

## CITY COUNCIL

For City Clerk's Use:

☐ **APPROVED** ☐ **DENIED**

Reso No. \_\_\_\_\_ File No. \_\_\_\_\_

Ord No. \_\_\_\_\_

**Agenda Item No.: 12**

**Date: October 5, 2011**

**TO:** Honorable Mayor and Members of the City Council

**FROM:** Michael Lowry, Fire Chief

**SUBJECT:** Award Design and Construction Contract to Erickson-Hall Construction Co. as the Design-build Entity for the Reconstruction and Remodel of Fire Station No. 4 (the "Project")

### RECOMMENDATION:

It is requested that Council adopt Resolution 2011-130 authorizing the Mayor and City Clerk to execute a design-build contract with Erickson-Hall Construction Co. ("Agreement") for an amount not to exceed \$2.1 million dollars (\$2,100,000) for the Project.

### FISCAL ANALYSIS:

The Agreement will be funded from an already established Capital Improvement Project fund ("CIP"), which Council approved on March 9, 2011.

### PREVIOUS ACTION:

None

### BACKGROUND:

In May, 2010, severe mold was discovered throughout Fire Station No. 4 rendering the building unsafe for Fire Department personnel. As a result, in July 2010, City Council authorized staff to enter into an agreement with Jeff Katz Architecture to prepare a schematic design and preliminary design phase for the necessary remodel and reconstruction of the station.

In March, 2011, City Council authorized the Fire Department to explore the design-build process for the Project because of expedited project completion and reduced project costs associated with this method of public construction. City Council then allocated approximately \$2.4 million dollars (\$2,400,000) into a CIP to fund the Project.

On July 18, 2011, the City sent pre-qualification questionnaires to eight (8) design-build entities ("DBE") that had previously expressed interest in the Project. After reviewing the completed pre-qualification questionnaires, staff determined that seven (7) DBE's were qualified to receive and submit a request for proposal ("RFP") for the Project. On August 15, 2011, staff delivered RFP's to the seven (7) pre-qualified DBE's.

On August 24, 2011, City Council authorized the Fire Department to contract with Jeff Katz Architecture a second time to prepare the secondary design phase for the Project, including but not limited to, completing construction documents, RFP evaluation, construction administrative services and any and all remaining architectural support needed for Project completion.

On September 8, 2011, the deadline for proposal submittal, the City received sealed proposals from four (4) of the seven (7) pre-qualified DBE's: Erickson-Hall Construction Co., Edge Development Inc., Soltek Pacific Construction Company and the Ledcor Group. City staff evaluated the proposals based on a "best value" analysis. As opposed to the more traditional design-bid-build approach where bids are awarded to the lowest responsive and responsible bidder, the "best-value" framework evaluates weighted objectives relative to price, features, functions and life-cycle costs, allowing a city to contract with the "most advantageous" DBE. In conducting the "best-value" analysis, City staff evaluated and scored the proposals based on responses to the following selection criteria:

1. Experience and Technical Competence

- DBE's described their experience in completing similar projects and were asked to list two (2) successfully completed fire station projects of similar nature and one (1) successfully completed remodel/expansion project within the last five (5) years.
- DBE's were asked to describe their experience with two (2) successfully completed design-build projects of similar nature completed within the last five (5) years.

2. Strength of Key Personnel

- DBE's detailed their proposed Project organization and provided an organizational chart, including identification and responsibilities of key personnel.

- DBE's indicated how local firms were to be utilized to ensure a strong understanding of local laws, ordinances, regulations, policies, requirements and permitting.
- DBE's described their capacity to perform the work within the City's time limitations, considering the DBE's current and planned workload and workforce.

### 3. Rates and Fees

- DBE's provided a fee for pre-construction services, including cost estimating, constructability review, site surveys, subcontractor bidding, submittal review and procurement of long lead items.
- DBE's provided detailed spreadsheets outlining the Project's general conditions, including quantities, units, unit costs and billing rates for all proposed team members.
- DBE's proposed an overhead and profit percentage rate and any other multipliers, such as, liability insurance, to be applied to the cost of the work.
- DBE's provided a comprehensive cost estimate taking into account all pre-construction design and support services and construction costs.

### 4. Proposed Method to Accomplish the Work

- DBE's described their technical and management approach to the design and construction effort and described lines of communications necessary to maintain design schedules, construction schedules and software availability for both schedule and management reporting.

### 5. Miscellaneous Factors Considered

- Knowledge and understanding of the State and local environment;
- Preliminary construction schedule;
- Conformance to the specified RFP requirements and format;
- Financial resources and stability of the principal consultant and/or DBE team;
- Ability to meet insurance requirements.

Upon reviewing the proposals from all four (4) DBE's, City staff scored (on a scale of 1-10) each category listed above for each DBE as follows:

<u>Item</u>	<u>Multiplier</u>	<u>Ledcor</u>	<u>Edge</u>	<u>Erickson Hall</u>	<u>Soltec Pacific</u>
Experience and Technical Competence	40%	8	9	10	9
Strength of Key Personnel	20%	7	9	10	8
Rates and Fees	10%	7	9	9	8
Proposed Method to Accomplish the Work	15%	6	10	10	7
Misc. Factors as noted in the RFP	15%	7	8	10	8
<b>Total Weighted Score</b>		<b>7.25</b>	<b>9</b>	<b>9.9</b>	<b>8.25</b>

Based on a total weighted score of 9.9, City staff recommends that Council consider the proposal submitted by Erickson-Hall Construction Co. to be the most advantageous "best-value" proposal for the Project. As such, City staff recommends awarding the design-build contract to Erickson-Hall Construction Co. in an amount not to exceed \$2.1 million dollars (\$2,100,000) for the Project.

Respectfully submitted,



Michael Lowry  
Fire Chief

RESOLUTION NO. 2011-130

A RESOLUTION OF THE CITY COUNCIL OF  
THE CITY OF ESCONDIDO, CALIFORNIA,  
AUTHORIZING THE MAYOR AND CITY  
CLERK, TO EXECUTE, ON BEHALF OF THE  
CITY, A DESIGN-BUILD CONTRACT WITH  
ERICKSON-HALL CONSTRUCTION CO. FOR  
THE RECONSTRUCTION AND REMODEL  
OF FIRE STATION NO. 4

WHEREAS, in May of 2010, severe mold was discovered throughout Fire Station No. 4 requiring a remodel and reconstruction of the existing structure; and

WHEREAS, in July of 2010, City Council authorized the Fire Department to hire Jeff Katz Architecture to prepare a schematic design, cost estimate and financing plan for the remodel and reconstruction of Fire Station No. 4 (the "Project"); and

WHEREAS, pursuant to California Public Contract Code ("PCC") Section 20175.2(a)(1), a City, with City Council approval, may utilize the "design-build" method as an alternative to the traditional design-bid-build process, for bidding on building construction projects in excess of one million dollars (\$1,000,000); and

WHEREAS, pursuant to PCC Section 20175.2(b)(4), the design-build method is ideal when a City anticipates that design-build will reduce project cost and expedite project completion, two objectives that are integral to the Project; and

WHEREAS, on March 9, 2011, City Council directed the Fire Department to explore the design-build method for the Project and allocated approximately \$2.4 million dollars (\$2,400,000) into a Capital Improvement Project fund earmarked for the Project; and

WHEREAS, on July 18, 2011, the City sent out eight (8) design-build entity ("DBE") pre-qualification questionnaires to interested DBE's, of which seven (7) were determined qualified to submit a request for proposal ("RFP") for the Project; and

WHEREAS, on August 15, 2011, the City delivered RFP's to the seven (7) pre-qualified DBE's; and

WHEREAS, on September 8, 2011, the City received four (4) sealed proposals from the following DBE's: Erickson-Hall Construction Co., the Ledcor Group, EDGE Development, Inc. and Soltek Pacific Construction Company; and

WHEREAS, City staff evaluated all four (4) proposals utilizing a "best-value" weighted evaluation scale wherein City staff scored each proposal (on a scale of 1-10) based on responses to the following selection criteria: (1) Experience and Technical Competence; (2) Strength of Key Personnel; (3) Rates and Fees; (4) Proposed Method to Accomplish the Work; and (5) Miscellaneous Factors, including but not limited to, knowledge of the local environment, conformance to the RFP requirements, financial stability of the DBE and preliminary construction schedule; and

WHEREAS, after calculating the aggregate scores of each DBE under the "best-value" analysis, City staff ranked the DBE's from most advantageous to least advantageous in accordance with PCC Section 20175.2(d)(4)(iv), as follows:

1. Erickson-Hall Construction Co.
2. EDGE Development, Inc.
3. Soltek Pacific Construction Company
4. The Ledcor Group; and

WHEREAS, as a result of scoring the highest on the City's "best-value" analysis, Erickson-Hall Construction Co. was deemed to be the most advantageous DBE for the Project; and

WHEREAS, this City Council desires at this time and deems it to be in the best public interest to approve the design-build contract with Erickson-Hall Construction Co. for the Project ("Agreement") in an amount not to exceed \$2.1 million dollars (\$2,100,000).

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Escondido, California, as follows:

1. That the above recitations are true.
2. That the Mayor and City Clerk are authorized to execute, on behalf of the City, the Agreement with Erickson-Hall Construction Co. in substantially the same form, subject to final review and approval by the City Attorney's Office, that is attached hereto as Exhibit "A" and incorporated by this reference.

## **DESIGN-BUILD AGREEMENT – FIRE STATION NO. 4**

This Design-Build Agreement ("Agreement") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by and between THE CITY OF ESCONDIDO ("City"), a municipal corporation, and ERICKSON-HALL CONSTRUCTION CO. ("Design-Builder" or "D/B").

### **RECITALS**

WHEREAS, Fire Station No. 4 is an existing fire station located at 3301 Bear Valley Parkway, Escondido, CA 92025 within the City; and

WHEREAS, as a result of a severe mold infestation of Fire Station No. 4, City planned a major remodel and reconstruction of the station (the "Project"); and

WHEREAS, City elected to utilize the design-build process for the Project, pursuant to California Public Contract Code § 20175.2, because of reduced Project costs and expedited Project completion that are expected with this method of public construction; and

WHEREAS, on August 15, 2011, City issued a Request for Proposal ("RFP") for the Project to seven (7) pre-qualified design-build entities; and

WHEREAS, four (4) design-build entities submitted proposals on or before September 8, 2011, and based upon the review of each proposal under a "best value" evaluation, City selected Design-Builder as the most advantageous respondent to complete the Project.

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, it is mutually agreed by and between the Parties as follows:

### **AGREEMENT**

#### **Section 1: General Scope of Work to Be Performed by D/B**

1.1 In accordance with the terms set forth in this Agreement, D/B shall provide limited pre-construction design support services to the extent necessary to assist the project architect, Jeff Katz Architecture ("Architect"), to design the renovation of Fire Station No. 4. In addition, D/B shall provide the construction services necessary to provide a fully functional fire station. The fire station shall include, but not be limited to, all components shown on the plans. The Project is located on City-owned property at 3301 Bear Valley Parkway, Escondido, CA 92025.

1.2 The services to be provided by D/B are generally to be performed in four (4) "Phases"; the services to be provided in each Phase are specified elsewhere in this Agreement. The services provided by the D/B shall include, but not be limited to, all



services outlined and described in this Agreement and pursuant to the Conceptual Plan in Exhibit 1.

1.3 The D/B shall:

1.3.1 Perform all services, work and obligations as described herein for the not to exceed amount of \$ 2,100,000, which includes Design Support Services and General Conditions necessary to provide a fully completed and functional Project. D/B shall perform all Design Support Services and General Conditions for the not to exceed amount of \$ 25,000 as outlined in the Design Build Fee Structure (Exhibit 2). The Guaranteed Maximum Price ("GMP") of \$ 2,100,000 includes, but is not limited to, the cost for all labor, equipment, and material to design and build a fully functional fire station and ancillary facilities, site work and handicap accessibility improvements in accordance with all applicable rules, regulations, and laws. The D/B fee shall be six percent (6%) of the cost of construction defined as the total sum of trade contracts (subcontractors), materials (purchase orders), equipment, self-performed work and general conditions. Any costs incurred by D/B in excess of said GMP shall be the sole responsibility of the D/B, unless a change order is approved by the City pursuant to Sections 9 and 14 of this Agreement. All funds remaining in the GMP at the completion of the project shall belong to the City.

1.3.2 Achieve "Substantial Completion" (as defined in §16.1) no later than \_\_\_\_\_.

1.3.3 Achieve "Final Completion" (as defined in §16.2) No later than \_\_\_\_\_.

Section 2: General Obligations of City

2.1 City shall be obligated as follows:

2.1.1 City shall designate a representative (or representatives) who is/are authorized to act on behalf of City with respect to the Project, except as to those decisions specified herein or by law that require authorization by the Escondido City Council.

2.1.2 City shall make decisions with reasonable promptness to avoid delay in the orderly progress of D/B's services per the schedule in Exhibit 3.

2.1.3 City shall pay for and cause to be completed all necessary environmental studies and obtain environmental approvals and/or permits with reasonable promptness to avoid delay to the orderly progress of D/B's performance per the schedule in Exhibit 3.

2.1.4 At the request of D/B, City shall use its best efforts to provide D/B with any available information about the Project Site geotechnical soil conditions; it will, however, be the responsibility of D/B to take all reasonable steps to verify all such information as it deems necessary to perform its services under this

Agreement. City does not warrant to D/B the accuracy or completeness of any such information.

2.1.5 City shall cooperate with D/B in identifying, processing and securing required permits, licenses and inspections in a timely fashion; however, this duty to cooperate does no relieve D/B of its primary obligations to identify, apply for and secure all necessary permits, licenses and inspections in a timely manner.

2.1.6 City shall make payments to D/B in the amounts and in accordance with the terms set forth below.

2.1.7 City shall issue Certificate of Substantial completion when City reasonably determines the Project has achieved Substantial Completion as defined in Section 16.1.

2.1.8 City shall issue a Notice of Acceptance when City reasonably determines the Project has achieved Final Completion as defined in Section 2.

2.2 City Review Process. City shall review 100% of CD's, which shall allow for construction of the Project in conformity with the approved Conceptual Plan for the Project.

### Section 3: General Obligations of D/B

3.1 D/B shall be obligated as follows:

3.1.1 At all times in performing its services under this Agreement, D/B shall provide limited pre-construction design support services and deliver the best possible Project consistent with standard of care in Section 3.3 that satisfies the time, monetary, quality and design parameters set forth in this Agreement.

3.1.2 D/B shall Construct the Project on time, consistent with time frames set forth in the schedule in Exhibit 3, and in such a manner that the GMP or Contract Time of the Project shall not be exceeded, but if D/B reasonably believes that any action, inaction, decision or direction by City or agent for the City will likely result in the GMP or Contract Time being exceeded or the Project being completed late, D/B will notify City at Project Team meeting and in writing within five (5) calendar days of discovering such action, inaction, decision, or direction. Included in such notice will be an estimate of the cost and time impact resulting from such action, inaction, decision or direction. D/B shall provide complete and accurate pricing within ten (10) calendar days of said discovery.

3.1.3 D/B shall perform, or obtain the prior written consent of City to subcontract all design support services for the Project utilizing qualified, licensed and sufficiently experienced architects, engineers and their professionals (herein

jointly "Design Support Consultants") as identified in Exhibit 4. D/B shall not be permitted to substitute any Design Support Consultant unless authorized by City. The fact that City approves the subcontracting of any such services will in no way relieve the D/B of any of its obligations or responsibilities under this Agreement.

3.1.4 D/B shall perform all construction on the Project utilizing subcontractors appropriately licensed by the California Contractors State License Board or other required agency.

3.1.5 D/B shall perform all services as expeditiously as is consistent with reasonable skill and care and shall complete the services within each and all of the time periods set forth in this Agreement.

3.1.6 D/B shall comply with the California Fair Employment and Housing Act and all other State, Federal and local laws including, but not limited to, those prohibiting discrimination, on account of race, color, national origin, religion, age, sex or handicap.

3.1.7 Pursuant to Section 1770 et seq. of the California Labor Code, D/B agrees that a prevailing rate and scale of wages, in accordance with applicable State and Federal Law, will be paid in the carrying out of this Agreement. D/B shall keep itself informed of and comply with all applicable federal, state, and local laws, statutes, codes, ordinances, regulations, and rules pertaining to the payment of prevailing wages. The prevailing rate and scale to be paid shall be the same as the 'General Prevailing Wage Rates' approved by the Department of Industrial Relations as of the date of the execution of this Agreement. Said rates and scales are herein referred to and adopted in this Agreement as though fully and completely set forth herein, and said scale as adopted by the Department is made a part of this Agreement by reference. Copies of the prevailing rate of per diem wages are available on the Internet at (<http://www.dir.ca.gov/DLSR>). Neither City, nor any elected nor appointed boards, officers, officials, employees, or agents of City, shall be liable, at law or in equity, as a result of any failure of D/B to comply with this section.

3.1.8 D/B shall study all applicable laws, codes, ordinances, rules, orders, regulations, and statutes affecting the Project, including but not limited to, zoning, environmental, building, fire and safety codes and coverage, density and density ratios and lien laws, and comply with them in performance of its services. D/B shall ensure that within the established GMP that the Project conforms to all applicable federal, state and local laws, statutes, ordinances, rules, regulations, orders or other legal requirements, (collectively "Governmental Requirements") existing as of the date of this Agreement. However, City recognizes that Governmental Requirements and their interpretations by governmental officials ("Code Authority") are often subject to change at any time, even after issuance of a building permit. If, after the date of this Agreement, modifications to the Project are required because of a change in Governmental Requirements or their interpretation by a Code Authority which had not

previously been given, or which if given, was different than a prior interpretation of a Code Authority, D/B shall make the required modifications to comply with the same. However, in the event of such an occurrence, the GMP and Contract Time may be subject to an adjustment in accordance with Section 14. Nothing contained in this paragraph shall relieve D/B of its obligations to modify the Project at its own expense where D/B has failed to construct the Project in compliance with Governmental Requirements applicable as of the date of this Agreement.

3.1.9 D/B shall take all reasonable steps during the course of the Project so as not to interfere with the ongoing operation of the adjacent residences, businesses and facilities, including but not limited to the following:

3.1.9.1 Pedestrian and vehicular access; and

3.1.9.2 D/B shall control dust and noise in accordance with the provisions in Section 7-8.1 of the 2009 Edition of the Standard Specifications for Public Works Construction, City Ordinances and this Agreement.

3.1.10 D/B shall use reasonable care to avoid damaging existing buildings, equipment and vegetation adjacent to the Project Site, except as set forth in the approved plans. If D/B causes damage to any of this property, D/B shall replace or repair said property at no expense to City and said damage shall not be a basis for seeking an adjustment to the GMP or Contract Time. D/B agrees to indemnify City for any and all fines, penalties, liabilities and costs imposed upon City, its officers, employees and agents as a result of this Project.

3.1.11 D/B shall obtain all permits necessary to complete the Project. City shall pay for cost of said permits. D/B shall be responsible for obtaining and paying for all permits normally obtained by the trades or subcontractors.

3.1.12 D/B shall ensure the Project design conforms to the requirements of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") and the Americans with Disabilities Act ("ADA").

3.1.13 D/B shall provide cost estimating and value engineering services, which take into consideration long-range maintenance costs, energy efficiency, and impact operation of the Project.

3.1.14 D/B shall review soils and geotechnical reports relating to the Project Site and determine and advise City if any further subsurface investigations are warranted. If such further investigations are authorized by City, D/B shall perform said investigations. The costs of said investigations are Reimbursable Costs to be paid by the City without markup, pursuant to Section 13.

3.1.15 D/B shall be fully responsible for all additive costs, damages, and liabilities resulting from errors or omissions beyond the standard of care defined in Section 3.3 by D/B or D/B's agents, employees, design support consultants

and contractors. Such costs, damages and liabilities shall not be chargeable to the City nor shall they be a basis for seeking an adjustment in the GMP or Contract Time.

3.1.16 D/B shall be fully responsible for all additive costs, damages, and liabilities resulting from errors or omissions beyond the standard of care defined in Section 3.3 by D/B or D/B's agents, employees, design support consultants and contractors. Such costs, damages and liabilities shall not be chargeable to the City nor shall they be a basis for seeking an adjustment in the GMP.

3.2 D/B agrees to fully assume all risks, and costs associated with such risks, in performing the services and meeting the obligations under this Agreement.

#### 3.2.1 Unanticipated subsurface site conditions

3.2.1.1 City assumes risks for unanticipated subsurface site conditions provided D/B notifies City in writing within five (5) calendar days of discovery if D/B believes it has uncovered or revealed a condition which:

3.2.1.1.1 differs materially from that indicated in the soils and geotechnical reports furnished by City, or

3.2.1.1.2 is of an unusual nature and differs materially from conditions ordinarily encountered and generally recognized as inherent in the work required by this Agreement.

3.2.1.2 Upon receipt of written notice, City shall promptly investigate and if it determines the conditions do materially differ, requiring a change in the Work, City shall commence the processing of a change order pursuant to Section 14. If City determines there is no bona fide Work scope change or if the change in Work is a minor change, which does not impact GMP or Contract Time, City shall notify D/B within ten (10) calendar days;

3.2.1.3 D/B shall not be entitled to an adjustment in the GMP or Contract Time if D/B knew or should have known of the existence of such conditions at the time D/B submitted and agreed to GMP or Contract Time, or if the existence of such condition could reasonably have been discovered as a result of D/B's obligations pursuant to Section 3.1.15.

3.3 D/B shall perform in a manner consistent with that level of care and skill ordinarily exercised by members of the profession currently practicing under similar conditions and in similar locations. Compliance with this section by D/B shall not in any way excuse or limit D/B's obligations to fully comply with all other terms in this Agreement.

3.3.1 D/B warrants that at least one member of the D/B team shall be licensed by the California Contractor's State License Board as a General Building Contractor. D/B is to provide a list of the responsible people within their organizations performing services, which shall include their qualifications and

their function, for approval by the City prior to start of construction. City and D/B shall establish "key personnel" who shall remain on the Project until Final Completion. If any such "key personnel" leave the employment of D/B, City shall have the right to approve the replacement personnel assigned to this Project. D/B shall comply with all licensing requirements of the State of California, County of San Diego, and City of Escondido.

3.3.2 Throughout all phases of the Project hereunder, the Individual Project Manager shall be as reflected in Exhibit 4. So long as the Individual Project Manager remains in the employ of the General Contractor, such persons shall not be changed or substituted from the Project, or cease to be fully committed to the Project as deemed necessary by the City in its reasonable discretion, without the prior written consent or instruction of the City. Any violation of the terms and provisions of this Section shall constitute a material breach of this Agreement.

3.3.3 Notwithstanding the foregoing provisions of Section 3.3.2 if the Individual Project Manager proves not to be satisfactory to the City, upon written notice from City to the General Contractor, such person or persons shall be promptly replaced by a person who is acceptable to City in accordance with the procedures set forth below.

3.3.4 Within five (5) working days after receipt of a notice from the City requesting the replacement of any Individual Project Manager, or promptly following the discovery by the Design Build Team that any Individual Project Manager is leaving the employ of the General Contractor, as the case may be, the replacement/substitution (together with such person's resume and other information regarding such person's experience and qualifications) shall be submitted for approval by City. The replacement/substitution shall commence work on the Project no later than five (5) calendar days following the City's approval of such replacement, which approval shall not be unreasonably withheld. In the event that the City and Design Build Team cannot agree as to the substitution of replacement of the Individual, the City shall be entitled to terminate this Agreement for cause.

3.4 D/B shall cooperate with City in obtaining Environmental approvals and/or permits.

3.5 D/B agrees and acknowledges that the City Representative is the only person with authority to approve additions or modifications to the Project. Any costs or delays resulting from or associated with additions or modifications implemented without the written authorization of City Representative shall be borne exclusively by D/B and not be grounds for an increase in GMP or Contract Time unless necessary to protect public health, safety or property.

3.6 D/B is to provide progress photographs taken at regular intervals throughout the Project. Photographic documentation shall depict an overview of Project site showing work in progress. Dates and times are to be documented. Copies of

documentation shall be transmitted to the City monthly. The costs are Reimbursable Costs to be paid by City without markup, pursuant to Section 13.3.

3.7 D/B shall fully cooperate with City Representative and any of its agents assigned to this project.

#### Section 4: Work Restriction and Bidding Requirement

4.1 D/B shall determine how best to package portions of the work for purposes of bidding. D/B shall be responsible for selectively bidding all construction work to others and for entering into subcontracts, in D/B's own name, with the bidder who in D/B's discretion best meets the monetary, time, and performance requirement of the Project. D/B is required to submit a summary of bid results for each bid package. D/B shall be responsible for ensuring that these contracts fully comply with all applicable local, state and federal laws, some but not all of which are listed below.

4.2 D/B shall hear and decide bid protests and shall develop and maintain bid protest procedures for that purpose. City shall be timely informed of all bid protests (prior to resolution) and the outcome of said protests.

#### Section 5: D/B's Phase I Services and Obligations – Design Support

5.1 D/B's services in Phase I shall include, but are not limited to: utilizing the City required standard specifications, facility program requirements, approved master plans, Federal, State, and City performance and design criteria, concept drawings and reports that will be identified in the Design/Build Contract. D/B shall:

5.1.1 Provide design support and constructability review of construction drawings and specifications suitable for obtaining City approval and issuance of permits and limiting conflicts in the design documents.

5.1.2 Complete design support for all elements of the project, including, but not limited to: architectural, civil, structural, landscape architectural, mechanical, plumbing, electrical, and specialty consulting areas such as for utilities, communication, security, and other specialty consultants that may be needed for the planning and construction of this type of facility.

5.1.3 Evaluate alternative structural and construction approaches for all facilities to ensure economical designs that optimize constructability yet meet all codes, architectural concepts, conceptual designs, and standard specifications of the project. Project Design shall satisfy ADA requirements as required, ADAAG, and the State of California Title 24 Regulations.

5.1.4 Incorporate the requirements of permitting agencies as may become apparent in the course of design. The D/B shall apply for and secure all permits and provide all contractor permit information to obtain the permits. In addition, the D/B shall be aware of all Air Pollution Control District and noise abatement requirements, along with any hazardous materials management

requirements of NFPA, Cal-OSHA and the Escondido Fire Department. The D/B shall become familiar with all appropriate environmental plans, including but not limited to, an air pollution control plan, a noise abatement plan and a hazardous materials management plan. The D/B shall submit, manage and obtain approval of an application for a Stormwater Management Permit to the appropriate authority and update the plan during construction for construction sequencing and modify the plan when required. The D/B shall be responsible for implementing all mitigation measures required by the CEQA documents for the projects.

5.1.5 Review current Construction Cost Estimates and Project Budgets based on project plans at Project inception. D/B shall prepare a revised Cost Estimate based on Construction Documents and Bidding to reflect a final Project Budget.

5.1.6 Perform value engineering ("VE") reviews to reduce cost and/or add value, utilizing all team members and City resources. D/B shall include recommendations to maximize energy efficiency and build a "green" or low-pollution project. D/B shall prepare a VE Report of all considerations, recommendations and decisions. D/B's goal is to maximize the quality of construction at a cost equal to or below the Project Budget.

5.1.7 Perform Quality Control ("QC") Review of the drawings and specifications throughout all Phases in order to correct errors and omissions and reduce the quantity of Change Orders during the course of construction. D/B shall include a detailed review of drawings and designs relative to Code Compliance Laws. D/B shall organize and publish detailed QC Reports based on all findings.

5.1.8 Establish a Critical Path Method Construction Schedule and monitor and update said Schedule to keep the Project on schedule.

5.1.9 Establish a bidding strategy. D/B shall identify, contract, and procure long lead items. D/B shall create early bid packages where applicable.

5.1.10 D/B agrees that any savings at the end of the Project will be deducted from the GMP and returned to City.

5.1.11 During the Bidding of the Project, D/B shall:

5.1.11.1 Recommend appropriate subdivisions of work into discrete Bid Packages.

5.1.11.2 Create detailed Scope of Work Packages for bidding to multiple sub-contractors that will be contracted directly to D/B.

5.1.11.3 Provide competitive bids (minimum 3) for each package and competitively bid each package.



5.1.11.4 Receive and submit to the Architect all Requests for Information ("RFI") and bid questions.

5.1.11.5 Schedule meetings with the City to review bid results and clarify Scopes of Work, exclusions, etc. D/B shall ensure bids match D/B Scope of Work.

5.1.11.6 Make recommendations for selections and award of bids based on best value. D/B shall provide cost spreadsheets that compare bids to cost estimates. If best value bid exceeds cost estimate, D/B shall prepare recommendations to resolve the problems and reduce cost without compromise to the overall goals of the Project, while remaining within budget and on schedule.

5.1.12 Provide constructability review with City participation at all stages of design completion. D/B shall incorporate results of the team's review into the design.

5.1.13 Provide construction cost control estimates during the design to support VE and constructability reviews. D/B shall revise these cost control estimates once accepted VE recommendations and other review comments have been incorporated.

5.1.14 Identify all permit requirements and prepare applications and support documents necessary for obtaining all permits. Permit fees will be borne by the City.

5.1.15 Prepare draft Operations Manual Index to serve as the basis for preparing the final Operations Manual during the construction phase.

## Section 6: D/B's Phase II Services and Obligations – Construction Documents

6.1 D/B's services in Phase II shall include but are not limited to the following:

6.1.1 D/B shall continue to develop and refine Project requirements and review such requirements with City.

6.1.1.1 D/B shall evaluate alternative structural and construction approaches to ensure economical designs, which optimize constructability yet meet all codes, architectural concepts, schematic designs, and standard specifications of the Project. Design and construction shall also meet all ADA requirements.

6.1.1.2 D/B shall provide additional site surveys and geotechnical investigations to the extent the D/B determines they are necessary for final design. The survey information provided by City is preliminary in nature and may not have sufficient accuracy or scope to support final design.

6.1.1.3 D/B shall furnish support to a City constructability review team. D/B shall incorporate the results of this review into the design.

6.1.1.4 D/B shall provide updated construction cost estimates at durations specified in this Agreement to support VE and constructability reviews.

6.2 D/B shall determine and establish the sequence of construction, and if appropriate, identify separate bid packages to accomplish phased construction of the Project.

6.3 D/B shall prepare a detailed Critical Path Method Schedule for all construction components of the Project Schedule showing all major milestones, bid dates for the major bid packages, commencement of construction, sequence of construction, completion of structural elements, completion of the fire facility, all of which shall conform with the dates of Substantial Completion and Final Completion of the Project.

6.4 D/B shall notify City within seven (7) days in writing whenever D/B reasonably believes that the cost of the Project is likely to exceed the GMP or Contract Time and include in said notice:

6.4.1 An itemized cost breakdown estimate; and

6.4.2 A list of recommended revisions which D/B believes will bring Project within the GMP.

6.5 D/B shall assist City in reviewing the itemized cost breakdown and recommend revisions so that City can revise the scope of the Project so that the GMP is not exceeded.

6.6 D/B shall provide accounting system data that will be updated, expanded and provided to City monthly as the Project develops.

6.7 D/B shall develop and implement Project Management Plan and Procedures including:

6.7.1 Project status reports

6.7.2 Coordination/interface with City and its other consultants/contractors

6.7.3 INTENTIONALLY LEFT BLANK

6.7.4 Biweekly Design and Construction meetings

6.7.5 Interface and communicate with other agencies

6.7.6 Vendors and subcontractors management

6.7.7 Document control

6.7.8 Schedule and budget control

6.7.9 Quality assurance and quality control

6.7.10 Throughout the design phase, the D/B shall provide scheduling and cost control reports monthly.

6.8 D/B shall submit and obtain approval from City of Phase II items. D/B shall provide written confirmation that the project is still within the GMP and can be built in accordance with the DCS. Said written confirmation shall include an accounting of all costs and expenses incurred to date against the GMP. D/B shall obtain written approval from City to proceed to Phase IV.

6.9 City and D/B may mutually agree in writing that D/B may contract for or perform certain limited Phase III services during earlier phases to expedite completion of the Project, for such tasks as, for example, demolition of the buildings and relocation of utilities, and other critical path activities to meet the Project Construction Schedule. However, absent such written agreement, D/B shall not proceed with any Phase III services until the City issues a written Notice to Proceed with Phase III.

6.10 D/B shall present to the City for approval the following: Management and Implementation Plan and Construction Schedule.

6.10.1 Upon presentation by D/B to the City of the items specified in Section 6.8, the City may:

6.10.1.1 Approve the Management and Implementation Plan and DCS and authorize D/B to proceed with Phase III services; or

6.10.1.2 Determine not to proceed with the Project and terminate this Agreement in accordance with Section 26.3 of this Agreement; or

6.10.1.3 Direct D/B to revise and resubmit documentation submitted to City pursuant to Section 6.10 which does not conform to previously approved direction of City any delay or additional costs resulting from the resubmittal shall be borne exclusively by D/B and are not to be grounds for an increase in the GMP or Contract Time.

## Section 7: D/B's Phase III Services: Construction Services

7.1 After City formally approves any required cost estimates, 100% Construction Documents and Construction Schedule, City shall issue to D/B a written Notice to Proceed with Phase III Services. The D/B shall construct the Project in accordance with City-approved plans and specifications prepared by the D/B to meet or exceed all requirements of the City provided program, schematic design and the performance criteria. The D/B's Phase III Services shall include but are not limited to:

7.1.1 Prepare and submit to City for review separate bid packages as D/B determines appropriate to enable the construction of the Project to proceed in an efficient and cost effective manner;

7.1.2 Conduct competitive bidding for the respective bid packages;

7.1.3 Schedule and conduct pre-bid conferences to answer questions posed by bidders; said answers and any other information required to provide clarification to the Construction Documents during the bidding process shall be issued as written addenda and provided to all prospective bidders;

7.1.4 Execute subcontracts, in D/B's own name, with the bidder best meeting the monetary, time, and performance requirements of the Project in the professional opinion of the D/B;

7.1.5 Perform construction management and administration services during the construction of the Project;

7.1.6 Coordinate all construction means, methods, techniques, sequences and procedures;

7.1.7 Coordinate scheduling of bid packages, submittals, and all design and construction of the Project to ensure the efficient and orderly sequence of the construction of the Project. D/B shall Monitor and report to the City on actual performance compared to schedule;

7.1.8 Give all notices and comply with laws, ordinances, rules, regulations, and lawful orders of public authorities relating to the Project;

7.1.9 Prepare all change orders, including zero dollar change orders which require the use of D/B Contingency Fund, irrespective of impact on GMP and Contract Time, which shall require City approval;

7.1.10 Establish and maintain a quality control program with appropriate reviews and independent testing procedures to ensure compliance with the Construction Documents;

7.1.11 Coordinate all required inspections in such a manner that the progress of construction is not affected or impacted;

7.1.12 Correct any work which does not conform to the Construction Documents;

7.1.13 Keep City informed of the progress and quality of the design and construction of the Project;

7.1.14 Pay royalties and license fees, if applicable. D/B shall defend suits or claims for infringement of patent rights and shall defend and hold City and

City's agents harmless from loss on account thereof; except that City shall be responsible for such loss when a particular design, process or product of a particular manufacturer is required by City. However, if D/B has reason to believe the use of a required design, process or product is an infringement of a patent, D/B shall be responsible for such loss unless such information is promptly given to the City in writing;

7.1.15 Ensure the Project site is maintained in a clean, neat, sanitary and safe condition free from accumulation of waste materials or rubbish. Prior to Final Completion, D/B shall cause to be removed from and about the Project site all tools, construction equipment, machinery, surplus materials, waste materials and rubbish;

7.1.16 Develop a mutually agreed upon program to abate and minimize noise, dust, and disruption to access for parking and services at all times for adjacent business entities and residences;

7.1.17 Provide City with a Construction Schedule on an approved software within fourteen (14) working days after receiving Notice to Proceed with Phase III, provide updated versions of Construction Schedule on a monthly basis and provide immediate notice of any impact on critical path items;

7.1.18 Conduct and prepare minutes for bi-weekly Project team meetings with City and appropriate design and construction members;

7.1.19 Maintain a complete and up-to-date set of Construction Documents in the Project's field office at all times during construction which reflect all changes and modifications, and at the end of construction prepare for City a complete set of Project documents, along with four reproducible, and one electronic set of drawings depicting As-Built conditions for the Project;

7.1.20 Notify City in writing when D/B believes that the Project has achieved Substantial Completion, participate with City in inspecting the completed construction, prepare a punchlist and cause the punchlist items to be performed and/or corrected in accordance with the Construction Documents;

7.1.21 Notify City in writing when D/B believes that the Project has achieved Final Completion. D/B shall assemble and deliver to City upon Final Completion all records, documents, warranties, bonds, guarantees, maintenance/ service contracts, and maintenance and operating manuals;

7.1.22 Inspect the Project during the one-year general building warranty period, identify items requiring repair, and oversee those repairs. D/B shall inspect each component at 180 and 360 days after Final Completion of Project and prepare reports to City, develop budgets and direct all repairs;

7.1.23 Conduct contractor meetings, as necessary, to provide technical input;

7.1.24 Assist during final acceptance process by furnishing final walk-through(s) and comments;

7.1.25 Be responsible for complete management, supervision, and reporting of all aspects of the construction of this Project;

7.1.26 Provide resident management and contract administration, including specialists necessary for the functional, safe, on-budget and on-schedule completion of the Project, starting with the issuance of a Notice to Proceed, upon receipt of final construction drawings, from the City and extending through issuance of Notice of Completion and Acceptance. D/B shall be responsible for contracting for and scheduling specialty inspections to verify compliance with the plans, specifications and contract documents. City staff will perform standard building code inspections;

7.1.27 Ensure construction compliance with applicable local, state, and federal codes, building and environmental permit requirements, construction mitigation documents and enforcement of the Contract Documents;

7.1.28 Be responsible for the construction and all contract administration services during the construction of the Project in accordance with all applicable laws, regulations, and codes, including, but not limited to, the 1990 Americans with Disabilities Act (ADA) and Title 24 California Code of Regulations ("Building Code") as defined in Section 18910 of California Health and Safety Code. The D/B is responsible as an employer and City representative to comply with all portions of Title 24 and the ADA;

7.1.29 Provide surveying, and other contracted services as required to complete project construction inspection and testing tasks. The D/B will be responsible for contracting for special inspection services and City will be responsible for periodic building inspections. D/B is responsible for scheduling and coordinating all inspections and paying for all re-inspections;

7.1.30 Develop a project-specific Plan for defining, tracking and reporting cash flow activity requirements and submit such plan to the City for review and approval prior to implementation;

7.1.31 Implement and maintain an internal records management and document control system as required to support project operations. The D/B shall provide records management and document control information in a manner consistent with the City's reporting system; process and shall resolve any warranty provision issues. The D/B shall report progress of project contract closeout to the City in a manner consistent with the City's reporting system;

7.1.33 Administer and enforce the Environmental Mitigation Monitoring and Reporting Plan for the Project, if any. The D/B shall report a record of environmental issues to the City in a manner consistent with the City's reporting system;

7.1.34 Prepare an Operations Manual.

7.2 Unless the D/B receives the City's prior approval to substitute equal or better quality materials, the D/B warrants to City that materials and equipment incorporated in the Project will be new, unless otherwise specified, and that the Project will be of good quality, free from faults and defects, and in strict conformance with the Construction Documents and in accordance with Section 22.

Section 8: D/B's Phase IV Services and Obligations: Operation/Startup Phase

8.1.1 The D/B shall prepare, submit for City review and written approval, and implement a Project Startup and Testing Plan for the Project.

8.1.2 The D/B shall conduct Operator Training Sessions for facilities.

8.1.3 The D/B shall supervise, manage, and coordinate all project startup and testing activities for mechanical systems within the provisions of the project Contract Documents.

8.1.4 The D/B shall report progress of project startup and testing to the City in a manner consistent with the City's reporting system.

8.1.5 The D/B shall report to the City all guarantee/warranty disputes. The D/B shall proceed to resolve such disputes after having submitted to the City for review and approval the D/B's approach for obtaining resolution for the dispute.

Section 9: Additional Services

9.1 City will have the right to direct D/B to perform Additional Services beyond those specified in this Agreement. D/B may provide Additional Services only if authorized in writing, in advance, by City and after complying with Section 9.4. The City may propose changes to the Work of a subcontractor after the bid has been awarded. In the event of a change of this nature, D/B will estimate the cost of the Change Order, assist City in developing drawings and specifications as necessary, solicit a revised bid, negotiate with the subcontractor, present a recommendation for a Change Order to City, and implement construction as approved by City.

9.2 For Additional Services which increase the Hard Construction Costs, design costs, or other reasonably necessary costs of the Project, D/B shall be paid a seven percent (7%) fee on the total additional services cost.

9.3 For additional services, which result in an extension of the Substantial Completion date, D/B shall be paid a fee equal to the number of working days the Substantial Completion date is extended multiplied by the daily proration of the general conditions fee included within the GMP.

9.4 If at any time D/B contends that it is being asked to perform Additional Services, it shall give City written notice five (5) days prior to performing said

services indicating that D/B intends to seek additional compensation beyond the D/B Fixed Fee. Furnishing advance written notice shall be a condition precedent to being able to seek additional compensation from City.

#### Section 10: Bonds

10.1 D/B shall furnish performance and payment bonds with the names of the obligees designated as the City in the amount set forth below, as security for the faithful performance and payment of all D/B's obligations under the Agreement. These bonds shall remain in effect at least until thirty (30) days after the filing date of Notice of Completion, except as otherwise provided by law or regulation or by this Agreement. D/B shall also furnish such other bonds as are required by this Agreement.

10.1.1 The performance bond shall be in the amount of 100% of Hard Construction Costs.

10.1.2 The payment bond shall be in the amount of 100% of the Hard Construction Costs.

10.2 All bonds shall be in the form prescribed by City and by such sureties which are authorized to transact such business in the State of California, listed as approved by the United States Department of Treasury Circular 570, and whose underwriting limitation is sufficient to issue bonds in the amount required by this Agreement and which also satisfy the requirements stated in Section 995.660 of the Code of Civil Procedure, except as provided otherwise by laws or regulations. All bonds signed by an agent must be accompanied by a certified copy of such agent's authority to act. Surety companies must be duly licensed or authorized in the jurisdiction in which the Project is located to issue bonds for the limits so required.

10.3 If the surety on any bond furnished by D/B is declared bankrupt or becomes insolvent or its right to do business is terminated in any state where any part of the Project is located, D/B shall within seven (7) days thereafter substitute another bond and surety, which must be acceptable to City.

#### Section 11: Insurance

11.1 The insurance provisions herein shall not be construed to limit D/B's indemnity obligations contained in this Agreement.

11.2 D/B shall procure and maintain for the duration of the contract, insurance against claims for injuries to persons or damages to property, which may arise from or in connection with the performance of the work hereunder by the D/B, its agents, representatives, employees or subconsultants. All subconsultants shall be required to comply with the applicable insurance provisions. The maintenance of proper coverage is a material element of this Agreement and that failure to maintain or renew coverage or to provide evidence of renewal may be treated by the City as a material breach of this Agreement.



### 11.3 Minimum Scope of Insurance

#### 11.3.1 Coverage shall be at least as broad as:

11.3.1.1 Insurance Services Office Commercial General Liability coverage (occurrence Form CG 0001) including Insurance Services Office Form (G0009 11 88 Owners and Contractors Protective Liability Coverage Form – Coverage for Operations of Designated Contractor).

11.3.1.2 Insurance Services Office Form Number CA 0001 covering Automobile Liability, Code 1 (any auto).

11.3.1.3 Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.

11.3.1.4 Errors and Omissions Insurance. The D/B shall carry errors and omissions insurance for any work performed by licensed design professionals retained by D/B under this Agreement.

11.3.1.5 Builder's Risk Property Insurance: D/B will provide coverage for "all risk" Builder's Risk Insurance, excluding the peril of earthquake, and subject to other policy terms, conditions and exclusions, Coverage will be provided for the Full Hard Cost Replacement Cost of Materials, Equipment and fixtures destined to become a permanent part of the structure, Property in Transit, and Property in Offsite Storage for Fire Station No. 1 construction in an amount to be mutually agreed upon. Contractors and Subcontractors will be added to policies as Loss Payees as their interest may appear.

11.3.1.6 Contractor and its Subcontractors will be solely responsible for any loss or damage to their personal property including contractor's tools and equipment owned, used, leased, or rented by the Contractor or Subcontractor.

11.3.1.7 Any policy deductible amount will be the responsibility of Contractor and/or Subcontractor.

### 11.4. Minimum Limits of Insurance

11.4.1 Contract or appropriate subcontractor shall maintain limits no less than:

11.4.1.1	General Liability	\$3,000,00	per occurrence for bodily injury, and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this
	(Including operations, products and completed operations.)		

			Project/location or the general aggregate limit shall be twice the required occurrence limit.
11.4.1.2	Automobile Liability:	\$1,000,000	per accident for bodily injury and property damage.
11.4.1.3	Workers' Compensation Employer's Liability	\$1,000,000	per accident for bodily injury, disease policy limit and disease- each employee.
11.4.1.4	Errors and Omissions	\$1,000,000 \$2,000,000	per occurrence policy aggregate
11.4.1.5	Builder's Risk	TBD	Hard Construction Cost of Structure

#### 11.5 Deductibles and Self-Insured Retentions

11.5.1 Any deductible or self-insured retentions must be declared to and approved by the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or the D/B shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

#### 11.6 Other Insurance Provisions

11.6.1 The general liability policy shall contain, or be endorsed to contain, the following provisions:

11.6.1.1 The City, its officers, officials, employees, and volunteers are to be covered as additional insureds using ISO Form CG 2010 or its equivalent, with respect to liability arising out of work or operations performed by or on behalf of the D/B including materials, parts or equipment furnished in connection with such work or operations.

11.6.1.2 For any claims related to this project the D/B's insurance coverage shall be the primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be in excess of the D/B's insurance and shall not contribute to it.

11.6.1.3 Coverage shall not extend to any indemnity coverage for the active negligence of the additional insured in any case where an agreement to indemnify the additional insured would be invalid under

Subdivision (b) of Sections 2782 of the Civil Code.

11.6.1.4 D/B's insurer will provide a Waiver of Subrogation in favor of the City for each required policy providing coverage during the life of this contract.

#### 11.7 Verification of Coverage

11.7.1 D/B shall furnish the City with original certificates and amendatory endorsements effecting coverage required by this clause. The endorsements should be on forms provided by the City or on other than the City's forms, provided those endorsements or policies conform to the requirements. All certificates and endorsements are to be received and approved by the City before work commences. The City reserves the right to require complete, certified copies of all required insurance policies, including endorsements affecting the coverage required by these specifications at any time.

#### 11.8 Subcontractors

11.8.1 All coverages for subcontractors or subconsultants shall be subject to all of the requirements stated herein. Subcontractors and Subconsultants shall be protected against risk of loss by maintaining insurance in the categories and at the limits required herein. Subcontractors and Subconsultants shall name City and D/B as additional insureds under its policies.

11.9 Cooperation. The D/B and its Contractors shall cooperate fully with and provide any information or records requested by the City or regarding all aspects of the insurance and project, including but not limited to claims, audit, payroll, insurance records and safety. Delays in reporting information to the City may result in delays in progress payments to the D/B.

11.10 Prior to beginning Work under the Agreement, each and every Contractor of any tier shall furnish Certificates of Insurance satisfactory to the City. All such Certificates shall contain at least the following provisions:

11.10.1 Thirty (30) days written notice to the City prior to any cancellation, non-renewal or material reduction in coverage.

11.10.2 The words "will endeavor" and "but failure to mail such notice shall impose no such obligation or liability of any kind upon the company, its agents or representatives" will be deleted from the Certificates.

11.10.3 Throughout the life of the Agreement, each and every Contractor of any tier shall pay for and maintain in full force and effect, with Insurers authorized by the California Insurance Commissioner to do business in the State of California, any policies required by this Agreement.

11.10.4 Any insurance provided for this project is to be placed with licensed insurers admitted to transaction business in the State of California with a current A.M. Best Rating of not less than A-:V. If insurance is placed with a surplus lines insurer, insurer must be listed on the State of California List of Eligible Surplus Lines Insurers (LESLI) with a current A.M. Best's rating of no less than A:X. Any exceptions are at the sole discretion of the City and subject to written approval of the City.

11.11 Questions concerning the insurance requirements of this Agreement shall be directed to the City Representative.

#### Section 12: Inspection

12.1 D/B shall be responsible for all specialty inspection and material testing and inspections. The City shall perform building inspection with its own forces. It shall be the responsibility of D/B, however, to call for, coordinate and schedule all inspections.

12.2 City, its consultants, subcontractors, independent testing laboratories as well as other governmental agencies with jurisdictional interests will have access at reasonable times for this observation, inspecting and testing. D/B shall provide them proper and safe conditions for such access and advise them of D/B's safety procedures and programs so that they may comply.

12.3 D/B will make, or have made, such inspections and tests, as the City deems necessary, to see that the Work is being accomplished in accordance with the requirements of the Construction Documents. Unless otherwise specified, the cost of such inspection and testing will be borne by the City. In the event such inspections or tests reveal non-compliance with the requirements of the Construction Documents, D/B shall bear the cost of corrective measures deemed necessary by City, as well as the cost of subsequent re-inspection and re-testing. Neither observations by the City nor inspections, tests, or approvals by others shall relieve D/B from D/B's obligations to perform the Work in accordance with the Construction Documents. D/B shall give City timely notice of readiness of the Work for all required building inspections and shall cooperate with inspection and testing personnel to facilitate required inspections or tests. D/B shall give at least twenty-four (24) hours' notice for building inspections.

12.4 City has the right to stop or suspend Work activities which will conceal or cover up D/B Work product which is to be inspected or tested, or which will interfere with the inspection or testing activities, for a reasonable time and D/B will have no right to additional cost or time it may incur as a result of the Work stoppage.

#### Section 13: D/B GMP for Services and Reimbursements

13.1 The GMP includes the Hard Construction Costs, D/B Contingency Fund, Reimbursable Costs, and D/B Fixed Fee for the complete design and construction of the entire Project; provided that:

13.1.1 The GMP shall not exceed \$2,189,000 and included within said GMP are Design Support Services and General Conditions.

13.1.2 D/B contingency fund shall not exceed five percent (5%) of the Hard Construction Costs.

13.1.3 All Hard Construction Costs included in the GMP are for direct Construction costs incurred in performing the work, including taxes, delivery and installation. City shall reimburse D/B for the exact amount of subcontract, self performed work or invoice amount. No additional D/B markup, handling fees, overhead, or other charges are to be added or paid except as otherwise set forth in this Agreement. Upon Final Completion of the Project, any amount of Hard Construction Costs or D/B Contingency Fund monies not utilized shall result in a deductive Change Order.

13.1.4 The GMP shall include a D/B Contingency Fund which can be used by the D/B with City approval. If the Parties mutually agree that there is a sufficient surplus, the D/B Contingency Fund will be available to provide additional funds for Change Orders as provided for in Section 7 of this Agreement. This Contingency Fund will not be available for: (1) Work required due to D/B's and/or Contractors/subcontractors failure to perform according to the terms of this Agreement and/or in compliance with the Construction Documents, or (2) uninsured losses resulting from the negligence of D/B or its Contractors/subcontractors. All change orders, including zero dollar change orders, which require the use of the D/B Contingency Fund, shall require City approval.

13.1.5 D/B shall prepare, with the cooperation of City, alternate bid items to assist in meeting the GMP.

13.2 Except as otherwise expressly provided in this Agreement, as full and complete compensation for performance of all services and obligations under this Agreement, D/B shall be compensated in accordance with the GMP. Said GMP shall not be exceeded unless additional services are requested pursuant to Section 7 above or a change order issued pursuant to Section 14. Unless otherwise expressly provided in this Agreement, D/B GMP shall include full compensation for all costs of any type incurred by D/B in performing all services and obligations under this Agreement, including but not limited to the following:

13.2.1 All Design Support Consultants, including but not limited to, communications and fire systems consultants;

13.2.2 Estimating, value engineering and construction management;

13.2.3 Construction supervision and Project management personnel, including but not limited to superintendents, Project managers, Project secretaries, Project engineers, Project accountants, and all other D/B personnel wherever located;

13.2.4 All on-site and off-site equipment, supplies and facilities, including but not limited to, computers, estimating, dictating, communication and accounting equipment, office space, trailers, field equipment and storage facilities;

13.2.4.1 In no case shall the cumulative monthly rental charges to the Project for equipment and Small Tools used by the D/B exceed ninety percent (90%) of the fair market value of any one piece of equipment or Small Tools. At City's option, the full price for equipment or Small Tools may be paid, and City may take possession upon completion of the Work.

13.2.5 All home-office and field overhead costs of any type including document control and retention;

13.2.6 All business license costs;

13.2.7 All profit D/B intends to earn under this Agreement.

13.2.8 All direct and incidental costs incurred by D/B, except for those specifically identified in Section 9.

13.3 D/B shall be reimbursed, without markup and only as specified in this Agreement for the following "Reimbursable Costs."

13.3.1 Any reimbursable cost expressly provided for elsewhere in this Agreement.

13.4 D/B agrees and acknowledges the City retains its full and complete discretion for all legislative actions, including any future appropriations necessary to complete this Project or fund this Agreement. As more fully provided in Section 26, the City may terminate this Agreement for any reason, including but not limited to, if City Council fails to appropriate sufficient funds.

#### Section 14: Change in GMP and Contract Time

14.1 The GMP and Contract Time may only be changed by written Change Order. Change Orders shall be issued only under the following circumstances:

14.1.1 The City directs D/B to perform Additional Services or City Changes as provided in Section 9.

14.1.2 For reasons expressly provided elsewhere in this Agreement.

14.2 The following procedure shall be followed for the issuance of Change Orders:

14.2.1 Upon the occurrence of any event that gives rise to a Change Order, D/B shall give the City notice of the same with five (5) days. D/B shall not proceed with any such services or work until such notice has been given to City

except if such services or work are necessary to protect public health, safety or property.

14.2.2 Unless otherwise directed by City Representative in writing, before proceeding with any Change Order work, D/B shall promptly provide City with a detailed and complete estimate of cost impact associated with the Change Order, including all appropriate direct and indirect costs and credits. All such costs and credits shall be accurately categorized into D/B Fixed Fee, Reimbursable Costs or Hard Construction Costs. D/B shall also provide City with a realistic estimate of the impact, if any, the Change Order will have on the Contract Time.

14.2.3 Upon submission of the detailed estimates by the D/B, the Parties will attempt to negotiate an appropriate adjustment in GMP and Contract Time. If an agreement is reached, a Change Order reflecting said agreement will be executed by the Parties. If an agreement is not reached, the City shall have the option to direct the D/B to proceed with the subject services and/or work, during which time the D/B shall contemporaneously maintain accurate and complete records of all labor, material and equipment utilized in performing the subject services and/or work. These records shall be submitted to the City and shall become the basis for continued negotiations between the Parties for an equitable adjustment to the GMP and/or Contract Time.

14.2.4 In the event there is any disagreement or dispute between the Parties as to whether the D/B is entitled to a Change Order or the amount of the Change Order, the matter shall be resolved in accordance with Section 33. D/B shall not have the right to stop or delay in the prosecution of any services or work, including services or work that is the subject of the Change Order, pending this resolution process. Instead, D/B shall continue diligently prosecuting all such services and work.

14.2.5 City may, in its sole discretion, adjust the GMP or Contract Time for any undisputed amount or time associated with the Change Order or Additional Services.

## Section 15: Payment Terms

15.1 D/B shall provide all Phase I and II services for the Phase I and II Fee. D/B shall submit certificate and application for payment to the City on a monthly basis for Phase I-II services rendered and costs incurred. The monthly payment shall be based upon percentage of completion of the Schedule of Values plus any Reimbursable Costs as provided in Section 15.3.

15.2 D/B shall provide all Phase III and IV services for the Phase III and IV Fee. D/B shall submit certificate and application for payment to City on a monthly basis for Phase III-IV services. The monthly payment application shall be based upon the percentage of completion of the Schedule of Values plus any Reimbursable Costs and Hard Construction Costs as provided in Section 15.3 and 15.4, less any payments previously made by the City and subject to the receipt of unconditional lien releases for all prior

payments and if the invoiced amount is not disputed by City, it shall pay D/B ninety percent (90%) of payment application based upon the percentage complete of the Schedule of Values and one hundred percent (100%) of the reimbursable costs within thirty (30) days after receipt of the fully documented invoice. City will withhold the remaining ten percent (10%) as security for D/B's full performance.

15.3 D/B shall develop and maintain an accurate system for tracking all Reimbursable Costs. Utilizing this system, D/B shall include with each month payment application an itemization of all such Reimbursable Costs actually incurred by D/B, during the previous month. If requested by City, D/B shall provide all backup documentation supporting such Reimbursable Costs.

15.4 D/B shall develop and maintain an accurate system for tracking all Hard Construction Costs it incurs on the Project. Utilizing this system, D/B shall include with each monthly application for payment an itemization of all Hard Construction Costs actually incurred by D/B during the previous month.

15.5 D/B shall separately submit to City certificate and application for payment on a monthly basis for any authorized Additional Services performed by D/B. Subject to the receipt of unconditional lien releases for all prior payments and if Additional Services are not disputed by City, City shall pay ninety percent (90%) of the invoiced amount within thirty (30) days of receipt of fully complete invoice. City will withhold the remaining ten percent (10%) as security for D/B's full performance.

15.6 Subject to Sections 15.8, City shall pay D/B the ten percent (10%) retention being withheld pursuant to Sections 15.2, and 15.5 as part of the "Final Payment" to D/B. Final Payment will be made thirty-five (35) days after Final Completion.

15.7 The City Manager will consider the release of the entire retention for subcontractors upon completion of the subcontractors' work and execution of a disclaimer and unconditional final lien release by the subcontractor.

15.8 In lieu of withholding retention under this Agreement, at the election of D/B, City will deposit retention amounts into escrow and/or the substitution of securities for money as provided in California Public Contract Code Section 22300.

#### Section 16: Project Completion

16.1 Substantial Completion shall be that stage in the progress of the construction when all Work on the Project is sufficiently complete in accordance with the Construction Documents so that City can fully utilize entire Project. Substantial Completion shall further mean that all goods, services and systems to be provided under the terms and conditions of the Construction Documents are in place and have been initially tested, and are operationally functional, subject only to final testing, balancing and adjustments and normal Final Completion punchlist Work.



16.2 Final Completion shall be deemed to occur on the last of the following events: (1) recordation of a Notice of Completion for the Project; (2) acceptance of the Project by the City; (3) issuance of a final Certificate of Occupancy for the Project; (4) submission of all documents required to be supplied by D/B to City under this Agreement, including but not limited to As-Built Drawings, warranties, and operating manuals; and (5) delivery to City of a Certificate of Completion duly verified by D/B.

16.3 D/B shall provide City with a Certificate of Completion, certifying to City under penalty of perjury, that the Project has been completed in accordance with the Construction Documents, all applicable building codes and regulations, all permits, licenses, and certificates of inspection, use and occupancy, and ordinances relating to the Project.

16.4 D/B shall provide two sets of City final record drawing documents at the end of construction and one copy in electronic format ("As-Built Drawings") and one copy of reproducible drawings. As-Built Drawings are to be accurate and legible records showing exact location by dimensions, and the exact depth by elevation of underground lines, valves, plugged tees, wiring and utilities.

16.5 D/B shall provide a copy of, or make available before destruction, all records (which includes all writings as defined in Evidence Code Section 250) to the City upon receipt or generation, which shall include a copy of D/B's filing protocol.

#### Section 17: Contract Time

17.1 The "Contract Time" shall be the number of calendar days stated in Section 1 for D/B to achieve Substantial Completion.

17.2 Time is of the essence with regard to Contract Time and all milestones listed in the Construction Schedule.

17.3 The Contract Time may only be changed by a Change Order as set forth in Section 14.

17.4 An extension in Contract Time will not be granted unless D/B can demonstrate through an analysis of the Project Schedule that the increases in the time to perform or complete the Project, or specified part of the Project, beyond the corresponding Contract Time arise from unforeseeable causes beyond the control and without the fault or negligence of D/B, its Design Consultants, and subcontractors or suppliers, and that such causes in fact lead to performance or completion of the Project, or specified part in question, beyond the corresponding Contract Time, despite D/B's reasonable and diligent actions to guard against those effects.

17.5 D/B carries the burden of proving an entitlement to an increase in the Contract Time. Delays attributable to and within the control of Design Support Consultants, or subcontractor or supplier shall be deemed to be delays within the control of D/B. No time extension will be allowed for such delays. An increase in Contract Time does not necessarily mean that D/B is due an increase in the GMP.

Section 18: Late Completion

18.1 City and D/B recognize that time is of the essence in this Agreement and that City will suffer financial loss if the Project is not completed within the Contract Time, plus any extensions thereof allowed in accordance with Section 17.3. The Parties also recognize the delays, expense, and difficulties involved in proving in a legal proceeding the actual loss suffered by City if the Project is not completed on time. Accordingly, instead of requiring any such proof, City and D/B agree that D/B shall pay as liquidated damages (but not as a penalty) for each calendar day of delay beyond the time specified for Substantial Completion of the Project, the following amounts which D/B expressly agrees are "not unreasonable under the circumstances" as defined in California Civil Code §1671(b): one hundred dollars (\$100) for each calendar day. Liquidated Damages shall not be assessed after the date on which Substantial Completion is achieved pursuant to Section 16.

Section 19: Right to Modify Work

19.1 Without invalidating the Agreement and without notice to any surety, City may at any time or from time to time, order additions, deletions, or revisions in the Project; said additions, deletions or revisions will be authorized by a written Change Order prepared and issued by City. Upon receipt of any such document, D/B shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Construction Documents (except as otherwise specifically provided).

19.2 When City desires a change in the Project, City may issue a Request for Proposal to D/B. D/B will be required to respond within the time indicated by City.

Section 20: Intentionally Omitted

Section 21: Work By Others

21.1 City may perform other work related to the Project at the Project Site by City's own forces, or let other direct contracts ("City Contractor"). The City will give D/B reasonable notice of its intent to do such other work. D/B's work shall take priority over the City Contractors, but the Parties will use their best efforts to coordinate their work so as to minimize the disruption to each other's work and to allow City Contractor to proceed expeditiously.

21.2 If the proper execution or results of any part of D/B's work depends upon the work by the City or City Contractor, D/B shall promptly inspect and report to City in writing any apparent delays, defects, or deficiencies in the City's work that render it unavailable or unsuitable for such proper execution and results. D/B's failure to promptly report such delays, defects, or deficiencies in writing before commencement of the affected work, will constitute an acceptance of the City's work as fit and timely for integration with D/B's Work except for latent defects and deficiencies in the City's work for which D/B will not be responsible.

21.3 If D/B or any person or entity working for D/B causes damage to the City's or City Contractor's work, property, or person, or if any claim arising out of D/B's performance of the Project by any other contractor is made against D/B, by City, any other contractor, or any other person, D/B shall promptly repair and/or resolve said claim at no cost to City.

## Section 22: Warranties and Guarantees

22.1 D/B warrants and guarantees to City that materials and equipment incorporated into the Project will be new unless otherwise specified and that all work will be in strict accordance with the Construction Documents and will not be defective. Prompt notice of defects known to City shall be given to D/B. All Defective Work, whether or not in place, may be rejected, corrected, or accepted as reasonably directed by City, provided D/B shall not be entitled to an extension in Contract Time or increase in GMP because of any delay or increase in cost attributable to the rejection, correction or acceptance of said work. Defective work may be rejected even if approved by prior inspection.

22.2 The warranty period shall commence when the Certificate of Final Completion is issued (irrespective of beneficial use by City prior to Final Completion) and extend one (1) year after that date or whatever longer period may be prescribed by laws or regulations or by the terms of any applicable special guarantee or specific provision of the Construction Documents.

22.3 D/B is to provide any extra material for maintenance at the completion of the Project, including items such as carpeting, base, floor tile, ceiling tile, paint, and filters.

22.4 D/B is to provide City two (2) sets of operating and maintenance data manuals, fully bound and indexed, including warranties, guarantees, and bonds.

22.5 If within the designated warranty period, or such longer period as may be required by laws or regulations, the Project or any part of the Project, is discovered to contain defective work, D/B shall promptly, without any reimbursement or adjustment in the GMP, and in accordance with City's written instructions, either correct that defective work, or if it has been rejected by City, remove it from the Project and replace it with work which is not defective. If circumstances warrant it, including but not limited to, in an emergency, City or D/B may have the defective work corrected or the defective work removed and replaced. In that event, D/B shall not be allowed to recover any associated cost and D/B shall reimburse City for all direct, and indirect costs of City and City shall be entitled to an appropriate decrease in the GMP, to withhold a setoff against amount recommended for payment, or make a claim on D/B's bond if D/B has been paid in full.

22.6 With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for Work performed and materials furnished under this Agreement, the D/B shall:

22.6.1 Obtain all warranties that would be given in normal commercial practice and as required by the City;

22.6.2 Require all warranties to be executed, in writing, for the benefit of City;

22.6.3 Enforce all warranties for the benefit of City, if directed by City;

22.6.4 In the event D/B's warranty under Section 22.2 has expired, City may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty;

22.6.5 D/B shall assign all subcontractor, supplier and manufacturer warranties including maintenance contracts from the installer for specialized equipment, such as elevators, escalators, movable partitions, equipment etc., to cover the limited warranty period to City at the expiration of the one year warranty.

Section 23: Use and Possession Prior to Completion

23.1 City shall have the right to take possession of or use any completed or partially completed part of the Work if mutually agreed upon by the Parties. Before taking possession of or using any Work, City shall furnish D/B a list of items of Work remaining to be performed or corrected on those portions of the Work that City intends to take possession of or use. However, failure of City to list any item of Work shall not relieve D/B of responsibility for complying with the terms of this Agreement. City's possession or use shall not be deemed an acceptance of any Work under this Agreement, nor relieve the D/B of any of its obligations under this Agreement.

23.2 While City has such possession or use, D/B shall be relieved of the responsibility for the loss of or damage to the Work resulting from City's possession or use. If prior possession or use by City delays the progress of the Work or causes additional expense to D/B, an equitable adjustment shall be made in the GMP or the Contract Time, and the Agreement shall be modified in writing accordingly.

Section 24: Personal Services and Non-Assignability

24.1 This is a personal services Agreement and, therefore, D/B shall not alter the key employees or Design Consultants nor assign or transfer, voluntarily or involuntarily, any of its rights, duties or obligations under this Agreement except upon the prior written consent of City. Any such change, assignment or transfer without the prior written consent of the City shall be deemed null and void and constitute a material breach under this Agreement.

Section 25: Indemnification

25.1 To the fullest extent permitted by the law, D/B shall indemnify, defend, protect and hold harmless City, its elected and appointed officers, agents, employees, consultants, (collectively herein the "Indemnitees"), from and against all claims, demands, causes of action, damages, injuries, liabilities, losses and expenses (including, without limitation, reasonable attorneys' and consultants' fees and expenses)

of any kind whatsoever, arising in whole or in part out of or resulting from D/B's performance of this Agreement, D/B's breach of this Agreement, or the alleged negligent acts or omissions of D/B, its architects, engineers, other professionals and consultants, Contractors, suppliers or anyone directly or indirectly employed by any of them or anyone for whose acts they may be liable. The obligations of the D/B under this paragraph for errors or omissions, including those of the design professional subcontractors, which includes the Design Support Subcontractors, consultants, agents and employees thereof ("Design Support Subcontractors"), which arise from (1) the preparation or approval of maps, drawings, opinions, reports, surveys, designs or specifications, or (2) the giving of or the failure to give directions or instructions shall not be limited to the amount of coverage provided for in the professional liability insurance policy. If City is fully reimbursed by D/B's insurance for any loss covered by this paragraph, D/B shall have no further obligation for such loss.

25.2 D/B's obligation to indemnify under section 25.1 shall not extend to such claims, demands, causes of action, damages, injuries, liabilities, losses and expenses, to the extent that such is the result of the active negligence or the willful misconduct of an Indemnitee. D/B's obligation to defend under section 25.1, if not covered by the insurance to be provided on the Project, shall not extend to such claims, demands, causes of action, damages, injuries, liabilities, losses and expenses, or causes of actions, to the extent that such are caused by the active negligence or the willful misconduct of the Indemnitee, and from no other cause.

25.3 The D/B agrees, notwithstanding the above to the fullest extent permitted by law, to indemnify, defend, and hold harmless the City, its elected and appointed officers, employees, agents and consultants from and against any and all claims, suits, demands, liabilities, losses, or costs, including reasonable attorney's fees and defense costs, resulting or accruing to any and all persons, firms, and any other legal entity, caused by, arising out of or in any way connected with the handling, removal, abatement, capping, migration (after handling, removal, abatement or capping) of, or disposal of any asbestos or hazardous or toxic substances, products or materials that exist on, about or adjacent to the jobsite, whether liability arises under breach of contract or warranty, tort, including negligence, strict liability or statutory liability or any other cause of action. D/B's obligation regarding asbestos or hazardous or toxic substances, products or materials shall be limited to the proper removal within the Project boundaries and the proper disposal of such materials.

#### Section 26: Right to Terminate and Suspend Work

26.1 Archaeological and Paleontological Discoveries: If a discovery is made of an archaeological or paleontological interest, D/B shall immediately cease operations in the area of the discovery and shall not continue until ordered by City. When resumed, operations within the area of the discovery shall be as directed by City.

26.1.1 Discoveries which may be encountered may include, but are not be limited to, dwelling sites, stone implements or other artifacts, animal bones, human bones, fossils or any item with cultural significance.

26.1.2 D/B shall be entitled to an extension of time and compensation in accordance with the provisions of this Agreement.

26.2 Termination of Agreement by City for Cause: If, through any cause, D/B shall fail to fulfill in a timely and proper manner D/B's obligations under this Agreement, or if D/B shall violate any of the covenants, agreements or stipulations of this Agreement, City shall have the right to terminate this Agreement by giving written notice to D/B of such termination and specifying the effective date thereof at least five (5) days before the effective date of such termination. All finished or unfinished documents, data, studies, drawings, maps, plans, specifications, reports and other materials prepared by D/B, or any of its agents, Design Support Consultants or Subcontractors, shall, at the option of the City, become the property of the City, and D/B shall be entitled to receive just and equitable compensation for any work satisfactorily completed on such documents and other materials up to the effective date of Notice of Termination, not to exceed amounts payable hereunder, and less any damages caused by D/B's breach.

26.2.1 In the event the Agreement is terminated in accordance with this Section, City may take possession of the Project and may complete the Project by whatever method or means City may select.

26.2.2 If the cost to complete the Project exceeds the balance, which would have been due, D/B shall pay the excess amount to City.

26.2.3 Rights of City Preserved: Where D/B's services have been so terminated by City, the termination will not affect any rights or remedies of City against D/B then existing or which may thereafter accrue. Any retention or payment of moneys due D/B by City will not release D/B from liability. It is agreed that termination hereafter will not in any way release, waiver, or abridge any rights the City has against D/B's performance bond surety.

26.2.4 Any dispute as to the amount due or owed to D/B upon termination under this section shall be resolved in accordance with Section 33.

26.3 Termination for Convenience by City: City may terminate this Agreement at any time and for any reason, by giving specific written notice to D/B of such termination and specifying the effective date thereof, at least seven (7) days before the effective date of such termination. In that event, all finished and unfinished documents and other materials described hereinabove shall, at the option of the City, become City's sole and exclusive property. If the Agreement is terminated by City as provided in this paragraph, D/B shall be entitled to receive just and equitable compensation for any satisfactory Work completed, including reasonable demobilization costs, to the effective date of such termination. D/B hereby expressly waives any and all claims for damages or compensation arising under this Agreement except as set forth herein.

26.3.1 Records and Documents Relating to Termination: Unless otherwise provided in the Agreement or by statute, D/B shall maintain all records and documents relating to the terminated portion of this Agreement for three (3) years after final settlement. This includes all books and other evidence bearing on

D/B's costs and expenses under this Agreement. D/B shall make these records and documents available to City, at D/B's office, at all reasonable times, without any direct charge. If approved by the City Manager, photographs, electronic files, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

26.4 Upon receipt of the Notice of Termination, D/B shall take any action that may be necessary, or that the City Manager may direct, for the protection and preservation of the property related to this Agreement that is in the possession of D/B and in which City has or may acquire an interest.

26.5 Payment to D/B Due to Termination - D/B and the City Manager may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a fee proportional to the percentage of work satisfactorily completed. However, the agreed amount, exclusive of costs shown in section 26.9 below, may not exceed the total dollar amount authorized by City as reduced by the amount of payments previously made.

26.6 Failure to Agree on Payment - If D/B and City fail to agree on the whole amount to be paid because of the termination of Project, City shall pay D/B the fair and reasonable amounts determined in good faith by City as follows, but without duplication of any amounts agreed to above:

26.6.1 The price for completed services accepted, including any retention, by City not previously paid;

26.6.2 The costs incurred in the performance of the Project terminated, including initial costs and preparatory expense allocable thereto. These costs are only for Work completed and accepted by the City based on an audit of all Contractors' bills of materials and the timecards for Work actually performed;

26.6.3 A portion of the D/B Fixed Fee (overhead and profit) based on the percentage of Work completed on the Project; however, if D/B would have sustained a loss on the entire Agreement had it been completed, City shall allow no profit under this section and shall reduce the settlement to reflect the indicated rate of loss;

26.6.4 D/B and Design Subcontractor services through the date of termination shall be paid based on actual time spent as documented on timecards. Expenses shall be paid based on invoice and receipts provided by D/B;

26.6.5 Under no circumstances will D/B be entitled to any consideration for lost profit or lost opportunity costs.

26.7 If D/B does not agree that the amount determined by the City Manager is fair and reasonable and if D/B gives notice of such disagreement to City within thirty (30) days of

receipt of payment, then the amount due shall be as later determined pursuant to the Dispute Resolution procedures in Section 33.

26.8 Payment for Property Destroyed, Lost, Stolen or Damaged - Except to the extent that City expressly assumed the risk of loss, the City Manager shall exclude from the amounts payable to D/B under this Section, the fair value, as determined by the City Manager, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to City.

26.9 Deductions - In arriving at the amount due D/B under this section, there shall be deducted:

26.9.1 Any claim which City has against D/B under this Agreement; and

26.9.2 The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by D/B or sold under the provisions of this clause and not recovered by or credited to City.

26.10 Termination of Agreement by D/B:

26.10.1 D/B may terminate the Agreement upon ten (10) days written notice to City, whenever:

26.10.1.1 The Project has been suspended under the provisions of Section 26.1 or 26.2, for more than ninety (90) consecutive days through no fault or negligence of D/B, and notice to resume Work or to terminate the Agreement has not been received from City within this time period; or,

26.10.1.2 City should fail to pay D/B any monies due it in accordance with the terms of this Agreement and within ninety (90) days after presentation to City by D/B of a request therefore, unless within said 10-day period City shall have remedied the condition upon which the payment delay was based.

26.10.2 In the event of such termination, D/B shall have no claims against City except for those claims specifically enumerated in Section 26.9, herein, and as determined in accordance with the requirements of said Section.

## Section 27: Independent Contractor

27.1 D/B and any Design Support Consultant, Contractor, Subcontractor, agent or employee of D/B, shall act as an independent contractor and not as an agent, officer or employee of City. Except as expressly provided in this Agreement, City assumes no liability for D/B's actions and performance; in particular, but without limitation, City assumes no responsibility for paying any taxes, bonds, payments or other commitments, implied or explicit, by or for D/B. D/B acknowledges that it is aware that because it is an independent contractor, City is making no deductions from the fees for services being paid to D/B and that City is not contributing to any fund on the behalf of D/B. D/B disclaims the right to any type of additional fee or benefits.



Section 28: Independent Judgment

28.1 Unless otherwise directed in writing by City, D/B shall, in providing the professional services required by this Agreement, arrive at conclusions with respect to the rendition of information, advice and recommendations, independent of the control and direction of City, other than normal contract monitoring; D/B, however, shall possess no authority with respect to any City decision beyond rendition of such information, advice and recommendations. D/B shall not have the authority to act as an agent on behalf of City unless specifically authorized to do so by City in writing.

Section 29: Maintenance of Records and Accounting

29.1 D/B shall maintain, during the Project and for a period of three (3) years after completion of the Project, accurate and organized records of all costs of any type and all services performed under this Agreement. City will have the right at any time, including during the performance of all Phases of the Project to audit and copy all such records.

Section 30: Ownership of Documents

30.1 All reports, studies information, data, statistics, forms, designs, plans, procedures, systems and any other materials or properties produced under this Agreement shall be the sole and exclusive property of City. No such materials or properties produced in whole or in part under this Agreement shall be subject to private use, copyrights or patent rights by Consultant in the United States or in any other country without the express written consent of City. City shall have unrestricted authority to publish, disclose (except as may be limited by the provisions of the Public Records Act), distribute, and otherwise use, copyright or patent, in whole or in part, any such reports, studies, data, statistics, forms or other materials or properties produced under this Agreement.

Section 31: Force Majeure

31.1 Any party to this Agreement may be excused for any delay or failure to perform its duties and obligations under this Agreement, except for obligations to pay money, but only to the extent that such failure or delay is caused by an Event of Force Majeure as set forth in section 31.2. If an Event of Force Majeure set forth in Section 31.2 causes a delay or failure in performance of only a portion of the obligations of a Party under this Agreement, then only that portion of performance which was delayed or prevented by such cause shall be deemed excused, and the performance of all other obligations of a Party not so delayed shall not be excused by an Event of Force Majeure. Delay or failure in performance of all other obligations of a Party not so delayed shall not be excused by such Event of Force Majeure. Delay or failure in performance by a Party which is the result of an Event of Force Majeure set forth in section 31.2 shall be deemed excused for a period no longer than the delay or failure in performance caused by such Event.

31.2 An Event of Force Majeure means an occurrence beyond the control and without the fault or negligence of a Party, including but not limited to unusually severe weather, flood, earthquake, fire, lightning, and other natural catastrophes, acts of God or the public enemy, war, terrorist act, riot, insurrection, civil disturbance or disobedience, strike or labor dispute for which D/B is not responsible, expropriation or confiscation of facilities, changes of applicable law, or sabotage of facilities, so long as such Party makes good faith and reasonable efforts to remedy the delays or failures in performance caused thereby. However, D/B, in developing the GMP and Project Schedule, has incorporated three (3) days for anticipated adverse weather days that may disrupt work on the Project; D/B shall be entitled to relief under this Section for adverse weather only to the extent adverse weather days exceed this amount of days.

31.3 A Party shall give written notice to the other Party as soon after becoming aware of the delay or failure in performance caused by an Event of Force Majeure as is reasonably possible, but in any event within five (5) working days after Party becomes aware of such delay or failure.

31.4 No Event of Force Majeure shall be a basis for monetary adjustment to the GMP. Costs incurred by the D/B as a result of a Force Majeure Event will be reimbursed according to the terms of this Agreement from the Contingency Fund.

#### Section 32: Hazardous Materials

32.1 In the event the D/B or any other party encounters asbestos or hazardous or toxic materials at the Project Site, or should it become known in any way that such materials may be present at the Project Site or any adjacent areas that may affect the performance of the D/B's services, the D/B may, at his or her option and without liability for consequential or any other damages, suspend performance of services on the Project until the City retains appropriate specialist consultant(s) or contractor(s) to identify, abate and/or remove the hazardous or toxic materials, and warrant that the Project Site is in full compliance with applicable laws and regulations.

#### Section 33: Disputes

33.1 All claims, counterclaims, disputes, and other matters in question arising under, or relating to, the Agreement or the breach thereof shall be processed in accordance with the provisions of this Section, unless specifically addressed by another provision of this Agreement.

33.2 D/B shall submit its written request for a Change Order to City pursuant to Section 14. City shall make a determination on D/B's request in writing within seven (7) days of receipt of request and all supporting data. Said Change Order shall be made in good faith and accurately reflect the adjustment in GMP or Contract Time for which D/B believes City is liable, and covers all costs and delays to which D/B believes it is entitled as a result of the occurrence of the claimed event. All requests for adjustment in Contract Time shall include an analysis of the Master Construction Schedule and the impact of the claimed work on specific activities on the Master Construction Schedule.

33.3 If D/B disagrees with City's determination, D/B shall file a claim in writing in accordance with the procedures set forth in Chapter 10 of the Escondido Municipal Code, as same may from time to time be amended, the provisions of which are incorporated by this reference as if fully set forth herein, and such policies and procedures used by the City in the implementation of the same.

33.4 Pending final resolution of any claim, including litigation, D/B shall proceed diligently with performance of the Project, and comply with any direction of City.

Section 34: Notices

34.1 All notices, demands or other communications hereunder shall be given or made in writing and shall be delivered personally or sent by courier or registered or certified mail, return receipt requested, postage prepaid, addressed to the Party to whom they are directed at the following addresses, or at such other addresses as may be designated by notice from such Party:

(i) To CITY:

Mike Lowry, Fire Chief  
1163 North Centre City Parkway  
Escondido, CA 92026

(ii) To D/B:

Erickson-Hall Construction Co.  
500 Corporate Drive  
Escondido, CA 92029  
Attn. Michael Hall

Any notice, demand or other communication given or made solely by mail in the manner prescribed in this Section shall be deemed to have been given and to be effective three (3) days after the date of such mailing, provided however, that any notice, demand or other communication which would otherwise be deemed to have been given on a day which is not a business day shall be deemed to have been given on the next subsequent business day.

Section 35: Miscellaneous Terms

35.1 Representations: Each Party hereto declares and represents that in entering into this Agreement it has relied and is relying solely upon its own judgment, belief and knowledge of the nature, extent, effect and consequence relating thereto. Each Party further declares and represents that this Agreement is being made without reliance upon any statement or representation of any other Party not contained herein, or any representative, agent or attorney of any other Party.

35.2 Severability: If any term or condition of this Agreement is held to any extent to be invalid or unenforceable, all the remaining terms and conditions shall be enforceable to the fullest extent permitted by law.

35.3 Entire Agreement: This Agreement contains the entire agreement, between the Parties and supersedes all prior negotiations, discussions, obligations and rights of the Parties in respect of each other regarding the subject matter of this Agreement. There is no other written or oral understanding between the Parties. No modification, amendment or alteration of this Agreement shall be valid unless it is in writing and signed by the Parties hereto.

35.4 Drafting Ambiguities: The Parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this Agreement, and that the decision of whether or not to seek the advice of counsel with respect to this Agreement is a decision which is the sole responsibility of each of the Parties hereto. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Agreement.

35.5 Applicable Law; Venue: The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California. In the event of litigation between the parties, venue in state trial courts shall lie exclusively in the County of San Diego, North County Branch. In the event of litigation in a U.S. District Court, venue shall lie exclusively in the Southern District of California, in San Diego.

35.6 Waiver: Unless otherwise expressly provided herein, no delay or omission by the Parties hereto in exercising any right or remedy provided for herein shall constitute a waiver of such right or remedy, nor shall it be construed as a bar to or a waiver of any such right or remedy on any future occasion.

35.7 Effect of Headings: Headings appearing in this Agreement are inserted for convenience of reference only, and shall in no way be construed to be interpretations of the provisions hereof.

35.8 Amendments: This Agreement may be modified, amended or supplemented only by the mutual written agreement of the Parties hereto.

35.9 Authorization and Compliance: Each Party represents that it is duly authorized to execute and carry out the provisions of this Agreement.

35.10 Further Assurances: The Parties agree to do such further acts and things and execute and deliver such additional agreements and instruments as the other may reasonably require to consummate, evidence or confirm the agreements contained herein in the manner contemplated hereby.

35.11 Counterparts: This Agreement may be executed by the Parties in one or more counterparts, all of which taken together shall constitute one and the same instrument. The facsimile signatures of the Parties shall be deemed to constitute original signatures,

And facsimile copies hereof shall be deemed to constitute duplicate original counterparts.

35.12 Exhibits and Glossary of Terms: All Exhibits and Glossary of Terms are incorporated herein by reference into this Agreement.

35.13 Third Party Beneficiary: Nothing within this Agreement shall create a contractual relationship between the City and any third party.

*(Signatures on next page)*

IN WITNESS WHEREOF, City and Design Builder have executed this Agreement on the day and year first written above.

CITY OF ESCONDIDO, a  
municipal corporation

Erickson-Hall Construction Co.

By: \_\_\_\_\_  
Sam Abed, Mayor

By: \_\_\_\_\_  
Michael Hall  
Chief Operating Officer

By: \_\_\_\_\_  
Marsha Whalen, City Clerk

By: \_\_\_\_\_  
Dave Erickson  
Chief Executive Officer

Approved as to Form:  
Jeffrey R. Epp, City Attorney

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

EXHIBIT LIST (1 - 4 )

1. Conceptual Plan
2. Guaranteed Maximum Price
3. Project Schedule
4. Project Team

(Exhibits to be provided at a later date)