

DESIGN-BUILD AGREEMENT  
FOR THE DESIGN-BUILD OF  
ODOR CONTROL SYSTEM REPLACEMENTS AND MISCELLANEOUS  
HEATING AND VENTILATION SYSTEM IMPROVEMENTS  
AT THE WASTEWATER TREATMENT PLANT  
LOCATED AT 4 ROUTE 340  
IN ORANGEBURG, NY

between  
COUNTY OF ROCKLAND  
and  
ROCKLAND COUNTY SEWER DISTRICT No. 1  
and

[ ]

Dated

[ ]

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- BB. Design-Build Performance Bond (as provided by Design-Build Contractor prior to execution of this Design-Build Agreement and the date of the bond must not be prior to date of the Design-Build Contractor's signature on this Design-Build Agreement.)
- CC. Design-Build Labor and Materials Payment Bond (as provided by Design-Build Contractor prior to execution of this Design-Build Agreement and the date of the bond must not be prior to date of the Design-Build Contractor's signature on this Design-Build Agreement.)
- DD. Form of Warranty Bond

DESIGN-BUILD AGREEMENT  
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VENTILATION SYSTEM IMPROVEMENTS  
AT THE WASTEWATER TREATMENT PLANT  
IN ORANGEBURG, NY

This Design-Build Agreement is made and entered into as of [ ] between the County of Rockland, New York (the “County”), the Rockland County Sewer District No.1, (the “Sewer District”), and [ ], organized and existing under the laws of the State of [ ] (the “Design-Build Contractor”) (the “Design-Build Agreement”).

R E C I T A L S

WHEREAS, the Sewer District owns a wastewater treatment plant located at 4 Route 340, in Orangeburg, NY that provides sewage treatment for the Towns of Ramapo and Clarkstown and several properties in the Town of Orangetown (the “WWTP”);

WHEREAS, the WWTP was originally constructed in 1967 to treat 10 mgd, and was expanded to treat 28.9 mgd in the 1980’s. As part of the expansion, twelve (12) odor control systems were installed to collect and treat potential odorous air from various unit operations throughout the WWTP. Each of the twelve (12) systems operate independently of one another;

WHEREAS, the Sewer District issued a Request for Proposals (RFP-RC-2020-028) on September 15, 2020, soliciting proposals to demolish twelve (12) existing odor control systems throughout the WWTP, (the B7 odor control vessel has already been demolished), to design, construct, start-up, and acceptance test thirteen (13) new odor control systems, and to perform miscellaneous heating and ventilation system improvements (the “RFP”). RFP Addenda were issued on September 22, 2020, October 6, 2020 and October 19, 2020;

WHEREAS, on [ ], 2020 the Sewer District received [ ] proposals in response to the RFP. A proposal clarification process was conducted wherein post-proposal clarification submittals were received from each of the proposers, and the Sewer District also conducted post proposal interviews of each of the proposers;

WHEREAS, on [ ] the Sewer District, utilizing the evaluation factors and selection criteria and following the review and selection process identified in the RFP, selected the Design-Build Contractor’s proposal as being in the best interest of the Sewer District;

WHEREAS, the Sewer District initiated contract negotiations with the Design-Build Contractor which have concluded in this Design-Build Agreement;

WHEREAS, the procurement process, proposal selection, contract negotiations and award were conducted by the Sewer District in accordance with the requirements of Chapter 665 of the Session Laws of the State of New York (the “Special Legislation”);

WHEREAS, on [ ] the Sewer District’s Board of Sewer Commissioners adopted a resolution authorizing the award of this Design-Build Agreement to the Design-Build Contractor;

WHEREAS, on [ ], the County Legislature adopted a resolution authorizing the delivery of this Design-Build Agreement;

WHEREAS, under this Design-Build Agreement the Design-Build Contractor is responsible for demolition of twelve (12) existing odor control systems throughout the WWTP, (The B7 odor control vessel has already been demolished), designing, constructing, start-up, and acceptance testing thirteen (13) new odor control systems; and for making miscellaneous heating and ventilation system improvements, all as further described herein; and

WHEREAS, the Sewer District desires to receive and the Design-Build Contractor desires to provide the services provided for under the terms of this Design-Build Agreement.

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

## **ARTICLE I. DEFINITIONS AND INTERPRETATION**

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

“Acceptance Standards” has the meaning specified in Appendix H hereto.

“Acceptance Tests” means tests conducted by the Design-Build Contractor to determine if the Odor Control Systems and Improvements are fully functioning in accordance with the requirements hereof and of the Contract Documents, including, but not limited to the Acceptance Standards and Technical Specifications.

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

“Agreement Date” means the date this Design-Build Agreement has been fully executed.

“Appendix” or “Appendices” means any of the Appendices attached to this Design-Build Agreement, as the same may be amended or modified from time to time in accordance with the terms hereto.

“Applicable Law” any law, rule, codes, standards, regulation, requirement, policy, consent decree, consent order, consent agreement, permit, guideline, action, determination or



order of, or Legal Entitlement issued by, any Governmental Body having jurisdiction, applicable from time to time to any activities associated with the subject matter of this Design-Build Agreement or any other transaction or matter contemplated hereby including any of the foregoing which concern health, safety, fire, environmental protection, labor relations, mitigation monitoring plans, building codes, non-discrimination and the payment of prevailing wages, including the Prevailing Wage Law.

“Authorized Representative” means the authorized representative for either Party designated pursuant to Section 3.2(C) hereof.

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

“Beneficial Occupancy” has the meaning set forth in Section 5.8(G) hereof.

“Change in Law” means any of the following events or conditions occurring on or after the execution of this Design-Build Agreement which has a material and adverse effect on the performance by the Parties of their respective obligations under this Design-Build Agreement (except for payment obligations):

A. Inclusions: A “Change in Law” shall include:

1. The enactment, adoption, promulgation, issuance, modification or written change in administrative or judicial interpretation on or after the Design-Build Agreement Date of any federal, State or local law (except as set forth in the exclusions in (B) below), regulation, rule, requirement, guideline, ruling or ordinance, unless such law, regulation, rule, requirement, ruling or ordinance was, on or prior to the Design-Build Agreement Date, proposed and published in the Federal or New York Register or was duly adopted, promulgated, issued or otherwise officially modified or changed in interpretation;

2. The order or judgment of any federal, State or local court, administrative agency or Governmental Body, on or after the Design-Build Agreement Date, to the extent such order or judgment is not the result of willful or negligent action, error or omission or lack of reasonable diligence of the Design-Build Contractor or of the Sewer District, whichever is asserting the occurrence of a Change in Law; provided, however, that the contesting in good faith or the failure in good faith to contest any such order or judgment shall not constitute or be construed as such a willful or negligent action, error or omission or lack of reasonable diligence; or

3. The denial of an application for, delay in the review, issuance or renewal of, or suspension, termination, interruption, imposition of a term, condition or requirement which is more stringent or burdensome in connection with the issuance, renewal or

failure of issuance or renewal on or after the Design-Build Agreement Date of any Legal Entitlement to the extent that such denial, delay, suspension, termination, interruption or imposition materially and adversely affects the performance of this Design-Build Agreement, if and to the extent that such denial, delay, suspension, termination, interruption or imposition is not the result of willful or negligent action, error or omission or a lack of reasonable diligence of the Design-Build Contractor or of the Sewer District, whichever is asserting the occurrence of a Change in Law; provided, however, that the contesting in good faith or the failure in good faith to contest any such denial, delay, suspension, termination, interruption or imposition shall not be construed as such a willful or negligent action, error or omission or lack of reasonable diligence.

B. Exclusions: A “Change in Law” shall not include:

1. A change in Applicable Law pertaining to taxes;
2. A change in the law of any foreign country;
3. Any Change in Law (including the issuance of any Legal Entitlement, the enactment of any statute, or the promulgation of any regulation) the terms and conditions of which do not impose more stringent or burdensome requirements on the Design-Build Contractor than those set forth in the obligations contained herein;
4. Any change in interpretation, however stringent, by a Governmental Body of the meaning of the terms and conditions of the Legal Entitlements in force as of the Design-Build Agreement Date; or
5. A change in law pertaining to the payment of prevailing wages or benefits, including the Prevailing Wage Law.

“Change Order” means a written order to the Design-Build Contractor executed by the Parties after execution of this Design-Build Agreement, directing a change in the Work.

“Construction Work” means everything required to be furnished and done for and relating to construction of the Project by the Design-Build Contractor pursuant to this Design-Build Agreement. A reference to “Construction Work” means any part and all of the Construction Work, including demolition, unless the context requires otherwise.

“Consumables” means those materials, supplies and similar consumables required by the Design-Build Agreement and used in connection with the operation of the Odor Control System or Improvements, which may include fuel, lubricants, office supplies and other chemicals, materials, supplies and similar consumables.

“Contract Documents” means this Design-Build Agreement, all appendices, schedules and amendments hereto, Change Orders, the Technical Specifications, and all other documents listed herein, all of which form this Design-Build Agreement, and are as fully a part of this Design-Build Agreement as if attached hereto or repeated herein.

“Contract Services” means everything required to be furnished and completed for and relating to the services to be provided by the Design-Build Contractor pursuant to this Design-Build Agreement, including, but not necessarily limited to, the Design-Build Work, the Design

Work, Construction Work, start-up, commissioning and Acceptance Test obligations described in this Design-Build Agreement. The “Contract Services” are deemed an essential service.

“Cost Substantiation” means a detailed itemization and substantiation of any costs including supporting documentation, charts, graphs, photographs, reports, invoices and receipts.

“County” means the County of Rockland, New York. For the purposes of this Design-Build Agreement, the terms “County” and “Sewer District” are interchangeable.

“Days” means calendar days unless otherwise specified.

“Design-Build Agreement” means this agreement for the design, construction and commissioning of the Project. This Design-Build Agreement includes the appendices and schedules hereto and all Contract Documents, as the same may be amended or modified from time to time.

“Design-Build Commencement Date” means the date, as set forth in the Notice to Proceed, upon which the Design-Build Contractor commences providing the Contract Services.

“Design-Build Contractor” means the entity executing this Design-Build Agreement with the Sewer District to provide the Contract Services.

“Design-Build Contractor Fault” means any breach (including the untruth or breach of any Design-Build Contractor representation or warranty herein set forth), failure, non-performance or non-compliance by the Design-Build Contractor (whether or not attributable to any officer, member, agent, employee, contractor, subcontractor of any tier, or independent contractor of the Design-Build Contractor or any Affiliate of the Design-Build Contractor) with respect to its obligations and responsibilities under this Design-Build Agreement to the extent not directly attributable to any Uncontrollable Circumstance or the Sewer District Fault, and which materially and adversely affects the Sewer District’s right and obligations or ability to perform under this Design-Build Agreement.

“Design-Build Labor and Materials Payment Bond” means the bond which guarantees the timely payment by the Design-Build Contractor for all labor, materials, supplies, implements, and machinery and equipment to be furnished with respect to the Contract Services throughout the term of this Design-Build Agreement.

“Design-Build Performance Bond” means the bond which guarantees the Design-Build Contractor’s timely performance of its obligations under this Design-Build Agreement for the benefit of the Sewer District throughout the term of this Design-Build Agreement.

“Design-Build Period” has the meaning specified in Section 5.1 hereof.

“Design-Build Standards” means the standards, terms, conditions, methods, techniques and practices imposed or required by: (1) Applicable Law; (2) the Technical Specifications; (3) Good Engineering and Construction Practice; (4) applicable equipment manufacturers’ specifications; (5) applicable Insurance Requirements; and (6) any other standard, term, condition or requirement specifically provided in this Design-Build Agreement to be observed by the Design-Build Contractor.

“Design-Build Work” means the totality of the Contract Services, including but not limited to the Design Work and the Construction Work.

“Design-Build Work Warranty” means the warranty provided by the Design-Build Contractor to the Sewer District that the Contract Services, including all materials, equipment, and structures furnished, shall (i) be new, of recent manufacture and of high quality, (ii) conform to the requirements of this Design-Build Agreement, and (iii) be free of defects or faults in design, materials, equipment, performance and workmanship.

“Design Work” means everything required to be furnished and done for and relating to the design of the Project by the Design-Build Contractor pursuant to this Design-Build Agreement. A reference to “Design Work” means any part and all of the Design Work, unless the context requires otherwise.

“Direct Damages” means and includes all of the costs to complete and to perform all of the obligations of the Design-Build Contractor set forth in this Design-Build Agreement through and until the expiration of the Warranty Period, including but not limited to procurement of a new contractor or contractors, completion of the Design-Build Work, achievement of Final Acceptance, correction, repair or replacement of the Design-Build Work, redoing or correcting of design work, reissuance of Governmental Approvals, Warranty Work, and any fines, penalties, judgments and liquidated damages for delay.

“Disputed Work” has the meaning set forth in Section 5.11(G) hereof.

“Documents” means reports, data, information, records, designs, plans, drawings, specifications, proposals and other documentary submittals.

“EFC” means the New York State Environmental Facilities Corporation or any predecessor or successor agency.

“Encumbrances” means any Lien, lease, mortgage, security interest, charge, judgment, judicial award, attachment, encumbrance or restriction of any kind that is imposed on or attached to any aspect of the Project.

“Engineer” means the engineering firm engaged by and/or individuals employed by the Sewer District licensed in the State of New York having similar experience with respect to the Work.

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

“Executive Director” means the Executive Director of the Sewer District, or his or her designee.

“Event of Default” means, with respect to the Design-Build Contractor, those items specified in Section 9.2 hereof and, with respect to the Sewer District, those items specified in Section 9.3 hereof.

“Extension Period” means the period commencing on the day after the Scheduled Final Acceptance Date and ending one hundred eighty (180) days following the applicable Scheduled Final Acceptance Date, or in the event of one or more delays caused by Uncontrollable

Circumstances, the Sewer District-requested Change Orders or the Sewer District Fault occurring during such period, the date which is the next business day following the date calculated by adding to the applicable Scheduled Final Acceptance Date the aggregate number of days of such delay.

“Extra Design-Build Work” means any Design-Build Work ordered by the Sewer District pursuant to Section 5.11 hereof in addition to the Design-Build Work originally required hereunder.

“Extra Payment” has the meaning set forth in Section 5.11(B) hereof.

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

“Final Acceptance” means acceptance by the Sewer District of the Design-Build Contractor’s representation that all performance tests have been successfully performed and the Acceptance Standards have been achieved.

“Final Acceptance Date” means the dates on which the Final Acceptance has occurred or are deemed to have occurred in accordance with Section 7.8 hereof.

“Final Acceptance Date Conditions” has the meaning specified in Section 7.6 hereof.

“Final Completion” means the date of completion of the Contract Services such that Substantial Completion has been achieved, the Sewer District has inspected, tested and approved the Project, the Project is fully operational, and has achieved Final Acceptance.

“Final Punch List” means a statement of repairs, corrections and adjustments to the Contract Services, and incomplete aspects of the Contract Services.

“Fixed Design-Build Price” means the price set forth in Section 6.1 herein.

“Good Engineering and Construction Practice” means those methods, techniques, standards and practices which, at the time they are to be employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good design, engineering, equipment supply, equipment installation, construction and commissioning practices for the design and construction industries as followed in the Northeast region of the United States.

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

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

“Guarantor” means the entity to be provided by the Design-Build Contractor that will guarantee the performance and payment obligations of the Design-Build Contractor throughout the term of this Design-Build Agreement.

“Guaranty Agreement” means the written agreement to be provided to the Sewer District by the Guarantor that will guarantee the Design-Build Contractor’s payment and performance obligations throughout the term of this Design-Build Agreement.

“Improvements” means the heating and ventilation system improvements to be made by the Design-Build Contractor pursuant to this Design-Build Agreement, and as more specifically set forth in the Technical Specifications in Appendix B hereto.

“Independent Engineer” means a nationally-recognized qualified consulting engineer or firm of consulting engineers, not otherwise associated with the transactions contemplated hereby, having experience with respect to the obtaining of governmental approvals for, design, construction, testing, operation, maintenance, repair, replacement and management of wastewater treatment facilities.

“Insurance Requirement” means any rule, regulation, code, or requirement issued by any fire insurance rating bureau or anybody having similar functions or by any insurance company which has issued an insurance policy as required under this Design-Build Agreement, compliance with which is a condition to the effectiveness of such policy.

“Legal Entitlement” means all permits, licenses, registrations, approvals, authorizations, consents and entitlements of whatever kind and however described which are required under Applicable Law to be obtained or maintained by any person with respect to the Contract Services.

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

“Lien” means any and every lien against the Project or against any monies due or to become due from the Sewer District to the Design-Build Contractor under this Design-Build Agreement, for or on account of the Design-Build Work, including mechanics’, materialmen’s, laborers’ and lenders’ liens.

“Liquidated Damages” means those damages payable by the Design-Build Contractor for a failure to achieve Substantial Completion and/or Final Completion as set forth herein.

“Loss-and-Expense” means any and all actual losses, liabilities, forfeitures, obligations, damages, fines, penalties, judgments, deposits, costs, expenses, charges, Taxes, or expenses, including all Fees and Costs, except as explicitly excluded or limited under any provision of this Design-Build Agreement. “Loss-and-Expense” for the purpose of any provision under this Design-Build Agreement requiring indemnification of the Sewer District by the Design-Build Contractor shall exclude any consequential damages, but shall mean and include any Direct Damages, incurred by the Sewer District.

“Manufacturers’ Warranties” has the meaning specified in Section 8.4 hereof.

“NYSDEC” means the New York State Department of Environmental Conservation.

“Non-Binding Mediation” means the voluntary system of dispute resolution established by Section 9.9 hereof for the resolution of technical disputes arising hereunder.

“Notice to Proceed” means the document issued to the Design-Build Contractor designating the official Design-Build Commencement Date.

“Odor Control Systems” means those systems that are being demolished and constructed at the WWTP as part of this Project.

“Overhead” means an allowance to compensate for all costs, charges and expenses, direct or indirect, except for the actual cost of labor and material. Overhead shall be considered to include, but not be limited to insurance bond or bonds, field and office supervisors and assistants above the level of foremen, use of hand tools and minor equipment, incidental job burdens, general office expense, etc.

“Overdue Rate” means the maximum rate of interest permitted by the laws of the State, if applicable, or the Prime Rate, whichever is lower.

“Party or Parties” means the Sewer District and/or the Design-Build Contractor executing this Design-Build Agreement.

“Performance Guaranty” means the guarantee from the Design-Build Contractor that the Odor Control Systems and Improvements will meet the Acceptance Standards by the date for Final Completion.

“Performance Warranty” means the warranty provided by the Design-Build Contractor to the Sewer District after Final Completion.

“Prevailing Wage Law” means Articles 8 and 9 of the New York Labor Law, as amended.

“Prime Rate” means the prime rate as published in The Wall Street Journal or a mutually agreeable alternative source of the prime rate if it is no longer published in The Wall Street Journal or the method of computation thereto is substantially modified.

“Project” means the demolition, design and construction of the Odor Control Systems and Improvements as set forth in this Design-Build Agreement, including furnishing all services, labor, goods, materials, supplies, equipment and other incidentals reasonably necessary for the successful completion of Work contemplated under this Design-Build Agreement.

“Project Labor Agreement” means a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on the Project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform Project work.

“Project Site” or “Site” means those portions of the WWTP where the Work will be performed for this Project, as more specifically described in Appendix A.

“Rating Service” means Moody’s Investors Service, Inc., Standard & Poor’s Rating Services LLC, or Fitch Ratings Ltd., or any of their respective successors and assigns and, if such corporations shall be dissolved or liquidated or shall no longer perform the functions of a securities rating agency, “Rating Service” shall be deemed to refer to any other nationally-recognized securities rating agency designated by the Sewer District.

“Record Drawings” means the set of as-built drawings that show the character and installation of all Construction Work, which shall be provided to the Sewer District upon Final Completion as required by this Design-Build Agreement.

“Required Insurance” means the insurance to be provided and maintained by the Design-Build Contractor in accordance with Appendix I hereto.

“Requisition” means a written request for payment signed by the Design-Build Contractor and made in accordance with the requirements of Section 6.2.

“RFP” means the Sewer District’s Request for Proposals issued September 15, 2020 for proposals for the procurement of design-build services for the Project, including the addenda thereto.

“Schedule of Values” means the document submitted by Company to the Sewer District for approval, apportioning the entire Fixed Design-Build Price among the different elements of the Work for purposes of periodic and final payment.

“Scheduled Final Acceptance Date” means [ ], as adjusted due to Uncontrollable Circumstances, the Sewer District Fault or the Sewer District requested Change Orders not due to Design-Build Contractor Fault.

“Security Instruments” means the Guaranty Agreement, the Design-Build Performance Bond, the Design-Build Labor and Materials Payment Bond, and the Warranty Bond.

“Sewer District” means the Rockland County Sewer District No. 1, an administrative arm of the County. For the purposes of this Design-Build Agreement, the terms “County” and “Sewer District” are interchangeable.

“Sewer District Fault” means any breach (including the untruth or breach of any the Sewer District representation or warranty herein set forth), failure, non-performance or non-compliance by the Sewer District under this Design-Build Agreement (whether or not attributable to any officer, member, agent, employee, contractor, subcontractor of any tier, or any independent contractor of the Sewer District) with respect to its obligations and responsibilities under this Design-Build Agreement to the extent not directly attributable to any Uncontrollable Circumstance or Design-Build Contractor Fault, and which materially and adversely affects the Design-Build Contractor’s rights, obligations or ability or costs to perform under this Design-Build Agreement.

“Sewer District Indemnatee” has the meaning specified in Section 11.3 hereof.

“Sewer District Property” means the WWTP, the Site, and any structures, improvements, equipment, fire alarm systems, water mains, valves, pumping systems, hydrants, hydrant



connections, duct lines, lamps, lampposts, monuments, sidewalks, curbs, trees, lawns, roadways, utilities or any other systems, fixtures, or real or personal property owned, leased, operated, maintained, or occupied by the Sewer District.

“Site” or “Project Site” means those portions of the WWTP where the Work will be performed for this Project, as more specifically described in Appendix A.

“State” means the State of New York.

“Subcontract” means an agreement between the Design-Build Contractor and a Subcontractor or between two (2) Subcontractors, as applicable.

“Subcontractor” means every person (other than employees of the Design-Build Contractor) employed or engaged by the Design-Build Contractor or any person directly or indirectly in privity with the Design-Build Contractor (including every Subcontractor of whatever tier) for any portion of the Contract Services, whether for the furnishing of labor, materials, equipment, supplies, services, or otherwise in connection with the design and construction of the Project.

“Submittals” means those documents that must be submitted by the Design-Build Contractor to the Sewer District. Submittals include but are not limited to, technical submittals, general submittals, monthly progress schedules and monthly status reports, as further described herein.

“Substantial Completion” has the meaning specific in Section 7.2 hereof.

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

“Technical Dispute” means a dispute pertaining to design, engineering, technical or Acceptance Test matters, and any price or payment matter related thereto, as further detailed in Section 9.9 hereof.

“Technical Specifications” means the design and construction requirements for the Project, set forth in Appendix B.

“Term” has the meaning set forth in Article X hereof.

“Termination Date” means the last day of the Term of this Design-Build Agreement.

“Uncontrollable Circumstances” means any act, event or condition that is beyond the reasonable control of the Party relying thereon as justification for not performing an obligation or complying with any condition required of such Party under this Design-Build Agreement, and that materially interferes with or materially increases the cost or time required for performing its obligations thereunder (other than payment obligations), to the extent that such act, event or condition is not the result of the willful or negligent act, error or omission, failure to exercise reasonable diligence, or breach of this Design-Build Agreement on the part of such Party.

A. Inclusions: Subject to the foregoing, Uncontrollable Circumstances shall include the following:

1. A Change in Law;
2. Naturally occurring events (but not including reasonably anticipated weather conditions for the geographic area of the WWTP) such as landslides, underground movement, earthquakes, fires, tornadoes, floods, epidemics, lightning, and other acts of God;
3. Explosion, sabotage or similar occurrence, acts of a declared public enemy, extortion, war, terrorism, blockade or insurrection, riot or civil disturbance;
4. Nationwide strikes or strikes that by virtue of their extent or completeness make the particular goods or services effectively unavailable to the Design-Build Contractor;
5. The failure of any appropriate federal, State, authority, or local public agency or private utility having operational jurisdiction in the area in which the WWTP is located to provide and maintain Utilities, services, water and sewer lines and power transmission lines to the WWTP (but not including reasonably anticipated power outages) which are required for the performance of the Contract Services; and
6. Acts of terror of a public enemy.

B. Exclusions: It is specifically understood that none of the following acts, events or circumstances shall constitute Uncontrollable Circumstances:

1. Any act, event or circumstance to the extent that it would not have occurred if the affected Party had complied with its obligations hereunder;
2. Changes in interest rates, inflation rates, wage rates, insurance costs, commodity prices, currency values, exchange rates or other general economic conditions;
3. Changes in the financial condition of the Sewer District, the Design-Build Contractor, its Subcontractors, or its Affiliates affecting their ability to perform their respective obligations;
4. The consequences of error, neglect or omissions by the Design-Build Contractor or any of its employees, agents, suppliers, Subcontractors or Affiliates in the performance of the Contract Services;
5. The failure of the Design-Build Contractor to secure patents or licenses or similar authorizations necessary for the performance of the Contract Services;
6. Strikes (other than nationwide strikes or strikes that by virtue of their extent or completeness make the particular goods or services effectively unavailable to the Design-Build Contractor), work stoppages or other labor disputes or disturbances occurring with

respect to any activity performed or to be performed on or off the Project Site by the Design-Build Contractor, a Subcontractor, or any affiliate of either;

7. Reasonably anticipated weather conditions for the geographic area of the WWTP;
8. Labor disputes involving employees of the Design-Build Contractor, its affiliates or Subcontractors;
9. Union or labor work rules, requirements or demands which have the effect of increasing the number of employees employed at the Project or otherwise increasing the cost or burden to the Design-Build Contractor of performing the Contract Services;
10. Any act, event, circumstance or Change in Law occurring outside of the United States;
11. The failure of any Subcontractor or supplier to furnish labor, materials, services or equipment for any reason other than for acts or events specifically enumerated herein as Uncontrollable Circumstances;
12. Any increase for any reason in premiums charged by the Design-Build Contractor's insurers or the insurance markets generally for the Required Insurance;
13. Any impact of prevailing wages, laws (including the Prevailing Wage Law) or rates on the Design-Build Contractor's costs with respect to wages and benefits.
14. Mechanical failure of equipment to the extent not resulting from a condition that is listed in the "Inclusions" section of this definition;
15. The failure or delay of any Governmental Body to issue any Legal Entitlements which are required for the performance of the Contract Services;
16. Power outages to the extent not caused by third-party utilities or resulting from a condition that is listed in the "Inclusions" section of this definition; and
17. A Change in Law pertaining to income taxes.

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

"Warranty Bond" has the meaning set forth in Section 12.2 hereof.

"Warranty Period" means the period commencing on the date of Final Completion and continuing through the first anniversary of the date of Final Completion, unless otherwise extended as provided herein.

"Warranty Work" means any work performed by the Design-Build Contractor during the Warranty Period.

“Wastewater Treatment Plant or WWTP” means the Sewer District’s wastewater treatment plant located at 4 Route 340, Orangeburg, NY.

“Work” or “Design-Build Work” means the totality of the Contract Services, including but not limited to the Design Work and the Construction Work in connection with the Improvements and the Odor Control Systems.

**SECTION 1.2 INTERPRETATION.** In this Design-Build Agreement, notwithstanding any other provision hereto:

A. References Hereto. The terms “hereby,” “hereof,” “hereto,” “herein,” “hereunder” and any similar terms refer to this Design-Build Agreement and the term “hereafter” means after, and the term “heretofore” means before, the Design-Build Agreement Date.

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

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

D. Headings. The table of contents and any headings preceding the text of the Articles, Sections and subsections of this Design-Build Agreement shall be solely for convenience of reference and shall not constitute a part of this Design-Build Agreement, nor shall they affect its meaning, construction or effect.

E. Entire Agreement. This Design-Build Agreement contains the entire agreement between the Parties hereto with respect to the transactions contemplated by this Design-Build Agreement and nothing in this Design-Build Agreement is intended to confer on any person other than the Parties hereto and their respective permitted successors and assigns hereunder any rights or remedies under or by reason of this Design-Build Agreement. Without limiting the generality of the foregoing, this Design-Build Agreement shall completely and fully supersede all other understandings and agreements among the Parties with respect to such transactions, including those contained in the RFP, the proposal of the Design-Build Contractor submitted in response thereto, and any amendments or supplements to the RFP or the proposal.

F. Technical Specifications. The Technical Specifications are intended to include the basic design principles, concepts and requirements for the Design-Build Work but do not include the final, detailed designs, plans or specifications or indicate or describe each and every item required for full performance of the physical Design-Build Work and for achieving Final Acceptance. The Design-Build Contractor agrees to prepare all necessary and required complete and detailed designs, plans, drawings and specifications and to furnish and perform, without additional compensation of any kind, all Design-Build Work in conformity with the Technical Specifications and the final designs, plans, drawings and specifications based thereon.

G. Representative Detail. All indications, notation, schedules, or details in this Design-Build Agreement specifically applicable to one or a number of similar situations, materials or processes, or shown as typical or representative, shall apply to all similar situations, materials, or processes, wherever appearing in the Design-Build Work, unless this Design-Build Agreement clearly requires a contrary result. A typical or representative detail indicated on the Technical Specifications shall be the standard of workmanship and material in all corresponding parts of the Design-Build Work. Where necessary, and where inferable from the Technical Specifications, the Design-Build Contractor shall adapt such representative detail for all corresponding parts of the Design-Build Work.

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

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

J. Costs and Cost Substantiation. The Fixed Design-Build Price has been negotiated by the Parties and fixed by the terms of this Design-Build Agreement. Any other cost proposed or incurred by the Design-Build Contractor which is directly or indirectly chargeable to the Sewer District in whole or in part hereunder shall be the fair market price for the good or service provided, or, if there is no market, shall be a just and reasonable price. The Design-Build Contractor shall provide Cost Substantiation for all such other costs invoiced to the Sewer District hereunder, and for all estimates and quotations furnished to the Sewer District hereunder for the purpose of negotiating a price for Extra Design-Build Work or other additional work necessitated on account of Uncontrollable Circumstances, the Sewer District Fault or the Sewer District request.

K. Liquidated Damages. This Design-Build Agreement provides for the payment by the Design-Build Contractor of liquidated damages in certain circumstances of non-performance, delay, breach and default. Each Party agrees that the Sewer District's actual damages in each such circumstance would be difficult or impossible to ascertain (particularly with respect to the public harm that would occur as a result of such non-performance, breach or default of the Design-Build Contractor), and that the liquidated damages provided for herein with respect to each such circumstance are intended to place the Sewer District in the same economic position as it would have been in had the circumstance not occurred. Where liquidated damages are provided, such liquidated damages shall constitute the sole and exclusive remedy of the Sewer District against the Design-Build Contractor in such circumstances of non-performance, delay, breach or default, regardless of legal theory. In those cases where additional remedies are provided for, the Parties acknowledge and agree that such remedies are intended to address harms and damages that are separate and distinct from those which the liquidated damages are meant to remedy. The amounts of the liquidated damages have been determined taking into account, among other things, cost savings which a Party might realize as a result of the circumstances resulting in the requirements to pay liquidated damages and any such savings shall not mitigate or off-set the requirement of a Party to pay the full amount of such liquidated damages. Except to the extent the Design-Build Contractor is excused for Uncontrollable Circumstances or the Sewer District Breach, the Sewer District shall have the right to deduct from the Fixed Design-Build Price amounts due from the Design-Build Contractor to the Sewer District for the liquidated damages.

L. Causing Performance. A Party shall itself perform, or shall cause to be performed, subject to any limitations specifically imposed hereby with respect to Subcontractors or otherwise, the obligations affirmatively undertaken by such Party under this Design-Build Agreement.

M. Cost of Performing Excludes Cost from Legal Proceeding. The "cost of performing" a Party's obligations hereunder, when used with respect to one Party's obligation to pay additional costs incurred by the other Party, shall not include any Loss-and-Expense incurred by the Party resulting from any third-party Legal Proceeding. Notwithstanding the foregoing, each Party retains its rights to bring any Legal Proceeding or to implead the other Party as to any matter arising hereunder.

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

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

P. Delivery of Documents in Digital Format. In this Design-Build Agreement, the Design-Build Contractor is obligated to deliver Documents in connection with the performance of its duties hereunder. The Design-Build Contractor agrees that all such Documents shall be submitted to the Sewer District both in printed form (in the number of copies indicated) and, at the Sewer District's request, in digital form (electronic files). Digital copies shall consist of computer readable data submitted in AutoCAD, Microsoft Word, Microsoft Access, and Microsoft Excel or in any other similar standard interchange format which the Sewer District may reasonably request to facilitate the administration and enforcement of this Design-Build Agreement. As the Design-Build Work progresses (or upon termination of the Design-Build Contractor's right to perform the Design-Build Work), the Design-Build Contractor shall deliver to the Sewer District all Documents and electronic files. All Documents and electronic files prepared by the Design-Build Contractor are instruments of the Design-Build Contractor's professional services and not products and shall remain the Design-Build Contractor's property. Documents or electronic files provided to the Sewer District may be reproduced and used in connection with the Project without compensation to the Design-Build Contractor or other Parties. Such Documents and electronic files are not intended to be reused for any other project, without the Design-Build Contractor's express written consent. Any reuse thereof without written consent shall be at the Sewer District's sole risk and without liability or legal exposure to the Design-Build Contractor or their independent contractors or consultants. Copies of Documents that may be relied upon by the Sewer District are limited to the printed copies (also known as hard copies). Electronic files in electronic media format of text, data, graphics or of other types that are furnished by the Design-Build Contractor to the Sewer District are only for convenience of the Sewer District. Any conclusion or information obtained or derived from such electronic files will be at the Sewer District's sole risk. Because electronic files can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the Party receiving electronic files agrees that it will perform acceptance tests or procedures within sixty (60) days after receipt thereof, after which the receiving Party shall be deemed to have accepted the data thus transferred. Any errors detected within the 60-day acceptance period will be corrected by the Party delivering the electronic files. The Design-Build Contractor shall not be responsible to maintain electronic files after Final Acceptance by the Sewer District.

Q. Severability. If any clause, provision, subsection, Section or Article of this Design-Build Agreement shall be ruled invalid by any court of competent jurisdiction, then the Parties shall: (1) promptly negotiate a substitute for such clause, provision, subsection, Section or Article which shall, to the greatest extent legally permissible, effect the intent of the Parties in the invalid clause, provision, subsection, Section or Article; (2) if necessary or desirable to accomplish item (1) above, apply to the court having declared such invalidity for a judicial construction of the invalidated portion of this Design-Build Agreement; and (3) negotiate such changes in substitution for or addition to the remaining provisions of this Design-Build Agreement as may be necessary in addition to and in conjunction with items (1) and (2) above to effect the intent of the Parties in the invalid provision. The invalidity of such clause, provision, subsection, Section or Article shall not affect any of the remaining provisions hereto, and this Design-Build Agreement shall be construed and enforced as if such invalid portion did not exist.

R. No Third-Party Rights. This Design-Build Agreement is exclusively for the benefit of the Sewer District and the Design-Build Contractor and shall not provide any third-parties with any remedy, claim, liability, reimbursement, cause of action or other rights.

S. References to Days. All references to days herein are references to calendar days, including Saturdays, Sundays and holidays, except as otherwise specifically provided.

T. References to Including. All references to “including” or “includes” herein shall be interpreted as meaning “including without limitation” or “includes without limitation”, respectively.

U. References to Knowledge. All references to “acknowledge”, “knowing”, “knowledge”, “know” or “knew” shall be interpreted as references to a Party having actual knowledge.

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

W. Governing Law. This Design-Build Agreement shall be governed by and construed in accordance with the applicable laws of the State and the County.

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

Y. Conflicts in Obligations and Standards. In the event of a conflict between any provisions of this Design-Build Agreement (including the Appendices hereto) imposing any requirement, obligation, standard or guarantee on the Design-Build Contractor, the higher or more stringent requirement, obligation, standard or guarantee shall apply. As used herein, the “most stringent” shall mean the applicable Design-Build Standard that is most beneficial to the Sewer District.

Z. Drafting Responsibility. Neither of the Parties shall be held to a higher standard than any other Party in the interpretation or enforcement of this Design-Build Agreement as a whole or any portion hereof based on drafting responsibility.

## **ARTICLE II. REPRESENTATIONS AND WARRANTIES**

**SECTION 2.1 REPRESENTATIONS AND WARRANTIES OF THE SEWER DISTRICT.** The Sewer District represents and warrants that:

A. Existence and Powers. The Sewer District is an administrative agency of a municipal corporation organized and existing under the laws of New York State, with full legal right, power and authority to enter into and to perform its obligations under this Design-Build Agreement.



B. Due Authorization and Binding Obligation. The Sewer District has duly authorized the execution and delivery of this Design-Build Agreement. This Design-Build Agreement constitutes a legal, valid and binding obligation of the Sewer District, enforceable against the Sewer District in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency, moratorium or other similar laws affecting creditors' rights generally from time to time in effect.

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

D. No Approvals Required. No approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Body is required for the valid execution and delivery by the Sewer District of this Design-Build Agreement or the performance by the Sewer District of its payment or other obligations hereunder except otherwise as such have been duly obtained or made.

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

F. Sewer District Ownership Interests in the WWTP. The Sewer District owns the WWTP in fee simple.

G. Information Pertaining to the Site. To the best of its knowledge, the Sewer District has made available to the Design-Build Contractor all of the significant studies, reports and other information pertaining to the Site which the Sewer District has developed in connection with its planning and preparation work with respect to the RFP and the Project and which, in the Sewer District's opinion, may reasonably be material to the performance by the Design-Build Contractor of the Design-Build Work. The Sewer District makes no representation, however, as to the accuracy or completeness of any such information.

H. No Implied Representations or Warranties. Except as expressly set forth in this Design-Build Agreement, the Sewer District shall not be deemed to have made and has not made

(1) any representation or warranties, either express or implied, irrespective of any reviews or other action by the Sewer District, or its representatives, with respect to the Project, (2) any representations or warranties as to the compliance with Technical Specifications, design, operation, fitness for use, condition or capacity, actual or design, of the Odor Control Systems or any component thereto or the Improvements, or (3) any representations or warranties as to the suitability of the Odor Control Systems or Improvements for the purpose specified in this Design-Build Agreement or for any other purpose specified in this Design-Build Agreement or otherwise.

**SECTION 2.2 REPRESENTATIONS AND WARRANTIES OF THE DESIGN-BUILD CONTRACTOR.** The Design-Build Contractor represents and warrants that:

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

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

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

D. No Approvals Required. No approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Body is required for the valid execution and delivery of this Design-Build Agreement by the Design-Build Contractor or the performance of its payment or other obligations hereunder except as such have been duly obtained or made.

E. No Litigation. Except as disclosed in writing to the Sewer District, to the best of its knowledge, there is no Legal Proceeding, at law or in equity, before or by any court or Governmental Body pending or, to the best of the Design-Build Contractor's knowledge, overtly threatened or publicly announced against the Design-Build Contractor, in which an unfavorable

decision, ruling or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Design-Build Agreement by the Design-Build Contractor or the validity, legality or enforceability of this Design-Build Agreement against the Design-Build Contractor, or any other agreement or instrument entered into by the Design-Build Contractor in connection with the transactions contemplated hereby, or on the ability of the Design-Build Contractor to perform its obligations hereunder or under any such other agreement or instrument.

F. Claims and Demands. Except as disclosed in writing to the Sewer District, to the best of its knowledge, there are no material and adverse claims or demands based in environmental tort law, or based on breach of contract, pending or threatened against the Design-Build Contractor with respect to any other project designed and constructed by the Design-Build Contractor.

G. Applicable Law Compliance. Except as disclosed in writing to the Sewer District, to the best of its knowledge, neither the Design-Build Contractor nor any Affiliate is in material violation of any law, order, rule or regulation applicable to any projects designed and constructed by the Design-Build Contractor or any Affiliate the violation of which may subject any of the foregoing to any significant regulatory enforcement action.

H. Practicability of Performance. The Design-Build Contractor assumes and shall have exclusive responsibility for the Technical Specifications and the technology to be employed in the construction of the Project, and for their efficacy, notwithstanding the negotiation of the terms of the Technical Specifications and Acceptance Standards with the Sewer District. The Design-Build Contractor (1) assumes the risk of the practicability and possibility of performance of the Odor Control System and Improvements on the scale required hereunder and (2) agrees that sufficient consideration for the assumption of such risks and duties is included in the Fixed Design-Build Price. The Design-Build Contractor's warranties in this paragraph shall apply notwithstanding the occurrence of any Uncontrollable Circumstance other than those specifically enumerated in item (1) of the definition thereto.

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

J. Adequacy of Price and Schedule. The Design-Build Contractor has reviewed carefully the Technical Specifications and all other documents forming part of this Design-Build Agreement, as existing on the Design-Build Agreement Date. Subject to the terms of this Design-Build Agreement, the Design-Build Contractor agrees that it can perform the Design-Build Work for the Fixed Design-Build Price as required under the Technical Specifications and can achieve Final Acceptance on or before the applicable Scheduled Final Acceptance Date.

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

L. No Legal Prohibition. The Design-Build Contractor has no knowledge of any Applicable Law in effect on the date s of which this representation is being made which would prohibit the performance by the Design-Build Contractor of this Design-Build Agreement and the transactions contemplated hereby, other than the need to obtain all Legal Entitlements necessary for performance of the Contract Services.

M. Delivery of Performance Security. Prior to the Agreement Date, the Design-Build Contractor delivered to the Sewer District (i) certificates of insurance for all Required Insurance specified in Appendix I hereto; (ii) the Design-Build Performance Bond, and (iii) the Design-Build Labor and Materials Payment Bond as required by Section 12.2(A) hereof.

SECTION 2.3 KNOWLEDGE-BASED REPRESENTATIONS. Whenever a representation or warranty hereunder is made to the best of the knowledge of the Sewer District or the best of the knowledge of the Design-Build Contractor, such representation or warranty shall be deemed made, as the case may be, to the knowledge of the County Attorney and the Sewer District Executive Director or to the knowledge of the General Counsel and Chief Executive Officer of the Design-Build Contractor.

SECTION 2.4 SURVIVAL OF REPRESENTATIONS AND WARRANTIES. Notwithstanding any other provision of this Design-Build Agreement, the representations, warranties and covenants in this Article II are intended to and shall survive termination of this Design-Build Agreement.

**ARTICLE III.  
NOTICE TO PROCEED**

SECTION 3.1 NOTICE TO PROCEED – GENERALLY. The Design-Build Contractor shall not begin the Design-Build Work until after issuance by the Sewer District of a Notice to Proceed.

SECTION 3.2 CONDITION PRECEDENT TO NOTICE TO PROCEED. As a condition precedent to the issuance by the Sewer District of a Notice to Proceed, within ten (10) business days following the Design-Build Agreement Date, the Sewer District and the Design-Build Contractor shall each designate in writing a person to transmit instructions, receive information and otherwise coordinate service matters arising pursuant to this Design-Build Agreement during the Design-Build Period (each, an “Authorized Representative”). Either Party may designate a successor or substitute Authorized Representative at any time by written notice to the other.

SECTION 3.3 NOTICE TO PROCEED NOT TO BE UNREASONABLY WITHHELD. Upon satisfaction by the Design-Build Contractor of the condition precedent listed in Section 3.2 hereof, the Sewer District shall issue a Notice to Proceed directing the Design-Build Contractor to commence the Design-Build Work. Such Notice to Proceed shall not be unreasonably withheld by the Sewer District.

## **ARTICLE IV. OWNERSHIP AND FINANCING OF THE PROJECT**

**SECTION 4.1 SEWER DISTRICT OWNERSHIP.** The Sewer District shall retain ownership of the WWTP, Site and all buildings and other improvements now existing and to be made thereon. The Design-Build Contractor shall perform the Design-Build Work provided for herein as an independent contractor and shall not have any legal, equitable, tax beneficial or other ownership or leasehold interest in the WWTP, the Odor Control Systems, the Improvements or the Site.

### **SECTION 4.2 FINANCING.**

(A) **Financing Generally.** The Sewer District shall secure the availability of all funds necessary to pay the Fixed Design-Build Price in a timely manner, whether through the authorization or issuance of revenue or debt obligations of the Sewer District, or otherwise as determined by the Sewer District.

(B) **Records.** In accordance with Applicable Law, the Project shall be subject to periodic site visits for reviews and inspections of the Project progress, records, and accounts. All Project management and fiscal records shall be maintained by the Sewer District and the Design-Build Contractor for a period of five (5) years following the Project's completion.

(C) **Financing Assistance.** The Design-Build Contractor shall cooperate with and assist the Sewer District by providing any information, certifications or documents which may be reasonably required in connection with the issuance of the Sewer District debt obligations or otherwise obtaining the funds necessary to pay the Fixed Design-Build Price.

### **SECTION 4.3 NEW YORK STATE WATER INFRASTRUCTURE IMPROVEMENT ACT GRANT.**

This Project has been awarded a NYS Water Infrastructure Improvement Act grant. The Design-Build Contractor agrees to comply with the contract provisions required by the Environmental Facilities Corporation ("EFC") in connection with the grant, including requirements regarding New York State certified service-disabled veteran-owned business, and New York State certified minority- and women-owned business enterprises and equal employment opportunities for minority group members and women. The required contract language is set forth in Appendix D. Also, the EFC Program Requirements and Bid Packet for Construction Contracts are attached hereto as Appendix N and copy of the grant award is attached as Appendix O.

## **ARTICLE V. DESIGN AND CONSTRUCTION OF THE PROJECT**

**SECTION 5.1 DESIGN-BUILD PERIOD – GENERALLY.** The period beginning on the Design-Build Commencement Date and ending at Final Completion shall be referred to as the Design-Build Period. The Design-Build Contractor shall complete all Design-Build Work during the Design-Build Period; provided, however, that the Design-Build Contractor shall not begin design and construction at the Site until after issuance by the Sewer District of the Notice to Proceed. During the Design-Build Period, the Design-Build Contractor shall be entitled to payments for Design-Build Work as provided in this Article.

### **SECTION 5.2 SITE SUITABILITY CONFIRMATION.**

(A) **Site Familiarity.** The Design-Build Contractor acknowledges that the Design-Build Contractor's agents and representatives have visited, inspected and are familiar with the WWTP and the Site, its surface physical conditions relevant to the obligations of the Design-Build Contractor pursuant to this Design-Build Agreement; that the Design-Build Contractor is familiar with all local and other conditions which may be material to the Design-Build Contractor's performance of its obligations under this Design-Build Agreement (including, but not limited to transportation; seasons and climate; access, availability, disposal, handling and storage of materials and equipment; and availability and quality of labor and Utilities), and has received and reviewed all information regarding the Site provided to it as part of the RFP or obtained in the course of performing its obligations hereunder; and that based on the foregoing, the Site constitutes an acceptable and suitable site for the Project in accordance herewith, and the Odor Control Systems and Improvements can be constructed on the Site within the Fixed Design-Build Price and by the applicable Scheduled Final Acceptance Date.

(B) **Sewer District-Supplied Information.** The Design-Build Contractor shall be responsible for the independent verification and confirmation of all information supplied to it by or on behalf of the Sewer District and upon which it elects to rely upon in connection herewith. Except as otherwise provided in this Design-Build Agreement, no error or omission in any such information shall constitute an Uncontrollable Circumstance, or relieve the Design-Build Contractor from any of its obligations or entitle the Design-Build Contractor to any increase in compensation hereunder.

(C) **Site Access During Design-Build Period.** The execution of this Design-Build Agreement shall be deemed to constitute the granting of a license to the Design-Build Contractor to access the Site for the purposes of: (1) performing engineering, analysis and such additional studies or tests as deemed necessary by the Design-Build Contractor; and (2) performing all necessary onsite activities pursuant to this Section. Such access shall be subject to the Sewer District's prior approval, which shall not be unreasonably withheld, as to time and scope. The Design-Build Contractor shall assume all risks associated with such activities and indemnify, defend and hold harmless the Sewer District and the Sewer District Indemnitees in accordance with Section 11.3 hereof from and against all Loss-and-Expense arising therefrom. On and after the Design-Build Commencement Date, the Sewer District shall also provide to the Design-Build

Contractor licenses in, over, or to the Site as may be necessary to permit the Design-Build Contractor to perform its obligations hereunder for the Term of this Design-Build Agreement.

### SECTION 5.3 DESIGN-BUILD WORK GENERALLY.

(A) Commencement of Design-Build Work. On the Design-Build Commencement Date, the Design-Build Period shall commence and the Design-Build Contractor shall promptly proceed to undertake, perform and complete the Design-Build Work in accordance with the Design-Build Standards. The time for completion of the Design-Build Contractor's performance of the Design-Build Work shall be computed from the Design-Build Commencement Date. The Design-Build Contractor's failure to achieve Final Completion on or before the date set for Final Completion in accordance with Section 7.12 hereof shall result in the assessment of delay liquidated damages under Section 7.9 hereof.

(B) Title and Risk of Loss. Title to the improvements, fixtures, machinery, equipment and materials constituting the Project shall pass to the Sewer District upon delivery to the Site or upon payment therefore by the Sewer District, whichever is earlier. The Design-Build Contractor shall, however, bear all risk of loss concerning such improvements, fixtures, machinery, equipment and materials until Final Completion has occurred, regardless of the extent to which the loss was insured or the availability of insurance proceeds.

(C) Elements of the Design-Build Work. In performing the Design-Build Work generally, the Design-Build Contractor shall, in accordance with the Design-Build Standards, including the Technical Specifications, and without limitation, as and to the extent applicable hereunder: (1) prepare the Site; (2) obtain any required Governmental Approvals; (3) demolish the Odor Control Systems as identified in the Technical Specifications; (4) design and construct the Odor Control Systems and Improvements; (5) conduct commissioning and start-up operations; (6) conduct the Acceptance Tests; and (7) decommission any existing equipment, if necessary, all so that the Odor Control Systems and Improvements are suitable and adequate for the purposes thereto. Laydown and staging areas for construction materials shall be located at the WWTP, on the Site or other areas as identified in Appendix A hereto, or at other locations approved by the Sewer District and any other appropriate Governmental Body and arranged and paid for by the Design-Build Contractor.

(D) Quality Assurance and Quality Control. The Design-Build Contractor shall have full responsibility for quality assurance and quality control for the Design-Build Work, including the requirements set forth in the Technical Specifications in Appendix B hereto.

(E) Applicable Law. All Design-Build Work shall be performed in accordance with Applicable Law.

(F) Health and Safety. All Design-Build Work shall be performed in accordance with all health and safety standards required by Applicable Law, any applicable Insurance Requirements, the Health and Safety plan set forth in Appendix M, and the other Design-Build Standards.



(G) Subcontractors. Section 13.5 hereof shall be applicable to the Design-Build Contractor's use of Subcontracts and Subcontractors in connection with the Design-Build Work.

(H) Damage or Destruction to the Design-Build Work. The procedures set forth in Article V hereof shall be applicable in the event of any damage to or the destruction of the Design-Build Work.

(I) Encumbrances. The Design-Build Contractor shall promptly discharge or bond any Encumbrance arising on the WWTP, Site or Design-Build Work arising out of the Design-Build Contractor's work on the Project, unless such bond or Encumbrance is the result of the Sewer District Fault.

(J) Payment of Costs. The Design-Build Contractor shall pay directly all costs and expenses of the Design-Build Work of any kind or nature whatsoever, including all costs of permitting (regardless of permittee); regulatory compliance and Legal Proceedings brought against the Design-Build Contractor; obtaining and maintaining the Security Instruments; payments due under this Design-Build Agreement, Subcontracts with Subcontractors or otherwise for all labor and materials; legal, financial, engineering, architectural and other professional services of the Design-Build Contractor; sales, use and similar taxes on building supplies, materials and equipment (unless tax-exempt due to the Sewer District's tax-exempt status); general supervision by the Design-Build Contractor of all Design-Build Work; Design-Build Contractor preparation of schedules, budgets and reports; keeping all construction accounts and cost records; and all other costs required to achieve Final Acceptance and Final Completion and to perform Warranty Work.

(K) Protecting the WWTP. The Design-Build Contractor shall undertake all Design-Build Work and Acceptance Tests in a manner that protects the WWTP, including its equipment and structures from any damage, interruption of operation, loss of power or the occurrence of another event which would interfere with the ongoing operations at the WWTP during construction.

(L) Permit Applications and Fee Payments. The Design-Build Contractor shall obtain, in a timely manner, any and all Governmental Approvals which are required for the Project, including design, construction and Acceptance Testing. The Design-Build Contractor only shall submit such applications as it deems in good faith to be complete, including all necessary studies and documentation. The Design-Build Contractor shall pay all standard permit fees, permitting agency costs and charges due in connection therewith, and shall take all action necessary on behalf of the Sewer District as applicant in connection with all associated permitting proceedings before all appropriate Governmental Bodies, if and to the extent required. The Sewer District shall cooperate with the Design-Build Contractor in the submittal of all applications for Governmental Approvals which the Design-Build Contractor is obligated to submit pursuant to this Design-Build Agreement. Except for the imposition of an unforeseeable, arbitrary or capricious term, condition or requirement, the Design-Build Contractor (without reimbursement by the Sewer District) shall pay all costs in obtaining Government Approvals for Design-Build Work, including costs related to any changes in the Design-Build Work required to obtain any Government Approvals.

(M) Permit Issuance. In the event a Governmental Approval cannot be obtained within a reasonable period of time (as determined by the Sewer District), for reasons other than Design-Build Contractor Fault, such failure to obtain a Governmental Approval shall be considered an Uncontrollable Circumstance.

(N) Project-Related Plans. The Design-Build Contractor shall prepare and submit to the appropriate Governmental Body, as needed to support any permit applications or meet permit conditions or as otherwise required by a Governmental Body, all Project-related plans.

(O) Utilities. The Design-Build Contractor shall make all arrangements necessary to secure the availability of all Utilities required to construct, install, commission and test the Work.

(Q) Preconstruction Conference. The Design-Build Contractor shall conduct a preconstruction conference with the Sewer District no later than thirty (30) days prior to the initiation of any construction activity at the Site.

(R) Design-Build Work Schedule. The Design-Build Contractor shall prepare and provide to the Sewer District the schedule for the Design-Build Work in accordance with Appendix G hereto.

(S) Design-Build Contractor Support. The Design-Build Contractor shall provide the Sewer District with such information as the Sewer District reasonably believes is necessary, and shall participate, if necessary, in board meetings and/or public meetings as the Sewer District may from time to time require during the Design-Build Period to provide ongoing design and construction information, updates and notifications to the Sewer District's Board of Commissioners and the public relating to the Design-Build Work.

#### SECTION 5.4 DESIGN-BUILD CONTRACTOR DESIGN.

(A) Sole Responsibility and Liability. The Design-Build Contractor shall have the sole and exclusive responsibility and liability for the design, construction, performance, commissioning and Acceptance of the Project hereunder, notwithstanding the Design-Build Standards or the fact that the RFP for the Design-Build Work may have included certain minimum design criteria for the Design-Build Work and certain performance standards that the Project would be required to meet. The Design-Build Contractor acknowledges that, in the proposal and clarification process leading to the execution of this Design-Build Agreement, the Design-Build Contractor had the unrestricted right and opportunity not to submit a proposal, and not to execute this Design-Build Agreement if the Design-Build Contractor had determined that such minimum design criteria would in any manner or to any degree impair the Design-Build Contractor's ability to perform the Design-Build Work in compliance herewith.

(B) Licensed Architect/Engineer. All Design Work required by this Design-Build Agreement shall be performed, as applicable, by licensed architects and engineers registered in New York State. In the case of termination of an architect or engineer, the Design-Build Contractor shall provide the services of another lawfully licensed person or entity against whom the Sewer District makes no reasonable objection. If the Sewer District transmits payment(s) for

professional design or engineering services to the Design-Build Contractor, or a third-party, the Design-Build Contractor or third-party shall be deemed an agent for the purposes of receipt and payment of monies and shall immediately pay such funds to the authorized entity or licensed design or engineering professional. If the Sewer District transmits payment(s) for professional design or engineering services to the Design-Build Contractor, or a third-party, that payment methodology shall not, in any way, alter the duties and responsibilities of the Parties under this Design-Build Agreement.

(C) Conformity of Design-Build Contractor Design Documents with the Technical Specifications. The Design-Build Contractor shall prepare all plans, technical specifications, drawings, blueprints and other design documents necessary or appropriate to carry out and complete the Design-Build Work. All Design-Build Contractor working and final design documents shall comply strictly with the Design-Build Standards so that the Odor Control Systems and Improvements are constructed to a standard of quality, integrity, durability and reliability which is equal to or better than the Design-Build Standards. The Sewer District shall have the right to review such design documents as provided in Appendix E hereto, but shall have no right of approval with respect thereto except in order to confirm the compliance and consistency of the design documents with the Technical Specifications. Neither compliance by the Design-Build Contractor with the Technical Specifications, nor review by the Sewer District or its engineer of the Design-Build Contractor's design documents, shall in any way relieve the Design-Build Contractor of full responsibility for the design, construction, commissioning and performance of the Odor Control Systems or Improvements in accordance with the Design-Build Standards. Architects and engineers engaged by the Design-Build Contractor for the Project to provide design services shall be experienced and qualified to perform such services and shall be licensed in the State and shall be selected in the manner provided in Section 13.5 hereof.

(D) The Sewer District's Interest in the Technical Specifications. The Design-Build Contractor acknowledges the Sewer District's material interest in each provision of the Technical Specifications and agrees that no change to the Technical Specifications shall be made except upon the terms and conditions set forth in this Section and pursuant to a Change Order or pursuant to Section 5.4(H). The Sewer District reserves the right to review and comment upon the final design of the Odor Control Systems and Improvements insofar as it relates to compliance with the Technical Specifications.

(E) Design-Build Contractor Requested Changes. If the Design-Build Contractor requests any changes to the Technical Specifications, they shall be subject to the sole discretion of the Sewer District and shall be handled in the same manner as provided in Section 5.11 hereof.

(F) Procedure for the Sewer District Review of Design Submittals. The procedures for the Sewer District review of design submittals are set forth in Appendix E hereto.

(G) Documents at the Site. The Design-Build Contractor shall maintain in a safe place one record copy of all drawings, specifications, addenda, Change Orders, graphic or written instructions, interpretations and clarifications, and all other documents related to the Design-Build Work, in good order and marked currently to record all changes made during

construction, together with blueprints, general arrangements, manufacturing and shop drawings, product data and samples, and copies of all building, electrical, plumbing and public safety codes applicable to the Design-Build Work. These documents shall be available to the Sewer District for reference, copying and use, and a complete set thereto shall be delivered to the Sewer District upon completion of the Design-Build Work.

(H) Permissible Variations in the Preliminary Design Drawings. Minor variations from the preliminary drawings in Appendix C may be permitted in the final design of the Project (without a Change Order) to the extent such variations do not diminish (in the opinion of the Sewer District) the quality, integrity, durability, functionality or reliability of the Project. No such variations shall be inconsistent with the Technical Specifications set forth in Appendix B. Any such minor variations shall require affirmative, written consent by the Sewer District. Any variations from the preliminary drawings in Appendix C that do not conform to the requirements of this Section shall require a Change Order.

#### SECTION 5.5 COMPLIANCE WITH APPLICABLE LAW.

(A) Compliance with Law and Equipment Operating Requirements. In designing, constructing, starting up and testing the Odor Control Systems and Improvements, the Design-Build Contractor shall comply with Applicable Law, shall construct all equipment and systems comprising Odor Control Systems and Improvements in accordance with the Design-Build Standards and applicable equipment manufacturer's specifications and recommendations.

(B) Compliance with Conditions in Governmental Approvals. The Design-Build Contractor shall comply with all conditions and requirements of all Governmental Approvals required to be made, obtained or maintained under Applicable Law in connection with the continuance of the Design-Build Work.

SECTION 5.6 CONSTRUCTION PRACTICE. The Design-Build Contractor shall perform the Design-Build Work in accordance with the Design-Build Standards and shall have exclusive responsibility for all construction means, methods, techniques, sequences, and procedures necessary or desirable for the correct, prompt, and orderly prosecution and completion of the Design-Build Work as required by this Design-Build Agreement. The responsibility to provide the construction means, methods, techniques, sequences and procedures referred to above shall include, but not be limited to, the obligation of the Design-Build Contractor to provide the following construction requirements: temporary power and light; temporary offices and construction trailers; required design certifications; required approvals; weather protection; Site clean-up and housekeeping; construction trade management; temporary parking; vehicle traffic; safety and first aid facilities; correction of or compensation for defective work or equipment; Subcontractors' insurance; storage areas; workshops and warehouses; temporary fire protection; Site security; temporary Utilities; potable water; sanitary services; Subcontractor and vendor qualification; receipt and unloading of delivered materials and equipment; erection rigging; temporary supports; and construction coordination.

SECTION 5.7 PROGRESS SCHEDULE. The Design-Build Contractor shall submit to the Sewer District a monthly progress schedule by the tenth (10th) day of each month. The

monthly progress schedule shall comply with the requirements of Appendix G hereto and shall include a recovery schedule in the event there is any deviation or noncompliance with the progress schedule. The Design-Build Contractor agrees that the Design-Build Contractor's submission of the monthly progress schedule (or any revised progress schedule) is for the Sewer District's information only, and the Sewer District's acceptance of the monthly progress schedule (or any revised progress schedule) shall not bind the Sewer District in any manner. Thus, the Sewer District's acceptance of the monthly progress schedule (or any revised monthly progress schedule) shall not imply the Sewer District approval or consent to any of the matters set forth therein.

#### SECTION 5.8 CONSTRUCTION MONITORING, OBSERVATIONS, TESTING AND UNCOVERING OF WORK.

(A) Observation and Design Review Program. During the progress of the Design-Build Work through Final Acceptance, the Design-Build Contractor shall at all times during normal working hours afford the Sewer District and its engineer every reasonable opportunity for observing all Design-Build Work, and shall comply with the Communications and Project Documentation Review Procedures set forth in Appendix E hereto. During any such observation, all representatives of the Sewer District and its engineer shall comply with all reasonable safety and other rules and regulations applicable to presence in or upon the Site or the WWTP, including those adopted by the Design-Build Contractor, and shall in no material way interfere with the Design-Build Contractor's performance of any Design-Build Work. The Design-Build Contractor shall provide the Sewer District with five (5) copies of the construction design drawings, blueprints, detailed plans and of all other Deliverable Materials, including manufacturing and shop drawings and the design development submittals in accordance with Appendix E hereto.

(B) Design-Build Contractor Tests. The Design-Build Contractor shall conduct all tests of the Design-Build Work and inspections required by the Design-Build Standards, including the Technical Specifications in Appendix B hereto. The Design-Build Contractor shall give the Sewer District and its engineer reasonable advance notice (at least thirty (30) days) of tests or inspections prior to the conduct thereto. If required by the Design-Build Standards, the Design-Build Contractor shall engage a registered engineer or architect, at its sole cost and expense, to conduct or witness any such test or inspection. In addition to the foregoing, Acceptance Testing of the performance of the completed Project shall be conducted in accordance with Article VII hereof and Appendix H hereto.

(C) Sewer District Tests, Observations and Inspections. The Sewer District, its employees, agents, representatives and contractors (which may be selected in the Sewer District's sole discretion), and all Governmental Bodies having lawful jurisdiction, may at any reasonable time and with reasonable notice conduct such on-site observations and inspections, and such civil, structural, mechanical, electrical, or other tests as the Sewer District deems necessary or desirable to ascertain whether the Design-Build Work complies with this Design-Build Agreement. The costs of such test, observation or inspection shall be borne by the Sewer District unless such test, observation or inspection reveals a material failure of the Design-Build

Work to comply with this Design-Build Agreement or Applicable Law, in which event the Design-Build Contractor shall bear all reasonable costs and expenses of such observation, inspection or test. In the event that any requested test, observation or inspection causes a material delay in the construction schedule, the applicable Scheduled Final Acceptance Date shall be adjusted to reflect the actual period of time needed for completion as directly caused by the requested testing, but only if such testing, observation or inspection does not reveal any material failure or non-compliance as set forth herein.

(D) Certificates and Reports. The Design-Build Contractor shall secure and deliver to the Sewer District promptly, at the Design-Build Contractor's sole cost and expense, all required certificates of inspection, test reports, work logs, and certified payroll and approvals with respect to the Design-Build Work as and when required by the Design-Build Standards. The Design-Build Contractor shall provide to the Sewer District, immediately after the receipt thereto, copies of any notice of default, breach or non-compliance received by the Design-Build Contractor under or in connection with any Governmental Approval, Subcontract or Security Instrument pertaining to the Design-Build Work.

(E) Notice of Covering Design-Build Work. The Design-Build Contractor shall give the Sewer District reasonable notice (at least ten (10) business days) in the monthly progress schedule of its upcoming schedule with respect to the covering and completion of any Design-Build Work, and shall update such notice, if necessary, within a reasonable time period before such covering and completion. The Sewer District shall give the Design-Build Contractor reasonable notice of any intended inspection or testing of such Design-Build Work in progress prior to its covering or completion, which notice shall be sufficient to afford the Sewer District a reasonable opportunity to conduct a full inspection of such Design-Build Work. At the Sewer District's written request, the Design-Build Contractor shall take apart or uncover for inspection or testing any previously-covered or completed Design-Build Work; provided, however, that the Sewer District's right to make such requests shall be limited to circumstances where there is a reasonable basis for concern by the Sewer District that the disputed Design-Build Work may not conform with the requirements of this Design-Build Agreement. The cost of uncovering, taking apart, or replacing such Design-Build Work along with the costs related to any delay in performing Design-Build Work caused by such actions, shall be borne as follows:

(1) by the Design-Build Contractor, if such Design-Build Work has been covered prior to any observation or test required by the Design-Build Standards or if such Design-Build Work has been covered prior to any observation or test for which the Sewer District has not been provided reasonable advance notice hereunder or did not observe the test; and

(2) in all other cases, as follows:

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

(b) by the Sewer District, if such observation or test reveals that the Design-Build Work complies with this Design-Build Agreement.

In the event, under subsection (2)(b) above, where such Design-Build Work does comply with this Design-Build Agreement, if the Design-Build Contractor experiences a delay caused by such observation or test, the Design-Build Contractor shall be entitled to an extension of time to be mutually agreed to by the Parties.

(F) Meetings and Design-Build Review. During the Design-Build Period, the Design-Build Contractor and the Sewer District shall conduct meetings on a monthly basis at a minimum. At such meetings, discussions shall be held concerning all aspects of the Design-Build Work including design and construction schedules, progress payments, shop drawings, and shop test results. Monthly reports containing all relevant information shall be prepared by the Design-Build Contractor and provided to the Sewer District at least two (2) business days prior to each monthly meeting, together with an agenda for the meeting. The Design-Build Contractor shall also attend any on-call meeting which may be required by the Sewer District from time to time in connection with the Design-Build Work, provided that the Design-Build Contractor has at least twenty-four (24) hours' notice of such meeting. The Design-Build Contractor shall provide to the Sewer District, for its planning, budgeting and financing purposes, monthly estimates of the commencement date for start-up operations, the date upon which the Acceptance Tests shall commence, and the Final Acceptance Date.

(G) Beneficial Occupancy. After Substantial Completion, the Sewer District shall have the right to take possession of and use any completed or partially completed portion of the Design-Build Work, notwithstanding the time for completing the entire Design-Build Work may not have expired. Taking possession and use shall not be deemed an acceptance of any Design-Build Work. The Sewer District's utilization of any portion of the Odor Control Systems or Improvements prior to Final Completion shall not relieve the Design-Build Contractor of any of its obligations under this Design-Build Agreement. The Sewer District's utilization of any portion of the Design-Build Work prior to Final Completion of the Project shall not be a representation by the Sewer District that such portions of the Design-Build Work are free from defects or a waiver of any of the Sewer District's rights and/or remedies in connection therewith. Upon occupancy by the Sewer District, the Sewer District will notify the Design-Build Contractor as to what portion or portions of the Design-Build Work have been placed into Beneficial Occupancy.

#### SECTION 5.9 CORRECTION OF DESIGN-BUILD WORK.

(A) Correction of Non-Conforming Design-Build Work. Throughout the Term of this Design-Build Agreement including the Warranty Period, the Design-Build Contractor shall complete, repair, replace, restore, re-perform, rebuild and correct promptly any Design-Build Work which does not conform with the Design-Build Standards and all other requirements of this Design-Build Agreement.

(B) Election to Accept Non-Conforming Design-Build Work. The Sewer District may elect by Change Order, at the Design-Build Contractor's request, to accept non-conforming Design-Build Work and charge the Design-Build Contractor (by a reduction in the Fixed Design-Build Price) for the amount agreed upon by the Parties by which the value of the Design-Build Contractor's services or Design-Build Work has been reduced.

(C) Relation to Other Obligations. The obligations specified in this Section establish the Design-Build Contractor's specific obligation to correct the Design-Build Work and shall not be construed to establish any limitation with respect to any other obligations or liabilities of the Design-Build Contractor under this Design-Build Agreement. This Section is intended to supplement (and not to limit) the Design-Build Contractor's obligations under the Acceptance Standards and any other provisions of this Design-Build Agreement or Applicable Law.

(D) Sewer District Corrective Action. Notwithstanding any other provision in this Section to the contrary, the Sewer District shall have the right, but not the obligation, to perform any construction obligation of the Design-Build Contractor relating to matters of health, safety, environment or nuisance that the Design-Build Contractor has failed to perform after fifteen (15) days' notice and to charge the Design-Build Contractor the cost of such corrective action on a Cost Substantiation basis.

#### SECTION 5.10 DAMAGE TO THE DESIGN-BUILD WORK.

(A) Damage Prevention. From the Design-Build Commencement Date until Final Acceptance (or whenever earlier or later performing Design-Build Work on the Site), the Design-Build Contractor shall use care and diligence, and shall take all appropriate precautions, except as a result of Uncontrollable Circumstances, to protect the Design-Build Work and the Site and the property or other persons (including any materials, equipment, or other items furnished by the Sewer District) from damage prior to the Final Acceptance Date. For such purpose, the Design-Build Contractor shall provide fencing, protective features (such as tarpaulins, boards, boxing, frames, canvas guards, and fireproofing), and other safeguards to the extent the Design-Build Contractor reasonably determines such are necessary and proper in the performance of the Design-Build Work.

(B) Restoration. In case of damage or destruction to the Design-Build Work, the WWTP or the Site resulting from any cause, except those occurring as a result of Uncontrollable Circumstances, and regardless of the extent thereto or the estimated cost of repair, replacement or restoration, and whether or not any insurance proceeds are sufficient or available for the purpose, the Design-Build Contractor shall immediately undertake and complete the repair, replacement and restoration of the damage or destruction to Design-Build Work to the character and condition thereto existing immediately prior to the damage or destruction in accordance with the construction procedures set forth herein, as applicable, all at the Design-Build Contractor's sole cost and expense, except in the event that such damage or destruction is caused by the Sewer District Fault.

(C) Notice and Reports. The Design-Build Contractor shall notify the Sewer District immediately of any damage or destruction to the Design-Build Work, the WWTP or the Site or any accident or permit violation on the Site, including but not limited to damage to sensitive areas, permit conditions violations, fires and injuries. Additionally, the Design-Build Contractor shall notify the insurers under any risk insurance and all applicable Required Insurance of any damage or destruction to the Design-Build Work, WWTP or the Site, or any accidents at the WWTP or on the Site, as promptly as possible after the Design-Build Contractor learns of any such damage, destruction or accidents. As soon as practicable after learning of any such



occurrence, the Design-Build Contractor shall submit a full and complete written report to the Sewer District. The Design-Build Contractor shall also submit to the Sewer District within twenty-four (24) hours copies of all reports relating to the subject matter of this subparagraph which are filed with, or given to the Design-Build Contractor by any insurance company, adjuster or Governmental Body.

(D) Repair of the Sewer District Private Property. The Design-Build Contractor shall promptly repair or replace all the Sewer District Property and all private property damaged by the Design-Build Contractor or any Subcontractor (or any officer, director, employee, representative or agent of the Design-Build Contractor or Subcontractor) in connection with the performance of, or the failure to perform, the Design-Build Work. The repair and replacements shall restore the damaged property, to the maximum extent reasonably practicable, to its character and condition existing immediately prior to the damage.

#### SECTION 5.11 CHANGE ORDERS AND EXTRA DESIGN-BUILD WORK.

(A) Right to Issue Change Orders. The Sewer District, subject to the provisions of subsection (F) of this Section, may issue Change Orders pertaining to any and all aspects of the Design-Build Work at any time and for any reason whatsoever, whether and however such Change Orders revise this Design-Build Agreement, add Extra Design-Build Work or omit Design-Build Work or affect the Scheduled Final Acceptance Date.

(B) Obligation to Complete Extra Design-Build Work. The Design-Build Contractor shall, except to the extent excused under subsection (F) of this Section, undertake and complete promptly all Extra Design-Build Work authorized under this Section. The Design-Build Contractor shall not commence performance of any Extra Design-Build Work without a Change Order authorized by the Sewer District. The Design-Build Contractor shall be entitled to additional compensation for Extra Design-Build Work determined in accordance with this Section ("Extra Payment").

(C) Effect of Design-Build Contractor Fault. The Design-Build Contractor shall not be entitled to any Extra Payment for any Extra Design-Build Work, if required by reason of any Design-Build Contractor Fault. The Fixed Design-Build Price shall be reduced for omitted Design-Build Work resulting from any Design-Build Contractor Fault by the greater of: (1) the reduction in value of the Project due to the omitted Design-Build Work; or (2) the reduction in the Design-Build Contractor's cost of the Design-Build Work.

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

(E) Proposal for Extra Design-Build Work. The Design-Build Contractor shall submit a written quotation on a lump-sum basis for Extra Design-Build Work covered by any Change Order. The Design-Build Contractor shall include with each quotation Cost Substantiation therefore. Any such quotation shall be deemed the Design-Build Contractor's offer to the Sewer District, binding for ninety (90) days to perform the Extra Design-Build Work

at the price quoted. In addition, each quotation shall include the effect, if any, of the Extra Design-Build Work on the progress schedule, the Scheduled Final Acceptance Date, the Fixed Design-Build Price and any of the other obligations of the Design-Build Contractor under this Design-Build Agreement. Upon such lump-sum price being agreed to by the Parties, such price shall not be further subject to Cost Substantiation.

(F) Conditions to Obligation to Proceed. The Parties shall promptly proceed to negotiate in good faith to reach agreement on the price to be paid by the Design-Build Contractor for the Extra Design-Build Work and on the effect of the Extra Design-Build Work on any other obligations of the Design-Build Contractor under this Design-Build Agreement. The Design-Build Contractor shall not be obligated to proceed with the Extra Design-Build Work except following agreement as to the price to be paid therefore and its other obligations hereunder which are necessitated by the Change Order requiring the Extra Design-Build Work. Payments for Extra Design-Build Work shall be paid only as a Fixed Design-Build Price Adjustment. Except to the extent that the Sewer District and the Design-Build Contractor shall agree, no such work shall modify the Scheduled Final Acceptance Date, or revise any other term or condition of this Design-Build Agreement. The Design-Build Contractor shall have no right of objection with respect to such work if the Sewer District affords the Design-Build Contractor price, schedule and any other relief hereunder agreed to by the Parties to be necessary to avoid any such impairment.

(G) Disputed Work. If the Design-Build Contractor is of the opinion that any Design-Build Work which it elects to perform in the absence of any agreement hereunder is Extra Design-Build Work and not original Design-Build Work ("Disputed Work"), the Design-Build Contractor shall give the Sewer District thirty (30) days' written notice of dispute before commencing the Disputed Work. The methods for resolution of the Disputed Work shall be determined as provided in the dispute resolution provisions of Section 9.9. In such case, the Design-Build Contractor shall keep and present, in such form as the Sewer District may request, an itemized accounting to go with Cost Substantiation and other appropriate supporting data with respect to the Design-Build Contractors position.

(H) Notice; Waiver. The Design-Build Contractor shall give the Sewer District at least thirty (30) days' prior written notice of the scheduling of all Extra Design-Build Work and all Disputed Work.

(I) Third-Party Performance. Notwithstanding the foregoing, the Sewer District shall have the right to have a third-party contractor perform any Extra Design-Build Work provided that no such third-party performance of any Extra Design-Build Work shall materially impair the Design-Build Contractor's ability to perform, impose any material additional obligation or liability on the Design-Build Contractor, or materially increase the Design-Build Contractor's cost hereunder. The Design-Build Contractor shall have no right to object to the performance of any Extra Design-Build Work so long as the Sewer District affords the Design-Build Contractor price, schedule, performance and any other relief necessary to avoid any such material effect.

SECTION 5.12 DELIVERABLE MATERIAL. As the Design-Build Work progresses (or upon the termination of the Design-Build Contractor's right to perform the Design-Build

Work), the Design-Build Contractor shall deliver to the Sewer District all documents, reports, design and construction submittals and other information and materials (“Deliverable Material”) required to be delivered under this Design-Build Agreement. The provisions of Section 13.2 hereof shall apply to any Deliverable Material used by the Design-Build Contractor in the Design-Build Work. The Sewer District shall have the right from and after the Agreement Date to use (or permit use of) all such Deliverable Materials and all ideas or methods represented by such Deliverable Material, without additional compensation.

#### SECTION 5.13 PERSONNEL.

(A) Personnel Performance. The Design-Build Contractor shall enforce discipline and good order at all times among the Design-Build Contractor’s employees and all Subcontractors. All persons engaged by the Design-Build Contractor for Design-Build Work shall have requisite skills for the tasks assigned. The Design-Build Contractor shall employ or engage and compensate engineers and other consultants to perform all engineering and other services required for the Design-Build Work. Each such engineer and consultant shall have current professional registration or certification to practice in the State if required by Applicable Law for the Design-Build Work such engineer or consultant is performing.

(B) Prevailing Wages. The Design-Build Contractor shall take all action necessary directly and through its Subcontractors to assure that all laborers performing services in connection with the Design-Build Work are paid prevailing wages under Applicable Law and are paid wages equal to the prevailing wages set forth in Appendix L. Certified payrolls and other relevant information shall be furnished to the Sewer District in order to permit the Sewer District to monitor compliance by the Design-Build Contractor with this Section. The Design-Build Contractor agrees that the Fixed Design-Build Price shall not be adjusted in the event of any changes or adjustments to prevailing wage requirements under Applicable Law.

(C) Design-Build Manager. The Design-Build Contractor shall designate an employee of the Design-Build Contractor or any Affiliate of the Design-Build Contractor, (the “Design-Build Manager”), who shall be present at the Site with any necessary assistants on a full time basis when the Design-Build Contractor or any Subcontractor is performing Design-Build Work. The Design-Build Manager shall, among other things:

- (1) be familiar with the Design-Build Work and all requirements of this Design-Build Agreement;
- (2) coordinate the Design-Build Work and give the Design-Build Work regular and careful attention and supervision;
- (3) maintain a daily status log of the Design-Build Work; and
- (4) attend monthly construction progress meetings with the Sewer District.

The Design-Build Contractor may change the person assigned as Design-Build Manager, subject to the provisions of subsection (D) of this Section.

(D) The Sewer District's Rights With Respect to Key Personnel. The Design-Build Contractor acknowledges that the identity of the key management and supervisory personnel proposed by the Design-Build Contractor and its Subcontractors in its proposal submitted in response to the RFP was a material factor in the selection of the Design-Build Contractor to perform this Design-Build Agreement. The Design-Build Contractor shall utilize such personnel as set forth in Appendix J to perform such services unless such personnel are unavailable for good cause shown. "Good cause shown" shall not include performing services on other projects, but shall include termination for cause, employee resignation, illness and death. In the event of any such permissible unavailability, the Design-Build Contractor shall utilize replacement key management and supervisory personnel of equivalent skill, experience and reputation. Any on-site personnel change shall be proposed to the Sewer District for its review, consideration and determination of compliance with this subsection with reasonable advance notice.

(E) Labor Disputes. The Design-Build Contractor shall furnish labor that can work in harmony with all other elements of labor employed for the performance of the Design-Build Work. The Design-Build Contractor shall have exclusive responsibility for disputes or jurisdictional issues among unions or trade organizations representing employees of the Design-Build Contractor or its Subcontractors, whether pertaining to organization of the Design-Build Work, arrangement or subdivision of the Technical Specifications, employee hiring, or any other matters. As set forth in the definition of Uncontrollable Circumstances, the Sewer District shall have no responsibility whatsoever for any such disputes or issues.

SECTION 5.14 DESIGN-BUILD BOOKS AND RECORDS. The Design-Build Contractor shall prepare and maintain proper, accurate and complete books and records regarding the Design-Build Work and all other transactions related to the permitting, design, construction, startup, testing and commissioning of the Odor Control Systems and Improvements, including all books of account, bills, vouchers, invoices, personnel rate sheets, payrolls, cost estimates and bid computations and analyses, Subcontracts, purchase orders, time books, daily job diaries and reports, correspondence, and any other documents showing all acts and transactions in connection with or relating to or arising by reason of the Design-Build Work, this Design-Build Agreement, any Subcontract or transactions in which the Sewer District has or may have a financial or other material interest hereunder, in each case to the extent required to determine changes in the Fixed Design-Build Price. Except as otherwise required by Applicable Law, the Design-Build Contractor shall produce such construction books and records (except financial ledgers and statements) for examination and copying in connection with the costs of Extra Design-Build Work, Uncontrollable Circumstance costs, or other changes in or additions to the Fixed Design-Build Price (other than lump sum amounts agreed to by the Parties) for which the Sewer District may be responsible with respect to work performed prior to the Final Acceptance Date. To the extent any such information is delivered or made available to the Sewer District, such information shall be presented in a format such that an independent auditor will be able to perform a review of such information in accordance with generally accepted accounting principles. The Design-Build Contractor shall keep and maintain all such construction books and records for at least seven (7) years after the Final Acceptance Date, or such longer period during which any Legal Proceeding with respect to the Project commenced within seven (7) years of the Final Acceptance Date may be pending.

**SECTION 5.15 DELIVERY OF OPERATIONS AND MAINTENANCE INFORMATION SYSTEMS AND MANUALS AND TRAINING OF STAFF.** The Design-Build Contractor shall prepare and deliver to the Sewer District Operations and Maintenance Information Systems, including all manufacturer's operation and maintenance manuals. The contents of the Operations and Maintenance Information Systems shall be consistent with the requirements of Appendix K and with the terms and provisions of this Design-Build Agreement. the Sewer District shall have the right to review, approve for consistency with the Design-Build Agreement, and make suggestions regarding the Operations and Maintenance Information Systems. Notwithstanding any such review, approval and discussion with the Sewer District, the Operations and Maintenance Information Systems shall remain the responsibility of the Design-Build Contractor. Neither the review or approval of, or comment upon, nor the failure of the Sewer District to review, approve or comment upon, the Operations and Maintenance Information Systems shall relieve the Design-Build Contractor of any of its responsibilities under this Design-Build Agreement. The Design-Build Contractor shall bear all costs and expenses of preparing the Operations and Maintenance Information Systems. The Design-Build Contractor shall be required to conduct a training program for the Sewer District and its designees in order to enable the Sewer District and its contractors to assume operating and maintenance responsibility for the Project in accordance with Appendix K hereto, including but not limited to the Operations and Maintenance Information Systems.

**ARTICLE VI.**  
**FIXED DESIGN-BUILD PRICE, PAYMENT AND RETAINAGE**

**SECTION 6.1 FIXED DESIGN-BUILD PRICE.**

(A) **Fixed Design-Build Price.** The Fixed Design-Build Price is an amount equal to [ (\$ ) ]. The Sewer District shall pay the Design-Build Contractor the Fixed Design-Build Price for the Design-Build Work on a milestone progress basis in accordance with the terms of this Section. The Fixed Design-Build Price shall be the sum of the Fixed Design-Build Price and the Fixed Design-Build Price Adjustments.

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

(1) An adjustment for the cost of any Change Orders issued by the Sewer District with respect to the Project pursuant to Section 5.11 hereof.

(2) An adjustment for the cost of any Uncontrollable Circumstances required pursuant to Section 11.2 hereof or due to the Sewer District Fault.

(C) **Entire Compensation.** The Design-Build Contractor agrees that the Fixed Design-Build Price shall be the Design-Build Contractor's entire compensation and reimbursement for the performance of the Design-Build Work, including obtaining all Utilities that the Design-Build Contractor will require to perform the Design-Build Work and for the commissioning and start-up of the Odor Control Systems and Improvements and for the operation of the Odor Control Systems and Improvements during the Acceptance Tests. In no event shall the Design-

Build Contractor be entitled to any payment for Project costs in excess of the Fixed Design-Build Price, notwithstanding any cost overruns, except for additional amounts payable to the Design-Build Contractor on account of Uncontrollable Circumstances or Change Orders. The Design-Build Contractor shall pay for or finance any such excess Project costs which are the Design-Build Contractor's responsibility in any manner it chooses without reimbursement from or other claim upon the Sewer District.

## SECTION 6.2 CONSTRUCTION DISBURSEMENT REQUISITION PROCEDURE.

(A) Milestone Payments. Appendix F hereto sets forth milestone payments to be made with respect to each separate milestone and a final schedule of values, and the sum of all such milestone payments and the final schedule of values equals the Fixed Design-Build Price. Payments by the Sewer District shall be (1) made only upon completion of the milestone, or completion of demonstrated progress against the final schedule of values, required to be completed as the basis for such payment as set forth in Appendix F-1 hereto; (2) subject to the maximum payment limitations specified in the maximum drawdown schedule set forth in Appendix F-2 hereto; and (3) subject to the conditions of payment set forth in this Section.

(B) Requisitions. Following the Design-Build Commencement Date, the Design-Build Contractor must submit Requisitions to the Sewer District on a monthly basis and may receive from the Sewer District the partial payments of the Fixed Design-Build Price. Each Requisition must be accompanied by a certificate of an authorized Design-Build Contractor official certifying: (1) the portion of the Fixed Design-Build Price which is payable to the Design-Build Contractor, (2) the amount of any Fixed Design-Build Price Adjustments which are payable to the Design-Build Contractor, together with Cost Substantiation for such amounts, if any, that are not subject to a lump sum amount, (3) that the Design-Build Contractor is neither in default under this Design-Build Agreement nor in breach of any material provision of this Design-Build Agreement such that the breach would, with the giving of notice or passage of time, constitute an Event of Default, (4) that all items applicable to the milestone or schedule of values entitling the Design-Build Contractor to request payment under the payment schedule set forth in Appendix F hereto have been completed in accordance therewith and with this Design-Build Agreement, including the Technical Specifications, and (5) that all work for which the Sewer District has previously paid is free and clear of any lien, claim, or other encumbrance of any person whatsoever. As a condition precedent to payment, the Design-Build Contractor shall, as required by the Sewer District, also furnish to the Sewer District properly executed waivers of lien or claim, in a form acceptable to the Sewer District, from all Subcontractors, materialmen, suppliers or others having lien or claim rights, wherein said Subcontractors, materialmen, suppliers or others having lien or claim rights, shall acknowledge receipt of all sums due pursuant to all prior Requisitions and waive and relinquish any liens, lien rights or other claims relating to the Work and the Project Site.

(C) Information Supporting Requisition. The Design-Build Contractor shall submit to the Sewer District with each Requisition or as part of the monthly progress schedule to be delivered pursuant to Section 5.7 hereof:

- (1) a verified statement setting forth the information required under any Applicable Law pertaining to prevailing wages;
- (2) a reasonably detailed description of all Design-Build Work actually completed to date;
- (3) revisions to the progress schedule (or a revised progress schedule) which shall reflect changes in the Design-Build Contractor's construction schedule since the date of the last Requisition;
- (4) certified payroll reports;
- (5) notice of any Liens or Encumbrances which have been filed, together with evidence that the Design-Build Contractor has bonded or discharged such Liens or Encumbrances; and
- (6) any other documents or information relating to the Design-Build Work or this Design-Build Agreement requested by the Sewer District as may be required by Applicable Law, this Design-Build Agreement, EFC, or generally accepted accounting principles in connection with the financing of the Project (but, with respect to the Fixed Design-Build Price, shall not include Cost Substantiation documents or information).

(D) Review and Payment of Requisitioned Amounts. The Sewer District shall review the Design-Build Contractor's certified Requisitions and may also review the Work at the Project Site to determine whether the quantity and quality of the Work is as represented in the Requisition and is as required by this Design-Build Agreement. Within fifteen (15) days of receipt of the Design-Build Contractor's Requisition, the Sewer District shall verify or dispute in writing (or by telecommunication promptly confirmed in writing) the Design-Build Contractor's certification that the Design-Build Contractor has achieved the level of progress indicated and is entitled to payment. If the Sewer District determines that the work has progressed as indicated in the Design-Build Contractor's certified Requisition and the Sewer District provides written notice thereto to the Design-Build Contractor, thereupon the Design-Build Contractor shall be entitled to payment within forty-five (45) days of such determination. Disputes regarding payments of the Fixed Design-Build Price and Fixed Design-Build Price Adjustments shall be resolved in accordance with Section 6.5.

SECTION 6.3 RETAINAGE. Each partial payment will be subject to a five percent (5%) retainage holdback. Interest earned on the retainage holdback shall be for the Sewer District's benefit only. The Sewer District shall release to the Design-Build Contractor the accumulated funds (without interest) so retained with respect to each milestone upon receipt of certification from the Design-Build Contractor and confirmation by the Sewer District that Final Acceptance of the Project has occurred. Upon confirmation by the Sewer District that the applicable Acceptance Tests have been passed, the Sewer District shall release to the Design-Build Contractor an amount equal to the related retainage holdback, except with respect to Final Completion as set forth herein. An amount equal to three times the amount of the Final Punch List shall be retained by the Sewer District and released upon Final Completion. Within forty-

five(45) days of Final Acceptance Date, the Sewer District will pay the Company an amount sufficient to increase total payments to the Design-Build Contractor to one hundred percent (100%) of the Fixed Design-Build Price, less any amounts attributable to damages, and less one hundred fifty percent (150%) of the costs, as reasonably determined by the Sewer District for correcting and bringing into conformance all defective and nonconforming work, and handling any outstanding or threatened claims. Such a calculation by the Sewer District of costs for correcting and bringing into conformance all defective and nonconforming work, and handling any outstanding or threatened claims shall not bar the Sewer District from exercise of its rights elsewhere herein, or otherwise as provided by law for any incomplete, defective or nonconforming work or claims which are discovered by the Sewer District whether or not such incomplete, defective or nonconforming work or claims were obvious or should have been discovered earlier.

SECTION 6.4 PERMISSIBLE WITHHOLDINGS. The Sewer District may disapprove and withhold and retain all or any portion of any payment requested in any Requisition in an amount equal to the sum of:

(A) any amounts which are permitted under this Section to be withheld from any payment requested in any Requisition;

(B) any amounts which the Design-Build Contractor is required to reimburse to the Sewer District hereunder;

(C) any liquidated damages which are payable hereunder;

(D) any indemnification or other amounts which are due and owing to the Sewer District under any provision of this Design-Build Agreement;

(E) any deductions which are required by Applicable Law;

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

(G) an amount equal to the cost to the Sewer District of performing any work in the event of a failure by the Design-Build Contractor or any Subcontractor to timely perform its obligations;

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

(I) any payments with respect to which any person has filed a Lien or Encumbrance resulting from the acts or omissions of the Design-Build Contractor in performing the Design-Build Work, where such Lien or Encumbrance remains unreleased, unbonded or undischarged;



(J) all requisitioned payments, if an Event of Default of the Design-Build Contractor has occurred under Section 9.2 hereof; and

(K) if the Design-Build Contractor owes, or following the execution of this Design-Build Agreement, comes to owe property taxes to the County, the Sewer District shall hold all payments due under this Design-Build Agreement, as they come due, in a non-interest bearing escrow account until all property taxes owed by the Design-Build Contractor to the County, including all penalties and accrued penalties and interest, are paid in full. Upon determining to hold payments in escrow, the County shall provide notice to the Design-Build Contractor. The County shall, upon request, but no more often than once per calendar month, give an accounting of the escrow to the Design-Build Contractor. Upon the Design-Build Contractor's payment in full of all property taxes due to the County, including all accrued penalties and interest, all escrowed funds will be paid to the Design-Build Contractor as soon as practicable. The escrowed funds may be applied towards any payment that fully satisfies all outstanding property tax debts, including all accrued penalties and interest. If the County holds an auction to satisfy the property tax debt and, upon the closing of the sale after auction there remains a deficiency, the County shall apply the escrow to the deficiency, but no more than necessary to make the County whole and any remaining amounts of the escrow shall be paid to the Design-Build Contractor as soon as practicable. The County shall not apply the escrowed funds for any other purpose. This remedy shall not be deemed a waiver of any other remedy available to the Sewer District or the County or bar any other means of collecting the property tax debt due to the County.

**SECTION 6.5 DISBURSEMENT DISPUTE PROCEDURES.** If the Sewer District determines pursuant to Section 6.2(D) that the work required for any payment has not progressed as indicated in the payment request, or disputes any requisition for Fixed Design-Build Price Adjustments, the Engineer shall provide prompt written notice to the Design-Build Contractor and the Sewer District as to the Engineer's reasons, in reasonable detail, for such determination or the basis for such dispute. After receiving such determination notice, the Design-Build Contractor may make the necessary corrections and resubmit a certified Requisition to the Engineer, or the Engineer may agree on a revised amount, Requisition or estimate, as applicable, in which case the Design-Build Contractor shall promptly notify the Sewer District of such agreement and thereupon be entitled to payment. Any proceedings undertaken to resolve a dispute arising under this subsection shall immediately terminate if: (1) the Design-Build Contractor demonstrates to the Engineer that the work has proceeded to the milestone indicated in the certified Requisition giving rise to the dispute or that any disputed certified Requisition is correct; and (2) the Engineer concurs with such demonstration. The Design-Build Contractor shall not be entitled to payment of the amount so requisitioned and disputed except upon resolution of the dispute in accordance with this subsection; provided, however, that the Design-Build Contractor shall be entitled to all requisitioned amounts which are not in dispute. In the event that upon resolution of any such dispute it is determined that the Design-Build Contractor was properly entitled to the disputed amount as of a date earlier than the date on which payment is actually made, the Design-Build Contractor shall be entitled promptly to receive such disputed amount. Nothing contained in this subsection shall be deemed to alter the rights of the Parties, if any, under Article IX hereof, including the right of either Party to request a referral of the dispute to Non-Binding Mediation.

SECTION 6.6 REQUIRED DESIGN-BUILD CONTRACTOR ENGINEER CERTIFICATION. Any notice, certification, report or requisition delivered by the Design-Build Contractor to the Sewer District in connection with the Design-Build Work or payment therefore under this Article, or any Appendix hereto, shall be accompanied by a certificate of the Design-Build Contractor's Design-Build engineer-of-record affirming the accuracy thereto to the best of his or her knowledge.

SECTION 6.7 CERTIFICATION OF AMOUNTS DUE. Whenever requested by the Sewer District, the Design-Build Contractor shall submit a sworn statement certifying all amounts then due (or yet to become due) the Design-Build Contractor for the Design-Build Work (or any portion thereto) and describing any payment or other dispute which may exist between the Design-Build Contractor and any Subcontractor.

SECTION 6.8 DESIGN-BUILD CONTRACTOR RELIEF DUE TO DELAYS DUE TO SEWER DISTRICT FAULT. Except as otherwise provided, an extension of time to be mutually agreed to by the parties shall be the Design-Build Contractor's sole remedy for any and all delays due to Sewer District Fault.

SECTION 6.9 PROPERTY TAXES OWED TO COUNTY

If the Design-Build Contractor owes, or following the execution of this Design-Build Agreement, comes to owe property taxes to the County, the Sewer District shall hold all payments due under this Design-Build Agreement, as they come due, in a non-interest bearing escrow account. The monies due to the Design-Build Contractor shall be held in escrow unless and until all property taxes owed by the Design-Build Contractor to the County, including all penalties and accrued penalties and interest, are paid in full. Upon determining to hold payments in escrow, the County shall provide notice to the Design-Build Contractor. The County shall, upon request, but no more often than once per calendar month, give an accounting of the escrow to the Design-Build Contractor. Upon the Design-Build Contractor's payment in full of all property taxes due to the County, including all accrued penalties and interest, all escrowed funds will be paid to the Design-Build Contractor as soon as practicable. The escrowed funds may be applied towards any payment that fully satisfies all outstanding property tax debts, including all accrued penalties and interest. If the County holds an auction to satisfy the property tax debt and, upon the closing of the sale after auction there remains a deficiency, the County shall apply the escrow to the deficiency, but no more than necessary to make the County whole and any remaining amounts of the escrow shall be paid to the Design-Build Contractor as soon as practicable. The County shall not apply the escrowed funds for any other purpose. This remedy shall not be deemed a waiver of any other remedy available to the Sewer District or the County or bar any other means of collecting the property tax debt due to the County.

SECTION 6.10 LIABILITY FOR MONIES BUDGETED

This Design-Build Agreement shall be deemed executory to the extent that the monies are appropriated in the current budget of the Sewer District for the purposes of this Design-Build Agreement, and no liability shall be incurred by RCSD, or any department, beyond the monies budgeted and available for this purpose. This Design-Build Agreement is not a general obligation

of the Sewer District. Neither the full faith and credit nor the taxing power of the County is pledged to the payment of any amount due or to become due under this Design-Build Agreement. It is understood that neither this Design-Build Agreement nor any representation by any County or Sewer District employee or officer creates any obligation to appropriate or make monies available for the purpose of this Design-Build Agreement. The Design-Build Agreement shall not be effective unless the monies to be paid hereunder by the Sewer District are appropriated in the Sewer District's budget.

#### SECTION 6.11 FEDERAL STATE AND LOCAL APPROVAL

Notwithstanding any other provisions of this Design-Build Agreement, the Sewer District shall not be liable for any payment or compensation to the Design-Build Contractor until the Contract Services rendered by the Design-Build Contractor under this Design-Build Agreement meet the approval and standards of any Federal, State or local agency, authority, commission or body, which has jurisdiction over the Contract Services and which provides funding in whole or in part for the Contract Services.

## **ARTICLE VII.**

### **SUBSTANTIAL COMPLETION, FINAL ACCEPTANCE AND FINAL COMPLETION**

SECTION 7.1 GENERALLY. At such time during the Design-Build Period that the Design-Build Contractor accomplishes Substantial Completion of the Project, the Design-Build Contractor shall then conduct applicable Acceptance Tests as provided for in this Article. Once the Acceptance Tests have been successfully passed and Final Acceptance and Final Completion shall have occurred, the Design-Build Period shall end.

#### SECTION 7.2 SUBSTANTIAL COMPLETION.

(A) Conditions to Substantial Completion. The Design-Build Contractor shall not commence start-up operations in preparation for conducting an applicable Acceptance Test until “Substantial Completion” has occurred. Substantial Completion shall occur only when all of the following conditions have been satisfied:

(1) The Design-Build Contractor has delivered to the Sewer District written certification from the equipment manufacturers that all major items of machinery and equipment included in the Project have been properly installed and tested in accordance with the manufacturers’ recommendations and requirements;

(2) The Design-Build Contractor has provided training, as necessary, to personnel and/or contractors of the Sewer District regarding operation of the Odor Control Systems and Improvements as well as any and all documentation surrounding the Odor Control Systems and Improvements, including but not limited to the Operations and Maintenance Information Systems, including all manufacturer’s operation and maintenance manuals required to be delivered under this Design-Build Agreement;

(3) The Design-Build Contractor has obtained all Governmental Approvals and such approvals have not been withdrawn, revoked, superseded, suspended, or materially impaired or amended;

(4) All Utilities specified or required under the Design-Build Agreement to be arranged for by the Design-Build Contractor are connected and functioning properly;

(5) The Design-Build Contractor and the Sewer District have agreed in writing upon the Final Punch List (or, if are unable to agree, the Sewer District shall have prepared and issued the final punch list to the Design-Build Contractor within fifteen (15) business days of the Design-Build Contractor having submitted its final punch list to the Sewer District);

(6) the Sewer District has received and indicated, in writing, that it has no objection to the certification by the Design-Build Contractor that all Contract Services pertaining to the Project, excepting the items on the Final Punch List, are complete and in all respects are in compliance with this Design-Build Agreement;

(7) The Design-Build Contractor has delivered to the Sewer District a claims statement setting forth in detail all claims of every kind whatsoever of the Design-Build Contractor connected with, or arising out of, the Contract Services pertaining to the Project, and arising out of or based on events prior to the date when the Design-Build Contractor provides such statement to the Sewer District; and

(8) The Design-Build Contractor has submitted written certification that all of the foregoing conditions have been satisfied and the Sewer District has received and indicated, in writing, that it has no objection to the Design-Build Contractor's certification.

Alternatively, Substantial Completion shall occur on any date certified by the Sewer District, which shall have discretion to waive any of the foregoing conditions.

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

(1) the Design-Build Contractor can complete before the Design-Build Contractor's agreed date for Final Completion and with minimal interference to the occupancy, use and lawful operation of the WWTP; and

(2) would represent, to perform or complete, a total cost of not more than one-half of one percent (0.5%) of the portion of the Fixed Design-Build Price (unless the Sewer District determines that a higher percentage is acceptable in its sole discretion).

Completion of the Final Punch List work shall be verified by a final walk-through of the WWTP, and in particular the Site where the Work was performed, conducted by the Sewer District and its Engineer with the Design-Build Contractor. The existence and approval of the Final Punch List shall in no way either limit the Design-Build Contractor from performing additional repairs, corrections and adjustments to the Design-Build Work as may be necessary to comply with this Design-Build Agreement or limit the Sewer District's ability to enforce the Design-Build Contractor obligation to complete the Design-Build Work in accordance with the Technical Specifications. If the Design-Build Contractor fails to complete any Final Punch List related Design-Build Work, the Sewer District shall have the right to withhold twice the value of such work from the retainage amount.

### SECTION 7.3 NOTICE OF START-UP OPERATIONS.

(A) Submittal of Acceptance Test Plan. At least one hundred eighty (180) days before the Scheduled Final Acceptance Date or the date upon which the Design-Build Contractor plans to begin any Acceptance Testing, the Design-Build Contractor shall prepare and submit to the Sewer District for its approval a detailed Acceptance Test Plan, which shall conform to the requirements of Appendix H hereto in all respects. If the Design-Build Contractor and the Sewer

District are unable to agree upon an acceptable Acceptance Test Plan within ninety (90) days of such submission, their inability to agree may be mediated as provided in Section 9.9 hereof.

(B) Notice of Substantial Completion. The Design-Build Contractor shall give the Sewer District's Authorized Representative at least thirty (30) days' prior written notice of the expected date of Substantial Completion and of commencement of start-up operations in preparation for conducting any Acceptance Test.

(C) Notice of Commencement of Acceptance Testing. The Design-Build Contractor shall also provide the Sewer District with at least thirty (30) days' prior written notice of the expected initiation of any Acceptance Test in accordance with the requirements of Appendix H hereto. At least ten (10) days prior to the actual commencement of the Acceptance Testing, the Design-Build Contractor shall certify in writing that it is ready to begin the applicable Acceptance Testing in accordance with the applicable Acceptance Test Plan and Appendix H hereto.

SECTION 7.4 ROLE OF OPERATOR. The Sewer District shall make available the services of its operators or other necessary personnel to assist the Design-Build Contractor during Acceptance Testing and start-up operations in preparation thereof.

SECTION 7.5 CONDUCT OF ACCEPTANCE TESTS. The Design-Build Contractor shall conduct the Acceptance Tests in accordance with Appendix H hereto and the applicable Acceptance Test Plan, and shall notify the Sewer District seven (7) day in advance of when any such test shall occur. The Design-Build Contractor shall permit the designated representatives of the Sewer District to inspect the preparations for any Acceptance Tests and to be present for the conducting of any Acceptance Tests for purposes of ensuring compliance with the applicable Acceptance Test Plan and the integrity of the Acceptance Test results.

SECTION 7.6 FINAL ACCEPTANCE DATE CONDITIONS. The following conditions shall constitute the "Final Acceptance Date Conditions," each of which must be satisfied in all material respects by the Design-Build Contractor in order for an applicable Final Acceptance Date to occur, and each of which must be and remain satisfied as of the applicable Final Acceptance Date:

(A) Achievement of Acceptance Standards. The Design-Build Contractor shall have completed any required Acceptance Tests and such tests shall have demonstrated that the Project meets the applicable Acceptance Standards;

(B) Substantial Completion. The Design-Build Contractor shall demonstrate that Substantial Completion has occurred;

(C) Record Documents. The Design-Build Contractor shall have delivered to the Sewer District a final and complete reproducible set of record documents;

(D) Equipment Warranties and Manuals. The Design-Build Contractor shall be in possession of, and shall have delivered to the Sewer District, copies of the draft warranties of machinery, equipment, and fixtures constituting a part of the Odor Control Systems and

Improvements, together with draft copies of all related operating manuals supplied by the equipment supplier, as applicable;

(E) Warranties. The Design-Build Contractor shall have delivered all warranties required to be obtained under Article VIII hereof to the Sewer District;

(F) Spare Parts and Consumables. The Design-Build Contractor shall have delivered and placed into storage at the WWTP all spare parts and Consumables required by the applicable Technical Specifications; and

(G) No Default. There shall be no Event of Default by the Design-Build Contractor under this Design-Build Agreement or by the Guarantor under the Guaranty Agreement, or event which with the giving of notice or the passage of time would constitute an Event of Default by the Design-Build Contractor hereunder or an Event of Default by the Guarantor under the Guaranty Agreement in accordance with Section 9.2(E) hereof.

SECTION 7.7 TEST REPORT. Within thirty (30) days following conclusion of any required Acceptance Test, the Design-Build Contractor shall furnish the Sewer District with six (6) copies of a certified written report describing and certifying (1) the Acceptance Test conducted, (2) the results of the Acceptance Test; and (3) the level of satisfaction of the Acceptance Tests Procedures and Standards relating thereto and all other requirements specified in Appendix H hereto. The written test report shall include copies of the original data sheets, log sheets and all calculations used to determine performance during the applicable Acceptance Test.

#### SECTION 7.8 CONCURRENCE OR DISAGREEMENT WITH TEST RESULTS.

(A) Final Acceptance Date Concurrence. The “Final Acceptance Date” shall be the day on which Acceptance Testing has been successfully completed and the Acceptance Standards have been achieved for all of the Odor Control Systems and Improvements. If the Design-Build Contractor certifies in its written report delivered pursuant to Section 7.7 hereof that such Acceptance Standards have been achieved, the Sewer District shall determine, within sixty (60) days of its receipt of such report, whether it concurs in such certification. If the Sewer District states in writing that it concurs with the Design-Build Contractor’s certification, the Project shall be deemed to have achieved Final Acceptance and the Final Acceptance Date for the Project shall be deemed to have been established on a permanent basis from the date of the Design-Build Contractor’s original certification of such Final Acceptance Date.

(B) Final Acceptance Date Disagreement. If the Sewer District determines at any time during such sixty (60) day review period that it does not concur with such certification, the Sewer District shall immediately send written notice to the Design-Build Contractor of the basis for its disagreement. In the event of any such non-concurrence by the Sewer District, either Party may elect to refer the dispute to Non-Binding Mediation for resolution pursuant to Section 9.9 hereof. The Mediator shall issue a decision within sixty (60) days of the dispute referral unless both Parties agree that more time is appropriate. In the event that the Mediator fails to issue a decision within sixty (60) days, then either Party may initiate judicial proceedings. The Parties acknowledge and agree that any decision rendered by the Mediator as to whether any Final Acceptance has occurred shall be non-binding. Final Acceptance shall not be deemed to

have been achieved unless the applicable Acceptance Test, conducted in a unified and continuous manner as provided in the applicable Acceptance Test Plan and in Appendix H hereto, demonstrates that all of the applicable Acceptance Standards have been met. In the event the Design-Build Contractor, in conducting the applicable Acceptance Test, does not successfully meet the Acceptance Standards, the Sewer District shall have the right, in its sole discretion, to permit the Design-Build Contractor to re-test for compliance only with the applicable Acceptance Test and Procedures Standards not previously achieved through an earlier Acceptance Test. Nothing in this Section shall prevent the Design-Build Contractor from bringing an action or from repeating any applicable Acceptance Test in order to establish the achievement of Final Acceptance.

#### SECTION 7.9 SCHEDULED FINAL ACCEPTANCE DATE.

(A) Schedule for Completing the Project. The Design-Build Contractor shall achieve Final Acceptance by the Scheduled Final Acceptance Date.

(B) Delay Liquidated Damages. Except as otherwise excused due to Uncontrollable Circumstances and the Sewer District Fault, the Design-Build Contractor shall pay daily delay liquidated damages to the Sewer District in the sum of One Thousand Dollars (\$1,000.00) per day for each and every calendar day of unexcused delays in achieving Substantial Completion beyond the date set for Substantial Completion. The Design-Build Contractor shall pay daily delay liquidated damages to the Sewer District in the sum of Five Hundred Dollars (\$500.00) per day for each and every calendar day of unexcused delays in achieving Final Completion and continuing for each day that Final Completion falls after the date set for Final Completion in accordance with Section 7.12 of this Design-Build Agreement, and thereafter until any termination of this Design-Build Agreement for an Event of Default. The Design-Build Contractor shall also indemnify the Sewer District in accordance with and subject to the limitations set forth in Section 11.3 hereof against all Loss-and-Expense resulting from any Legal Proceeding originated by any third-party arising from such failure to achieve Final Acceptance by the applicable Scheduled Final Acceptance Date except to the extent such failure is caused by an Uncontrollable Circumstance, and/or arising from a failure to achieve Final Completion by the applicable date set for Final Completion in accordance with Section 7.12 of this Design-Build Agreement.

Any sums due and payable as liquidated damages by the Design-Build Contractor shall be payable, not as a penalty, but as liquidated damages representing a reasonable and fair approximation of the damages likely to be sustained by the Sewer District as a result of the Design-Build Contractor's delay, estimated at the time of executing the Design-Build Agreement. When the Sewer District reasonably believes that Substantial Completion or Final Completion will be inexcusably delayed, the Sewer District shall be entitled, but not required, to withhold from any amounts otherwise due the Design-Build Contractor an amount then believed by the Sewer District to be adequate to recover Liquidated Damages applicable to such delays. If and when the Design-Build Contractor overcomes the delay in achieving Substantial Completion or Final Completion, for which the Sewer District has withheld from payment amounts sufficient to cover Liquidated Damages commensurate with the anticipated delays, the Sewer District shall promptly release to the Design-Build Contractor those funds withheld as liquidated damages for



anticipated delays which did not occur. Nothing in this section shall be constructed to limit any non-damage remedies, including termination, also provided for with respect to any such nonperformance, breach or default.

SECTION 7.10 EFFECT OF UNEXCUSED DELAY; EXTENSION PERIOD. Time is of the essence in the achievement of the Final Acceptance Date Conditions. If Final Acceptance shall not have occurred on or before the Scheduled Final Acceptance Date, the Design-Build Contractor shall be entitled to conduct or repeat the applicable Acceptance Test in order to secure Final Acceptance during the Extension Period. The Design-Build Contractor shall be responsible for and shall pay any applicable liquidated damages as set forth in subsection 7.9(B) hereof.

SECTION 7.11 FAILURE TO MEET ACCEPTANCE STANDARD. If, as of the last day of an Extension Period, an applicable Acceptance Test has not been conducted or has failed to demonstrate that the Odor Controls Systems and Improvements operate at a standard equal to or greater than the applicable full Final Acceptance standard, an Event of Default by the Design-Build Contractor shall be deemed to have occurred under Section 9.2 hereof notwithstanding any absence of notice, further cure opportunity or other procedural rights accorded the Design-Build Contractor thereunder, and the Sewer District shall thereupon have the right to terminate this Design-Build Agreement upon written notice to the Design-Build Contractor. Upon any such termination, the Sewer District shall have all of the rights provided in Article IX hereof upon a termination of the Design-Build Contractor for cause.

SECTION 7.12 FINAL COMPLETION.

(A) Requirements. The Design-Build Contractor shall achieve Final Completion for the Project within ninety (90) days after Substantial Completion. Final Completion shall occur when all of the following conditions have been satisfied:

(1) Final Acceptance Achieved. The applicable Acceptance Tests have been conducted, the Acceptance Standards have been achieved, and Final Acceptance has occurred;

(2) Design-Build Work Completed. All Design-Build Work (including all items on the Final Punch List and all clean up and removal of construction materials and demolition debris, if any) is complete and in all respects is in compliance with this Design-Build Agreement;

(3) Operation and Maintenance Information Systems. The Design-Build Contractor has updated the Operation and Maintenance Information Systems, including all manufacturer's operation and maintenance manuals to address needs and issues raised during startup and Acceptance Testing;

(4) Deliverable Material Furnished. The Design-Build Contractor has furnished to the Sewer District all Deliverable Material required to be delivered prior to Final Acceptance, including a complete list of all equipment included in the completed Project;

(5) Record Drawings. The Design-Build Contractor shall have delivered to the Sewer District prior to Final Acceptance a final and complete reproducible set of record drawings, together with six (6) copies thereto, in a size and form required by the Sewer District and as required by the Technical Specifications and shall certify that the Project was constructed in accordance with the Technical Specifications, including any Change Orders. The Design-Build Contractor shall also provide an electronic file in AutoCAD/DXF format to the extent drawings are prepared in such format; and

(6) Equipment Warranties and Manuals. The Design-Build Contractor shall be in possession of, and shall have delivered to the Sewer District, copies of the final warranties of machinery, equipment, fixtures and rolling stock constituting a part of the Project, together with all related final operating manuals supplied by the equipment supplier.

(B) Final Certificate and Claims Statement. The Design-Build Contractor shall also prepare and submit to the Sewer District as soon as practicable following the applicable Acceptance Tests, for purposes of demonstrating Final Completion: (1) a certificate of the Design-Build Contractor's Authorized Representative certifying (a) that all the Design-Build Work has been completed in accordance herewith and with the Technical Specifications, and (b) that Final Acceptance has occurred; and (2) a claims statement setting forth a detailed, itemized description, related dollar amount and grounds for all claims of every kind whatsoever against the Sewer District in connection with or arising out of the Design-Build Work the Design-Build Contractor may have. The Sewer District shall review the certificate and the claims statement and shall verify or dispute them in writing within thirty (30) days of receipt.

(C) Release of Retainage. Final Completion shall be a condition to the release of amounts retained from the Fixed Design-Build Price to which the Design-Build Contractor is entitled in accordance with Section 6.3 hereof.

**SECTION 7.13 NO ACCEPTANCE, WAIVER OR RELEASE.** Unless other provisions of this Design-Build Agreement specifically provide to the contrary, none of the following, without limitation, shall be construed as the Sewer District's acceptance of any Design-Build Work which is defective, incomplete, or otherwise not in compliance with this Design-Build Agreement, as the Sewer District's release of the Design-Build Contractor from any obligation under this Design-Build Agreement, as the Sewer District's extension of the Design-Build Contractor's time for performance, as an estoppel against the Sewer District, or as the Sewer District's acceptance of any claim by the Design-Build Contractor:

(A) the Sewer District's payment to the Design-Build Contractor or any other person with respect to all or any portion of the Fixed Design-Build Price;

(B) the Sewer District's review or acceptance of any drawings, submissions, punch lists, other documents, certifications or Design-Build Work of the Design-Build Contractor or any Subcontractor;

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

- (D) the Sewer District's entry at any time on the Site;
- (E) any inspection, testing, observation, or approval of any Design-Build Work (whether finished or in progress) by the Sewer District or any other person;
- (F) the failure of the Sewer District or any the Sewer District consultant to respond in writing to any notice or other communication of the Design-Build Contractor; or
- (G) any other exercise of rights or failure to exercise rights by the Sewer District hereunder.

SECTION 7.14 PAYMENT OF DESIGN-BUILD PRICE DURING START-UP AND TESTING. All costs for design, construction, permitting, commissioning, start-up, testing for Final Acceptance, and any operations prior to the Final Acceptance Date, including costs for labor, materials, and Utilities, shall be borne by the Design-Build Contractor without reimbursement by the Sewer District.

## **ARTICLE VIII. WARRANTY**

### **SECTION 8.1 PERFORMANCE WARRANTY.**

(A) General. The Design-Build Contractor warrants that the Design-Build Work shall be capable of meeting the Acceptance Standards throughout the Warranty Period (“Performance Warranty”). The Warranty Period is the period commencing on the date of Final Completion and continuing through the first anniversary of the date of Final Completion, unless otherwise extended as provided herein.

(B) Performance Warranty Conditions. The Design-Build Contractor shall have no responsibility under the Performance Warranty to the extent that any failure of the Design-Build Work is due to (1) failure of the Sewer District to operate or maintain the Odor Control Systems or Improvements in accordance with the Operation and Maintenance Information Systems prepared by Design-Build Contractor and approved by the Sewer District; provided that any such the Sewer District failure due to error or defect in the Operations and Maintenance Information Systems shall be Design-Build Contractor’s responsibility, or (2) the Sewer District Fault, gross negligence or willful misconduct.

(C) Remedies. Subject to the conditions set forth in subsection (B), if the Project fails to satisfy the Performance Warranty, the Design-Build Contractor shall, upon notice from the Sewer District, promptly begin and continue to take all necessary actions to satisfy the Performance Warranty (including, but not limited to, training or support of City operations staff; or correction, repair or replacement of facilities) to satisfy the Performance Warranty. The costs of any such training or support of Sewer District operations staff that are effective in achieving satisfaction of the Performance Warranty shall be paid by the Sewer District. The costs of any correction, repair or replacement of facilities required to achieve satisfaction of the Performance Warranty shall be paid by the Design-Build Contractor without reimbursement from the Sewer District. Before any necessary correction, repair or replacement of facilities is initiated by the Design-Build Contractor, a plan indicating the scope and schedule for such work shall be approved by the Sewer District. In the event of a latent, hidden, or not readily observable defect in the design, materials or workmanship or deviation from this Design-Build Agreement, the Performance Warranty shall extend for an additional two (2) years from the date of discovery of such defect, deviation or condition.

### **SECTION 8.2 DESIGN-BUILD WORK WARRANTY.**

(A) General. The Design-Build Contractor warrants to the Sewer District that the Design-Build Work, including all materials, equipment, and structures furnished, shall (i) be new, of recent manufacture and of high quality, (ii) conform to the requirements of this Design-Build Agreement, including the Technical Specifications, and (iii) be free of defects in materials, equipment, workmanship (“Design-Build Work Warranty”). The Design-Build Work Warranty: (1) excludes remedy for damage or defect caused by modifications not executed by the Design-Build Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage; and (2) includes remedy for damage or defect caused by any defects or

errors in the Operation and Maintenance Information System prepared by the Design-Build Contractor.

(B) Call-Back Obligations. If, at any time during the Warranty Period, the Odor Controls Systems or any of the Design-Build Work is found to be malfunctioning, defective or otherwise not in accordance with the requirements of this Design-Build Agreement (including the Design-Build Work Warranty), the Design-Build Contractor shall correct it promptly after receipt of written notice from the Sewer District to do so. The Sewer District shall give such notice promptly after discovery of the condition. The Design-Build Contractor shall respond to critical or emergency service calls from the Sewer District within eight (8) hours and to non-critical or non-emergency calls within three (3) business days. Such response shall require that a competent representative or representatives of the Design-Build Contractor familiar with the Project, including its specific equipment, design and operational requirements, inspect the Work and, while on Site, either correct the problem or initiate a course of action that will fully correct the problem within a reasonable period of time in accordance with Good Engineering and Construction Practice and the specific requirements of subsection (H) of this Section. In critical or emergency situations, the time period for correction shall not exceed forty-eight (48) hours after the on-site inspection, and for non-emergencies, the time period for correction shall not exceed ten (10) days; provided, however, that if such time periods are not practicable in accordance with Good Engineering and Construction Practice, then the time period for correction shall be the minimum amount of time required in accordance with Good Engineering and Construction Practice.

(C) Right of the Sewer District to Proceed with Corrective Action; Design-Build Contractor Liability. If the Design-Build Contractor fails to commence and complete the steps set forth in subsection (B) of this Section within the required time frames, in addition to any other remedies provided under this Design-Build Agreement, the Security Instruments or Applicable Law, the Sewer District may commence and complete the correction of such nonconforming Design-Build Work with its own forces or with third party contractors. If the Sewer District does perform such corrective Design-Build Work, the Design-Build Contractor shall be responsible for all costs incurred in performing such correction.

(D) No Period of Limitation on Other Obligations. Nothing contained in this Article shall be construed to establish a period of limitation with respect to other obligations that the Design-Build Contractor has under this Design-Build Agreement or under Applicable Law with respect to the Design-Build Work, including warranties and obligations with respect to latent defects. The Warranty Period relates only to the specific obligations of the Design-Build Contractor to respond to notices from the Sewer District under this Article, and has no relationship to the time within which the obligation of the Design-Build Contractor to comply with this Design-Build Agreement may be enforced, nor the time within which proceedings may be commenced to establish the Design-Build Contractor's liability with respect to the Design-Build Contractor's obligations under this Design-Build Agreement.

(E) Extension of Warranties. The "call-back" obligations set forth in this Section shall apply to all Design-Build Work re-done or corrected pursuant to this Design-Build Agreement. The "call-back" obligations for re-done or corrected elements of the Design-Build

Work shall extend beyond the Warranty Period, if necessary, to provide a one (1) year period following acceptance by the Sewer District of such re-done or corrected Design-Build Work; provided, however, that in no event shall such “call-back” obligations extend beyond one (1) year following the expiration of the Warranty Period.

(F) Design-Build Contractor Reliance on Manufacturers’ Warranties During Call-Back Period. During the period in which the call-back obligations set forth in this Section are in effect, the Design-Build Contractor (or the Sewer District) shall be permitted to enforce all warranties provided by manufacturers, suppliers and other third parties. Notwithstanding the applicability or effectiveness of such warranties, the Design-Build Contractor shall be required to comply with all the requirements set forth in subsection (B) of this Section.

(G) Compensation. The Design-Build Contractor acknowledges that the Fixed Design-Build Price contains the entire compensation due the Design-Build Contractor for any and all Warranty Work to be performed by the Design-Build Contractor or its Subcontractors or agents pursuant to this Article including overhead and profit, except as otherwise provided. In the event any amounts are required to be paid to third-parties to perform Warranty Work pursuant to this Article, payment of such amounts shall be the responsibility of the Design-Build Contractor. Notwithstanding the foregoing, if the Design-Build Contractor responds to a warranty-related claim and such claim is later determined not to be a valid warranty claim, the Sewer District shall reimburse the Design-Build Contractor for its reasonable labor and related costs incurred in responding to the claim.

(H) Performance of Warranty Work. The Design-Build Contractor acknowledges that time is of the essence in the performance of all Warranty Work required under this Article in light of the Project’s essential public purpose. Accordingly, all Warranty Work required under this Article shall be performed in accordance with the Design-Build Standards and, without limiting any of the specific time requirements set forth in subsection (B) of this Section, within the minimum amount of time required in accordance with Good Engineering and Construction Practice. The Design-Build Contractor shall perform or cause to be performed all Warranty Work performed under this Article in a manner that will minimize interference with the ongoing operations of the WWTP. The Design-Build Contractor shall provide a written plan for all proposed Warranty Work pursuant to this Section (unless expressly waived by the Sewer District).

SECTION 8.3 WARRANTIES NOT EXCLUSIVE. The warranties set forth in this Article are in addition to, and not in limitation of, any other warranties, rights and remedies available under this Design-Build Agreement or Applicable Law, and shall not limit the Design-Build Contractor’s liability or responsibility imposed by this Design-Build Agreement or Applicable Law with respect to the Design-Build Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud. The provisions of this Article shall survive the termination of this Design-Build Agreement.

SECTION 8.4 MANUFACTURERS’ WARRANTIES.

(A) Manufacturers' Warranties Generally. The Design-Build Contractor shall, for the protection of the Sewer District, obtain from all Subcontractors, vendors, suppliers and other persons from which the Design-Build Contractor procures structures, improvements, fixtures, machinery, equipment and materials to be incorporated in the Project such warranties and guarantees as are normally provided with respect thereto and as are specifically required in this Design-Build Agreement ("Manufacturers' Warranties"), each of which shall be assigned to the Sewer District to the full extent of the terms thereof. No such warranty shall relieve the Design-Build Contractor of any obligation hereunder, and no failure of any warranted or guaranteed structures, improvements, fixtures, machinery, equipment or material shall be the cause for any increase in the Fixed Design-Build Price or excuse any non-performance of the Design-Build Work, including any Warranty Work required under this Article, unless such failure is itself attributable to an Uncontrollable Circumstance.

(B) No Limitation of Third Party Warranties. Nothing in this Design-Build Agreement is intended to limit any third party warranty that provides the Sewer District with greater warranty rights than those provided under this Article.

SECTION 8.5 WARRANTY BOND. The warranty related responsibilities set forth herein shall be secured by a Warranty Bond in accordance with Section 12.2 hereof.

SECTION 8.6 POST FINAL ACCEPTANCE AND POST WARRANTY SERVICES. Upon Final Acceptance and continuing beyond the expiration of the Warranty Period, at the Sewer District's option and in accordance with the scope and term determined by the Sewer District, the Design-Build Contractor shall provide one or more qualified individuals for operations assistance, support and/or training services. Not later than fifteen (15) days after the Sewer District's request, the Design-Build Contractor will prepare a proposal in accordance with Section 5.11 (E) hereof and if acceptable, the Sewer District will issue a Change Order for these services. The Design-Build Contractor will utilize, to the extent practical, the key personnel who were involved in the Design-Build Work to provide such services.

SECTION 8.7 SPARE PARTS, TOOLS AND ACCESSORIES.

The Design-Build Contractor shall provide to the Sewer District the anticipated spare parts listing required for the first year of operation, local U.S. distributor and distributor locations, and associated pricing. The Design-Build Contractor shall guarantee on Site delivery of spare parts within 72 hours upon placement of order. A complete set of spare parts and supplies with an inventory list as approved by the Sewer District shall be furnished to the Sewer District to assure efficient operation of the Odor Control Systems and Improvements for a period of 365 days. The foregoing shall not relieve the Design-Build Contractor of any responsibilities under any Guaranty or warranty specified herein. All spare parts shall be plainly tagged and marked for identification and ordering. The Design-Build Contractor shall provide adequate storage and protection for spare parts. Spare parts and supplies shall be turned over to the Sewer District at start-up. The Design-Build Contractor must confirm that the use of non-original equipment manufacturer replacement and wear-parts does not void the Manufacturer's Warranties. The Design-Build Contractor represents that it has received manufacturer's approval or has assumed the Manufacturer's Warranty responsibility. The Design-Build Contractor shall,

unless otherwise stated, furnish with each type, kind or size of equipment, one complete set of suitable marked, high-grade special tools and appliances which may be needed to adjust, operate, maintain or repair the equipment. Each piece of equipment shall be provided with a nameplate, securely fastened in place and clearly inscribed with the manufacturer's name, year of manufacture and principal rating data.

## **ARTICLE IX. BREACH, DEFAULT, REMEDIES AND TERMINATION**

SECTION 9.1 REMEDIES FOR BREACH. The Parties agree that, except as otherwise provided in this Design-Build Agreement, in the event that either Party breaches this Design-Build Agreement, the other Party may exercise any legal rights it may have under this Design-Build Agreement, under the Security Instruments or under Applicable Law to recover damages or to secure specific performance, and that such rights to recover damages and to secure specific performance shall ordinarily constitute adequate remedies for any such breach. Neither Party shall have the right to terminate this Design-Build Agreement for cause except upon the occurrence of an Event of Default.

### SECTION 9.2 EVENTS OF DEFAULT BY THE DESIGN-BUILD CONTRACTOR.

(A) Events of Default Not Requiring Previous Notice or Further Cure Opportunity for Termination. Each of the following shall constitute an Event of Default by the Design-Build Contractor upon which the Sewer District, by notice to the Design-Build Contractor, may terminate this Design-Build Agreement without any requirement of having given notice previously or of providing any further cure opportunity:

(1) Security for Performance. The failure of the Design-Build Contractor to obtain, within ten (10) days after the Agreement Date, or to maintain or replace any Security Instrument required by, and in accordance with, Article XII hereof as security for the performance of this Design-Build Agreement, without excuse for Uncontrollable Circumstances or the Sewer District Fault;

(2) Failure to Achieve Final Acceptance. The failure of the Design-Build Contractor to achieve the Final Acceptance Date prior to the end of any applicable Extension Period;

(3) Insolvency. The insolvency of the Design-Build Contractor as determined under the Bankruptcy Code;

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



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

(6) Intentional Misrepresentation. Any intentional misrepresentation of information and facts relating to the Design-Build Contractor's performance of its obligations hereunder or the performance of the Odor Control Systems or Improvements.

(7) Unauthorized Assignment or Change in Ownership. Failure to comply with the requirements set forth in Section 13.6.

(8) Failure to Provide or Renew Required Insurance. The failure of the Design-Build Contractor to obtain or maintain in full force and effect, or renew within thirty (30) days prior to expiration, or otherwise comply with the requirements related to the provision and maintenance of the Required Insurance.

(9) Violation of New York Labor Law. A violation of the New York Labor Law.

(10) Loss of Legal Entitlement. The loss of a Legal Entitlement required for the performance of the Design-Build Contractor's obligations under this Design-Build Agreement.

(11) Default of Guarantor. The failure of the Guarantor to make any payment or perform any other obligation under the Guaranty Agreement in a timely manner, or the failure of the Guarantor to comply with the terms and conditions thereof.

(B) Events of Default Requiring Previous Notice and Cure Opportunity for Termination. It shall be an Event of Default by the Design-Build Contractor upon which the Sewer District may terminate this Design-Build Agreement, by notice to the Design-Build Contractor, if:

(1) any representation or warranty of the Design-Build Contractor hereunder under the Guaranty Agreement was false or inaccurate in any material respect when made, and the legality of this Design-Build Agreement or the Guaranty Agreement or the ability of the Design-Build Contractor to carry out its obligations hereunder to carry out its obligation thereunder is thereby adversely affected; and

(2) the Design-Build Contractor fails, refuses or otherwise defaults in its duty (a) to pay or credit any amount required to be paid or credited to the Sewer District under this Design-Build Agreement (including liquidated damages) within thirty (30) days following the due date for such payment or credit, or (b) to perform any material obligation under this Design-Build Agreement (unless such default is excused by an

Uncontrollable Circumstance or the Sewer District Fault as and to the extent provided herein);

(C) Notice and Cure Provisions. No default (other than those set forth in subsection (A) of this Section) shall constitute an Event of Default giving the Sewer District the right to terminate this Design-Build Agreement for cause under this section unless:

(1) the Sewer District has given prior written notice to the Design-Build Contractor stating that in its opinion a specified default in its duty to pay or perform exists which gives the Sewer District a right to terminate this Design-Build Agreement for cause under this Section, and describing the default in reasonable detail; and

(2) The Design-Build Contractor has neither challenged in an appropriate forum the Sewer District's conclusion that such failure or refusal to perform has occurred or constitutes a material breach of this Design-Build Agreement nor corrected or diligently taken steps to correct such default within a reasonable period of time, but not more than thirty (30) days, from receipt of the notice given pursuant to clause (i) of this subsection (but if the Design-Build Contractor shall have diligently taken steps to correct such default within a reasonable period of time, the same shall not constitute an Event of Default for as long as the Design-Build Contractor is continuing to take such steps to correct such default; provided however, that if such breach remains uncured for ninety (90) days regardless of the Design-Build Contractor's efforts to cure such breach, the Sewer District may terminate this Design-Build Agreement upon written notice to the Design-Build Contractor.

(D) Other Remedies Upon Design-Build Contractor Event of Default. The right of termination provided under this Section upon an Event of Default by the Design-Build Contractor is not exclusive. If this Design-Build Agreement is terminated by the Sewer District for an Event of Default by the Design-Build Contractor, the Sewer District shall have the right to pursue a cause of action for Direct Damages, and to exercise all other remedies which are available to it under this Design-Build Agreement, under the Security Instruments and under Applicable Law. Without limiting the foregoing, except as provided in Section 9.7 hereof, upon any termination of the Design-Build Contractor for an Event of Default the Direct Damages payable by the Design-Build Contractor to the Sewer District shall include, but not be limited to the costs of (1) making all repairs and replacements to the Project, (2) completing the Design-Build Work, (3) remediating any public health and safety problems, and (4) paying all unpaid fines and penalties payable to any Governmental Body, in each case resulting from any breach of this Design-Build Agreement by the Design-Build Contractor.

(E) Guarantor Event of Default. The Sewer District may terminate this Design-Build Agreement if an Event of Default arises pursuant to the terms of the Guaranty Agreement and in accordance thereof.

### SECTION 9.3 EVENTS OF DEFAULT BY THE SEWER DISTRICT.

(A) Events of Default Permitting Termination. Each of the following shall constitute an Event of Default by the Sewer District upon which the Design-Build Contractor, by notice to the Sewer District, may terminate this Design-Build Agreement:

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

(2) Failure to Pay or Perform. The failure, refusal or other default by the Sewer District in its duty: (1) to pay the amount required to be paid to the Design-Build Contractor under this Design-Build Agreement within sixty (60) days following the due date for such payment; or (2) to perform any other material obligation under this Design-Build Agreement (unless such default is excused by an Uncontrollable Circumstance or Design-Build Contractor Fault).

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

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

(2) The Sewer District has neither challenged in an appropriate forum the Design-Build Contractor's conclusion that such failure or refusal to perform has occurred or constitutes a material breach of this Design-Build Agreement nor corrected or diligently taken steps to correct such default within a reasonable period of time but not more than thirty (30) days from the date of the notice given pursuant to the preceding paragraph. If the Sewer District shall have diligently taken steps to correct such default within a reasonable period of time, the same shall not constitute an Event of Default for as long as the Sewer District is continuing to take such steps to correct such default.

(D) No Other the Sewer District Failures Shall Constitute an Event of Default. No other failure on the part of the Sewer District shall constitute an event of default for which the Design-Build Contractor may terminate this Design-Build Agreement.

#### SECTION 9.4 OBLIGATIONS OF THE DESIGN-BUILD CONTRACTOR UPON TERMINATION OR EXPIRATION.

(A) Design-Build Contractor Obligations. Upon a termination of the Design-Build Contractor's right to perform this Design-Build Agreement hereunder, or upon the expiration of this Design-Build Agreement under Section 10.1 hereof, the Design-Build Contractor shall, as set forth in written instructions provided by the Sewer District:

- (1) stop the Design-Build Work on the date and to the extent specified by the Sewer District;
- (2) cease incurring any further obligations or liabilities pertaining to the Design-Build Work;
- (3) promptly take all action as necessary to protect and preserve all materials, equipment, tools, facilities and other property;
- (4) promptly remove from the WWTP and Site all equipment, implements, machinery, tools, temporary facilities of any kind and other property owned or leased by the Design-Build Contractor (including, but not limited to sheds, trailers, workshops and toilets), and repair any damage caused by such removal;
- (5) clean all applicable areas of the WWTP and the Site and leave them in a neat and orderly condition;
- (6) subject to subsection (B) of this Section, promptly remove all employees of the Design-Build Contractor and any Subcontractors and vacate the WWTP and Site;
- (7) promptly deliver to the Sewer District a list of all supplies, materials, machinery, equipment, property and special order items previously delivered or fabricated by the Design-Build Contractor or any Subcontractor but not yet incorporated in the Project;
- (8) deliver to the Sewer District the Operation and Maintenance Information Systems and all computer programs used in the performance of the Design-Build Work, including all revisions and updates thereto;
- (9) deliver to the Sewer District a copy of all books and records in its possession relating to the performance of the Design-Build Work;
- (10) provide the Sewer District with a list of all files, and access and security codes with instructions and demonstrations which show how to open and change such codes;
- (11) advise the Sewer District promptly of any special circumstances which might limit or prohibit cancellation of any Subcontract;
- (12) promptly deliver to the Sewer District copies of all Subcontracts, together with a statement of:
  - (a) the items ordered and not yet delivered pursuant to each agreement;
  - (b) the expected delivery date of all such items;
  - (c) the total cost of each agreement and the terms of payment; and

(d) the estimated cost of canceling each agreement;

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

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

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

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

(17) notify the Sewer District promptly in writing of any Legal Proceedings against the Design-Build Contractor by any Subcontractor or other third-parties relating to the termination of the Design-Build Work;

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

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

(B) Design-Build Contractor Payment of Certain Costs. If termination is pursuant to Section 9.2 hereof, or upon the expiration of this Design-Build Agreement under Section 10.1 hereof, the Design-Build Contractor shall be obligated to pay the costs and expenses of undertaking its obligations under subsection (A) of this Section. If the Design-Build Contractor fails to comply with any obligation under this Section, the Sewer District may perform such obligation and the Design-Build Contractor shall pay on demand all reasonable costs thereto subject to Cost Substantiation.

(C) The Sewer District Payment of Certain Costs. If termination is due to a the Sewer District Event of Default pursuant to Section 9.3 hereof, the Sewer District shall pay to the Design-Build Contractor within sixty (60) days of the date of the Design-Build Contractor's invoice supported by Cost Substantiation all reasonable cost and expenses incurred by the Design-Build Contractor in satisfying its obligations under subsection (A) of this Section.

(D) Optional Termination. The Sewer District may, at its option, terminate the Design-Build Agreement, in whole or in part, at any time by ten (10) days' written notice (delivered by Certified or Registered Mail, Return Receipt Requested) to the Design-Build Contractor, whether or not the Design-Build Contractor is in default. Upon such termination, the Design-Build Contractor shall waive any claims for damages, including loss of anticipated profits, on account thereof, but as the sole right and remedy of the Design-Build Contractor, the Sewer District shall pay the Design-Build Contractor in accordance with this subparagraph, provided, however, that those provisions of this Design-Build Agreement which by their very nature survive Final Completion under this Design-Build Agreement shall remain in full force and effect after such termination. Upon receipt of any such notice, the Design-Build Contractor shall, unless the notice requires otherwise: (i) immediately discontinue work on the date and to the extent specified in the notice; (ii) place no further orders or subcontracts for materials, services or facilities, other than as may be necessary or required for completion of such portion of Work under this Design-Build Agreement that is not terminated, and; (iii) promptly make every reasonable effort to obtain cancellation upon terms satisfactory to the Sewer District of all orders and Subcontracts to the extent they relate to the performance of Work terminated or assign to Sewer District those orders and Subcontracts and revoke agreements specified in such notice. Upon any such termination, the Sewer District will pay to the Design-Build Contractor all amounts due and not previously paid to the Design-Build Contractor for Work completed in accordance with this Design-Build Agreement prior to such notice and for Work thereafter completed as in such notice

SECTION 9.5 SURVIVAL OF CERTAIN PROVISIONS UPON TERMINATION. All representations and warranties of the Parties hereto contained in Article II hereof and the rights and obligations of the Parties hereto pursuant to Sections 1.2(K), 5.3, 5.4, 7.9, 8.1, 8.2, 8.3, 8.4, 8.5, 8.6, 9.1, 9.2, 9.3, 9.4, 9.7, 9.8, 9.9, 11.1, 11.2, 11.3, 12.2, 13.2 and 13.5(D) hereof shall survive the termination of this Design-Build Agreement. No termination of this Design-Build Agreement shall (1) limit or otherwise affect the respective rights and obligations of the Parties hereto accrued prior to the date of such termination; or (2) preclude either Party from impleading the other Party in any Legal Proceeding originated by a third-party as to any matter occurring during the Term of this Design-Build Agreement.

SECTION 9.6 NO WAIVERS. No action of the Sewer District or Design-Build Contractor pursuant to this Design-Build Agreement (including, but not limited to, any investigation or payment), and no failure to act, shall constitute a waiver by either Party of the other Party's compliance with any term or provision of this Design-Build Agreement. No course of dealing or delay by the Sewer District or Design-Build Contractor in exercising any right, power or remedy under this Design-Build Agreement shall operate as a waiver thereto or otherwise prejudice such Party's rights, powers and remedies. No single or partial exercise of (or failure to exercise) any right, power or remedy of the Sewer District or the Design-Build Contractor under this Design-Build Agreement shall preclude any other or further exercise thereto or the exercise of any other right, power or remedy.

SECTION 9.7 NO CONSEQUENTIAL OR PUNITIVE DAMAGES. In no event shall either Party hereto be liable to the other or obligated in any manner to pay to the other any special, incidental, consequential, punitive or similar damages (except for any Direct Damages)

based upon claims arising out of or in connection with the performance or non-performance of its obligations or otherwise under this Design-Build Agreement, or the material falseness or inaccuracy of any representation made in this Design-Build Agreement, whether such claims are based upon contract, tort, negligence, warranty or other legal theory.

**SECTION 9.8 FORUM FOR DISPUTE RESOLUTION.** All Legal Proceedings related to this Design-Build Agreement or to the Project or to any rights or any relationship between the Parties arising therefrom shall be solely and exclusively initiated and maintained in the New York State Supreme Court located in Rockland County, New York. The Design-Build Contractor and the Sewer District each expressly and irrevocably waives any right otherwise provided by any Applicable Law to remove the matter to any other state or federal venue, consents to the jurisdiction of such courts in any such Legal Proceeding, waives any objection it may have to the laying of the jurisdiction of any such Legal Proceeding, and waives its right to a trial by jury.

**SECTION 9.9 NON-BINDING MEDIATION PRIOR TO ACCEPTANCE.** Either Party hereto may give the other Party written notice that a dispute occurring prior to the applicable Final Acceptance Date constitutes a Technical Dispute and shall be submitted to an Independent Engineer for non-binding mediation. A “Technical Dispute” for the purposes of this Section means a dispute pertaining to design, engineering, technical or Acceptance Test matters, and any price or payment matter related thereto. The Sewer District and the Design-Build Contractor shall mutually agree on the Independent Engineer prior to the Design-Build Commencement Date or at such time as is necessary to address such dispute. If a Party unilaterally submits a dispute to non-binding mediation, such Party shall pay all costs associated with the services provided by the Independent Engineer. If the Parties mutually agree to submit a dispute to non-binding mediation, the cost associated with the services provided by the Independent Engineer shall be shared equally by the Sewer District and the Design-Build Contractor. If the Independent Engineer is unable, within fourteen (14) days, to reach a determination as to the dispute that is acceptable to the Parties hereto, the matter may be referred by either Party to Legal Proceedings. Such mediation is intended to assist the Parties in resolving disputes over the correct interpretation of this Design-Build Agreement. The Independent Engineer shall not be empowered to render a binding decision.

## **ARTICLE X. TERM**

SECTION 10.1 EFFECTIVE DATE AND TERM. This Design-Build Agreement shall become effective on the Agreement Date, and shall continue in effect until the expiration of the Warranty Period or termination in accordance with Article IX hereof. All rights, obligations and liabilities of the Parties hereto shall commence on the Agreement Date, subject to the terms and conditions hereto.

## **ARTICLE XI. INSURANCE, UNCONTROLLABLE CIRCUMSTANCES AND INDEMNIFICATION**

### **SECTION 11.1 INSURANCE.**

(A) Design-Build Contractor Insurance. At all times during the Term, the Design-Build Contractor shall obtain and maintain the Required Insurance in accordance with Appendix I hereto and shall pay all premiums with respect thereto as the same become due and payable.

(B) Insurers, Deductibles and the Sewer District's Rights. All insurance required by this Section shall be obtained and maintained from financially sound and generally recognized responsible insurance companies meeting the qualifications set forth in Appendix I hereto. The Design-Build Contractor shall be responsible for any deductible amounts. The Design-Build Contractor shall also be responsible for all self-insured retentions contained in its insurance coverages, as well as any excluded losses if such losses are within the liability of the Design-Build Contractor hereunder. The amounts of any deductibles and any self-insured retentions shall be subject to the Sewer District's written approval and in accordance with Appendix I hereto. All policies evidencing such insurance shall provide for: (1) payment of the losses to the Sewer District, and to the Design-Build Contractor as their respective interests may appear; and (2) at least forty-five (45) days prior written notice of the cancellation thereto or change in the provision of such policy or policies to the Design-Build Contractor and the Sewer District. All policies of insurance required by this Section shall be primary insurance without any right of contribution from other insurance carried by the Sewer District.

(C) Certificates, Policies and Notice. The delivery by the Design-Build Contractor to the Sewer District of certificates of Required Insurance was required prior to the execution of this Design-Build Agreement as a condition precedent to the execution hereof. Whenever a Subcontractor is utilized, the Design-Build Contractor shall either obtain and maintain or require the Subcontractor to obtain and maintain insurance in accordance with the applicable requirements of Appendix I hereto.

(D) Maintenance of Insurance Coverage. If the Design-Build Contractor fails to pay any premium for Required Insurance, or if any insurer cancels any Required Insurance policy and the Design-Build Contractor fails to obtain replacement coverage so that the Required Insurance is maintained on a continuous basis, then, at the Sewer District's election (but without any obligation to do so), the Sewer District, following notice to the Design-Build Contractor, may pay such premium or procure similar insurance coverage from another company or



companies and upon such payment by the Sewer District the amount thereto shall be immediately reimbursable to the Sewer District by the Design-Build Contractor. The Design-Build Contractor shall not perform Design-Build Work during any period when any policy of Required Insurance is not in effect. The failure of the Design-Build Contractor to obtain and maintain any Required Insurance shall not relieve the Design-Build Contractor of its liability for any losses intended to be insured thereby. Should any failure to provide continuous insurance coverage occur, the Design-Build Contractor shall indemnify and hold harmless the Sewer District in the manner provided in Section 11.3 hereof, from and against any Loss-and-Expense arising out of such failure. The purchase of insurance to satisfy the Design-Build Contractor's obligations under this Section shall not be a satisfaction of any Design-Build Contractor liability under this Design-Build Agreement or in any way limit, modify or satisfy the Design-Build Contractor's indemnity obligations hereunder.

## SECTION 11.2 UNCONTROLLABLE CIRCUMSTANCES.

(A) Relief from Obligations. Except as expressly provided under the terms of this Design-Build Agreement, neither Party to this Design-Build Agreement shall be liable to the other for any loss, damage, delay, default or failure to perform any obligation to the extent it results from an Uncontrollable Circumstance. The Parties agree that the relief for an Uncontrollable Circumstance described in this Section shall apply to all obligations in this Design-Build Agreement, except to the extent specifically provided otherwise, notwithstanding that such relief is specifically mentioned with respect to certain obligations in this Design-Build Agreement but not other obligations. The occurrence of an Uncontrollable Circumstance shall not excuse or delay the performance of a Party's obligation to pay monies previously accrued and owing under this Design-Build Agreement, or to perform any obligation hereunder not affected by the occurrence of the Uncontrollable Circumstance.

(B) Notice and Mitigation. The Party that asserts the occurrence of an Uncontrollable Circumstance shall notify the other Party by electronic mail, on or promptly after the date the Party experiencing such Uncontrollable Circumstance first knew of the occurrence thereto, followed within fifteen (15) days by a written description of: (1) the Uncontrollable Circumstance and the cause thereto (to the extent known); and (2) the date the Uncontrollable Circumstance began, its estimated duration, the estimated time during which the performance of such Party's obligations hereunder shall be delayed, or otherwise affected. As soon as practicable after the occurrence of an Uncontrollable Circumstance, the affected Party shall also provide the other Party with an description of: (1) the amount, if any, by which the Fixed Design-Build Price is proposed to be adjusted as a result of such Uncontrollable Circumstance; (2) its estimated impact on the other obligations of such Party under this Design-Build Agreement; and (3) potential mitigating actions which might be taken by the Design-Build Contractor or the Sewer District and any areas where costs might be reduced and the approximate amount of such cost reductions. The affected Party shall also provide prompt written notice of the cessation of such Uncontrollable Circumstance. Whenever such act, event or condition shall occur, the Party claiming to be adversely affected thereby shall, as promptly as practicable, use all reasonable efforts to eliminate the cause therefor, reduce costs and resume performance under this Design-Build Agreement. While the Uncontrollable Circumstance continues, the affected Party shall give notice to the other Party, before the first day of each

succeeding month, updating the information previously submitted. The Party claiming to be adversely affected by an Uncontrollable Circumstance shall bear the burden of proof, and shall furnish promptly any additional documents or other information relating to the Uncontrollable Circumstance reasonably requested by the other Party.

(C) Conditions to Performance, Fixed Design-Build Price, and Schedule Relief. If and to the extent that Uncontrollable Circumstances interfere with, delay or increase the cost of the Design-Build Contractor's performance of the Design-Build Work and the Design-Build Contractor has provided notice as required by Section 11.2(B), the Design-Build Contractor shall be entitled to a reasonable and appropriate increase in the Fixed Design-Build Price or an extension of schedule which properly reflects the interference with performance, the amount of the increased cost, or the time lost as a result thereto, and the Design-Build Contractor shall perform all other Design-Build Work. The proceeds of any Required Insurance available to meet any such increased cost, and the payment by the Design-Build Contractor of any deductible, shall be applied to such purpose prior to any determination of cost increase payable by the Sewer District under this Section. Any cost reduction achieved through the mitigating measures undertaken by the Design-Build Contractor pursuant to subsection (B) of this Section upon the occurrence of an Uncontrollable Circumstance shall be reflected in a reduction of the amount by which the Fixed Design-Build Price would have otherwise been increased or shall serve to reduce the Fixed Design-Build Price to reflect such mitigation measures, as applicable. In the event that the Design-Build Contractor believes it is entitled to any Fixed Design-Build Price or schedule relief on account of any Uncontrollable Circumstance, it shall furnish the Sewer District written notice of the specific relief requested and detailing the event giving rise to the claim within thirty (30) days after the giving of notice delivered pursuant to subsection (B) of this Section, or if the specific relief cannot reasonably be ascertained and such event detailed, with such thirty (30) day period, then within such longer period with which it is reasonably possible to detail the event and ascertain such relief. Within thirty (30) days after receipt of such a timely submission from the Design-Build Contractor the Sewer District shall issue a written determination as to the extent, if any, it concurs with the Design-Build Contractor claim for performance, price or schedule relief, and the reasons therefore. The Design-Build Contractor acknowledges that its failure to give reasonable and timely notice pertaining to an Uncontrollable Circumstance as required under this Section may increase the cost of the Uncontrollable Circumstance to the Sewer District. To the extent the Design-Build Contractor's failure to give reasonable and timely notice to the Sewer District causes the Sewer District to incur additional costs related to the Uncontrollable Circumstance, the relief to the Design-Build Contractor shall be reduced to account for such additional cost. The Design-Build Contractor shall have the affirmative burden of refuting the Sewer District's assertion. Absent such refutation, the reduction in relief to the Design-Build Contractor and the reduction in additional cost to the Sewer District asserted by the Sewer District in such circumstances shall be effective.

(D) Acceptance of Relief Constitutes Release. The Design-Build Contractor's acceptance of any performance, price or schedule relief under this Section shall be construed as a release of the Sewer District by the Design-Build Contractor (and all persons claiming by, through, or under the Design-Build Contractor) for any and all Loss-and-Expense resulting from, or otherwise attributable to, the event giving rise to the relief claimed.

**SECTION 11.3 INDEMNIFICATION BY THE DESIGN-BUILD CONTRACTOR.**

The Design-Build Contractor shall protect, indemnify and hold harmless the Sewer District, and its representatives, officers, employees, agents, contractors, and subcontractors (each, a "Sewer District Indemnatee"), from and against (and pay the full amount of) any and all Loss-and-Expense, and will defend the Sewer District Indemnitees in any suit or matter, including appeals, arising from or in connection with (or alleged to arise from or in connection with): (1) the Design-Build Contractor's performance of its obligations under this Design-Build Agreement; or (2) the negligent acts, errors or omissions or willful misconduct of the Design-Build Contractor or any of its officers, directors, employees, agents, representatives or Subcontractors, resulting in personal injury or property damage to any Sewer District Indemnatee. The Design-Build Contractor shall also indemnify the Sewer District and Sewer District Indemnitees as and to the extent provided elsewhere in this Design-Build Agreement. The Design-Build Contractor's indemnity obligations hereunder shall not be limited by any coverage exclusions or other provisions in any insurance policy maintained by the Design-Build Contractor which is intended to respond to such events. The Design-Build Contractor shall not, however, be required to reimburse or indemnify any Sewer District Indemnatee for any Loss-and-Expense to the extent such Loss-and-Expense is resulting from the gross negligence or willful misconduct of any Sewer District Indemnatee or to the extent attributable to any Uncontrollable Circumstance. Any Sewer District Indemnatee judicially determined to be proportionally responsible for or contributing to the Loss-and-Expense, and any Sewer District Indemnatee whose gross negligence or other wrongful conduct, act or omission is adjudged to have caused such Loss-and-Expense shall be responsible therefor in the proportion that its gross negligence or wrongful conduct caused or contributed to the Loss-and-Expense. A Sewer District Indemnatee shall promptly notify the Design-Build Contractor of the assertion of any claim against it for which it is entitled to be indemnified hereunder. The Design-Build Contractor may only assume the defense of the claim in any Legal Proceeding upon consent of the Sewer District Indemnatee in writing. The Design-Build Contractor shall not approve any settlement of the claim unless the Sewer District Indemnatee first approves such settlement in writing. These indemnification provisions are for the protection of the Sewer District Indemnitees only and shall not establish, of themselves, any liability to third parties. This indemnification obligation shall include, but is not limited to, all claims against the Sewer District or a Sewer District Indemnatee by an employee or former employee of the Design-Build Contractor or any Subcontractor and this Design-Build Agreement expressly waives all immunity and limitation on liability under any Industrial Insurance Act, other workers' compensation act, disability benefit act, or other employee benefit act of any jurisdiction which would otherwise be applicable in the case of such a claim. The provisions of this Section shall survive termination of this Design-Build Agreement.

**ARTICLE XII.  
SECURITY FOR PERFORMANCE**

**SECTION 12.1 GUARANTOR.**

(A) Guaranty Agreement. The Design-Build Contractor shall cause the Guaranty Agreement to be provided and maintained by the Guarantor during the Term hereof in the form set forth in Appendix AA hereto.

## SECTION 12.2 BONDS.

(A) Design-Build Performance Bond and Design-Build Labor and Materials Payment Bond and Warranty Bond. As a condition to the execution of this Design-Build Agreement, prior to the Agreement Date, the Design-Build Contractor provided the Design-Build Performance Bond and the Design-Build Labor and Materials Payment Bond, each in an amount equal to the Fixed Design-Build Price relating to the construction component of Design-Build Work, as financial security for the faithful performance and payment of its Design-Build Period obligations hereunder. The Design-Build Contractor must also secure a Warranty Bond securing its warranty obligations under this Design-Build Agreement during the Warranty Period. The Design-Build Performance Bond, the Design-Build Labor and Materials Payment Bond are included as Transaction Forms BB and CC to this Design-Build Agreement, and the Warranty Bond shall be substantially in the form set forth in Transaction Form DD. The Design-Build Performance Bond, Labor and materials Payment Bond and Warranty Bond shall be issued by a surety company: (1) approved by the Sewer District having a rating of "A" in the latest revision of the A.M. Best Company's Insurance Report; (2) be listed in the United States Treasury Department's Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsurance Companies"; and (3) properly registered and licensed to conduct business in the State. The Design-Build Performance Bond and the Design-Build Labor and Materials Payment Bond shall remain open until Final Completion has been achieved. The Design-Build Warranty Bond shall be effective during the Warranty Period, any extension thereto made in accordance with this Design-Build Agreement.

(B) Monitoring of Sureties. The Design-Build Contractor shall be responsible throughout the Term of this Design-Build Agreement for monitoring the financial condition of any surety company issuing bonds under this Design-Build Agreement. In the event the rating of any issuing surety company falls below such minimum level, the Design-Build Contractor shall promptly notify the Sewer District of such event and shall promptly furnish or arrange for the furnishing of a substitute or an additional bond of a surety company whose rating and other qualifications satisfy all above requirements, unless the Sewer District agrees to accept the surety company or agrees to an alternative method of assurance. Upon such notice by the Design-Build Contractor of such an event, the Sewer District shall not unreasonably withhold its approval of such assurance.

SECTION 12.3 COSTS OF PROVIDING SECURITY FOR PERFORMANCE ARE INCLUDED IN THE FIXED DESIGN-BUILD PRICE. The cost and expense of obtaining and maintaining the Security Instruments required under this Article as security for the performance of the Design-Build Contractor's obligations hereunder shall be borne by the Design-Build Contractor without reimbursement from the Sewer District other than the Fixed Design-Build Price.

### **ARTICLE XIII. MISCELLANEOUS PROVISIONS**

SECTION 13.1 RELATIONSHIP OF THE PARTIES. The Design-Build Contractor is an independent contractor of the Sewer District and the relationship between the Parties shall be limited to performance of this Design-Build Agreement in accordance with its terms. Neither Party shall have any responsibility with respect to the services to be provided or contractual benefits assumed by the other Party. Nothing in this Design-Build Agreement shall be deemed to constitute either Party a partner, agent or legal representative of the other Party. No liability or benefits, such as workers compensation, pension rights or liabilities, or other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship, shall arise or accrue to any Party's agent or employee as a result of this Design-Build Agreement or the performance hereof.

#### **SECTION 13.2 PROPERTY RIGHTS.**

(A) Protection from Infringement. The Design-Build Contractor shall pay all royalties and license fees in connection with the Design-Build Work. The Design-Build Contractor shall protect, indemnify, defend and hold harmless the Sewer District, and any of the Sewer District Indemnities, in the manner provided in Section 11.3 hereof, from and against all Loss-and-Expense arising out of or related to the infringement or unauthorized use of any patent, trademark, copyright or trade secret relating to, or for the Design-Build Work or at its option, shall acquire the rights of use under infringed patents, or modify or replace infringing equipment with equipment equivalent in quality, performance, useful life and technical characteristics and development so that such equipment does not so infringe. The Design-Build Contractor shall not, however, be required to reimburse or indemnify any person for any Loss-and-Expense to the extent due to the negligence or willful conduct of such person. The provisions of this Section shall survive termination of this Design-Build Agreement.

(B) Intellectual Property Developed by the Design-Build Contractor. All intellectual property developed by the Design-Build Contractor at or through the use of the WWTP, the Odor Control Systems, the Improvements or otherwise in connection with the performance of the Design-Build Work shall be owned by the Design-Build Contractor subject to the terms and conditions of this Section, and is hereby licensed to the Sewer District on a non-exclusive cost free, perpetual basis for use by the Sewer District and any operator of the WWTP. Such intellectual property shall include technology, inventions, innovations, processes, know-how, formulas and software, whether protected as proprietary information, trade secrets, or patents. The Design-Build Contractor shall have an irrevocable, perpetual and unrestricted right to use such intellectual property for any Sewer District request, whether before or following the Termination Date. Neither the Sewer District nor the Design-Build Contractor shall license, transfer or otherwise make available such intellectual property to any third-party for remuneration except with the consent of the other, which consent may be conditioned upon mutual agreement as to the sharing of any such remuneration.

SECTION 13.3 INTEREST ON OVERDUE OBLIGATIONS. Except as otherwise provided herein, all amounts due hereunder, whether as damages, credits, revenue, charges or

reimbursements, that are not paid when due shall bear interest at the rate of interest which is the Overdue Rate, on the amount outstanding from time to time, on the basis of a 365-day year, counting the actual number of days elapsed, and such interest accrued at any time shall, to the extent permitted by Applicable Law, be deemed added to the amount due as accrued.

#### SECTION 13.4 COST SUBSTANTIATION.

(A) Substantiating Non-Fixed Costs. The Fixed Design-Build Price has been negotiated by the Parties and fixed by the terms of this Design-Build Agreement. Any other cost proposed or incurred by the Design-Build Contractor which is directly or indirectly chargeable to the Sewer District in whole or in part hereunder shall be the fair market price for the good or service provided, or, if there is no market, shall be a commercially reasonable price. The Design-Build Contractor shall provide certified Cost Substantiation for all such other costs invoiced to the Sewer District hereunder, including any cost plus pricing arrangements, and for all estimates and quotations furnished to the Sewer District hereunder for the purpose of negotiating a fixed or lump-sum price for Extra Design-Build Work or other additional work necessitated on account of Uncontrollable Circumstances, the Sewer District Fault or the Sewer District direction. Upon such fixed or lump-sum price being agreed to by the Parties, such price shall not be further subject to Cost Substantiation.

(B) Cost Substantiation Certificate. Any certificate delivered hereunder to substantiate cost shall be signed by a senior management officer of the Design-Build Contractor, shall state the amount of such cost and the provisions of this Design-Build Agreement under which such cost is properly chargeable to the Sewer District, shall describe the competitive or other process utilized by the Design-Build Contractor to obtain a fair market price, and shall state that such cost is a fair market price for the service or materials to be supplied (or, if there is no market, that such cost is commercially reasonable) and that such services and materials are reasonably required pursuant to this Design-Build Agreement. The certificate shall be accompanied by copies of such documentation as shall be reasonably required by the Sewer District. Such documentation shall be in a format reasonably acceptable to the Sewer District and shall include reasonably detailed information concerning: (1) all Subcontracts; (2) the amount and character of materials and services furnished or to be furnished, the persons from whom purchased or to be purchased, the amounts payable therefore and related delivery and transportation costs and any sales or personal property Taxes; (3) a statement of the equipment used or to be used, and any rental payable therefore; (4) Design-Build Contractor and Subcontractor employee hours, duties, wages, salaries, benefits and assessments; and (5) Design-Build Contractor profit and overhead in accordance with subsection (D) of this Section, bonds and insurance. The Design-Build Contractor's entitlement to reimbursement of Cost Substantiated costs of the Design-Build Contractor shall be subject to the limitations set forth in this Section.

(C) Technical Services. The Design-Build Contractor personnel and personnel of Subcontractors providing technical services shall be billed at their then currently applicable rates for similar services on projects of similar size and scope to the Design-Build Work.

(D) Mark-Up. The Design-Build Contractor shall be entitled to a mark-up of twenty percent (20%) of its construction labor (including wages and benefits), equipment rental and materials costs which covers superintendence, the use of tools and other overhead expense and profit.

The Design-Build Contractor and approved Subcontractors shall be entitled to a total mark-up of twenty percent (20%) which covers superintendence, the use of tools and other overhead expenses and profit. The compensation for the approved Subcontractor for overhead expense and profit shall be a maximum allowable overhead of fifteen (15%) of its construction labor (including wages, benefits and insurance), equipment rental and materials costs which covers superintendence, the use of tools and other overhead expense and profit. No overhead and profit shall be allowed for Required Insurance the Design-Build Contractor is contractually required to maintain. The Design-Build Contractor shall only be entitled to a maximum allowable overhead of five (5%) for Subcontractors' costs.

For both, Design-Build Contractor and approved Subcontractors, overhead expense shall be considered to include, but not be limited to insurance bond or bonds, field and office supervisors and assistants above the level of foremen, use of small tools and minor equipment, incidental job burdens, general office expense, etc. No amount for overhead expense and profit shall be allowed on the premium portion of overtime pay. No amount for overhead expense and profit shall be allowed on payroll taxes which include unemployment insurance, FICA tax, workman's compensation, personal liability and property damage.

The Design-Build Contractor shall be not be entitled to mark-up of its engineering personnel as the costs of such personnel shall be based a multiplier of 3.1 to the direct labor cost. Equipment rental charges shall be the pro-rated charge actually paid by the Design-Build Contractor in the case where equipment is rented, except that this rental charge shall not exceed the latest rental rates compiled by the Blue Book. If the equipment is owned by the Design-Build Contractor, the equipment rental charge shall be pro-rated on the basis of the monthly rates as set forth in the Blue Book. To the extent fuel and lubricant costs are not included in the rental rates then the fuel and lubrication costs will be paid for separately by the Sewer District.

(E) Evidence of Costs Incurred. To the extent reasonably necessary to confirm direct costs required to be Cost Substantiated, copies of timesheets, invoices, canceled checks, expense reports, receipts and other documents, as appropriate, shall be delivered to the Sewer District with the request for reimbursement of such costs.

#### SECTION 13.5 SUBCONTRACTORS.

(A) Use Restricted. Subcontractors may be used to perform other Design-Build Work, subject to the Sewer District's right of approval set forth in subsection (B) of this Section for Subcontractors not listed in Appendix J hereto.

(B) Sewer District Review and Approval of Permitted Subcontractors. Except with regard to those Subcontractors that are approved by the Sewer District in advance of this Design-Build Agreement and included on the list of approved Subcontractors attached hereto as Appendix J, the Design-Build Contractor shall, unless waived by the Sewer District, supply the

Sewer District with the information detailed below for each proposed Subcontractor who will undertake work related to the Project in excess of \$50,000.00. The Design-Build Contractor shall furnish the Sewer District written notice of its intention to engage any Subcontractor, together with, as applicable, proposals or bids from such Subcontractors, together with all information required by the Sewer District pertaining to the demonstrated responsibility of the proposed Subcontractor in the following areas, including but not limited to: (1) any conflicts of interest; (2) any record of felony criminal convictions or pending felony criminal investigations; (3) any final judicial or administrative finding or adjudication of illegal employment discrimination; (4) any unpaid federal, State, or local Taxes; (5) work or services provided directly or indirectly to the Sewer District or for a Sewer District project in the past five years; and, (6) any final judicial or administrative findings or adjudication of non-performance in contracts with the Sewer District. The approval or withholding thereto by the Sewer District of any proposed Subcontractor shall not create any liability of the Sewer District to the Design-Build Contractor, to third-parties or otherwise. In no event shall any Subcontract be awarded to any person debarred, suspended or disqualified from State or Sewer District contracting for any services similar in scope to Design-Build Work.

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

(D) Indemnity for Subcontractor Claims. The Design-Build Contractor shall pay or cause to be paid to all direct Subcontractors all amounts due in accordance with their respective Subcontracts. No Subcontractor shall have any right against the Sewer District for labor, services, materials or equipment furnished for the Design-Build Work. The Design-Build Contractor acknowledges that its indemnity obligations under Section 11.3 hereof shall extend to all claims for payment or damages by any Subcontractor who furnishes or claims to have furnished any labor, services, materials or equipment in connection with the Design-Build Work.

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



(F) Assignability. All Subcontracts entered into by the Design-Build Contractor with respect to the Project shall be assignable to the Sewer District, solely at the Sewer District's election and without cost or penalty, upon the expiration or termination of this Design-Build Agreement.

SECTION 13.6 ASSIGNMENT AND CHANGES IN OWNERSHIP OF DESIGN-BUILD CONTRACTOR.

(A) By the Design-Build Contractor. The Design-Build Contractor shall not assign, transfer, convey, sell, lease, encumber or otherwise dispose of this Design-Build Agreement, its right to execute the same, or its right, title or interest in all or any part of this Design-Build Agreement or any monies due hereunder whatsoever prior to their payment to the Design-Build Contractor, whether legally or equitably, by power of attorney or otherwise, without the prior written consent of the Sewer District. Any such approval given in one instance shall not relieve the Design-Build Contractor of its obligation to obtain the prior written approval of the Sewer District to any further assignment. Any such assignment of this Design-Build Agreement which is approved by the Sewer District shall require the assignee of the Design-Build Contractor to assume the performance of and observe all obligations, representations and warranties of the Design-Build Contractor under this Design-Build Agreement which shall remain in full force and effect during the Term hereto. The approval of any assignment, transfer or conveyance shall not operate to release the Design-Build Contractor in any way from any of its obligations under this Design-Build Agreement unless such approval specifically provides otherwise.

(B) By the Sewer District. The Sewer District may not assign its rights or obligations under this Design-Build Agreement without the prior written consent of the Design-Build Contractor. the Sewer District may however, assign its rights and obligations under this Design-Build Agreement, without the consent of the Design-Build Contractor, to another Governmental Body if such assignee assumes, and is legally capable of discharging, the duties and obligations of the Sewer District hereunder.

(C) Change in Ownership of Design-Build Contractor. The Design-Build Contractor shall provide the Sewer District with sixty (60) days prior written notice of any change of any nature in the ownership, or ownership structure, of the Design-Build Contractor or any parent, subsidiary or affiliate thereof, including, without limitation, any transfers of shares of stock, membership or other ownership units of the Design-Build Contractor, parent, subsidiary or affiliate. In addition, if the Design-Build Contractor is a privately held company, the Design-Build Contractor shall provide the Sewer District with sixty (60) days prior written notice of any changes in the officers, principals or directors of the Design-Build Contractor. Subsequent to any such notices, the Design-Build Contractor shall provide, without limitation, upon request of the Sewer District any information requested by the Sewer District related to such change in ownership, officers, principals or directors or ownership structure. At any time within sixty (60) days following the Sewer District's receipt of such supporting information, the Sewer District shall have the right to terminate this Design-Build Agreement upon thirty (30) days' notice to the Design-Build Contractor. In the event of a violation of this provision by the Design-Build Contractor, the Sewer District shall have the right in its sole discretion to terminate this Design-

Build Agreement without prior notice or cure period, and in the event of such termination, the Design-Build Contractor shall forfeit all monies earned thereunder.

SECTION 13.7 COMPLIANCE WITH MATERIAL AGREEMENTS. The Design-Build Contractor shall comply with its obligations under agreements of the Design-Build Contractor which are material to the performance of its obligations under this Design-Build Agreement. The Sewer District shall comply with its obligations under agreements of the Sewer District which are material to the performance of its obligations hereunder.

SECTION 13.8 NO OTHER AGREEMENTS. All negotiations, proposals and agreements prior to the date of this Design-Build Agreement are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein, unless otherwise provided. This Design-Build Agreement, including all Appendices attached hereto, constitutes the entire agreement between the Sewer District and the Design-Build Contractor with respect to the design, construction, start-up, acceptance testing and commissioning of the Project. No obligation or covenant of good faith or fair dealing shall be implied or interpreted as conferring upon either Party any right, duty, obligation or benefit other than as expressly set forth herein, notwithstanding the fact that certain of the terms and conditions hereto may give either Party discretion in the manner of performance under this Design-Build Agreement.

SECTION 13.9 BINDING EFFECT. This Design-Build Agreement shall inure to the benefit of and shall be binding upon the Sewer District and the Design-Build Contractor and any assignee acquiring an interest hereunder consistent with Section 13.6 hereof.

SECTION 13.10 AMENDMENT AND WAIVER. Neither this Design-Build Agreement nor any provision hereof may be changed, modified, amended or waived except by a written agreement duly executed by both Parties. Any of the terms, covenants, and conditions of this Design-Build Agreement may be waived at any time by the Party entitled to the benefit of such term, covenant or condition if such waiver is in writing and executed by the Party against whom such waiver is asserted.

SECTION 13.11 NON-DISCRIMINATION OR SEXUAL HARASSMENT. The Design-Build Contractor shall not discriminate nor permit discrimination by any of its officers, employees, agents and representatives against any person because of age, race, color, religion, national origin, sex, sexual orientation, physical or mental disability, or any other protected class. The Design-Build Contractor will take all actions reasonably necessary to ensure that qualified applicants are employed, and that employees are treated during employment, without regard to age, race, color, religion, national origin, sex, sexual orientation, physical or mental disability, military status, predisposing genetic characteristic, marital status or domestic violence victim status, or any protected class. Such action shall include, without limitation, recruitment and recruitment advertising; employment; job assignment; layoff or termination; upgrading, demotion, transfer, rates of pay or other form of compensation; and selection for training, including apprenticeship. The Design-Build Contractor shall impose the non-discrimination provisions of this Section by contract on all Subcontractors hired to perform work related to the Project and shall take all reasonable actions necessary to enforce such provisions. The Design-

Build Contractor will post in conspicuous places, available to employees and applicants for employment, notices setting forth the provision of this non-discrimination clause. The Design-Build Contractor shall comply with the Sewer District's Affirmative Action program. The Design-Build Contractor shall also ensure that it has in place during the Term of this Design-Build Agreement, a sexual harassment policy in compliance with the New York Human Rights Law ("NYHRL"). The Design-Build Contractor shall ensure that it provides sexual harassment training to all of its employees in accordance with the NYHRL.

SECTION 13.12 NOTICES.

(A) Procedure. All notices, consents, approvals or written communications given pursuant to the terms of this Design-Build Agreement shall be: (1) in writing and delivered in person; (2) transmitted by certified mail, return, receipt requested, postage prepaid or by overnight courier utilizing the services of a nationally-recognized overnight courier service with signed verification of delivery; or (3) given by e-mail transmission, if a signed original is deposited in the United States Mail within two (2) days after transmission. Notices shall be deemed given only when actually received at the address first given below with respect to each Party. Either Party may, by like notice, designate further or different addresses to which subsequent notices shall be sent.

(B) Design-Build Contractor Notice Address. Notices required to be given to the Design-Build Contractor shall be addressed as follows:

[ ]

With a copy to: [ ]

Sewer District Notice Address. Notices required to be given to the Sewer District shall be addressed as follows:

Rockland County Sewer District No. 1  
4 Route 340  
Orangeburg, New York 10962  
Tel.: (845) 365-6111  
Fax: (845) 365-6686  
Email: \_\_\_\_\_

With a copy to: [ ]

Email: ]

SECTION 13.13 NOTICE OF LITIGATION. In the event the Design-Build Contractor or the Sewer District receives notice of or undertakes the defense or the prosecution of any Legal Proceedings, claims, or investigations in connection with the Project, the Party receiving such notice or undertaking such prosecution shall give the other Party timely notice of such

proceedings and shall inform the other Party in advance of all hearings regarding such proceedings.

SECTION 13.14 FURTHER ASSURANCES. The Sewer District and Design-Build Contractor each agree to execute and deliver such further instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Design-Build Agreement. The Sewer District and the Design-Build Contractor, in order to carry out this Design-Build Agreement, each shall use all commercially reasonable efforts to provide such information, execute such further instruments and documents and take such actions as may be reasonably requested by the other and not inconsistent with the provisions of this Design-Build Agreement and not involving the assumption of obligations or liabilities different from or in excess of or in addition to those expressly provided for herein.

[SIGNATURE PAGE TO FOLLOW]

Rockland County Sewer District No.1

Design-Build Agreement for Design Build of Odor Control System Replacements And Miscellaneous Heating And Ventilation System Improvements at The Wastewater Treatment Plant in Orangeburg, NY

IN WITNESS WHERETO, the Parties have caused this Design-Build Agreement to be executed by their duly authorized representatives as of the day and year first above written.

ROCKLAND COUNTY SEWER  
DISTRICT NO. 1

[DESIGN-BUILD CONTRACTOR]

Approved for Signature of County Executive

By: \_\_\_\_\_

By: \_\_\_\_\_

MICHAEL R. SABER, P.E.

Executive Director

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

ROCKLAND COUNTY

DEPARTMENT OF LAW

Approved for signature of County Executive

COUNTY OF ROCKLAND

By: \_\_\_\_\_

By: \_\_\_\_\_

JEANNE GILBERG

EDWIN J. DAY

Principal Assistant County Attorney

County Executive

Rockland County Sewer District No.1

Design-Build Agreement for Design Build of Odor Control System Replacements And Miscellaneous Heating And Ventilation System Improvements at The Wastewater Treatment Plant in Orangeburg, NY

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_