DESIGN-BUILD CONTRACT
FOR THE
CENTRAL TREATMENT PLANT UPGRADE
AND EXPANSION PROJECT

BID NO. PW04-0006F

between

THE CITY OF TACOMA, WASHINGTON

and

[PROJECT COMPANY]

Dated

_____, 2005

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DESIGN-BUILD CONTRACT
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THIS DESIGN-BUILD CONTRACT FOR THE CENTRAL TREATMENT PLANT UPGRADE AND EXPANSION PROJECT is made and entered into as of this _____ day of _____, 2004 between the City of Tacoma, Washington (the "City") and [PROJECT COMPANY], a [corporation] organized and existing under the laws of the State of _____ and authorized to do business in the State of Washington (the "Company").

RECITALS

(A) The City has determined that it is in its best interests to contract with a private entity to design, construct, start up, acceptance test and obtain governmental approvals for the City's Central Treatment Plant Upgrade and Expansion Project (the "Project").

(B) The City is further authorized under the Revised Code of Washington ("RCW") Chapter 39.10, the Alternative Public Works Contracting Procedures Act (the "Act"), as amended, to undertake alternative public works contracting procedures, including the procurement of design-build contracts, through a competitive process utilizing public solicitation of proposals for design-build services.

(C) Pursuant to the Act, the City held a public hearing on its recommendation to use a design-build project delivery method on July 8, 2003. On July 15, 2003, the City Council in Resolution No. 35903 authorized the use of the design-build process and authorized the Public Works Department to evaluate and recommend a design-build team. The first phase of the procurement process was the issuance of a Request for Qualifications ("RFQ") by the City on August 12, 2003.

(D) Following an evaluation of the statements of qualifications submitted in response to the RFQ based upon the criteria set forth in the RFQ, the City's evaluation committee on October 28, 2003 short-listed four firms deemed to be the most qualified to submit proposals.

(E) On May 5, 2004, the City undertook the second phase of the competitive process by issuing to the proposers a request for proposals to design, construct, start up, acceptance test and obtain governmental approvals for the City's Central Wastewater Treatment Plant Upgrade and Expansion Project (the "RFP"). RFP Addenda were issued on _____. The City provided the four short-listed proposers with reasonable access to the Central Treatment Plant site to allow them the opportunity to conduct such inspections and perform such tests as they deemed necessary to become familiar with the site and to review related documentation prior to submittal of their proposals.

(F) The final proposals were reviewed by the City's selection committee and assigned a score based on the evaluation criteria and scoring method set forth in the RFP.

(G) Based on the evaluations and scoring of the final proposals, the selection committee determined that the proposal submitted by _____ was the most advantageous proposal received in response to the City's RFP.

(H) On _____, 2005, by Resolution No. ____, the City Council authorized the execution and delivery of this Design-Build Contract on behalf of the City.

(I) This Design-Build Contract has been approved by the Department of Ecology on _____ pursuant to the requirements of Section 173-98-060 of the Washington Administrative Code ("WAC").

(J) _____, an affiliate of the Company, will guarantee the performance of the obligations of the Company under this Design-Build Contract pursuant to a guaranty agreement executed concurrently herewith.

(K) Concurrently with the execution of this Design-Build Contract, the Company delivered to the City the Required Development Period Insurance.

(L) The Project will be owned, financed, operated and maintained by the City.

(M) The Project will be designed, constructed, started up, and warrantied by the Company pursuant to the terms of this Design-Build Contract.

(N) The City desires to receive, and the Company desires to provide design and construction services under the terms of this Design-Build Contract.

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

ARTICLE I

DEFINITIONS AND INTERPRETATION

SECTION 1.1. DEFINITIONS. As used in this Design-Build Contract the following terms shall have the meanings set forth below:

"Acceptable Influent" has the meaning set forth in Schedule 4.

"Acceptance" means demonstration in accordance with the terms and conditions of Article VII and Schedules 4 and 11 that the Acceptance Tests have been conducted, the Acceptance Standards have been achieved and the other Acceptance Date Conditions set forth in Section 7.4 have been achieved.

"Acceptance Date" means the date on which Acceptance of the Design-Build Improvements occurs or is deemed to have occurred under Article VII.

"Acceptance Date Conditions" has the meaning specified in Section 7.4.

"Acceptance Standard" means the standards for Acceptance that must be achieved as set forth in Schedules 4 and 11.

"Acceptance Test Procedures and Standards" means the test procedures and standards for Acceptance set forth in Schedules 4 and 11.

"Acceptance Tests" or "Acceptance Testing" means the test, plans, and procedures set forth in Schedule 11 and further detailed in the Company's Acceptance Test Plan to be conducted upon Substantial Completion to demonstrate Acceptance.

"Additional City Assumed Conditions Risks" has the meaning set forth in Section 3.4.

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

"Applicable Law" means (1) any federal, state or local law, code or regulation; (2) any formally adopted and generally applicable rule, requirement, determination, standard, policy, implementation schedule, or other order of any Governmental Body having appropriate jurisdiction; (3) any established interpretation of law or regulation utilized by an appropriate regulatory Governmental Body if such interpretation is documented by such regulatory body and generally applicable; (4) any Governmental Approval; and (5) any consent order or decree, settlement agreement or similar agreement between the City and the United States Environmental Protection Agency (the "EPA"), the Washington State Department of Ecology ("Ecology") or any other Governmental Body, in each case having the force of law and applicable from time to time: (a) to the siting, funding, permitting, design, construction, start-up, staff training, acceptance testing, operation and warranty repairs and replacements of wastewater treatment plants including upgrade and expansions thereof, including the Design-Build Improvements; and (b) to any other transaction or matter contemplated hereby including, without limitation, any of the foregoing which pertain to wastewater treatment, health, safety,

fire, environmental protection, labor relations, conflicts of interest, building codes, the payment of prevailing or minimum wages and non-discrimination.

"Authorized City Representative" means either (1) an engineer employed by the City; (2) a nationally-recognized consulting engineer or firm of engineers hired by the City; or (3) another employee or firm designated by the Contract Administrator, to perform review and monitoring activities on behalf of the City as set forth in this Design-Build Contract, designated as the Authorized City Representative from time to time in writing by the Contract Administrator.

"Bankruptcy Code" means the United States Bankruptcy Code, 11 U.S.C. 101 *et seq.*, as amended from time to time and any successor statute thereto. "Bankruptcy Code" shall also include (1) any similar state law relating to bankruptcy, insolvency, the rights and remedies of creditors, the appointment of receivers or the liquidation of companies and estates that are unable to pay their debts when due, and (2) in the event the Guarantor is incorporated or otherwise organized under the laws of a jurisdiction other than the United States, any similar insolvency or bankruptcy code applicable under the laws of such jurisdiction.

"Base Rate" means the interest rate announced from time to time by Citibank, N.A. or any successor thereto as its "base rate" based on a 365-day year.

"Central Treatment Plant or CTP" means the existing wastewater treatment facility owned and operated by the City of Tacoma and located at 2201 Portland Avenue, Tacoma, Washington 98421.

"Central Treatment Plant Upgrade and Expansion Design-Build Project" or "Project" means the provision of all Development Period Work, Construction Period Work and the Warranty Work.

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

"Change in Law" means any of the following acts, events or circumstances to the extent that compliance therewith materially expands the scope of the obligations of either party hereunder, or materially interferes with, materially delays or materially increases the cost of performing the obligations of either party hereunder:

(a) the adoption, amendment, promulgation, issuance, modification, repeal or written change in administrative or judicial interpretation of any Applicable Law on or after the Contract Date (except as set forth in (iv) below), unless such Applicable Law was on or prior to the Contract Date duly adopted, promulgated, issued or otherwise officially modified or changed in interpretation, in each case in final form, to become effective without any further action by any Governmental Body; or

(b) the order or judgment of any Governmental Body issued on or after the Contract Date (unless such order or judgment is issued to enforce compliance with Applicable Law which was effective as of the Contract Date) to the extent such order or judgment is not the result of willful or negligent action, error or omission or lack of

reasonable diligence of the Company or of the City, whichever is asserting the occurrence of a Change in Law; provided, however, that the contesting in good faith or the failure in good faith to contest any such order or judgment shall not constitute or be construed as such a willful or negligent action, error or omission or lack of reasonable diligence; or

(c) except as provided in (ii), (iii) and (iv) below, the denial of an application for, a delay in the review, issuance or renewal of, or the suspension, termination or interruption of any Governmental Approvals, or the imposition of a term, condition or requirement which is more stringent or burdensome than the Contract Standards in effect as of the Contract Date in connection with the issuance, renewal or failure of issuance or renewal of, any Governmental Approval to the extent that such occurrence is not the result of willful or negligent action, error or omission or a lack of reasonable diligence of the Company or of the City, whichever is asserting the occurrence of a Change in Law; provided, however, that the contesting in good faith or the failure in good faith to contest any such occurrence shall not be construed as such a willful or negligent action or lack of reasonable diligence.

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

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

(ii) the denial of an application for, a delay in the review or approval of (except as provided for in Section 4.4(D)), the suspension, termination or interruption of, the imposition of a term, condition or requirement which is more stringent or burdensome than the Contract Standards in effect on the Contract Date in, or any other acts, events and circumstances with respect to, the Governmental Approvals for which the Company has expressly assumed the permitting risk under Section 5.2;

(iii) any Change in Law (including the issuance of any Governmental Approval, the enactment of any statute, or the promulgation of any regulation) the terms and conditions of which do not impose more stringent or burdensome requirements on the Company than are imposed by the Contract Standards in effect as of the Contract Date;

(iv) adoption by the City of Tacoma of the International Building Code 2003; or

(v) any event that affects generally applicable working conditions or standards that is not specific to the wastewater treatment industry or to the Design-Build Improvements.

[Note to Proposers: Prior to the Contract Date, the Company will have the opportunity to address the cost or other consequences of any Changes in Law that might have occurred subsequent to the date of the proposal and prior to the Contract Date.]

"Change Order" means a written order issued by the City to the Company after the Contract Date requiring a change in the Design-Build Work and not due to Uncontrollable Circumstances.

"City" means the City of Tacoma, Washington, a municipal corporation organized and existing under and by virtue of the laws of the State.

"City Fault" means (1) any breach by the City of its representations, warranties and covenants, all as set forth in this Design-Build Contract (including the untruth of any City representation or warranty herein set forth), and (2) any failure, non-performance or non-compliance by the City with respect to its obligations and responsibilities under this Design-Build Contract to the extent not directly attributable to any Uncontrollable Circumstance.

"City Indemnitee" has the meaning specified in Section 13.3(A).

"City Property" means any structures, improvements, equipment, or systems including but not limited to any fire alarm systems, wastewater and water mains, valves, pumping systems, hydrants, hydrant connections, duct lines, lamps, lampposts, monuments, sidewalks, curbs, trees, lawns, roadways, utilities or any other systems, fixtures, or real or personal property owned, leased, operated, maintained, or occupied by the City.

"Claims Statement" means a verified written statement of each and every alleged claim of any kind whatsoever of the Company and all persons claiming by, through, or under the Company against the City (or the retainage or security maintained by the City under this Design-Build Contract), in any way connected with, or arising out of the Design-Build Work, which sets forth in detail with respect to each such claim:

(a) the total amount of the claim;

(b) a specific and detailed description of all the Company's grounds for the claim, relating the dollar amount claimed to the events giving rise to the claim;

(c) an itemized and detailed statement of the dates, costs, and quantities of labor, material, and other elements included in the claim; and

(d) all other information which the Company deems relevant to the alleged claim.

"Close-Out Requirements" means the Company's obligations for closing-out the Design-Build Work and completing documentation of the Design-Build Work pursuant to this Design-Build Contract (including such matters as submittal of Record Drawings, and manuals; clean-up and removal of construction materials and debris from the Site; and all other matters which this Design-Build Contract requires the Company to do and perform as part of the completion and winding-up of the Company's Design-Build Work obligations, all as more fully described in Schedules 3, 4, 5, 6, 7, 8, 9, 10 and 11).

"Company" means _____, a [corporation] organized and existing under the laws of _____, and its permitted successors and assigns.

"Company Fault" means (1) any breach by the Company of its representations, warranties and covenants, all as set forth in this Design-Build Contract (including the untruth

of any Company representation or warranty herein set forth), and (2) any failure, non-performance or non-compliance by the Company with respect to its obligations and responsibilities under this Design-Build Contract to the extent not directly attributable to any Uncontrollable Circumstance.

"Company Indemnitee" has the meaning specified in Section 13.3(B).

"Concrete Repair Allowance" means $1,650,000 as set forth in Section 8.4.

"Concrete Repair Allowance Item" has the meaning set forth in Section 8.4.

"Construction Commencement Date" means the first date on which all of the Construction Commencement Date Conditions shall be satisfied or waived as agreed to in writing by the parties and the Notice to Proceed with construction of the Design-Build Improvements is issued.

"Construction Commencement Date Conditions" has the meaning set forth in Section 4.3 hereof.

"Construction Period" means the period from and including the Construction Commencement Date through the date of Final Completion.

"Construction Period Price Escalation Index" has the meaning specified in Schedule 16 hereto.

"Construction Period Work" means all work required to be conducted during the Construction Period, including successful completion of design, construction, Acceptance Testing, preparation of O&M manual and other plans, and completion of staff training.

"Construction Subcontract" has the meaning specified in subsection 10.5(F).

"Construction Subcontractor" means _____, the lead Subcontractor(s) to the Company for the construction of the Design-Build Improvements.

"Contract Administration Memorandum" has the meaning set forth in subsection 10.2(B).

"Contract Administrator" means the Assistant Division Manager for the Tacoma Department of Public Works, Eric C. Johnson, or such other representative as shall be designated in writing by the Public Works Director.

"Contract Date" means the date this Design-Build Contract is executed and delivered by the parties hereto.

"Contract Services" means the Design-Build Work and the Warranty Work.

"Contract Standards" means the standards, terms, conditions, methods, techniques and practices imposed or required by: (1) Applicable Law; (2) the Design Requirements; (3) the Supplemental Technical Information; (4) Good Engineering and Construction Practice; (5) Good Industry Practice; (6) the DB Quality Management Plan; (7) the Operation and Maintenance Manual; (8) applicable written equipment manufacturers' specifications; (9) applicable Insurance Requirements; (10) the approved amended Facilities Plan; and (11) any other standard, term, condition or requirement specifically provided in this

Design-Build Contract to be observed by the Company. Subsection 1.2(O) shall govern issues of interpretation related to the applicability and stringency of the Contract Standards.

"Cost Substantiation" has the meaning specified in Section 15.5.

"CTP" means the City of Tacoma Central Treatment Plant.

"DB Quality Management Plan" means the Company's plan for quality assurance and quality control in implementing the Design-Build Work as set forth in Schedule 10, and as amended in accordance with Section 4.1(A)(21).

"Delegation Agreement" means the agreement between the City and the Department of Ecology dated September 19, 2003 pursuant to which the City is delegated certain responsibilities for design review from the Department of Ecology under WAC 173-98-060.

"Deliverable Material" means all or any part of any plan, drawing, design, specification, shop drawing, sample, report, software, study, survey, parts, lists, papers, or data, regardless of medium, required by the Schedules or otherwise by this Design-Build Contract to be prepared by or for the Company for delivery to the City as part of the Design-Build Work.

"Department" means the Public Works Department, a government agency of the City of Tacoma. The Director of the Department may appoint authorized representatives to act on its behalf and in its name for the purpose of this Contract.

"Department of Ecology" or "Ecology" means the Washington State Department of Ecology or any predecessor or successor agency.

"Design-Build Contract" or "Contract" means this Design-Build Contract for the Central Treatment Plant Upgrade and Expansion Project between the Company and the City, including the Schedules and Transaction Forms attached hereto, as the same may be amended or modified from time to time in accordance herewith.

"Design-Build Improvements" means the improvements to the CTP to be designed, constructed, installed, started up, tested and warrantied by the Company in accordance with the Design Requirements.

"Design-Build Price" has the meaning specified in subsection 8.2(A).

"Design-Build Work" means everything required to be furnished and done for and relating to the design and construction of the Design-Build Improvements by the Company pursuant to this Design-Build Contract during the Design-Build Period. Design-Build Work includes the employment and furnishing of all labor, materials, equipment, supplies, tools, scaffolding, transportation, Utilities, insurance, temporary facilities and other things and services of every kind whatsoever necessary for the full performance and completion of the Company's design, engineering, permitting, plan preparation, procurement, construction, start-up, Acceptance Testing, obtaining Governmental Approvals and related obligations with respect to the construction of the Design-Build Improvements under this Design-Build Contract, including all completed structures, assemblies, fabrications, acquisitions and installations,

connection and upgrades to utility infrastructure, if any, all commissioning and testing, and all of the Company's personnel training, reporting, plan preparation, administrative, accounting, recordkeeping, notification and similar responsibilities of every kind whatsoever under this Design-Build Contract pertaining to such obligations. Design-Build Work shall include all contract coordination work required to be performed by the Company in connection with the new electrical substation as detailed in Section 6.4.21 of Schedule 6. A reference to Design-Build Work shall mean any part and all of the Design-Build Work unless the context otherwise requires, and shall include all Extra Design-Build Work authorized by Change Order.

"Design Documents" means the Company's plans, technical specifications, drawings, bluelines and other design documents prepared in connection with the Design-Build Work.

"Design Requirements" means the design and performance requirements for the Design-Build Improvements set forth in Schedules 4, 5, 6 (except those items designated as "Supplemental Technical Information"), 7 and 8 as the same may be changed or modified in accordance herewith.

"Design Subcontract" has the meaning set forth in subsection 10.5(E).

"Development Period" means the period from and including the Contract Date to the Construction Commencement Date.

"Development Period Responsibilities" means the Company's responsibilities with respect to the Development Period under Section 4.1 and/or the City's responsibilities with respect to the Development Period under Section 4.2 hereof.

"Development Period Work" means everything required to be furnished and done for and relating to the Design-Build Improvements by the Company pursuant to this Design-Build Contract during the Development Period. "Development Period Work" shall mean "any part and all of the "Development Period Work" unless the context otherwise requires.

"Disputed Work" has the meaning set forth in subsection 6.6(H).

"Drawings" means the Company's preliminary drawings and plans for the Design-Build Improvements submitted in response to the RFP and set forth in Schedule 6.

"Electronic O&M Manual Allowance" means $500,000 as set forth in Section 8.4.

"Electronic O&M Manual Allowance Item" has the meaning forth in Section 8.4.

"Encumbrances" means any Lien, lease, mortgage, security interest, charge, judgment, judicial award, attachment or encumbrance of any kind with respect to the Design-Build Improvements, other than Permitted Encumbrances.

"Engineer" means a professional engineer licensed in the State who is in responsible charge for a portion of or all of the Company's Design-Build Work.

"EPA" means the United States Environmental Protection Agency and any successor agency.

"Event of Default" means, with respect to the Company, those items specified in Section 11.2 and, with respect to the City, those items specified in Section 11.3.

"Extension Period" means the period commencing on the day after the Scheduled Acceptance Date and ending 180 days following the Scheduled Acceptance Date, or in the event of one or more delays caused by Uncontrollable Circumstances, Change Orders or City Fault occurring during such period, the date which is the next business day following the date calculated by adding to the Scheduled Acceptance Date the aggregate number of days of such delay.

"Extra Design-Build Work" means any Design-Build Work that is City-directed pursuant to Section 6.6, and that is in addition to the Design-Build Work originally required hereunder.

"Extra Payment" means payment due the Company for Extra Design-Build Work, computed in accordance with subsection 6.6(B) hereof.

"Facilities Plan" means the plan for the improvement of the CTP which was approved by the Department of Ecology in March, 2002, as such plan may be amended and approved in accordance with the requirements of Applicable Law.

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

"Final Completion" means completion of the Design-Build Work in compliance with the Design Requirements, the Supplemental Technical Information and the requirements of Section 7.8.

"Final Punch List" has the meaning specified in subsection 7.2(B).

"Fixed Construction Period Price" means the portion of the Fixed Design-Build Price [as proposed on Proposal Forms 7C and 7D] which includes the price for all Design-Build Work to be performed during the Construction Period and all Warranty Work (but does not include the Fixed Development Price or the Project Allowance), in the amount of [$] as such amount may be adjusted by Change Orders or Uncontrollable Circumstance, which amount is subject to escalation pursuant to subsection 8.2(C)(4).

"Fixed Design-Build Price" has the meaning specified in subsection 8.2(B) [as proposed on Proposal Form 7A.]

"Fixed Design-Build Price Adjustments" has the meaning specified in Section 8.2(C).

"Fixed Development Price" has the meaning set forth in subsection 8.3(A) [as proposed on Proposal Form 7B.]

"Good Engineering and Construction Practice" means those methods, techniques, standards and practices which, at the time they are to be employed and in light of

the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good design, engineering, equipping, installation, construction and commissioning practices for the design, construction and improvement of capital assets in the municipal wastewater treatment industry as followed in the northwestern region of the United States.

"Good Industry Practice" means the methods, techniques, standards and practices which, at the time they are to be employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good operation, maintenance, repair, replacement and management practices in the municipal wastewater treatment industry as observed in the northwestern region of the United States.

"Governmental Approvals" means all orders of approval, permits, licenses, authorizations, consents, certifications, exemptions, rulings, entitlements and approvals issued by a Governmental Body of whatever kind and however described which are required under Applicable Law to be obtained or maintained by any person with respect to the Design-Build Work.

"Governmental Body" means any federal, state, regional or local legislative, executive, judicial or other governmental board, agency, authority, commission, administration, court or other body, or any official thereof having jurisdiction or authority.

"Guarantor" means _____, a [corporation] organized and existing under the laws of _____, and its permitted successors and assigns.

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

"Hazardous Material" means any waste, substance, object or material deemed hazardous under Applicable Law including, without limitation, "hazardous substances" as defined under CERCLA and "hazardous waste" as defined under RCW.

"Incentive Payments" means the payments which may be made to the Company pursuant to Section 8.11 which payments shall not exceed $350,000 in the aggregate.

"Independent Engineer" means an engineer or firm of engineers having experience with respect to the design, construction, testing, operation and maintenance of water treatment systems, which is selected by the parties for mediation purposes pursuant to Section 7.5(B) or 12.2.

"Instrumentation and Controls Allowance" means $2,700,000 as set forth in Section 8.4.

"Instrumentation and Controls Allowance Item" has the meaning set forth in Section 8.4.

"Insurance Requirement" means any rule, regulation, code, or requirement issued by any insurance company which has issued a policy of Required Design-Build Period

Insurance under this Design-Build Contract, as in effect during the Term of this Design-Build Contract, compliance with which is a condition to the effectiveness of such policy.

"Interpretive Center Allowance" means $250,000 as set forth in Section 8.4.

"Interpretive Center Allowance Item" has the meaning set forth in Section 8.4.

"Lead Design Firm" means _____, the primary engineering firm contracting with the Company and responsible for the design of the Design-Build Improvements.

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

"Letter of Credit" has the meaning specified in subsection 14.3(B). **[Note to Proposers: A Letter of Credit will not be required unless a Material Decline in the Guarantor's Credit Standing occurs as set forth in Section 14.1.]**

"Lien" means any and every lien against the Design-Build Improvements or against any monies due or to become due from the City to the Company under this Design-Build Contract, for or on account of the Design-Build Work, including mechanics', materialmen's, laborers' and lenders' liens.

"Loss-and-Expense" means any and all actual loss, liability, forfeiture, obligation, damage, fine, penalty, judgment, deposit, charge, Tax, cost or expense, including all Fees and Costs, except as explicitly excluded or limited under any provision of this Design-Build Contract.

"Material Decline in Guarantor's Credit Standing" has the meaning specified in subsection 14.1(B).

"MBE" means a Minority Business Enterprise as defined in 40 CFR 35.6015(26) of the Code of Federal Regulations, as amended from time to time.

"Mediator" means an Independent Engineer or any other person serving as a mediator of disputes hereunder pursuant to Section 12.2.

"Minimum Financial Criteria" has the meaning set forth in Schedule 23.

"Monthly Progress Report" has the meaning set forth in subsection 6.3(F).

"Moody's" means Moody's Investors Service Inc., or any of its successors and assigns. If such corporation shall be dissolved or liquidated or shall no longer perform the functions of a securities rating agency, "Moody's" shall be deemed to refer to any other nationally-recognized securities rating agency designated by the City.

"Non-Binding Mediation" means the voluntary system of dispute resolution established by Section 12.2 for the resolution of any dispute arising under this Design-Build Contract.

"Non-Design Influent" means influent that is not Acceptable Influent.

"Notice to Proceed" means a notice issued by the City on the Construction Commencement Date which authorizes the Company to commence construction of the Design-Build Work, all as provided in subsection 6.2(A).

"Operation and Maintenance Manual" means the manual and related computer based applications prepared by the Company containing detailed standard operating and maintenance procedures and other specific instructions, policies, directives, routines, schedules and other matters relating to the operation and maintenance of the Design-Build Improvements, developed and maintained as required by subsection 7.1(C) and Schedule 9.

"Operations Control Center Allowance" means $100,000 as set forth in Section 8.4.

"Operations Control Center Allowance Item" has the meaning set forth in Section 8.4.

"Payment Bond" means the payment bond required to be provided by the Company in accordance with Section 14.2 and in substantially the form set forth in the Transaction Forms.

"Peak Wet Weather Flow Event" means receipt at the CTP of influent flow in excess of 75 mgd resulting from a storm event or events.

"Performance Bond" means the performance bond required to be provided by the Company in accordance with Section 14.2 and substantially in the form set forth in the Transaction Forms.

"Performance Warranty" means the warranty by the Company that the performance of the Design-Build Improvements will meet the standards set forth in Schedule 4 during the Performance Warranty Period.

"Performance Warranty Period" means the period during which the Company warrants the Peak Wet Weather Flow Event treatment performance of the Design-Build Improvements as set forth in Section 9.1(A).

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

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

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

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

(4) servitudes, licenses, easements, encumbrances, restrictions, rights-of-way and rights in the nature of easements or similar charges which will not in the aggregate materially and adversely impair the construction and operation of the Design-Build Improvements by the Company;

(5) zoning and building ordinances, municipal charter provisions and regulations, and restrictive covenants, which do not materially interfere with the construction and operation of the Design-Build Improvements by the Company;

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

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

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

"Phase I Environmental Assessment" means the Central Treatment Plant Phase I Environmental Site Assessment (Brown & Caldwell) dated April, 2004.

"Pre-Existing Environmental Condition" means, and is limited to, (1) the presence anywhere in, on or under the Site of underground storage tanks, (2) the presence in any existing structures or pipes of asbestos-containing material or lead based paint, and (3) the presence of any other Regulated Substances anywhere in, on or under the Site (including presence in surface water, groundwater, soils or subsurface strata), in each case, which is beyond that as identified as confirmed or suspected in Schedule 1, Section 1.2.2.5.

"Project" means the provision of all Development Period Work, Construction Period Work, and Warranty Work.

"Project Allowance" means an allowance totaling $5,700,000 representing the maximum costs for the Project Allowance Items and comprising the Instrumentation and Controls Allowance, the Operations Control Center Allowance, the Electronic O&M Manual Allowance, the Interpretive Center Allowance; the Yard Water/Spray Water Allowance; the Site Lighting Allowance; and the Concrete Repair Allowance.

"Project Allowance Items" means those items [identified on Proposal Forms 7C and 7D] included in the Design-Build Work the cost for which will be agreed upon following the Contract Date including the Instrumentation and Controls Allowance, the Operations Control Center Allowance, the Electronic O&M Manual Allowance; the Interpretive Center Allowance; the Yard Water/Spray Water Allowance; the Site Lighting Allowance; and the Concrete Repair Allowance.

"Project Manager" has the meaning set forth in subsection 10.4(B).

"Project Warranties" means the Company's warranties with respect to the Design-Build Work as provided in Article IX.

"Qualified Commercial Bank" has the meaning set forth in subsection 14.3(A).

"Rating Service" means Moody's or Standard & Poor's.

"RCW" means the Revised Code of Washington, as amended from time to time.

"Record Drawings" means detailed drawings showing how the Design-Build Work was actually constructed, including any deviations from the permitted plans and specifications, and meeting the minimum requirements set forth in Schedule 12.

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

"Reimbursable Expenses" has the meaning set forth in subsection 4.4(B).

"Required Construction Period Insurance" has the meaning specified in Schedule 18.

"Required Development Period Insurance" means the insurance which the Company must provide prior to the Contract Date and maintain during the Development Period as set forth in Schedule 18.

"Required Insurance" means the Required Development Period Insurance and the Required Construction Period Insurance as set forth in Schedule 18.

"Requisition" means the form accepted by the Authorized City Representative which is to be used by the Company in requesting progress or final payments for the Design-Build Work, and which is to be accompanied by such supporting documentation as required by subsection 8.5(B).

"Response Action" means any action taken in the investigation, removal, confinement, remediation or cleanup of a release of any Regulated Substance. "Response Actions" include, without limitation, any action which constitutes a "removal", "response", or "remedial action" as defined by Section 101 of CERCLA.

"RFP" means the City's Request for Proposals for the Central Treatment Plant Upgrade and Expansion Design-Build Project, issued by the City of Tacoma on May 5, 2004, as amended from time to time.

"SBRA" means Small Business in Rural Areas as such term is defined in 15 U.S.C. § 653 and implementing authorities.

"Schedule" means any of the schedules and, as applicable, any attachments thereto, that are appended to this Design-Build Contract and identified as such in the Table of Contents.

"Scheduled Acceptance Date" means the day ____ [To be proposed on Proposal Form 10B] consecutive calendar days following the Scheduled Construction Commencement Date or, in the event of one or more delays caused by Uncontrollable Circumstances or City-directed Change Orders occurring during the Construction Period, the date which is the next calendar day following the date calculated by adding to ____ [the number of days stated above] the aggregate number of days of such delay. Any such extension in the Scheduled Acceptance Date shall be evidenced by a Contract Administration Memorandum or Change Order, as appropriate.

"Scheduled Construction Commencement Date" means the day _____ [To be proposed on Proposal Form 10A] consecutive calendar days following the Contract Date, or, in the event of one or more delays caused by Uncontrollable Circumstances or City-directed Change Orders occurring during the Development Period, the date which is the next calendar day following the date calculated by adding to _____ [the number of days stated above], the aggregate number of days of such delay. Any such extension in the Scheduled Construction Commencement Date shall be evidenced by a Contract Administrative Memorandum or a Change Order, as appropriate.

"Schedule of Values" means the detailed itemized list that establishes the value or cost of each detailed part of the Design-Build Work, relating to the Fixed Construction Period Price and which is used as the basis for preparing progress payments and is in the form required by Schedule 15.

"Security Instruments" means the Guaranty Agreement, the Performance Bond, the Payment Bond and the Letter of Credit (if required).

"Senior Supervisors" has the meaning specified in subsection 10.3(A).

"Site" means the real property owned by the City currently occupied by the Central Treatment Plant and generally referred to as the Central Treatment Plant site on which the Design-Build Improvements will be constructed, as more particularly described in Schedule 1.

"Site Lighting Allowance" means $200,000 as set forth in Section 8.4.

"Site Lighting Allowance Item" has the meaning set forth in Section 8.4.

"Site Related Documents" means those documents listed in Schedule 1; Exhibit 1-1.

"Specified Site Conditions" means, and is limited to, the presence at the Site of: (1) subsurface structures, materials or conditions having historical, archaeological, religious or similar significance; (2) any man-made object or structure; (3) functioning subsurface structures used by Utility providers on, underneath, near or adjacent to the Site; (4) any designated wetland, stream, shoreline or other critical area regulated under Applicable Law; (5) any habitat of an endangered or protected species as provided in Applicable Law; and (6) isolated subsurface geotechnical and soils conditions that both, (a) differ significantly from surrounding materials and (b) would require substantially different foundation types or removal and replacement with more structurally suitable materials, in each case, which

condition could not have been reasonably anticipated based upon the information disclosed to the Company in the Site Related Documents or information otherwise disclosed to the Company as of the Contract Date.

"SRF Loan Agreement" means the loan agreement regarding the State Revolving Fund (SRF) loan from the Department of Ecology to the City to partially fund the Project as set forth in Schedule 20.

"Standard & Poor's" means Standard & Poor's Rating Services, a division of The McGraw-Hill Companies, Inc., or any of its successors and assigns. If such corporation shall be dissolved or liquidated or shall no longer perform the functions of a securities rating agency, "Standard & Poor's" shall be deemed to refer to any other nationally-recognized securities rating agency designated by the City.

"Start-up and Testing Approvals" has the meaning set forth in subsection 7.3(C).

"State" means the State of Washington.

"Subcontract" means an agreement or purchase order by the Company, or a Subcontractor to the Company, as applicable.

"Subcontractor" means every person (other than employees of the Company) employed or engaged by the Company or any person directly or indirectly in privity with the Company (including all subcontractors and every sub-subcontractor of whatever tier) for any portion of the Design-Build Work, whether for the furnishing of labor, materials, equipment, supplies, services or otherwise.

"Substantial Completion" has the meaning specified in Section 7.2.

"Supplemental Technical Information" means those portions of the Company's technical proposal incorporated into the Technical Specifications set forth in Schedule [6] which are so designated.

"Surety" means the surety company issuing the Performance Bond or the Payment Bond.

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

"Technical Specifications" means the Design Requirements and the Supplemental Technical Information.

"Technology Supply Agreement" shall mean the Technology Supply Agreement of _____ substantially in the form attached hereto as a Transaction Form. [if applicable].

"Term" means the time period during which the obligations under this Design-Build Contract are to be performed and shall begin on the Contract Date and end on the Warranty Completion Date.

"Termination Date" means the last day of the Term of this Design-Build Contract resulting from a termination under Article XI.

"Transaction Form" means any of the Transaction Forms appended to this Design-Build Contract and identified as such in the Table of Contents.

"Uncontrollable Circumstance" means any act, event or condition that is beyond the reasonable control of the party relying thereon as justification for not performing an obligation or complying with any condition required of such party under this Design-Build Contract, and that by itself or in combination with other acts, events or circumstances beyond the control of such party, materially expands the scope of the obligations of either party hereunder, materially interferes with, materially delays or materially increases the cost of performing the obligations of either party hereunder, to the extent that such act, event or condition is not the result of the willful or negligent act, error or omission, failure to exercise reasonable diligence, or breach of this Design-Build Contract on the part of such party.

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

(a) a Change in Law, except as otherwise provided in this Design-Build Contract;

(b) the existence of a Pre-Existing Environmental Condition, except as otherwise provided in Section 3.6;

(c) the existence of a Specified Site Condition;

(d) the occurrence of Additional City Assumed Conditions Risks;

(e) naturally occurring events (except weather conditions reasonably anticipated for the City) such as landslides, underground movement, earthquakes, fires, tornadoes, hurricanes, floods, lightning, epidemics and other acts of God;

(f) explosion, terrorism, sabotage or similar occurrence, acts of a declared public enemy, extortion, war, blockade or insurrection, riot or civil disturbance;

(g) labor disputes, except labor disputes involving employees of the Company, its Affiliates, or Subcontractors which affect the performance of the Design-Build Work (provided, however, that the Company shall be afforded schedule relief only for labor disputes affecting those Subcontractors which are equipment fabricators or transporters);

(h) the failure of any Subcontractor (other than the Company, the Guarantor or any Affiliate of either) to furnish services, materials, chemicals or equipment on the dates agreed to, but only if such failure is the result of an event which would constitute an Uncontrollable Circumstance if it affected the Company directly, and the Company is not able after exercising all reasonable efforts to timely obtain substitutes;

(i) the failure of any appropriate Governmental Body or private utility having operational jurisdiction in the area in which the Design-Build Improvements is

located to provide and maintain Utilities to the Design-Build Improvements which are required for the performance of this Design-Build Contract;

(j) the preemption, confiscation, diversion, destruction or other interference in possession or performance of materials or services by a Governmental Body in connection with a public emergency or any condemnation or other taking by eminent domain of any material portion of the Design-Build Improvements;

(k) a violation of Applicable Law by a person other than the affected party or its Subcontractors;

(l) the receipt of Non-Design Influent;

(m) with respect to the Company, any City Fault and City-directed Change Orders not due to Company Fault;

(n) with respect to the City, any Company Fault; or

(o) the failure of the new electrical substation and related infrastructure to be operational by the Scheduled Acceptance Date.

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

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

(b) changes in interest rates, inflation rates, wage rates, insurance premiums, commodity prices, currency values, exchange rates or other general economic conditions;

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

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

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

(f) weather conditions reasonably anticipated for the City;

(g) any and all surface, subsurface and other conditions affecting the Site, which may increase costs of performing or cause delay in the performance of the Design-Build Work, including particularly any subsurface geotechnical and groundwater conditions, except those constituting Pre-Existing Environmental Conditions, Specified Site Conditions and Additional City Assumed Conditions Risks;

(h) any act, event, circumstance or Change in Law occurring outside of the United States;

(i) mechanical failure of equipment used or supplied by the Company to the extent not resulting from a condition that is listed in the "Inclusions" section of this definition;

(j) the accuracy or inaccuracy of any as-built drawings provided by the City relating to above ground elements of the CTP which could have been verified prior to the Contract Date without excavations, cutting through equipment or structures, draining or removing materials from equipment or structures or unreasonably materially interfering with the operations of the CTP;

(k) labor disputes involving employees of the Company, its Affiliates, or its Subcontractors;

(l) any impact of prevailing wage or similar law, customs or practices on the Company's costs;

(m) the failure of the City in its governmental capacity to approve any design submittals due to its sole judgment that such submittal does not comply with the standard against which it is required to undertake the review;

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

(o) power outages;

(p) a Change in Law pertaining to Taxes (except a Change in Law which imposes a State or local Tax on the private provision of water treatment services, or the imposition of a new State Tax, or an increase or decrease in the rate of the local Tax currently imposed on building materials used in the construction of the Design-Build Improvements or imposed for the use of the City's sewers);

(q) the receipt of influent which is not Non-Design Influent; or

(r) failure of the new electrical substation to be completed and operational unless such failure itself is due to any circumstance that constitutes an Uncontrollable Circumstance.

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

"Warranty Completion Date" means the date that the Company's obligations set forth in Article IX are completed.

"Warranty Work" means everything to be provided and completed and relating to the Design-Build Improvements that is required by the warranties contained in Article IX.

"WBE" means a Woman's Business Enterprise as defined in 40 CFR 35.6015(54) of the Code of Federal Regulations as amended from time to time.

"Yard Water/Spray Water Allowance" means $300,000 as set forth in Section 8.4.

"Yard Water/Spray Water Allowance Item" has the meaning set forth in Section 8.4.

SECTION 1.2. INTERPRETATION. In this Design-Build Contract, notwithstanding any other provision hereof:

(A) References Hereto. The terms "hereby," "hereof," "herein," "hereunder" and any similar terms refer to this Design-Build Contract; and the term "hereafter" means after, and the term "heretofore" means before, the Contract Date.

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

(C) Persons. Words importing persons include firms, companies, associations, joint ventures, general partnerships, limited partnerships, limited liability corporations, trusts, business trusts, corporations and other legal entities, including public bodies, as well as individuals.

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

(E) Entire Contract. This Design-Build Contract contains the entire agreement between the parties hereto with respect to the transactions contemplated by this Design-Build Contract. Without limiting the generality of the foregoing, this Design-Build Contract shall completely and fully supersede all other understandings and agreements among the parties with respect to such transactions including those contained in the RFP, the proposal of the Company submitted in response thereto, and any amendments or supplements to the RFP or the proposal.

(F) Technical Specifications. The Technical Specifications are intended to include the basic design principles, concepts and requirements for the Design-Build Work but do not include the final, detailed design, plans or specifications or indicate or describe each and every item required for full performance of the physical Design-Build Work and for achieving Acceptance. The Company agrees to prepare all necessary and required, complete and detailed designs, plans, drawings and specifications and to furnish and perform, without additional compensation of any kind, all Design-Build Work in conformity with the Technical Specifications and the final designs, plans, drawings and specifications based thereon. The Company further agrees that it shall not have the right to bring any claim whatsoever against the City or any of its consultants or subcontractors, arising out of any design, drawings or documents (except those which are included in the definition of Additional City Assumed

Change of Conditions Risks), specifications or Design Requirements included in the RFP or otherwise made available during the procurement process.

(G) Standards of Workmanship and Materials. Any reference in this Design-Build Contract to materials, equipment, systems or supplies (whether such references are in lists, notes, specifications, schedules, or otherwise) shall be construed to require the Company to furnish the same in accordance with the grades and standards therefor indicated in this Design-Build Contract including the Contract Standards and Schedules 6, 7, 8 and 10. Where this Design-Build Contract does not specify any explicit quality or standard for construction materials or workmanship, the Company shall use only workmanship and new materials of a quality consistent with that of construction workmanship and materials specified elsewhere in the Technical Specifications, and the Technical Specifications are to be interpreted accordingly.

(H) Technical Standards and Codes. References in this Design-Build Contract to all professional and technical standards, codes and specifications are to the most recently published professional and technical standards, codes and specifications of the institute, organization, association, authority or society specified, all as in effect as of the Contract Date. Unless otherwise specified to the contrary, (1) all such professional and technical standards, codes and specifications shall apply as if incorporated in the Technical Specifications and (2) if any material revision occurs, to the Company's knowledge, after the Contract Date, and prior to completion of the applicable Design-Build Work, the Company shall notify the City. If so directed by the City, the Company shall perform the applicable Design-Build Work in accordance with the revised professional and technical standard, code, or specification as long as the Company is compensated, subject to Cost Substantiation, for any additional cost or expense attributable to any such revision.

(I) Liquidated Damages. This Design-Build Contract provides for the payment by the Company of liquidated damages in certain circumstances of non-performance, breach or default. Each party agrees that the City's actual damages in each such circumstance would be difficult or impossible to ascertain (particularly with respect to the public harm that could occur as a result of such non-performance, breach or default of the Company), and that the liquidated damages provided for herein with respect to each such circumstance are intended to place the City in the same economic position as it would have been in had the circumstance not occurred. Except where additional remedies are otherwise specifically provided for in this Design-Build Contract, such liquidated damages shall constitute the only damages payable by the Company to the City in such circumstances of non-performance, breach or default, regardless of legal theory. The parties acknowledge and agree that such additional remedies are intended to address harms and damages which are separate and distinct from those which the liquidated damages are meant to remedy. The amounts of the liquidated damages have been determined taking into account, among other things, cost savings which a party might realize as a result of the circumstance resulting in the requirement to pay liquidated damages, and any such savings shall not mitigate or off-set the requirement of a party to pay the full amount of such liquidated damage.

(J) Causing Performance. A party shall itself perform, or shall cause to be performed, subject to any limitations specifically imposed hereby with respect to

Subcontractors or otherwise, the obligations affirmatively undertaken by such party under this Design-Build Contract.

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

(L) Assistance. The obligations of a party to cooperate with, to assist or to provide assistance to the other party hereunder shall be construed as an obligation to use the party's personnel resources to the extent reasonably available in the context of performance of their normal duties, and not to incur material additional overtime or third party expense unless requested and reimbursed by the assisted party.

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

(N) Good Industry Practice and Good Engineering and Construction Practice. Good Industry Practice and Good Engineering and Construction Practice shall be utilized hereunder, among other things, to implement and in no event displace or lessen the stringency of, the Contract Standards. In the event that, over the course of the Term of this Design-Build Contract, Good Industry Practice or Good Engineering and Construction Practice evolves, the Company shall comply with such evolved Good Industry Practice and Good Engineering and Construction Practice at its cost and expense.

(O) Applicability and Stringency of Contract Standards. The Company shall be obligated to comply only with those Contract Standards which are applicable in any particular case. Where more than one Contract Standard applies to any particular performance obligation of the Company hereunder, each such applicable Contract Standard shall be complied with. In the event there are different levels of stringency among such applicable Contract Standards, the most stringent of the applicable Contract Standards shall govern.

(P) Delivery of Documents in Digital Format. In this Design-Build Contract, the Company is obligated to deliver reports, records, designs, plans, drawings, specifications, proposals and other documentary submittals in connection with the performance of its duties hereunder. The Company agrees that all such documents shall be submitted to the City as to form and number as required by the applicable Schedules hereto. In the event that a conflict exists between the signed or the signed and stamped hard copy of any document and the digital copy thereof, the signed or the signed and stamped hard copy shall govern.

(Q) Severability. If any clause, provision, subsection, Section or Article of this Design-Build Contract shall be ruled invalid by any court of competent jurisdiction, then the parties shall: (1) promptly negotiate a substitute for such clause, provision, subsection, Section or Article which shall, to the greatest extent legally permissible, effect the intent of the parties in the invalid clause, provision, subsection, Section or Article; (2) if necessary or

desirable to accomplish item (1) above, apply to the court having declared such invalidity for a judicial construction of the invalidated portion of this Design-Build Contract; and (3) negotiate such changes in substitution for or addition to the remaining provisions of this Design-Build Contract as may be necessary in addition to and in conjunction with items (1) and (2) above to effect the intent of the parties in the invalid provision. The invalidity of such clause, provision, subsection, Section or Article shall not affect any of the remaining provisions hereof, and this Design-Build Contract shall be construed and enforced as if such invalid portion did not exist.

(R) Drafting Responsibility. Neither party shall be held to a higher standard than the other party in the interpretation or enforcement of this Design-Build Contract as a whole or any portion hereof based on drafting responsibility.

(S) No Third-Party Rights. This Design-Build Contract is exclusively for the benefit of the City and the Company and shall not provide any third parties (with the exception of the rights of any third-party City or Company Indemnitees as expressly set forth in Section 13.3, and the State of Washington who shall be a third party beneficiary to this Contract) with any remedy, claim, liability, reimbursement, cause of action or other rights.

(T) References to Days. All references to days herein are references to calendar days unless otherwise expressly stated.

(U) References to Include. All references to "include" or "including" herein shall be deemed to be followed by the words "but not be limited to" or "without limitation" or words of similar import.

(V) References to Applicable Law. All references to Applicable Law here shall be construed as including all Applicable Law provisions consolidating, amending or replacing the Applicable Law referred to. To the extent any such Applicable Law is consolidated, amended or replaced during the Term of this Design-Build Contract, either party shall have the right to assert that a Change in Law has occurred in accordance with the definition thereof and Section 13.2.

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

(X) Governing Law. This Design-Build Contract shall be governed by and construed in accordance with the applicable laws of the State of Washington unless otherwise indicated in the text of this Contract with respect to Federal regulations.

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

(Z) Due Dates. When a Deliverable Material or any other obligation under this Design-Build Contract is due on a certain date in accordance with the time periods set forth herein and in Schedule 12, and that day falls upon a Saturday, Sunday or legal holiday, the due date for such Deliverable Material or other obligation shall be deferred to the next business day.

ARTICLE II

REPRESENTATIONS AND WARRANTIES

SECTION 2.1. REPRESENTATIONS AND WARRANTIES OF THE CITY. The City represents and warrants that:

(A) Existence and Powers. The City is a political subdivision of the State of Washington validly existing under the Constitution and laws of the State, with full legal right, power and authority to enter into and perform its obligations under this Design-Build Contract.

(B) Due Authorization and Binding Obligation. This Design-Build Contract has been duly authorized, executed and delivered by all necessary action of the City and, subject to regulatory approvals required after the execution of this Design-Build Contract in accordance with Applicable Law, constitutes a legal, valid and binding obligation of the City, enforceable against the City in accordance with its terms except insofar as such enforcement may be affected by bankruptcy, insolvency, moratorium and other laws affecting creditors' rights generally.

(C) No Conflict. Neither the execution nor the delivery by the City of this Design-Build Contract nor the performance by the City of its obligations hereunder nor the consummation by the City of the transactions contemplated hereby (1) conflicts with, violates or results in a breach of any law or governmental regulation applicable to the City or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, decree, agreement or instrument to which the City is a party or by which the City or any of its properties or assets are bound, or constitutes a default under any such judgment, decree, agreement or instrument.

(D) No Litigation. There is no action, suit or other proceeding, at law or in equity, before or by any court or governmental authority, pending or, to the City's best knowledge, threatened against the City which is likely to result in an unfavorable decision, ruling or finding which would materially and adversely affect the validity or enforceability of this Design-Build Contract or any other agreement or instrument to be entered into by the City in connection with the transactions contemplated hereby, or which would materially and adversely affect the performance by the City of its obligations hereunder or under any such other agreement or instrument.

(E) No Legal Prohibition. The City has no knowledge of any Applicable Law in effect on the date as of which this representation is being made which would prohibit the performance by the City of this Design-Build Contract and the transactions contemplated hereby.

(F) Hazardous Waste. Without having undertaken any investigations beyond the Phase I environmental assessments or made any inquiries with respect thereto, to the best knowledge of the City, there is no Hazardous Waste located on or under the Site, except as is present in the ordinary course of operating and maintaining a wastewater treatment system or as indicated in the Site-Related Documents.

SECTION 2.2. REPRESENTATIONS AND WARRANTIES OF THE COMPANY. In addition to any other representations and warranties made by the Company in this Design-Build Contract, the Company represents and warrants that:

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

(B) Due Authorization and Binding Obligation. This Design-Build Contract has been duly authorized, executed and delivered by all necessary corporate action of the Company and constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application.

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

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

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

(F) Claims and Demands. Except as disclosed in writing to the City, there are no material and adverse claims and demands based in environmental, contract or tort law pending or threatened against the Company with respect to any water or wastewater plant providing service to the general public designed, constructed, operated, maintained or managed by the Company.

(G) Applicable Law Compliance. Except as disclosed in writing to the City, neither the Company, the Guarantor nor any Affiliate has knowledge of any material violation of any law, order, rule or regulation applicable to any water or wastewater plant providing service to the general public within the United States, which has been designed, constructed, operated, maintained or managed by the Company, the Guarantor or any Affiliate.

(H) Practicability of Performance. The Technical Specification, the technology and the construction practices to be employed in the design and construction of the Design-Build Improvements is furnished exclusively by the Company and its Subcontractors pursuant to the terms of this Design-Build Contract, and the Company assumes and shall have exclusive responsibility for their efficacy, notwithstanding the inclusion of design principles or other terms and conditions in the RFP or the clarification or negotiation of the terms of the Technical Specifications, and Acceptance Test Procedures and Standards, or warranties between the Company and the City. The Company assumes the risk of the practicability and possibility of performance of the Design-Build Improvements on the scale, within the time for completion and in the manner required hereunder, and of treating wastewater in a manner which meets all of the requirements hereof, even though such performance may involve technological or market breakthroughs or overcoming facts, events or circumstances (other than Uncontrollable Circumstances) which may be different from those assumed by the Company in entering into this Design-Build Contract, and agrees that sufficient consideration for the assumption of such risks and duties is included in the Fixed Design-Build Price. No impracticability or impossibility of any of the foregoing shall be deemed to constitute an Uncontrollable Circumstance.

(I) Patents and Licenses. The Company owns, or is expressly authorized to use under patent rights, licenses, franchises, trademarks or copyrights, the technology necessary for the Design-Build Improvements without any known material conflict with the rights of others.

(J) Information Supplied by the Company and the Guarantor. The information supplied and representations and warranties made by the Company and the Guarantor in all submittals made in response to the RFP and in all post-proposal submittals with respect to the Company and the Guarantor (and to its knowledge, all information supplied in such submittals with respect to any Subcontractor) are true, correct and complete in all material respects.

SECTION 2.3. KNOWLEDGE-BASED REPRESENTATIONS. Whenever a representation or warranty hereunder is made to the best of the knowledge of the Company, such representation or warranty hereunder shall be deemed made, as the case may be, to the knowledge of the General Counsel, the Chief Executive Officer of the Company and the person executing this Design-Build Contract (if not the Chief Executive Officer).

ARTICLE III

OWNERSHIP OF THE PROJECT; USE AND CONDITION OF THE SITE AND THE CENTRAL TREATMENT PLANT

SECTION 3.1. OWNERSHIP OF THE PROJECT AND THE CENTRAL TREATMENT PLANT. The Design-Build Improvements and the Central Treatment Plant shall be owned by the City at all times. The Company shall perform the Design-Build Work provided for herein as an independent contractor and shall not have any legal, equitable, tax beneficial or other ownership or leasehold interest in the Design-Build Improvements or the Central Treatment Plant.

SECTION 3.2. USE OF THE SITE AND THE CENTRAL TREATMENT PLANT. The execution of this Design-Build Contract shall be deemed to constitute the granting of a license to the Company to access the Site and the Central Treatment Plant for all purposes of this Design-Build Contract; provided that the Company's access to the Site prior to the Construction Commencement Date shall be subject to the terms and conditions of Section 3.3. The Company may enter upon, occupy and use the Site and the Central Treatment Plant to design, construct, install, start-up and test the Design-Build Improvements, all to provide the Design-Build Work in accordance herewith, and for no other purpose. The City shall use good faith efforts to cooperate with the Company with respect to Company requests (in writing and upon reasonable notice) regarding scheduling of outages to accommodate construction activities; provided, however, that it is the responsibility of the Company to schedule and perform construction activities in accordance with the Company's Maintenance of Plant Operations and in a manner which will not interfere with the ability of the City to operate the Central Treatment Plant so that it can continually meet all Applicable Law including requirement of Governmental Approvals to which it is subject.

SECTION 3.3. ACCESS TO AND SUITABILITY OF THE SITE. (A) Familiarity with the Site. The Company acknowledges that the Company's agents and representatives have visited, inspected and are familiar with the Site, its surface physical condition relevant to the obligations of the Company pursuant to this Design-Build Contract, including surface conditions, normal and usual soil conditions, roads, utilities, topographical conditions and air and water quality conditions; that the Company is familiar with all local and other conditions which may be material to the Company's performance of its obligations under this Design-Build Contract (including, but not limited to, transportation; seasons and climate; access, availability, disposal, handling and storage of materials and equipment; and availability and quality of labor and Utilities), and has received and reviewed all information regarding the Site provided to it as part of the Site-Related Documents or obtained in the course of performing its obligations hereunder including, but not limited to, geotechnical data; and that based on the foregoing, the Site constitutes an acceptable and suitable site for the construction of the Design-Build Improvements in accordance herewith, and the Design-Build Improvements can be constructed, started up and successfully tested on the Site within the Fixed Design-Build Price and by the Scheduled Acceptance Date.

(B) Access to Site Prior to Commencement of Construction. The execution of this Design-Build Contract shall be deemed to constitute the granting of a license to the

Company to access the Site for the purposes of performing engineering, pilot testing, analysis and such additional subsurface and geotechnical studies or tests as deemed necessary by the Company prior to commencement of construction. Such access shall be subject to the City's prior approval, which shall not be unreasonably withheld, as to time and scope. The Company shall assume all risks associated with such activities and shall indemnify, defend and hold harmless the City and the City Indemnitees in accordance with Section 13.3 from and against all Loss-and-Expense arising therefrom.

(C) City Responsibility for Pre-Existing Environmental Conditions and Specified Site Conditions. Nothing in this Section shall be deemed to limit or otherwise affect the scope of the City's obligations with respect to Pre-Existing Environmental Conditions, Specified Site Conditions or the Site conditions for which the City has assumed liability, as expressly set forth in this Article III.

SECTION 3.4. SURFACE AND SUBSURFACE CONDITIONS. **[Note to Proposers: Proposers should review Sections 2 and 6 and forms in Volume I of the RFP for pricing instructions in connection with surface and subsurface risks.]** (A) Familiarity with the Site. The City will assume the risk for the following:

(1) (i) the presence anywhere in, on or under the Site of underground storage tanks, (ii) the presence in any existing structures or pipes of asbestos containing material or lead based paint, and (iii) the presence of any oil, petroleum or petroleum product and any pollutant, contaminant, hazardous substance, hazardous material, toxic substance, toxic pollutant, solid waste, municipal waste, industrial waste or hazardous waste that is defined as such by and is subject to regulation under any Applicable Law requiring special handling or disposal ("Regulated Substances") anywhere in, on or under the Site (including the presence in surface water, groundwater, soils or subsurface strata), in each case of i-iii, which is beyond that as identified as confirmed or suspected in Schedule 1, Sections 1.2.2.4 and 1.2.2.5 (collectively, "Pre-Existing Environmental Conditions");

(2) (i) subsurface structures, materials or conditions having historical, archaeological, religious or similar significance, (ii) any man-made object or structure, (iii) functioning subsurface structures used by Utility providers on, underneath, near or adjacent to the Site; (iv) any designated wetland, stream, shoreline or other critical area regulated under Applicable Law; (v) any habitat of an endangered or protected species as provided in Applicable Law; and (vi) isolated subsurface geotechnical and soils conditions that both, (a) differ significantly from surrounding materials and (b) would require substantially different foundation types or removal and replacement with more structurally suitable materials, in each case which condition could not have been reasonably anticipated based upon the information disclosed in the Site Related Documents or information otherwise disclosed to the Company as of the Contract Date, (collectively, "Specified Site Conditions"); and

(3) (i) the actual condition of all underground pipes and man-made structures to the extent such conditions is materially different than the condition which should have been reasonably anticipated based upon Good Engineering and Construction Practice, (ii) the actual location of all underground man-made structures to the extent such location materially varies

from the locations indicated in the Site Related Documents or as otherwise disclosed to the Company prior to the Contract Date, (iii) the actual location of underground pipes and other underground utilities to the extent such location materially differs from the locations indicated in Drawings 1B through 1H included in Schedule 1, (iv) the repairs necessary to upgrade and operate the influent and effluent pumps set forth in Sections 6.4.7 and 6.4.11 of Schedule 6 shall be sufficient for such purpose (so that if after inspection by the Company the parties agree that further repairs are necessary, the City shall bear the cost of such further repairs); provided, however, that following inspections and agreement as to all necessary repairs to such pumps in accordance with Sections 6.4.7 and 6.4.11 of Schedule 6, the Company shall bear all risk with respect to such pumps; (v) the actual interior condition of certain City-inspected structures that materially differ from conditions described in Section 1.2.2.2, Table 1-1 of Schedule 1; (vi) the actual condition of all other above surface elements of structures and equipment which cannot be verified by the Company prior to the Contract Date without cutting through such equipment or structures, draining or removing materials therefrom, or unreasonably materially interfering with the operations of the CTP to the extent that such condition materially differs from that condition which should be reasonably anticipated based upon Good Engineering and Construction Practice; and (vii) the actual conditions at the plant differ from that shown in the electrical one-line diagram set forth in Drawing 2 of Schedule 1, provided, however that following verification as required by Sections 6.4.7 and 6.4.10 of Schedule 6, the actual conditions are in conformance with such diagram, or alternatively, following an agreement as to an adjustment based upon material differences from such diagram, the Company shall bear the risk of the adequacy of the electrical distribution system (collectively, "Additional City Assumed Conditions Risks").

(B) Company Risk. The Company, based on the investigations of the Site and other inquiries made by the Company prior to the Contract Date, which the Company acknowledges to be sufficient for this purpose, and except with respect to Specified Site Conditions, Pre-Existing Environmental Conditions and the Additional City Assumed Conditions Risks, assumes the risk of all other surface and subsurface conditions at the Site as they may affect the Company's performance of the Design-Build Work, including the structural suitability of the Site or the Company's excavation or construction costs or schedules, and agrees that any such other surface or subsurface condition revealed during the Design-Build Work which has such an affect shall not be an Uncontrollable Circumstance.

SECTION 3.5. ENVIRONMENTAL CONDITION OF THE SITE. (A) Phase I Environmental Assessments. Each party acknowledges that it has reviewed (i) the Phase I Environmental Site Assessment, City of Tacoma Central Wastewater Treatment Plant (Brown and Caldwell, dated April, 2004), (ii) the Geotechnical Data Report, Central Wastewater Treatment Plant Upgrade and Expansion Phase III, Tacoma Washington, (Shannon & Wilson, Inc., April 2004) and (iii) the CTP Asbestos and Lead-Based Paint Survey (BHC, October 2003) prepared on behalf of the City and that, based thereon, neither party requires any further environmental review of the Site for purposes of this Design-Build Contract prior to the commencement of construction; provided that the foregoing shall not be deemed to limit or

otherwise affect the scope of the City's obligations with respect to Pre-Existing Environmental Conditions, as expressly set forth in this Design-Build Contract.

(B) Discovery of Hazardous Materials Prior to Construction Commencement Date. If, prior to the Construction Commencement Date, Hazardous Materials (other than any such materials which are beyond that as identified as confirmed or suspected in Schedule 1, Sections 1.2.2.4 and 1.2.2.5) are discovered on the Site through any further environmental assessments, geotechnical investigations conducted by the Company or from any other information source, the City shall elect either:

(1) to cause the Hazardous Materials so identified to be removed from the Site at its sole cost and expense;

(2) to designate another area within the Site for the construction of the Design-Build Improvements, in which case the Fixed Design-Build Price and the Scheduled Acceptance Date shall be adjusted to the extent necessary to place the Company in the same position following the site redesignation as it was in hereunder as of the Contract Date; or

(3) to terminate this Design-Build Contract, with the same effect as if this Design-Build Contract was terminated under Section 4.5(A) for the City's convenience prior to the Construction Commencement Date.

The discovery of Hazardous Materials (other than any such materials which are beyond that as identified as confirmed or suspected in Schedule 1, Sections 1.2.2.4 and 1.2.2.5.) on the Site after the Construction Commencement Date shall be treated as an Uncontrollable Circumstance governed by the terms of Sections 3.6 and 13.2.

(C) SEPA. The Company shall not make any change to the Design-Build Work which would result in a requirement that an environmental impact statement be prepared under the State Environmental Policy Act, Chapter 43.21C RCW, unless approved in writing by the City.

SECTION 3.6. PRE-EXISTING ENVIRONMENTAL CONDITIONS. (A) Company Obligations. In the performance of the Design-Build Work, the Company shall exercise due care, in light of all relevant facts and circumstances, to avoid exacerbating the nature or extent of any Pre-Existing Environmental Condition after the location and existence of such Pre-Existing Environmental Condition has been disclosed to, or through physical observation (including any such observation made during excavations) becomes actually known to, the Company during the Term of this Design-Build Contract. Except for the Company's failure to exercise due care with respect to such disclosed or known Pre-Existing Environmental Condition, the Company shall not be responsible for any Pre-Existing Environmental Condition including any Loss-and-Expense relating to any Pre-Existing Environmental Condition.

(B) City Obligations. If at any time a Pre-Existing Environmental Condition is determined to exist which (1) reasonably requires a Response Action or other action in order to comply with Applicable Law, (2) interferes with the performance of the Design-Build Work, or (3) increases the cost to the Company of performing the Design-Build Work, then the City shall promptly after the receipt of written notice from any Governmental Body or the Company

of the presence or existence thereof, commence and diligently prosecute Response Actions or other actions as may be necessary to dispose of, remediate or otherwise correct the Pre-Existing Environmental Condition or otherwise make the Pre-Existing Environmental Condition comply with Applicable Law. The City shall have the right to contest any determination of a Pre-Existing Environmental Condition and shall not be required to take any action under this subsection so long as: (i) the City is contesting any determination of a Pre-Existing Environmental Condition in good faith by appropriate proceedings conducted with due diligence; and (ii) Applicable Law permits continued design, construction or operation of the Design-Build Improvements pending resolution of the contest, so that the Company shall have no liability as a result of the failure of the City to dispose of, remediate or otherwise correct such Pre-Existing Environmental Condition during the period of contest.

SECTION 3.7. CENTRAL TREATMENT PLANT CONDITION CONFIRMATION. (A) Familiarity with the Site. The Company acknowledges that:

(1) the Company has access to and has reviewed the as-built drawings and other records and reports regarding the Central Treatment Plant and the Site included in the Site Related Documents and all other records and information pertaining to the Central Treatment Plant and the Site that it has deemed necessary to receive and review for the purposes of entering into and performing this Design-Build Contract, and acknowledges that certain of such drawings, records and reports have been identified by the City in the RFP to be not fully accurate and that other such drawings, records and reports may be out-dated and may or may not reflect current conditions;

(2) in light of the potential inaccuracies in the Site Related Documents and in accordance with Good Industry Practice, the Company's agents and representatives have visited, inspected, observed and are familiar with the Central Treatment Plant and the Site, its design, and its physical condition relevant to the obligations of the Company pursuant to this Design-Build project, including structural and operating conditions, roads, Utilities, topographical conditions, the presence of Regulated Substances, and historical influent, effluent residuals quality conditions; provided, however, that such inspections and observations have not included those which would require excavation, cutting through equipment or structures, draining or removing materials from equipment or structures or unreasonably materially interfering with the operations of the CTP;

(3) the Company is familiar with all current local conditions which may be material to the Company's performance of its obligations under this Design-Build Contract (including transportation; seasons, climate and ambient air; access, availability, handling, storage and disposal of materials, supplies and equipment; and availability and quality of labor and Utilities); and

(4) based on the foregoing, the Design-Build Improvements can be designed, constructed, started up, tested and accepted by the Scheduled Acceptance Date at a cost which is less than or equal to the Fixed Design-Build Price.

(B) "As-Is" Condition of Central Treatment Plant and Site. Based on its review of the design drawings, plans and specifications and the other Site Related Documents pertaining to the Central Treatment Plant and the Site, its inspections of the Central Treatment Plant and the Site, and other inquiries and investigations made by the Company prior to the Contract Date, which the Company acknowledges to be sufficient for this purpose, the Company, subject to the limitations provided in subsection (C) of this Section, assumes the risk of the existing, "as-is" condition of the Central Treatment Plant and the Site as such condition may affect the ability of the Company to comply with Applicable Law, design and construct the Design-Build Improvements, meet the Acceptance Standards or perform any of its other obligations hereunder on the schedule and for the compensation provided for herein. The Company agrees that, subject to the limitations provided in subsection (C) of this Section**,** any latent or patent defect, flaw, error, inoperability, inadequacy or other condition or aspect of the existing condition of the elements of the Central Treatment Plant or the Site included within or related to the scope of this Project which exists as of the Contract Date or which may be revealed during the performance hereof shall not be an Uncontrollable Circumstance. No error or omission in any information supplied by the City in the Site Related Documents or otherwise shall constitute grounds for relief from the Company's obligations or entitle the Company to schedule relief or price increases except with respect to material adverse deviations from information contained in Sections 1.2.2.4 and 1.2.2.5, Drawings 1B - 1H, Table 1-1 in Section 1.2.2.2 and Drawing 2 of Schedule 1 to the extent and expressly provided for in Section 3.4(A).

(C) Limitations on the Company's Assumption of "As-Is" Risk; Uncontrollable Circumstances. It is specifically understood that the Company's assumption of the "as-is" risk of the condition of the Central Treatment Plant and the Site as provided in subsection (B) of this Section shall not extend to the following: (1) Pre-Existing Environmental Conditions, (2) Specified Site Conditions and (3) the Additional City Assumed Change in Condition Risks. The City shall retain all obligations arising out of any third party Legal Proceedings resulting from the conditions contained in items (1) - (3) above except to the extent such Legal Proceeding is based in whole or in part on the Company's breach of its obligations pursuant to Section 3.6. No other Uncontrollable Circumstance, however, shall relieve or limit the Company's assumption of the "as-is" risk as provided in subsection (B) of this Section.

ARTICLE IV

THE DEVELOPMENT PERIOD

SECTION 4.1. COMPANY DEVELOPMENT PERIOD RESPONSIBILITIES. (A) Generally. Promptly following the Contract Date, the Company shall proceed at its own cost and expense to exercise good faith and due diligence in order to satisfy all of the following Company responsibilities, continuously, expeditiously and as soon as practicable:

(1) Site Conditions. The Company shall make all additional soil test borings and conduct analysis of subsurface conditions, inspections and site history reviews of the Site necessary under good construction and engineering practice as preparation for excavation and construction hereunder in accordance with Applicable Law and as necessary to obtain all required Governmental Approvals.

(2) Design and Approvals. The Company shall perform all design work and other work necessary to obtain, and shall obtain an approved amendment (or amendments, as necessary) to the Facilities Plan issued by the Department of Ecology and all applicable Governmental Approvals which are required to be issued under Applicable Law for the commencement of construction of the Design-Build Improvements, except for those Governmental Approvals specified in Schedule 3 hereto to be obtained by the City, in a form and substance satisfactory to the City. All Governmental Approvals shall be final. In addition, the Company shall cooperate with and assist the City in obtaining all Governmental Approvals which the City is responsible for obtaining. The Company shall provide the City with final Design Documents and copies of all Government Approvals in accordance with Schedules 3 and 12.

(3) Site Plan. The Company shall prepare or have prepared a site plan for the Site showing:

(a) the dimensions and locations of proposed improvements to the Site;

(b) the location of all means of access thereto and all easements relating thereto;

(c) that the proposed location of the Design-Build Improvements on the Site is in compliance with all applicable building and set-back lines and does not encroach on or interfere with existing easements (whether on, above or below ground) nor any shoreline or shoreline buffers or wetland or wetland buffers (unless expressly authorized in writing by the City); and

(d) no encroachments from the Design-Build Improvements extending to adjacent property nor any gaps, gores, projections, protrusions or other survey defects.

(4) Utilities. The Company shall demonstrate that all Utilities required to construct and operate (except as otherwise set forth below) the Design-Build Improvements at their design capacity shall then be available to the Design-Build Improvements in the capacities required hereunder, as evidenced by letters from the providers of such Utilities obtained by the Company confirming such availability. The parties recognize that a new electrical substation will be required for the operation of the Facility and that such substation

will not be constructed prior to the Construction Commencement Date. The Company shall, therefore, provide a letter from Tacoma Public Utilities indicating that it is anticipated that the substation will be completed prior to the Scheduled Acceptance Date.

(5) Design Drawings. The Company shall provide to the City all plans, technical specifications, blueprints, drawings and other design documents prepared prior to the Construction Commencement Date for permitting, regulatory, financing, bonding, credit enhancement and insurance purposes.

(6) Applicable Law Compliance. The Company shall comply with all other requirements of Applicable Law pertaining to the activities of the Company constituting the Construction Commencement Date Conditions.

(7) Guarantor and Company Law Compliance. The Guarantor and the Company shall certify to the City as of the Construction Commencement Date that each is in substantial compliance with all laws, regulations, rules and orders applicable to their respective businesses, non-compliance with which would have a material effect upon their respective businesses or its ability to perform their respective obligations under this Design-Build Contract, or the Guaranty in other transaction agreements to which it is a party.

(8) Confirmation of Guaranty. The Guarantor shall execute and deliver confirmation to the City that the Guaranty as executed on the Contract Date remains in full force and effect.

(9) Company Performance Letter of Credit. If the Guarantor has experienced a Material Deadline in Guarantor's Credit Standing prior to the Construction Commencement Date, the Company shall obtain or cause the Guarantor to obtain and deliver to the City a Letter of Credit securing all payment and performance obligations of the Company hereunder in accordance with Section 14.3 hereof and substantially in the form set forth in Transaction Form D hereto.

(10) Required Insurance. Company shall submit to the City certificates of insurance for all Required Construction Period Insurance specified in Schedule 18 hereto.

(11) Representations. The representations of the Company set forth in Section 2.2 hereof and of the Guarantor set forth in the Guaranty shall be true and correct in all material respects as of the Construction Commencement Date as if made on and as of the Construction Commencement Date, and the Company and the Guarantor shall deliver to the City a certificate of its authorized officer to that effect.

(12) Documents Evidencing Required Activities. The Company shall have provided to the City copies of all filing and reports conducted, prepared or obtained with respect to or evidencing the Company's activities pursuant to this Section and Section 3.4 hereof.

(13) Financial Condition. The Company shall provide audited consolidated financial statements of the Guarantor and unaudited financial statements of the Company (or its member companies in the case of a joint venture) for the most recently completed fiscal year and a certificate certified by an authorized officer of the Guarantor stating that as of the

quarter immediately preceding the Construction Commencement Date the Guarantor meets or exceeds the Minimum Financial Criteria. The Company and the Guarantor shall certify that since the Contract Date, there shall not have occurred any change, financial or otherwise, in the condition of the Company or the Guarantor that would materially and adversely affect the ability of the Company to perform its obligations under this Design-Build Contract or the Guarantor to perform its obligations under the Guaranty. Financial statements submitted in response to this paragraph shall become the property of the City of Tacoma. All such statements shall be deemed public records as defined in RCW 42.17.250 to .340, "Public Records." Any information that the Proposer desires to claim as exempt from disclosure under the provisions of RCW 42.17.250 to .340, or the Washington Trade Secrets Act must be clearly designated. Each page claimed to be exempt from disclosure must be clearly identified by the word "Confidential" printed on the lower right hand corner of the page, and the particular exception from disclosure upon which the Proposer is making the claim must be stated on the page. The Proposer must be reasonable in designating information as confidential. In the event the City receives a request for disclosure of information that a Proposer has designated as confidential, the City will give the Proposer notice, and a reasonable amount of time for the Proposer, at its own expense, to take legal action to obtain a protective order.

(14) Construction Schedule. The Company shall prepare and provide to the City a "critical path" construction schedule detailing the anticipated dates corresponding to the occurrence of critical path items in connection with the Design-Build Work in accordance with Section 6.3(F) and Schedule 14.

(15) Maintenance of Plant Operations Plan. The Company shall prepare for City review a Maintenance of Plant Operations Plan which plan shall address among other things the need for any planned partial shutdowns or other interferences with the operations of the Central Treatment Plant, all in accordance with Schedule 8 hereof.

(16) Assistance to City. The Company shall cooperate with and assist the City in the performance and completion of its Development Period Responsibilities.

(17) Technology Supply Agreement. The Company shall deliver to the City an executed Technology Supply Agreement. [If applicable]

(18) Notice of Default. The Company shall provide to the City, immediately after the receipt thereof, copies of any notice of default, breach or non-compliance received under or in connection any Government Approval, Subcontract or other agreement pertaining to the Design-Build Improvements.

(19) SRF Loan Assistance. The Company shall cooperate with and assist the City in applying for any payments under the SRF loan relating to the Design-Build Work in accordance with Section 5.3, including the preparation of any project evaluation forms, project cost estimates and project funding applications and all work related thereto.

(20) Operations Plan. The Company shall prepare and provide to the City the plans of operations consistent with WAC 173-240-070(1) and Ecology's Water Quality Financial Assistance Programs for Fiscal year 2003 (December 2001), Volume One - Guidelines; Volume Two - Appendices; Volume Three - Laws and Rules (the "Operations Plans"). The Operations

Plan shall include 1) an interim operations plan describing how the CTP will be operated during the transition period and Acceptance Testing; and 2) a final operations plan describing how the CTP is to be operated following Acceptance of the Project. The interim operations plan shall be part of the Transition Plan required under Schedule 11. The final operations plan shall be included in the O&M Manual.

(21) Updated DB Quality Management Plan. The Company shall have prepared and submitted to the City an amendment to its DB Quality Management Plan setting forth a detailed construction quality assurance plan according to the submittal date requirements set forth in Schedule 12. The plan must describe the activities which will be undertaken to achieve adequate and competent performance of all construction work in accordance with Schedule 10.

(22) Easements. The Company shall obtain all easements (or modifications to existing easements) or other interests in real property, if any, as may be necessary in order to provide necessary Utilities and to enable the Company to perform the Design-Build Work. **[Note to Proposers: The City believes it would be appropriate for it to obtain easements that are necessary for the Project that are not unique to the technical approach proposed. The City does not anticipate a need for any such easements. If an easement is required which is unique to the technical approach proposed, the City requires that the Company take responsibility for such easements].**

(23) Apprenticeship/City Resident Program. The Company shall prepare and submit to the City an apprenticeship program in conformance with the requirements of Schedule 19.

(B) Payment for Company Development Period Work. The Company shall be paid for its Development Period Work in accordance with Section 8.3.

SECTION 4.2. CITY DEVELOPMENT PERIOD RESPONSIBILITIES. Promptly following the Contract Date, the City shall proceed at its own cost and expense to exercise good faith and due diligence in order to satisfy all of the following City responsibilities continuously, expeditiously and as soon as practicable:

(1) Governmental Approvals. The City shall obtain all Governmental Approvals from State agencies necessary for construction of the Design-Build Improvements which are set forth in Schedule 3 as the City's responsibility. The City shall cooperate with and assist the Company in obtaining all Governmental Approvals which the Company is obligated to obtain.

(2) Property Line Survey. The City shall provide the Company with a property line survey of the Site.

SECTION 4.3. CONSTRUCTION COMMENCEMENT DATE CONDITIONS. (A) Commencement Date Conditions Defined. The obligations of the Company and the City to proceed with their respective obligations on and after the Construction Commencement Date, hereunder shall not commence until all of the following conditions necessary for the commencement of the construction of the Design-Build Improvements (the "Commencement Date Conditions") are satisfied or waived:

(1) Company Development Period Responsibilities. The Company shall have fulfilled its responsibilities with respect to the Development Period under Section 4.1 hereof.

(2) City Development Period Responsibilities. The City shall have fulfilled its responsibilities with respect to the Development Period under Section 4.2 hereof.

(3) Funding. The City shall have successfully concluded loan transactions, and, notwithstanding certain limitations of the disbursement of the proceeds of such loans, such loans together with other funding sources available for the Project, are in an amount at least equal to the Fixed Design-Build Price set forth herein.

(4) Acceptability and Effectiveness of Documents. All of the documents, instruments and agreements identified in this Article shall be in form and substance reasonably satisfactory to both parties, and shall be valid, in full force and effect and enforceable against each party thereto on the Construction Commencement Date. No such document, instrument or agreement shall be subject to the satisfaction of any outstanding condition precedent except those expressly to be satisfied after the Construction Commencement Date, no party to any such document, instrument or agreement shall have repudiated or be in default or imminent default thereunder, and each party shall have received such certificates or other evidence reasonably satisfactory to it of such facts as such party shall have reasonably requested.

(5) Legal Proceedings. Unless counsel acceptable to the City has determined that the Legal Proceeding has no merit or the City has determined to proceed notwithstanding the tendency of such Legal Proceeding, there shall be no Legal Proceeding, at law or in equity, before or by any court or governmental authority, pending or threatened, which (1) challenges, or might challenge, directly or indirectly, (a) the authorization, execution, delivery, validity or enforceability of this Design-Build Contract or any other transaction agreement, entered into or adopted by the City or the Company, the Guarantor or their Affiliates in connection with the transactions contemplated hereby, or (b) the real property interest of the City in the Site, or (2) seeks to enjoin or restrict the use of the Site for the purposes contemplated by this Design-Build Contract or seeks damages, fines, remediation or any other remedy in connection with the environmental condition or any other factor pertaining to the Site.

(6) Independent Engineer. The City and the Company shall have each submitted to the other the names of five (5) Independent Engineers which each believes are qualified, for the future selection of the Mediator pursuant to Section 12.2 hereof.

(B) Construction Commencement Date Conditions for Which Both Parties Have Responsibility. The City and the Company shall each proceed at their own cost and expense to exercise good faith and due diligence in taking such actions as may reasonably be under their control in order to satisfy the Construction Commencement Date Conditions set forth in items (3), (4), (5) and (6) of subsection 4.3(A).

(C) Conditions to Governmental Approvals. The Company shall manage the process of obtaining the Governmental Approvals for which it is responsible hereunder in a manner which affords the City with a reasonable and informed opportunity to review and

comment upon material documentation submitted to and issued by the Company and the Governmental Body in connection therewith in accordance with Schedule 3.

(D) Development Period Meetings. Following the issuance of the Notice to Proceed with Development Period Work, the parties shall meet in accordance with the requirements of Schedule 12 at the City's offices to discuss the status of the Construction Commencement Date Conditions and related matters. Prior to each meeting, the Company shall inform the City's designated representative of the proposed agenda and shall incorporate any comments of such representative into the final agenda. The Company shall provide all necessary documentation as dictated by the agreed upon agenda. The Company shall prepare minutes of each meeting include action items in such minutes and shall distribute such minutes to the City within five days following the meeting.

SECTION 4.4. CLOSING OF THE DEVELOPMENT PERIOD. (A) Satisfaction of Conditions. The parties shall give each other prompt written notice when each Commencement Date Condition has been satisfied or waived. Within 14 days of the satisfaction or waiver of all of such Commencement Date Conditions, the parties shall hold a formal closing acknowledging such satisfaction and certifying that the Construction Commencement Date has occurred and thereupon the City shall issue a Notice-to-Proceed. Original or certified copies of all of the documents or instruments constituting or evidencing satisfaction of the Commencement Date Conditions shall be furnished to each party prior to or on the Construction Commencement Date.

(B) Failure of Conditions. If by the date which is [the date derived by adding the number of days proposed on Proposal Form 10A days following the Contract Date] (the "Scheduled Construction Commencement Date"), or such later date upon which the City and the Company may agree, any Construction Commencement Date Condition is not satisfied despite the good faith efforts of the parties, or waived, the City may, by notice in writing to the Company, terminate this Design-Build Contract. Neither party shall be liable to the other for the termination of this Design-Build Contract pursuant to this subsection 4.4(B), and each of the parties shall bear its respective costs and expenses incurred in seeking to satisfy the Commencement Date Conditions, except that following such a termination, the City shall reimburse the Company its Cost-Substantiated costs incurred directly by the Company and any expenses paid or incurred to third parties from the Contract date to the termination date hereunder not previously compensated by the City, which are directly related to the performance of the Company's obligations, and which are necessary to be performed prior to the Construction Commencement Date ("Reimbursable Expenses") subject to a maximum amount of the Fixed Development Price. The availability of the convenience termination rights contained in Section 4.5 shall in no way limit the City's right to terminate for cause in the event the Company fails to use good faith efforts to satisfy its Development Period Responsibilities.

(C) Failure of Company to Obtain Approvals Other Than Facilities Plan Amendment. The Company shall obtain all Governmental Approvals set forth in subsection 4.1(A)(2) and Schedule 3 by the Scheduled Construction Commencement Date. The failure to obtain such approvals other than as set forth in paragraph (D) below with respect to the

approval of the Facilities Plan Amendment (if the conditions in paragraph (D) are met), by the Scheduled Construction Commencement Date will have the effect of waiving the Company's right to escalation of the Fixed Design-Build Price and, potentially, shortening the guaranteed construction schedule as set forth in subsection 5.2(C). In the event the Company fails to obtain any Governmental Approval set forth in subsection 4.1(A)(2) and Schedule 3 other than the approval of the Facilities Plan Amendment (if items (i) - (iii) of paragraph (D) below are met) prior to the 120th day following the Scheduled Construction Commencement Date, such an occurrence shall constitute an Event of Default.

(D) Failure of Company to Obtain Approval of Facilities Plan Amendment. In the event the Company fails to obtain approval of the Facilities Plan Amendment prior to the Scheduled Construction Commencement Date and (i) the Company has diligently taken all measures to obtain such approval, (ii) such failure is not the result of the quality or completeness of the submittal application or of the nature of the design or approach reflected in such submittal, and (iii) the Department of Ecology has failed to respond to the Company submittal(s) in a reasonably timely manner taking into consideration the nature of the required review and the reasonable review period for similarly situated applicants, such failure shall not constitute an Event of Default, the Scheduled Acceptance Date shall be extended by the number of days by which such delay materially adversely effects the Company's critical path schedule and the Company will be entitled to escalation of the Fixed Construction Period Price in accordance with Section 8.2(C)(4). No other relief shall be afforded the Company as a result of such delay. If such delay continues for more than 120 days following the Initial Scheduled Construction Commencement Date, the City shall have the right to terminate this Design-Build Contract pursuant to Section 4.4(B). In the event the Company fails to obtain approval of the Facilities Plan Amendment prior to the Scheduled Construction Commencement Date and either (i) the Company failed to diligently taken all measures to obtain such approval, (ii) such failure is the result of the quality or completeness of the submitted application or the nature of the design or approach reflected in such submittal, or (iii) the Department of Ecology has not failed to respond to the Company's submittal in a reasonably timely manner, then such failure shall constitute an Event of Default and the City shall have the rights set forth in paragraph (C) above.

SECTION 4.5. CITY TERMINATION AND SUSPENSION OPTION DURING THE DEVELOPMENT PERIOD. (A) City Convenience Termination Option Prior to Construction Commencement Date. The City shall have the right at any time prior to the Construction Commencement Date, exercisable in its sole discretion for any reason by three business days' written notice to the Company, to terminate this Design-Build Contract. Upon any such termination, as termination liquidated damages, the City shall reimburse the Company for 100% of its Reimbursable Expenses.

(B) City Suspension Option During the Development Period. The City shall have the right at any time prior to the Construction Commencement Date, exercisable in its sole discretion for any reason by three business days' written notice to the Company and without terminating this Design-Build Contract, to suspend the obligation of the Company and the City to seek the fulfillment of the Commencement Date Conditions. Upon any such suspension, the City shall reimburse the Company, subject to Cost Substantiation and the

maximum reimbursement limitation of subsection 4.4(B) hereof, for 100% of its Reimbursable Expenses. The Company shall not be further obligated during the suspension to seek to fulfill the Commencement Date Conditions. The City may in its sole discretion at any time thereafter, upon written notice to the Company, reinstate the obligations of the Company to fulfill the Commencement Date Conditions, and thereupon an amount equal to all Reimbursable Expenses (but not any amounts paid as part of the Fixed Development Price) previously reimbursed to the Company shall be deducted from the Fixed Design-Build Price and the obligations of the Company as to the Commencement Date Conditions shall resume (subject to an adjustment to the Scheduled Construction Commencement Date corresponding to the duration of the suspension). If the City does not reinstate the obligation of the Company to seek to fulfill the Commencement Date Conditions within 180 days following the suspension (or such longer period agreed upon by the parties), the Company may at any time thereafter terminate this Design-Build Contract upon written notice to the City.

(C) Cost Records and Reporting. During the Development Period the Company shall prepare and maintain accurate and complete books and records of the cost and description of the permitting and other Development Period Work which the Company has performed since the Contract Date which is directly related to the Company's obligations under this Design-Build Contract, the cost of which would be the responsibility of the City if the City were to elect to terminate this Design-Build Contract pursuant to subsection 4.5(A) or to suspend this Design-Build Contract pursuant to subsection 4.5(B) hereof. The Company shall submit such books and records or a reasonably detailed summary thereof acceptable to the City, together with a summary statement of monthly and aggregate Reimbursable Expenses incurred, to the City on a monthly basis after the Contract Date until either the City exercises its right to terminate or suspend this Design-Build Contract or until the Construction Commencement Date occurs. Specific requests by the Company for the payment of Reimbursable Expenses shall be supported by Cost Substantiation. Within 60 days of receipt of such information in support of a request for payment of Reimbursable Expenses, the City will advise the Company as to whether and to what extent the City disputes such information contained in such books and records. In addition, on the Contract Date and on the first day of each month thereafter the Company shall provide to the City an itemized list of all Development Period Work expected to be undertaken in the following two months, and the expected costs thereof. The City shall have the right to question the Company's decision to undertake such activities and to provide notice to the Company that such costs will not be Reimbursable Expenses.

(D) Delivery of Development Period Work Product to the City. Concurrently with payment by the City to the Company of the amount due upon any termination or suspension of this Design-Build Contract under Section 4.4(B) or this Section 4.5, the Company shall deliver to the City all of its Development Period Work product. Such work product shall include, without limitation, all plans, specifications, designs (including CADD files in a format requested by the City), drawings, rendering, blueprints, manuals, equipment layouts, and Governmental Approvals and related applications, submittals and other information prepared for the purpose of planning, designing, constructing and operating the Design-Build Improvements or operating the Design-Build Improvements and securing

Governmental Approvals and financial security for the Company's obligations pursuant hereto. In the event the City utilizes any incomplete design provided by the Company following a convenience termination, the Company shall have no liability with respect thereto.

ARTICLE V

DESIGN, PERMITTING AND FINANCING ASSISTANCE

SECTION 5.1. DESIGN WORK. (A) Performance of the Design Work. The Company agrees to undertake, perform, and complete the designs and plans in accordance with the Contract Standards and all other provisions and requirements of this Design-Build Contract. The Company shall make design submittals to the City in accordance with Schedule 12.

(B) Design Risk. The Company shall have sole and exclusive responsibility for the design of the Design-Build Improvements hereunder and the preparation of all plans, specifications, drawings, blueprints and other design documents necessary or appropriate to complete the Design-Build Work. All such design documents shall comply in all respects with the Design Requirements and shall ensure that the Design-Build Improvements are constructed to a standard of quality, durability and reliability which is equal to or better than the standard established by the Design Requirements. The City and the Authorized City Representative shall have the right to review and provide comment, but shall have no approval rights with respect to, such Design Documents except as set forth in subsection 5.2(D).

(C) Changes to Design Requirements. The Company acknowledges the City's material interest in each provision of the Design Requirements and agrees that no change shall be made to the Design Requirements pertaining to the Design-Build Improvements hereto without the prior written approval of the City, which approval may be withheld in the sole discretion of the City. The Company, following written notice to the City, may make non-material changes to those portions of the Technical Specifications that are designated as Supplemental Technical Information without the prior consent of the City; provided, however, that the Company shall not make any change which the City determines to be material and provides the Company notice thereof. The Company shall not take any action which would adversely affect the status of the Project as an eligible project under Chapter 173-98 WAC or which would cause a violation of any covenant, condition or provision of the loan agreement attached as Schedule 20 (the "SRF Loan Agreement")

(D) Licensing Requirements. Architects and engineers engaged by the Company for Design-Build Improvements design services shall be licensed to practice in the State (including all licenses set forth in Schedule 6) and shall be experienced and qualified to perform such services.

SECTION 5.2. PERMITTING WORK. (A) Applications for Governmental Approvals. The Company shall make all applications and take all other action necessary to obtain, and shall obtain and maintain all Governmental Approvals, necessary to commence, continue and complete the Design-Build Work including payment of all fees, costs and charges due in connection therewith except with respect to those approvals for which the City is obligated to obtain, maintain and pay for in accordance with Schedule 3. Where required under Applicable Law, such applications shall be made in the name of the City, subject to the City's rights hereunder. The Company shall manage the process of obtaining the Governmental Approvals on behalf of the City for which it is responsible hereunder in a

manner which affords the City a reasonable opportunity to review and comment upon such submittals and all material documentation submitted to and issued by any Governmental Body in connection therewith as provided in Schedule 12. The Company shall not knowingly take any action in any application, data submittal or other communication with any Governmental Body regarding Governmental Approvals or the terms and conditions thereof that would impose any unreasonable cost or burden on the City or that would contravene any City policies with respect to the matters contained therein. The City reserves the right to reject, modify, alter, amend, delete or supplement any information supplied, or term or condition proposed, by the Company which would have the effect described in the preceding sentence. The Company, at its cost and expense, shall provide to the City and all involved regulatory agencies all data and information that is within its possession and its control (including proprietary information and all information specific to the Design-Build Improvements which may exist or be required by the involved regulatory agencies to be developed by the Company) which may be required in order to properly apply for and obtain such permits, licenses and approvals. All such data and information shall be correct and complete in all material respects.

(B) Limited Permitting Assistance by the City. The City shall provide reasonable assistance to the Company in connection with the Company's obligation to obtain and maintain the Governmental Approvals which it is required to obtain under this Section, including signing permit applications, attending public hearings and meetings of the Governmental Bodies charged with issuing such Governmental Approvals, and providing the Company with existing relevant data and documents that are within its custody or control and which are reasonably required for such purpose; provided, however, that the City's obligation to provide such reasonable assistance shall be limited, in light of the Company's primary role in the permitting and development of the Design-Build Improvements, only to those actions which are legally required to be taken by the City as permittee or which involve providing information which is solely in the possession of the City. Notwithstanding the above, the City shall provide a higher level of assistance with respect to the Facilities Plan Amendment. Such assistance shall include attendance and input during preliminary Facilities Plan Amendment meetings with the Company, review of preliminary submittal information to Ecology, and attendance at meetings the Company may hold with Ecology. Any such assistance shall be provided only upon the reasonable request of the Company made directly to the City. This covenant shall not obligate the City to staff the Company's permitting efforts, to undertake any new studies or investigations with respect to the Design-Build Improvements, or to affirmatively seek to obtain the issuance of the Governmental Approvals required under this Section. The City, however, shall not take any action which seeks to cause the denial or delay of any application for a Governmental Approval. Any agreement by the City to cooperate does not in any way obligate the City with respect to usual and customary City permitting, code compliance and other regulatory reviews as they may relate to the Company or the Company's requirements hereunder. The outcome of any regulatory review or action undertaken by the City involving the Company will be independent of and in no way biased, prejudiced, or predetermined in any way by this Contract. Nothing in this Contract is intended or shall be construed to require that the City exercise its discretionary authority under its regulatory ordinances in a manner favorable to the Company.

(C) Company Assumption of Permitting Risk for Design-Build Work. Subject to the limitation set forth in Section 4.4(D) with respect to the Facilities Plan Amendment, the Company explicitly assumes the risk of obtaining and maintaining all Governmental Approvals for which it is responsible pursuant to Schedule 3 that are required for the Design-Build Work, including the risk of delay, non-issuance or imposition of any term or condition in connection therewith by a Governmental Body. In assuming this risk, the Company acknowledges in particular that the delay or non-issuance of any Governmental Approval required pursuant to subsection 4.1(A)(2) beyond the Scheduled Construction Commencement Date will give the City the right to terminate this Design-Build Contract for an Event of Default in accordance with Article XI. In the event the City elects not to terminate this Contract pursuant to such an Event of Default, the Company acknowledges that the delay or non-issuance of any Governmental Approval required pursuant to subsection 4.1(A)(2) beyond the Scheduled Construction Commencement Date will delay the occurrence of the Construction Commencement Date and will have the effect of (i) eliminating any escalation of the Fixed Design-Build Price pursuant to Section 8.2(C) and (ii) compressing the period within which the completion of construction, acceptance testing and all other Design-Build Work will need to be completed hereunder in order to avoid delay liquidated damages pursuant to Section 7.6; provided, however, that if the City determines that the Company is using good faith efforts to obtain such Governmental Approvals, the City may, in its discretion, forbear from compressing the Company's construction schedule for up to 90 days following the Scheduled Construction Commencement Date. The Company further acknowledges that the Governmental Body in issuing any Governmental Approval may impose terms and conditions which require the Company to make changes or additions to the Design-Build Improvements which may increase the cost or risk to the Company of performing the Design-Build Work, all of which costs or risks shall be for the account of and borne by the Company.

(D) City Review of Design Submittals on Behalf of Department of Ecology. The City has negotiated an agreement with the Department of Ecology that formally delegates certain design review activities that the Department of Ecology would otherwise perform from Ecology to the City of Tacoma Department of Public Works as authorized by RCW Ch. 90.48.110(2) (the "Delegation Agreement"). The delegated activities include review of engineering reports, design packages (plans and specifications suitable for obtaining building permits), and O&M manuals. In performing these activities, the City, in its governmental capacity, will review the specified reports and materials for conformance with the Facilities Plan, as amended, and Chapter 173-240 WAC requirements, solely on behalf of the Department of Ecology. In no way shall such City review be construed as acceptance of the reviewed materials under the Design-Build Contract, nor shall it relieve the selected Design-Build Contractor from its obligations to meet performance and other requirements of the Design-Build Contract. Furthermore, the Company acknowledges that if the City in its governmental capacity determines that a design submittal is not in conformance with the approved Facilities Plan or Chapter 173-240 WAC requirements, it shall not constitute an Uncontrollable Circumstance. Under the Delegation Agreement, the Department of Ecology retains full authority over the approval of Facilities Plans and any amendments thereto.

SECTION 5.3. ASSISTANCE WITH FINANCING PROCESS. The Company shall cooperate with and assist the City in providing any information, certifications or documents, and in attending meetings, hearings or forums, which may be reasonably required in connection with (i) any requisitioning of funds from the Department of Ecology pursuant to the SRF Loan Agreement, or (ii) otherwise obtaining the funds necessary to pay the Fixed Design-Build Price.

SECTION 5.4. SRF RESPONSIBILITIES. (A) Application and Submittals. The City shall submit all filings, applications and reports necessary to obtain reimbursement from the SRF for the Design-Build Improvements.

(B) Company Responsibilities. The Company shall be responsible for:

(1) coordinating with Department of Ecology staff on the schedule and content of the submittals required for the SRF program;

(2) preparing the application and developing and furnishing all necessary supporting material;

(3) supplying all data and information which may be required;

(4) familiarizing itself with the terms and conditions of the SRF program relating to construction activities and practices;

(5) complying with the terms and conditions of the SRF Loan Agreement or other financing document required by the SRF program, and the requirements contained in RCW Ch. 90.50A, WAC Ch. 173-98; Washington State Department of Ecology's; "Water Quality Financial Assistance Programs for Fiscal Year 2003 - Volume One: Guidelines Volume Two: Appendices and Volume Three: Laws and Rules (December 2001)", Department of Ecology's Administrative Requirements for Ecology Grants and Loans, Publication No. 91-18, (October 2000) relating to construction activities and practices;

(6) preparing all plans required by the SRF Loan Agreement and the applicable regulations of the SRF program;

(7) attending meetings, as necessary, with Department of Ecology and other Governmental Bodies; and

(8) taking all other action necessary or otherwise reasonably requested by the City in order to assist and support the City related to the SRF financing for the Design-Build Improvements.

The Company shall take all actions necessary to comply with the conditions to disbursement of proceeds of the SRF Loan Agreement and to maximize the City's eligibility to receive timely reimbursement under the SRF Loan Agreement.

(C) Data and Information. All data, information and action required to be supplied or taken in connection with any SRF financing shall be supplied and taken on a timely basis considering the SRF requirements at the Company's sole cost and expense. The data and information supplied by the Company to the City and the Department of Ecology in connection therewith shall be correct and complete in all material respects and shall be

submitted in draft form to the City sufficiently in advance to allow full and meaningful review and comment by the City. The Company shall be responsible for any schedule and cost consequences which may result from the submission of materially incorrect or incomplete information. The City reserves the right to reject, modify, alter, amend, delete or supplement any information supplied by the Company pursuant to this Section.

(D) Design Packages. The Company shall be responsible for preparing design packages pursuant to the requirements of the Department of Ecology (WAC 173-240), and in accordance with Schedule 20, in connection with any application for obtaining reimbursement for the Design-Build Improvements under the SRF Loan Agreement. The design packages shall include, but not be limited to, all plans, drawings, mapping, inspections, models, studies, reports, analyses and cost estimates required by the Department of Ecology. The preliminary design report submittal requirements are set forth in Schedule 12.

(E) SRF Requirements. In performing its SRF-related responsibilities as set forth herein, the Company shall do so in a manner which complies with all SRF program requirements. The City will make filings to the Department of Ecology. All SRF related submittals to be prepared by the Company as set forth herein shall be delivered to the City for its review and comment.

ARTICLE VI

CONSTRUCTION OF THE DESIGN-BUILD IMPROVEMENTS

SECTION 6.1. AGREEMENT TO CONSTRUCT. (A) Commencement of Construction. The Company shall commence the preparation of the Site, the disposal of any debris thereon, and the construction of the Design-Build Improvements in accordance with the Design Requirements promptly after the Construction Commencement Date, and shall proceed with due diligence to cause the Design-Build Improvements to be started up and tested for Acceptance in accordance with this Design-Build Contract. All excavated soil and other debris or waste generated from the Design-Build Work, including debris from the demolition of any components of the Central Treatment Plant as required by the Design Requirements, shall be used or disposed of properly by the Company at its expense. Subcontracts entered into by the Company for the construction of the Design-Build Improvements shall neither supersede nor abrogate any of the terms or provisions of this Design-Build Contract. Laydown and staging areas for construction materials shall be located on the Site as set forth in Schedule 8 or at other locations arranged and paid for by the Company.

(B) Construction Practice. The Company shall perform the Design-Build Work in accordance with the Contract Standards and shall have exclusive responsibility for all construction means, methods, techniques, sequences, and procedures necessary or desirable for the correct, prompt, and orderly prosecution and completion of the Design-Build Work as required by this Design-Build Contract. The responsibility to provide the construction means, methods techniques, sequences and procedures referred to above shall include, but shall not be limited to, the obligation of the Company to provide the following construction requirements as further set forth in Schedule 8: (1) temporary power and light, (2) temporary offices and construction trailers, (3) required design certifications, (4) required approvals, (5) weather protection, (6) site clean-up and housekeeping, (7) construction trade management, (8) temporary parking (beyond the parking provided by the City as described in Schedule 8), (9) safety and first aid facilities, (10) correction of defective work or equipment, (11) Subcontractors' insurance, (12) staging areas (beyond the storage areas provided by the City as described in Schedule 8), (13) workshops and warehouses, (14) temporary fire protection, (15) site security, (16) potable water (the Company is permitted to use CTP's water supply for domestic use only), (17) telecommunications, (18) sanitary facilities, (19) fuel, (20) Subcontractor and vendor qualification, (21) receipt and unloading of delivered materials and equipment, (22) erection rigging, (23) temporary supports, (24) snow removal, and (25) construction coordination.

(C) Measurements. The Company shall be responsible for all measurements required for execution of the Design-Build Work to the exact position and elevation as required by this Design-Build Contract.

(D) Compliance With Law. In designing, constructing, starting up and testing the Design-Build Improvements, the Company shall comply with Applicable Law, shall construct and operate all equipment and systems constituting the Design-Build Improvements in accordance with good engineering practice and applicable equipment manufacturers'

specifications and recommendations, and shall observe all applicable safety standards with respect to the operation of the Design-Build Improvements.

(E) Engagement of Authorized City Representative. The City may designate a representative ("Authorized City Representative") to assist it in connection with this Design-Build Contract. The services of the Authorized City Representative may include but shall not be limited to the following:

(1) review and monitor construction progress, payments and procedures;

(2) determine the completion of specified portions of the Design-Build Work and review the release of funds to the Company pursuant hereto;

(3) review proposed changes to the Design Requirements;

(4) review Design-Build Improvements drawings, plans and specifications available to the City hereof for compliance with the Design Requirements;

(5) monitor the Acceptance Tests undertaken by the Company to determine whether any Acceptance Standard has been satisfied;

(6) review the validity of the Company's written notice that an Uncontrollable Circumstance has occurred; and

(7) review and advise the City with respect to material changes to the Design-Build Improvements during the term of this Design-Build Contract.

It is understood that the services intended to be provided by the Authorized City Representative shall be of an observational nature only, unless additional inspection, testing or monitoring services are requested by the City pursuant to subsection 6.3(C) hereof. The Company agrees to cooperate with all reasonable requests made by the Authorized City Representative in connection with the performance of such duties for the City. The fees of the Authorized City Representative shall be paid by the City, except that the Company shall reimburse the City, on a Cost Substantiated basis, for any services performed by the Authorized City Representative (i) after the Scheduled Acceptance Date or (ii) in connection with each repetition of all or any portion of the initial Acceptance Tests unless and to the extent any such additional Acceptance Tests are required as a result of Uncontrollable Circumstances or City Fault.

(F) Limitation on City Liability. If the Company shall claim to have sustained delays due to an Uncontrollable Circumstance (other than delays resulting from City Fault or City-directed Change Orders not due to Company Fault), the Company shall be entitled only to an extension of time as a result of such delay and shall not have or assert any other claim, cause or action against the City based on such delay.

(G) Maintenance of Plant Operations and Transition Plan. The Company shall implement the Construction Work in a manner which will not adversely affect the City's ability to comply with its NPDES Permit and all other requirements of Applicable Law. The Company shall develop plans describing the approach and operational procedures for initiating and constructing the Design-Build Improvements while minimizing interference with the operations of the CTP (the "Maintenance of Plant Operations Plan") and for starting up and

testing the Design-Build Improvements while minimizing interference with CTP operations (the "Transition Plan"). The Company shall submit to the City a detailed Maintenance of Plant Operations Plan and Transition Plan as set forth in Schedules 8 and 11. In the event of unplanned outages occur at the CTP due to the Company's construction related activities, the actual costs to the City resulting in such outages may be deducted from the Company's next Design-Build Price requisitions.

SECTION 6.2. COMMENCEMENT OF WORK. (A) Notice to Proceed. The City shall give the Company a Notice to Proceed upon the satisfaction or waiver of all of the Construction Commencement Date Conditions, which shall require the Company to promptly commence the Design-Build Work. Thereafter, the Company shall undertake the Design-Build Work so as to achieve Acceptance on or before the Scheduled Acceptance Date.

(B) Time. The time for the Company's performance of the Design-Build Work shall be computed from the Scheduled Construction Commencement Date. The Company's failure to achieve Acceptance on or before the Scheduled Acceptance Date will result in assessment of damages under Section 7.6 hereof.

(C) Effect of Progress Schedule. As part of the Monthly Progress Report required under subsection 6.3(F) hereof, the Company shall submit to the Authorized City Representative a progress schedule completed with corresponding dates of completion. The Company agrees that the Company's submission of any such progress schedule is for the City's information only; and the City's acceptance of any such progress schedule shall not bind the City or the Company in any manner. Thus, the Authorized City Representative's acceptance of any such progress schedule shall not imply that the City:

(1) approves the Company's proposed staffing or scheduling of the Design-Build Work;

(2) agrees or guarantees to the Company or any other person that the Company has the capacity or ability to complete the Design-Build Work in accordance with the progress schedule, or that the Design-Build Work can or will be completed in accordance with the monthly progress schedule; or

(3) consents to any changes in scheduling, or agrees to any extension of time, unless the City agrees specifically in writing to the applicable change.

SECTION 6.3. DESIGN REVIEW, OBSERVATIONS, TESTING AND UNCOVERING OF WORK. (A) Observations and Design Review Protocol. During the progress of the Design-Build Work through Acceptance, the Company shall at all times during normal working hours afford the City, appropriate regulatory agency representatives, the Authorized City Representative and all City consultants every reasonable opportunity for observing all Design-Build Work at the Site, and shall comply with the requirements of Schedules 8 and 12 and the DB Quality Management Plan contained in Schedule 10. During any such observation, all representatives of the City and the City's consultants and regulatory body representatives shall comply with all reasonable safety and other rules and regulations applicable to presence in or upon the Site or the Design-Build Improvements, and shall in no material way interfere with the Company's performance of any Design-Build Work.

(B) Tests. The Company shall conduct all tests of the Design-Build Work (including shop tests) or inspections required by Schedules 6, 8, and 11, the Design Requirements or by Applicable Law or Insurance Requirements. The Company shall give the City, the Authorized City Representative, the appropriate construction code enforcement agency, and City consultants designated by the City Authorized Representative reasonable advance notice (at least 10 business days for those tests which must be witnessed by third parties in accordance with Applicable Law) of tests or inspections prior to the conduct thereof. In no event shall the inability, failure, or refusal of the Authorized City Representative or any City consultant or State representative to attend or be present at or during any such test or inspection, delay the conduct of such test or inspection or the performance of the Design-Build Work. If required by Applicable Law or Insurance Requirements, the Company shall engage a licensed engineer or architect to conduct or witness any such test or inspection. All analyses of test samples shall be conducted by persons appearing on lists of laboratories authorized to perform such tests by the State or Federal agency having jurisdiction or, in the absence of such an authorized list in any particular case, shall be subject to the approval of the City, which shall not be unreasonably withheld. Acceptance Testing of the performance of the completed Design-Build Improvements shall be conducted in accordance with Schedule 11 hereto.

(C) City Observations, Inspections and Tests. The City, its employees, agents, representatives and contractors (which may be selected in the City's sole discretion), and all Governmental Bodies, may at any reasonable time conduct such on-site observations and inspections, and such civil, structural, mechanical, electrical, chemical, or other tests as the City, the Authorized City Representative or Governmental Body deems necessary or desirable to ascertain whether the Design-Build Work complies with this Design-Build Contract. The Company shall not restrict the ability of the City or the Authorized City Representative to take progress photographs of the Design-Build Improvements construction. The City will pay for any test, observation or inspection requested by the Authorized City Representative and incur any costs directly resulting from a delay in performing the Design-Build Work caused by such test or inspection (and not required under subsection 6.3(B) hereof or as Extra Design-Build Work under Section 6.6 hereof). The test, observation or inspection shall be treated as an Uncontrollable Circumstance hereunder, the cost of which shall be borne by the City, unless such test, observation or inspection reveals a material failure of the Design-Build Work to comply with this Design-Build Contract or Applicable Law, in which event the Company shall bear all reasonable costs and expenses of such observation, inspection or test and of any such delays. If the test, observation and inspection is requested by a Governmental Body (other than the City) the cost and delay resulting from such test, observation or inspection shall be treated as an Uncontrollable Circumstance, unless the test, observation or inspection reveals a material failure of the Design-Build Work to comply with this Design-Build Contract or Applicable Law, in which event the Company shall bear all reasonable costs and expenses of such observation, inspection or test and of any such delays.

(D) Certificates and Reports. The Company shall secure and deliver to the Authorized City Representative promptly, at the Company's sole cost and expense, all required certificates of inspection, test reports, work logs, or approvals with respect to the Design-Build Work as and when required by the Design Requirements or by Applicable Law or Insurance

Requirements. The Company shall provide to the City, immediately after the receipt thereof, copies of any notice of default or noncompliance received by the Company under or in connection with any Governmental Approval, Subcontract, or other transaction agreement pertaining to the Construction Period.

(E) Taking Apart, Uncovering and Replacing Design-Build Work. The Company shall give the City reasonable notice (at least 10 business days for those events which must be witnessed by third parties in accordance with Applicable Law) of its upcoming schedule with respect to the covering and completion of any Design-Build Work. The City shall give the Company reasonable notice of any intended inspection or testing of such Design-Build Work in progress prior to its covering or completion, which notice shall be sufficient to afford the City and the Authorized City Representative a reasonable opportunity to conduct a full inspection of such Design-Build Work, including, but not limited to, at least 5 business days' advance notice with respect to all final visual inspections and tests of all sewer lines, mechanical equipment and Design-Build Improvements operation. At the City's written request, the Company shall take apart or uncover for inspection or testing any previously covered or completed Design-Build Work; provided, however, that the City's right to make such requests shall be limited to circumstances where there is a reasonable basis for concern by the City that the disputed Design-Build Work conforms with the requirements of this Design-Build Contract. The cost of uncovering, taking apart, or replacing such Design-Build Work along with the costs related to any delay in performing Design-Build Work caused by such actions, shall be borne as follows:

(1) by the Company, if such Design-Build Work has been covered prior to any observation or test required by the Design Requirements or by Applicable Law or Insurance Requirements or if such Design-Build Work has been covered prior to any observation or test as to which the City has provided reasonable advance notice of its intent to conduct; and

(2) in all other cases, as follows:

(a) by the Company, if such observation or test reveals that the Design-Build Work does not comply with this Design-Build Contract; or

(b) by the City, if such observation or test reveals that the Design-Build Work does comply with this Design-Build Contract.

In the event such Design-Build Work is revealed to comply with this Design-Build Contract, the delay caused by such observation or test shall be treated as having been caused by an Uncontrollable Circumstance and any costs incurred with respect to such observation or test shall be borne solely by the City.

(F) Monthly On-Site Meetings and Design and Construction Review. During the Construction Period, the Company, the City and the Authorized City Representative shall conduct management meetings on at least a monthly basis, and shall conduct construction progress meetings on a weekly basis as set forth in Schedule 13. Such meetings shall take place on the Site in a field office to be provided by the Company. At its option, representatives of the Development of Ecology shall be permitted to attend and participate in all such

meetings. At such meetings, discussions will be held concerning all aspects of Design-Build Improvements construction including, but not limited to, construction schedule, progress payments, Extra Design-Build Work, shop drawings, progress photographs to the extent available, and any soil boring data and shop test results. A monthly progress report, (the "Monthly Progress Report") containing all relevant information as required by Schedule 12, shall be prepared by the Company and provided to the City and the Authorized City Representative at least five (5) days prior to each monthly meeting.

(G) Notices of Non-Compliance. The City may, but shall not be obligated to, deliver notices of noncompliance or breach during construction which shall reasonably describe the actions or omissions of the Company which constitute a breach of the Company's obligations under this Design-Build Contract. Each notice of non-compliance shall require the Company to promptly cure the non-compliance and, upon the issuance of a second and each subsequent notice in any month (whether for the same, but uncured, or separate, non-compliance), the Company shall be required to pay the City $500.00 as a liquidated damage. In addition to such liquidated damages, the City may elect to cure such breach and the Company shall be required to pay for all costs and expenses incurred by the City in the curing of such breach. Repeated and uncured breaches shall be grounds for termination as set forth in Section 11.2 hereof, irrespective of the fact that liquidated damages might have been paid for previous non-compliances.

SECTION 6.4. CORRECTION OF WORK. (A) Correction of Non-Conforming Design-Build Work. The Company at its sole cost and expense shall repair, restore, rebuild or replace and correct promptly, any Design-Build Work which does not conform with the requirements of this Design-Build Contract. If the Company fails to repair, restore, rebuild or replace and correct promptly, any such Design-Build Work, the City shall give to the Company written notice of the need to correct such non-conforming Design-Build Work. The Company shall have the right to object to the City's determination within five (5) days of receipt of the City notice, and the matter may be submitted for dispute resolution pursuant to Section 12.2 hereof. Notwithstanding the Company's right of objection, upon receipt of City notice pursuant to this subsection, the Company shall, without being deemed to have waived such objection, at its cost and expense, complete, repair, replace, restore, rebuild and correct promptly the non-conforming Design-Build Work. The failure of the Company to do so shall constitute a Company Fault under the terms of this Design-Build Contract.

(B) Costs of Correction. The costs of correcting rejected or omitted Design-Build Work shall be borne by the Company. If it is determined by the parties or through dispute resolution pursuant to Section 12.2 hereof that the corrective action was not necessary to conform the Design-Build Work with the requirements of this Design-Build Contract, the City shall reimburse the Company for its costs and expenses incurred in correcting the Design-Build Work, subject to Cost Substantiation and the Scheduled Acceptance Date shall be extended to reflect delays caused by such corrective work.

(C) Elective Acceptance of Defective Design-Build Work. The City may elect, at the Company's request, to accept non-conforming Design-Build Work and charge the Company, by Change Order, for the amount agreed upon by the parties, which amount shall

reflect the reduction in value of the Company's services or Design-Build Work has been reduced.

(D) Relation to Other Obligations. The obligations specified in subsection 6.4(A) hereof establish only the Company's specific obligation to correct the Design-Build Work and shall not be construed to establish any limitation with respect to any other obligations or liabilities of the Company under this Design-Build Contract. This Section 6.4 is intended to supplement (and not to limit) the Company's obligations under the Acceptance Test Procedures and Standards, the Performance Warranty and any other provision of this Design-Build Contract or Applicable Law.

(E) Payments of Amounts Owed. Any amounts for which the Company is responsible under this Section shall be deducted from the unpaid balance of the Design-Build Price; and the Company shall pay to the City upon demand any amount owing under this Section which exceeds the unpaid balance of the Design-Build Price.

SECTION 6.5. DAMAGE TO THE DESIGN-BUILD WORK. (A) Damage Prevention. During the Construction Period (or whenever earlier or later performing Design-Build Work on the Site), the Company shall use care and diligence, and shall take precautions to protect the Design-Build Work and all City Property and property of other persons (including any materials, equipment, or other items furnished by the City) located at the Site from damage prior to Final Completion. For such purpose, the Company shall provide reasonable and appropriate security measures, fencing, protective features (such as waterproof coverings and/or roofing, boards, boxing, frames, canvas guards, and fireproofing), and other safeguards to the extent necessary and proper in the performance of the Design-Build Work.

(B) Restoration. During the Construction Period, in case of damage to the Design-Build Work, and regardless of the extent thereof or the estimated cost of restoration, and whether or not any insurance proceeds are sufficient or available for the purpose, the Company shall promptly undertake and complete restoration of the damage to Design-Build Work to the character and condition existing immediately prior to the damage in accordance with the procedures set forth herein, as applicable, regarding Uncontrollable Circumstances, Change Orders or Extra Design-Build Work. If the Company fails to undertake restoration of the damage, or having so commenced fails to complete restoration in accordance with this Section and the revised progress schedule, the City may (but shall not be obligated to) undertake or complete restoration at the Company's expense to the extent applicable.

(C) Notice and Reports. The Company shall notify the City, any other appropriate Governmental Body, and the insurers under any applicable Required Insurance of any damage to the Design-Build Work, or any accidents on the Site, as promptly as reasonably possible after the Company learns of any such damage or accidents; and, as soon as practicable after learning of any such occurrence (but in no event later than 72 hours), the Company shall submit a full and complete written report to the Authorized City Representative and the City. Such report shall be updated on a weekly basis and upon culmination of all tests, analysis and reviews, a final report incorporating all of the test, analysis and reviews and the findings thereof shall be submitted to the City. The Company shall also submit to the

Authorized City Representative and the City copies of all accident and other reports filed with (or given to the Company by) any insurance company, adjuster, or Governmental Body or otherwise prepared or filed in connection with the damage or accident, and prior to resuming work, shall provide written releases of OSHA and other Governmental Bodies and a report of a qualified independent engineer certifying that it is safe to resume such work.

SECTION 6.6. CHANGE ORDERS AND EXTRA DESIGN-BUILD WORK. (A) Right to Issue Change Orders. The City, subject to the provisions of subsection 6.6(F) hereof, may issue Change Orders pertaining to any and all aspects of the Design-Build Work at any time and for any reason whatsoever, whether and however such Change Orders revise this Design-Build Contract, add Extra Design-Build Work or omit Design-Build Work.

(B) Extra Design-Build Work. The Company shall, except to the extent excused under subsection 6.6(F) hereof, undertake and complete promptly all Extra Design-Build Work authorized under this Section. The Company shall not perform any Extra Design-Build Work without a Change Order authorized by the City. The Company shall be entitled to additional compensation for Extra Design-Build Work, determined in accordance with this Section ("Extra Payment").

(C) Extra Design-Build Work Caused by Company Fault. The Company shall not be entitled to any Extra Payment for any Extra Design-Build Work, if and to the extent required by reason of any Company Fault.

(D) Cost Reductions from Change Orders. The Design-Build Price shall be reduced if and to the extent that any Change Order, whether for omitted Design-Build Work or otherwise, results in any reduction in the Company's cost of the Design-Build Work.

(E) Proposal for Extra Design-Build Work. If the City requires Extra Design-Build Work involving items of Design-Build Work for which the Company has unit prices as set forth in Schedule 22, the Extra Payment shall be determined in accordance with such unit prices, plus additional labor and engineering costs as required and subject to Cost Substantiation. In other cases, the City may request the Company to submit a lump-sum price for Extra Design-Build Work covered by any proposed Change Order which price shall be broken out by the categories of work to be done and corresponding costs. Within seven (7) days after receipt of any such request (unless a longer or shorter period is specified or is reasonably required by the Company taking into account the scope and complexity of the proposed Change Order), the Company shall submit a written quotation on a lump-sum basis (or on a unit-price basis if unit prices for the items involved were previously set forth in this Design-Build Contract or are appropriate to the proposed Extra Design-Build Work). With respect to any Extra Design-Build Work necessitated by Uncontrollable Circumstances, the Company agrees to a reduced profit with respect thereto as set forth in Schedule 22 hereto. The Company shall include with each quotation Cost Substantiation therefore in accordance with the definition thereof and Schedule 22. Any such quotation shall be deemed the Company's offer to the City, binding for 30 days, to perform the Extra Design-Build Work at the price quoted. In addition, each quotation shall include the effect, if any, of the Extra Design-Build Work on the progress schedule, the ability to meet the Acceptance Standards or

standards more stringent than the Acceptance Standards, the Scheduled Acceptance Date, the Design-Build Price and any of the other obligations of the Company under this Design-Build Contract. If the City does not accept the Company's quotation, the Company shall use its best efforts to procure three quotations for the Extra Design-Build Work and any individual elements thereof, which shall constitute the Company's offer to the City, binding for 30 days. Alternatively, the City, as owner, may bid-out the work directly with another contractor.

(F) Conditions to Obligation to Proceed. The parties shall promptly proceed to negotiate in good faith to reach agreement on the price to be paid the Company for the Extra Design-Build Work and on the effect of the Extra Design-Build Work on any other obligations of the Company under this Design-Build Contract. The Company acknowledges that it shall not be entitled to seek a price which is in excess of the fair market price for such Extra Design-Build Work. In order to receive payments for Extra Design-Build Work, the Company shall submit Requisitions, which will include all Cost Substantiation information (unless a lump sum price is agreed upon), to the City, with a copy to the Authorized City Representative on a monthly basis, for amounts specified in this subsection 6.6(F) as they are incurred. The Requisition and payment procedure shall be in accordance with Section 8.5 hereof.

(G) Obligation to Proceed Notwithstanding Dispute. In the event the City and the Company are unable to agree on a price and any adjustments to this Design-Build Contract which are occasioned by a Change Order for Extra Design-Build Work within a reasonable period of time after conducting good faith negotiations with respect thereto pursuant to subsection 6.6(F) hereof, the Company at the election of the City shall perform the Extra Design-Build Work on a Cost Substantiation basis.

(H) Disputed Work. If the Company is of the opinion that any Design-Build Work which it elects to perform in the absence of any agreement under subsection 6.6(F) is Extra Design-Build Work and not Original Design-Build Work ("Disputed Work"), the Company shall give the City and the Authorized City Representative a written notice of dispute before commencing the Disputed Work.

(I) Notice; Waiver. The Company shall give reasonable advance notice to the Authorized City Representative in writing of the scheduling of all Extra Design-Build Work and all Disputed Work. The Company's failure to give such written notice of Disputed Work under this Section shall constitute a waiver of Extra Payment, any extension of time, and all other Loss-and-Expense whatsoever relating to the particular Disputed Work.

SECTION 6.7. PATENT, COPYRIGHT AND OTHER PROTECTED MATERIAL. (A) Property of the City. The Design Requirements and all other documents forming part of this Design-Build Contract, the Deliverable Material, and all drawings, notes, studies, surveys, computer programs, films, draft and final reports, and other documents issued by the City or by the Company to the City in connection with this Design-Build Contract or the Design-Build Work shall be "works for hire" and remain the property of the City and the City will own all copyrights thereto, whether or not the City undertakes the Design-Build Improvements or subsequently terminates the Design-Build Work or this Design-Build Contract.

(B) Delivery of Deliverable Material. As the Design-Build Work progresses (or upon the termination of the Company's right to perform the Design-Build Work), the Company shall deliver to the City all Deliverable Material described in Schedule 12 and as otherwise required herein.

(C) Use of Deliverable Material, Processes and Equipment. If any Deliverable Material, process or equipment utilized in the Design-Build Work is patented or copyrighted by other persons (or is or may be subject to other protection from use or disclosure), the City (and the Department of Ecology and EPA) shall have a royalty-free perpetual license to use the same. The City shall have the right to use (or permit use of) all such Deliverable Material, process or equipment, all oral information whatsoever received by the City in connection with the Design-Build Work, and all ideas or methods represented by such Deliverable Material, process or equipment, at any time without additional compensation, but solely for purposes of the ownership, construction and operation of the Design-Build Improvements.

(D) Substitutes for Deliverable Material, Process or Equipment. If the City is enjoined or otherwise legally prohibited from using any Deliverable Material, process or equipment (or any affected Design-Build Work) for reasons other than Uncontrollable Circumstances, or City Fault, the Company, at its expense, shall:

(i) acquire the right to legally use under infringed patents or copyrights; or

(ii) modify or replace infringed Deliverable Materials, processes or equipment (or any affected Design-Build Work) with uninfringed Deliverable Materials, processes or equipment (or any affected Design-Build Work) equivalent in quality, performance, useful life and technical characteristics and development.

SECTION 6.8. CITY TERMINATION OPTIONS DURING THE CONSTRUCTION PERIOD. (A) City Termination for Cause. The City shall have the right during the Construction Period to terminate this Design-Build Contract for cause and to pursue all remedies available pursuant to Article XI, without cost or liability to the City, based upon the occurrence of any Event of Default by the Company during the Construction Period.

(B) City Convenience Termination Option Prior to the Acceptance Date. The City shall have the right at any time following the Construction Commencement Date and prior to the Acceptance Date, exercisable in its sole discretion, for its convenience and without cause, to terminate this Design-Build Contract upon 30 days' written notice to the Company. Upon any such termination the City, subject to Cost Substantiation, shall reimburse the Company an amount equal to the sum of 100% of the unbilled and billed and unpaid portion of the Design-Build Price for the Design-Build Work completed to such date, subject to settlement of payments owing the Company as of the Termination Date under subsection (C) of this Section (the "Reimbursable Construction Expenses"), plus the Company's reasonable Cost Substantiated costs related to demobilization.

(C) Cost Records and Reporting. During the Construction Period, the Company shall prepare and maintain proper, accurate and complete books and records of the cost and description of the permitting and other work which the Company has performed since the Construction Commencement Date which is directly and solely related to the Company's

obligations during the Construction Period under this Design-Build Contract, the cost of which would be the responsibility of the City if the City were to elect to suspend or terminate this Design-Build Contract pursuant to this Section. All financial records of the Company and its Subcontractors shall be maintained in accordance with generally accepted accounting principles and auditing standards. The Company shall submit all books and records or a reasonably detailed summary thereof acceptable to the City, together with a summary statement of monthly and aggregate Reimbursable Construction Expenses incurred, to the City at any time after the Construction Commencement Date at its request. If the Company fails to provide such monthly reports to the City within 60 days from the last business day of any such month, the Company waives its right to claim and receive any Reimbursable Construction Expenses incurred for that month. Specific requests by the Company for the payment of Reimbursable Construction Expenses shall be supported by Cost Substantiation. In addition, on the Construction Commencement Date and on the first day of each month thereafter the Company shall provide to the City an itemized list of all Construction Period work expected to be undertaken in the following two months, and the expected costs thereof. The City shall have the right to question the Company's decision to undertake such activities and to provide notice to the Company that such costs will not be Reimbursable Construction Expenses.

(D) Delivery of Design-Build Period Work Product to the City. Concurrently with payment by the City to the Company of the amount due upon any termination of this Design-Build Contract under this Section, the Company shall deliver to the City all of its Design-Build Period work product produced during the period commencing on the Contract Date to the Termination Date hereunder, which work product immediately shall become the property of the City. The City's use of any such work product for any purpose other than the Design-Build Improvements shall be at its own risk and the Company shall have no liability therefor.

ARTICLE VII

ACCEPTANCE OF THE PROJECT

SECTION 7.1. START-UP OPERATIONS. **[Note to Proposers: The City recognizes that the sequencing of construction and start-up for components of the Design-Build Improvements will vary with each Proposal and therefore the contract language set forth in this section may or may not be appropriate for a particular Proposal. Each Proposer is encouraged to mark-up this section, to the extent necessary, to reflect the sequencing included in its Proposal.]** (A) Notices. The Company shall give the City (1) at least 90 days' prior written notice of the expected date of commencement of start-up operations, which notice shall include a certification (to be confirmed as of the date start-up operations commence) that the Company is in full compliance with the terms of this Contract, and that the Design-Build Improvements are in compliance with all of the conditions of the Governmental Approvals applicable to the Design-Build Improvements and other Applicable Law; and (2) notice as to the Company's requirements for influent during commissioning and start-up operations reasonably in advance of the date by which the Company requires the influent.

(B) Commissioning. The Company may commission and start-up the Design-Build Improvements, test equipment and systems, and, subject to paragraph (E) below, conduct post-start-up operations at its election at any time. The Company's cost of all such commissioning-related activities, regardless of their extent or duration, shall be included in the Fixed Design-Build Price.

(C) Operations and Maintenance Manual. The Company shall provide to the City and the Authorized City Representative a detailed description of the electronic operations and maintenance manual which the Company is required to provide pursuant to and in conformance with Section 9.1.3 of Schedule 9. Such detailed description shall describe, among other things, the Operation and Maintenance Manual's features, and provide a content and organizational overview, and shall be delivered to the City within the time frame set forth in Schedule 12.

(D) Training of Personnel. The Company shall, on not less than 30 days' prior written notice to the City, conduct a comprehensive training program for the City and the Design-Build Improvement personnel in order to enable them to assume operating and management responsibility for the Design-Build Improvement as set forth in Schedule 9.

(E) Operations Following Start-Up and Prior to Acceptance Testing. Upon completion of commissioning and start-up testing (check-out testing, not Acceptance Testing) of equipment and systems, such equipment and systems necessary for the normal and proper operation of the CTP will be integrated into the CTP. Prior to integration of equipment or systems into the CTP, the Company shall, pursuant to the provisions of Sections 11.2 and 11.3 of Schedule 11, (i) demonstrate to the satisfaction of the City that such equipment or system operates properly and that integration of any such equipment or system will not adversely affect the ability of the CTP to meet any requirement of Applicable Law, (ii) provide training to City personnel in accordance with Schedules 9 and 11 to enable City personnel to properly

operate and maintain such equipment or system, and (iii) in the event the final Operation and Maintenance Manual has not been delivered to the City, provide a detailed operation and maintenance protocol to the City with respect to such equipment or system. Following satisfaction of the preceding conditions and prior to Acceptance, the City, at its costs, will operate and maintain such equipment and systems in close consultation with Company personnel and in accordance with the Operation and Maintenance Manual or protocols provided by the Company. The Company will be responsible, at its cost, for performing all repairs and replacements and other non-routine maintenance on Company-installed malfunctioning equipment, systems and improvements which may be necessary prior to Acceptance. Prior to commencing the Acceptance Tests, the Company shall inspect all equipment and systems which constitute the Design Build Improvements, including those which have been previously integrated into the CTP and operated by the City, to ensure that all such improvements are ready for Acceptance Testing. The Company shall certify to the City, in accordance with Section 7.2, that all such improvements have been designed and constructed in accordance with this Agreement and that all such improvements in their then existing condition are ready to undergo the Acceptance Tests. In the event the Company believes any such improvements have not been operated and maintained in accordance with the operation and maintenance protocols or the consultations provided by the Company, and that equipment or systems operated by the City are not ready to be Acceptance Tested as a result thereof, the Company shall give prompt written notice of such circumstance to the City. If the City disagrees with such assertion, such dispute shall be resolved in accordance with Article XII hereof. In the absence of any such notice from the Company, the Company will be deemed to have accepted the risk of the condition of such improvements.

SECTION 7.2. SUBSTANTIAL COMPLETION. (A) Conditions to Substantial Completion. "Substantial Completion" shall occur when all of the following conditions have been satisfied:

(1) a preliminary or temporary certificate of occupancy has been issued for the Design-Build Improvements, if required by Applicable Law;

(2) the authority to operate the Design-Build Improvements contained in the Governmental Approvals is in full force and effect and has not been withdrawn, revoked, superseded, suspended or materially impaired or amended;

(3) the Company is authorized, on a temporary or permanent basis, to operate the Design-Build Improvements under Applicable Law;

(4) all Utilities specified or required under this Design-Build Contract to be arranged for by the Company are connected and functioning properly;

(5) the Company and the Authorized City Representative have agreed in writing upon the Final Punch List (or, if they are unable to agree, the Authorized City Representative shall have prepared and issued the Final Punch List to the Company within 15 business days of the Company having submitted its Final Punch List to the Authorized City Representative);

(6) the Authorized City Representative has approved in writing, such approval not to be unreasonably withheld, a certification by the Company that all Design-Build Work, excepting the items on the Final Punch List and the Close-Out Requirements, is complete and in all respects is in compliance with this Design-Build Contract and that the Design-Build Improvements in their then current condition are ready for the Acceptance Tests;

(7) the Company has delivered to the Authorized City Representative a Claims Statement setting forth in detail all claims of every kind whatsoever against the City connected with, or arising out of, this Design-Build Contract or the Design-Build Work and arising out of or based on events prior to the date when the Company gives such statement to the Authorized City Representative;

(8) the Company has delivered to the City the final Operation and Maintenance Manual;

(9) the Company has delivered to the City written certification from the equipment manufacturers (including information technology systems and instrumentation and controls) that all major items of machinery and equipment included in the Design-Build Improvements have been properly installed and tested in accordance with the manufacturers' recommendations and requirements;

(10) the Company has developed and conducted a training program to train operating personnel designated by the City to operate and maintain the Design-Build Improvements in accordance with subsection 7.1(D); and

(11) the Company has submitted written certification that all of the foregoing conditions have been satisfied and the City has approved the Company's certification, which approval shall be effective as of the date of the Company's certification. Alternatively, Substantial Completion shall occur on any date certified by the City, which shall have discretion to waive any of the foregoing conditions.

(B) Final Punch List. The Company shall submit a proposed Final Punch List to the Authorized City Representative when the Company believes that the Design-Build Work has been substantially completed in compliance with this Design-Build Contract. The "Final Punch List" shall be a statement of repairs, corrections and adjustments to the Design-Build Work, and incomplete aspects of the Design-Build Work, which in the Authorized City Representative's opinion:

(1) the Company can complete before the Company's agreed date for Final Completion set forth in Section 7.8 and with minimal interference to the occupancy, use and lawful operation of the Design-Build Improvements; and

(2) would represent, to perform or complete, a total cost of not more than one percent (1%) of the original Design-Build Price (unless the City determines that a higher percentage is acceptable).

In no event shall the Final Punch List contain any incomplete items necessary for full Design-Build Improvements operations. The Final Punch List shall be approved by the City, and completion of the Final Punch List items shall be verified by a final walk-through of

the Design-Build Improvements conducted by the City and the Authorized City Representative with the Company and the Project Manager.

SECTION 7.3. ACCEPTANCE TESTING. (A) Submittal of Acceptance Test Plan. The Company shall prepare and submit to the City for its approval a detailed Acceptance Test plan, which shall conform to the requirements of Schedule 11 in all respects and in accordance with the timeframe set forth in Schedule 12. If the Company and City are unable to agree upon an acceptable Acceptance Test plan within 90 days of such submittal, their inability to agree may be mediated as provided in Section 12.2.

(B) Notice of Commencement of the Acceptance Tests. The Company shall provide the City and the Department of Ecology with at least 30 days' prior written notice of the expected initiation of the Acceptance Tests in accordance with the requirements of Schedule 11. At least 10 days prior to the actual commencement of Acceptance Testing, the Company shall certify in writing that it is ready to begin Acceptance Testing in accordance with the Acceptance Test plan and Schedule 11.

(C) Conditions to Commencement of the Acceptance Tests. The Company shall not commence the Acceptance Tests until the following events have occurred:

(1) The requirements of subsections (A) and (B) of this Section have been met and the City has approved the Acceptance Test plan;

(2) To the extent required by Applicable Law, the Department of Ecology has approved the Acceptance Test plan proposed by the Company and approved by the City;

(3) Substantial Completion has occurred;

(4) All Governmental Approvals, including those relating to changes to or exemptions from the requirements included in the City's NPDES Permit or other approved operating procedures, necessary to perform the Acceptance Tests ("Start-up and Testing Approvals") have been obtained; and

(5) The Company has certified that it has complied with the pre-Acceptance Testing requirements of Schedule 11.

(D) Conduct of the Acceptance Tests. The Company shall supervise the Acceptance Tests (to be conducted by City personnel) in accordance with Schedule 11 and the Acceptance Test plan and the requirements of Applicable Law. The Authorized City Representative and the other designated representatives of the City may inspect the preparations for the Acceptance Tests and to be present for the conduct of the Acceptance Tests for purposes of ensuring compliance with the Acceptance Test plan and the integrity of the Acceptance Tests results. During the performance of the Acceptance Tests, City operating personnel will assist in the coordination of the requirements for testing with the requirements for the proper performance of the CTP generally. In the event that the City representative believes that the ongoing conduct of the Acceptance Test is jeopardizing the ability of the CTP to comply with any requirements of Applicable Law or is otherwise adversely affecting the performance of the CTP, the City shall notify the Company thereof. Upon such notification, the Acceptance Testing shall immediately terminate. The Company shall make all corrections in

order to avoid any such adverse consequence and shall re-initiate the Acceptance Tests. If it is determined that the Acceptance Tests were not conducted with Acceptable Influent and the Company passes the Acceptance Tests, the City shall have the option of (i) accepting the final test results or (ii) requiring re-testing, at the City's cost, using Acceptable Influent. If it is determined that the Company failed the Acceptance Tests and the Company successfully demonstrates that such failure was due to the failure to receive Acceptable Influent, such failure shall constitute an Uncontrollable Circumstance. In such event, the City shall have the option of declaring that the Acceptance Tests have been passed or requiring the Company to re-perform the tests, in which event the Company would be entitled to cost and schedule relief.

(E) Test Report. Within 30 days following the last day of any Acceptance Test, the Company shall furnish the City and the Authorized City Representative with ten copies of a written Acceptance Test report consistent with the requirements specified in Schedule 11, certified as true, complete and correct by the Company. The failure of the Company to furnish the certified Acceptance Test report within such 30-day period shall constitute a breach of this Design-Build Contract and such failure shall not operate to extend the Extension Period.

SECTION 7.4. ACCEPTANCE DATE CONDITIONS. The following conditions shall constitute the "Acceptance Date Conditions," each of which must be satisfied in all material respects by the Company in order for the Acceptance Date to occur, and each of which must be and remain satisfied as of the Acceptance Date:

(1) Achievement of Acceptance Test Procedures and Standards. The Company shall have completed the Acceptance Tests and such test shall have demonstrated that the Design-Build Improvements have met the Acceptance Test Procedures and Standards;

(2) Operating Governmental Approvals. All Governmental Approvals required under Applicable Law which are necessary for the continued routine operation of the Design-Build Improvements shall have been duly obtained by the Company and shall be in full force and effect. Certified copies of all such Governmental Approvals, to the extent not in the City's possession, shall have been delivered to the City; and

(3) No Default. The Company has certified that there is no Event of Default by the Company existing under this Design-Build Contract or by the Guarantor under the Guaranty Agreement, or event which with the giving of notice or the passage of time would constitute an Event of Default by the Company hereunder or an Event of Default by the Guarantor under the Guaranty Agreement.

SECTION 7.5. CONCURRENCE OR DISAGREEMENT WITH TEST RESULTS. (A) Acceptance Date Concurrence. The "Acceptance Date" shall be the day upon which the Company certifies that all Acceptance Date Conditions have occurred. If the Company verifies in the written report delivered pursuant to subsection 7.3(E) that the Acceptance Date Conditions have been satisfied, the City shall determine, within 30 days of its receipt of such report, whether it concurs with such certification. If the City states in writing that it concurs with the Company's certification, the Design-Build Improvements shall be deemed to have

achieved Acceptance and the Acceptance Date shall be deemed to have been established on the date of the Company's original certification of the Acceptance Date.

(B) Acceptance Date Disagreement. If the City determines at any time during such 30-day review period that it does not concur with the Company's certification of Acceptance, the City shall immediately send written notice to the Company of the basis for its disagreement. In the event of any such non-concurrence by the City, either party may elect to refer the dispute to Non-Binding Mediation for resolution pursuant to Section 12.2. The Mediator shall issue a decision within 60 days of the dispute referral unless both parties agree that more time is appropriate. In the event that the Mediator fails to issue a decision within the applicable time period, then either party may initiate judicial proceedings. The parties acknowledge and agree that any decision rendered by the Mediator as to whether Acceptance has occurred shall be non-binding. Acceptance shall not be deemed to have been achieved unless the Acceptance Tests, conducted in a unified and continuous manner as provided in the Acceptance Test plan and in Schedule 11, demonstrate that all of the Acceptance Test Procedures and Standards have been met. In the event the Company, in conducting the Acceptance Tests, does not successfully meet the Acceptance Test Procedures and Standards, the Company shall re-test the Design-Build Improvements in accordance with Schedule 11. Nothing in this Section shall prevent the Company from bringing an action or from repeating any Acceptance Test in order to establish the achievement of Acceptance. The Company shall provide the City with at least three days' written notice of any re-test of the Acceptance Tests.

SECTION 7.6. DELAY LIQUIDATED DAMAGES. In the event that Acceptance occurs subsequent to the Scheduled Acceptance Date, the Company shall pay to the City daily delay liquidated damages for each day that the Acceptance Date falls after the Scheduled Acceptance Date, in the amount of $1,000 per day for each of the first 60 days following the Scheduled Acceptance Date, $3,500 per day for each of days 61-120 following the Scheduled Acceptance Date and $5,000 per day for each day thereafter until any termination of this Design-Build Contract for an Event of Default. In no event shall the aggregate amount of delay liquidated damages payable by the Company exceed $1,470,000 unless otherwise agreed to in writing by the parties.

SECTION 7.7. FAILURE TO ACHIEVE ACCEPTANCE. Unless, as of the last day of the Extension Period, Acceptance has been achieved, an Event of Default by the Company will be deemed to have occurred under Section 11.2 notwithstanding any absence of notice, further cure opportunity or other procedural rights accorded the Company thereunder, and the City shall thereupon have the right to terminate this Design-Build Contract upon written notice to the Company. Upon any such termination, the City shall have all of the rights provided in Article XI upon a termination of the Company for cause.

SECTION 7.8. FINAL COMPLETION/RELEASE OF FINAL RETAINAGE. (A) Certification of Final Completion. The Company shall prepare and submit to the City as soon as practicable following the Acceptance Tests, and, in any event within 90 days thereof, for purposes of demonstrating Final Completion, a certificate of an authorized officer of the Company certifying (1) that the Company is neither in default under this Contract nor in breach of any material provision of this Contract such that the breach would, with the giving of

notice or passage of time, constitute an Event of Default, and (2) that all Design-Build Work has been completed in accordance herewith and with the Design-Build Requirements and that Final Completion has occurred.

(B) Conditions of Final Completion. "Final Completion" shall occur when all of the following conditions have been satisfied:

(1) Final Certificate of Occupancy. A final certificate of occupancy has been issued for the Design-Build Improvements, if required by Applicable Law;

(2) Design-Build Work Completed. The Company has certified that all Design-Build Work (including all items on the Final Punch List and all Close-Out Requirements) is complete and in all respects is in compliance with this Agreement;

(3) Deliverable Materials. The Company has delivered to the City all Deliverable Materials required to be delivered prior to Acceptance;

(4) Final Completion Requisition. The Company has submitted to the Authorized City Representative a Final Completion Requisition stating that the Company has full completed all previously incomplete aspects of the Design-Build Work;

(5) Payment of Claims. The Company has certified to the City that all claims against the City have been paid;

(6) Encumbrances. The Company has provided evidence to the City that no Encumbrances exist with respect to the Design-Build Improvements and has provided a written representation that there exist no outstanding claims from Subcontractors or materials providers or, if there are outstanding claims from Subcontractors or materials providers, the Company shall state the nature and amount of the claims, identify the claimant, indemnify the City for such claims, and certify that the Company shall bond any such claims which become Encumbrances. In addition, the Company shall certify that it will indemnify the City for any unknown claims of Subcontractors or material providers and bond any such claims which become Encumbrances. If any claims of Subcontractors or material providers, whether known or unknown, are reduced to judgments in the future, after giving the Company notice of its intention to pay such claim and providing the Company a reasonable opportunity to discuss the City's intention, the City may pay such amounts due and owing and offset such amounts from those due and owing by the City to the Company at any time;

(7) Acceptance Achieved. The Company has achieved Acceptance of the Project;

(8) Final Record Drawings. The Company shall have delivered to the City a final and complete reproducible set of Record Drawings as required by Schedule 12;

(9) Equipment and Materials Warranties and Manuals. The Company shall be in possession of, and shall have delivered to the City, copies of the warranties of machinery, materials, equipment, fixtures and vehicles constituting a part of the Project required to be obtained under Section 9.4, together with copies of all related operating and maintenance manuals supplied by the equipment supplier;

(10) Spare Parts In Storage. All spare parts required by the applicable Technical Specifications have been delivered and are in storage at the Project;

(11) Warranty Period Security. The Company shall have provided the City with the Security Instruments set forth in Section 9.10;

(12) Licenses. The Company shall have delivered all licenses necessary for the City to operate, maintain, repair and replace the Design-Build Improvements; and

(13) Declaration of Construction Completion. the Company shall have provided the City the declaration of construction required by WAC 173.240-090 and 095.

(C) Effect of Final Completion. Upon Final Completion, (1) the Company's obligations to furnish and maintain the Payment and Performance Bonds and the Required Insurance shall terminate except with respect to item (11) of subsection 7.8(B), and (2) the City shall release any amounts retained from the Design-Build Price to which the Company is entitled pursuant to Section 8.5(D).

(D) Concurrence with Final Completion. Not later than thirty (30) days after the City's receipt of the Final Completion Requisition, the City shall decide whether it agrees that Final Completion has been achieved and shall notify the Company in writing of the City's decision. If the City determines that the Company's Final Completion Requisition was correct, Final Completion shall be deemed irrevocably to have occurred as of the date of the Company's certification. If the City determines that Final Completion has not been achieved, then the notice shall specify in detail why it believes that Final Completion has not occurred. Failure of the City to so notify the Company within such thirty (30) day period shall constitute the City's agreement that Final Completion has occurred. Alternatively, Final Completion shall occur on any date, prior to the satisfaction of all of the foregoing conditions, which is specified by the City, which shall have authority to waive any of the foregoing conditions. In no event shall Final Completion be deemed to have occurred prior to the date the Design-Build Improvements have achieved Acceptance pursuant to Section 7.4.

SECTION 7.9. NO ACCEPTANCE, WAIVER OR RELEASE. Unless another provision of this Contract specifically provides to the contrary, none of the following shall be construed as the City's acceptance of any Design-Build Work which is defective, incomplete, or otherwise not in compliance with this Contract, or as the City's release of the Company from any obligation, guarantee, or warranty under this Contract, or as the City's extension of the Company's time for performance, or as an estoppel against the City, or as the City's acceptance of any claim by the Company:

(1) the City's payment to the Company or any other person of all or any portion of the Design-Build Price (including any Extra Payment, any payment upon Substantial Completion or Final Completion, or while the Company is requesting any extension of time) or payment of a processing fee during Interim Operations; or the City's failure to retain any portion of the Design-Build Price; or the City's change or variation in the time, method or condition of payment;

(2) the City's review or acceptance of any drawings, submissions, punch lists, other documents, certifications (other than certificates relating to completion or

Acceptance of the Design-Build Improvements), or Design-Build Work of the Company or any Subcontractor;

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

(4) the City's failure to include any item on any punch list or similar document unless the City explicitly approves such an omission (any such omissions shall be approved or acknowledged in writing);

(5) the City's entry at any time on the Site (including any area in which the Design-Build Work is being performed) or the City's use or occupancy of the Site at any time (whether before or after Substantial Completion or Final Completion);

(6) any inspection, testing, or review of any Design-Build Work (whether finished or in progress) by the Authorized City Representative, the City or any other person; or

(7) the failure of the City, the Authorized City Representative, or any City consultant to respond in writing to any notice or other communication of the Company.

ARTICLE VIII

FINANCING AND PAYMENT OF THE DESIGN-BUILD PRICE

SECTION 8.1. CITY FINANCING. The City shall secure the availability of all funds necessary to pay the Design-Build Price in a timely manner, whether through the authorization or issuance of debt obligations of the City or otherwise as determined by the City. Payments of the Design-Build Price shall be made by the City to the Company in the manner provided in Sections 8.5 and 8.6 and Schedule 15.

SECTION 8.2. DESIGN-BUILD PRICE. (A) Design-Build Price Generally. The Company shall be entitled to receive the Design-Build Price for the Contract Services on a progress basis in accordance with the terms of this Section. The Design-Build Price shall be the sum of the Fixed Design-Build Price and the Fixed Design-Build Price Adjustments.

(B) Fixed Design-Build Price. The Fixed Design-Build Price shall be the sum of the Fixed Development Price, the Fixed Construction Period Price, the Incentive Payments and the Project Allowance, and shall be equal to $_____. Except as provided in subsection (C) of this Section, the Fixed Design-Build Price shall not be subject to adjustment in any manner whatsoever.

(C) Fixed Design-Build Price Adjustments. The following items shall constitute the Fixed Design-Build Price Adjustments:

(1) An adjustment for the cost of any Change Orders issued by the City with respect to the Design-Build Improvements pursuant to Section 6.6;

(2) An adjustment for the cost of any Uncontrollable Circumstances required pursuant to Section 13.2;

(3) A downward adjustment representing the balance of the Project Allowance representing available funds allocated for Project Allowance Items for which the parties have not agreed upon a guaranteed fixed price as of the Construction Commencement Date, which items will be treated in accordance with Section 8.4;

(4) In the event the Construction Commencement Date occurs subsequent to the date set forth in Schedule 10A [the proposed Scheduled Construction Commencement Date], the Fixed Construction Period Price portion of the Fixed Design-Build Price will be adjusted by multiplying (i) the Fixed Construction Period Price, by (ii) the Construction Period Price Escalation Index; provided, however, that the Fixed Construction Period Price shall not escalate if the Construction Commencement Date occurs subsequent to the Scheduled Construction Commencement Date due to either the Company's failure to use good faith efforts to achieve the Construction Commencement Date or, notwithstanding its good faith efforts, the Company has failed to obtain all Governmental Approvals (other than the Facilities Plan Amendment) required for the Construction Commencement Date to occur as set forth in subsection 4.1(A)(2); and

(5) A downward adjustment representing the balance of the Incentive Payments which the Company failed to earn prior to Final Completion.

(D) Limitation on Payments for Costs of the Design-Build Improvements. The Company agrees that the Design-Build Price shall be the Company's entire compensation and reimbursement for the performance of the Design-Build Work, including obtaining all Utilities that the Company will require to perform the Design-Build Work, commissioning and starting up the Design-Build Improvements, and operating the Design-Build Improvements during the Acceptance Tests and prior to the Acceptance Date and performing all repairs and replacements during the Warranty Period (the "Warranty Work"). In no event shall the Company be entitled to any payment for Design-Build Improvements costs in excess of the Design-Build Price, notwithstanding any cost overruns the Company may incur. The Company shall finance and pay for any such excess cost of the Design-Build Improvements in any manner it chooses without reimbursement from or other claim upon the City.

SECTION 8.3. PAYMENT FOR THE DEVELOPMENT PERIOD WORK. (A) Fixed Development Price. The Company shall be paid the Fixed Development Price for its Development Period Work on a milestone basis in accordance with the terms of this Section. The Fixed Development Price shall be the sum of $_____ [as proposed on Proposal Form 7B] and any adjustments under the terms of this Design-Build Contract, including any City-approved Change Orders.

(B) Milestone Schedule. The Company shall be entitled to payment for Development Period activities hereunder in accordance with the milestones set forth in Schedule 15, which payments are and shall be considered to be partial payments of the Fixed Design-Build Price to the Company. Such payments shall be based on the Company's final completion of each such Development Period activity and shall not exceed the individual and aggregate maximum Development Period payments therefor. All other costs and expenses incurred by the Company in performing its obligations during the Development Period shall be for the account of the Company and shall not be reimbursable until and unless the Construction Commencement Date occurs or the City exercises its right to suspend or terminate this Design-Build Contract during the Development Period as provided in Section 4.5 (including the limitations on amounts reimbursable thereunder).

(C) Conditions of Payment. Notwithstanding any provision of this Design-Build Contract to the contrary, the Company shall not be entitled to receive any payments for Development Period Work until the Company has provided the City (i) the Letter of Credit if applicable, (ii) the Required Development Period Insurance as set forth in Schedule 18, and (iii) the Technology Supply Agreement (if applicable).

(D) Disbursement Procedure. The Company shall be entitled to submit requisitions and receive from the City the payments, which (1) shall be made on a milestone basis in accordance with Schedule 15 and (2) shall be subject to the maximum payments set forth in Schedule 15. Each Requisition must be submitted [at least 10 business days before the submittal date required of the City by the Department of Ecology and] be accompanied by a monthly requisition report, which shall include:

(i) a certificate of an authorized officer of the Company certifying (1) the portion of the Fixed Development Price which is payable to the Company, (2) that the Company is neither in default under this Design-Build Contract nor in breach of any material provision of this Design-Build Contract such that the breach would, with the giving of notice or passage of time, constitute an Event of Default, and (3) that all milestones which the Company has identified in Schedule 14 have been completed in accordance therewith;

(ii) notice of any liens which have been filed together with evidence that the Company has discharged or bonded against any such liens; and

(iii) any other documents or information relating to the Development Period Work or this Design-Build Contract requested by the City or the Authorized City Representative or as may be required by Applicable Law, this Design-Build Contract or generally accepted accounting practices or principles.

The Authorized City Representative shall review the Company's certified Requisitions to the City for each Fixed Development Price payment and within 10 business days of receipt of the Company's written report, shall verify or dispute in writing (or by telecommunication promptly confirmed in writing) the Company's certification that the Company has achieved the level of progress indicated and is entitled to payment. If the Authorized City Representative determines that the work has progressed to the milestone indicated in the Company's certified Requisition and the Authorized City Representative provides written notice thereof to the Company and the City, thereupon the Company shall be entitled to payment within 45 days of such determination. Disputes regarding payments of the Fixed Development Price shall be resolved in accordance with subsection 8.3(E) hereof.

(E) Disbursement Dispute Procedures. If the Authorized City Representative determines pursuant to subsection 8.3(D) hereof that the milestone required for any payment has not been reached as indicated by the Company, or otherwise disputes any Requisition, the Authorized City Representative shall provide prompt written notice to the Company and the City as to the Authorized City Representative's reasons, in reasonable detail, for such determination or the basis for such dispute. After receiving such determination notice, the Company may make the necessary corrections and resubmit a certified Requisition to the Authorized City Representative. If the Company is unable to reach agreement with the Authorized City Representative as to the completion of the milestone, the Company may exercise its right to contest the Authorized City Representative's determination in accordance with the dispute resolution procedures set forth in Section 12.2 hereof. Any proceedings undertaken to resolve a dispute arising under this subsection 8.3(E) shall immediately terminate if (1) the Company demonstrates to the Authorized City Representative that the milestone has been completed as indicated in the certified Requisition giving rise to the dispute or that any disputed certified Requisition is correct, and (2) the Authorized City Representative concurs with such demonstration. The Company shall not be entitled to payment of the amount so requisitioned and disputed except upon resolution of the dispute in accordance with this subsection 8.3(E). Payment shall be made only upon the submission of a certified Requisition indicating that a particular milestone has been reached and no partial payments will be made for Requisitions involving milestones which are in dispute or not otherwise fully

completed. In the event that upon resolution of any such dispute, it is determined that the Company was properly entitled to the disputed amount as of a date earlier than the date on which payment is actually made, the Company shall be entitled to receive promptly following such resolution such disputed amount plus interest on such disputed amount for the period of dispute calculated at the Base Rate.

(F) Retainage. Payment to the Company for Development Period activities will not be subject to retainage holdback. The Company shall be entitled to full payment for all milestones reached and for which a certified Requisition has been provided and verified by the Authorized City Representative as provided in Section 8.3(D) hereof.

SECTION 8.4. PROJECT ALLOWANCE. The parties acknowledge that the Fixed Design-Build Price contains an allowance in the aggregate amount of $5,700,000 (the "Project Allowance") for certain portions of the Design-Build Work (the "Project Allowance Items") including the procurement, installation and testing of the instrumentation and control necessary for the Design-Build Improvements (the "Instrumentation and Controls Allowance Item") in the amount of $2,700,000 (the "Instrumentation and Controls Allowance"); the development of an electronic operations and maintenance manual pursuant to the requirements of Section 9.1.3 of Schedule 9 (the "Electronic O&M Manual Allowance Item") in the amount of $500,000 (the "Electronic O&M Manual Allowance"); the construction, equipping and furnishing of the operations building control room (the "Operations Control Center Allowance Item") in the amount of $100,000 (the "Operations Control Center Allowance"); the upgrading of existing pumps and piping to provide greater capacity for yard water and spray water functions (the "Yard Water/Spray Water Allowance Item") in the amount of $300,000 (the "Yard Water/Spray Water Allowance"); upgrading, expanding and addition of lighting on the Site (the "Site Lighting Allowance Item") in the amount of $200,000 (the "Site Lighting Allowance"); the remodeling or expansion of existing facilities to provide an interpretive center/tour meeting area (the "Interpretive Center Allowance Item") in the amount of $250,000 (the "Interpretive Center Allowance"); and the repair of concrete at the primary and final settling tanks (the "Concrete Repair Allowance Item") in the amount of $1,650,000 (the "Concrete Repair Allowance"). The cost of all design work relating to the Project Allowance Items shall not be included in the Project Allowance but shall be embedded elsewhere in the Fixed Design-Build Price. To the extent practicable, prior to the Construction Commencement Date the parties shall agree to guaranteed fixed prices for each Project Allowance Item. The individual allowances relating to each Project Allowance Item represent the maximum amount which the City anticipates will be paid for such Project Allowance Item; provided, however, the City may agree to a price for an individual item in excess of the corresponding allowance without a Change Order as long as the aggregate payments for the Project Allowance Items do not exceed the Project Allowance. On the Construction Commencement Date the Fixed Design-Build Price will be adjusted accordingly as set forth in subsection 8.2(C). In the event that a guaranteed fixed price for any Project Allowance Item has not been set prior to the Construction Commencement Date, the balance of the Project Allowance shall be deducted from the Fixed Design-Build Price and the City shall have the option of either (i) agreeing with the Company to another methodology for fixing the payment for such Project Allowance Item (e.g. cost-plus, guaranteed maximum price, or future guaranteed fixed price) or (ii) bidding

such work out to a third party in which event such work will no longer constitute Design-Build Work for which the Company is responsible. In either event, the parties shall memorialize their agreement on how to proceed through the execution of a Contract Administration Memorandum as set forth in Section 10.2.

SECTION 8.5. PAYMENT PROCEDURE FOR DESIGN-BUILD WORK.

(A) Schedule of Values. The Schedule of Values established in Schedule 15 will serve as the basis for progress payments and will be incorporated into a form of Requisition acceptable to the City.

(B) Construction Disbursement Procedure. The Company shall be entitled to submit Requisitions and receive from the City the payments, which (1) shall be made on a percent complete basis in accordance with Schedule 15, (2) shall be subject to the maximum drawdown limitations specified in Schedule 15 hereto, and (3) shall be subject to the conditions of payment set forth in Section 8.6 hereof; provided, however, that on the date that the Acceptance Date is permanently established under Section 7.4, the Company shall be entitled to receive all payments due for completed work (which is unencumbered) which remain unpaid as of such date except for the payment conditioned on Final Completion. Each Requisition must be submitted **[**at least 10 business days before the submittal date required of the City by the Department of Ecology and**]** shall be accompanied by a monthly requisition report, which shall include:

(a) the Monthly Progress Report;

(b) a certificate of an authorized officer of the Company certifying (1) the portion of the Fixed Design-Build Price which is payable to the Company, (2) that the Company is neither in default under this Design-Build Contract nor in breach of any material provision of this Design-Build Contract such that the breach would, with the giving of notice or passage of time, constitute an Event of Default, and (3) that all items applicable to the work entitling the Company to requested payment under the schedule in Schedule 14 have been completed in accordance therewith and with the Design Requirements;

(c) a verified statement setting forth the information required under any Applicable Law pertaining to prevailing wages and information regarding the status of the MBE, WBE, SBRA and Apprenticeship/City Resident Programs;

(d) notice of any liens which have been filed together with evidence that the Company has discharged or bonded against any such liens; and

(e) any other documents or information relating to the Design-Build Work or this Design-Build Contract requested by the City or the Authorized City Representative or as may be required by Applicable Law, this Design-Build Contract or generally accepted accounting practices or principles.

The Authorized City Representative shall review the Company's certified Requisitions to the City for each Design-Build Price payment and within 10 business days of receipt of the Company's written report delivered pursuant to Section 8.6 hereof, shall verify or dispute in writing (or by telecommunication promptly confirmed in writing) the Company's certification

that the Company has achieved the level of progress indicated and is entitled to payment. If the Authorized City Representative determines that the work has progressed to the milestone indicated in the Company's certified Requisition and the Authorized City Representative provides written notice thereof to the Company and the City, thereupon the Company shall be entitled to payment within 45 days of such determination. Disputes regarding payments of the Fixed Design-Build Price shall be resolved in accordance with subsection 8.5(C) hereof.

(C) Disbursement Dispute Procedures. If the Authorized City Representative determines pursuant to subsection 8.5(B) hereof that the work required for any payment has not progressed as indicated by the Company, or otherwise disputes any Requisition, the Authorized City Representative shall provide prompt written notice to the Company and the City as to the Authorized City Representative's reasons, in reasonable detail, for such determination or the basis for such dispute. After receiving such determination notice, the Company may make the necessary corrections and resubmit a certified Requisition to the Authorized City Representative, or the Authorized City Representative may agree on a revised amount, Requisition or estimate, as applicable, in which case the Company shall promptly notify the City of such agreement. If the Company is unable to reach agreement with the Authorized City Representative as to the progress of work, the Company may exercise its right to contest the Authorized City Representative's determination in accordance with the dispute resolution procedures set forth in Section 12.2 hereof. Any proceedings undertaken to resolve a dispute arising under this subsection 8.5(C) shall immediately terminate if (1) the Company demonstrates to the Authorized City Representative that the work has proceeded as indicated in the certified Requisition giving rise to the dispute or that any disputed certified Requisition is correct, and (2) the Authorized City Representative concurs with such demonstration. The Company shall not be entitled to payment of the amount so requisitioned and disputed except upon resolution of the dispute in accordance with this subsection 8.5(C); provided, however, that the Company shall be entitled to all requisitioned amounts which are not in dispute. In the event that upon resolution of any such dispute, it is determined that the Company was properly entitled to the disputed amount as of a date earlier than the date on which payment is actually made, the Company shall be entitled to receive promptly following such resolution such disputed amount plus interest on such disputed amount for the period of dispute calculated at the Base Rate.

(D) Retainage. Each construction drawdown payment will be subject to a 5% retainage holdback; provided, however, that there will be a 10% retainage holdback on the first $100,000 requisitioned pursuant to TMC 10-10-010. The City shall release to the Company the accumulated funds retained upon (i) receipt of certification from the Company and confirmation by the Authorized City Representative that Acceptance has occurred pursuant to Section 7.4 hereof; and (ii) the Company having provided to the City, notification from the Washington State Department of Revenue that the Company has paid all applicable taxes as of the date which is no more than 15 days prior to the date of the Company's Certification in (i) above; provided, however, that to the extent items are contained on the Final Punch List, the City or the Authorized City Representative shall reasonably estimate the cost to make each correction or to complete each such item and the City shall be entitled to withhold from payment of the retained funds an amount equal to two times the aggregate value of such items,

in addition to the amount of unresolved or unbonded claims or liens by third parties in connection with the Design-Build Work and earned interest on the retained funds. Upon certification by the Authorized City Representative that Final Completion has occurred and so long as authority contained in the Governmental Approvals issued by the Department of Ecology to operate the Design-Build Improvements remains unimpaired, the City shall release to the Company all remaining retained funds, including the amount equal to the interest actually received on the retainage holdback.

SECTION 8.6. CONDITIONS OF PAYMENT. (A) Information Supporting Requisition. The Company shall submit to the City, with a copy to the Authorized City Representative, with each Requisition all information required in subsection 8.5(B) hereof.

(B) Permissible Withholdings. The City may disapprove and withhold and retain all or any portion of any payment requested to any Requisition in an amount equal to the sum of:

(1) any amounts which are permitted under Section 8.5 hereof to be withheld from any payment requested in any Requisition;

(2) any amounts which are due the City under Section 6.4 hereof;

(3) any liquidated damages which are payable;

(4) any indemnification amounts which are agreed to by the parties, or after judicial review are found to be due and owing to the City under Section hereof;

(5) any amounts which are due from the Company under Section 6.5 hereof;

(6) any other deductions which are required by Applicable Law;

(7) any payments with respect to which documents to be delivered in connection therewith are not correct and complete;

(8) any payments with respect to which the Design-Build Work covered by such Requisition (or any previous Requisition) does not comply with this Design-Build Contract;

(9) any payments with respect to which any person has asserted a Lien resulting from the acts or omissions of the Company in performing the Design-Build Work and such Lien remains unreleased or unbonded;

(10) all requisitioned payments, if an Event of Default of the Company has occurred under Section 11.2 hereof; and

(11) in the event the Company fails to pay any taxes, assessments, penalties or fees imposed by any governmental body, including a court of law, then the Company authorizes the City to deduct and withhold or pay over to the appropriate governmental body those unpaid amounts upon demand by the governmental body. It is agreed that this provision shall apply to taxes and fees imposed by City ordinance.

SECTION 8.7. FINAL REQUISITION AND PAYMENT. (A) Final Requisition. The Company shall prepare and submit to the City for purposes of demonstrating Final Completion:

(1) a certificate certifying (a) that all applicable Design-Build Work has been completed in accordance herewith and with the Technical Specifications, (b) that Acceptance of the Design-Build Improvements has occurred, and (c) all other conditions of Final Completion have occurred or been achieved; and

(2) a final Application for Payment.

The final Application for Payment shall enclose:

(i) AIA Document G707 (Consent of Surety Company to Final Payment) certifying the Surety agrees that final payment of the Fixed Design-Build Price shall not relieve the Surety of any of its obligations under the Performance and Payments Bonds;

(ii) a contractor's affidavit regarding settlement of claims and complete and legally effective releases or waivers acceptable to the City in the full amount of the Design-Build Price, or if any Subcontractor refuses or fails to furnish such release or waiver, a bond or other security acceptable to the City to indemnify the City against any payment claim; and

(iii) a list of all pending property damage and personal injury or death insurance claims arising out of or resulting from the Design-Build Work, identifying the claimant and the nature of the claim.

(B) Final Payment. If based on the Authorized City Representative's (1) observation of the Design-Build Work, (2) final inspection, and (3) review of the final Requisition and other documents required by subsection (A) of this Section, the Authorized City Representative is satisfied that conditions for Final Completion have been satisfied, the Authorized City Representative shall, within 30 days after receipt of the final Requisition, furnish to the City and the Company the Authorized City Representative's recommendation of final payment and Final Completion. If the Authorized City Representative is not satisfied, the Authorized City Representative shall return the final Requisition to the Company, indicating in writing the reasons for not recommending final payment, in which case the Company shall make the necessary corrections and resubmit the final Requisition.

(1) City Concurrence. If the City concurs with the Authorized City Representative's recommendation of final payment, the City will, within 15 days, file a written notice of final completion of the Design-Build Work and notify the Company and the Authorized City Representative of such acceptance. Within 60 days after filing such notice, the City shall pay to the Company the balance of the Design-Build Price, subject to any withholdings and those other provisions governing final payment specified herein.

(2) City Non-Concurrence. If the City does not concur with the Authorized City Representative's determination, the City will return the Requisition to the Company, through the Authorized City Representative, indicating in writing its reasons for refusing final payment and Final Completion. The Company shall promptly make

the necessary corrections and resubmit the Requisition to the Authorized City Representative. The City's written determination shall bind the Company, unless the Company delivers to the City, through the Authorized City Representative, written notice of claim within 30 days after receipt of that determination.

(3) Partial Release of Final Payment. If recommended by the Authorized City Representative, the City may, upon receipt of the Company's final Requisition and without terminating the Design-Build Period, make payment of the balance due for that portion of the Design-Build Work fully completed and accepted, if Final Completion is significantly delayed due to Uncontrollable Circumstances. If the balance to be held by the City for the Design-Build Work not fully completed or corrected is less than the retainage on that work, the affidavits specified in subsection (A) of this Section and the release or waiver, or Performance and Payment Bonds, shall be furnished as required and submitted by the Company. Payment of the balance due shall be made under the provisions for final payment, but shall not constitute a wavier of claims. The City shall pay with reasonable promptness any amounts deducted from the final payment, upon resolution of the claims for which the amounts were withheld.

Final payment does not constitute a waiver by the City of any rights relating to the Company's obligations under the Design-Build Contract. Final payment constitutes a wavier of all claims by the Company against the City other than those previously filed in writing with the City on a timely basis and still unsettled.

SECTION 8.8. PROMPT PAYMENT. (A) Company Payment to Subcontractor or Supplier. The Company shall pay its Subcontractors all undisputed amounts owing within seven days of receipt of each progress payment from the City. The Company shall pay for the amount of Design-Build Work performed or materials supplied by each Subcontractor as accepted and approved by the City with each progress payment. In addition, any reduction of retention by the City to the Company shall result in a corresponding reduction to Subcontractors who have performed satisfactory work. The Company shall pay Subcontractors the reduced retention within 14 days of the payment of the reduction of the retention to the Company. No contract between Company and its Subcontractors may materially alter the rights of any Subcontractor to receive prompt payment and retention reduction as provided herein. If the Company fails to make payments in accordance with this Section, the City may take any one or more of the following actions and the Company agrees that the City may take such actions:

(1) to hold the Company in default under this Design-Build Contract;

(2) withhold future payments including retention until proper payment has been made to Subcontractors in accordance with this Section; or

(3) terminate this Design-Build Contract.

(B) Alternative Dispute Resolution Between Company and Subcontractor or Supplier. If Company's payment to a Subcontractor is in dispute, the Company and the Subcontractor agree to submit the dispute to any of one of the following dispute resolution processes within 14 days from the date any party gives notice to the other:

(1) binding arbitration;

(2) a form of alternative dispute resolution (ADR) agreeable to all parties; or

(3) a City-facilitated mediation.

When disputed claim is resolved through ADR or otherwise, the Company and the Subcontractor agree to implement the resolution within seven days from the resolution date.

(C) Inclusion of Provisions in Subcontracts. The Company shall include these prompt payment provisions in every Subcontract, including procurement of materials and leases of equipment for this Design-Build Contract.

(D) No Subcontractor Claims. Nothing contained in this Section shall provide a basis for any Subcontractor claim against the City from its administration, enforcement or waiver of this prompt payment provision.

SECTION 8.9. AUDIT BOOKS AND RECORDS. (A) Audit. All payments whatsoever by the City to the Company and all Design-Build Work of the Company shall be subject to audit at any time by the City, the Office of the State Auditor, and the Department of Ecology.

(B) Construction Books and Records. The Company shall prepare and maintain proper, accurate and complete books and records regarding the Design-Build Work and all other transactions related to the design, permitting, construction, shakedown and testing of the Design-Build Improvements, including all books of account, bills, vouchers, invoices, personnel rate sheets, cost estimates and bid computations and analyses, Subcontracts, purchase orders, time books, daily job diaries and reports, correspondence, and any other documents showing all acts and transactions in connection with or relating to or arising by reason of the Design-Build Work, this Design-Build Contract, any Subcontract or any operations or transactions in which the City has or may have a financial or other material interest hereunder. All financial records of the Company and its Subcontractors shall be maintained in accordance with generally accepted accounting principles and auditing standards for governmental institutions. The Company and its Subcontractors shall comply with the requirements of the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507), Revised OMB Circulars A-128 and 133 and State OMB Circular 87-11. The Company shall produce such construction books and records (except for the Company's financial ledgers and statement) for examination and copying in connection with the costs of Change Orders, Extra Design-Build Work, Uncontrollable Circumstance costs, or other costs in addition to the Fixed Design-Build Price under circumstances in which such costs are required to be Cost substantiated pursuant to this Design-Build Contract, for which the City may be responsible hereunder with respect to work performed prior to Acceptance except with respect to costs incurred in connection with work performed on a fixed price basis. The Company shall keep and maintain all such construction books and records for the Project separate and distinct from other records and accounts, and shall maintain such books and records for at least seven years after Acceptance, or such longer period during which any Legal Proceeding with respect to the Design-Build Improvements commenced within seven years of the Acceptance Date may be pending.

SECTION 8.10. TAX EXEMPTION OF DESIGN-BUILD IMPROVEMENTS. It is the intent of the parties that the Design-Build Improvements shall continue to be municipally owned property and not subject to property taxation. The parties acknowledge that the Fixed Design-Build Price is based upon the assumption that all construction materials and supplies acquired by the Company or any Subcontractor in connection with the Design-Build Improvements are subject to State sales and use taxes. In the event (i) any such construction materials and supplies can legally and permissibly be acquired by the Company or any Subcontractor in connection with the Design-Build Improvements in accordance with Applicable Law without the payment of State sales or use taxes, and the Company or Subcontractor does not pay such taxes, or (ii) an exemption from the payment of such sales or use taxes is available to the Company under Applicable Law and the Company fails to take advantage of such exemption, then, in either case, the City shall be entitled to a credit from the Design-Build Price in the amount of the sales or use taxes which the Company legally and permissibly did not pay or in the amount to which such exemption would have been applicable under Applicable Law.

SECTION 8.11. PERFORMANCE INCENTIVES. **[Note to Proposers: The City has included an amount of $350,000 as a required line item in the Fixed Design-Build Price corresponding to an incentive program which will be designed to enhance both project management and superior construction quality and performance. The actual contract language regarding the incentive program will be based upon the Selected Proposer's Proposal, however, if incentives are not earned, the Fixed Design-Build Price will be reduced by the balance of the $350,000 which was not "earned". The City reserves the right to eliminate the incentive program and reduce the Fixed Design-Build Price by $350,000 in the event the parties cannot agree upon an effective incentive structure.]**

ARTICLE IX

PROJECT WARRANTIES

SECTION 9.1. PERFORMANCE WARRANTY. (A) General. The Company guarantees that the Design-Build Improvements shall meet the Acceptance Standards for the treatment of Influent during a Peak Wet Weather Flow Event as set forth in Schedules 4 and 11 (the "Performance Warranty") during the two-year period following Final Completion (the "Performance Warranty Period").

(B) Relief from Warranties. The Company shall be provided relief from the Performance Warranty in the event its failure to meet such warranty is due to the failure of the City to operate and maintain the Design-Build Improvements in accordance with the Operation and Maintenance Manual or the procedures set forth in Schedule 11, or the City's negligence or willful misconduct.

(C) Peak Wet Weather Flow Event Procedures. The City shall provide the Senior Supervisor designated by the Company with notice as soon as practicable upon the occurrence of a Peak Wet Weather Flow Event during the Performance Warranty Period and that the Peak Wet Weather Flow Event procedures are to be undertaken by the City in accordance with Schedule 11. The Company shall have the right to monitor the City's implementation of the procedures set forth in Schedule 11 during the occurrence of the Peak Wet Weather Flow Event. Within 14 days following the end of the Peak Wet Weather Flow Event the City shall notify the Company in writing as to whether the applicable standards were met during the Peak Wet Weather Flow Event based upon the data and protocol [to be proposed by the Company] set forth in Schedule 11. If the required standards were not achieved, such notification shall include which standard(s) were not achieved as well as the actual levels that were achieved.

(D) City Remedies for Noncompliance with Performance Warranty. In the event the Design-Build Improvements fail to meet any Performance Warranty during the Performance Warranty Period, except if such failure is directly due to a reason set forth in paragraph (B) above, the Company shall, without relief under any other warranty, or under any other remedy provided herein, allowed by Applicable Law or required by a Governmental Body:

(1) pay any resulting damages, fines, levies, assessments, impositions, penalties or other charges resulting therefrom;

(2) take any action (including, without limitation, making all repairs and replacements and performing additional training) necessary in order to comply with such Performance Warranty, and eliminate the cause of, and avoid or prevent recurrences of non-compliance with such Performance Warranty; and

(3) assist the City with all public relations matters necessary to adequately address any public concern caused by such non-compliance, including, but not limited to, preparation of press releases, attendance at press conferences, and participation in public information sessions and meetings.

SECTION 9.2. WARRANTY OF PROFESSIONAL SERVICES. The Company warrants to the City that all engineering and other professional services provided under this Agreement will be provided in accordance with the terms of this Design-Build Contract and will, at a minimum, conform to the standard of care required of similarly situated professional engineers performing similar services. The City's review or consent of any Design Documents or other instruments of professional service shall not constitute a waiver by the City of any of the Company's warranties or obligations under this Article nor shall this warranty limit the Company's obligations or the City's rights under any other warranty or obligation contained in this Design-Build Contract.

SECTION 9.3. WARRANTY OF MATERIALS AND EQUIPMENT. The Company warrants to the City that the materials, machinery, structures, improvements and equipment furnished under this Agreement will be new, of recent manufacture, of good quality unless otherwise required or permitted under this Design-Build Contract, that the Design-Build Work will be free from defects and that the Design-Build Work will conform with the requirements of this Design-Build Contract. Design-Build Work not conforming to these requirements, including substitutions not properly approved and authorized by the City, may be considered defective. The Company's warranty set forth in this Section excludes remedy for damage or defect caused by modifications not executed by the Company, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.

SECTION 9.4. MANUFACTURERS' WARRANTIES. The Company shall, for the protection of the City, obtain from all Subcontractors, vendors, suppliers and other persons from which the Company procures structures, improvements, fixtures, machinery, equipment and materials, warranties for a minimum of two years beginning on the date that such structure, improvement, fixture, machinery, equipment or material is integrated into the CTP as set forth in Section 7.1(E), or as otherwise specifically required in Schedule 21 and the Contract Standards, each of which shall be assigned to the City to the full extent of the terms thereof. No such warranty shall relieve the Company of any obligation hereunder, and no failure of any warranted or guaranteed structures, improvements, fixtures, machinery, equipment or material shall be the cause for any increase in the Design-Build Price or non-performance of the Design-Build Work unless such failure is itself attributable to an Uncontrollable Circumstance.

SECTION 9.5. WARRANTY OF ADEQUACY OF CONSTRUCTION SERVICES. The Company warrants to the City that all construction and related services provided under this Design-Build Contract shall be performed in a good and workmanlike manner, by workers who are appropriately trained and experienced in the work being performed, and in accordance with all requirements under this Design-Build Contract, Good Engineering and Construction Practices and all Applicable Law.

SECTION 9.6. CALL-BACK OBLIGATIONS. (A) Call-Back Generally. If, at any time within 2 years after the date of Final Completion, any of the Design-Build Work is found to be malfunctioning or otherwise not in accordance with the requirements of this Design-Build Contract, the Company shall correct it promptly after receipt of written notice from the City to do so unless the City has previously given the Company a written release of such condition.

The City shall give such notice promptly after discovery of the condition. The Company must respond to critical and/or emergency service calls from the City within 24 hours and non-critical or non-emergency calls within five business days. Such response shall require that a competent representative familiar with the specific equipment used within the City's Design-Build Improvements inspect the Design-Build Improvements and while on site, either correct the problem or initiate a course of action that will fully correct the problem within a reasonable period of time. In critical and/or emergency situations, that time period shall not exceed 48 hours after the on-site inspection. For non-emergencies, such period shall not exceed ten calendar days. The obligations and time limitations set forth in this Section shall not limit the Company's obligations or the City's rights set forth in Section 9.1 with respect to the Company's Performance Warranty.

(B) No Period of Limitation on Other Project Warranties. Nothing contained in this Section shall be construed to establish a period of limitation with respect to other obligations which the Company might have under this Design-Build Contract or under Applicable Law, including, without limitation, warranties with respect to latent defects. Establishment of the time period of 2 years as described in subsection (A) of this Section relates only to the specific obligation of the Company to correct the Design-Build Work, and has no relationship to the time within which the obligation to comply with this Design-Build Contract may be sought to be enforced, nor the time within which proceedings may be commenced to establish the Company's liability with respect to the Company's obligations other than specifically to correct the Design-Build Work.

(C) Extension of Warranties. The "call-back" obligations shall apply to all Design-Build Work re-done pursuant to the terms of this Design-Build Contract. The "call-back" obligations for re-done elements of the Design-Build Work shall extend beyond the original 2-year period, if necessary, to provide at least a 1-year period following acceptance of such re-done Design-Build Work.

(D) Company Reliance on Manufacturers' Warranties During Call-Back Period. During the period in which the call-back obligations set forth in this Section are in effect, the Company shall be permitted to enforce all warranties provided by manufacturers and suppliers. Notwithstanding the applicability or effectiveness of such warranties, the Company shall be required to comply with the requirements set forth in Section 9.6(A).

SECTION 9.7. EXTENDED WARRANTY SERVICE PROVIDER. The Company shall provide the name of the qualified, independent service organization for each major type of equipment or structures which is under an extended warranty (beyond the two-year call-back warranty as set forth in Schedule 21) to provide corrective maintenance and repairs under the terms of this Design-Build Contract.

SECTION 9.8. WARRANTIES NOT EXCLUSIVE. The warranties set forth in this Article are in addition to, and not in limitation of, any other warranties, rights and remedies available under this Contract or Applicable Law, and shall not limit the Company's liability or responsibility imposed by this Contract or Applicable Law with respect to the Design-Build Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud.

SECTION 9.9. WARRANTY WORK. (A) Compensation. The Company acknowledges that the Design-Build Price contains the entire compensation due the Company for any and all Warranty Work to be performed by the Company or its Subcontractors or agents. In the event any amounts are required to be paid to third parties to perform Warranty Work, payment of such amounts shall be the responsibility of the Company.

(B) Performance of Design-Build Work. All Warranty Work shall be performed in accordance with the Contract Standards. The Company shall perform or cause to be performed all Warranty Work in a manner which will minimize interference with the ongoing operations of the CTP. The Company shall provide a written plan for its proposed Warranty Work to the City for its review and comment prior to undertaking any such Warranty Work (unless expressly waived by the City).

(C) Significant Warranty Work. In addition to the requirement set forth in subsection (B) above, the Company shall comply with all of the requirements set forth in this Design-Build Contract with respect to performing the Design-Build Work in the event the Warranty Work to be performed constitutes "significant Warranty Work" as determined by the Contract Administrator in his or her sole discretion.

SECTION 9.10. SECURITY DURING THE PERFORMANCE WARRANTY PERIOD. During the Performance Warranty Period the Company shall (i) maintain a Performance Bond in the amount of $7,000,000, (ii) maintain the insurance set forth in Schedule 18 and (iii) in the event a Material Decline in Guarantor's Credit Standing occurred, maintain the Letter of Credit in accordance with Section 14.1(C).

SECTION 9.11. ASSISTANCE WITH PERFORMANCE OPTIMIZATION. The parties anticipate that during the Performance Warranty Period, the Company shall assist the City in optimizing the operation of the Design-Build Improvements. Such assistance shall be described in, and provided pursuant to, a professional services agreement the form of which is included in Schedule 25. Compensation for such optimization assistance will be provided pursuant to the provisions of the professional services agreement.

ARTICLE X

RELATIONSHIP OF PARTIES; CONTRACT ADMINISTRATION;
COMPANY PERSONNEL AND SUBCONTRACTORS

SECTION 10.1. RELATIONSHIP OF THE PARTIES. The Company is an independent contractor of the City and the relationship between the parties shall be limited to performance of this Design-Build Contract in accordance with its terms. Neither party shall have any responsibility with respect to the services to be provided or contractual benefits assumed by the other party. Nothing in this Design-Build Contract shall be deemed to constitute either party a partner, agent or legal representative of the other party. No liability or benefits, such as workers compensation, pension rights or liabilities, or other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship shall arise or accrue to any party's agent or employee as a result of this Design-Build Contract or the performance thereof.

SECTION 10.2. CONTRACT ADMINISTRATION. (A) Administrative Communications. The parties recognize that a variety of contract administrative matters will routinely arise throughout the Term of this Design-Build Contract. These matters will by their nature involve requests, notices, questions, assertions, responses, objections, reports, claims, and other communications made personally, in meetings, by phone, by mail and by electronic and computer communications. The purpose of this Section is to set forth a process by which the resolution of the matters at issue in such communications, once resolution is reached, can be formally reflected in the common records of the parties so as to permit the orderly and effective administration of this Design-Build Contract.

(B) Contract Administration Memoranda. The principal formal tool for the administration of matters arising under this Design-Build Contract between the parties shall be a "Contract Administration Memorandum." A Contract Administration Memorandum shall be prepared, once all preliminary communications have been concluded, to evidence the resolution reached by the City and the Company as to matters of interpretation and application arising during the course of the performance of their obligations hereunder. Such matters may include, for example:

(1) the determination of the specific relief to be given the Company under Section 13.2 on account of an Uncontrollable Circumstance;

(2) the determination of the specific amount of any increase or decrease of the Design-Build Price to which the Company is entitled under any provision of this Design-Build Contract;

(3) issues as to the meaning, interpretation, application or calculation to be made under any provision hereof;

(4) notices, waivers, releases, satisfactions, confirmations, further assurances, consents and approvals given hereunder; and

(5) other similar contract administration matters.

(C) Procedures. Either party may request the execution of a Contract Administration Memorandum. When resolution of the matter is reached, a Contract Administration Memorandum shall be prepared by or at the direction of the City reflecting the resolution. Contract Administration Memoranda shall be serially numbered, dated, signed by a Senior Supervisor for the Company and by the City's Contract Administrator. The City and the Company each shall maintain a parallel, identical file of all Contract Administration Memoranda, separate and distinct from all other documents relating to the administration and performance of this Design-Build Contract.

(D) Effect. Executed Contract Administration Memoranda shall serve to guide the ongoing interpretation and application of the terms of this Design-Build Contract. Any material change, alteration, revision or modification of this Design-Build Contract, however, shall be effectuated only through a formal Design-Build Contract amendment authorized, approved or ratified by resolution of the governing body of the City and properly authorized by the Company.

SECTION 10.3. CONTRACT REPRESENTATIVES. (A) Company's Senior Supervisors. The Company shall appoint and inform the City from time to time of the identity of the corporate officials of the Company and the Guarantor with senior supervisory responsibility for the Design-Build Improvements and the performance of this Design-Build Contract (the "Senior Supervisors"). The Company shall promptly notify in writing to the City of the appointment of any successor Senior Supervisors. The Senior Supervisors shall cooperate with the City in any reviews of the performance of the Project Manager which the City may undertake from time to time, and shall give full consideration to any issues raised by the City in conducting such performance reviews.

(B) City's Contract Administrator. The City shall designate an individual or firm to administer this Design-Build Contract and act as the City's liaison with the Company in connection with the Design-Build Work (the "Contract Administrator"). The Company understands and agrees that the Contract Administrator has only limited authority with respect to the implementation of this Design-Build Contract, and cannot bind the City with respect to any Design-Build Contract amendment. Within such limitations, the Company shall be entitled to rely on the written directions of the Contract Administrator. The Contract Administrator shall have the right at any time to issue the Company a written request for information relating to this Design-Build Contract. Any written request designated as a "priority request" shall be responded to by the Company within three business days.

(C) City Approvals and Consents. When this Design-Build Contract requires any approval or consent by the City to a Company submission, request or report, the approval or consent shall, within the limits of the authority of subsection (B) of this Section, be given by the Contract Administrator in writing and such writing shall be conclusive evidence of such approval or consent, subject only to compliance by the City with the Applicable Law that generally governs its affairs. Unless expressly stated otherwise in this Design-Build Contract, and except for requests, reports and submittals made by the Company that do not, by their

terms or the terms of this Design-Build Contract, require a response or action, if the City does not find a request, report or submittal acceptable, it shall provide written response to the Company describing its objections and the reasons therefor within 30 days of the City's receipt thereof. If no response is received, the request, report or submittal shall be deemed rejected unless the City's approval or consent may not be unreasonably delayed by the express terms hereof, and the Company may resubmit the same, with or without modification. Requests, reports and submittals that do not require a response or other action by the City pursuant to some specific term of this Design-Build Contract shall be deemed acceptable to the City if the City shall not have objected thereto within 30 days of the receipt thereof.

SECTION 10.4. PERSONNEL. (A) Personnel Performance. The Company shall enforce discipline and good order at all times among the Company's employees and all Subcontractors. All persons engaged by the Company for Design-Build Work shall have requisite skills for the tasks assigned. The Company shall employ or engage and compensate engineers and other consultants to perform all engineering and other services required for the Design-Build Work. All firms and personnel performing Design-Build Work, including Subcontractor firms and personnel, shall meet the licensing and certification requirements imposed by Applicable Law.

(B) Project Manager. The Company shall designate an employee of the Company, any Affiliate of the Company, or the Company's Construction Subcontractor or construction manager (the "Project Manager"), who shall be present on the Site with any necessary assistants on a full-time basis when the Company or any Subcontractor is performing the Design-Build Work. The Project Manager shall, among other things:

(1) be familiar with the Design-Build Work and all requirements of this Design-Build Contract;

(2) coordinate the Design-Build Work and give the Design-Build Work regular and careful attention and supervision;

(3) maintain a daily status log of the Design-Build Work; and

(4) attend all monthly management meetings, weekly construction meetings and applicable design-related meetings with the City and the Authorized City Representative.

The Company may change the person assigned as Project Manager, subject to the provisions of subsection (C) of this Section.

(C) City Rights With Respect to Key Personnel. The Company acknowledges that the identity of the key management and supervisory personnel proposed by the Company and its Subcontractors in its proposal submitted in response to the RFP was a material factor in the selection of the Company to perform this Design-Build Contract. The Company's key management and supervisory personnel and their affiliations are set forth in Schedule 17. The Company shall utilize such personnel to perform such services unless such personnel are

unavailable for good cause shown. "Good cause shown" shall not include performing services on other projects for the Company or any of its Affiliates, but shall include termination for cause, employee death, disability, retirement or resignation. In the event of any such permissible unavailability, the Company shall utilize replacement key management and supervisory personnel of equivalent skill, experience and reputation. Any change to key personnel shall be proposed to the City for its review, consideration and approval (not to be unreasonably withheld).

(D) Labor Disputes. The Company shall furnish labor that can work in harmony with all other elements of labor employed for the performance of the Design-Build Work. The Company shall have exclusive responsibility for disputes or jurisdictional issues among unions or trade organizations representing employees of the Company or its Subcontractors, whether pertaining to organization of the Design-Build Work, arrangement or subdivision of the Technical Specifications, employee hiring, or any other matters. The City shall have no responsibility whatsoever for any such disputes or issues and the Company shall indemnify, defend and hold harmless the City and the City Indemnitees in accordance with Section 13.3 from any and all Loss-and-Expense resulting from any such labor dispute.

(E) Prevailing Wages. The Company shall pay or cause to be paid by its Subcontractors prevailing wages for all labor engaged in connection with the Design-Build Work, in accordance with the rate determined by the Industrial Statistician of the Washington State Department of Labor and Industries pursuant to Chapter 34.12 RCW or the United States Secretary of Labor pursuant to 29 CFR Part 5, whichever is greater.

SECTION 10.5. SUBCONTRACTORS. (A) Use Restricted. Subcontractors may be used to perform the Design-Build Work, subject to the City's right of rejection set forth in subsection (B) of this Section.

(B) Limited City Review and Rejection of Permitted Subcontractors. Except as provided in the next sentence, the City shall have the right, based on the criteria provided below in this Section, to reject any Subcontractors which (i) the Company is permitted to engage under subsection (A) of this Section for Design-Build Work valued in excess of $500,000 annually, and (ii) any substitute for an approved Subcontractor listed in Schedule 17. City rejection of Subcontractors as provided in the preceding sentence shall not be applicable to: (1) Affiliates of the Company; (2) equipment suppliers; (3) Governmental Bodies; (4) approved Subcontractors listed in Schedule 17; and (5) Subcontractors hired by the Company for purposes of remedying an emergency situation. The Company shall furnish the City written notice of its intention to engage such Subcontractors, together with all information reasonably requested by the City pertaining to the demonstrated responsibility of the proposed Subcontractor in the following areas: (1) any conflicts of interest; (2) any record of felony criminal convictions or pending felony criminal investigations; (3) any final judicial or administrative finding or adjudication of illegal employment discrimination; (4) any unpaid federal, State, City or local Taxes; and (5) any final judicial or administrative findings or adjudication of non-performance in contracts with the City or the State. The rejection by the

City of any proposed Subcontractor shall not create any liability of the City to the Company, to third parties or otherwise. In no event shall any Subcontract be awarded to any person debarred, suspended or disqualified from State or City contracting for any services similar in scope to the Design-Build Work.

(C) Subcontract Terms and Subcontractor Actions. The Company shall retain full responsibility to the City under this Design-Build Contract for all matters related to the Design-Build Work notwithstanding the execution or terms and conditions of any Subcontract. No failure of any Subcontractor used by the Company in connection with the provision of the Design-Build Work shall relieve the Company from its obligations hereunder to perform the Design-Build Work. The Company shall be responsible for settling and resolving with all Subcontractors all claims arising out of delay, disruption, interference, hindrance, or schedule extension caused by the Company or inflicted on the Company or a Subcontractor by the actions of another Subcontractor.

(D) Indemnity for Subcontractor Claims. The Company shall pay or cause to be paid to all direct Subcontractors all amounts due in accordance with their respective Subcontracts. No Subcontractor shall have any right against the City for labor, services, materials or equipment furnished for the Design-Build Work. The Company acknowledges that its indemnity obligations under Section 13.3 shall extend to all claims for payment or damages by any Subcontractor who furnishes or claims to have furnished any labor, services, materials or equipment in connection with the Design-Build Work.

(E) [Design Subcontract. Not later than 30 days after the Contact Date, the Company shall enter into a design subcontract with _____ (the "Design Subcontract") with the Lead Design Firm. The Design Subcontract shall provide for the design of the Design-Build Improvements. The Design Subcontract shall be subject to review and comment by the City for consistency with the applicable requirements of this Design-Build Contract [(subject to redaction of pricing information)], and shall not contain any provision which is material and adverse to the City. No such review or comment shall amend, alter or affect this Design-Build Contract or the Company's obligations hereunder in any manner, nor shall the City incur any liability or expense as a result thereof.]

(F) [Construction Subcontract. Not later than 30 days after the Contract Date, the Company shall enter into a construction subcontract (the "Construction Subcontract") with _____, or, subject to the approval of the City not to be unreasonably withheld, another general construction contractor reasonably experienced in constructing industrial and utility projects similar to the Design-Build Improvements (the "Construction Subcontractor"). The Construction Subcontract shall provide for the construction, installation and equipping of the Design-Build Improvements, and the performance of all Design-Build Work except work to be performed by the Company and work pertaining to Design-Build Improvements design or Acceptance Testing, based upon detailed design documents furnished by the Company for such purpose. All such design documents shall be based on and consistent with the Technical Specifications and all other terms and conditions of this Design-

Build Contract. The Construction Subcontract shall be subject to review and comment by the City for consistency with the applicable requirements of this Design-Build Contract subject to redaction of pricing information, and shall not contain any provision which is material and adverse to the City. The provisions of the Construction Subcontract that the Company certifies are proprietary and not materially adverse to the City may be blacked out in any copy given to the City. No such review or comment by the City shall amend, alter or affect this Design-Build Contract or the Company's obligations hereunder in any manner, nor shall the City incur any liability or expense as a result thereof.]

(G) Notice to City of Amendments, Breaches and Defaults. The Company shall give prior written notice to the City of any proposed and final amendments to the Design Subcontract or the Construction Subcontract, and shall not enter into any such amendment which is material and adverse to the rights and obligations of the City hereunder without the City's prior written consent. The Company shall notify the City promptly of any material breach or event of default occurring under the Design Subcontract or the Construction Subcontract and the probable effect on the Design-Build Work. The Company shall keep the City apprised of the course of the dispute and shall advise the City of its ultimate resolution.

(H) Assignability. All Subcontracts entered into by the Company with respect to the Design-Build Improvements shall be assignable to the City, solely at the City's election and without cost or penalty, upon the termination of this Design-Build Contract.

SECTION 10.6. MBE/WBE PARTICIPATION. (A) City Goals. The Company agrees to solicit and recruit, to the maximum extent possible, certified minority (MBE) and women (WBE) businesses, and small businesses in rural areas (SBRA), for the performance of the Design-Build Work. The Company shall use good faith efforts to attempt to meet the following goals for MBE, WBE and SBRA participation in the Design-Build Work:

(a) Development Period. MBE participation at a level of 10%, WBE participation at a level of 6%, and SBRA participation at a level of 0.5% of the Fixed Design-Build Price relating to the development portion of the Design-Build Work; and

(b) Construction Period. MBE participation at a level of 10%, WBE participation at a level of 6% and SBRA participation at a level of 0.5% of the Fixed Design-Build Price relating to the construction portion of the Design-Build Work.

The Company's MBE, WBE and SBRA Plan for compliance with these requirements is set forth in Schedule 19.

(B) Requirements. Except to the extent waived by the City, the Company shall attempt to meet the goals identified in subsection (A) of this Section by taking the following affirmative steps to make available opportunities for MBEs, WBEs and SBRAs for utilization in performing the Design-Build Work set forth in this Design-Build Contract.

(1) Include qualified MBEs, WBEs and SBRAs on solicitation lists for subcontracting opportunities and maintain records of the responses;

(2) Ensure that qualified MBEs, WBEs and SBRAs are solicited whenever they are potential sources of services or supplies;

(3) Maintain a file of names and addresses of each MBE, WBE and SBRA contacted and action taken with respect to each such contract;

(4) Disseminate the Company's MBE/WBE participation policy within the Company's management and externally communicate this policy to all Subcontractors and suppliers;

(5) Subdivide the relevant portion of the Design-Build Work under this Design-Build Contract, when economically-feasible, into smaller tasks or quantities, to permit maximum participation by qualified MBEs, WBEs and SBRAs;

(6) Establish delivery schedules, where work requirements permit, which will encourage participation of qualified MBEs, WBEs and SBRAs;

(7) Use the services and assistance of the State Office of Minority and Women's Business Enterprises (OMWBE), the Offices of Minority Business Enterprises, Small Business Administration and Minority Business Development Agency of the United Stated Department of Commerce, and the City's Office of Contract Compliance, as appropriate; and

(8) Adopt, update and comply with the MBE, WBE and SBRA Plan submitted in the Company's proposal in response to the RFP, and included in Schedule 19, as approved by the City.

(C) Remedies for Non-Compliance. The Company further agrees that any breach of the MBE/WBE provisions of this Design-Build Contract shall be material and shall entitle the City to any or all of the following remedies, in addition to all other remedies allowed by Applicable Law:

(a) Withholding of 10% of all future payments on the relevant portion of the Design-Build Work until it is determined that the Company is in compliance;

(b) Withholding of all future payments on the relevant portion of the Design-Build Work until it is determined that the Company is in compliance; and

(c) Termination of this Design-Build Contract pursuant to Section 11.4.

(D) MBE, WBE and SBRA Reports and Records. The Company shall report at the time of submitting each request for payment, on the form attached as Schedule 19, Exhibit 19-3, payments made to qualified MBE, WBE, and SBRA firms. The report shall include the name and state OMWBE certification number, where applicable, of any qualified

firm receiving funds under the invoice or request, and the total dollar amount paid to qualified firms under the invoice or request.

(E) Maintenance of List of Contractors. The Company shall submit, as part of its monthly Application for Payment, a monthly updated list of all subcontractors and suppliers that submitted quotations to the Company for the relevant portion of the Design-Build Work. The following information is required:

(1) Name of the Subcontractor providing the bid/quote;

(2) Type of work or product that was bid or quoted by the Subcontractor; and

(3) The MBE, WBE, SBRA or non-MBE, WBE or SBRA status of each Subcontractor.

The information submitted to the City may be in a form convenient to the Company. This may include a project spreadsheet, hand-written list, or other form normally used by the Company in the preparation of their bid. The Company acknowledges that the sole purpose of this subsection is to allow the City to identify Subcontractors participating in City public works projects and to further understand the local construction market.

(F) Maintenance of Records. The Company shall maintain, for at least twelve (12) months after the Final Completion Date, relevant records and information necessary to document the Company's utilization of qualified MBE, WBE and SBRA firms as subcontractors on this Project. The Company shall also maintain all written quotes, bids, estimates, or proposals submitted to the Company by all businesses seeking to participate as subcontractors on this Project. The City shall have the right to inspect and copy such records upon request. The Company also shall comply with all record-keeping requirements set forth in any federal rules, regulations or statutes included or referenced in the Project Agreements.

(G) City Requirements. The Company will develop and implement a program for this Project to provide on-the-job training aimed at developing trainees to journeyman status for the trades involved in the Project and to employ City residents, in accordance with the requirements of Schedule 19.

(H) Compliance with Plans. The City will monitor compliance with all aspects of the requirements in Schedule 19 during the term of the Contract, and may require such reports or other information reasonably necessary to determine compliance, changes or substitutions. Any substitution for, or failure to use, an MBE, WBE or SBRA projected to be used must be approved in advance by the City. Substitution of one firm for another will be allowed where there has been a refusal to execute necessary agreements by the original firm, a default on agreements previously made or other reasonable ground. Where the Company shows that no other MBE, WBE or SBRA is available as a substitute and that failure to secure participation by the firm listed in the proposal/plan is through no fault of the Company, substitution by a non-MBE, WBE or SBRA will be allowed. Whenever contract supplements, amendments or change orders are made that increase the total dollar value of the original

contract by more than ten percent, the Company shall, where feasible, increase the MBE, WBE and SBRA participation to meet the goals in Schedule 19. If work to be performed by an MBE, WBE or SBRA is diminished or deleted by change order, other work of equivalent value shall be substituted by the Company, where feasible. Any requirement for "reasonableness" of a Company action or "feasibility" of a requirement, and any exception or exemption from the requirements of Schedule 19, shall be made in accordance with the City's rules for "Administrative Determinations" in its Historically Underutilized Businesses Program, Section IV.A.4, and shall be reviewed in accordance with the "Review Process" in Section IV.B of those Rules.

ARTICLE XI

DEFAULT, REMEDIES AND TERMINATION

SECTION 11.1. REMEDIES FOR BREACH. The parties agree that, except as otherwise expressly provided in Sections 4.5, 6.8, 11.2, 11.3, 11.4 with respect to termination rights, in the event that either party breaches this Design-Build Contract, the other party may exercise any legal rights it may have under this Design-Build Contract, under the Security Instruments and under Applicable Law to recover damages or to secure specific performance, and that such rights to recover damages and to secure specific performance shall ordinarily constitute adequate remedies for any such breach. Neither party shall have the right to terminate this Design-Build Contract for cause except upon the occurrence of an Event of Default.

SECTION 11.2. EVENTS OF DEFAULT BY THE COMPANY. (A) Events of Default Not Requiring Previous Notice or Cure Opportunity for Termination. Each of the following shall constitute an Event of Default by the Company upon which the City, by notice to the Company, may terminate this Design-Build Contract without any requirement of having given notice previously or of providing any further cure opportunity:

(1) Security for Performance. The failure of the Company to obtain and maintain in full force and effect any Security Instrument required by Article XIV as security for the performance of this Design-Build Contract, without excuse for Uncontrollable Circumstances;

(2) Failure to Obtain Approvals, or to Achieve Acceptance or Final Completion. The failure of the Company to (i) obtain the required Governmental Approvals by the 120th day following the Scheduled Construction Commencement Date as set forth in subsection 4.4 (except with respect to the approval of the Facilities Plan Amendment if the failure to obtain such approval is a result of the Department of Ecology exceeding a reasonable time for review of such submittal taking into consideration the nature of the required review and the reasonable review period for similarly situated applicants and not due to the Company's failure to diligently take all measures to obtain such approval, or the quality or completeness of the submittal or the nature of the design or technical approval reflected in the submittal, or (ii) achieve Acceptance by the end of the Extension Period as provided in Section 7.7, or (iii) achieve Final Completion by the date as provided in Section 7.8;

(3) Insolvency. The insolvency of the Company or the Guarantor as determined under the Bankruptcy Code;

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

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

(6) Gross Misfeasance. The failure or refusal of the Company to perform a material obligation hereunder such that the failure or refusal constitutes a gross misfeasance of duty, notwithstanding the fact that at the time the notice of an Event of Default is given such failure or refusal to perform may no longer exist or be continuing;

(7) Default of Guarantor. The failure of the Guarantor to perform any obligation under the Guaranty in a timely manner; or

(8) Guarantor Credit Standing. The failure of the Company to provide credit enhancement when and as required by subsection 14.1(C).

(B) Events of Default Requiring Previous Notice and Cure Opportunity for Termination. It shall be an Event of Default by the Company upon which the City may terminate this Design-Build Contract, by notice to the Company, if: (1) any representation or warranty of the Company hereunder or of the Guarantor under the Guaranty Agreement was false or inaccurate in any material respect when made, and the legality of this Design-Build Contract or the Guaranty Agreement or the ability of the Company to carry out its obligations hereunder or the ability of the Guarantor to carry out its obligations thereunder is thereby materially and adversely affected; (2) the occurrence of any of the events described in section 11.4 permitting the City to cancel this Design-Build Contract **[Note to Proposers: This relates to Company's obligation to use good faith efforts to attempt to meet goals for MBE/WBE participation]**; or (3) the Company fails, refuses or otherwise defaults in its duty (a) to pay any amount required to be paid to the City under this Design-Build Contract within 60 days following the due date for such payment, or (b) to perform any other material obligation under this Design-Build Contract (unless such default is excused by an Uncontrollable Circumstance as and to the extent provided herein), except that no such default (other than those set forth in subsection (A) of this Section) shall constitute an Event of Default giving the City the right to terminate this Design-Build Contract for cause under this subsection unless:

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

(2) The Company has neither challenged in an appropriate forum the City's conclusion that such a default has occurred or constitutes a material breach of this Design-Build Contract nor corrected or diligently taken steps to correct such default within a reasonable time but not more than 60 days from the date of the notice given pursuant to item (1) above but if the Company shall have diligently taken steps to

correct such default within a reasonable period of time, the same shall not constitute an Event of Default for so long as the Company is continuing to take such steps to correct such default.

(C) Other Remedies Upon Company Event of Default. The right of termination provided under this Section upon an Event of Default by the Company is not exclusive. If this Design-Build Contract is terminated by the City for an Event of Default by the Company, the City shall have the right to pursue a cause of action for actual damages and to exercise all other remedies which are available to it under this Design-Build Contract, under the Security Instruments and under Applicable Law.

(D) Limitation on Termination Damages. **[Note to Proposers: The limitation on termination damages provided herein is not intended to be a liquidated damage that the Company would be required to pay in the event of a termination by the City due to a Company Event of Default. This limitation on termination damages provision is intended to benefit the Company by placing an artificial cap on the amount of damages that a judge presiding over a termination claim could award to the City.]** The maximum amount of damages payable by the Company to the City for termination of the Design-Build Contract upon an Event of Default by the Company under this Section shall be the amount that is equal to 90% of the Design-Build Price. This subsection shall not limit any other obligation of the Company hereunder and no amount other than damages payable by the Company to the City for termination of this Design-Build Contract upon an Event of Default by the Company shall be subject to such limitation. The following losses, claims, payments, fines, damages or liabilities which may be incurred by the Company will not be subject to the limitation provided above nor will the occurrence of such losses, claims, payments, fines, damages or liabilities in any way reduce the amount of termination damages which the City may collect from the Company as a result of a termination of this Contract by the City due to an Event of Default by the Company:

(1) any design or construction overruns or losses sustained by the Company, the Guarantor, or any other party in connection with this Design-Build Contract, the Guaranty or any other agreement relating to the Project;

(2) any claims, losses and liabilities to third parties;

(3) any fines, penalties or other amounts paid to any Governmental Body;

(4) any indemnity payments made to the City; and

(5) any liquidated damages or other non-performance damages paid to the City or incurred prior to the date of termination.

SECTION 11.3. EVENTS OF DEFAULT BY THE CITY. (A) Events of Default Permitting Termination. Each of the following shall constitute an Event of Default by the City upon which the Company, by notice to the City, may terminate this Design-Build Contract:

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

(2) Failure to Pay or Perform. The failure, refusal or other default by the City in its duty: (1) to pay the amount required to be paid to the Company under this Design-Build Contract within 60 days following the due date for such payment; or (2) to perform any other material obligation under this Design-Build Contract (unless such default is excused by an Uncontrollable Circumstance as and to the extent provided herein); or

(3) Bankruptcy. The authorized filing by the City of a petition seeking relief under the Bankruptcy Code, as applicable to political subdivisions which are insolvent or unable to meet their obligations as they mature; provided that the appointment of a financial control or oversight board by the State for the City shall not in and of itself constitute an Event of Default hereunder.

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

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

(2) The City has neither challenged in an appropriate forum the Company's conclusion that such default has occurred or constitutes a material breach of this Design-Build Contract nor corrected or diligently taken steps to correct such default within a reasonable period of time but not more than 60 days from the date of the notice given pursuant to item (1) above but if the City shall have diligently taken steps to correct such default within a reasonable period of time, the same shall not constitute an Event of Default for as long as the City is continuing to take such steps to correct such default.

(C) Termination Damages Upon City Event of Default. If this Design-Build Contract is terminated by the Company for cause as a result of an Event of Default by the City during the Term of the Design-Build Contract, the Company shall be paid all amounts to which it would be entitled had the Contract been terminated pursuant to subsections 4.5(A) or 6.8(B).

(D) Payment of Amounts Owing Through the Termination Date. Upon any termination pursuant to this subsection, the Company shall also be paid all amounts due for the Design-Build Work to be paid as part of the Design-Build Price, but not yet paid as of the date of termination.

SECTION 11.4. SPECIAL CITY CANCELLATION RIGHTS. The City shall have the right at any time, exercisable in its sole discretion, without penalty or further obligation, to cancel this Design-Build Contract if either (i) the City determines that the

MBE/WBE Plan submitted by the Company is false or fraudulent, or (ii) if the City determines that the Company has failed to meet its obligations under Section 10.6.

SECTION 11.5. GENERAL PROVISIONS REGARDING CONVENIENCE TERMINATION. (A) Termination Fee Payment Contingent Upon Surrender of Possession. The City has retained the right to terminate this Contract at its convenience as set forth in Sections 4.5 and 6.8. The City shall have no obligation to pay the applicable termination fee provided for in Sections 4.5 and 6.8, except concurrently with the surrender of possession and control by the Company of the Design-Build Improvements to the City and compliance with the obligations of the Company set forth in Section 11.6(A).

(B) Adequacy of Termination Payment. The Company agrees that the applicable termination amounts provided in Sections 4.5 and 6.8 shall fully and adequately compensate the Company and all Subcontractors for all costs of undertaking their obligations, foregone potential profits, Loss-and-Expense, and charges of any kind whatsoever (whether foreseen or unforeseen), including initial transition and mobilization costs and demobilization, employee transition and other similar wind-down costs, attributable to the termination of the Company's right to perform this Design-Build Contract.

(C) Consideration for Convenience Termination Payment. The right of the City to terminate this Design-Build Contract for its convenience and in its sole discretion constitutes an essential part of the overall consideration for this Design-Build Contract, and the Company hereby waives any right it may have under Applicable Law to assert that the City owes the Company a duty of good faith dealing in the exercise of such right.

(D) Completion or Continuance by City. After the date of any termination under this Article, the City may at any time (but without any obligation to do so) take any and all actions necessary or desirable to continue and complete the Design-Build Work so terminated, including, without limitation, entering into contracts with other designers and contractors.

SECTION 11.6. OBLIGATIONS OF THE COMPANY UPON TERMINATION OR EXPIRATION. (A) Company Obligations. Upon a termination of the Company's right to perform this Design-Build Contract under Sections 4.5, 6.8 or 11.2, the Company shall, as applicable:

(1) stop the Design-Build Work on the date and to the extent specified by the City;

(2) promptly deliver to the City all Design Documents and Record Drawings prepared by the Company in carrying out the Design-Build Work which have not previously been delivered to the City;

(3) promptly take all action as necessary to protect and preserve all materials, equipment, tools, facilities and other property including all of the items described in item (8) below;

(4) promptly remove from the Design-Build Improvements all equipment, implements, machinery, tools, temporary facilities of any kind and other property

owned or leased by the Company (including, but not limited to sheds, trailers, workshops and toilets), and repair any damage caused by such removal;

(5) clean the Design-Build Improvements and the Site and leave them in a neat and orderly condition;

(6) promptly remove all employees of the Company and any Subcontractors and vacate the Design-Build Improvements;

(7) promptly deliver to the City a list of all supplies, materials, machinery, equipment, property and special order items previously delivered or fabricated by the Company or any Subcontractor but not yet incorporated in the Design-Build Improvements;

(8) deliver to the City the Operation and Maintenance Manual and all other computer programs used at the Design-Build Improvements in the performance of the Design-Build Work, including all revisions and updates thereto;

(9) deliver to the City a copy of all books and records in its possession relating to the performance of the Design-Build Work;

(10) provide the City with a list of all files, and access and security codes with instructions and demonstrations which show how to open and change such codes;

(11) advise the City promptly of any special circumstances which might limit or prohibit cancellation of any Subcontract;

(12) promptly deliver to the City copies of all Subcontracts, together with a statement of:

(a) the items ordered and not yet delivered pursuant to each agreement;

(b) the expected delivery date of all such items;

(c) the total cost of each agreement and the terms of payment; and

(d) the estimated cost of canceling each agreement;

(13) assign to the City any Subcontract that the City elects in writing, at its sole election and without obligation, to have assigned to it. The City shall assume, and the Company shall be relieved of its obligations under, any Subcontract so assigned;

(14) unless the City directs otherwise, terminate all Subcontracts and make no additional agreements with Subcontractors;

(15) provide the City with a list of all Design-Build Improvements equipment subject to patents, licenses, franchises, trademarks or copyrights and the associated royalties and license fees associated therewith which the City will be responsible for paying on or after the Termination Date;

(16) as directed by the City, transfer to the City by appropriate instruments of title, and deliver to the Design-Build Improvements (or such other place as the City may specify), all special order items pursuant to this Design-Build Contract for which the City has made or is obligated to make payments;

(17) promptly transfer to the City all warranties given by any manufacturer or Subcontractor with respect to particular components of the Design-Build Work;

(18) notify the City promptly in writing of any Legal Proceedings against the Company by any Subcontractor or other third parties relating to the termination of the Design-Build Work (or any Subcontracts);

(19) give written notice of termination, effective as of date of termination of this Design-Build Contract, promptly under each policy of Required Insurance (with a copy of each such notice to the City), but permit the City to continue such policies thereafter at its own expense, if possible;

(20) arrange its dealings with employees such that no "successor clause" or accrued benefit liability will bind the City in the event the City determines to offer employment to the Company's employees at the Design-Build Improvements following the Termination Date; and

(21) take such other actions, and execute such other documents as may be necessary to effectuate and confirm the foregoing matters, or as may be otherwise necessary or desirable to minimize the City's costs, and take no action which shall increase any amount payable by the City under this Design-Build Contract.

(B) Continuity of Service and Technical Support. Upon the termination of the Company's right to perform this Design-Build Contract under Sections 4.5, 6.8 or 11.2, the Company, at the request and direction of the City, shall provide for an effective continuity of service and the smooth and orderly transition of the Project to the City or any replacement contractor designated by the City. Such service shall be for a period of up to 90 days and shall include providing technological and design advice and support and delivering any plans, drawings, renderings, bluelines, operating manuals, computer programs, spare parts or other information useful or necessary for the City or any replacement contractor designated by the City to carry out and complete the Design-Build Work. In addition, the Company shall provide the City with a one-time training program relating to the operation of the Design-Build Improvements.

(C) Company Payment of Certain Costs. If termination is pursuant to Section 11.2, the Company shall be obligated to pay the costs and expenses of undertaking its obligations under subsection (B) of this Section. If the Company fails to comply with any obligation under this Section, the City may perform such obligation and the Company shall pay on demand all reasonable costs thereof subject to Cost Substantiation.

(D) City Payment of Certain Costs. If termination is for the convenience of the City under Section 4.5 or 6.8 or due to a City Event of Default pursuant to Section 11.3, the City shall pay to the Company within 60 days of the date of the Company's invoice supported by Cost Substantiation all reasonable cost and expenses incurred by the Company in satisfying its obligations under subsection (B) of this Section.

SECTION 11.7. SURVIVAL OF CERTAIN PROVISIONS UPON TERMINATION. All representations and warranties of the parties hereto contained in this Design-Build Contract, each of the party's indemnity obligations in this Design-Build Contract

with respect to events that occurred prior to the Termination Date or during the Company's provision of the transition services under Section 11.6, the rights and obligations of the parties hereto pursuant to Article XI (except for this Section 11.7), and all other provisions of this Design-Build Contract that so provide shall survive the termination of this Design-Build Contract. No termination of this Design-Build Contract shall (1) limit or otherwise affect the respective rights and obligations of the parties hereto accrued prior to the date of such termination; or (2) preclude either party from impleading the other party in any Legal Proceeding originated by a third-party as to any matter occurring during the Term of this Design-Build Contract.

SECTION 11.8. NO WAIVERS. No action of the City or Company pursuant to this Design-Build Contract (including, but not limited to, any investigation or payment), and no failure to act, shall constitute a waiver by either party of the other party's compliance with any term or provision of this Design-Build Contract. No course of dealing or delay by the City or Company in exercising any right, power or remedy under this Design-Build Contract shall operate as a waiver thereof or otherwise prejudice such party's rights, powers and remedies. No single or partial exercise of (or failure to exercise) any right, power or remedy of the City or the Company under this Design-Build Contract shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

ARTICLE XII

DISPUTE RESOLUTION

SECTION 12.1. FORUM FOR DISPUTE RESOLUTION. It is the express intention of the parties that all Legal Proceedings related to this Design-Build Contract or to the Design-Build Improvements or to any rights or any relationship between the parties arising therefrom shall be solely and exclusively initiated and maintained in the State or Federal courts located in Pierce County, Washington. The Company and the City each irrevocably consents to the jurisdiction of such courts in any such Legal Proceeding and waives any objection it may have to the laying of the jurisdiction of any such Legal Proceeding.

SECTION 12.2. NON-BINDING MEDIATION. (A) Rights to Request and Decline. Either party may request Non-Binding Mediation of any dispute arising under this Design-Build Contract, whether technical or otherwise. The non-requesting party may decline the request in its sole discretion. If there is concurrence that any particular matter shall be mediated, the provisions of this Section shall apply. The costs of such Non-Binding Mediation shall be divided equally between the City and the Company.

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

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

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

SECTION 12.3. CONTINUANCE OF DESIGN-BUILD WORK DURING DISPUTE. At all times during the course of any Legal Proceeding or mediation process, the Company shall continue with the Design-Build Work as directed by the City, in a diligent manner and without delay or conform to the City's decision or order, and shall be governed by the applicable provisions of this Design-Build Contract. Records of the Design-Build Work performed during such time shall be kept in sufficient detail to enable payment in accordance with the applicable provisions in this Design-Build Contract, if necessary

SECTION 12.4. NO SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES. In no event shall either party hereto be liable to the other or obligated in any manner to pay to the other any special, incidental, consequential, punitive or similar damages based upon claims arising out of or in connection with the performance or non-performance of its

obligations or otherwise under this Design-Build Contract, or the material falseness or inaccuracy of any representation made in this Design-Build Contract, whether such claims are based upon contract, tort, negligence, warranty or other legal theory. The waiver of the foregoing damages under this Section is intended to apply to only disputes and claims as between the City and the Company, and specifically is not intended to limit the scope of the indemnity provisions in Section 13.3, which indemnity includes all claims by third parties irrespective of the nature thereof or the relief sought thereby.

ARTICLE XIII

INSURANCE, UNCONTROLLABLE CIRCUMSTANCES
AND INDEMNIFICATION

SECTION 13.1. INSURANCE. (A) Company Insurance. At all times during the Term of this Design-Build Contract, the Company shall obtain and maintain the Required Insurance in accordance with Schedule 18 and shall pay all premiums with respect thereto as the same become due and payable. The Required Development Period Insurance shall be provided concurrently with the execution and delivery of this Design-Build Contract or otherwise as provided by Applicable Law and remain in effect during the Development Period in annually (or other) renewable periods and the Required Construction Period Insurance shall be provided on or before the Construction Commencement Date and remain in effect during the Design-Build Period in annually (or other) renewable periods.

(B) Insurers, Deductibles and City Rights. All insurance required by this Section shall be obtained and maintained from financially sound and generally recognized responsible insurance companies meeting the qualifications set forth in Schedule 18. The insurers shall be selected by the Company and authorized to write such insurance in the State. The insurance coverage may be written with deductible amounts within the limits approved by the City as provided in Schedule 18, and the Company shall be responsible for any deductible amounts. The Company shall also be responsible for all self-insured retentions contained in its insurance coverages, as well as any excluded losses. All policies evidencing such insurance shall provide for: (1) payment of the losses to the City, and to the Company as their respective interests may appear; and (2) at least 30 days' prior written notice of the cancellation thereof to the Company and the City. All policies of insurance required by this Section shall be primary insurance without any right of contribution from other insurance carried by the City. The City shall have the right to fully participate in all insurance claim settlement negotiations and to approve all final insurance settlements, which approval shall not be unreasonably withheld.

(C) Certificates, Policies and Notice. The Required Insurance, including any renewals thereof, shall be evidenced by certificates of insurance as provided herein and in Schedule 18. No later than the 30 days prior to the issuance date of each policy of Required Insurance, including any renewals thereof, the Company shall provide the City with a draft certificate of insurance for review and approval, and shall deliver the final, approved certificate of insurance to the City promptly following its issuance. The Company shall also supply the City, upon request, with certified copies of such policies promptly following issuance by the insurers. Not later than 60 days prior to the beginning of each contract year throughout the Term, the Company shall furnish certificates of insurance to the City to confirm the continued effectiveness of the Required Insurance. Whenever a Subcontractor is utilized, the Company shall either obtain and maintain or require the Subcontractor to obtain and maintain insurance in accordance with the applicable requirements of Schedule 18.

(D) Maintenance of Insurance Coverage. If the Company fails to pay any premium for Required Insurance, or if any insurer cancels any Required Insurance policy and the Company fails to obtain replacement coverage so that the Required Insurance is maintained on a continuous basis, then, at the City's election (but without any obligation to do

so), the City, following notice to the Company, may pay such premium or procure similar insurance coverage from another company or companies and upon such payment by the City the amount thereof shall be immediately reimbursable to the City by the Company. The Company shall not perform Design-Build Work during any period when any policy of Required Insurance is not in effect. The Company shall comply with all applicable Required Insurance and take all steps necessary to assure the Design-Build Improvements remain continuously insured in accordance with the requirements of this Design-Build Contract during the Term hereof. The failure of the Company to obtain and maintain any Required Insurance shall not relieve the Company of its liability for any losses intended to be insured thereby. Should any failure to provide continuous insurance coverage occur, the Company shall indemnify and hold harmless the City in the manner provided in Section 13.3, from and against any and all Loss-and-Expense arising out of such failure. The purchase of the Required Insurance to satisfy the Company's obligations under this Section shall not be a satisfaction of any Company liability under this Design-Build Contract or in any way limit, modify or satisfy the Company's indemnity obligations hereunder.

SECTION 13.2. UNCONTROLLABLE CIRCUMSTANCES. (A) Relief from Obligations. Except as expressly provided under the terms of this Design-Build Contract, neither party to this Design-Build Contract shall be liable to the other for any loss, damage, delay, default or failure to perform any obligation to the extent it results from an Uncontrollable Circumstance. The parties agree that the relief for an Uncontrollable Circumstance described in this Section shall apply to all obligations in this Design-Build Contract, except to the extent specifically provided otherwise, notwithstanding that such relief is specifically mentioned with respect to certain obligations in this Design-Build Contract but not other obligations. The occurrence of an Uncontrollable Circumstance shall not excuse or delay the performance of a party's obligation to pay monies previously accrued and owing under this Design-Build Contract, or to perform any obligation hereunder not affected by the occurrence of the Uncontrollable Circumstance. The parties acknowledge that improvements to existing aging facilities, including the Design-Build Improvements, by their nature are likely to encounter conditions of deteriorated structures, pipes and materials, and that a company utilizing Good Industry Practice would take into consideration such conditions in its approach to implementing the Design-Build Work, including having readily available equipment and materials which may be necessary to mitigate damages, extra costs or schedule delays which might otherwise result from such conditions.

(B) Notice and Mitigation. The party that asserts the occurrence of an Uncontrollable Circumstance shall notify the other party by telephone or facsimile, on or promptly after the date the party experiencing such Uncontrollable Circumstance first knew of the occurrence thereof, followed within 15 days by a written description of: (1) the Uncontrollable Circumstance and the cause thereof (to the extent known); and (2) the date the Uncontrollable Circumstance began, its estimated duration, the estimated time during which the performance of such party's obligations hereunder shall be delayed, or otherwise affected. As soon as practicable after the occurrence of an Uncontrollable Circumstance, the affected party shall also provide the other party with a description of: (i) the amount, if any, by which

the Design-Build Price is proposed to be adjusted as a result of such Uncontrollable Circumstance; (ii) any areas where costs might be reduced and the approximate amount of such cost reductions; and (iii) its estimated impact on the other obligations of such party under this Design-Build Contract. The affected party shall also provide prompt written notice of the cessation of such Uncontrollable Circumstance. Whenever such act, event or condition shall occur, the party claiming to be adversely affected thereby shall, as promptly as practicable, use all reasonable efforts to eliminate the cause therefor, reduce costs and resume performance under this Design-Build Contract. While the Uncontrollable Circumstance continues, the affected party shall give notice to the other party, before the first day of each succeeding month, updating the information previously submitted. The party claiming to be adversely affected by an Uncontrollable Circumstance shall bear the burden of proof, and shall furnish promptly any additional documents or other information relating to the Uncontrollable Circumstance reasonably requested by the other party.

(C) Conditions to Performance, Schedule and Design-Build Price Relief. If and to the extent that an Uncontrollable Circumstance materially expands the scope of the Company's obligations hereunder, materially interferes with, materially delays or materially increases the cost of the Company's performing its obligations hereunder, the Company shall be entitled to relief from the performance of its obligations hereunder, an extension of schedule or an increase in the Design-Build Price, or any combination thereof, which properly reflects the interference with performance, the time lost or the amount of the increased cost, in each case as a result thereof, but only to the minimum extent reasonably forced on the Company by the event and subject to the provisions of Section 6.1(F). The proceeds of any Required Insurance available to meet any such increased cost, and the payment by the Company of any deductible, shall be applied to such purpose prior to any determination of cost increase payable by the City under this Section. In the event that the Company believes it is entitled to relief on account of an Uncontrollable Circumstance, it shall furnish the City written notice of the specific relief requested and detailing the event giving rise to the claim within 30 days after the giving of the initial notice delivered pursuant to subsection (B) of this Section. If the specific relief cannot reasonably be ascertained and such event detailed within such 30-day period, then such notice shall be provided within such longer period within which it is reasonably possible to detail the event and ascertain such relief. Within 30 days after receipt of such a timely submission from the Company, the City shall issue a written determination as to the extent, if any, it concurs with the Company claim for performance, price or schedule relief, and the reasons therefor. The Company acknowledges that its failure to give timely notice pertaining to an Uncontrollable Circumstance as required under this Section may adversely affect the City. To the extent the City asserts that any such adverse effect has occurred and that the relief to the Company or the additional cost to be borne by the City under this subsection should be reduced to account for such adverse effect, the Company shall have the affirmative burden of refuting the City's assertion. The agreement of the parties as to the specific relief to be given the Company hereunder on account of an Uncontrollable Circumstance shall be evidenced by a Contract Administration Memorandum.

(D) Share of Costs of Uncontrollable Circumstances. The Company shall bear the costs which result from the occurrence of an uninsured Uncontrollable Circumstance (except any Change in Law made by the City) to the extent of the first 5% of such costs necessitated by Uncontrollable Circumstances up to an aggregate of $50,000 over the Term of this Contract. The Company's share of such net costs shall be reflected in a decrease in the amount by which the Design-Build Price, as the case may be, would have otherwise been increased on account of such occurrence, unless otherwise agreed to by the parties. The Company's obligation under subsection 13.1(B) to bear the expense of any deductibles applicable on claims made with respect to any Required Insurance provided by the Company hereunder is an independent obligation, and the amount of any such expense shall not be taken into account in determining costs borne by the Company under this subsection.]

(E) Acceptance of Relief Constitutes Release. Either party's acceptance of any performance, price or schedule relief under this Section shall be construed as a release of the other party for any and all Loss-and-Expense resulting from, or otherwise attributable to, the event giving rise to the relief claimed.

SECTION 13.3. INDEMNIFICATION. (A) Indemnification by the Company. The Company shall indemnify, defend and hold harmless the City, and its elected officials, appointed officers, employees, representatives, agents and contractors (each, a "City Indemnitee"), from and against (and pay the full amount of) any and all Loss-and-Expense incurred by a City Indemnitee in connection with third party claims from or in connection with (or alleged to arise from or in connection with):

(1) any failure by the Company to perform its obligations under this Design-Build Contract;

(2) the negligence or willful misconduct of the Company or any of its officers, directors, employees, agents, representatives or Subcontractors in connection this Design-Build Contract;

(3) Company Fault; or

(4) the performance of the Company's obligations under this Design-Build Contract.

The Company shall also indemnify the City as and to the extent provided elsewhere in this Design-Build Contract. The Company's indemnity obligations hereunder shall not be limited by any coverage exclusions or other provisions in any insurance policy maintained by the Company which is intended to respond to such events. The Company shall not, however, be required to reimburse or indemnify any City Indemnitee for any Loss-and-Expense to the extent caused by the negligence or willful misconduct of any City Indemnitee or to the extent attributable to any Uncontrollable Circumstance. A City Indemnitee shall promptly notify the Company of the assertion of any claim against it for which it is entitled to be indemnified hereunder, and the Company shall have the right to assume the defense of the claim in any Legal Proceeding and to approve any settlement of the claim. These indemnification provisions are for the protection of the City Indemnitee only and shall not establish, of themselves, any

liability to third parties. The provisions of this Section shall survive termination of this Design-Build Contract.

(B) Indemnification by the City. The City shall indemnify, defend and hold harmless the Company and its appointed officers, directors, employees, and contractors (each, a "Company Indemnitee"), from and against (and pay the full amount of) any and all Loss-and-Expense incurred by a Company Indemnitee to in connection with third party claims arising from or in connection with (or alleged to arise from or in connection with):

(1) any failure by the City to perform its obligations under this Design-Build Contract;

(2) the negligence or willful misconduct of the City or any of its officials, officers, employees, agents, representatives or Subcontractors in connection this Design-Build Contract;

(3) City Fault; or

(4) the performance of the City's obligations under this Design Building Contract.

The City's indemnity obligations hereunder shall not be limited by any coverage exclusions or other provisions in any insurance policy maintained by the City which is intended to respond to such events. The City shall not, however, be required to reimburse or indemnify any Company Indemnitee for any Loss-and-Expense to the extent caused by the negligence or willful misconduct of any Company Indemnitee or to the extent attributable to any Uncontrollable Circumstance. A Company Indemnitee shall promptly notify the City of the assertion of any claim against it for which it is entitled to be indemnified hereunder, and the City shall have the right to assume the defense of the claim in any Legal Proceeding and to approve any settlement of the claim. These indemnification provisions are for the protection of the Company Indemnitee only and shall not establish, of themselves, any liability to third parties. The provisions of this Section shall survive termination of this Design-Build Contract.

ARTICLE XIV

SECURITY FOR PERFORMANCE

SECTION 14.1. GUARANTOR. (A) Guaranty Agreement. The Company shall cause the Guaranty Agreement to be provided and maintained by the Guarantor during the Term hereof in the form attached hereto as a Transaction Form.

(B) Material Decline in Guarantor's Credit Standing Defined. For purposes of this Section, a "Material Decline in Guarantor's Credit Standing" shall be deemed to have occurred if neither the Company nor Guarantor maintain the Minimum Financial Criteria set forth in Criteria I, II, or III contained in Schedule 23 hereto. The Company immediately shall notify the City of any Material Decline in Credit Standing.

(C) Credit Enhancement Upon a Material Decline in Guarantor's Credit Standing. If, at any time after the Contract Date and prior to the expiration of the Performance Warranty, a Material Decline in Guarantor's Credit Standing occurs, the Company shall provide, or cause the Guarantor to provide to the City within 60 days of notice from the City, a Letter of Credit from a Qualified Commercial Bank in the stated amount of $3 million in accordance with the requirements of Section 14.3 (the "Letter of Credit"). The City shall have the right but not the obligation, exercisable in its sole and absolute discretion, to waive, modify (but not increase the face amount), alter or replace any of the foregoing requirements from time to time as and to the extent the City deems necessary to protect the public interest and to secure the performance by the Company of its obligations hereunder and by the Guarantor of its obligations under the Guaranty Agreement in light of the nature, extent and potential duration of the Material Decline in Guarantor's Credit Standing.

(D) Restoration of Credit Standing. If, at any time following the occurrence of a Material Decline in Guarantor's Credit Standing, (1) the credit rating or "shadow" credit rating of the Guarantor is raised to investment grade by both of the Rating Services, or (2) an additional guaranty agreement in a form substantially identical to the form of the Guaranty is provided by another company acceptable to the City whose credit rating would have avoided the occurrence of a Material Decline in Guarantor's Credit Standing, the Letter of Credit will not longer be required.

(E) Guarantor Annual Reports. The Company shall furnish the City, within 120 days after the end of the Guarantor's fiscal year, consolidated balance sheets and income statements for the Guarantor attached to the audited year-end financial statements reported upon by the Guarantor's independent public accountant. If applicable, the Company shall also furnish the City with copies of the quarterly and annual reports and other filings of the Guarantor filed with the Securities and Exchange Commission or comparable foreign regulatory body, as applicable.

SECTION 14.2. BONDS. (A) Performance and Payment Bonds. On or before the Construction Commencement Date, the Company shall provide the Performance Bond and the Payment Bond each in the form attached hereto and in an amount equal to the Fixed Construction Price plus the Project Allowance, as financial security for the faithful performance and payment of its construction obligations hereunder. The obligations of the

Surety under the Performance Bond shall not extend to any design services, preconstruction services, finance services, maintenance services, operations services or any other related services hereunder. The Performance Bond and the Payment Bond shall be substantially in the forms set forth in the Transaction Forms and shall be issued by a surety company: (1) approved by the City having a rating of "A" in the latest revision of the A.M. Best Company's Insurance Report; (2) be listed in the United States Treasury Department's Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsurance Companies"; and (3) holding a certificate of authority to transact surety business in the State issued by the State Insurance Commission. The Performance Bond and the Payment Bond shall remain open until Final Completion. Prior to the Company's undertaking any Extra Design-Build Work under this Design-Build Contract, the Company shall increase the Performance Bond and a Payment Bond, each by an amount equal to the construction costs of such Extra Design-Build Work.

(B) Monitoring of Sureties. The Company shall be responsible throughout this Design-Build Contract for monitoring the financial condition of any surety company issuing bonds under this Design-Build Contract and for making inquiries no less often than annually to confirm that each such surety company maintains at least the minimum rating level specified in this Section. In the event the rating of any issuing surety company falls below such minimum level, the Company shall promptly notify the City of such event and shall promptly furnish or arrange for the furnishing of a substitute or an additional bond of a surety company whose rating and other qualifications satisfy all above requirements, unless the City agrees to accept the surety company or agrees to an alternative method of assurance. Upon such notice by the Company of such an event, the City shall not unreasonably withhold its approval of such assurance.

SECTION 14.3. LETTER OF CREDIT. **[Note to Proposers: A Letter of Credit will not be initially required but may be required if there is a Material Decline in the Guarantor's Credit Standing as set forth in Section 14.1.]** (A) Qualified Commercial Bank. A "Qualified Commercial Bank" for the purposes of this Design-Build Contract shall mean a domestic or foreign commercial bank whose long-term debt is rated "A2" or higher by Moody's and whose long-term debt is rated "A" or higher by Standard & Poor's, and if there is a split rating, then the lower of the two shall apply. The Qualified Commercial Bank shall maintain a banking office in either Tacoma or Seattle, Washington. The Qualified Commercial Bank shall be subject to the approval of the City, which shall not unreasonably be withheld or delayed.

(B) Letter of Credit Requirements. The Letter of Credit shall be for a term of one year, shall be continuously renewed, extended or replaced so that it remains in effect until 180 days after the earlier of the Termination Date or the end of the Term, and shall be issued substantially in the form set forth in the Transaction Forms. The Letter of Credit shall be in a stated amount (the "stated amount") equal to $3,000,000. The required stated amount shall, upon each renewal, extension or replacement thereof, be reduced by the aggregate amount of all amounts drawn on all previous Letters of Credit provided under this subsection. The stated amount of the Letter of Credit and the City's estimate of damages for purposes of its drawing rights under this Section shall in no way limit the amount of damages to which the City may be

entitled for any material breach or Company Event of Default hereunder. In order to evidence the authorized reduction of the stated amount hereunder, the City, at the request of the Company, shall deliver to the Qualified Commercial Bank the certificate for reduction in stated amount provided for in the Transaction Forms.

(C) Drawings for Non-Renewal or Bankruptcy. The City shall have the unconditional right to immediately draw upon the Letter of Credit for the full stated amount thereof upon the following conditions: (1) in the event that any required renewal, extension or replacement thereof is not made earlier than the date which is 30 days prior to its expiration date; (2) the Company or the Guarantor (i) has filed a petition of voluntary bankruptcy under the Bankruptcy Code, (ii) has consented to the filing of any bankruptcy or reorganization petition against the Company or the Guarantor, or (iii) has filed a petition to reorganize the Company or the Guarantor pursuant to the Bankruptcy Code; or (3) a court of competent jurisdiction has issued an order appointing a receiver, liquidator, custodian or trustee of the Company or the Guarantor or of a major part of the Company's or the Guarantor's property, respectively, or a petition to reorganize the Company or the Guarantor pursuant to the Bankruptcy Code has been filed against the Company or the Guarantor, and such order has not been discharged or such filing has not been dismissed within 90 days after such issuance or filing. The proceeds of any such drawing shall be held by the City as cash collateral to secure the performance of the Design-Build Work and, in the event of a material breach of this Design-Build Contract following any such drawing, may be retained by the City as payment or partial payment of damages resulting therefrom.

(D) Drawings for Termination. The City shall have the unconditional right to immediately draw upon the Letter of Credit an amount estimated by the City as representing the damages it has suffered as a result of the termination of this Design-Build Contract by the City pursuant to Section 11.2.

(E) Drawings for Material Breach. The City shall have the right to draw upon the Letter of Credit in an amount estimated by the City as representing the damages it has suffered as a result of a material breach of this Design-Build Contract by the Company. It shall be a condition to the right of the City to draw on the Letter of Credit under this subsection that: (1) the City has given the Company written notice of a material breach of this Design-Build Contract, whether or not such breach constitutes an Event of Default, and attached a copy of his or her good faith assessment of the damages the City has suffered as a result of such breach; and (2) the Company has had an opportunity at a meeting scheduled by the Public Works Director to be held not earlier than 15 days nor later than 30 days following delivery of such notice, to present to the Public Works Director evidence disputing the City's assertion of breach or assessment of damages. Notice to the Company of a material breach hereof shall be given concurrently with notice to the Guarantor, except that following any event of voluntary bankruptcy or involuntary bankruptcy by the Company as described in Section 11.2 or a termination of this Design-Build Contract pursuant to Section 11.2, no such notice shall be required to be given to the Company, nor shall the giving of such notice be a condition to the City's drawing rights under the Letter of Credit pursuant to this subsection.

(F) Effect of Final Determination of Damages. In the event that subsequent to any drawing on the Letter of Credit it is determined by any court of competent jurisdiction in a final non-appealable decision that such drawing to any extent was not permitted hereunder, the City shall pay the amount wrongfully drawn to the Company together with interest thereon of the Base Rate calculated from the date of drawing to the date of payment to the Company.

SECTION 14.4. COSTS OF PROVIDING SECURITY FOR PERFORMANCE. The cost and expense of obtaining and maintaining the Security Instruments required under this Article as security for the performance of the Company's obligations hereunder shall be borne by the Company without reimbursement from the City.

ARTICLE XV

MISCELLANEOUS PROVISIONS

SECTION 15.1. LIMITED RECOURSE TO CITY. No recourse shall be had to the general fund or general credit of the City for the payment of any amount due the Company hereunder, whether on account of the Design-Build Price or for any Loss-and-Expense or payment or claim of any nature arising from the performance or non-performance of the City's obligations hereunder. The sole recourse of the Company for all such amounts shall be to the revenues of the City's Wastewater/Stormwater Enterprise Fund. All such revenues shall be held for the uses permitted and required thereby and by the City Charter and other Applicable Law, and no such amounts shall constitute property of the Company.

SECTION 15.2. PROPERTY RIGHTS. The Company shall pay all royalties and license fees in connection with the Design-Build Work. The Company shall protect, indemnify, defend and hold harmless the City, and any of the City Indemnitees, in the manner provided in Section 13.3, from and against any and all Loss-and-Expense arising out of or related to the infringement or unauthorized use of any patent, trademark, copyright or trade secret relating to, or for the Design-Build Work, or at its option, shall acquire the rights of use under infringed patents, or modify or replace infringing equipment with equipment equivalent in quality, performance, useful life and technical characteristics and development so that such equipment does not so infringe. The provisions of this Section shall survive termination of this Design-Build Contract.

SECTION 15.3. INTEREST ON OVERDUE OBLIGATIONS. All amounts due hereunder, whether as damages, credits, revenue, charges or reimbursements, that are not paid when due shall bear interest at the rate of interest which is the Base Rate, on the amount outstanding from time to time, on the basis of a 365-day year, counting the actual number of days elapsed, and such interest accrued at any time shall, to the extent permitted by Applicable Law, be deemed added to the amount due as accrued.

SECTION 15.4. NEGOTIATED FIXED PRICE WORK. (A) Fixed Design-Build Price. The Fixed Design-Build Price has been fixed and agreed to by the parties based on the Company's proposal submitted in response to the RFP, and is not subject to Cost Substantiation. Notwithstanding the foregoing sentence, the Company shall furnish the City with all cost information required by the City for the payment of the Fixed Design-Build Price under Article VIII.

(B) Negotiated Lump Sum Pricing of Work for Which the City is Financially Responsible. This Design-Build Contract obligates the City to pay for certain costs resulting from Uncontrollable Circumstances, City Fault and otherwise as more specifically provided herein. It is the expectation of the parties, in general, that the City will pay for such costs on a negotiated, lump sum basis, and that the lump sum price will be negotiated in advance of the Company's performance of the work. For example, if a Change in Law occurs, as required under Section 13.2 the parties will assess the impact of the Change in Law, take all appropriate mitigation steps, determine any necessary Extra Design-Build Work, and agree upon lump sum pricing therefor. To facilitate such negotiations, the Company shall furnish

the City with all information reasonably required by the City regarding the Company's expected costs of performing the work and its mark-up. Once the parties agree upon the lump sum price, the Company's actual costs of performance shall not be subject to Cost Substantiation unless after-the-fact Cost Substantiation with respect to all or a portion of the Company's actual costs was agreed to by the parties in establishing the lump sum price.

SECTION 15.5. COST SUBSTANTIATION OF WORK ALREADY PERFORMED. (A) Cost Substantiation Generally. The Company shall provide Cost Substantiation for the costs for which the City is financially responsible hereunder, other than the Fixed Design-Build Price and the costs for which the parties have negotiated a lump sum price, all as and to the extent provided in Section 15.4. In incurring costs which are or may be subject to Cost Substantiation, the Company shall utilize competitive practices to the maximum reasonable extent (including, where practicable and except with respect to costs of the Company to which the Fixed Design-Build Price apply, obtaining three competing quotes or estimates for costs expected to be in excess of $50,000, and shall enter into subcontracts on commercially reasonable terms and prices in light of the work to be performed and the City's potential obligation to pay for it.

(B) Costs Requiring Cost Substantiation. Cost Substantiation shall be provided as soon as reasonably practicable after the costs which require substantiation have been incurred by the Company. Examples of costs which require substantiation include (1) work done on an emergency basis to respond to an Uncontrollable Circumstance, where it is not reasonably practicable for the parties in advance to negotiate a lump sum price for the work; and (2) work done by the Company under subsection 11.6(B) upon the expiration or termination of this Design-Build Contract, to the extent such costs are the responsibility of the City under subsection 11.6(D). Cost Substantiation shall also be required where the parties agree that the Company shall perform work on a cost-plus basis, subject to the limitations set forth in subsection (D) of this Section.

(C) Cost Substantiation Certificate. Any certificate delivered hereunder to substantiate cost shall state the amount of such cost and the provisions of this Design-Build Contract under which such cost is chargeable to the City, shall describe the competitive or other process utilized by the Company to obtain the commercially reasonable price, and shall state that such services and materials are reasonably required pursuant to this Design-Build Contract. The Cost Substantiation certificate shall be accompanied by copies of such documentation as shall be necessary to reasonably demonstrate that the cost as to which Cost Substantiation is required has been paid or incurred. Such documentation shall be in a format reasonably acceptable to the City and shall include reasonably detailed information concerning all Subcontracts and, with respect to self-performed work,

(1) the amount and character of materials, equipment and services furnished or utilized, the persons from whom purchased, the amounts payable therefor and related delivery and transportation costs and any sales or personal property Taxes;

(2) a statement of the equipment used and any rental payable therefor;

(3) employee hours, duties, wages, salaries, benefits and assessments; and

(4) profit, administration costs, bonds, insurance, taxes, premiums overhead, and other expenses.

The Company's entitlement to reimbursement of Cost Substantiated costs of the Company shall be subject to the limitations set forth in this Section.

(D) Technical Services. Company personnel and personnel of Subcontractors providing technical services shall be billed at their then currently applicable rates for similar services on projects of similar size and scope to the Design-Build Work. The Company shall use commercially reasonable efforts to use available Company personnel for additional work hereunder before using Subcontractors.

(E) Mark-Up. On all costs incurred by the Company for work performed directly by the Company or any of its Affiliates which are subject to Cost Substantiation, the Company shall be entitled to the mark-up set forth in Schedule 22 and will not be entitled to any other additional compensation. On all costs incurred by the Company for work performed by Subcontractors, the Company shall be entitled to the mark-up set forth in Schedule 22 for risk, profit, administration, and all other overhead. The price payable to all Subcontractors, including Subcontractor overhead and mark-ups for risk and profit, shall be commercially reasonable.

(F) Evidence of Costs Incurred. To the extent reasonably necessary to confirm direct costs required to be Cost Substantiated, copies of timesheets, invoices, canceled checks, expense reports, receipts and other documents, as appropriate, shall be delivered to the City with the request for reimbursement of such costs.

SECTION 15.6. AFFIRMATIVE ACTION REQUIREMENTS. (A) Applicable Law. The Company shall comply at all times with the affirmative action requirements of RCW 35.22.650 and the anti-discrimination requirements of Chapter 1.29 of the Tacoma Municipal Code.

(B) Affirmative Action Statement. The Company shall actively solicit the employment of minority group members. The Company shall actively solicit bids for the subcontracting of goods or services from qualified minority businesses. The Company shall furnish evidence of the Company's compliance with these requirements of minority employment and solicitation. The Company further agrees to consider the grant of subcontracts to said minority bidders on the basis of substantially equal proposals in the light most favorable to said minority businesses. As used in this section, the term "minority business" means a business at least fifty-one percent of which is owned by minority group members. Minority group members include, but are not limited to, blacks, women, native Americans, Asians, Eskimos, Aleuts, and Hispanics. The Company and all subcontractors shall also comply with the City's Non-discrimination provisions, codified in Chapters 1.29 and 10.26.030 of the Tacoma Municipal Code. The Company agrees to take all steps necessary to comply with all federal, state and City laws and policies regarding non-discrimination and equal employment opportunities. The Company, and all of its subcontractors, shall not discriminate in any employment action because of race, religion, color, national origin or ancestry, sex, gender identity, sexual orientation, age, martial status, familial status or the presence of any sensory, mental, or physical handicap. In the event of non-compliance by the

Company or its subcontractors with any of the non-discrimination provisions of this Contract, the City, shall be deemed to have cause to terminate this Agreement, in whole or in part. The Company shall comply with all Federal and State laws, regulations and policies against discrimination.

(C) Subcontracts. The Company further agrees that the affirmative action statement in subsection (B) of this Section shall be incorporated in all Subcontracts with all labor organizations furnishing skilled, unskilled and union labor, or who may perform any such labor or services in connection with this Design-Build Contract.

SECTION 15.7. ACTIONS OF THE CITY IN ITS GOVERNMENTAL CAPACITY. (A) Rights as Government Not Limited. Nothing in this Design-Build Contract shall be interpreted as limiting the rights and obligations of the City under Applicable Law in its governmental or regulatory capacity (including police power actions to protect health, safety and welfare or to protect the environment), or as limiting the right of the Company to bring any action against the City, not based on this Design-Build Contract, arising out of any act or omission of the City in its governmental or regulatory capacity.

(B) No City Obligation to Issue Governmental Approvals. The City retains all issuance and approval rights it has under Applicable Law with respect to any Governmental Approval required with respect to the Design-Build Improvements or the Design-Build Work, and none of such rights shall be deemed to be waived, modified or amended as a consequence of the execution of this Design-Build Contract. The City shall not be deemed to be in breach of or default hereunder as a result of any delay or failure in the issuance or approval of any such Governmental Approval. Furthermore, the City shall not be deemed to be in breach of or default hereunder as a result of any delay or failure in the issuance or approval, on behalf of the Department of Ecology pursuant to the Delegation Agreement, of the Company's design submittals for conformity with an approved Facilities Plan and other standards set forth in the Delegation Agreement.

SECTION 15.8. ASSIGNMENT. (A) By the Company. The Company shall not assign, transfer, convey, lease, encumber or otherwise dispose of this Design-Build Contract, its right to execute the same, or its right, title or interest in all or any part of this Design-Build Contract or any monies due hereunder whatsoever prior to their payment to the Company, whether legally or equitably, by power of attorney or otherwise, without the prior written consent of the City. Any such approval given in one instance shall not relieve the Company of its obligation to obtain the prior written approval of the City to any further assignment. Any such assignment of this Design-Build Contract which is approved by the City, shall require the assignee of the Company to assume the performance of and observe all obligations, representations and warranties of the Company under this Design-Build Contract, and no such assignment shall relieve the Guarantor of any of its obligations under the Guaranty Agreement, which shall remain in full force and effect during the Term hereof. The approval of any assignment, transfer or conveyance shall not operate to release the Company in any way from any of its obligations under this Design-Build Contract unless such approval specifically provides otherwise.

(B) By the City. The City may not assign its rights or obligations under this Design-Build Contract without the prior written consent of the Company. The City may however, assign its rights and obligations under this Design-Build Contract, without the consent of the Company, to another Governmental Body if such assignee assumes, and is legally capable of discharging the duties and obligations of the City hereunder.

SECTION 15.9. COMPANY BUSINESS. The Company, at its expense, shall obtain and keep in force any and all necessary licenses and permits including, but not limited to, the business license required under Tacoma Municipal Code Section 6.69.010. Tacoma Municipal Code Chapter 6.68 provides that all transactions with the City, wherever consummated, are subject to the City of Tacoma's Business and Occupation Tax. The Company must register with the City of Tacoma's Department of Tax and License and pay all required taxes.

SECTION 15.10. BINDING EFFECT. This Design-Build Contract shall inure to the benefit of and shall be binding upon the City and the Company and any assignee acquiring an interest hereunder consistent with Section 15.8.

SECTION 15.11. AMENDMENT AND WAIVER. This Design-Build Contract may not be amended except by a written agreement signed by the parties. Any of the terms, covenants, and conditions of this Design-Build Contract may be waived at any time by the party entitled to the benefit of such term, covenant or condition if such waiver is in writing and executed by the party against whom such waiver is asserted.

SECTION 15.12. NOTICES. (A) Procedure. All notices, consents, approvals or written communications given pursuant to the terms of this Design-Build Contract shall be: (1) in writing and delivered in person; (2) transmitted by certified mail, return, receipt requested, postage prepaid or by overnight courier utilizing the services of a nationally-recognized overnight courier service with signed verification of delivery; or (3) given by facsimile transmission, if a signed original is deposited in the United States Mail within two days after transmission. Notices shall be deemed given only when actually received at the address first given below with respect to each party. Either party may, by like notice, designate further or different addresses to which subsequent notices shall be sent.

(B) City Notice Address. Notices required to be given to the City shall be addressed as follows:

City of Tacoma Public Works Department
Engineering Services/Science and Engineering Division
2201 Portland Avenue
Tacoma, Washington 98421-2711
Attn: [Project Manager]
Facsimile No.: (253) 502-2107

with a copy to:

City of Tacoma Legal Department
747 Market Street
Suite 1120
Tacoma, Washington
Attn: City Attorney
Facsimile No.: (253) 591-5755

(C) Company Notice Address. Notices required to be given to the Company shall be addressed as follows:

[Company Name/Address]

Attention:

With a copy to:

SECTION 15.13. NOTICE OF LITIGATION. In the event the Company or City receives notice of or undertakes the defense or the prosecution of any Legal Proceedings, claims, or investigations in connection with the Design-Build Improvements, the party receiving such notice or undertaking such defense or prosecution shall give the other party timely notice of such proceedings and shall inform the other party in advance of all hearings regarding such proceedings. For purposes of this Section only, "timely notice" shall be deemed given if the receiving party has a reasonable opportunity to provide objections or comments or to proffer to assume the defense or prosecution of the matter in question, given the deadlines for response established by the relevant rules of procedure.

SECTION 15.14. FURTHER ASSURANCES. The City and Company each agree to execute and deliver such further instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Design-Build Contract. The City and the Company, in order to carry out this Design-Build Contract, each shall use all commercially reasonable efforts to provide such information, execute such further instruments and documents and take such actions as may be reasonably requested by the other and not inconsistent with the provisions of this Design-Build Contract and not involving the assumption of obligations or liabilities different from or in excess of or in addition to those expressly provided for herein.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties have caused this Design-Build Contract to be executed by their duly authorized representatives as of the day and year first above written.

CITY OF TACOMA, a municipal corporation, _____,
_____

By: _____

Name: William H. Baarsma, Mayor

[City Seal]

ATTEST:

Doris Sorum, City Clerk

Approved as to form:

_____
Steve Victor, Assistant City Attorney

_____
James L. Walton, City Manager

_____
William L. Pugh, P.E., Public Works Director

_____
Steven A. Marcotte, Finance Director

_____
Debbie Dahlstrom, Interim Risk Manager

[COMPANY]

By

Name: _____
Printed

[Company Seal]

ATTEST

_____

Printed Name: _____