design Costs shall be an amount which bears the same ratio to that fixed sum Cost as the Cost of the Work in clauses 3.8.4(a) and 3.8.4(b) bear to a reasonable estimate of the probable Cost of the Work upon its completion.
  - e. Add the General Conditions Costs. The General Conditions Costs shall be an amount which bears the same ratio to that fixed sum Cost as the Cost of the Work in clauses 3.8.4(a) and 3.8.4(b) bear to a reasonable estimate of the probable Cost of the Work upon its completion.
  - f. Subtract the aggregate of previous payments made by the City.
- .5 Except with the City's prior approval, payments to Subcontractors shall be subject to retention of not less than ten percent (10%) up to half the contract value. The City and the

Design-Build Firm shall agree upon a mutually agreeable procedure for review and approval of payments and retention for subcontracts.

.6 Except with the City's prior approval, the Design-Build Firm shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

**8.9 Progress Payment Documentation.** The Design-Build Firm shall supply and each Application for Payment shall be accompanied by the following, all in form and substance satisfactory to the City:

- .1 a duly executed and acknowledged sworn statement showing all Subcontractors with whom the Design-Build Firm has entered into subcontracts, the amount of each subcontract, the amount requested for any Subcontractor in the requested progress payment and the amount to be paid to the Design-Build Firm from such progress payments, together with similar sworn statements from all subcontractors and, where appropriate, from sub-Subcontractors; and
- .2 duly executed waivers of mechanics' and materialmen's liens of the money due or to become due herein, establishing payment to the Subcontractor or material supplier of all such obligations to cover the full amount of the Application for Payment from each and every Subcontractor and suppliers of material or labor to release the City of any claim to a mechanic's lien, which they or any of them many have under the mechanics' lien laws of Illinois. Any payments made by the City without requiring strict compliance to the terms of this paragraphs shall not be construed as a waiver by the City of the right to insist upon strict compliance with the terms of this approach as a condition of later payments. The Design-Build Firm shall indemnify and save the City harmless from all claims of Subcontractors, laborers, workmen, mechanics, material men and furnishers of machinery and parts thereof, equipment, tools and all supplies incurred in the furtherance of the performance of the Work; and
- .3 sworn statements or lien waivers supporting the Application for Payment submitted late by the Design-Build Firm will result in the Application for Payment not being processed until the following month.
- .4 updated progress schedules in accordance with paragraph 4.5 of this Agreement.

**8.10 Late Payments.** The City shall pay the Design-Build Firm in accordance with the Illinois Local Government Prompt Payment Act.

**8.11 Title.** The Design-Build Firm warrants and guarantees that title to all Work, materials, and equipment covered by an Application for Payment, whether incorporated in the Project or not, will pass to the City free and clear of all liens, claims, security interests or encumbrances upon receipt of such payment by the Design-Build Firm.

**8.12 Final Payment.** Final Payment shall be due and payable when the Work is fully completed. Before issuance of any final payment, the City may request satisfactory evidence that all payrolls, materials, bills, and other indebtedness connected with the Work have been or will be paid or otherwise satisfied. Acceptance of the final payment shall be considered as a release in full of all claims against the City arising from or by reason of the Work done and materials furnished

hereunder, with the exception of pending claims for additional compensation that have been documented and filed as required by this Agreement. The Design-Build Firm agrees that final payment shall be conditioned on the receipt by the City of duly executed and acknowledged statements showing that the Design-Build Firm and all subcontractors and suppliers have been paid in full and each has duly executed lien waivers or waivers of right to claim against any payment bond that ensure the release of any all claims or liens against the City and any owner of property upon which the Work has been located. In making final payment, the City waives all claims except for outstanding liens, improper workmanship or defective materials appearing within one year after the date of Final Completion, and terms of any special warranties required by the Contract Documents.

- .1 The amount of the final payment shall be calculated as follows:
  - .1 Take the sum of the Cost of the Work, Construction Management Fees, Engineering Design Costs, and General Conditions Costs, substantiated by the Design-Build Firm's final accounting, but not more than the Guaranteed Maximum Price.
  - .2 Subtract the aggregate of previous payments made by the City. If the aggregate of previous payments made by the City exceeds the amount due the Design-Build Firm, the Design-Build Firm shall reimburse the difference to the City.
- .2 The City's accountants will review and report in writing on the Design-Build Firm's final accounting within thirty (30) days after delivery of the final accounting to the City by the Design-Build Firm. Based upon such Cost of the Work, Construction Management Fees, Engineering Design Costs, and General Conditions Costs as the City's accountants report to be substantiated by the Design-Build Firm's final accounting, the City will, within seven (7) days after receipt of the written report of the City's engineers, either make final payment as requested to the Design-Build Firm, or notify the Design-Build Firm in writing of the City's reasons for withholding part or all of the requested final payment.
- .3 If, subsequent to final payment and at the City's request, the Design-Build Firm incurs further costs, not excluded by paragraph 3.7 to correct nonconforming Work, the City shall reimburse the Design-Build Firm for such costs and the Construction Manager's fee, if any related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Design-Build Firm has participated in savings, the amount of such savings shall be re-calculated and appropriate credit given to the City in determining the net amount to be paid by the City to the Design-Build Firm.

**8.13 Accounting Records.** The Design-Build Firm shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be reasonably satisfactory to the City. The City shall be afforded access to the Design-Build Firm's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Project, and the Design-Build Firm shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

**8.14 Payment Approval.** The City may disapprove a payment, in whole or in part, or because of subsequent observations, nullify any progress payment previously made, to such extent as may be necessary, in its opinion, to protect its interests due to:

- .1 Defective work not remedied;
- .2 Third party claims or reasonable evidence indicating the probable filing of such claims;
- .3 Failure to make payments to subcontractors for labor, materials or equipment;
- .4 Reasonable evidence that the Work cannot be completed for the unpaid balance of the Guaranteed Maximum Price;
- .5 Failure to prosecute the Work with sufficient workers, materials, and/or equipment;
- .6 Failure to perform the Work in accordance with the Contract Documents.

## ARTICLE 9 – CHANGES

9.1 **Change Orders.** Changes in the Work which are within the general scope of this Contract may be accomplished by Change Order without invalidating this Contract. A Change Order is a written instrument issued after execution of this Contract signed by the City and the Design-Build Firm stating their agreement upon a change and any adjustment in the Guaranteed Maximum Price and/or the date of Substantial Completion. The Design-Build Firm shall not be obligated to perform changed Work until the Change Order has been executed by the City and the Design-Build Firm.

9.2 **Costs.** An increase or decrease in the Guaranteed Maximum Price resulting from a change in the Work shall be determined by one or more of the following methods:

- .1 Unit prices as set forth in this Contract or as subsequently agreed (but if the original quantities are altered to a degree that application of previously agreed unit prices would be inequitable to either the City or the Design-Build Firm, the Unit Prices shall be equitably adjusted);
- .2 A mutually accepted, itemized lump sum;
- .3 Time and materials.

The Construction Management Fee shall be proportionately increased in all Change Orders that increase the Guaranteed Maximum Price, but shall not be proportionately decreased by a Change Order that decreases the Guaranteed Maximum Price. If the parties cannot agree on the price term of a Change Order, then the Change Order will be calculated on the basis of actual time and materials costs incurred. If at the City's request the Design-Build Firm incurs substantial costs of time investigating a proposed change which is never ultimately made, the Guaranteed Maximum Price and Contract Time shall be equitably adjusted.

9.3 **Unknown Conditions.** If in the performance of the Work, the Design-Build Firm finds latent, concealed or subsurface physical conditions which differ from the conditions the Design-Build Firm reasonably anticipated, or if physical conditions are materially different from those normally encountered and generally recognized as inherent in the kind of work provided for in this Contract, then the Guaranteed Maximum Price and/or the Date of Substantial Completion shall be equitably adjusted by Change Order within a reasonable time after the conditions are first observed.

9.4 **Claims.** For any claim for an increase in the Guaranteed Maximum Price and/or an extension in the date of Substantial Completion, the Design-Build Firm shall give the City written notice of the claim within twenty-one (21) days after the Design-Build Firm first recognizes the condition giving rise to the claim. Except in an emergency, notice shall be given before proceeding with the Work. In any emergency affecting the safety of persons and/or property, the Design-Build Firm shall act, at its discretion to prevent threatened damage, injury or loss. Any change in Guaranteed Maximum Price and/or Date of Substantial Completion resulting from such claim shall be effectuated by Change Order.

## ARTICLE 10 – INSURANCE AND BONDING

10.1 **Design-Build Firm's Insurance.** Contemporaneous with the Design-Build Firm's execution of this Agreement, the Design-Build Firm shall provide certificates and policies of insurance, all with coverages and limits acceptable to the City, and evidencing at least the minimum insurance coverages and limits as set forth in paragraph 10.2, covering claims which may arise out of the performance of this Contract, whether resulting from the Design-Build Firm's operations or by the operations of any Subcontractor, anyone in the employ of any of them, or by an individual or entity for whose acts they may be liable:

- .1 workers compensation, disability benefit and other employee benefit claims under acts applicable to the Work;
- .2 under applicable employer's liability law, bodily injury, occupational sickness, disease or death claims of the Design-Build Firm's employees;
- .3 bodily injury, sickness, disease or death claims for damages to person not employed by the Design-Build Firm;
- .4 usual personal injury liability claims for damages directly or indirectly related to the person's employment by the Design-Build Firm or for damages to other person(s);
- .5 damage to or destruction of tangible personal property, including resulting loss of use claims for property other than the Work itself and other property insured by the City;
- .6 bodily injury, death or property damage claims resulting from motor vehicle liability in the use, maintenance or ownership of any motor vehicle;
- .7 contractual liability claims involving the Design-Build Firm's indemnity obligations; and
- .8 loss due to errors or omission with respect to provision of professional services under this Agreement, including engineering services.

10.2 **Insurance Limits of Liability.** The Design-Build Firm's Commercial General and Automobile Liability Insurance shall be written for not less than the following limits of liability:

### Commercial General Liability Insurance

Each Occurrence Limit	\$1,000,000
General Aggregate Limit	\$2,000,000

Products/Completed Operations Agg.	\$2,000,000
Personal & Advertising Injury Limit	\$1,000,000
Fire Damage (any one fire)	\$100,000
Medical Expenses, each person	\$10,000

## Comprehensive Automobile Liability Insurance

Combined Single Limit, each accident \$1,000,000

Or

Bodily Injury (per person) \$1,000,000  
Bodily Injury (per accident) \$1,000,000  
Property Damage (per accident) \$1,000,000

## Worker's Compensation & Employer's Liability

Worker's Compensation Employer's Liability	Statutory Limits
Bodily Injury by Accident	\$500,000 each accident
Bodily Injury by Disease	\$500,000 policy limit
Bodily Injury by Disease	\$500,000 each employee

## Commercial Umbrella/Excess Liability

Each Occurrence \$2,000,000  
Aggregate \$2,000,000

## Professional Liability

Each Occurrence \$2,000,000  
Aggregate \$2,000,000

**10.3** Commercial General Liability Insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies and an Excess or Umbrella Liability policy. The policies shall contain a provision that coverage will not be canceled or not renewed until at least thirty (30) days' prior written notice has been given to the City. Certificates of insurance showing required coverage to be in force shall be provided to the City upon the Design-Build Firm's execution of this Agreement.

Products and Completed Operations insurance shall be maintained for a minimum period of at least one year after the date of Substantial Completion or final payment, whichever is earlier.

**10.4 Primary Insurance.** The Design-Build Firm's insurance shall be primary insurance as respects the City and Engineer. Any insurance or self-insurance maintained by the City and Engineer shall be excess of Design-Build Firm's insurance and shall not contribute with it. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City and Engineer.

**10.5 Acceptability of Insurers.** The insurance carrier used by the Design-Build Firm shall have a minimum insurance rating of A:VII according to the AM Best Insurance Rating Schedule.

10.6 **The City's Insurance.** The City shall obtain and maintain property insurance in a form reasonably acceptable to the Design-Build Firm upon the entire Project for the full cost of replacement at the time of any loss. The City's insurance may include self -insured retention in any amount deemed appropriate by the City. This City's insurance shall include as named insureds the City and Design-Build Firm, Engineer, Subcontractors and Subsubcontractors. This insurance shall insure against loss from the perils of fire and extended coverage, and shall include "all risk" insurance for physical loss or damage including without duplication of coverage, at least: theft, vandalism, malicious mischief, transit, collapse, falsework, temporary buildings, debris removal, flood, earthquake, testing, and damage resulting from defective design, workmanship or material. The City shall increase limits of coverage, if necessary, to reflect estimated replacement cost. The City shall be responsible for any co-insurance penalties or deductibles. If the City occupies or uses a portion of the Project prior to its Substantial Completion, such occupancy or use shall not commence prior to a time mutually agreed to by the City and the Design-Build Firm and to which the insurance company or companies providing the property insurance have consented by endorsing the policy or policies. This insurance shall not be canceled or lapsed on account of partial occupancy. Consent of the Design-Build Firm to such early occupancy or use shall not be unreasonably withheld. Upon the Design-Build Firm's request, the City shall provide the Design-Build Firm with a copy of all policies before an exposure to loss may occur. Copies of any subsequent endorsements shall be furnished to the Design-Build Firm. The Design-Build Firm shall be given thirty (30) days' notice of cancellation, non-renewal, or any endorsements restricting or reducing coverage. The City shall give written notice to the Design-Build Firm before commencement of the Work if the City will not be obtaining property insurance. In that case, the Design-Build Firm, may obtain insurance in order to protect its interest in the Work. The Guaranteed Maximum Price shall be increased by the cost of this insurance through Change Order. If the Design-Build Firm is damaged by failure of the City to purchase or maintain property insurance or to so notify the Design-Build Firm, the City shall bear all reasonable costs incurred by the Design-Build Firm arising from the damage.

10.7 **Property Insurance Loss Adjustment.** Any insured loss shall be adjusted with the City and the Design-Build Firm and made payable to the City and the Design-Build Firm as trustees for the insureds, as their interests may appear, subject to any applicable mortgagee clause. Upon the occurrence of an insured loss, monies received will be deposited in a separate account; and the trustees shall make distribution in accordance with the agreement of the parties in interest, or in the absence of such agreement, in accordance with the dispute resolution provisions of this Contract. If the trustees are unable to agree between themselves on the settlement of the loss, such dispute shall also be submitted for resolution pursuant to the dispute resolution provisions of this Contract.

10.8 **Waiver of Subrogation.** The City and the Design-Build Firm waive all rights against each other, the Engineer, and any of their respective employees, agents, consultants, Subcontractors, and Subsubcontractors, for damages caused by risks covered by insurance provided in paragraph 10.2 to the extent they are covered by that insurance, except such rights as they may have to the proceeds of such insurance held by the City and Design-Build Firm as trustees. The Design-Build Firm shall require similar waivers from all Subcontractors, and shall require each of them to include similar waivers in their subcontracts and consulting agreements. The City waives subrogation against the Design-Build Firm, Engineer, Subcontractors, and Subsubcontractors on all property and consequential loss policies purchased for the Project after its completion. If the policies of insurance referred to in this Paragraph require an endorsement to provide continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

10.9 **Bonds.** The Design-Build Firm shall furnish payment and performance bonds covering faithful performance of the Cost of Construction ("Cost of Work") portion of the Contract and payment

obligations arising thereunder, equal to one-hundred and ten percent (110%) of the Guaranteed Maximum Price, less the aggregate Construction Management Fee, Engineering Design costs, and General Conditions Costs, on forms approved by the City. Bond certificates shall be submitted with the executed Agreement. Such bond(s) shall be conditioned to save and keep harmless the City from any and all claims, demands, loss, suits, costs, expenses and damages which may be brought, sustained or recovered against the City by reason of any negligence, default or failure of the Design-Build Firm in building, constructing or completing the Work, and that the Work shall be free from all defects and remain in good order and condition for one year from its completion and acceptance by the City, ordinary wear and tear, and damage resulting from accident or willful destruction excepted. Failure to provide the required bond(s) shall constitute a breach of Design-Build Firm's obligations under this Agreement. Each surety providing a bond shall be licensed in Illinois and have an A.M. Best Company, Inc., financial strength rating of at least A-. All bonds signed by an agent must be accompanied by a certified copy of his or her authority to act. It shall be the duty of the Design-Build Firm to advise the surety or sureties of any Change Orders that result in an increase to the Design-Build Firm's compensation and to ensure that the amounts of the bonds are updated to reflect and cover any such increases throughout the course of the Project. A copy of all bond certificates shall be attached to this Agreement and made a part hereof.

## ARTICLE 11 – TERMINATION

### 11.1 **By the Design-Build Firm.** Upon seven (7) days' written notice to the City, the Design-Build Firm may terminate this Contract for any of the following reasons:

- .1 if the Work has been stopped for a thirty (30) day period:
  - a. under court order or order of other governmental authorities having jurisdiction;
  - b. as a result of the declaration of a national emergency or other governmental act during which, through no act or fault of the Design-Build Firm, materials are not available; or
  - c. because of the City's failure to pay the Design-Build Firm in accordance with this Agreement.
- .2 if the Work is suspended by the City for sixty (60) days;
- .3 if the City materially delays the Design-Build Firm in the performance of the Work without agreeing to an appropriate Change Order; or
- .4 if the City otherwise materially breaches this Agreement; or

Upon termination by the Design-Build Firm in accordance with this paragraph, the Design-Build Firm shall be entitled to recover from the City payment for all Work executed and for any proven loss, cost or expense in connection with the Work, plus all demobilization costs and reasonable damages. In addition, the Design-Build Firm shall be paid an amount calculated as set forth in paragraph 11.3.

### 11.2 **By the City for Cause.** If the Design-Build Firm fails to perform any of its obligations under this Contract, the City may after seven (7) days' written notice, during which period the Design-Build Firm fails to perform or to begin to perform such obligations, undertake to perform such obligations itself. The Contract Price shall be reduced by the cost to the City of performing such obligations.

Upon seven (7) days' written notice to the Design-Build Firm and the Design-Build Firm's surety, if any, the City may terminate this Contract for any of the following reasons:

- .1 if the Design-Build Firm persistently utilizes improper materials and/or inadequately skilled workers;
- .2 if the Design-Build Firm does not make proper payment to laborers, material suppliers or subcontractors and refuses or fails to rectify same promptly;
- .3 if the Design-Build Firm fails to abide by the orders, regulations, rules, ordinances or laws of governmental authorities having jurisdiction; or
- .4 if the Design-Build Firm makes a material misrepresentation to the City regarding the Work or performance thereof;
- .5 if the Design-Build Firm fails to timely commence or continuously and vigorously pursue correction of defective Work;
- .6 if the Design-Build Firm otherwise materially breaches this Contract.

If the Design-Build Firm fails to cure within seven (7) days, the City, without prejudice to any other right or remedy, may take possession of the site and complete the Work utilizing any reasonable means. In this event, the Design-Build Firm shall not have a right to further payment until the Work is completed. If the Design-Build Firm files a petition under the Bankruptcy Code, this Contract shall terminate if the Design-Build Firm or the Design-Build Firm's trustee rejects the Agreement or, if there has been a default, the Design-Build Firm is unable to give adequate assurance that the Design-Build Firm will perform as required by this Contract or otherwise is unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code. In the event the City exercises its rights under this paragraph, upon the request of the Design-Build Firm, the City shall provide a detailed accounting of the costs incurred by the City.

**11.3 Termination by City Without Cause.** Notwithstanding any other provision of this Agreement, the City may terminate this Agreement or any Work issued under it, in whole or in part, at any time, without cause, upon thirty (30) days written notice to the Design-Build Firm. Upon receiving notice of termination, the Design-Build shall discontinue the Work on the date and to the extent specified in the notice and shall place no further orders for materials, equipment, services, or facilities, except as needed to continue any portion of the Work that was not terminated. The Design-Build Firm shall also make every reasonable effort to cancel, upon terms satisfactory to the City, all orders or subcontractors related to the terminated work.

If the City terminates this Agreement other than as set forth above, the City shall pay the Design-Build Firm for the Cost of all Work executed and for any proven loss, cost or expense in connection with the Work, plus all demobilization costs. The City also shall pay to the Design-Build Firm fair compensation, either by purchase or rental at the election of the City, for any equipment retained but which is no longer in use due to City's termination of the Work or to a part of the Work. The City shall assume and become liable for obligations, commitments and unsettled claims that the Design-Build Firm has previously undertaken in good faith in connection with the Work or as a result of the termination of this Contract. As a condition of receiving the payments provided under this Article 11, the Design-Build Firm shall cooperate with the City by taking all steps necessary

to accomplish the legal assignment of the Design-Build Firm's rights and benefits to the City, including the execution and delivery of required papers.

**11.4 Suspension by the City for Convenience.** The City for its own convenience may order the Design-Build Firm in writing to suspend, delay or interrupt all or any part of the Work without cause for such period of time as the City may determine to be appropriate. Adjustments shall be made for increases in the Guaranteed Maximum Price and/or date of Substantial Completion caused by suspension, delay or interruption. No adjustment shall be made if the Design-Build Firm is or otherwise would have been responsible for the suspension, delay or interruption of the Work, or if another provision of this Contract is applied to render an equipment adjustment.

## **ARTICLE 12 – DISPUTE RESOLUTION**

**12.1 Step Negotiations.** The parties shall attempt in good faith to resolve all disputes promptly by negotiation, as follows. Either party may give the other party written notice of any dispute not resolved in the normal course of business. Management representatives of both parties one level above the Project personnel who have previously been involved in the dispute shall meet at a mutually acceptable time and place within ten (10) days after delivery of such notice, and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the dispute. If the matter has not been resolved within thirty (30) days from the referral of the dispute to such management representatives, or if no meeting has taken place within fifteen (15) days after such referral, the dispute shall be referred to senior managers under the aforesaid procedure. If the matter has not been resolved by such senior managers, either party may initiate mediation as provided hereinafter. If a negotiator intends to be accompanied at a meeting by an attorney, the other negotiator shall be given at least three (3) working days' notice of such intention and may also be accompanied by an attorney. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and applicable state Rules of Evidence.

**12.2 Mediation.** In the event that any dispute arising out of or relating to this Contract is not resolved in accordance with the procedures provided in paragraph 12.1, such dispute shall be submitted to mediation with the American Arbitration Association ("AAA") or JAMS/Endispute, Inc. If the mediation process has not resolved the dispute within thirty (30) days of the submission of the matter to mediation, or such longer period as the parties may agree to, the dispute shall be decided by a court of law.

**12.4 Continued Performance of Work.** In the event of any dispute, the Design-Build Firm shall continue to perform the Work and maintain its progress pending final determination of the dispute, provided the City places a sum equal to 150% of the amount in dispute in an escrow account, reasonably satisfactory to both parties, which specifies that the escrow agent shall distribute the escrow sum between the parties in accordance with any agreement, arbitration award or court judgment entered resolving the dispute.

**12.5 Required in Subcontracts.** The Design-Build Firm shall include the provisions of this Article 12 in all Subcontracts into which it enters.

## **ARTICLE 13 – LIQUIDATED DAMAGES AND LIMITATION OF LIABILITY**

**13.1 Liquidated Damages.** The time of completion for the performance of this contract is of the essence of this contract and since quantifying losses arising from Contractor's delay are inherently difficult

insofar as delay may impact the provision of City services to the public, the City will require Design Builder to compensate the City in the amount of Five Hundred Dollars (\$500.00) per calendar day beyond the delivery/performance date specified unless the delivery/performance date is delayed for reasons of force majeure. This is not meant to be a penalty, but rather as a reasonable measure of damages given the nature of the losses that may result from delay. Any extensions agreed to by executed Change Orders will be considered in the application of Liquidated Damages.

13.2 **Limitation of Liability.** The City acknowledges that the Design-Build Firm is a limited liability company and agrees that any claim made by the City arising out of or pertaining to this Contract shall be made against only the Design-Build Firm and not against any director officer, or employee of the Design-Build Firm or any other company affiliated with the Design-Build Firm.

#### ARTICLE 14 – MISCELLANEOUS

14.1 **Notices.** Notices to the parties shall be given at the mail addresses show below, by fax, or by any other reasonable means:

If to City:

City of Wheaton  
Attn: City Clerk  
303 W. Wesley St., Box 727  
Wheaton, IL 60187-727  
E-Mail: [cityclerk@wheaton.il.us](mailto:cityclerk@wheaton.il.us)

If to Design-Build Firm:

Burke, LLC  
Attn: John P. Caruso  
9575 West Higgins Road, Suite 600  
Rosemont, IL 60018-4920  
E-Mail: [jcaruso@cbbel.com](mailto:jcaruso@cbbel.com)

14.2 **Integration.** This Contract is solely for the benefit of the parties, and no one is intended to be a third party beneficiary hereto. This Contract represents the entire and integrated agreement between the parties, and supersedes all prior negotiations, representations or agreements, either written or oral.

14.3 **Governing Law.** The Agreement shall be interpreted according to the laws of the State of Illinois. Exclusive jurisdiction for any litigation involving any aspect of this Agreement shall be in the Eighteenth Judicial Circuit Court, DuPage County, Illinois.

14.4 **Severability.** The partial or complete invalidity of any one or more provisions of this Contract shall not affect the validity or continuing force and effect of any other provision.

14.5 **Existing Contract Documents.** A concept plan and renderings are attached as an exhibit to this Contract.

14.6 **Amendment.** No amendment or modification to this Agreement shall be effective unless and until such amendment or modification is in writing, properly approved in accordance with applicable procedures, and executed.

14.7 **Headings.** The headings of the several paragraphs of this Agreement are inserted only as a matter of convenience and for reference and are in no manner intended to define, limit or describe the scope of intent of any provision of this Agreement, nor shall they be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

14.8 **Contract Numbering.** The faces of all invoices and documents shall contain the following contract number C 36990 for reference purposes.

IN WITNESS WHEREOF, the parties have entered into this Agreement this 20<sup>th</sup> day of November 2017.

**CTIY OF WHEATON, an Illinois Municipal Corporation**

BY:  DATE: 11/18/17

ATTEST:

BY:  DATE: 11/18/17

**BURKE, LLC, an Illinois Limited Liability Company**

BY: \_\_\_\_\_ DATE: \_\_\_\_\_

Its: \_\_\_\_\_

ATTEST:

BY: \_\_\_\_\_ DATE: \_\_\_\_\_

Title: \_\_\_\_\_