SE-733

AGREEMENT BETWEEN AGENCY AND DESIGN-BUILDER

AGENCY:

PROJECT NAME:

PROJECT NUMBER:

THIS AGREEMENT is made this the       day of       in the year Two Thousand       by and between

NAME:

ADDRESS:

hereinafter called the “Agency”, and

NAME:

ADDRESS:

hereinafter called the “Design-Builder”.

In consideration of the mutual covenants and obligations set forth herein, the Agency and Design-Builder (hereinafter jointly referred to as the “parties”) agree to the following Terms and Conditions as they apply to the contract for the project listed above.

ARTICLE 1 CONTRACT DOCUMENTS

1. Documents forming a part of the contract are, in the order of precedence:
   1. This Agreement (SE-733);
   2. General Conditions to Agreement Between the Agency and Design-Builder (SE-734);
   3. Agency Request for Proposal (RFP) for Design-Build services made pursuant to this contract;
   4. Proposal issued by the Design-Builder in response to the Agency’s RFP;
   5. Programming Documents issued by the Agency to the Design-Builder pursuant to this contract;
2. The following other documents:
3. The contract is the entire and integrated agreement between the parties and supersedes prior negotiations, representations, or agreements, whether written or oral.

ARTICLE 2 THE WORK OF THE CONTRACT:

1. The Design-Builder shall fully execute the Work as specified or indicated in the Contract Documents. The Work is generally described as the design and construction of the following:

1. Independent Peer Review

Independent Peer Review is required and is part of the Contract Sum.

Independent Peer Review is required and is not part of the Contract Sum.

1. Green Construction

Project is required to be certified per the Energy Efficiency Act of 2007. Yes  No

If Yes, what certification is being pursued? LEED Silver  Green Globes  Other (specify)

ARTICLE 3 CONTRACT DATES

* + - * 1. The Date of Commencement of the Work shall be the date fixed in the Notice to Proceed (SE-790) issued by the Agency to the Design-Builder. The Contract Time shall be measured from the Date of Commencement.
        2. The Agency shall issue the SE-790 to the Design-Builder, no less than seven days prior to the Date of Commencement. Unless otherwise provided in the contract documents and provided the Design-Builder has secured all required insurance and surety bonds, the Design-Builder may commence work immediately upon receipt of the Notice to Proceed.
        3. The Agency and Design-Builder mutually agree that time is of the essence with respect to the times set forth in the Contract Documents.
        4. Subject to adjustments of the Contract Time as provided in the Contract Documents, the Design-Builder will achieve Substantial Completion of the entire Work within the Contract Time indicated on the Notice to Proceed. If the Design-Builder fails to achieve Substantial Completion of the Work within the time specified, the Agency shall be entitled to withhold or recover from the Design-Builder liquidated damages.
        5. Design-Builder agrees that from the compensation to be paid, the Agency shall retain as liquidated damages the amount indicated in the Notice to Proceed for each calendar day the actual construction time required to achieve Substantial Completion exceeds the specified, or adjusted, time for Substantial Completion as provided in the Contract Documents. The liquidated damages amount is intended by the parties as the predetermined measure of compensation for actual damages, not as a penalty.
        6. Design-Builder will achieve Final Completion of the Work no later than       calendar days after the date of Substantial Completion is established.

ARTICLE 4 CONTRACT SUM

* + - * 1. The Agency shall pay the Design-Builder in current funds for the design, construction and completion of the Work subject to additions anddeductions as provided in the Contract Documents, the Contract Sum of $     .
        2. If the fee for Design Professional services requires an adjustment in the Contract Sum via a Change Order, the services for the Design Professional shall be in accordance with the negotiated and established hourly billing rates attached as noted in Article 1. The Design-Builder may invoice no more than the direct labor cost of the Design Professional providing the services multiplied by a markup not to exceed       % for administrative costs.
        3. If the fee for Construction services requires an adjustment in the Contract Sum via a Change Order, the allowable mark-up for overhead and profit on work performed by the Design-Builder and/or Subcontractor(s) forces shall be limited to the amounts stated in Article 6 of the General Conditions.
        4. If the fee for reimbursable expenses requires an adjustment in the Contract Sum via a Change Order, the compensation shall be the actual cost with a reasonable markup not to exceed 10% for administrative costs related to the reimbursable expense.

ARTICLE 5 PAYMENTS

1. Progress Payments
2. The Design-Builder shall submit Application for Payment for work performed in accordance with Article 8 of the General Conditions. The period covered by each Application shall be one calendar month ending on the last day of the month.
3. Each Application for Payment shall be based on the most recent Schedule of Values submitted by the Design-Builder in accordance with the Contract Documents and shall be prepared in such form and supported by such data to substantiate its accuracy. The schedule, unless objected to by the Agency, shall be used as a basis for reviewing the Design-Builder’s Applications for Payment. The Schedule of Values shall allocate the entire Contract Sum among the various portions of the Work and indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.
4. Agency shall make progress payments on account of the Contract Price on the basis of Design-Builder’s Applications for Payment, provided that such Applications for Payment have been submitted in a timely manner and otherwise meet the requirements of the Contract. Subject to other provisions of the Contract Documents and subject to S.C. Code Ann. § 12-8-550 (Withholding Requirements for Payments to Non-Residents), the amount of each progress payment shall be computed as follows:
5. The portion of the Contract Sum properly allocable to completed Work, multiplied by the percentage completion of each portion of the Work in the Schedule of Values;
6. Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction, or, if approved in advance by the Agency, suitably stored off the site at a location agreed upon in writing;
7. Add that portion of Construction Change Directives that the Agency determines to be reasonably justified.
8. Less the aggregate of ay amounts previously paid by the Agency;
9. Less the amount, if any, for Work that remains uncorrected and for which the Agency has previously withheld a Certificate for Payment as provided in Article 8 of the General Conditions;
10. Less the amount, if any, for which the Design-Builder does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Design-Builder intends to pay;
11. Less the amount, if any, for which the Agency has withheld or nullified a Certificate for Payment in whole or in part as provided in Section 8.6 of the General Conditions; and
12. Less Retainage withheld pursuant to Section 5.1.5
13. The progress payment amount determined in accordance with Section 5.1.3 shall be further modified under the following circumstances:
14. Upon Substantial Completion of the Work, the Agency shall pay a sum sufficient to increase the total payments to the full amount of the Contract Sum, less such amounts as the Agency shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and
15. If Final Completion of the Work is thereafter materially delayed through no fault of the Design-Builder, the Agency may be required to pay additional amounts in accordance with Section 8.11.3 of the General Conditions.
16. Retainage
    1. For each progress payment made prior to Substantial Completion of the Work, the Agency may withhold three and one-half percent (3.5%), as retainage, from the payment otherwise due.
    2. When a portion, or division, of Work as listed in the schedule of values is 100% complete, that portion of the retained funds which is allocable to the completed division must be released to the Design-Builder. Upon release by the Agency, the Design-Builder shall within ten (10) days of receipt, release to the subcontractor responsible for the completed work the full amount of retention.
    3. Upon Substantial Completion of the Work, the Design-Builder may submit an Application for Payment that includes the retainage withheld from prior Applications for Payment pursuant to this Section 5.1.5.
17. Notwithstanding the provisions above, no retainage shall be withheld with respect to the portion of a payment application pertaining to engineering, design, and other professional services.
18. No payment for materials incorporated into the work will be made if the designer of record or Agency approvals have not been obtained.
19. Compensation for Design Professional Services shall be based on the approval of completed documents at each phase of service as follows:

Schematic Design Phase percent (       %)

Design Development Phase percent (       %)

Construction Documents Phase percent (       %)

Total Basic Compensation percent (100%)

1. Final Payment
2. Upon Final Completion and acceptance of the Work in accordance with Article 8 of the General Conditions, Agency shall pay the remainder of the Contract Sum when:
3. the Design-Builder has fully performed the Contract except for the Design-Builder’s responsibility to correct Work as provided in Article 11 of the General Conditions and to satisfy other requirements, if any, which extend beyond final payment; and
4. a final Certificate for Payment has been approved by the Agency.

ARTICLE 6 REPRESENTATIVES

1. Agency’s Representative:

Agency designates the individual listed below as its Representative, which individual has the authority and responsibility set forth in Section 2.1 of the General Conditions:

NAME:

TITLE:

ADDRESS:

TELEPHONE:       EMAIL:

1. **Design-Builder’s Representative:**

Design-Builder designates the individual listed below as its Design-Builder’s Representative, which individual has the authority and responsibility set forth in Section 3.2 of the General Conditions:

NAME:

TITLE:

ADDRESS:

TELEPHONE:       EMAIL:

1. Neither the Agency nor the Design-Builder shall change their representatives without ten (10) days written notice to the other party.

ARTICLE 7 DESIGN-BUILDER CERTIFICATION

1. Design-Builder certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Section 7.1:
2. “corrupt practice” means the offering, giving, receiving, or soliciting of anything of value likely to influence the action of a public official in the bidding process or in the Contract execution;
3. “fraudulent practice” means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Agency, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Agency of the benefits of free and open competition;
4. “collusive practice” means a scheme or arrangement between two or more Bidders, with or without the knowledge of Agency, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
5. “coercive practice” means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.
6. Design-Builder makes the following representations for the Agency’s reliance:
7. Design-Builder has examined and carefully studied the Contract Documents and the other related data identified in Article 1.
8. Design-Builder has visited the Site and become familiar with and is satisfied as to the general, local, and site conditions that may affect cost, progress, and performance of the Work.
9. Design-Builder is familiar with and is satisfied as to all federal, state, and local Laws and Regulations that may affect cost, progress, and performance of the Work.
10. Design-Builder has carefully studied all: (1) reports of explorations and tests of subsurface conditions at or contiguous to the Site and all drawings of physical conditions relating to existing surface or subsurface structures at the Site, if any, that have been identified or made available by the Agency and (2) reports and drawings of hazardous environmental conditions, if any, at the Site that have been identified or made available by Agency.
11. Design-Builder is aware of the general nature of work to be performed by the Agency and/or others at the Site that relates to the Work as indicated in the Contract Documents.
12. Design-Builder has considered the information known to the Design-Builder, its construction subcontractors, and its design professional subcontractors; information commonly known to design-builders, and design professionals doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Site-related reports and drawings identified in the Contract Documents, with respect to the effect of such information, observations, and documents on (1) the cost, progress, and performance of the Work; (2) the means, methods, techniques, sequences, and procedures of construction to be employed by Design-Builder, including any specific means, methods, techniques, sequences, and procedures of construction expressly required by the Contract Documents; and (3) Design-Builder’s safety precautions and programs.
13. Based on the information and observations referred to above, Design-Builder does not consider that further examinations, investigations, explorations, tests, studies, or data are necessary for it to enter into this Contract for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract Documents.
14. Design-Builder has given the Agency written notice of all conflicts, errors, ambiguities, or discrepancies that Design-Builder has discovered in the Contract Documents, and the written resolution thereof by the Agency is acceptable to Design-Builder.
15. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
16. Design-Builder’s entry into this Contract constitutes an incontrovertible representation by the Design-Builder that without exception all prices in the Agreement are premised upon performing and furnishing the Work required by the Contract documents.

ARTICLE 8 DESIGN-BUILDERS SCHEDULE

1. The Design-Builder shall prepare a construction schedule in accordance with section 3.11 of the General Conditions; unless, a more detailed schedule is required by the Agency as follows:

*(Check box if applicable to this Contract)*

The Construction Schedule shall be in a detailed precedence-style critical path management (CPM) or primavera-type format satisfactory to the Agency that shall also (1) provide a graphic representation of all activities and events that will occur during performance of the Work; (2) identify each phase of construction and occupancy; and (3) set forth milestone dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents.

1. Upon review by the Agency for conformance with milestone dates and Construction Time, with associated Substantial Completion date, the Construction Schedule shall be deemed part of the Contract Documents and attached to the Agreement as an Exhibit. If returned for non-conformance, the Construction Schedule shall be promptly revised by the Design-Builder in accordance with the recommendations of the Agency and resubmitted. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
2. The Design-Builder shall monitor the progress of the Work for conformance with the requirements of the Construction Schedule and shall promptly advise the Agency of any delays or potential delays. Whenever the Construction Schedule no longer reflects actual conditions and progress of the Work or the Contract Time is modified in accordance with the terms of the Contract Documents, the Design-Builder shall update the Construction Schedule to reflect such conditions.
3. In the event any progress report indicates any delays, the Design-Builder shall propose an affirmative plan to correct the delay, including overtime and/or additional labor, if necessary.
4. In no event shall any progress report constitute an adjustment in the Contract Time, any milestone date, or the Contract Sum unless any such adjustment is agreed to by the Agency and authorized pursuant to Change Order.
5. The Agency’s review of the Design-Builder’s schedule is not conducted for the purpose of either determining its accuracy, completeness, or approving the construction means, methods, techniques, sequences or procedures. The Agency’s review shall not relieve the Design-Builder of any obligations.

ARTICLE 9 DISPUTE RESOLUTION

1. Claims and disputes shall be resolved in accordance with Article 14 of the General Conditions.

ARTICLE 10 TERMINATION OR SUSPENSION

1. The Contract may be terminated by the Agency or the Design-Builder as provided in Article 13 of the General Conditions.
2. The Work may be suspended by the Agency as provided in Article 13 of the General Conditions.

ARTICLE 11 INSURANCE AND BONDS

1. The Agency and Design-Builder shall purchase and maintain insurance, and provide bonds, as set forth.
2. Agency’s Insurance
3. Prior to commencement of the Work, the Agency shall secure the insurance, and provide evidence of the coverage, required under this Section 11.2 and, upon the Design-Builder’s request, provide a copy of the property insurance policy or policies required by Section 11.2.3. The copy of the policy or policies provided shall contain all applicable conditions, definitions, exclusions, and endorsements.
4. Liability Insurance

The Agency shall be responsible for purchasing and maintaining the Agency’s usual general liability insurance.

11.3 Design-Builder’s Insurance

1. General
2. Certificates of Insurance. The Design-Builder shall provide certificates of insurance acceptable to the Agency evidencing compliance with the requirements in this Section 11.3 at the following times: (1) prior to commencement of the Work; (2) upon renewal or replacement of each required policy of insurance; and (3) upon the Agency’s written request. An additional certificate evidencing continuation of commercial liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment and thereafter upon renewal or replacement of such coverage until the expiration of the periods required by Section 11.3.2.1 and Section 11.3.3.1. The certificates will show the Agency as an additional insured on the Design-Builder’s Commercial General Liability and excess or umbrella liability policy or policies. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Design-Builder with reasonable promptness.
3. Deductibles and Self-Insured Retentions. The Design-Builder shall disclose to the Agency any deductible or self-insured retentions applicable to any insurance required to be provided by the Design-Builder.
4. Additional Insured Obligations. To the fullest extent permitted by law, the Design-Builder shall cause the commercial general liability coverage to include the Agency and the Agency’s consultants as additional insureds for claims caused in whole or in part by the Design-Builder’s negligent acts or omissions during the Design-Builder’s operations. The additional insured coverage shall be primary and non-contributory to any of the Agency’s general liability insurance policies and shall apply to both ongoing and completed operations, whether such operations be by the Design-Builder or by a Subcontractor of the Design-Builder or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Agency and the Agency’s consultants, CG 20 32 07 04.
5. A failure by the Agency to either (i) demand a certificate of insurance or written endorsement required by Section 11.3, or (ii) reject a certificate or endorsement on the grounds that it fails to comply with Section 11.3, shall not be considered a waiver of Design-Builder's obligations to obtain the required insurance.
6. Design-Builder’s Required Insurance Coverage
7. The Design-Builder shall purchase and maintain the following types and limits of insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Design-Builder shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 11.2.2 of the General Conditions, for such other period for maintenance of completed operations coverage as specified in the Contract Documents, or unless a different duration is stated below:

1. Commercial General Liability insurance for the Project written on an occurrence form with policy limits of not less than $1,000,000 each occurrence, $1,000,000 general aggregate, $1,000,000 aggregate for products-completed operations hazard, $1,000,000 personal and advertising injury, $50,000 fire damage (any one fire), and $5,000 medical expense (any one person) providing coverage for claims including:
2. damages because of bodily injury, sickness or disease, including occupational sickness or disease, and death of any person;
3. personal injury and advertising injury;
4. damages because of physical damage to or destruction of tangible property, including the loss of use of such property;
5. bodily injury or property damage arising out of completed operations; and
6. the Design-Builder’s indemnity obligations under Section 3.19 of the General Conditions.
7. The Design-Builder’s Commercial General Liability policy under this Section 11.3.2.2 shall not contain an exclusion or restriction of coverage for the following:
8. Claims by one insured against another insured, if the exclusion or restriction is based solely on the fact that the claimant is an insured, and there would otherwise be coverage for the claim.
9. Claims for property damage to the Design-Builder’s Work arising out of the products-completed operations hazard where the damaged Work or the Work out of which the damage arises was performed by a Subcontractor.
10. Claims for bodily injury other than to employees of the insured.
11. Claims for indemnity under Section 3.19 of the General Conditions arising out of injury to employees of the insured.
12. Claims or loss excluded under a prior work endorsement or other similar exclusionary language.
13. Claims or loss due to physical damage under a prior injury endorsement or similar exclusionary language.
14. Claims related to residential, multi-family, or other habitational projects, if the Work is to be performed on such a project.
15. Claims related to roofing, if the Work involves roofing.
16. Claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces, if the Work involves such coatings or surfaces.
17. Claims related to earth subsidence or movement, where the Work involves such hazards.
18. Claims related to explosion, collapse and underground hazards, where the Work involves such hazards.
19. Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Design-Builder, with policy limits of not less than $1,000,000 per accident, for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles along with any other statutorily required automobile coverage.
20. The Design-Builder may achieve the required limits and coverage for Commercial General Liability, Employers Liability, and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided such primary and excess or umbrella insurance policies result in the same or greater coverage as the coverages required under Section 11.3.2.2 and 11.3.2.3, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers. The umbrella policy limits shall not be less than $3,000,000.
21. Workers’ Compensation at statutory limits.
22. Employers’ Liability with policy limits not less than $100,000 each accident, $100,000 each employee, and $500,000 policy limit for claims, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed.
23. Jones Act, and the Longshore & Harbor Workers’ Compensation Act, as required, if the Work involves hazards arising from work on or near navigable waterways, including vessels and docks.
24. If the Design-Builder is required to furnish professional services as part of the Work, the Design-Builder shall procure Professional Liability insurance covering performance of the professional services, with policy limits of not less than $      per claim and $     in the aggregate.
25. Insurance for maritime liability risks associated with the operation of a vessel, if the Work requires such activities, with policy limits of not less than $     per claim and $     in the aggregate.
26. Insurance for the use or operation of manned or unmanned aircraft, if the Work requires such activities, with policy limits of not less than $     per claim and $     in the aggregate.
27. Required Property Insurance
28. The Design-Builder shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk “all-risks” completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Design-Builder’s property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion and thereafter as provided in Section 11.3.3.1.3, unless otherwise provided in the Contract Documents or otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the Agency, Design-Builder, Subcontractors, and Sub-subcontractors in the Project as insureds.
29. Causes of Loss. The insurance required by this Section 11.3.3.1 shall provide coverage for direct physical loss or damage and shall include the risks of fire (with extended coverage), explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, workmanship, or materials. *(Indicate below the cause of loss and any applicable sub-limit.)*

Causes of Loss and Sub-Limit

1. Specific Required Coverages. The insurance required by this Section 11.3.3.1 shall provide coverage for loss or damage to falsework and other temporary structures, and to building systems from testing and startup. The insurance shall also cover debris removal, including demolition occasioned by enforcement of any applicable legal requirements, and reasonable compensation for the Agency’s Consultants and Design-Builder’s services and expenses required as a result of such insured loss, including claim preparation expenses. *(Indicate below the cause of loss and any applicable sub-limit.)*

Causes of Loss and Sub-Limit

1. Unless the parties agree otherwise, upon Substantial Completion, the Agency shall replace the insurance policy required under Section 11.3.3.1 with property insurance written for the total value of the Project.
2. Deductibles and Self-Insured Retentions. If the insurance required by this Section 11.3.3 is subject to deductibles or self-insured retentions, the Design-Builder shall be responsible for all loss not covered because of such deductibles or retentions.
3. Occupancy or Use Prior to Substantial Completion. The Agency’s occupancy or use of any completed or partially completed portion of the Work prior to Substantial Completion shall not commence until the insurance company or companies providing the insurance under Section 11.3.3.1 have consented in writing to the continuance of coverage. The Agency and the Design-Builder shall take no action with respect to partial occupancy or use that would cause cancellation, lapse, or reduction of insurance, unless they agree otherwise in writing.
4. If the Agency requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Design-Builder shall, if possible, include such insurance, and the cost thereof shall be charged to the Agency by appropriate Change Order.
5. Before an exposure to loss may occur, the Design-Builder shall file with the Agency a copy of each policy that includes insurance coverages required by this Section 11.3.3. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project.
6. Design-Builder’s Other Insurance Coverage
7. Insurance selected and described in this Section 11.3.3 shall be purchased from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Design-Builder shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 11.2.2 of the General Conditions, unless a different duration is stated below:

1. The Design-Builder shall purchase and maintain the following types and limits of insurance in accordance with Section 11.3.3.1.
2. Insurance for physical damage to property while it is in storage and in transit to the construction site on an “all-risk” completed value form.
3. Property insurance on an “all-risk” completed value form, covering property owned by the Contractor and used on the Project, including scaffolding and other equipment.
4. Boiler and Machinery Insurance

The Design-Builder shall purchase and maintain boiler and machinery insurance as required, which shall specifically cover such insured objects during installation and until final acceptance by the Agency; this insurance shall include interests of the Agency, Design-Builder, Subcontractors and Sub-subcontractors in the Work, and the Agency and Design-Builder shall be named insureds.

1. Performance Bond and Payment Bond

The Design-Builder shall provide surety bonds, from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located, as follows:

*(Specify type and penal sum of bonds.)*

Type Penal Sum ($0.00)

Payment Bond

Performance Bond

1. Before commencing any services hereunder, the Design-Builder shall provide the Agency with Performance and Payment Bonds, each in an amount not less than the Contract Price set forth in Article 4 of the Agreement. The Surety shall have, at a minimum, a ''Best Rating'' of ''A'' as stated in the most current publication of ''Best's Key Rating Guide, Property-Casualty''. In addition, the Surety shall have a minimum ''Best Financial Strength Category'' of ''Class V", and in no case less than five (5) times the contract amount. The Performance Bond shall be written on Form SE-355, ''Performance Bond'' and the Payment Bond shall be written on Form SE-357, ''Labor and Material Payment Bond'', and both shall be made payable to the Agency.
2. The Performance and Labor and Material Payment Bonds shall:
3. be issued by a surety company licensed to do business in South Carolina;
4. be accompanied by a current power of attorney and certified by the attorney-in-fact who executes the bond on the behalf of the surety company; and
5. remain in effect for a period not less than one (1) year following the date of Substantial Completion or the time required to resolve any items of incomplete Work and the payment of any disputed amounts, whichever time period is longer.
6. Any bonds required by this Contract shall meet the requirements of the South Carolina Code of Laws and Regulations, as amended.

ARTICLE 12 MISCELLANEOUS

1. Assignment of Contract: Unless expressly agreed to elsewhere in the Contract, no assignment by a party hereto of any rights under or interests in the Contract will be binding on the other party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, money that may become due and money that is due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract.
2. Successors and Assigns: The Agency and Design-Builder respectively bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract as a whole, or in part, without written consent of the other and then only in accordance with and as permitted by Regulation 19-445.2180 of the South Carolina Code of Regulations, as amended. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.
3. Severability: Any provision or part of the Contract held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Agency and Design-Builder, who agree that the Contract shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.
4. Economic Conflict of Interest: The Design-Builder shall not have or exercise any official responsibility regarding a public contract in which the Design-Builder, or a business with which he is associated, has an economic interest. A person working for Design-Builder shall not have or exercise any official responsibility regarding a public contract in which the person, an individual with whom he is associated, or his family members have an economic interest. If Design-Builder is asked by any person to violate, or does violate, either of these restrictions, Design-Builder shall immediately communicate such information to the procurement officer. The state may rescind, and recover any amount expended as a result of, any action taken or contract entered in violation of this provision. The terms "business with which he is associated," "economic interest," "family member," "immediate family," "individual with whom he is associated," "official responsibility" and "person" have the meanings provided in Section 8-13-100.
5. Illegal Immigration
6. Design-Builder certifies and agrees that it will comply with the applicable requirements of Title 8, Chapter 14 of the South Carolina Code of Laws and agrees to provide to the State upon request any documentation required to establish either that:
7. Title 8, Chapter 14 is inapplicable both to Design-Builder and its subcontractors or sub-subcontractors; or
8. Design-Builder and its subcontractors or sub-subcontractors are in compliance with Title 8, Chapter 14. Pursuant to SC Code § 8-14-60, "A person who knowingly makes or files any false, fictitious, or fraudulent document, statement, or report pursuant to this chapter is guilty of a felony and, upon conviction, must be fined within the discretion of the court or imprisoned for not more than five years, or both."
9. Design-Builder agrees to include in any contracts with its subcontractors language requiring its subcontractors to:
10. comply with the applicable requirements of Title 8, Chapter 14, and
11. include in their contracts with the sub-subcontractors language requiring the sub-subcontractors to comply with the applicable requirements of Title 8, Chapter 14. (An overview is available at [www.procurement.sc.gov](http://www.procurement.sc.gov))
12. Drug-Free Workplace: The Design-Builder certifies to the Agency that Design-Builder will provide a Drug-Free Workplace, as required by Title 44, Chapter 107 of the South Carolina Code of Laws, as amended.
13. False Claims: According to the SC Code § 16-13-240, "a person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty" of a crime.
14. Non-Indemnification: Any term or condition is void to the extent it requires the State to indemnify anyone. It is unlawful for a person charged with disbursements of state funds appropriated by the General Assembly to exceed the amounts and purposes stated in the appropriations. (SC Code § 11-9-20) It is unlawful for an authorized public officer to enter into a contract for a purpose in which the sum is in excess of the amount appropriated for that purpose. It is unlawful for an authorized public officer to divert or appropriate the funds arising from any tax levied and collected for any one fiscal year to the payment of an indebtedness contracted or incurred for a previous year. (SC Code § 11-1-40)
15. Intellectual Property Indemnity:
16. Without limitation and notwithstanding any other provision in this agreement, Design-Builder shall, upon receipt of notification, defend and indemnify the Indemnitees against all actions, proceedings or claims of any nature (and for all damages, settlement payments, attorneys' fees, costs, expenses, losses or liabilities attributable thereto) by any third party asserting or involving Intellectual Property (IP) rights related to the Instruments of Service. Design-Builder's obligations under this paragraph do not apply to a claim to the extent that:
17. the claim is caused by Design-Builder's compliance with a detailed, exact statement of particulars (such as a statement prescribing materials, dimensions, and quality of work) furnished by the State unless Design-Builder knew its compliance with the State's specifications would infringe an IP right, or
18. the claim is caused by Design-Builder's compliance with a detailed, exact statement of particulars furnished by the State if the State knowingly relied on a third party's IP right to develop the specifications provided to Design-Builder and failed to identify such product to Design-Builder.
19. The State must reasonably cooperate with Design-Builder's defense of such claims or suits and, subject to Title 1, Chapter 7 of the South Carolina Code of Laws, may allow Design-Builder sole control of the defense, so long as the defense is diligently and capably prosecuted. The State may participate in the defense of any action.
20. Design-Builder's obligations under this clause shall survive the termination, cancellation, rejection, or expiration of this Agreement.
21. "IP rights" means any rights protected by the laws governing patents, copyrights, trademarks, trade secrets, or any other proprietary rights. As used in this paragraph, "Indemnitees" means the State (including its instrumentalities, agencies, departments, boards, and political subdivisions), the contractor, the subcontractors at all tiers, and the officers, agents and employees of all the forgoing.
22. Open Trade: During the contract term, including any renewals or extensions, Design-Builder will not engage in the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in SC Code § 11-35-5300.

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| AGENCY: | DESIGN-BUILDER: |
| BY:  *(Signature of Representative)* | BY:  *(Signature of Representative)* |
| PRINT NAME: | PRINT NAME: |
| PRINT TITLE: | PRINT TITLE: |
| DATE: | DATE: |