

**DESIGN-BUILD CONTRACT  
BETWEEN  
THE CITY OF INDIANAPOLIS  
AND**

**[\_\_\_\_\_]**

**FOR  
DESIGN-BUILD SERVICES**

**NEW CONSOLIDATED CIVIL AND CRIMINAL COURTHOUSE**

**AT THE COMMUNITY JUSTICE CAMPUS**

**RFP-11EAL-094**

<b>SECTION I.</b>	<b>SCOPE OF DESIGN-BUILD SERVICES .....</b>	<b>1</b>
1.01	Services and Work .....	1
1.02	Excluded services.....	1
<b>SECTION II.</b>	<b>BASIS OF DESIGN DOCUMENTS; DESIGN-BUILDER'S OBLIGATION TO REVIEW BASIS OF DESIGN DOCUMENTS .....</b>	<b>1</b>
2.01	Contract Documents.....	1
2.02	Basis of Design Documents .....	1
2.03	Exhibits .....	1
2.04	Reference Information .....	2
2.05	Spearin warranty waivers.....	2
2.06	No reliance .....	2
2.07	Waiver related to undisclosed clarifications .....	3
<b>SECTION III.</b>	<b>INTERPRETATION AND INTENT .....</b>	<b>3</b>
3.01	Entire agreement .....	3
3.02	Order of precedence .....	3
3.03	Joint drafting .....	3
3.04	Applicable law .....	3
<b>SECTION IV.</b>	<b>CONTRACT TIME .....</b>	<b>3</b>
4.01	Notice to Proceed .....	3
4.02	Substantial Completion.....	3
4.03	Final Completion .....	3
4.04	Time is of the essence .....	4
4.05	Liquidated Damages .....	4
4.06	Delay liquidated damages .....	4
4.07	Liquidated damages valid .....	4
4.08	Excusable delays .....	4
4.09	Risk of delays.....	5
4.10	Early completion bonus .....	5
<b>SECTION V.</b>	<b>CONTRACT PRICE.....</b>	<b>5</b>
5.01	Contract Price.....	5
5.02	Shared savings .....	5
<b>SECTION VI.</b>	<b>DUTIES OF DESIGN-BUILDER.....</b>	<b>6</b>
6.01	General Requirements.....	6
6.02	Design Services.....	6

6.03	Licensing and Permitting .....	7
6.04	Construction Services. ....	7
6.05	Safety .....	9
<b>SECTION VII.</b>	<b>FLOW-DOWNS AND THIRD-PARTY COORDINATION .....</b>	<b>10</b>
7.01	City agreements with Citizens .....	10
7.02	Obligations related to Citizens.....	10
7.03	Flow-down requirement.....	11
7.04	Coordination of the Work .....	11
7.05	Work by others.....	11
<b>SECTION VIII.</b>	<b>SUBCONTRACTS AND WORKFORCE REQUIREMENTS .....</b>	<b>12</b>
8.01	No work stoppages.....	12
8.02	Grievance Resolution Process.....	12
8.03	Retirement and health insurance .....	12
8.04	Living wages .....	12
8.05	Apprenticeship programs .....	13
8.06	Safety and health laws .....	13
8.07	Size of workforce .....	13
8.08	Collective bargaining agreements.....	13
<b>SECTION IX.</b>	<b>DIVERSITY, NON-DISCRIMINATION, EQUAL EMPLOYMENT OPPORTUNITY .....</b>	<b>14</b>
9.01	M/W/V/DO/BE Participation.....	14
9.02	M/W/V/DO/BE Notification Procedure .....	14
9.03	Diversity Plan.....	14
9.04	Compliance with laws.....	14
9.05	Non-discrimination .....	14
9.06	Equal Employment Opportunities.....	15
9.07	ADA compliance .....	15
9.08	Flow-down .....	15
9.09	Participation Program .....	16
9.10	Written approval required for substitutions .....	16
9.11	Substitution of a M/W/V/DO/BE.....	17
<b>SECTION X.</b>	<b>DUTIES OF THE CITY .....</b>	<b>18</b>
10.01	City’s review of the Design and Construction Services and the Work.....	18
10.02	Means and methods.....	18
10.03	Communications .....	18

<b>SECTION XI.</b>	<b>DESIGN AND CONSTRUCTION SCHEDULE; SCHEDULE OF VALUES .....</b>	<b>18</b>
11.01	The Schedule.....	18
11.02	Commencement of the Design and Construction Services and the Work ...	18
11.03	Schedule requirements .....	18
11.04	Schedule of Values .....	18
<b>SECTION XII.</b>	<b>NONCONFORMING WORK AND WARRANTIES .....</b>	<b>19</b>
12.01	Nonconforming Work.....	19
12.02	Failure to correct Nonconforming Work .....	19
12.03	Nonconforming Work after Substantial Completion .....	19
12.04	City’s acceptance of Nonconforming Work .....	19
12.05	DESIGN-BUILDER’s representations and warranties.....	20
<b>SECTION XIII.</b>	<b>SITE ACCESS, SITE CONDITIONS, HAZARDOUS CONDITIONS AND DIFFERING SITE CONDITIONS.....</b>	<b>21</b>
13.01	Site access .....	21
13.02	Right of way.....	22
13.03	Differing Site Conditions .....	22
13.04	Voluntary Remediation Program .....	22
13.05	Jobsite responsibility.....	23
13.06	Additional permits or authorizations. ....	23
13.07	Shallow aquifer .....	23
<b>SECTION XIV.</b>	<b>PROGRESS PAYMENTS AND FINAL PAYMENT .....</b>	<b>23</b>
14.01	Schedule of Values .....	23
14.02	Progress payments .....	24
14.03	Payment Application delivery.....	24
14.04	Payment Application contents .....	24
14.05	Materials and equipment.....	24
14.06	Retainage.....	24
14.07	Time for progress payments.....	25
14.08	Prompt payment .....	25
14.09	Right to withhold payment.....	25
14.10	Basis for withholding payment .....	26
14.11	Right to stop Work.....	26
14.12	Substantial Completion.....	26
14.13	Notice of failure to achieve Substantial Completion .....	26

14.14	Certificate of Substantial Completion.....	26
14.15	Final Completion .....	26
<b>SECTION XV.</b>	<b>INSURANCE.....</b>	<b>27</b>
15.01	General insurance requirements.....	27
15.02	Minimum requirements.....	28
15.03	Additional insureds .....	28
15.04	Coverage forms and limits .....	28
15.05	Certificates of insurance .....	30
15.06	Continuing coverage .....	31
15.07	Deductible amounts .....	31
15.08	Deductible payments.....	31
15.09	Builder’s Risk Insurance.....	31
15.10	DESIGN-BUILDER’s coverage primary .....	32
15.11	Flow-down of insurance requirements.....	32
15.12	Waiver of subrogation.....	32
<b>SECTION XVI.</b>	<b>PAYMENT AND PERFORMANCE BONDS .....</b>	<b>32</b>
<b>SECTION XVII.</b>	<b>CHANGES AND CLAIMS.....</b>	<b>32</b>
17.01	Change defined .....	32
17.02	Change Orders .....	32
17.03	Change Directives.....	33
17.04	Minor Changes.....	33
17.05	DESIGN-BUILDER’S notice of potential Changes.....	33
17.06	Claims defined .....	33
<b>SECTION XVIII.</b>	<b>TERMINATION.....</b>	<b>33</b>
18.01	Termination for cause by The City .....	33
18.02	DESIGN-BUILDER’S right to cure .....	34
18.03	Election by the sureties .....	34
18.04	Termination for cause converted to termination for convenience .....	34
18.05	Termination for convenience .....	34
18.06	Failure to follow M/W/V/DO/BE Notification Procedure.....	35
18.07	Termination for cause by DESIGN-BUILDER.....	35
18.08	The City’s right to cure.....	35
<b>SECTION XIX.</b>	<b>INDEMNIFICATION.....</b>	<b>35</b>
19.01	General indemnification for torts.....	35

19.02	Additional specific indemnification requirements .....	36
19.03	Indemnification damages .....	37
19.04	Limits of indemnification obligations.....	37
<b>SECTION XX.</b>	<b>DISPUTES .....</b>	<b>37</b>
20.01	Good faith efforts .....	37
20.02	Notice of Dispute .....	37
20.03	Negotiations by the Parties .....	37
20.04	Agreement to Mediate.....	38
20.05	Litigation.....	38
20.06	Flow-down and consolidation.....	38
<b>SECTION XXI.</b>	<b>MISCELLANEOUS PROVISIONS.....</b>	<b>38</b>
21.01	Independent contractor.....	38
21.02	Necessary documentation .....	38
21.03	Confidentiality. ....	38
21.04	Records; audits.....	39
21.05	Ownership. ....	39
21.06	Termination for failure of funding.....	40
21.07	Consequential damages.....	40
21.08	Notice .....	41
21.09	Non-contingent fees .....	41
21.10	Applicable Law; forum. ....	41
21.11	Waiver.....	42
21.12	Severability .....	42
21.13	Successors and Assigns.....	42
21.14	Debarment and suspension. ....	42
21.15	Compliance with E-Verify Program .....	43
21.16	Post-Employment restrictions.....	44
21.17	Wage Theft/Payroll Fraud.....	45

This agreement for Design and Construction Services (hereinafter referred to as “Design-Build Contract”), entered into as of \_\_\_\_\_ (“Effective Date”), by and between **the City of Indianapolis** (hereinafter referred to as “The City”) and [-----] (hereinafter referred to as “DESIGN-BUILDER”), a [----- corporation], is executed pursuant to the terms and conditions set forth herein. In consideration of those mutual undertakings and covenants, the parties agree as follows:

## **SECTION I. SCOPE OF DESIGN-BUILD SERVICES**

- 1.01 Services and Work. DESIGN-BUILDER will perform all Design and Construction Services and complete the Work in strict compliance with the requirements of the Contract Documents.
- 1.02 Excluded services. DESIGN-BUILDER is not responsible for performing any services or work for the Jail Project, the Site Preparation Project, the Site Enabling Project, or other projects at the CJC that are not described in the Contract Documents (“Other CJC Projects”). DESIGN-BUILDER will, in coordination with The City, make itself familiar with the work being done on Other CJC Projects to ensure that this work does not adversely impact its ability to perform the Design and Construction Services and complete the Work in accordance with the Contract Documents.

## **SECTION II. BASIS OF DESIGN DOCUMENTS; DESIGN-BUILDER’S OBLIGATION TO REVIEW BASIS OF DESIGN DOCUMENTS**

- 2.01 Contract Documents. The Contract Documents consist of the following:
  - 2.01.1 Changes;
  - 2.01.2 This Design-Build Contract;
  - 2.01.3 Construction Documents;
  - 2.01.4 Final Design Development Documents;
  - 2.01.5 Basis of Design Documents; and
  - 2.01.6 Exhibits.
- 2.02 Basis of Design Documents. The Basis of Design Documents consist of the DESIGN-BUILDER’S Qualitative Proposal and agreed modifications to DESIGN-BUILDER’S Qualitative Proposal through negotiations authorized by the Design-Build Statute, if any.
- 2.03 Exhibits. Exhibits are as follows:
  - 2.03.1 Exhibit 1 – Definitions;

- 2.03.2 Exhibit 2 – Project Agreement between The City and Citizens;
  - 2.03.3 Exhibit 3 – Environmental Agreement between The City and Citizens;
  - 2.03.4 Exhibit 4 – Ground Lease;
  - 2.03.5 Exhibit 5 – Non-Disclosure Agreement;
  - 2.03.6 Exhibit 6 – Accession Agreements;
  - 2.03.7 Exhibit 7 – Subcontractor’s Disclosure Agreement;
  - 2.03.8 Exhibit 8 – Soil Management Plan;
  - 2.03.9 Exhibit 9 – Indianapolis Community Justice Campus Project Diversity Plan; and
  - 2.03.10 Exhibit 10 – Schedule.
- 2.04 Reference Information. Reference Information Documents are not Contract Documents, and DESIGN-BUILDER relies on Reference Information at its sole risk.
- 2.05 Spearin warranty waivers. The DESIGN-BUILDER represents that it has thoroughly reviewed the RFP Documents and the Site carefully and with all reasonable skill and care necessary to perform the Design and Construction Services and complete the Work consistent with the Basis of Design Documents, for the Contract Price and within the Contract Time. More specifically, the DESIGN-BUILDER represents that it has:
- 2.05.1 Reviewed the RFP Documents;
  - 2.05.2 Visited the Site; and
  - 2.05.3 Provided The City with written notice of any concerns or necessary clarifications resulting from the above investigation prior to submitting its Price Proposal and in conformance with the RFP process such that the Design and Construction Services and the Work can be completed without exceeding the Contract Price and within the Contract Time.
- 2.06 No reliance. DESIGN-BUILDER did not rely on any of the RFP Documents without verifying them, and DESIGN-BUILDER further represents and warrants that the Basis of Design Documents have been verified or prepared in such a way (consistent with DESIGN-BUILDER’s above investigation) so as to ensure that the Design and Construction Services and the Work will be completed within the Contract Time and without exceeding the Contract Price, subject only to Changes authorized by Section 17 of this Design-Build Contract.



- 2.07 Waiver related to undisclosed clarifications. DESIGN-BUILDER waives the right to request an increase in the Contract Price or extension of the Contract Time as a result of its failure to raise any concerns or clarifications as required above.

### **SECTION III. INTERPRETATION AND INTENT**

- 3.01 Entire agreement. The Contract Documents constitute the entire agreement between the parties and supersede all prior agreements, written or verbal, between The City and DESIGN-BUILDER. No statements, promises, or agreements whatsoever, in writing or verbal, in conflict with the terms of the Contract Documents have been made by The City or DESIGN-BUILDER which in any way modify, vary, alter, enlarge or invalidate any of the provisions and obligations herein stated. The Contract Documents may be amended and modified only in accordance with Section 17 of this Design-Build Contract.
- 3.02 Order of precedence. In resolving conflicts, errors, discrepancies and disputes concerning the scope of the Design and Construction Services or the Work to be performed by DESIGN-BUILDER or other rights or obligations of The City or DESIGN-BUILDER the document or provision thereof expressing the greater quantity, quality or scope of service or imposing the greater obligation upon DESIGN-BUILDER and affording the greater right or remedy to The City, shall govern. In the event of a conflict or ambiguity between or among the Contract Documents, the Contract Documents will be given the priority as listed in Section 2.01, above, such that the Contract Document listed first will take precedence over the remaining Contract Documents and so on.
- 3.03 Joint drafting. Any interpretation applied to the Contract Documents, by the parties hereto, by any court of law, or by any other third party, will not be made against The City solely by virtue of The City's representatives having drafted all or any portion of the Contract Documents.
- 3.04 Applicable law. This Contract Documents include, and incorporate by reference, any requirement, provision, covenant, or condition required or provided by Applicable Law.

### **SECTION IV. CONTRACT TIME**

- 4.01 Notice to Proceed. DESIGN-BUILDER will commence the Design and Construction Services upon receipt of The City's written Notice to Proceed.
- 4.02 Substantial Completion. The Work will achieve Substantial Completion on or before September 30, 2021.
- 4.03 Final Completion. The Work will achieve Final Completion on or before December 31, 2021.

- 4.04 Time is of the essence. Time is of the essence with respect to the performance of the Design and Construction Services and completion of the Work.
- 4.05 Liquidated Damages. If DESIGN-BUILDER does not achieve Substantial Completion of all elements of the Work within the time required by the Contract Documents, it is understood and agreed that The City will incur substantial damages and losses which are and will hereafter be difficult or impossible to quantify, ascertain and prove as actual damages for such delay. Such damages are foreseen to include, without limitation, extended or additional costs for observation, inspection, engineering, utilities, insurance, administration, and also indeterminate damages, hindrance, or inconvenience to members of the public, deprivation of use and operation, and impairment of financing. Accordingly, DESIGN-BUILDER and its Surety shall be liable to The City, and The City shall be entitled to collect and recover such liquidated damages from DESIGN-BUILDER and its Surety, not as a penalty, in the amounts per day stated in Section 4.06 below for each calendar day that Final Completion of the entire Work, as appropriate, is delayed beyond the date(s) or time limitation(s) provided by the Contract Documents. Neither partial acceptance nor partial beneficial occupancy or use of portions of the Work by The City prior to achievement of Final Completion of all elements of the Work shall defeat or impair The City's rights in respect to liquidated damages.
- 4.06 Delay liquidated damages. If DESIGN-BUILDER does not complete the Work on or before the date of Final Completion, it or its Surety will pay liquidated damages, and be liable, to The City in the amount of \$5,000 per day for every day that the Work remains incomplete. This amount will increase to \$12,500 per day beginning 45 days after the date of Final Completion and \$25,000 per day beginning 90 days after Final Completion. These liquidated damages are capped at, and will not exceed, \$5,000,000 in total.
- 4.07 Liquidated damages valid. DESIGN-BUILDER acknowledges and agrees that the respective amounts of such liquidated damages are reasonable with due consideration for the type, nature and extent of the Work and the Contract Price and that such liquidated damages fairly approximate the nature and amount of actual damages which The City may incur as a result of delayed completion, and that such liquidated damages may be assessed and recovered by The City without proof or evidence concerning the types or amounts of such actual damages.
- 4.08 Excusable delays. If DESIGN-BUILDER is delayed or hindered at any time in the progress of the Work by any act or neglect of The City or the Owner's Representative, or by any representative of these parties, or by Changes ordered in the Work, or by unavoidable labor disputes, fire, explosion, act of God, terrorism, unavoidable casualties, power blackout, natural disaster, embargo, war, or any other causes beyond DESIGN-BUILDER's reasonable control and the risks of which are not otherwise assumed by DESIGN-BUILDER under the Contract Documents, then DESIGN-BUILDER shall give notice of a Claim and request that the Contract Time be extended by Change Order for such reasonable time as

The City and the Owner's Representative may determine. DESIGN-BUILDER is not be entitled to an extension of time for delays or hindrances caused by circumstances within its reasonable control, weather conditions or other natural phenomena of normal intensity for the locality and season during which Work is performed, inadequate construction forces, financial difficulties of DESIGN-BUILDER or its Subcontractors, or the failure of DESIGN-BUILDER or its Subcontractors or material suppliers to provide required submittals on a timely basis and as scheduled or to place orders for equipment or materials sufficiently in advance to insure timely and proper delivery.

- 4.09 Risk of delays. Unless otherwise specified in the Contract Documents, DESIGN-BUILDER shall assume the risk of any and all suspensions of, delays or interferences in or hindrances to the performance of the Work. DESIGN-BUILDER shall bear all direct or indirect costs, expenses and liabilities which it may incur in connection with such suspensions, delays, hindrances or interferences and all such suspensions, delays, interferences or hindrances, costs, expenses and liabilities of any nature whatsoever, whether or not specifically described or referred to in the Contract Documents, shall conclusively be deemed to have been within the contemplation of the parties.
- 4.10 Early completion bonus. To the extent the Work is completed prior to the Substantial Completion date, The City may, in its sole discretion, pay a reasonable early completion bonus to be calculated based on any actual cost savings The City receives as a result of the early completion. This provision is subject to The City's ability to verify such cost savings. The City has no obligation to pay an early completion bonus.

## **SECTION V. CONTRACT PRICE**

- 5.01 Contract Price. DESIGN-BUILDER's total compensation for performing the Design and Construction Services and completing all of the Work is \_\_\_\_\_ Dollars and 00/100 Cents (\$\_\_\_\_\_) ("Contract Price"). This amount will not be exceeded without an express Change authorized by Section 17 of this Design-Build Contract. If the actual cost of the Design and Construction Services and Work exceeds the Contract Price, DESIGN-BUILDER is solely responsible for such cost overruns and will not be compensated for amounts over the Contract Price without an express written Change authorized by this Design-Build Contract.
- 5.02 Shared savings. To the extent the Design and Construction Services and Work is completed for less than the Contract Price as a result of any value engineering, innovation, or proposed Change by the DESIGN-BUILDER, The City may, in its sole discretion, share any cost savings with the DESIGN-BUILDER in an amount to be established by The City in its sole discretion. DESIGN-BUILDER should not sacrifice quality or manipulate its contingencies in seeking shared savings under this provision. This provision is subject to The City's ability to verify such

cost savings. The City has no obligation to pay a shared savings bonus under this provision.

## **SECTION VI. DUTIES OF DESIGN-BUILDER**

### **6.01 General Requirements.**

- 6.01.1 The parties will meet upon execution of the Design-Build Contract to confer regarding planning for the Work, the Schedule, coordination of the Work with Other CJC Projects or elements on or around the Site, and other issues necessary for coordinated and timely execution of the Work.
- 6.01.2 DESIGN-BUILDER will manage and perform its Design and Construction Services, complete the Work, consult with the City, attend Courts Project meetings, communicate with members of the Courts Project team, and report progress to The City and Stakeholders as necessary.

### **6.02 Design Services.**

- 6.02.1 DESIGN-BUILDER will perform the Design Services with the level of skill, care, and diligence ordinarily required of other professionals performing the same or similar services on projects of similar size, complexity, and purpose. Where such Design Services require professional licenses, DESIGN-BUILDER will ensure that the Design Services are performed by licensed professionals in accordance with Applicable Law.
- 6.02.2 DESIGN-BUILDER will prepare Final Design Development Documents consistent with the Basis of Design Documents, Contract Time and Contract Price, and submit the Final Design Development Documents to The City for review consistent with the Schedule
- 6.02.3 DESIGN-BUILDER will prepare Construction Documents consistent with the Basis of Design Documents, Final Design Development Documents, Contract Time and Contract Price, and submit the Construction Documents to The City for review consistent with the Schedule. The Construction Documents will be submitted a second time after they are advanced to 100% complete to ensure The City is given a final opportunity to review the Construction Documents.
- 6.02.4 DESIGN-BUILDER may break the submittals of the Final Design Development Documents and Construction Documents into separate packages consistent with the Schedule and its obligations to coordinate the Design and Construction Services and the Work with The City, Stakeholders, and Citizens Gas & Coke Utility Co. (“Citizens”).

6.03 Licensing and Permitting.

- 6.03.1 DESIGN-BUILDER will be responsible for payment, preparation, and submission of all required licenses and permit applications required to complete the Courts Project, unless already obtained by The City or otherwise identified by The City in writing as being The City's responsibility. The DESIGN-BUILDER will develop and submit to The City a list of the required licenses and permits and will track the progress of all licenses and permits through a review process such that the Schedule is not affected by delays in obtaining the requisite licenses and permits. DESIGN-BUILDER will pay all license and permit fees and other governmental charges which are assessed for or become a lien on the Site including any interest or penalties assessed for the late payment or non-payment thereof.
- 6.03.2 DESIGN-BUILDER will obtain and maintain all necessary or required registrations, permits, or approvals, as well as, valid licenses to practice in the State, by personnel who are skilled, experienced, and competent in their respective trades or professions to perform the Work in accordance with the Contract Documents and who shall assume professional responsibility for the accuracy and completeness of the Construction Documents and other documents prepared or approved by them.

6.04 Construction Services.

- 6.04.1 DESIGN-BUILDER will construct the Courts Project according to and in compliance with the Construction Documents approved by The City and necessary approvals obtained by The City from Citizens. During construction, the DESIGN-BUILDER shall ensure the Work is completed in a manner consistent with the Construction Documents and shall provide all labor, materials, bonds, and equipment necessary to fully complete the Courts Project in accordance with the Construction Documents, Schedule, Contract Time, and Contract Price.
- 6.04.2 DESIGN-BUILDER will ensure all of the Work is performed in strict compliance and in accordance with the Construction Documents reviewed and approved for the Courts Project.
- 6.04.3 DESIGN-BUILDER will provide and maintain a fully-equipped construction office on the Courts Project site.
- 6.04.4 DESIGN-BUILDER will ensure the construction office is managed by personnel competent to oversee the Work at all times while construction is underway. Such personnel shall maintain full-time, on-site construction supervision and provide daily inspections, quality control,

monitoring, coordination of various trades, record drawings, and daily work log.

- 6.04.4.1 DESIGN-BUILDER shall maintain in a safe place at the Site one copy of all specifications, drawings, addenda, written amendments, Change Orders, and written interpretations and clarifications in good order and annotated to show all changes made during construction.
- 6.04.5 DESIGN-BUILDER will conduct meetings consistent with the Specifications.
- 6.04.6 DESIGN-BUILDER will ensure all Work on the Courts Project complies with all Applicable Law.
- 6.04.7 DESIGN-BUILDER will supervise and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. DESIGN-BUILDER is solely responsible for the means, methods, techniques, sequences and procedures of construction. DESIGN-BUILDER is responsible to see that any finished Work complies strictly with the Contract Documents.
- 6.04.8 DESIGN-BUILDER is responsible to The City, the Owner's Representative, and The City's agents and representatives for all acts and omissions of its Subcontractors, suppliers and other persons and organizations performing or furnishing any of the Work under a direct or indirect contract with DESIGN-BUILDER just as DESIGN-BUILDER is responsible for DESIGN-BUILDER'S own acts and omissions. Nothing in the Contract Documents shall create any contractual relationship between The City, the Owner's Representatives, or any agent or representative of The City and any Subcontractor, supplier or other person or organization, except as to warranties enforceable by The City as against such parties, nor shall it create any obligation on the part of The City, the Owner's Representatives, or any agent or representative of The City to pay, or to see to the payment of, any moneys due any such Subcontractor, supplier or other person or organization, except as may otherwise be required by Applicable Law.
- 6.04.9 DESIGN-BUILDER will procure from each of its Subcontractors, suppliers, and laborers furnishing labor, services or materials to the Courts Project releases or waivers of any claims to liens impacting the Courts Project, including but not limited to mechanic's liens or claims against public funds allocated to pay for the Design and Construction Services or the Work. In the event a lien or claim against funds is filed against the Courts Project, DESIGN-BUILDER shall promptly cause the lien or claim to be discharged or provide to The City evidence that

the lien or claim is being contested by proceedings adequate to prevent foreclosure of the lien or encumbrance of public funds.

6.04.10 DESIGN-BUILDER will notify the Owner's Representative immediately upon observing damage to the Site regardless of whether or not the damage is a result of DESIGN-BUILDER'S operations.

6.04.11 DESIGN-BUILDER will have no claim against The City or any of its representatives for delays, disruptions or hindrances caused by other contractors who may be operating at the site, including without limitation delays resulting from lack of coordination.

6.05 Safety. DESIGN-BUILDER will provide a safe and efficient site with controlled access. As part of this obligation, DESIGN-BUILDER shall be solely responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Courts Project, and will provide the necessary protection to prevent damage, injury or loss to all employees on the Site and other affected persons, all the Work and all materials or equipment incorporated in the Work whether in storage or on Site, and other property at the Site.

6.05.1 DESIGN-BUILDER will comply with all Applicable Law of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss; and shall erect and maintain all necessary safeguards for such safety and protection. Prior to the start of construction activities, DESIGN-BUILDER will prepare a safety plan for the Courts Project conforming to OSHA 29 CFR 1910 & 1926 and the Soil Management Plan provided in Exhibit 8. This safety plan developed by the DESIGN-BUILDER shall be submitted to The City for approval prior to the commencement of Construction Services. Such approval does not relieve DESIGN-BUILDER of being solely responsible for safety on the Courts Project.

6.05.2 Once the safety plan has been approved, the DESIGN-BUILDER shall comply with the plan at all times during construction. Pursuant to I.C. 36-1-12-20, all Work which requires the creation of a trench or hole of at least five (5) feet in depth, shall be provided with a trench safety system. Trench safety systems shall meet all of the requirements of IOSHA Regulations 29 C.F.R. 1910 & 1926, Subpart P or other applicable safety standards and regulations. The cost of compliance with any and all such regulations shall be borne by DESIGN-BUILDER without any increase in the Contract Price.

6.05.3 DESIGN-BUILDER will be responsible for site security. DESIGN-BUILDER will secure the Site from unauthorized trespassers and provide security and safety measures on the Site until Final Completion.

- 6.05.4 DESIGN-BUILDER will maintain and repair the existing fencing around the Project Site.
- 6.05.5 DESIGN-BUILDER will notify owners of adjacent property and of underground facilities and utility owners when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation and replacement of their property. All damage, injury or loss to any property referred to in Sections 6.05 caused, directly or indirectly, in whole or in part, by DESIGN-BUILDER, any Subcontractor or supplier, or any other person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, shall be remedied by DESIGN-BUILDER.
- 6.05.6 DESIGN-BUILDER will designate responsible staff consistent with the Specifications to administer the safety requirements, avoid accidents, and take other action necessary to maintain a safe site.
- 6.05.7 DESIGN-BUILDER will cooperate and coordinate as appropriate with the Owner's Representative.

## **SECTION VII. FLOW-DOWNS AND THIRD-PARTY COORDINATION**

- 7.01 City agreements with Citizens. DESIGN-BUILDER understands and agrees that The City has entered into various agreements with Citizens pertaining to the Site, including but not limited to the Project Agreement attached hereto as Exhibit 2, the Environmental Agreement attached hereto as Exhibit 3, the Ground Lease attached hereto as Exhibit 4, and the Non-Disclosure Agreement attached hereto as Exhibit 5. DESIGN-BUILDER confirms and agrees that by executing this Design-Build Contract it has read, understands, and agrees to abide by the terms and conditions of each of these agreements. DESIGN-BUILDER shall execute the Accession Agreements attached hereto as Exhibit 6 to ensure compliance with the Non-Disclosure Agreement and the Environmental Agreement. DESIGN-BUILDER confirms and agrees that by executing this Design-Build Contract it has read, understands, and agrees to ensure all of its Subcontractors and laborers execute and abide by the terms and conditions of the Subcontractor's Disclosure Statement attached hereto as Exhibit 7.
- 7.02 Obligations related to Citizens. Pursuant to these agreements, DESIGN-BUILDER will:
  - 7.02.1 Allow Citizens to access, occupy, and use the Site as necessary for Citizens to complete the Remediation Work Plans as identified in the Environmental Agreement and the Project Agreement.
  - 7.02.2 Allow The City to review all final design plans and specifications for the Courts Project. DESIGN-BUILDER understands and agrees that The City must obtain approval for any final design plans from Citizens



through a committee of technical advisors (the “Site Design Committee”) to review and approve all final design plans and specifications and shall provide The City with any information requested by the Site Design Committee that is reasonably related to ensuring the design final plans and specifications comply with the Site Design Standards as defined in the Ground Lease. Prior to commencing construction, DESIGN-BUILDER shall submit the final design plans and specifications to The City for the Site Design Committee’s review and approval no later than thirty (30) days prior to construction to determine if the final design plans and specifications comply with the Site Design Standards as defined in the Ground Lease. The DESIGN-BUILDER will not commence construction until The City has obtained a Design Certificate from the Site Design Committee stating the design plans and specifications comply with the Site Design Standards as defined under the Ground Lease. The Site Design Committee’s actions in review, approval, and issuance of one or more Design Certificates are solely for purposes of review and compliance and are not a verification or warranty of the design prepared by the DESIGN-BUILDER. The Site Design Committee’s actions in review, approval, and issuance of one or more Design Certificates are not intended to, and do not, transfer responsibility for Design Services from DESIGN-BUILDER to The City, Citizens, or their representatives.

7.02.3 In the event of a Change that constitutes a modification under the Ground Lease, DESIGN-BUILDER will not proceed with construction of such Change until The City has received a Design Certificate from the Site Design Committee for the Change.

7.03 Flow-down requirement. DESIGN-BUILDER will incorporate the terms of this Design-Build Contract, particularly this Section 7, by flowing them down into all contracts with or held by Subcontractors performing Design and Construction Services or completing any portion of the Work on the Courts Project. The DESIGN-BUILDER will require its Subcontractors to sign and submit to The City a Subcontractor’s Disclosure Statement on the form provided in Exhibit 7.

7.04 Coordination of the Work. DESIGN-BUILDER will schedule the Design & Construction Services and the Work such that it will not delay the work of other contractors. The Owner’s Representative will monitor DESIGN-BUILDER’s coordination of its Work with the work of other contractors. Where coordination and scheduling conflicts arise between the Work and the work of other contractors on the site the Owner’s Representative will provide input to resolve the conflict, but such input or monitoring by the Owner’s Representative will not relieve DESIGN-BUILDER of its obligations with respect to coordination with other contractors.

7.05 Work by others. If any part of DESIGN-BUILDER’S Work depends for proper execution or results upon the work of any other contractor or utility owner or The

City's forces, DESIGN-BUILDER shall inspect and promptly report to the Owner's Representative in writing any delays, defects or deficiencies in such work that render it unavailable or unsuitable for such proper execution and results or that hinder or otherwise impact the Work to be performed by DESIGN-BUILDER. DESIGN-BUILDER'S failure to report shall constitute an acceptance of the other work as fit and proper for integration with DESIGN-BUILDER'S Work except for latent or non-apparent defects and deficiencies in the other work.

## **SECTION VIII. SUBCONTRACTS AND WORKFORCE REQUIREMENTS**

- 8.01 No work stoppages. During the term of this Design-Build Contract, there shall be no strikes, stoppages, slowdowns, picketing, or interruptions of any type for any reason.
- 8.02 Grievance Resolution Process. DESIGN-BUILDER and each of its Subcontractors, suppliers, and laborers must have a Grievance Resolution Process for their employees working on the Courts Project. The Grievance Resolution Process must require that any claims, disputes, or controversies brought by their employees must be submitted to binding arbitration before an arbitrator provided by the Federal Mediation and Conciliation Service or another neutral arbitration service approved by The City. The Grievance Resolution Process shall in no way prohibit employees from exercising their statutory rights of pursuing claims with federal, state, local courts, or administrative agencies. If DESIGN-BUILDER and each of its Subcontractors, suppliers, and laborers employ members of organizations affiliated with the Building and Construction Trades Department, AFL-CIO, these employees must stipulate to being subject to the dispute resolution process outlined in the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry approved by the Building and Construction Trades Department, AFL-CIO; provided, however, DESIGN-BUILDER and its Subcontractors are not required to employ or not employ members of any labor organization.
- 8.03 Retirement and health insurance. DESIGN-BUILDER and each of its Subcontractors shall provide to their employees:
- 8.03.1 A retirement savings plan and provide contributions on behalf of their employees; and
- 8.03.2 Health insurance coverage and disability insurance coverage paid for by DESIGN-BUILDER or its Subcontractors, at least in part.
- 8.04 Living wages. DESIGN BUILDER will pay and require that its Subcontractors pay all applicable workers employed by DESIGN-BUILDER or its Subcontractors to perform the Work a living wage. Notwithstanding any term of this Design-Build Contract to the contrary, to the extent that the Indiana Department of Labor approves project-specific wage rates for the Courts Project, then DESIGN-BUILDER shall pay, and shall cause all Subcontractors to pay,

such project-specific wage rates when performing or when contracting for the performance of any of DESIGN-BUILDER'S obligations under this Design-Build Contract. DESIGN-BUILDER shall comply and cause its Subcontractors performing Work to comply with all Applicable Law pertaining to living wages in the County.

8.04.1 It is DESIGN-BUILDER'S sole responsibility to determine the wage rates required to be paid. If rates of wages and benefits change while this Design-Build Contract is in effect, then DESIGN-BUILDER shall bear the cost of such changes and shall have no Claim against The City on account of such changes. Without limiting the foregoing, no such claim or Claim will be allowed which is based on DESIGN-BUILDER'S lack of knowledge or a misunderstanding of any such requirements.

8.04.2 DESIGN-BUILDER shall comply and cause its Subcontractors performing Work on the Courts Project to comply with all Applicable Law, regarding notice and posting of intent to pay wages, of wage requirements and of wage rates.

8.05 Apprenticeship programs. All employees of DESIGN-BUILDER and each of its Subcontractors shall have completed or are enrolled in a two-year apprenticeship program certified by the United States Department of Labor Bureau of Apprenticeship and Training that must incorporate on-the-job and classroom training. Within seventy-two (72) hours of the Effective Date, DESIGN-BUILDER must provide evidence of participation in apprenticeship and training programs, applicable to the Work to be performed on the Courts Project, which are approved by and registered with the United States Department of Labor's Office of Apprenticeship, or its successor organization. The required evidence includes a copy of all applicable apprenticeship certificates or standards for those training programs.

8.06 Safety and health laws. DESIGN-BUILDER will at all times comply, and require by contract that all Subcontractors, laborers, suppliers, and vendors comply, with all applicable federal and state labor, occupational safety and health laws, federal and state orders, and Applicable Law.

8.07 Size of workforce. DESIGN-BUILDER and each of its Subcontractors, and laborers shall increase the size of their workforce if Work demands require it in order to ensure compliance with the Schedule.

8.08 Collective bargaining agreements. DESIGN-BUILDER and each of its Subcontractors that are party to a collective bargaining agreement with a labor organization as defined under the National Labor Relations Act, 29 U.S.C. §§ 151-169, shall be deemed to have satisfied Articles 8.01 through 8.07 of this Design-Build Contract.

**SECTION IX. DIVERSITY, NON-DISCRIMINATION, EQUAL EMPLOYMENT OPPORTUNITY**

- 9.01 Minority, Women, Veterans, and Disability-Owned Business Enterprise Participation. To the extent DESIGN-BUILDER uses Subcontractors or other agents in the performance of Design and Construction Services or completion of the Work, DESIGN-BUILDER must either:
- 9.01.1 Use, at a minimum, fifteen percent (15%) Minority Business Enterprises, eight percent (8%) Women’s Business Enterprises, three percent (3%) Veteran’s Business Enterprises, and one percent (1%) Disability-Owned Business Enterprises in the performance of Design and Construction Services and/or completing Work under this Design-Build Contract; or
  - 9.01.2 Demonstrate a good faith effort to achieve such percentages, in compliance with the policies and to the satisfaction of The City of Indianapolis Department of Minority & Women Business Development. “Good faith effort” referenced above shall include, but not be limited to consultation with any and all individuals or firms hired for the Courts Project for purposes of improving vendor diversity.
- 9.02 M/W/V/DO/BE Notification Procedure. Prior to beginning the Work, DESIGN-BUILDER will perform the following Notification Procedure:
- 9.02.1 Provide written notification to each Tier I and Tier II M/W/V/DO/BE Subcontractor designated in the DESIGN-BUILDER’S Diversity Plan Questionnaire that the DESIGN-BUILDER has been awarded the Design-Build Contract (“Notification”).
  - 9.02.2 Provide a copy of each Notification to the Owner’s Representative; and
  - 9.02.3 Provide a contract to each Subcontractor receiving the Notification.
- 9.03 Diversity Plan. DESIGN-BUILDER will comply with the Indianapolis Community Justice Campus Project Diversity Plan attached hereto as Exhibit 9.
- 9.04 Compliance with laws. DESIGN-BUILDER will comply with the Indiana Age Discrimination in Employment Act, the American with Disabilities Act, the Indiana Civil Rights Law, specifically IC 22-9-1-10, the Civil Rights Act of 1964, the Age Discrimination in Employment Act, as they relate to nondiscrimination, and as they may be amended from time to time, which are herein incorporated by reference and made a part of this Design-Build Contract.
- 9.05 Non-discrimination. DESIGN-BUILDER and its Subcontractors will not discriminate against any employee or applicant for employment in the performance of this Design-Build Contract, with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly

related to employment, because of race, sex, sexual orientation, gender identity, religion, color, national origin, ancestry, age, disability, and United States military service veteran status (“Protected Characteristics”). Furthermore, DESIGN-BUILDER certifies compliance with applicable federal laws, regulations, and executive orders prohibiting discrimination based on the Protected Characteristics in the provision of services. Breach of this provision may be regarded as a material breach of this Design-Build Contract.

9.06 Equal Employment Opportunities. The following equal employment opportunity requirements apply to this Design-Build Contract:

- 9.06.1 In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, DESIGN-BUILDER agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, “Office of Federal Agreement Compliance Programs, Equal Employment Opportunity, Department of Labor,” 41 C.F.R. Parts 60 et seq., (which implement Executive Order No. 11246, “Equal Employment Opportunity,” as amended by Executive Order No. 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” 42 U.S.C. § 2000e note), and with any applicable federal statutes, executive orders, regulations, and federal policies that may in the future affect construction activities undertaken in the course of the Courts Project. DESIGN-BUILDER agrees to take affirmative action to ensure that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- 9.06.2 In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623, DESIGN-BUILDER agrees to refrain from discrimination against present and prospective employees for reason of age.

9.07 ADA compliance. In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, DESIGN-BUILDER agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,” 29 C.F.R. Part 1630, pertaining to employment of persons with disabilities.

9.08 Flow-down. DESIGN-BUILDER agrees to include the requirements of this Section 9 in each subcontract, laborer contract, materials contract or any other contract entered into pertaining to the Courts Project. Further, each potential subcontractor, laborer, or supplier shall be notified by DESIGN-BUILDER of its

obligations under this Design-Build Contract and the regulations relative to nondiscrimination on the grounds of race, color, sex, or national origin.

9.09 Participation Program. In order to monitor the level of M/W/V/DO/BE participation, DESIGN-BUILDER will:

- 9.09.1 Contract with all M/W/V/DO/BE firms listed on the Diversity Plan Questionnaire. Within ninety (90) days of the execution of this Design-Build Contract, provide copies of fully-executed subcontracts and purchase orders with all M/W/V/DO/BEs included in its Diverse Business Participation Plan contained in Exhibit 9 to the Owner's Representative.
- 9.09.2 The subcontract or purchase order shall be for an amount that is equal to, or greater than, the total dollar amount listed as anticipated in the Subcontractor/Supplier Participation Form and Payment Application attached as Exhibit 9-A.
- 9.09.3 Notify Owner's Representative immediately if any of the firms listed on the Diversity Plan Questionnaire refuses to enter a subcontract or purchase order, or fails to perform according to the requirements of the subcontract or purchase order.
- 9.09.4 Expeditiously provide copies of all change orders, contract modifications, additions and deletions to all subcontracts and purchase orders issued to M/W/V/DO/BEs.
- 9.09.5 Submit written assurance of meeting the goals stated in this Design-Build Contract through submission of monthly reports detailing the progress of the DESIGN-BUILDER in achieving the goals established in the Diversity Plan Questionnaire and the Design-Build Contract.
- 9.09.6 Cooperate and participate in compliance reviews as determined necessary by The City. DESIGN-BUILDER will provide all necessary documentation to show proof of compliance with the requirements of the Indianapolis Community Justice Campus Project Diversity Plan as requested by The City.

9.10 Written approval required for substitutions. DESIGN-BUILDER will not substitute, replace or terminate any M/W/V/DO/BE firm without prior written authorization from The City. DESIGN-BUILDER will not reduce the scope of work or monetary value of a subcontract or purchase order with any M/W/V/DO/BE without prior written authorization from The City. DESIGN-BUILDER will notify The City of any additional awards to M/W/V/DO/BEs. In the event of a substitution, DESIGN-BUILDER will submit a new Diversity Plan Questionnaire Plan setting forth the new M/W/V/DO/BE(s) that will perform work for the DESIGN-BUILDER.

- 9.10.1 DESIGN-BUILDER shall make a good faith effort to replace a M/W/V/DO/BE Subcontractor, sub-consultant or supplier of goods and services that is unable to perform successfully with another M/W/V/DO/BE. All such substitutions shall be approved by The City of Indianapolis – Office of Minority and Women Business Development (“OMWBD”), to ensure that the substitute firm(s) is certified by The City.
- 9.10.2 OMWBD, in cooperation with the Owner’s Representatives, will evaluate the submitted Diversity Plan Questionnaire Plan and respond to the request for a substitution within a reasonable time.
- 9.10.3 Actual substitutions of M/W/V/DO/BE Subcontractors, sub-consultants, or suppliers of goods or services will not be made before written approval from OMWBD is given. Once notified of OMWBD’s approval, the substitute M/W/V/DO/BE subcontract is to be executed immediately, and a copy of the document with original signatures of all parties to the contract will be submitted to the Owner’s Representative and OMWBD.

9.11 Substitution of a M/W/V/DO/BE. Substitution of a M/W/V/DO/BE Subcontractor may be appropriate where The City or DESIGN-BUILDER determine that the Subcontractor is not a bona fide M/W/V/DO/BE before the awarding of a contract. If after the awarding of a contract it is determined that an M/W/V/DO/BE commitment cannot be fulfilled, the proposed substitution will be subject to approval according to the following procedures:

- 9.11.1 OMWBD and the Owner’s Representative must be notified in writing immediately of an apparent necessity to reduce or cancel an M/W/V/DO/BE Subcontractor and to propose a substitute M/W/V/DO/BE.
- 9.11.2 The DESIGN-BUILDER’S notification should include specific reasons for the proposed substitution. Acceptable reasons, include but are not limited to, the M/W/V/DO/BE was found: not to be able to perform; to perform unacceptable work; not to be a bona fide M/W/V/DO/BE; or previously committed at a given price and sources out of the Subcontractor’s control demanded an unreasonable escalation or prices to perform under the Subcontractor’s contract.
  - 9.11.2.1 Unacceptable reasons for substitution include, but are not limited to: a dispute about performance under the Subcontractor’s contract, except in cases where unacceptable performance is documented and every effort to settle the dispute has been made and documented; or an M/W/V/DO/BE has requested reasonable price

escalation, which may be justified due to unforeseen circumstances.

## **SECTION X. DUTIES OF THE CITY**

- 10.01 City's review of the Design and Construction Services and the Work. Whenever in the Contract Documents the terms "as ordered", "as directed", "as required", "as allowed", "as approved" or terms of like effect or import are used, or the adjectives "reasonable", "suitable", "acceptable", "proper" or "satisfactory" or adjectives of like effect or import are used to describe requirement, direction, review or judgment of the Owner's Representative as to the Work, it is intended that such requirement, direction, review or judgment will be solely to evaluate the Work for compliance with the Contract Documents (unless there is a specific statement indicating otherwise). The use of any such term or adjective shall not be effective to assign to the Owner's Representative any duty or authority to supervise or direct the furnishing or performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of this Article.
- 10.02 Means and methods. The City and the Owner's Representative shall have no responsibility for DESIGN-BUILDER'S selection or implementation of means, methods, techniques, sequences or procedures of construction, or the safety precautions and programs incident thereto, and The City and the Owner's Representative will not be responsible for DESIGN-BUILDER'S failure to perform or furnish the Work or to fulfill other duties in accordance with the Contract Documents.
- 10.03 Communications. The City may issue all communication to DESIGN-BUILDER through the Owner's Representative or at its option may communicate with DESIGN-BUILDER directly.

## **SECTION XI. DESIGN AND CONSTRUCTION SCHEDULE; SCHEDULE OF VALUES**

- 11.01 The Schedule. The Schedule is attached to this Design-Build Contract as Exhibit 10 and incorporated by reference. The Schedule must be consistent with the Contract Time, and the Schedule will not be changed without a written Change approved by The City. The Schedule must meet the requirements in Section 013213 of the Specifications.
- 11.02 Commencement of the Design and Construction Services and the Work. DESIGN-BUILDER will start to perform the Design and Construction Services and the Work on the date designated in the Notice to Proceed.
- 11.03 Schedule requirements. The Schedule must meet the requirements in Section 013213 of the Specifications.
- 11.04 Schedule of Values. Within seven (7) days of the Effective Date, DESIGN-BUILDER will provide a preliminary Schedule of Values for all of the Work



which will include quantities and prices of items aggregating the Contract Price and will subdivide the Work into component parts in sufficient detail to serve as the basis for progress payments during construction. Such prices will include an appropriate amount of overhead and profit applicable to each item of Work which shall be confirmed in writing by DESIGN-BUILDER at the time of submission.

## **SECTION XII. NONCONFORMING WORK AND WARRANTIES**

- 12.01 Nonconforming Work. DESIGN-BUILDER will correct Nonconforming Work in conformance with this Section 12. If DESIGN-BUILDER discovers Nonconforming Work prior to Substantial Completion it will provide The City with written notice within seven (7) days describing the Nonconforming Work and commence efforts to correct the Nonconforming Work immediately without affecting the Contract Time or Contract Price. If The City discovers Nonconforming Work prior to Substantial Completion, it will provide DESIGN-BUILDER with written notice describing the Nonconforming Work and, within three days of receiving this notice, the DESIGN-BUILDER will commence efforts to correct the Nonconforming Work immediately without affecting the Contract Time or Contract Price.
- 12.02 Failure to correct Nonconforming Work. If DESIGN-BUILDER refuses or fails to correct Nonconforming Work in accordance with The City's Notice, The City may, without prejudice to other remedies, correct the Nonconforming Work at its discretion and back-charge all costs incurred in correcting the Nonconforming Work, including reasonable consultant and attorneys' fees. The City has the right to stop payment and withhold such amounts from payments as it deems reasonably necessary to cover the costs necessary to correct the Nonconforming Work. At a point where The City has confirmed all costs to be back-charged, an appropriate Change Order will be issued deducting from payments then or thereafter due DESIGN-BUILDER. If payments then or thereafter due DESIGN-BUILDER are not sufficient to cover such amounts, DESIGN-BUILDER shall pay the difference to The City.
- 12.03 Nonconforming Work after Substantial Completion. DESIGN-BUILDER shall promptly correct all failures or defects in the Work for a period of one year after the actual date of Substantial Completion, or the date of acceptance by The City, whichever is later. The City will give DESIGN-BUILDER written notice of the failures or defects within a reasonable time after discovery. If DESIGN-BUILDER fails to correct the failures or defects within thirty 30 days after receipt of notice from The City, The City may, without prejudice to other remedies, correct the Work with its own forces and DESIGN-BUILDER will reimburse all of The City's costs in doing so, including reasonable consultant and attorneys' fees.
- 12.04 City's acceptance of Nonconforming Work. If The City prefers, in its sole discretion, to accept Nonconforming Work, The City may make this election before any corrective work commences. If The City makes this election, the

Contract Price will be reduced by an amount reasonably commensurate with the costs necessary to correct the Nonconforming Work. Such adjustment shall be effectuated whether or not final payment has been made.

12.05 DESIGN-BUILDER's representations and warranties. DESIGN-BUILDER further represents and warrants to The City, as of the Effective Date, as follows:

- 12.05.1 DESIGN-BUILDER and its Subcontractors have maintained and complied with, and throughout the term of this Design-Build Contract will maintain and comply with, all required authority, license status, applicable licensing standards, certification standards, accrediting standards, professional ability, skills, and capacity to perform the Work, including but not limited to having Subcontractors who are properly licensed under Indiana Code § 25-4 as an architect and/or Indiana Code § 25-31 as a professional engineer;
- 12.05.2 DESIGN-BUILDER conducted a reasonable investigation prior to the Effective Date, and as a result of such reasonable investigation, DESIGN-BUILDER is familiar with and accepts the physical requirements of the Work;
- 12.05.3 DESIGN-BUILDER, prior to the Effective Date, familiarized itself with the requirements of any and all Applicable Law and the conditions of any required governmental approvals. DESIGN-BUILDER shall be responsible for complying with the foregoing at its sole cost and without any additional compensation or time extension on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in or inferable from the Basis of Design Documents or would have an adverse effect on costs.
- 12.05.4 DESIGN-BUILDER has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute, deliver, and perform all of its obligations under the Contract Documents. DESIGN-BUILDER is duly qualified to do business, and is in good standing, in the State of Indiana, in each case, as of the Effective Date, and will remain duly qualified and in good standing throughout the Contract Time and for as long thereafter as any obligations remain outstanding under the Contract Documents. DESIGN-BUILDER affirms that it is properly registered and owes no outstanding reports with the Indiana Secretary of State.
- 12.05.5 As of the Effective Date, there is no action, suit, proceeding, investigation or litigation pending and served on DESIGN-BUILDER which challenges its authority to execute, deliver or perform, or the validity or enforceability of, the Design-Build Contract, or which challenges the authority of the DESIGN-BUILDER official executing

the Design-Build Contract; and DESIGN-BUILDER has disclosed to The City prior to the Effective Date any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which DESIGN-BUILDER is aware. DESIGN-BUILDER has no current, pending or outstanding criminal, civil, or enforcement actions initiated by the State of Indiana, and agrees that it will immediately notify The City of any such actions.

12.05.6 DESIGN-BUILDER has disclosed to The City in writing all organizational conflicts of interest of DESIGN-BUILDER and its Subcontractors of which DESIGN-BUILDER was actually aware.

12.05.7 DESIGN-BUILDER and its Subcontractors are not aware that any or all of them are in violation of Applicable Law as it relates to performance of the Design and Construction Services or completion of the Work

12.05.8 As required by IC 5-22-3-7, DESIGN-BUILDER certifies that in accordance with IC 5-22-3-7, except for de minimis and nonsystematic violations, DESIGN-BUILDER has not violated the terms of IC 24-4.7 (Telephone Solicitation Of Consumers), IC 24-5-12 (Telephone Solicitations), or IC 24-5-14 (Regulation of Automatic Dialing Machines) in the previous 365 days, even if IC 24-4.7 is preempted by federal Law; and DESIGN-BUILDER will not violate the terms of IC 24-4.7 for the duration of this Design-Build Contract, even if IC 24-4.7 is preempted by federal law.

12.05.9 As required by IC 5-22-3-7, DESIGN-BUILDER certifies that an affiliate or principal of DESIGN-BUILDER and any agent acting on behalf of DESIGN-BUILDER or on behalf of an affiliate or principal of DESIGN-BUILDER, except for de minimis and nonsystematic violations, has not violated the terms of IC 24-4.7 in the previous 365 days, even if IC 24-4.7 is preempted by federal law; and will not violate the terms of IC 24-4.7 for the duration of this Design-Build Contract, even if IC 24-4.7 is preempted by federal law.

### **SECTION XIII. SITE ACCESS, SITE CONDITIONS, HAZARDOUS CONDITIONS AND DIFFERING SITE CONDITIONS**

13.01 Site access. DESIGN-BUILDER understands and agrees that Citizens retains the right to access the Site in accordance with the agreements referenced in Section 7.01. DESIGN-BUILDER will not interfere with Citizens' right to access the Site and shall cooperate with Citizens to permit Citizens to develop the Site. Unless explicitly authorized by The City and Citizens in advance and in writing, the DESIGN-BUILDER will not have access to, or conduct any Work within, the areas designated as "Restricted Areas" identified in the Environmental Agreement and Exhibit B.1 to the Environmental Agreement. DESIGN-BUILDER agrees to cooperate with Citizens and The City, acting reasonably and in good faith, in the

implementation of the terms of this Design-Build Contract, including, all Exhibits attached hereto.

- 13.02 Right of way. The City will furnish the Site upon which the Work is to be performed, rights-of-way and easements for access thereto, and such other lands which are designated to be made available by The City for the use of DESIGN-BUILDER. Easements for permanent structures or permanent changes in existing facilities will be obtained and paid for by The City, unless otherwise provided in the Contract Documents. DESIGN-BUILDER shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.
- 13.03 Differing Site Conditions. If DESIGN-BUILDER discovers or encounters a Differing Site Condition that could impact the Contract Price or the Contract Time, it must provide The City with written notice of the Differing Site Condition as a Claim under Section 17. DESIGN-BUILDER will not disturb the conditions or perform Work in connection therewith until The City makes its determination under Section 17.06. The notice provided by DESIGN-BUILDER under this section must include all available information about the condition and DESIGN-BUILDER'S recommendation for how to handle the Differing Site Condition. The Differing Site Condition Claim will then be administered through the Claims process in Section 17.
- 13.04 Voluntary Remediation Program. DESIGN-BUILDER understands that the Site is currently enrolled in the Voluntary Remediation Program ("VRP") under Indiana Department of Environmental Management ("IDEM") supervision and that the soil, groundwater, and nearby creek have been impacted (and continue to be impacted) by Citizens' historic manufactured gas-plant ("MGP") operations at the Site, which are further detailed in the Remediation Work Plan. DESIGN-BUILDER understands that its Work may involve handling, management, and disposal of Hazardous Material in the soil and groundwater. With respect to any Hazardous Material, DESIGN-BUILDER shall comply with the Soil Management Plan attached as Exhibit 8. Upon encountering any "Level 4" Soil as defined in the Soil Management Plan, DESIGN-BUILDER will immediately:
- 13.04.1 Stop any Work that is impacted or in an area affected by the Hazardous Material and secure the area to ensure it is not disturbed;
  - 13.04.2 Notify The City;
  - 13.04.3 Assist The City in preparing any information to notify the appropriate agencies or authorities, if required;
  - 13.04.4 Establish site security by excluding unnecessary traffic and personnel from the affected area;

- 13.04.5 Conduct operations within the affected area to minimize exposure to personnel and the general public and to eliminate the potential for airborne dispersion; and
- 13.04.6 As necessary to carry out the requirements of this Section, handle and/or store Hazardous Materials in a proper manner.
- 13.05 Jobsite responsibility. DESIGN-BUILDER remains responsible for the jobsite until The City has been notified of the uncovering or revealing of Hazardous Materials and The City has provided DESIGN-BUILDER with further instructions with respect to handling, management, and/or disposal of the Hazardous Material.
- 13.06 Additional permits or authorizations. The City will be responsible for obtaining any required permits or authorizations or submit any required notices related to such Hazardous Materials and shall establish any special terms or conditions under which such Work shall be performed by the DESIGN-BUILDER.
- 13.07 Shallow aquifer. DESIGN-BUILDER understands that the Site is located atop a “shallow” aquifer that has been impacted by Citizens’ historic MGP operations at the Site, which is separated by a clay aquitard and underlying “deep” aquifer that does not appear to have been impacted by Citizens’ historic MGP operations. In performing the Work, the DESIGN-BUILDER will, if on-Site conditions indicate that the clay aquitard has or could become compromised and cause cross-contamination between the shallow and deep aquifers, immediately:
- 13.07.1 Stop any Work related to the compromise or the potential compromise to the clay aquitard;
- 13.07.2 Notify The City immediately; and
- 13.07.3 Follow instructions of Owner’s Representative or its designee to mitigate or avoid any further potential harm or risk to the deep aquifer.

#### **SECTION XIV. PROGRESS PAYMENTS AND FINAL PAYMENT**

- 14.01 Schedule of Values. The Schedule of Values subdivides the Work into its fundamental components by providing values for each component of the Work. These components are the basis for monthly progress payments. The City has a contingency for its exclusive use, and it may be listed as a separate stand-alone component within the Schedule of Values. The City’s contingency is not part of the Contract Price, and the DESIGN-BUILDER has no right to use The City’s contingency without express written consent from The City. If DESIGN-BUILDER, using its reasonable discretion, believes circumstances exist whereby The City’s contingency should or could be used, it shall provide written notice of the circumstances to The City with sufficient detail and time for The City to determine whether it will use its contingency for the circumstances.

- 14.02      Progress payments. No later than the 10<sup>th</sup> day of each month following the execution of this Design-Build Contract, the DESIGN-BUILDER will submit its Payment Application requesting payment for all Work completed during the prior month. The Payment Application will be structured to match the components and amounts in the Schedule of Values, and DESIGN-BUILDER will include documentation supporting the amounts being requested in the Payment Application. The Payment Application will not include any request for using The City's contingency unless DESIGN-BUILDER has received prior written approval to do so, in which case, it shall include a copy of the written approval with the Payment Application.
- 14.03      Payment Application delivery. Payment Applications must be directed to CJC Project Accountant Kim Fain of The Cymberly Group at [KimFain@TheCymberlyGroup.com](mailto:KimFain@TheCymberlyGroup.com) and must also include the following information: Project Number; Project Name; Payment Application Number; Payment Application Period; the DESIGN-BUILDER's contact person with name, phone number, and e-mail address in case of questions or errors.
- 14.04      Payment Application contents. The following forms and documents must be included with every Payment Application:
- 14.04.1    Information aligning with the Schedule of Values as required in Section 14.03;
  - 14.04.2    Partial Lien Waiver(s)/Final Lien Waiver(s);
  - 14.04.3    Subcontractor/Supplier Participation Form and Payment Application;
  - 14.04.4    Copies of Invoices for Subcontractors;
  - 14.04.5    Certified Payrolls including form WH 347; and
  - 14.04.6    Updated Schedule.
- 14.05      Materials and equipment. DESIGN-BUILDER may include materials or equipment not incorporated in the Work in a Payment Application, so long as the materials or equipment has already been purchased for the Courts Project and sufficient documentation is included to demonstrate that the material or equipment is part of the appropriate component of the Schedule of Values.
- 14.06      Retainage. The City shall withhold retainage in the amount of ten percent (10%) of each Progress Payment until the Work or designated portion thereof is fifty percent (50%) complete. Thereafter, no further retention under this Section shall be made, provided that DESIGN-BUILDER is making satisfactory progress and there is no specific cause for greater withholding. If required by governing statutes, such retainage shall be deposited into an interest bearing escrow account pursuant to the terms of a written escrow agreement executed in accordance with such statutes, and upon such form as approved by The City. Upon issuance and

The City's execution of a Certificate of Substantial Completion, The City may reduce the retained amount to not less than two hundred percent (200%) of the cost of the Work remaining to be completed, corrected or accepted.

14.06.1 Retainage may not be reduced until DESIGN-BUILDER provides The City with complete and legally effective releases or waivers of all claims or liens arising out of or filed in connection with the Work, which instruments shall be upon such forms as approved by The City.

14.06.2 In lieu thereof and as approved by The City, DESIGN-BUILDER may furnish receipts or releases in full; an affidavit of DESIGN-BUILDER that the releases and receipts include all labor, services, material, and equipment for which a claim or lien could be filed, and that all payrolls, material work equipment bills, and other indebtedness connected with the Work for which The City or its property might in any way be responsible have been paid or otherwise satisfied; and consent of the Surety, if any, to final payment. If any Subcontractor, manufacturer, fabricator, supplier or distributor fails to furnish a release or receipt in full, DESIGN-BUILDER may furnish a Bond or other collateral satisfactory to The City to indemnify The City against any claim or lien.

14.07 Time for progress payments. The City will pay appropriate, complete, and acceptable Payment Applications by the end of the month in which they are timely submitted. DESIGN-BUILDER shall accept invoice payments via check, purchasing card or Automated Clearing House (ACH) at The City's sole option and discretion. The City will not be responsible for any card fees or other bank charges incurred by the DESIGN-BUILDER.

14.08 Prompt payment. DESIGN-BUILDER will pay first-tier Subcontractors within 10 days of receipt of payment covering work or services provided by such first tier Subcontractor, and DESIGN-BUILDER will require Subcontractors to include 10-day payment terms in lower tier Subcontractor agreements.

14.09 Right to withhold payment. The City may withhold payment or a portion of a payment if The City determines:

14.09.1 DESIGN-BUILDER has failed to comply with the Contract Documents;

14.09.2 DESIGN-BUILDER has failed to include requirement information in or with its Payment Application;

14.09.3 The City has independent rights to set-off under Applicable Law; or

14.09.4 DESIGN-BUILDER has failed to pay a Subcontractor or The City reasonably believes that Subcontractors are not being paid or that claims on the Payment Bond or other payment claims are being asserted by a Subcontractor.

- 14.10 Basis for withholding payment. If The City withholds payment, it will provide a written explanation to DESIGN-BUILDER by the end of the month in which the Payment Application was timely submitted. If DESIGN-BUILDER disagrees with The City's decision to withhold payment, it will commence dispute resolution proceedings under Section 20.
- 14.11 Right to stop Work. DESIGN-BUILDER may stop the Work if The City fails to make payments or provide the written explanation for withholding payment if payment and/or written explanation are not made or issued within 90 days of the applicable Payment Application.
- 14.12 Substantial Completion. DESIGN-BUILDER will follow Section 017700 of the Specifications with respect to Substantial Completion.
- 14.13 Notice of failure to achieve Substantial Completion. If The City or the Owner's Representative conclude that the Work is not substantially complete, the Owner's Representative will within fourteen (14) days after such inspection notify DESIGN-BUILDER in writing, stating basis therefore.
- 14.14 Certificate of Substantial Completion. If, after the inspection The City or the Owner's Representative consider the Work substantially complete, the Owner's Representative shall prepare and deliver to The City a recommended certificate of Substantial Completion, which shall fix the date of Substantial Completion, and address the respective responsibilities of The City and DESIGN-BUILDER with respect to security, operation, safety, maintenance, heat, utilities, insurance and warranties. The certificate, as recommended by the Owner's Representative or as approved by The City may have attached a list of items to be completed or corrected prior to final payment and may state any additional issues or reservations to remain unaffected by substantial completion. The certificate of Substantial Completion, as accepted and approved by The City, will be submitted to DESIGN-BUILDER for acceptance, which acceptance shall be deemed effective, and DESIGN-BUILDER shall become unconditionally bound to the terms thereof, upon (i) DESIGN-BUILDER's execution of the certificate, or (ii) DESIGN-BUILDER's failure to provide written notice objecting to the terms of such certificate within five (5) days after receipt thereof.
- 14.15 Final Completion. DESIGN-BUILDER will follow Section 017700 of the Specifications with respect to Substantial Completion. In addition, DESIGN-BUILDER will do the following:
- 14.15.1 To the extent The City identifies any incomplete or defective items, DESIGN-BUILDER shall immediately take such measures as are necessary to complete and remedy such Work to the satisfaction of The City and the Owner's Representative. Upon written notice from DESIGN-BUILDER that all Work which was incomplete or defective has been completed or remedied, The City and the Owner's



Representative will make an additional inspection to verify the work performed.

- 14.15.2 If it is determined that the Work is still incomplete or defective, DESIGN-BUILDER shall bear all direct, indirect and consequential costs of re-inspecting said Work (including but not limited to fees and charges of engineers, architects, attorneys, and other professionals) and The City shall be entitled to an appropriate decrease in the Contract Price by Change Order or written agreement.
- 14.15.3 After DESIGN-BUILDER has completed the Work and all corrections as provided elsewhere in this Section and delivered all maintenance and operating instructions, schedules, guarantees, bonds, and certificates of inspection as required under the Contract Documents and after The Owner's Representative has indicated that the Work is acceptable, DESIGN-BUILDER may make application for Final Payment.
- 14.15.4 The Final Payment Application shall be accompanied by complete and legally effective releases or waivers by all Subcontractors and material suppliers from all claims or liens arising out of or filed or which could otherwise be filed in connection with the Work.
- 14.15.5 If any Subcontractor or supplier fails to furnish a release or receipt in full, DESIGN-BUILDER may at The City's option furnish a Bond or other collateral satisfactory to indemnify The City against any Claim or Lien.
- 14.15.6 DESIGN-BUILDER's Final Payment Application shall be accompanied by a list of all Subcontractors involved in the Courts Project, and the amount in dollars paid to each Subcontractor.
- 14.15.7 If The City is satisfied that the Work has been completed and DESIGN-BUILDER's other obligations under the Contract Documents have been fulfilled, the Owner's Representative will, after receipt of the Final Application of Payment, indicate in writing its recommendation of payment and present the Application to The City for payment.

## **SECTION XV. INSURANCE**

- 15.01 General insurance requirements. The DESIGN-BUILDER and its Subcontractors shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions as described in this Section 15 or elsewhere in the Contract Documents. DESIGN-BUILDER and its Subcontractors shall purchase and maintain the insurance required by this Contract from an insurance company or insurance companies lawfully authorized to issue insurance in Indiana and holding a current A.M. Best rating of no less than A-, VIII. DESIGN-BUILDER and its Subcontractors must maintain the

required insurance continuously from before commencing Work and for a period of at least one (1) year after Final Completion.

15.02 Minimum requirements. The insurance requirements set forth in this Section 15 are minimum requirements only, and any additional coverages that may be necessary to further protect DESIGN-BUILDER are the sole responsibility of DESIGN-BUILDER. DESIGN-BUILDER is responsible for determining that the Subcontractors are adequately insured. The premiums, costs, and charges for any such insurance shall be paid by each Subcontractor at its own expense. Each insurance policy purchased and maintained by DESIGN-BUILDER must be written so the effective (or retroactive) date of the policy is prior to the date of commencement of providing services on the Site.

15.03 Additional insureds. DESIGN-BUILDER shall cause the commercial liability, automobile liability, pollution liability, and umbrella excess liability coverages required under this Section 15 to include: The City, HOK (formerly known as “Hellmuth, Obata + Kassabaum”), Owner’s Representative, Indianapolis-Marion County Building Authority, Citizens Gas & Coke Utility Co., and Citizens Energy Group, (“Additional Insureds”) and any other entities required by The City as additional insureds. The additional insured coverage shall be primary and non-contributory to any of The City’s general liability insurance policies, shall apply to both ongoing and completed operations, and shall contain a cross-liability provision.

15.04 Coverage forms and limits. The following coverages and limits must be provided by DESIGN-BUILDER and its Subcontractors:

15.04.1 Workers Compensation Insurance

Statutory Limits

The foregoing are minimum limits, if higher limits or unlimited coverage is required by statute the statutory amounts shall be provided.

15.04.2 Employers Liability Insurance

\$1,000,000 Bodily Injury by Accident, Each Accident

\$1,000,000 Bodily Injury by Disease, Each Employee

\$1,000,000 Bodily Injury by Disease, Policy Limit

The foregoing are minimum limits, if higher limits or unlimited coverage is required by statute, the statutory amounts shall be provided.

15.04.3 Commercial General Liability Insurance

\$5,000,000 Each Occurrence

\$5,000,000 Annual General Aggregate

\$5,000,000 Products/Completed Operations Aggregate

Limits may be provided by using a combination of primary and excess liability policies. Such insurance shall include The City and City Additional Insureds as additional insureds on a primary and non-contributory basis using form CG 20 10 11 85 or its equivalent. A waiver of subrogation will apply in favor of The City and City Additional Insureds. Coverage shall include but not be limited to the following: (a) Contractual Liability; (b) Broad Form Property Damage Liability Insurance; (c) Independent Contractors; (d) Such policy shall include all of the coverages which may be included in coverages (a), (b) and (c) contained in the Commercial General Liability Policy, without deletion. Such policy must be issued upon an "occurrence" basis, as distinguished from a "claims made" basis; and (e) Products and Completed Operations Coverage

15.04.4 Umbrella/Excess Liability Insurance

\$25,000,000 Each Occurrence

\$25,000,000 Annual General Aggregate

\$25,000,000 Products/Completed Operations Aggregate

Coverage is to be provided for The City, DESIGN-BUILDER and Subcontractors of every tier for any incidents that occur at the Site. Off-Site labor will be covered by DESIGN-BUILDER'S and Subcontractors' off-Site, or master insurance policies.

Coverage under the Commercial General Liability and Excess Liability policies will be provided on a primary and non-contributory basis with respect to any insurance maintained by The City and The City Additional Insureds.

15.04.5 Auto Liability Insurance. DESIGN-BUILDER and Subcontractors will provide and maintain coverage for DESIGN-BUILDER'S and Subcontractors', (as the case may be) vehicles, whether owned, leased or hired. Limits of liability shall be not less than:

DESIGN-BUILDER: \$5,000,000 per Occurrence (combined single limit)

Subcontractors: \$2,000,000 per Occurrence (combined single limit)

These limits may be achieved through a combination of primary and excess insurance. Such insurance shall include The City and The City Additional Insureds as additional insureds.

- 15.04.6 Pollution Legal Liability. DESIGN-BUILDER will provide coverage for environmental incidents that arise out of its Work, with limits of no less than \$10,000,000 per claim and in the aggregate. Such policy shall remain in effect for three years after completion of the Work on a claims-made basis. Coverage will include The City and The City Additional Insureds as additional insureds.
- 15.04.7 Professional Liability. DESIGN-BUILDER shall purchase and maintain coverage to insure against claims that may arise out of its professional errors and omissions in performing the Design Services under this Design-Build Contract, with limits of no less than \$5,000,000 per claim and in the aggregate. Such policy shall remain in effect for three years after completion of the Work on a claims-made basis.
- 15.04.8 Property Insurance. DESIGN-BUILDER and each Subcontractor shall secure, pay for and maintain whatever fire and extended coverage it may deem necessary for protection against loss of owned or rented capital equipment and tools, including any tools owned by mechanics, and any tools, equipment, scaffolding, staging, sheds, trailers, vehicles, towers and forms owned or rented by it. The City shall have no liability with respect to such equipment and tools. Failure of the DESIGN-BUILDER or any Subcontractor to secure such insurance or to maintain adequate levels of coverage shall not obligate The City or any of its agents and employees for any losses on such owned or rented equipment or tools. If DESIGN-BUILDER or any Subcontractor secures such insurance, the insurance policy shall include a waiver of subrogation wherein the insurance company agrees that in no event shall they have any right of recovery against The City or any of its agents or employees for any losses on such owned or rented equipment.
- 15.04.9 Railroad Protective Liability. DESIGN-BUILDER and each Subcontractor shall secure, pay for and maintain Railroad Protective Liability insurance in the name of the relevant railroad in connection with all work across, under or adjacent to railroad tracks or right-of-way. DESIGN-BUILDER and each Subcontractor shall contact the railroad and be responsible for determining what coverages and limits are required and shall be responsible for purchasing and paying for such insurance.

- 15.05 Certificates of insurance. Certificates of insurance from DESIGN-BUILDER shall be provided to The City within ten (10) days of signing the Design-Build Contract. Certificates of insurance from each Subcontractor shall be provided to The City within ten (10) days after award of the Subcontract and prior to

commencement of the Subcontractor's work. The certificates will show The City and The City Additional Insured's as additional insureds as prescribed above. Failure of The City to obtain or object to lack of a certificate of insurance or to the coverages indicating within the certificate of insurance shall not constitute a waiver by The City of any of DESIGN-BUILDER'S or its Subcontractor's obligations under the Contract Documents.

- 15.06 Continuing coverage. DESIGN-BUILDER will not allow insurance required by the Contract Documents to lapse, be canceled, reduced in limits or coverage, non-renewed, or materially changed or have restrictive modifications added during the Contract Time. DESIGN-BUILDER shall also promptly notify The City and Owner's Representative in writing of the threat of any cancellation or substantive modification of any insurance policy required hereunder. If DESIGN-BUILDER fails to procure or maintain the coverages required under the Contract Documents, The City may purchase such coverage and deduct the cost thereof from any monies due to the DESIGN-BUILDER, or terminate this Contract under Section 18.
- 15.07 Deductible amounts. DESIGN-BUILDER shall disclose to The City any deductible or self-insured retentions applicable to any insurance required to be provided by DESIGN-BUILDER.
- 15.08 Deductible payments. DESIGN-BUILDER and each Subcontractor shall pay any applicable deductible or self-insured retention, and all insurance premiums for any insurance required under this Section 15, including any charges for required waivers of subrogation or the endorsement of additional insureds.
- 15.09 Builder's Risk Insurance. The City, at its own expense, shall provide "All Risk" Builders Risk insurance on a replacement cost basis for full project value subject to policy exclusions, insuring the Courts Project against all standard perils, including and not limited to earthquake, flood, damages for delay, and insuring all materials, supplies, equipment, machinery, and other property of any nature to be included as a permanent part of the Courts Project, but shall exclude coverage for owned, rented or leased construction tools, equipment, sheds, trailers, vehicles, cranes or other property to be used by DESIGN-BUILDER, any Subcontractor or supplier of any tier to perform the Work, or brought to the Site, or any other property that will not be incorporated into the completed Work. Such coverage shall be extended to cover all materials, supplies, equipment and machinery to be incorporated into the Work and stored on site or. This insurance shall name the DESIGN-BUILDER and Subcontractors as loss payees as their interest may appear and a waiver of subrogation shall apply in favor of the DESIGN-BUILDER and Subcontractors. Losses within the deductible of the all-risk insurance shall be borne by The City, unless the loss was caused by the DESIGN-BUILDER or any Subcontractor. DESIGN-BUILDER or the Subcontractor of the any employee responsible for theft including theft of any materials, equipment, tools, or other property shall bear the cost of the deductible for said theft.

- 15.10      DESIGN-BUILDER's coverage primary. Coverage provided by the DESIGN-BUILDER and Subcontractors must be primary insurance and non-contributing with respect to any other insurance carried by The City.
- 15.11      Flow-down of insurance requirements. DESIGN-BUILDER must comply, and require all of its Subcontractors to comply, with this Section 15.
- 15.12      Waiver of subrogation. DESIGN-BUILDER and its Subcontractors hereby waive all rights of subrogation and recovery against The City and each City Additional Insured to the extent of any loss or damage, including within any deductibles on the General Liability and Workers' Compensation coverages. Notwithstanding the foregoing and not by way of limitation of the same, each Subcontractor shall similarly waive their rights of subrogation and recovery in each of their respective Subcontracts with respect to their Work to the extent of any loss or damage that is insured by The City.

## **SECTION XVI.      PAYMENT AND PERFORMANCE BONDS**

DESIGN-BUILDER shall furnish Performance and Payment Bonds, each in an amount at least equal to one-hundred percent (100%) of the Contract Price as security for the faithful performance and payment of all DESIGN-BUILDER's obligations under the Contract Documents. These Bonds shall remain in effect at least until one (1) year after the date when final payment becomes due, except as otherwise provided by Applicable Law or Contract Documents. All Bonds shall be in the forms prescribed by Applicable Law and the Contract Documents and be executed by such Sureties as (i) are licensed to conduct business in the State of Indiana, and (ii) are named in the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Circular 570 (amended) by the Audit Staff Bureau of Government Financial Operations, U.S. Treasury Department. All Bonds signed by an agent must be accompanied by a certified copy of the power of attorney or other instrument establishing the agent's authority.

## **SECTION XVII.      CHANGES AND CLAIMS**

- 17.01      Change defined. A Change is a Change Order, a Change Directive, or a Minor Change.
- 17.02      Change Orders. A Change Order is a written instrument signed by The City and DESIGN-BUILDER confirming their agreement to amend the Contract Documents with respect to the Work, the Contract Time, the Contract Price, or otherwise. A Change Order will be in a form dictated or approved by The City and will describe, at a minimum, the following:
- 17.02.1      The scope or nature of the amendment to the Contract Documents, Design and Construction Services, and/or the Work;
- 17.02.2      The amount of the amendment to the Contract Time;
- 17.02.3      The amount of the amendment to the Contract Price; and

17.02.4 The nature of other amendments to terms of the Design-Build Contract.

- 17.03 Change Directives. A Change Directive is a written order issued by The City directing a change in the Design and Construction Services and/or Work prior to an agreement with DESIGN-BUILDER with respect to adjustments to the Contract Time, the Contract Price or other amendment to the terms of the Design-Build Contract.
- 17.04 Minor Changes. A Minor Change is an amendment to the Design and Construction Services and/or Work or the Design-Build Contract that does not impact the Contract Time, the Contract Price, or otherwise require an amendment to the material terms of the Contract Documents.
- 17.05 DESIGN-BUILDER'S notice of potential Changes. If DESIGN-BUILDER has reason to believe a Change has or will occur, or otherwise wishes to raise a potential Change, it will provide The City with written notice of the circumstances for the potential Change prior to proceeding with any additional work or services related to the potential Change. Once the potential Change has been raised, The City will meet and confer with the DESIGN-BUILDER, as necessary, with respect to scope, pricing, and schedule impacts arising from the potential Change. DESIGN-BUILDER will provide information related to these impacts, including pricing options, for The City's review and consideration. The City, in its sole discretion, will determine whether a Change Order will be issued. If the parties disagree about the implementation of the Change they may initiate the dispute resolution process under Section 20.
- 17.06 Claims defined. A Claim is any request by - or right, claim, title or interest held by or in favor of - DESIGN-BUILDER for an increase in the Contract Time, an increase in the Contract Price, a material alteration to the Contract Documents, or other relief claimed by DESIGN-BUILDER to exist under the Contract Documents or Applicable Law whether at law, in equity, tort or otherwise. If DESIGN-BUILDER has reason to believe a Claim exists, it will provide The City with written notice of the Claim within fourteen (14) days of first becoming aware of the circumstances giving rise to the potential Claim. The City will investigate the Claim, and DESIGN-BUILDER will provide additional information or meet with The City to facilitate The City's investigation. At the conclusion of its investigation, The City will inform DESIGN-BUILDER whether it approves or rejects some, or all, of the Claim. If the parties disagree on The City's determination they may initiate the dispute resolution process under Section 20.

## **SECTION XVIII. TERMINATION**

- 18.01 Termination for cause by The City. If DESIGN-BUILDER fails to:
- 18.01.1 Comply with Applicable Law;
- 18.01.2 Timely pay Subcontractors for the Work;

- 18.01.3 Provide a sufficient and appropriate number of skilled workers;
- 18.01.4 Perform the Work in such a way as to ensure it will complete the Work for the Contract Price and within the Contract Time; or
- 18.01.5 Otherwise fails to perform, or breaches, its obligations under the Contract Documents;

then The City may give written notice of the failure to DESIGN-BUILDER describing the failure and providing any additional relevant information.

- 18.02 DESIGN-BUILDER'S right to cure. DESIGN-BUILDER has 14 days from receipt of The City's notice to correct the failure or commence activities to correct the failure. If DESIGN-BUILDER fails to proceed in accordance with The City's notice and this Section 18.02, then The City may issue a second notice terminating the Design-Build Contract for cause. The City may extend the fourteen (14) day period at its sole discretion and failing to issue a second notice of termination within fourteen (14) days is not a waiver of The City's right to terminate the Design-Build Contract under this section 18.02. Upon issuance of this notice of termination, The City will have the right to enter onto the Site, take over and assume the Design and Construction Services and the Work, finish the the Design and Construction Services and the Work and back-charge or deduct amounts owed or to become due to the DESIGN-BUILDER to pay for its completion of the Design and Construction Services and the Work. If amounts otherwise owed or that would become due to the DESIGN-BUILDER are insufficient to cover The City's costs in completing the Design and Construction Services and the Work, then DESIGN-BUILDER will reimburse The City for such amounts, including reasonable attorney fees, consulting fees, and indirect costs.
- 18.03 Election by the sureties. In the event The City issues a notice under section 18.01, DESIGN-BUILDER consents to allow any sureties to make their election under any performance bond before such time that The City's termination of this Design-Build Contract becomes effective. Specifically, DESIGN-BUILDER consents to allow any surety to make its election and waives any right to claim that an election by any surety constitutes interference with DESIGN-BUILDER's rights or interests under this Design-Build Contract.
- 18.04 Termination for cause converted to termination for convenience. If it determined that The City's decision to terminate was wrongful or in violation of this Design-Build Contract or Applicable Law, then the termination will be treated as a Termination for Convenience under Section 18.05.
- 18.05 Termination for convenience. Upon fourteen (14) days written notice to DESIGN-BUILDER, The City may elect to terminate this Design-Build Contract for The City's convenience. In the event of such election, DESIGN-BUILDER will stop the Design and Construction Services and the Work and take necessary



actions, consistent with The City's notice, to secure the Site and hand the Courts Project back to The City.

18.06 Failure to follow M/W/V/DO/BE Notification Procedure. If DESIGN-BUILDER fails to follow the Notification Procedure outlined in Section 9.02, in addition to exercising its rights under this Section 18 and Applicable Law, The City may take any of the following actions:

18.06.1 Require the DESIGN-BUILDER to return all payments made to The City under the Design-Build Contract that was breached by failure to comply with the Notification Procedure; and

18.06.2 Use DESIGN-BUILDER'S failure to comply with the Notification Procedure as a basis for finding the DESIGN-BUILDER is not a responsible Offeror when evaluating the award of any future contracts awarded by The City.

18.07 Termination for cause by DESIGN-BUILDER. If The City fails to:

18.07.1 Pay for the Design and Construction Services and the Work for an additional thirty (30) days after DESIGN-BUILDER's right to stop the Work accrues under Section 14.11; or

18.07.2 Otherwise fails to perform or breaches its obligations under the Contract Documents;

then DESIGN-BUILDER may give written notice of the failure to The City describing the failure and providing any additional relevant information.

18.08 The City's right to cure. The City has twenty-eight (28) days from receipt of DESIGN-BUILDER's notice to correct the issue or commence activities to correct the issue. If The City fails to proceed in accordance with DESIGN-BUILDER's notice, then DESIGN-BUILDER may issue a second notice terminating the Design-Build Contract for cause. DESIGN-BUILDER may extend the fourteen (14) day period at its sole discretion and failing to issue a second notice of termination within fourteen (14) days is not a waiver of DESIGN-BUILDER's right to terminate the Design-Build Contract under this section 18.08.

## **SECTION XIX. INDEMNIFICATION**

19.01 General indemnification for torts. To the fullest extent permitted by law, DESIGN-BUILDER will defend, indemnify and hold harmless The City, including The City's agents and employees, including but not limited to Owner's Representative, from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or to the extent caused by the negligent acts or omissions of the DESIGN-BUILDER or DESIGN-

BUILDER'S Subcontractors. This obligation will not be limited by amounts or benefits paid as it relates to claim under worker's compensation insurance.

19.02 Additional specific indemnification requirements. In addition, DESIGN-BUILDER will defend, indemnify and hold harmless The City, including The City's agents and employees, including but not limited to Owner's Representative, from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or to the extent caused:

- 19.02.1 DESIGN-BUILDER's breach or alleged breach of the Design-Build Contract;
- 19.02.2 The failure or alleged failure by the DESIGN-BUILDER or its Subcontractors to comply with Applicable Law relating to the performance of the Work;
- 19.02.3 Any alleged patent or copyright infringement or other allegedly improper appropriation or use by the DESIGN-BUILDER or its Subcontractors whose acts they may be liable, of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in the preparation of the Proposal, the performance of the Work, or arising out of any use in connection with the Courts Project of methods, processes, designs, information, or other items furnished or communicated to The City pursuant to the Contract Documents; provided that this indemnity shall not apply to any infringement resulting from The City's failure to comply with specific written instructions regarding use provided to The City by DESIGN-BUILDER;
- 19.02.4 The actual or alleged fraud, bad faith, willful misconduct or gross negligence of DESIGN-BUILDER or its Subcontractors;
- 19.02.5 Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any property or income of DESIGN-BUILDER or its Subcontractors for whose acts they may be liable with respect to any payment for the Work made to or earned by DESIGN-BUILDER or its Subcontractors;
- 19.02.6 Any and all stop notices, liens, payment bond claims, and claims filed in connection with the Work;
- 19.02.7 The claim or assertion by any third party that the DESIGN-BUILDER, or DESIGN-BUILDER'S or its Subcontractors interfered with or hindered the progress or completion of Work being performed by the third party, or failed to cooperate reasonably with the third party, so as to cause inconvenience, disruption, delay or loss;
- 19.02.8 Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (a) the failure of DESIGN-BUILDER or its

Subcontractors to comply with best industry practices or requirements of the Contract Documents respecting control and mitigation of construction activities and construction impacts in connection with the performance of the Work, (b) the intentional misconduct or negligence of the DESIGN-BUILDER or its Subcontractors in connection with the performance of the Work, or (c) the actual physical entry onto or encroachment upon another's property by DESIGN-BUILDER or its Subcontractors in connection with the performance of the Work;

19.03 Indemnification damages. Such indemnity shall include reasonable attorneys' fees and all costs and other expenses arising therefrom or incurred in connection therewith and shall not be limited by reason of the enumeration of any insurance coverage required herein.

19.04 Limits of indemnification obligations. Subject to the releases and disclaimers herein, DESIGN-BUILDER'S indemnity obligation shall not extend to any third-party loss to the extent directly caused by:

19.04.1 The sole negligent acts, sole negligent omissions, sole violations of Applicable Law, recklessness or willful misconduct, bad faith or fraud of an indemnified party; or

19.04.2 The City's material breach of any of its obligations under the Design-Build Contract.

## **SECTION XX. DISPUTES**

20.01 Good faith efforts. The parties agree to work collaboratively and in good faith to avoid and resolve disputes. The parties will continue to perform their respective obligations under the Contract Documents while any dispute is pending, and the fact that a dispute exists is not a basis to stop performing, unless such right to stop performing is expressly authorized by another provision in this Design-Build Contract.

20.02 Notice of Dispute. In the event of a dispute, either party may initiate the dispute resolution process by sending a request or notice to the other party. This request or notice should include the factual and legal basis for the relief being requested and any documents or information the party believes support its position. In addition, the notice should include dates and times when the party is available to meet and confer with the other party.

20.03 Negotiations by the Parties. The party receiving the request or notice for dispute resolution will respond within fourteen (14) days by providing the factual and legal basis for its position in responding to the request or notice. It will also communicate with the other party about setting a meeting to discuss and negotiate the dispute. Once a date, time and location are set, the parties will convene to negotiate a resolution to the dispute. If preliminary discussions reveal that the parties are at an impasse they may proceed directly to mediation.

- 20.04      Agreement to Mediate. If the negotiations do not resolve the dispute, then the parties agree to mediate the dispute. The parties may mutually agree on a mediator and mediation procedures. If they cannot agree, they will follow the procedures in Rule 2 of the Indiana Rules of Alternative Dispute Resolution. The parties will endeavor to conduct mediation prior to commencing litigation, but mediation is not a condition precedent to litigation. If litigation is commenced prior to mediation, the parties will set the mediation as soon as reasonably possible to avoid unnecessary legal costs and delay.
- 20.05      Litigation. Disputes that are not resolved via negotiations or mediation will be resolved via litigation in the County courts.
- 20.06      Flow-down and consolidation. DESIGN-BUILDER will flow these dispute resolution terms down to all Subcontractors to ensure that necessary parties can be added to any dispute between The City and the DESIGN-BUILDER. Necessary parties are those parties whose rights or defenses are potentially impacted by the resolution of the dispute between The City and the DESIGN-BUILDER or those parties substantially involved in a question of fact or question of law that is in common with an issue being disputed between The City and the DESIGN-BUILDER.

## **SECTION XXI. MISCELLANEOUS PROVISIONS**

- 21.01      Independent contractor. The parties agree that DESIGN-BUILDER is an independent contractor as that term is commonly used and is not an employee of The City, the County, or the consolidated City/County. As such, DESIGN-BUILDER is solely responsible for all taxes and none shall be withheld from the sums paid to DESIGN-BUILDER. DESIGN-BUILDER acknowledges that it is not insured in any manner by The City or the Consolidated City for any loss of any kind whatsoever. DESIGN-BUILDER has no authority, express or implied, to bind or obligate The City or the Consolidated City in any way.
- 21.02      Necessary documentation. DESIGN-BUILDER certifies that it will furnish The City, if requested, any and all documentation, certification, authorization, license, permit, or registration required by the laws or rules and regulations of The City, the County, other units of local government, the State of Indiana, and the United States. DESIGN-BUILDER further certifies that it is now and will remain in good standing with such governmental agencies and that it is now and will maintain its license, permit, registration, authorization, or certification, as applicable, in force during the term of this Design-Build Contract.
- 21.03      Confidentiality.
- 21.03.1      The obligations of this section shall survive the termination of this Design-Build Contract and shall be applicable to the full extent permissible under statutes governing access to public records. DESIGN-BUILDER understands that the information provided to it or obtained

from The City during the performance of its Design and Construction Services is confidential and may not, without prior written consent of The City, be disclosed to a person not in The City's employ except to employees or agents of DESIGN-BUILDER who have a need to know in order to provide the Design and Construction Services. Further, DESIGN-BUILDER's work product generated during the performance of this Design-Build Contract is confidential to The City. The failure to comply in all material respects with this section shall be considered a material breach of this Design-Build Contract. Confidential information shall not include information, that: (a) was known by DESIGN-BUILDER at the time it was received; (b) is, as of the time of its disclosure or thereafter becomes, part of the public domain through a source other than DESIGN-BUILDER; (c) is made known to DESIGN-BUILDER by a third person who does not impose any obligation of confidence on DESIGN-BUILDER with respect to such information; (d) is required to be disclosed pursuant to governmental authority, law, regulation, duly authorized subpoena or court order whereupon DESIGN-BUILDER shall provide notice to The City prior to such disclosure; or (e) information that is independently developed by DESIGN-BUILDER without references to the confidential information.

21.03.2 DESIGN-BUILDER will not, under any circumstances, release information provided to it by, or on behalf of, The City that is required to be kept confidential by The City pursuant to Indiana law except as contemplated by Section 21.03.1(d), above.

21.03.3 DESIGN-BUILDER acknowledges that The City will not treat this Design-Build Contract as confidential information and will post the Design-Build Contract on The City's website as required by Section 141-105 of the Revised Code of The City and the County. Use by the public of any document or the information contained therein shall not be considered an act of The City.

21.04 Records; audits. DESIGN-BUILDER shall maintain books, records, documents and other evidence directly pertinent to performance of Design and Construction Services and completion of the Work under this Design-Build Contract. DESIGN-BUILDER shall make such materials available at its offices at all reasonable times during the Design-Build Contract period and for three (3) years from the date of final payment under this Design-Build Contract for inspection by The City or any other assign, agent or authorized representative of The City. Copies thereof, if requested, shall be furnished at no cost to The City.

21.05 Ownership.

21.05.1 "Works" means works of authorship fixed in any tangible medium of expression by DESIGN-BUILDER or its officers, employees, agents or Subcontractors in the course of performing the Design and Construction

Services under this Design-Build Contract, including, but not limited to, computer programs, electronic art, building information models, computer generated art, notes, specifications, drawings, flow charts, memoranda, correspondence, records, notebooks, documentation, reports and charts, regardless of the medium in which they are fixed, and all copies thereof.

21.05.2 All Works made or created by DESIGN-BUILDER, either solely or jointly with The City, in the course of DESIGN-BUILDER's performance of Design and Construction Services under this Design-Build Contract shall be deemed to be works for hire and are and shall be the exclusive property of The City, provided DESIGN-BUILDER has been paid in full for its Design and Construction Services. At The City's request, DESIGN-BUILDER will execute all documents reasonably required to confirm or perfect ownership of such Works and any corresponding copyright rights in and to such Works in The City. Without the prior written consent of The City, DESIGN-BUILDER shall not use, copy or prepare derivative works of the Works, or any parts of them, other than as related to the performance of this Design-Build Contract. During the performance of this Design-Build Contract, DESIGN-BUILDER shall be responsible for loss or damage to the Works while they are in DESIGN-BUILDER's possession or control. Any loss or damage shall be restored at DESIGN-BUILDER's expense. The City shall have free and unlimited access to the Works at all times and, upon demand, shall have the right to claim and take possession of the Works and all copies. If The City or a third-party at The City's request modifies and reuses the Works without involvement of DESIGN-BUILDER, then The City will be responsible for such modification and use. Notwithstanding the foregoing, DESIGN-BUILDER shall be entitled to retain a set of its work papers for archival purposes only, in accordance with applicable professional standards.

21.06 Termination for failure of funding. Notwithstanding any other provision of this Design-Build Contract, if funds for the continued fulfillment of this Design-Build Contract by The City are at any time insufficient or not forthcoming through failure of any entity to appropriate funds or otherwise, then The City shall have the right to terminate this Design-Build Contract without penalty by giving written notice documenting the lack of funding, in which instance this Design-Build Contract shall terminate and become null and void on the last day of the fiscal period for which appropriations were received. The City agrees that it will make its best efforts to obtain sufficient funds, including but not limited to, requesting in its budget for each fiscal period during the term hereof sufficient funds to meet its obligations hereunder in full.

21.07 Consequential damages. In addition to amounts recoverable as direct and liquidated damages under this Design-Build Contract, The City and DESIGN-BUILDER may recover consequential and indirect damages, as defined below, in

an amount up to 10% of the Contract Price. The City and DESIGN-BUILDER mutually waive all rights against each other for consequential and indirect damages in excess of 10% of the Contract Price. Consequential and indirect damages include, by way of example and not limitation, damages resulting from loss of use, profit, financing, future business, rent and reputation; and other speculative damages not directly caused by the negligence or breach of contract of a party to this Design-Build Contract.

- 21.08 Notice. Any notice required to be sent under this Design-Build Contract shall be sent by internationally recognized overnight courier, certified mail, facsimile or other delivery method which provides confirmation of receipt and shall be directed to the persons and addresses specified below (or such other persons and/or addresses as any party may indicate by giving notice to the other party):

To DESIGN-BUILDER:

To The City:

- 21.09 Non-contingent fees. DESIGN-BUILDER warrants that no person or selling agency has been employed or retained to solicit or secure this Design-Build Contract upon a Design-Build Contract or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees. For breach or violation of this warranty The City shall have the right to annul this Design-Build Contract without liability or in its discretion to deduct from the Contract Price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

- 21.10 Applicable Law; forum.

21.10.1 DESIGN-BUILDER agrees to comply with all applicable federal, state and local laws, rules, regulations or ordinances, and all provisions required thereby to be included in this Design-Build Contract are hereby incorporated by reference. This includes, but is not limited to, the Federal Civil Rights Act of 1964 and, if applicable, the Drug-Free Workplace Act of 1988. The enactment of any state or federal statute or the promulgation of regulations thereunder after execution of this Design-Build Contract shall be reviewed by The City and DESIGN-BUILDER to determine whether the provisions of the Design-Build Contract require formal modification.

21.10.2 This Design-Build Contract will be construed in accordance with the laws of the State of Indiana, and by all applicable Municipal Ordinance or Codes of The City and the County. Suit, if any, shall be brought in the state court in the County. DESIGN-BUILDER consents to joinder of any suits or claims by non-parties to this Design-Build Contract where the dispute relates to the suit between The City and DESIGN-BUILDER.

- 21.11 Waiver. The City's delay or inaction in pursuing its remedies set forth in this Design-Build Contract, or available by law, shall not operate as a waiver of any of The City's rights or remedies.
- 21.12 Severability. If any provision of this Design-Build Contract is held to be invalid, illegal, or unenforceable by a court of competent jurisdiction, the violating provision shall be stricken, and all other provisions of this Design-Build Contract which can operate independently of such stricken provisions shall continue in full force and effect.
- 21.13 Successors and Assigns.
- 21.13.1 The City and DESIGN-BUILDER each binds itself and its partners, successors, executors, administrators and assigns to the other party of this Design-Build Contract and to the partners, successors, executors, administrators and assigns of such other party, in respect to all covenants of this Design-Build Contract; except as otherwise provided herein, DESIGN-BUILDER shall not assign, sublet or transfer its interest in this Design-Build Contract without the advanced written consent of The City. Nothing herein shall be construed as creating any personal liability on the part of any officer or agent of The City. In the event that The City approves of any such subcontracting, assignment, conveyance, or delegation, DESIGN-BUILDER shall remain solely responsible for performing, managing, directing and paying the person or persons to whom such responsibilities or obligations are subcontracted, assigned or delegated.
- 21.13.2 The City may – at any time – convey, assign, sublease, or otherwise transfer its interests under the Design-Build Contract without written notice to, or consent from, DESIGN-BUILDER. The City shall have no obligation whatsoever toward such assignee(s).
- 21.14 Debarment and suspension.
- 21.14.1 DESIGN-BUILDER certifies, by entering into this Design-Build Contract, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from or ineligible for participation in any federal assistance program by any federal department or agency, or by any department, agency or political subdivision of the State of Indiana. The term "principal" for purposes of this Design-Build Contract means an officer, director, owner, partner, key employee, or other person with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over the operations of DESIGN-BUILDER.



- 21.14.2 DESIGN-BUILDER certifies, by entering into this Design-Build Contract, that it does not engage in investment activities in Iran as more particularly described in Indiana Code § 5-22-16.5.
- 21.14.3 DESIGN-BUILDER shall provide immediate written notice to The City if, at any time after entering into this Design-Build Contract, DESIGN-BUILDER learns that its certifications were erroneous when submitted, or DESIGN-BUILDER is debarred, suspended, proposed for debarment, declared ineligible, has been included on a list or received notice of intent to include on a list created pursuant to Indiana Code § 5-22-16.5, voluntarily excluded from or becomes ineligible for participation in any federal assistance program. Any such event shall be cause for termination of this Design-Build Contract as provided herein.
- 21.14.4 DESIGN-BUILDER shall not subcontract with any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in any federal assistance programs by any federal department or agency, or by any department, agency or political subdivision of the State of Indiana.

21.15 Compliance with E-Verify Program. Pursuant to Indiana Code § 22-5-1.7, DESIGN-BUILDER shall enroll in and verify the work eligibility status of all newly hired employees of DESIGN-BUILDER through the E-Verify Program (“Program”). DESIGN-BUILDER is not required to verify the work eligibility status of all newly hired employees through the Program if the Program no longer exists.

- 21.15.1 DESIGN-BUILDER and its Subcontractors shall not knowingly employ or contract with an unauthorized alien or retain an employee or contract with a person that DESIGN-BUILDER or its Subcontractor subsequently learns is an unauthorized alien. If DESIGN-BUILDER violates this Section 21.16.1, The City shall require DESIGN-BUILDER to remedy the violation not later than thirty (30) days after The City notifies DESIGN-BUILDER. If DESIGN-BUILDER fails to remedy the violation within the thirty (30) day period, The City shall terminate the contract for breach of contract.
- 21.15.2 If The City terminates the contract, DESIGN-BUILDER shall, in addition to any other contractual remedies, be liable to The City for actual damages. There is a rebuttable presumption that DESIGN-BUILDER did not knowingly employ an unauthorized alien if DESIGN-BUILDER verified the work eligibility status of the employee through the Program.
- 21.15.3 If DESIGN-BUILDER employs or contracts with an unauthorized alien but The City determines that terminating the contract would be detrimental to the public interest or public property, The City may allow

the contract to remain in effect until The City procures a new DESIGN-BUILDER.

21.15.4 DESIGN-BUILDER shall, prior to performing any work, require each Subcontractor to certify to DESIGN-BUILDER that the Subcontractor does not knowingly employ or contract with an unauthorized alien and has enrolled in the Program. DESIGN-BUILDER shall maintain on file a certification from each Subcontractor throughout the duration of the Courts Project. If DESIGN-BUILDER determines that a Subcontractor is in violation of this Section 21.15.4, DESIGN-BUILDER may terminate its contract with the Subcontractor for such violation.

21.15.5 Pursuant to Indiana Code § 22-5-1.7 a fully executed affidavit affirming that the business entity does not knowingly employ an unauthorized alien and confirming DESIGN-BUILDER's enrollment in the Program, unless the Program no longer exists, shall be filed with The City prior to the execution of this Design-Build Contract. This Design-Build Contract shall not be deemed fully executed until such affidavit is filed with The City.

21.16 Post-Employment restrictions. Neither DESIGN-BUILDER nor its Subcontractors:

21.16.1 Participated in any way in the solicitation, negotiation, or awarding of this Design-Build Contract while previously employed by an agency of The City or the County for a period of one (1) year prior to the execution of this Design-Build Contract;

21.16.2 For a period of one (1) year after such employee ceased supervising the administration or performance of this Design-Build Contract on behalf of The City or an agency of The City or the County, shall perform any functions on behalf of DESIGN-BUILDER under this Design-Build Contract with respect to The City, unless the employee's former agency has consented to the employee's performance for DESIGN-BUILDER in writing;

21.16.3 Has violated any provision of Chapter 293 of the Revised Code of The City and the County, regarding the solicitation, negotiation, awarding, or performance of this Design-Build Contract;

21.16.4 Is currently an official or deputy mayor of, or has appointing authority to, any agency of The City or the County; and

21.16.5 Was previously employed by The City or the County within one (1) year of this Design-Build Contract and currently has the performance of lobbying activity (as that term is defined in Section 909-101 of The City and the County) related to an agency or an official as a responsibility of

his or her employment or contractual relationship with DESIGN-BUILDER.

21.16.6 Violation of this certification shall constitute a material breach of this Design-Build Contract and, upon such a violation, The City may terminate this Design-Build Contract. In addition, upon a violation of this certification, The City shall report such violation to The City's Office of Corporation Counsel who may, at its discretion, debar DESIGN-BUILDER from eligibility for future purchasing, bids, contracts, and/or projects with The City or the County.

21.17 Wage Theft/Payroll Fraud. The DESIGN-BUILDER shall report, and shall require its Subcontractors to report, all complaints or adverse determinations of wage theft or payroll fraud against the DESIGN-BUILDER or its Subcontractors to the City's Office of Finance and Management within thirty (30) days of notification of the complaint or adverse determination. If an adverse decision is rendered against the DESIGN-BUILDER with respect to Services provided to The City, The City may terminate this Design-Build Contract, reduce the incentives or subsidies to be provided under this Design-Build Contract, or seek other remedies. DESIGN-BUILDER shall provide a sworn statement on whether the DESIGN-BUILDER had any adverse determinations rendered against the DESIGN-BUILDER within the preceding three (3) years.

IN WITNESS WHEREOF, the parties hereto have executed this Design-Build Contract on the dates subscribed below.

**[SIGNATURE BLOCK]**

**AFFIDAVIT**

- A. E-Verify. Pursuant to Indiana Code 22-5-1.7-11, the DESIGN-BUILDER entering into a contract with an Indiana political subdivision is required to enroll in and verify the work eligibility status of all its newly hired employees through the E-Verify program. The DESIGN-BUILDER is not required to verify the work eligibility status of all its newly hired employees through the E-Verify program if the E-Verify program no longer exists.

The undersigned, on behalf of the DESIGN-BUILDER, being first duly sworn, deposes and states that the DESIGN-BUILDER does not knowingly employ an unauthorized alien. The undersigned further affirms that, prior to entering into this contract, the undersigned DESIGN-BUILDER will enroll in and agrees to verify the work eligibility status of all its newly hired employees through the E-Verify program.

- B. Wage Enforcement. Pursuant to the Wage Enforcement provisions found in Chapter 272 of the City and the County, the undersigned, on behalf of the DESIGN-BUILDER, being first duly sworn, deposes and states the following: (please check one of the following)

1. \_\_\_\_\_ That there has not been any adverse determination against the DESIGN-BUILDER within the proceeding 3-year period for wage theft or payroll fraud; Or
2. \_\_\_\_\_ That there has been an adverse determination against the DESIGN-BUILDER within the preceding 3-year period for wage theft or payroll fraud.

(DESIGN-BUILDER): \_\_\_\_\_

By (Written Signature): \_\_\_\_\_

(Printed Name): \_\_\_\_\_

(Title): \_\_\_\_\_

*Important - Notary Signature and Seal Required in the Space Below*

STATE OF \_\_\_\_\_

SS:

COUNTY OF \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,  
20 \_\_\_\_

My commission expires: \_\_\_\_\_ (Signed) \_\_\_\_\_

Residing in \_\_\_\_\_ County, State of \_\_\_\_\_