

SUPPLEMENTAL CITY COUNCIL STAFF REPORT

MEETING DATE: DECEMBER 17, 2014

PREPARED BY: Karl Bjarke, Public Works Director
APPROVED BY: City Manager

..TITLE

AWARD DESIGN-BUILD CONTRACT FOR DOWNTOWN PARKING STRUCTURE AND APPROVE RELATED AGREEMENTS

..RECOMMENDATION

RECOMMENDATION(S):

Approve the following action to replace action number 2 in the Primary Staff Report;

Adopt **revised Resolution** approving and authorizing the City Manager to negotiate and execute a Design/Build Contract with F&H Construction Inc. for the Downtown Parking Structure Project in the amount of \$8,580,000 and authorize expenditure of an additional \$170,000 as contingency funds.

..BODY

NARRATIVE:

Attached to this report is a **revised Resolution** approving and authorizing the City Manager to negotiate and execute a Design/Build Contract with F&H Construction for the Downtown Parking Structure. Also attached is the Design/Build Contract Agreement with F&H Construction. The attached **revised Resolution** replaces the Resolution attached to the Primary Staff Report.

The Resolution has been revised to authorize that the City Manager - in addition to administering the provisions of the Contract Agreement - be delegated authority to further negotiate and make modifications to the Contract Agreement, if necessary, to better align the provisions of the Contract Agreement with those of the Request for Proposals (RFP) so long as no further or increased compensation would result.

LINKS/ATTACHMENTS:

Revised Resolution
Contract Agreement

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE AND ADMINISTER THAT CERTAIN DESIGN/BUILD AGREEMENT WITH F&H CONSTRUCTION FOR THE DOWNTOWN PARKING STRUCTURE PROJECT IN THE AMOUNT OF \$8,580,000 AND AUTHORIZING EXPENDITURE OF CONSTRUCTION CONTINGENCY FUNDS NOT TO EXCEED \$170,000

WHEREAS, the City of Morgan Hill, a municipal corporation and general law city duly organized and existing under and pursuant to the Constitution and laws of the State of California (“City”), is authorized to enter into contracts and agreements for the benefit of the City; and

WHEREAS, the reasons supporting the entrance of the City into that certain agreement described in, and that is the subject of, this Resolution are set forth in detail in that certain City Council Staff Report entitled "Award Design/Build Contract for Downtown Parking Structure" submitted for City Council consideration at its meeting of December 17, 2014, submitted to the City Council by the City Manager (the “Staff Report”), the contents of which Staff Report are incorporated herein by this reference; and

WHEREAS, the consideration by City Council of the adoption of this Resolution has been duly noticed pursuant to applicable laws and has been placed upon the City Council Meeting Agenda on the date set forth in the Staff Report, or to such date that the City Council may have continued or deferred consideration of this Resolution, and on such date the City Council conducted a duly noticed public meeting at which meeting the City Council provided members of the public an opportunity to comment and be heard and considered any and all testimony and other evidence provided in connection with the adoption of this Resolution; and

WHEREAS, an Environmental Impact Report (EIR) was adopted and certified for the Downtown Specific Plan and an addendum has been completed for the proposed parking garage and retail project which concluded that the Project would not have the potential to result in any new or increased environmental impacts beyond those analyzed in the EIR for the subject site, and therefore, no further environmental assessment is required; and

WHEREAS, the City Council determines that adoption of this Resolution is in the public interest.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MORGAN HILL DOES HEREBY FIND, DETERMINE, RESOLVE AND ORDER AS FOLLOWS:

Section 1. Recitals. The City Council does hereby find, determine and resolve that all of the foregoing recitals are true and correct.

Section 2. Approval and Authorization. The City Council does further resolve, order and/or direct as follows:

- a. That the Design/Build Agreement with F&H Construction for the Downtown Parking Structure Project, substantially in the form attached hereto as Exhibit A and incorporated herein by this reference (the “Agreement”), is hereby approved; and
- b. That the City Manager is hereby delegated authority to and is authorized and directed to further negotiate, execute, and subsequently administer including the authority to terminate as necessary or appropriate, the Agreement substantially in the form attached hereto as Exhibit A; provided, specifically, (1) that the total amounts to be paid by City under the Agreement shall in no event exceed (i) eight million five hundred eighty thousand dollars (\$8,580,000.00) and (ii) one hundred seventy thousand dollars (\$170,00.00) for construction contingencies and (2) that the City Manager may modify the terms and provisions of the Agreement from its approved form to make non-substantive modifications or clarifications or to better align the provisions of the Agreement with the request for proposal terms and provisions, all so long as no increase in overall compensation results; and
- c. That the City Manager is hereby delegated authority to and is authorized to take all other ministerial actions that may be necessary or appropriate to implement the provisions of this Resolution.

Section 3. This Resolution shall take effect immediately upon adoption.

PASSED AND ADOPTED by the City Council of the City of Morgan Hill at its meeting held on this 17th day of December, 2014 by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

COUNCIL MEMBERS:
COUNCIL MEMBERS:
COUNCIL MEMBERS:
COUNCIL MEMBERS:

DATE: _____

Steve Tate, MAYOR

∞ CERTIFICATION ∞

I, Irma Torrez, City Clerk of the City of Morgan Hill, California, do hereby certify that the foregoing is a true and correct copy of Resolution No.XXXX , adopted by the City Council at the meeting held on December 17, 2014.

WITNESS MY HAND AND THE SEAL OF THE CITY OF MORGAN HILL.

DATE: _____

Irma Torrez, CITY CLERK

DESIGN-BUILD CONTRACT

CITY OF MORGAN HILL DOWNTOWN PARKING STRUCTURE PROJECT

This design-build contract ("Contract") is entered into by and between the City of Morgan Hill ("City") and F&H Construction ("DBE"), for design, construction and completion of the City's Downtown Parking Structure Project ("Project").

The parties agree as follows:

- Award of Contract.** In response to City's Request for Proposals ("RFP"), DBE has submitted a Proposal ("Proposal") to design and build the Project. City has awarded the Contract for the Project to DBE based on its determination that DBE's Proposal offers the best value based upon the criteria set forth in the RFP.
- Contract Documents.** The Contract Documents are comprised of the Design Build RFP Documents, dated October 6, 2014, Parts 1-3 and 5-6, as amended by Addenda 1-7 (collectively, the "Design Build Documents"); DBE's Proposal and attachments thereto (collectively, the "Proposal"); this Contract and any authorized Change Orders; the payment and performance bonds; and the General Conditions, all of which are incorporated herein. Capitalized terms that are used in this Contract or in the bond forms provided by the City, and that are not otherwise defined have the same meanings provided for those terms in the General Conditions.
- DBE's Responsibilities.** DBE shall be responsible for providing the Design-Build Services necessary to complete the Project consistent with the Contract Documents. DBE shall exercise reasonable skill and judgment in the performance of its services, all in conformance with the Contract Documents. DBE must provide, furnish, and supply all things necessary and incidental for the timely design, performance and completion of the Project, including, but not limited to, provision of all necessary labor, materials, equipment, transportation, and utilities, unless otherwise specified in the Contract Documents. DBE also agrees to use its best efforts to complete the Work in a professional and expeditious manner and to meet or exceed the performance standards required by the Contract Documents.
- Payment.** As full and complete compensation for DBE's timely performance and completion of the Design-Build Services in strict accordance with the terms and conditions of the Contract Documents, City will pay DBE for its cost to provide the Design-Build Services, as detailed in the Proposal (the "Contract Price") in an amount not to exceed Eight Million, Five Hundred Eighty Thousand Dollars (\$8,580,000.00), in accordance with the payment provisions set forth in the General Conditions. The Contract Price includes all applicable federal, state, and local taxes.
- Time for Completion.** DBE will fully complete the Project by _____, 2015. By signing below, DBE expressly waives any claim for delayed early completion.
- Liquidated Damages.** If DBE fails to complete the Project within the Contract Time, City may assess liquidated damages in the amount of two thousand five hundred dollars (\$2,500.00) for each day of unexcused delay in completion, and the Contract Price will be reduced by that amount.
- Labor Code Compliance.** The Construction Services provided under this Contract

are subject to all applicable requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, including, but limited to, requirements pertaining to wages, working hours and workers' compensation insurance.

8. **Workers' Compensation Certification.** Pursuant to Labor Code Section 1861, by signing this Contract, DBE certifies as follows: "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the Work on this Contract."

9. **Prevailing Wages.** The Construction Services provided for this Project are subject to the prevailing wage requirements applicable to the locality in which the Work is to be performed for each craft, classification or type of worker needed to perform the Work, including employer payments for health and welfare, pension, vacation, apprenticeship and similar purposes. Copies of these prevailing rates are available online at <http://www.dir.ca.gov/DLSR>.

10. **Notice.** Any notice, billing, or payment required by the Contract Documents must be made in writing, and sent to the other party by personal delivery, U.S. Mail, a reliable overnight delivery service, facsimile, or by e-mail as a .pdf (or comparable) file. Notice is deemed effective upon delivery unless otherwise specified. Notice for each party must be given as follows:

CITY:

City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037
Attn: City Clerk

With copies to:
City Engineer/Director of Public Works
17575 Peak Avenue
Morgan Hill, CA 95037
Fax: (408) 779-7236
Email: Karl.Bjarke@MorganHill.ca.gov

Master Architect:
Watry Design, Inc.
100 Century Center Court, Suite 600
San Jose, CA 95112
Attn: Michelle Wendler
Fax: (408) 532-5004
Email: MWendler@watrydesign.com

DBE

F&H Construction
1115 East Lockeford Street
Lodi, CA 95240
Attn: Stephen Seibly, Executive VP

With copies to:

11. **General Provisions.**

11.1 **Assignment and Successors.** DBE may not assign its rights or obligations under this Contract, in part or in whole, without City's written consent. This Contract is binding on DBE's successors and permitted assigns.

11.2 **Third Party Beneficiaries.** There are no intended third party beneficiaries to this Contract except as expressly provided in the General Conditions.

11.3 **Governing Law and Venue.** This Contract is governed by California law and venue will be in the Superior Court of Santa Clara County, and no other place.

11.4 **Amendment.** No amendment or modification of this Contract will be binding unless it is in a writing duly authorized and signed by the parties to this Contract.

11.5 **Integration; Severability.** This Contract and the Contract Documents incorporated herein, including authorized amendments or change orders thereto, constitute the final, complete, and exclusive terms of the agreement between City and DBE. If any provision of this Contract, or portion thereof, is determined to be illegal, invalid, or unenforceable, the remaining provisions of the Contract will remain in full force and effect.

11.6 **Authorization.** Each individual signing below warrants that he or she is authorized to do so by the party that he or she represents, and that this Contract is legally binding on that party.

The parties agree to this Contract as witnessed by the signatures below:

CITY OF MORGAN HILL:

DBE:

s/ _____

s/ _____

_____, City Manager

Name/Title [print]

Date: _____

Date: _____

Attest:

Corporate entities must provide a second signature:

s/ _____

s/ _____

_____, City Clerk

Name/Title [print]

Date: _____

Date: _____

DBE's License Number(s)
(and expiration date(s))

Approved as to Form:

s/ _____

Renee Gurza, City Attorney

Date: _____

**END OF DOCUMENT
DESIGN-BUILD CONTRACT**

PERFORMANCE BOND

The City of Morgan Hill ("City") and F&H Construction, Inc. ("DBE") have entered into a design-build contract, dated _____, 20__ ("Contract") for the design and construction of the Downtown Parking Structure Project ("Project"). The Contract is incorporated by reference into this Performance Bond ("Bond").

1. Pursuant to this Bond, the DBE as Principal and _____, its surety ("Surety"), are bound to City as Obligee in the maximum amount of Eight Million, Five Hundred Eighty Thousand Dollars (\$8,580,000.00), (the "Bond Sum") for the Construction Services portion of the Contract. DBE and Surety hereby bind themselves and their respective heirs, executors, administrators, successors and assigns, jointly and severally, as provided herein.
2. If DBE fully performs its Construction Services obligations under the Contract, Surety's obligations under this Bond shall become null and void upon recordation of the notice of completion. Otherwise Surety's obligations shall remain in full force and effect. Surety waives any requirement to be notified of alterations to the Contract or extensions of time for performance of Work under the Contract, and also waives the provisions of Civil Code Sections 2819 and 2845.
3. Upon making a demand on this Bond, City shall make the Contract Balance available to Surety for completion of the Construction Services under the Contract. For purposes of this provision, the Contract Balance is defined as the total amount payable by City to the DBE as the Contract Price minus amounts already paid to DBE, and minus any liquidated damages, credits, or backcharges to which City is entitled under the terms of the Contract.
4. Upon written notification from City that DBE is in default, Surety shall promptly act to remedy the default through one of the following courses of action:
 - 4.1 Arrange for completion of the Work under the Contract by DBE, with the City's consent, but only if DBE is in default solely due to its financial inability to complete the Work;
 - 4.2 Arrange for completion of the Work under the Contract by a qualified contractor acceptable to City, and secured by performance and payment bonds issued by an admitted surety as required by the Contract Documents, at Surety's expense, or
 - 4.3 Waive its right to complete the Work under the Contract and reimburse City the amount of City's costs to have the remaining Work completed.
5. This Bond shall be governed by California law, and any dispute pursuant to this Bond shall be venued in the Superior Court for Santa Clare, and no other place. Surety shall be responsible for City's attorneys' fees and costs in any action to enforce the provisions of this Bond.

6. This Bond is entered into and effective on _____, 20____.

SURETY:

s/ _____

Name: _____

Title: _____

(Attach Acknowledgment with Notary Seal and Power of Attorney)

DBE:

s/ _____

Name: _____

Title: _____

**END OF DOCUMENT
PERFORMANCE BOND**

PAYMENT BOND

The City of Morgan Hill ("City") and F&H Construction, Inc. ("DBE") have entered into a design-build contract, dated _____, 20__ ("Contract") for the design and construction of the Downtown Parking Project("Project"). The Contract is incorporated by reference into this Payment Bond ("Bond").

1. Pursuant to this Bond, DBE as principal and _____, its surety ("Surety"), are bound to City as Obligee in the maximum amount of Eight Million, Five Hundred Eighty Thousand Dollars (\$8,580,000.00) for the Construction Services portion of the Contract ("Bond Sum"), pursuant to California Civil Code Sections 9550, et seq.
2. If DBE fails to pay any of the persons named in California Civil Code Section 9100 amounts due under the Unemployment Insurance Code with respect to work or labor performed under the Construction Services portion of the Contract, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the DBE and its Subcontractors, pursuant to Section 13020 of the California Unemployment Insurance Code, with respect to the work and labor, that Surety will pay for the same, and also, in case suit is brought upon the Bond, a reasonable attorney's fee, to be fixed by the court.
3. This Bond shall inure to the benefit of any of the persons named in California Civil Code Section 9100, so as to give a right of action to those persons or their assigns in any suit brought upon this Bond.
4. If DBE promptly makes payment of all sums for all labor, materials, and equipment furnished for use in the performance of the Construction Services portion of the Work required by the Contract, in conformance with the time requirements set forth in the Contract and as required by California law, Surety's obligations pursuant to this Bond shall be null and void. Otherwise, Surety's obligations shall remain in full force and effect.
5. Surety waives any requirement to be notified of alterations to the Contract or extensions of time for performance of the Work under the Contract, and also waives the provisions of Civil Code Sections 2819 and 2845.
6. This Bond shall be governed by California law, and any dispute pursuant to this Bond shall be venued in the Superior Court of Santa Clara, and no other place. Surety shall be responsible for City's attorneys' fees and costs in any action to enforce the provisions of this Bond.
7. This Bond is entered into and is effective on _____, 20_____.

[Signature page follows.]

SURETY:

_____ Principal _____ Principal

By: _____
Surety

By: _____
Attorney-in-Fact

By: _____
California Resident Agent

By: _____
Non-resident Agent – Attorney-in-Fact

(Attach Acknowledgment with Notary Seal and Power of Attorney)

**END OF DOCUMENT
PAYMENT BOND**

**CITY OF MORGAN HILL
DOWNTOWN PARKING STRUCTURE PROJECT
GENERAL CONDITIONS**

Table of Contents:

Article 1 – Definitions	1
Article 2 – DBE’s Role and Responsibilities.....	4
Article 3 – Contract Documents.....	8
Article 4 – Bonds, Indemnity and Insurance	9
Article 5 – Contract Time.....	11
Article 6 – Contract Modification.....	14
Article 7 – General Construction Provisions.....	16
Article 8 – Payment	22
Article 9 – Labor Provisions	23
Article 10 – Safety Provisions.....	24
Article 11 – Completion and Warranty Provisions.....	26
Article 12 – Dispute Resolution	27
Article 13 – Suspension and Termination.....	31
Article 14 – Miscellaneous Provisions	32

**Article 1
Definitions**

1. **Definitions.** The following definitions apply to all of the Contract Documents unless otherwise indicated. Defined terms and titles of documents are capitalized in the Contract Documents, with the exception of the words “day” and “install.”

Allowance means an amount included in the Proposal for Work or costs for goods or services that may or may not be included in the Project, depending on conditions that will not become known until after the Contract is executed. If the Contract Price includes an Allowance and the cost of performing the Work or providing the goods or services covered by that allowance is greater or less than the Allowance, the Contract Price may be increased or decreased accordingly.

Architect of Record means the architect retained by DBE with authority to stamp the plans provided by DBE.

Change Order means a written document duly approved and executed by City and DBE, which changes the scope of Work, the Contract Price, or the Contract Time.

City means the City of Morgan Hill acting through its City Council, officers, employees, or authorized representatives.

Claim means a separate demand by DBE for change in the Contract Time or Contract Price, that has previously been submitted to City in accordance with the requirements of the Contract Documents, and which has been rejected by City, in whole or in part.

Construction Documents means the Design Documents prepared by DBE and approved

by City for construction of the Project, pursuant to Article 2 herein.

Construction Manager means the individual(s) or firm retained by City to provide construction management services for the Project. If no Construction Manager has been retained for this Project, any reference to Construction Manager shall be deemed to refer to the City's Director of Public Works.

Construction Services means all of the Work required to construct the Project as designed, including, but not limited to all services required to be provided by or customarily provided by or under the direction of a licensed general contractor, and excluding all of the Design Services.

Contract means the signed agreement between City and DBE and the Contract Documents incorporated therein.

Contract Documents means, collectively, the Design Build Documents; DBE's Proposal and attachments thereto; the Contract; the payment and performance bonds; these General Conditions; approved and executed Change Orders; and any duly authorized and executed amendments to the Contract; and any other documents expressly made part of the Contract Documents.

Contract Price means the total compensation to be paid to the DBE for its costs to design and construct the Project, exclusive of all Financing Costs, as set forth in the Contract and as may be amended by Change Order, adjusted pursuant to an Allowance, or reduced by liquidated damages.

Contract Time means the number of calendar days for completing design and construction of the Project, as set forth in the Contract and as may be amended by Change Order.

Day means a calendar day unless otherwise specified.

Design Build Documents means the Design Build RFP Documents, dated October 6, 2014, Parts 1-3 and 5-6, as amended by Addenda 1-7.

Design-Build Entity or **DBE** means the individual, partnership, corporation, or joint-venture who has signed the Contract with City to design and construct the Project in accordance with the Contract requirements.

Design Phase means the period during which Design Professionals are preparing the Design Documents for City's approval.

Design-Build Services means all of the Design Services and all of the Construction Services which must be performed to completely design and construct the Project in accordance with the Contract Documents.

Design Development Documents means the Design Documents prepared by DBE and approved by City for preparation of the final Construction Documents pursuant to Article 2 herein.

Design Documents means the plans and specifications for construction of the Project which are developed by DBE as part of the Design Services.

Design Professional means any architect, including the Architect of Record, engineer,

landscape architect, or land surveyor licensed and in good standing under the applicable provisions of the California Business and Professions Code, who is retained or employed by DBE to provide Design-Build Services for the Project, based on his or her licensed authority.

Design Services means all services necessary to design the Project in conformance with the Design Build Documents, including, but not limited to all services required to be provided by or customarily provided under the direction of a licensed architect or other Design Professional, and excluding all of the Construction Services.

Engineer means the City Engineer/Director of Public Works for the City of Morgan Hill or authorized delegee acting within the scope of his or her delegation.

Final Completion means the DBE has fully completed all of the Design-Build Services required by the Contract Documents, including all punch list items and all required submittals, to the City's satisfaction.

Hazardous Materials means any substance or material identified now or in the future as hazardous under any federal, state, or local law or regulation, or any other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal, or cleanup.

Inspector means the individual(s) or firm(s) employed or retained by City to inspect the workmanship, materials, and manner of construction of the Project and its components on behalf of City to ensure compliance with the Contract Documents, the approved Construction Documents, and all applicable codes, regulations, and permits.

Install means to fix in place for materials, and to fix in place and connect for equipment.

Master Architect means the architectural firm of Watry Design, Inc., retained by the City to develop the Design Build Documents.

Project means the City of Morgan Hill's Downtown Parking Structure Project.

Project Manager means the City's representative for this Project.

Project Schedule means the City-approved schedule for the Design-Build Services, including Final Completion.

Proposal means the Proposal and all attachments thereto submitted by the DBE in response to the City's Request for Proposals.

Request for Proposals means the City's Request for Proposals for the City's Downtown Parking Structure Project in the Design Build Documents.

Specifications or **specifications** means the technical specifications prepared by the Master Architect, or, if indicated by the context, the technical specifications in the approved Construction Documents.

Subcontractors means all licensed contractors, suppliers, fabricators, or lessors of equipment, of any tier unless otherwise indicated by the context, retained by DBE to provide the Construction Services.

Technical Specifications or **technical specifications** means the technical specifications

prepared by the Master Architect, or, if indicated by the context, the technical specifications in the approved Construction Documents.

Work means the Construction Services necessary or incidental to completing the Project in conformance with the requirements of the Contract Documents and approved Construction Documents.

Worksite means the place or places where the Work is performed.

Article 2 DBE's Role and Responsibilities

2.1 Relationship of Trust and Confidence. DBE accepts the relationship of trust and confidence established between it and City by this agreement. DBE agrees to furnish the Design-Build Services necessary for the design and completion of the Project and agrees to furnish efficient business administration and superintendence, and to use its best efforts to complete the Project in the best and soundest way and in the most efficient and economical manner consistent with the best interest of City.

2.1.1 DBE represents that it is an independent DBE and that it is familiar with the type of work it is undertaking.

2.1.2 Neither DBE nor any of its agents or employees shall act on behalf of or in the name of City unless authorized in writing by the Engineer.

2.1.3 DBE shall perform its obligations with integrity, ensuring at a minimum that conflicts of interest, including but not limited to conflicts of interests on the part of the design professionals employed by DBE, shall be avoided.

2.2 Scope of Services. DBE shall be responsible for procuring or providing the Design-Build Services for the Project consistent with the Contract Documents. DBE shall exercise reasonable skill and judgment in the procurement and provision of the Design-Build Services, consistent with the applicable industry practices and the terms and conditions of the Contract Documents.

2.3 Design Services.

2.3.1 Architectural and Engineering Services. Architectural and engineering services must be provided by licensed, independent Design Professionals retained by DBE or by licensed employees of DBE, or as permitted by the law of the State of California. DBE may not engage the services of any Design Professional for this Project, including, but not limited to, firms or individuals serving as Architect of Record or providing other Design Services, without obtaining the City's prior written approval, which approval will not be unreasonably withheld. City's approval will not be deemed to create any contractual relationship between City and any such Design Professional, except that the City must be considered a third party beneficiary of such Design Professional's services for the Project. DBE must bind its Design Professionals in the same manner as DBE is bound to the City under this Contract, including, but not limited to, the insurance and indemnity requirements set forth herein. All Design Services must be guided by the Design Build Documents and on further refinements to the Design Build Documents which are approved by City.

2.3.1.1 **CADD files.** The Design Documents must be prepared and submitted using the CADD files provided with the Design Build Documents.

2.3.1.2 **Design Team Meetings.** After the City has issued a notice to proceed, the DBE must meet every two weeks with the City's Project representatives, in order to keep the City informed of the status of the Design Documents and to receive input from the City on design issues. DBE must schedule and coordinate these meetings, keep minutes, and distribute the minutes to all participants.

2.3.2 **Project Schedule.** Within ten (10) days following full execution of the Contract, DBE must prepare and submit for City's review and approval a preliminary Project Schedule showing the timing and sequencing of the design and construction required to complete the Project. The preliminary Project Schedule should include completion of Design Development Documents; Construction Documents; procurement of Subcontractors; construction; final close out; as well as any other milestones applicable to this Project. The Project Schedule shall be updated for City's review and approval upon completion of each milestone included in the Project Schedule. Upon receipt of the notice to proceed, DBE must direct the Architect of Record to begin preparing the Design Documents in accordance with the approved Project Schedule.

2.3.3 **Design Development Documents.** Within the time specified in the City-approved Project Schedule, DBE shall prepare and submit for City's review and approval the Design Development Documents. The Design Development Documents must be based on the Design Build Documents, as may be modified by the use permit and design approvals by the City, but must further define the Project, including drawings and outline specifications fixing and describing the Project size, character and site relationships, and other appropriate elements describing the structural, architectural, mechanical and electrical systems. Design Development Documents shall include, as applicable, plans, sections and elevations; criteria and sizing of major components; equipment sizes and capacities and approximate layouts, including required spaces and clearances; typical details; materials selections and general quality levels. When submitting the Design Development Documents, the DBE shall identify in writing, for City's approval, all material changes and deviations that have taken place since approval of the Design Build Documents and the Project Schedule. Two printed sets and one reproducible set of Design Development Documents, on a CD using approved CADD software, must be provided to the City. The estimated time for City's review of the Design Development Documents is 2 weeks.

2.3.4 **Construction Documents.** Following City approval of the Design Development Documents and within the time specified in the City-approved Project Schedule, DBE must prepare and submit for City's review and approval, Construction Documents setting forth in detail the quality levels of and the requirements for construction of the Project, and consisting of drawings and specifications that comply with applicable codes, laws, and regulations in effect at the time of their preparation at the location of the Project. The Construction Documents must also include all necessary bid and contract documents for procuring and providing the Construction Services, all of which are subject to approval by City and its legal counsel. When submitting the Construction Documents, the DBE shall identify in writing all for City's approval, all material changes and deviations that have taken place since approval of the Design Development Documents and Project Schedule. Two printed sets and one

reproducible set, on a CD using approved CADD software, of the Construction Documents must be provided to the City for its review.

2.3.4.1 Specifications. The written specifications for the Construction Documents must be prepared using MS Word software (2007 or later version for MS Windows) and in a format complying with the current edition of the CSI Master Format. The specifications must comply with Public Contract Code section 3400, and may not contain restrictions that will limit competitive bids.

2.3.4.2 Copies of Approved Construction Documents. Upon approval of the Construction Documents, City must be provided with one full-size unbound original of the approved drawings, ten bound copies of all of the approved Construction Documents (including both drawings and specifications), one reproducible copy of the drawings on a CD using CADD software, and one reproducible copy of the approved specifications on a CD using MS Word. All disks must be clearly labeled to indicate the contents and date produced. DBE will also be responsible for providing copies of the approved Construction Documents as required for any other departments within the City or other agencies which must review the Construction Documents.

2.3.5 Ownership of Documents.

2.3.5.1 Ownership of Tangible Documents. City shall receive ownership of the property rights, except for copyrights, of all documents, drawings, specifications, electronic data and information prepared, provided or procured by DBE, as part of the Design Services.

2.3.5.2 Use of Documents in Event of Termination. In the event of a termination of this Contract, City shall have the right to use, to reproduce, and to make derivative works of the Design Documents to complete the Project, regardless of whether there has been a transfer of copyright to City.

2.3.5.3 City's Use of Documents After Completion of Project. After completion of the Project, City may reuse, reproduce or make derivative works from the Design Documents solely for the purposes of maintaining, renovating, remodeling or expanding the Project at the Worksite.

2.3.5.4 Subcontractors and Consultants. DBE shall obtain from its Subcontractors and consultants rights and rights of use that correspond to the rights given by DBE to City in this Contract and DBE shall provide evidence that such rights have been secured.

2.4 Construction Services.

2.4.1 DBE shall provide all labor, materials, equipment and services necessary to perform and timely complete the Work in strict accordance with the Contract Documents, including the approved Construction Documents, and in an economic and efficient manner in the best interests of City.

2.4.2 DBE is responsible for supervising and directing all aspects of the Work to facilitate the efficient and timely completion of the Work. DBE is solely responsible

for, and required to exercise full control over, construction means, methods, techniques, sequences, procedures, and coordination of all portions of the Work, except to the extent that the Contract Documents provide other specific instructions.

2.4.3 DBE shall provide sufficient and competent Subcontractors, administration, staff, and skilled workforce necessary to perform and timely complete the Work in accordance with the Contract Documents.

2.4.4 DBE shall, at all times during performance of the Work, provide a qualified full-time superintendent, acceptable to City, and assistants, as necessary, who must be physically present at the Project site while any aspect of the Work is being performed.

2.4.5 DBE must, at all times, ensure that the Work is performed in a good workmanlike manner and in full compliance with the Contract Documents and all applicable laws, regulations, codes, standards, and permits. DBE must obtain a no-cost building permit from the City before starting the Construction Services.

2.4.6 DBE is solely responsible to City for the acts or omissions of any party or parties performing portions of the Work or providing equipment, materials or services for or on behalf of DBE or its Subcontractors.

2.4.7 DBE shall promptly correct, at DBE's sole expense, any Work that is deficient or defective in workmanship, materials, and equipment.

2.4.8 DBE shall keep such full and detailed accounts as may be necessary for proper financial management under this Contract. City shall be afforded access to all DBE's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to Change Order work performed on the basis of actual cost. DBE shall preserve all such records for a period of three years after final payment or longer where required by law.

2.4.9 DBE shall provide periodic written reports to City on the progress of the Work in such detail as is required by City and as agreed to by City and DBE.

2.5 **DBE's Subcontractors.**

2.5.1 All Work which is not performed by DBE with its own forces shall be performed by Subcontractors. DBE must provide each Subcontractor with a complete set of the Construction Documents and any approved modifications thereto.

2.5.2 DBE shall require every Subcontractor and material supplier to be bound to the provisions of the Contract Documents as they apply to the Subcontractor's or material supplier's portion(s) of the Work, and to likewise bind their Subcontractors or material suppliers. City reserves the right to reject any Subcontractor or material supplier based upon City's reasonable belief that the Subcontractor or material supplier is not adequately qualified, or whose performance is unacceptable to the City, or who has a history of unacceptable performance on other public works projects. Nothing in these Contract Documents creates a contractual relationship between a Subcontractor or material supplier and City, but City shall be deemed to be a third-party beneficiary of the contract between DBE and each Subcontractor.

2.5.3 If the Contract is terminated, each subcontract agreement shall be assigned by DBE to City, subject to the prior rights of any surety, provided that the City accepts such assignment by written notification, and assumes all rights and obligations of DBE pursuant to each such subcontract agreement.

2.5.4 All Subcontractors bidding on contracts for the Work shall be afforded the protections contained in the Subletting and Subcontracting Fair Practices Act (Public Contract Code Section 4100 et seq.).

2.6 **Coordination of Work.** City reserves the right to perform or to have performed other work on or adjacent to the Project site while the Work is being performed. DBE is responsible for coordinating its Work with other work being performed on or adjacent to the Project site, and shall avoid hindering, delaying, or interfering with the work of other contractors. To the full extent permitted by law, DBE shall hold harmless and indemnify City against any and all claims arising from or related to DBE's avoidable, negligent, or willful hindrance of, delay to, or interference with the work of another contractor or City's own forces.

2.7 **DBE's Representative.** DBE shall designate a person who shall be DBE's authorized representative, subject to City's approval, which shall not unreasonably be withheld.

2.8 **Downtown Special Events.** DBE must accommodate four (4) special events, listed below, that are scheduled to take place downtown by stopping construction activity, cleaning adjacent public walks and roads, and securing the construction site for heavy pedestrian activity. No Work may take place during these events unless approved in advance in writing by the Engineer. The only Work activities that will be considered for this purpose are those which will not disrupt the special events and where construction vehicle access will be minimal. The following dates and times (all in 2015) are subject to this provision:

- Mushroom Mardi Gras - Saturday, May 23, 7:00 a.m. through Monday, May 25, 5:00 p.m.
- Fourth of July - Friday, July 3, 12:00 p.m. through Sunday, July 5, 5:00 p.m.
- Taste of Morgan Hill - Friday, September 25, 12:00 p.m. through Sunday, September 27, 5:00 p.m.
- Halloween - October 31, 7:00 a.m. through 11:00 p.m.

Article 3 Contract Documents

3.1 **The Contract Documents.** The Contract Documents are comprised of the following:

- 3.1.1 Duly authorized and executed Change Orders;
- 3.1.2 The Contract and any duly authorized and executed amendments thereto;
- 3.1.3 The General Conditions;
- 3.1.4 The Design Build Documents;

3.1.5 The payment and performance bonds; and

3.1.6 The Proposal.

3.2 **Order of Precedence.** Information included in one Contract Document but not in another shall not be considered a conflict or inconsistency. In case of any conflict or inconsistency among the Contract Documents, the order of precedence shall follow the order in which the Contract Documents are listed in Section 3.1, above, which are listed from highest to lowest.

3.3 **Design Build Documents.** The Design Build Documents refer to the design drawings and specifications, including addenda thereto issued prior to execution of the Agreement. The drawings are the graphic and pictorial portions of the Design Build Documents, wherever located and whenever issued, showing generally, the design, location and dimensions of the Project and may include without limitation, plans, elevations, sections, details, schedules and/or diagrams. The specifications are the portion of the Design Build Documents consisting of the written requirements for materials, equipment, construction systems, standards, criteria and workmanship for the Project and related services. The Design Build Documents are for general intent of the final Project design and are not considered to be a complete working package. The DBE is responsible to hire and coordinate all associated Design Services (Architectural, Structural, MEP, Civil Engineering, Landscape Architecture, etc.), for the structures and systems whether shown or implied in the Design Build Documents or required for a complete Project built to current governing codes.

Article 4 Bonds, Indemnity, and Insurance

4.1 **Payment and Performance Bonds.** Within ten (10) days following execution of the Contract, DBE is required to provide a payment bond and a performance bond, each in the penal sum of one hundred percent (100%) of the estimated price for the Construction Services, using the bond forms included with the Contract Documents.

4.1.1 Each bond must be issued by a surety admitted in California. If an issuing surety cancels the bond or becomes insolvent, within fourteen (14) days following written notice from City, DBE must substitute a surety acceptable to City.

4.2 **Maintenance Bond.** Upon Final Completion, DBE is required to provide a maintenance bond, in a form approved by City's City Attorney, in the amount of fifty percent (50%) of the final price for Construction Services, as a full guarantee for the one (1) year warranty requirement set forth in Article 11 herein.

4.3 **Indemnity.** To the fullest extent permitted by law, DBE shall indemnify, defend, and hold harmless City, its Mayor and City Council, officers, employees, agents and consultants (individually, "Indemnitee," and collectively the "Indemnitees") from and against any and all liability, loss, damage, claims, expenses (including, without limitation, attorney fees, expert witness fees, paralegal fees, and fees and costs of litigation or arbitration) (collectively, "Liability") of every nature arising out of or in connection with the negligence, recklessness, or willful misconduct of DBE, its employees, Subcontractors, representatives, or agents, in performing the Work or its failure to comply with any of its obligations under the Contract, except such Liability caused by the active negligence, sole

negligence, or willful misconduct of an Indemnitee. Pursuant to Public Contract Code Section 9201, City shall timely notify DBE upon receipt of any third-party claim relating to the Contract.

4.4 Insurance. No later than ten (10) days following issuance of the notice of selection, DBE shall provide to City proof of the insurance coverage required by this section in the form of certificates and endorsements. The required insurance must cover the activities of DBE and its Design Professionals and Subcontractors relating to or arising from the performance of the Design-Build Services, and must remain in full force and effect at all times during the period covered by the Contract until the date of recordation of the notice of completion. All required insurance must be issued by a company licensed to do business in the State of California, and each such insurer must have an A.M. Best's financial strength rating of "A" or better and a financial size rating of "VIII" or better. If DBE fails to provide any of the required coverage in full compliance with the requirements of the Contract Documents, City may, at its sole discretion, purchase such coverage at DBE's expense and deduct the cost from payments due to DBE, or terminate the Contract for default.

4.4.1 The following insurance policies and limits are required for this Contract unless otherwise specified:

4.4.1.1 Professional Liability Insurance: This insurance must insure against DBE's or any Design Professional's negligent errors and omissions in the provision of Design Services for the Project, in an amount no less than five million dollars (\$5,000,000.00) combined single limit. The Professional Liability insurance must include prior acts coverage sufficient to cover all Design Services provided by DBE for this Project, and this coverage must continue in effect for four (4) years following substantial completion.

4.4.1.2 Commercial General Liability Insurance ("CGL"): The CGL policy shall be issued on an occurrence basis, written on a comprehensive general liability form, and shall include coverage for liability arising from DBE's or its Design Professional's or Subcontractor's acts or omissions in the performance of the Work, including DBE's protected coverage, blanket contractual, completed operations, vehicle coverage and employer's non-Ownership liability coverage, with limits of at least five million dollars (\$5,000,000.00) per occurrence. The CGL policy must name City as an additional insured for all liability arising out of the operations by or on behalf of the named insured, and must protect City, its officers, employees, and agents against any and all liability for personal injury, death, or property damage or destruction arising directly or indirectly in the performance of the Contract. The CGL coverage may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by excess or umbrella policies, provided each such policy complies with the requirements set forth herein.

4.4.1.3 Builder's Risk Insurance: A Builder's Risk Insurance policy shall be issued on occurrence basis, for all-risk coverage on a one hundred percent (100%) completed value basis on the insurable portion of the Project for the benefit of City.

4.4.1.4 Workers' Compensation Insurance and Employer's Liability: The policy must comply with the requirements of the California Workers' Compensation Insurance and Safety Act, with of at least one million dollars (\$1,000,000.00). If DBE is self-insured, DBE shall provide its Certificate of Permission to Self-Insure, duly authorized by the Department of Industrial Relations.

4.4.2 Each certificate of insurance must state that the coverage afforded by the policy or policies shall not be reduced, cancelled or allowed to expire without at least thirty (30) days written notice to City, unless due to non-payment of premiums, in which case ten (10) days written notice shall be made to City.

4.4.3 Each required policy must include an endorsement providing that the carrier agrees to waive any right of subrogation it may have against City.

4.4.4 The CGL Policy and the Builder's Risk Policy must include the following specific endorsements:

4.4.4.1 The inclusion of more than one insured shall not operate to impair the rights of one insured against another, and the coverages afforded shall apply as though separate policies have been issued to each insured.

4.4.4.2 The insurance provided is primary and no insurance held or owned by City shall be called upon to contribute to a loss.

4.4.4.3 This policy does not exclude explosion, collapse, underground excavation hazard, or removal of lateral support.

4.4.5 DBE shall ensure that each Design Professional and Subcontractor is required to maintain the same insurance policies as set forth herein, with respect to its operations, including those requirements related to the additional insureds and waiver of subrogation.

Article 5 Contract Time

5.1 **Time.** Time is of the essence in DBE's performance and completion of the Work, and DBE must diligently provide the Design-Build Services and complete the Project within the Contract Time.

5.1.1 DBE must commence the Design-Build Services on the date indicated in the notice to proceed, and must fully complete the Design-Build Services, in strict compliance with all requirements of the Contract Documents, within the Contract Time.

5.1.2 DBE and its Design Professionals and Subcontractors must, at all times, provide workers, materials, and equipment sufficient to maintain the rate of progress necessary to ensure full completion of the Work within the Contract Time. If City determines that DBE is failing to provide the Design-Build Services at a sufficient rate of progress, City may, in its sole discretion, direct DBE to provide additional workers, materials, or equipment, and/or to work additional hours or days without additional cost to City, in order to achieve a rate of progress satisfactory to City. If DBE fails to comply with City's directive in this regard, City may, at DBE's expense, separately contract for additional workers, materials, or equipment or use City's own forces to achieve the necessary rate of progress. Alternatively, City may terminate the Contract based on DBE's default.

5.2 **Schedule.** Within fifteen (15) calendar days following City's approval of the Construction Documents, DBE shall submit to City for review and approval an as-planned Project Schedule showing in detail how DBE plans to perform and fully complete the Work within the Contract Time and indicating and critical path for timely completion. The as-planned schedule must include the work of all trades required for the Work, and must be sufficiently comprehensive and detailed to enable progress to be monitored on a day-by-day basis. For each activity, the as-planned schedule must be dated and must include, at a minimum, a description of the activity, the start and completion dates, and the duration. "Float" is the amount of time between the early start date and late start date, or the early completion date or late completion date of any of the activities on the schedule. Float does not belong to the City, the DBE or the Subcontractors, but may be used for the benefit of the Project, as determined by City acting in its sole discretion.

5.2.1 DBE must submit an updated Project Schedule for review and approval at the end of each month. The updated schedule must show actual progress of the Design-Build Services to date compared to the as-planned Project Schedule, and must identify any actual or potential impacts to the critical path. DBE shall present an updated three-week look-ahead schedule at each Project Team Meeting (every two weeks)

5.2.2 If City determines that the Work is more than one week behind schedule, within seven (7) days following written notice of such determination, DBE must submit a recovery schedule to City in conformance with the above requirements for the initial as-planned Project Schedule, showing how the DBE intends to perform and complete the Work within the Contract Time.

5.2.3 DBE and its Subcontractors must perform the Work in accordance with the most current approved schedule unless otherwise directed by City. City's approval of a schedule does not operate to extend the time for completion of the Work or any component of the Work, and will not affect City's right to assess liquidated damages for DBE's unexcused delay in completing the Work within the Contract Time.

5.2.4 DBE must at all times maintain a copy of the most current approved schedule posted prominently in its on-site office.

5.2.5 City reserves the right to direct the sequence in which the Work must be performed or to make changes in the sequence of the Work in order to facilitate the performance of work by City or others, or to facilitate City's use of its property. The Contract Time or Contract Price may be adjusted to the extent such changes in sequence actually increase or decrease DBE's time or cost to perform the Work.

5.2.6 DBE is limited to working Monday through Friday, excluding holidays, during City's normal business hours, except as expressly provided in the Design Build Documents, or as authorized in writing by City. City reserves the right to charge DBE for additional costs incurred by City due to DBE working on days or during hours not expressly authorized in these Contract Documents, including, but not limited to, reimbursement of costs incurred for inspection, testing, and construction management services.

5.3 **Delay and Extensions of Contract Time.**

5.3.1 The Contract Time may be extended if DBE encounters an unavoidable delay in performing the Work due to causes completely beyond DBE's control, and which DBE could not have avoided or mitigated through planning, foresight, and diligence ("Excusable Delay"). Grounds for Excusable Delay may include, but are not limited to, fire, earthquake, acts of terror or vandalism, epidemic, unforeseeable adverse government actions, unforeseeable actions of third parties, encountering unforeseeable hazardous materials, unforeseeable site conditions, or unusually severe weather.

5.3.1.1 Excusable Delay does not include delay caused by weather conditions which are normal for the location of the Project, as determined by reliable records, including monthly rainfall averages, for the preceding ten years.

5.3.1.2 Excusable Delay does not include delay caused by DBE's failure to order equipment and materials sufficiently in advance of the time needed for the Work.

5.3.1.3 Excusable Delay does not include delay caused by DBE's failure to provide adequate notification to utility companies for connections or services necessary for the timely performance and completion of the Work.

5.3.1.4 Excusable Delay does not include delay caused by foreseeable conditions DBE could have ascertained from reasonably diligent inspection of the Worksite or review of the Contract Documents.

5.3.1.5 Excusable Delay does not include delay caused by DBE's financial inability to perform the Work, e.g., insufficient funds to pay its Subcontractors or suppliers.

5.3.2 A request for an extension of time and an adjustment to the Contract based upon associated delay costs must be submitted in writing to the Engineer within ten (10) calendar days of the date the delay is first encountered, even if the duration of the delay is not yet known at that time, or shall be deemed waived. In addition to complying with the requirements of this Article 5, the request must be submitted in compliance with the Change Order request procedures in Article 6, below. Strict compliance with these requirements is necessary to ensure that any delay or delay costs may be mitigated as soon as possible, and to facilitate cost-efficient administration of the Project and timely performance of the Work. Any request for an extension of time or an adjustment to the Contract Price for delay costs that does not strictly comply with the requirements of Article 5 or Article 6 will be deemed waived by DBE.

5.3.2.1 The request must include a detailed description of the cause(s) of the

delay, and must also describe the measures that DBE has taken to mitigate the delay and/or its effects, including efforts to mitigate the cost impact of the delay, e.g., by workforce management, change in sequencing, etc. If the delay is still ongoing at the time the request is submitted, the request should also include DBE's plan for continued mitigation of the delay or its effects.

5.3.2.2 The request must also include any and all supporting documentation necessary to evidence the delay and its actual impacts, including schedule impacts, and cost impacts, including, but not limited to, a time impact analysis using critical path methodology, and demonstrating unavoidable delay in Final Completion. The time impact analysis must be submitted in a form or format specified by or acceptable to City, and must fragment back to critical path to show unavoidable delay in Final Completion. DBE has the burden of proving 1) that the delay was an Excusable Delay, as defined above, 2) that DBE has made reasonable efforts to mitigate the delay and its schedule and cost impacts, 3) that the delay will unavoidably result in delaying Final Completion, and 4) that any delay costs claimed by DBE were actually incurred and were reasonable under the circumstances.

5.3.2.3 If DBE is granted an extension of time for Excusable Delay, any increase to the Contract Price based on delay costs shall be limited to actual, direct, reasonable, and substantiated costs, and will not include home office overhead, or markup for overhead and profit.

5.3.2.4 Nothing in this provision is intended to require the waiver, alteration, or limitation of the applicability of Public Contract Code Section 7102.

5.3.2.5 Any grant of an extension of time or delay costs due to an Excusable Delay will not operate as a waiver of City's right to assess liquidated damages for unexcused delay.

5.3.2.6 In the event of a dispute over entitlement to an extension of time or delay costs, DBE may not cease working pending resolution of the dispute, but must continue to comply with its duty to diligently prosecute the performance and timely completion of the Work. DBE's sole recourse for an unresolved dispute based on City's rejection of a Change Order request for an extension of time or delay costs is to comply with the Dispute Resolution provisions set forth in Article 12, below.

5.4 Liquidated Damages. It is expressly understood that if Final Completion is not achieved within the Contract Time, City will suffer damages which are difficult to determine and accurately specify. If DBE fails to achieve Final Completion within the Contract Time, the Contract Price will be reduced for each day that Final Completion is delayed beyond the Contract Time, as liquidated damages and not as a penalty.

5.4.1 Liquidated damages will not be assessed for any Excusable Delay, as set forth above.

5.4.2 Liquidated damages may also be separately assessed for failure to meet milestones specified elsewhere in the Contract Documents, regardless of impact on Contract Time and Final Completion.

Article 6 Contract Modification

6.1 Changes in Work. City reserves the right to make changes in the Work without invalidating the Contract. City may direct or DBE may request changes in the Work, and any such changes will be formalized in a Change Order, which may include commensurate changes in the Contract Price or Contract Time as applicable. DBE must promptly comply with City-directed changes in the Work in accordance with the intent of the original Contract Documents, even if DBE and City have not yet reached agreement as to adjustments to the Contract Price or Contract Time.

6.1.1 In the event of a dispute over entitlement to a change in Contract Time or a change in Contract Price related to an City-directed change, DBE must perform the Work as directed and may not delay its work or cease work pending resolution of the dispute, but must continue to comply with its duty to diligently prosecute the performance and timely completion of the Work, including the Work in dispute.

6.1.2 In the event that City and DBE dispute whether a portion or portions of the Work are already required by the Contract Documents as opposed to changed Work, DBE must perform the Work as directed and may not delay its Work or cease Work pending resolution of the dispute, but must continue to comply with its duty to diligently prosecute the performance and timely completion of the Work, including the Work in dispute.

6.1.3 DBE's failure to promptly comply with an City-directed change shall be deemed a material breach of the Contract, and in addition to all other remedies available to it, City may, at its sole discretion, hire another contractor and/or use its own forces to complete the disputed Work at DBE's sole expense, and may deduct such cost from the Contract Price.

6.1.4 DBE's sole recourse for an unresolved dispute related to changes in the Work is to comply with the dispute resolution provisions set forth in Article 12, below.

6.2 Change Order Requests. DBE must submit a request for a change in the Work or a change in the Contract Price or Contract Time as a written Change Order request. Any Change Order request submitted by DBE must include a complete breakdown of actual cost, and credits, and shall itemize labor, materials, taxes, insurance, and subcontract amounts. All claimed costs must be fully documented.

6.2.1 All Change Order requests must be signed by DBE and must include the following certification:

"The undersigned DBE certifies under penalty of perjury that its statements and representations in this Change Order request are true and correct. DBE warrants that this Change Order request is comprehensive and complete, and agrees that any costs, expenses, or time extension request not included herein shall be deemed waived. DBE understands that submission of claims which have no basis in fact or which DBE knows to be false may violate the False Claims Act, as set forth in Government Code Sections 12650 et seq."

6.3 Adjustments to the Contract Price. Any increase or decrease to the Contract Price shall be determined based on one of the following methods in the order provided:

6.3.1 Amounts previously provided in the form of unit prices, the Schedule of Values, or Allowances, shall apply first if unit pricing, a Schedule of Values, or an Allowance amount has previously been submitted for the subject Work; or, if none

6.3.2 A mutually agreed upon lump sum; or, if none

6.3.3 On a time and materials basis, which may include a not-to-exceed limit, calculated as the total of the following sums:

6.3.3.1 All direct labor costs plus fifteen percent (15%) for overhead and profit;

6.3.3.2 All direct material costs, including sales tax, plus fifteen percent (15%) for overhead and profit;

6.3.3.3 All direct plant and equipment rental costs, plus fifteen percent (15%) for overhead and profit;

6.3.3.4 All direct subcontract costs plus ten percent (10%) for overhead and profit; and

6.3.3.5 Increased premium costs computed at one and one half percent (1½ %) of total of the previous four sums.

Article 7 General Construction Provisions

7.1 Permits and Taxes.

7.1.1 DBE shall obtain and pay for any and all permits, fees, or licenses required to perform the Work, unless otherwise indicated in the Contract Documents. DBE shall cooperate with and provide notifications to government agencies with jurisdiction over the Project, as may be required. DBE shall provide City with copies of all notices, permits, licenses, and renewals required for the Work.

7.1.2 DBE shall pay for all taxes on material and equipment.

7.2 Temporary Facilities. DBE shall provide, at DBE's sole expense, any and all temporary facilities, including, but not limited to onsite office, sanitary facilities, storage, scaffolds, barricades, walkways, and any other temporary structure required to perform the Work along and any utility services incidental thereto. Such structures must be safe and adequate for the intended use, and installed and maintained in accordance with all applicable federal, state, and local laws, codes, and regulations. DBE shall promptly remove all such temporary facilities when they are no longer needed or upon completion of the Work, whichever comes first. DBE shall promptly repair any damage to City's property caused by the installation, use, or removal of the temporary facilities, and shall promptly restore the property to its original or intended condition. Additional provisions pertaining to temporary facilities may be included in the Specifications or Design Build Documents.

7.2.1 DBE shall provide, at no additional cost to City, any power used at the Worksite. DBE is solely responsible for making all necessary with the electrical utility and with the City for power takeoff points, voltage and phasing requirements,

transformers, and metering and shall pay all costs and fees arising therefrom. DBE shall provide all special connections required for the Work.

7.2.2 City shall provide water required for performance of the Work. DBE is responsible for the appropriate disposal of waste water in coordination with the City.

7.3 **Signs.** No signs may be displayed on or about City's property, except signage which is required by law, without City's prior written approval as to content, size, design, and location.

7.4 **Protection of Work and Property.**

7.4.1 DBE is responsible at all times for protecting the Work and materials and equipment to be incorporated into the Work from damage until the Notice of Completion has been recorded. Except as specifically authorized by City, DBE shall confine its operations to the area of the Project site indicated in the drawings. DBE is liable for any damage caused to City's real or personal property, the real or personal property of adjacent property owners, or the work or personal property of other DBEs working for City.

7.4.2 If DBE encounters facilities, utilities, or other unknown conditions not shown on or reasonably inferable from the drawings or apparent from inspection of the Project site, DBE shall promptly notify the Engineer, and shall avoid taking any action which could cause damage to such facilities or utilities pending further direction from the Engineer. If the Engineer's subsequent direction to DBE affects DBE's cost or time to perform the Work, DBE may submit a Change Order request as set forth herein.

7.4.3 DBE shall provide, install, and maintain all shoring, bracing, underpinning, etc., necessary to provide support to City's property and adjacent properties and improvements thereon. DBE shall provide notifications to adjacent property owners as may be required by law.

7.4.4 Any existing facilities that are broken or damaged by the installation of Work shall be repaired or replaced with the same kind of material, the same finish, and in not less than the same dimensions as the original work. All such repairs or replacements shall match the appearance of the existing facilities as nearly as possible.

7.5 **Noninterference.** DBE shall take reasonable measures to avoid interfering with City's use of its property at or adjacent to the Project site, including, but not limited to, use of roadways, entrances, parking areas, walkways, and structures.

7.6 **Materials, Equipment and Plants.**

7.6.1 Unless otherwise specified, all materials and equipment required for the Work must be new and of the best grade for the intended purpose, and furnished in sufficient quantities to ensure the proper and expeditious performance of the Work. Unless otherwise specified, all materials and equipment required for the Work shall be deemed to include all components required for complete installation and intended operation, and shall be installed in accordance with the manufacturer's recommendation. DBE is responsible for all shipping, handling, and storage costs associated with the materials and equipment required for the

Work.

7.6.2 If the Work includes installation of materials or equipment to be provided by City, DBE shall be responsible for the proper examination, handling, storage, and installation of such items in accordance with the Contract Documents. DBE shall promptly notify City of any defects discovered in City-provided materials or equipment. DBE shall be responsible for any loss of or damage to such items which occurs while the items are in DBE's custody and control, the cost of which may be offset from the Contract Price and deducted from any payment(s) due to DBE.

7.6.3 The DBE shall provide and use equipment and plants suitable to produce the quality of work and materials required by the Contract Documents. DBE may be required to remove equipment which the Engineer deems unsuitable for the Work. DBE shall ensure that equipment is operated by trained, experienced operators, and at a speed or rate of production not to exceed that recommended by the manufacturer. Any vehicles used to haul materials over existing streets and highways shall be equipped with pneumatic tires.

7.7 **Substitutions.**

7.7.1 Any specification designating a material, product, thing, or service by specific brand or trade name, followed by the words "or equal," is intended only to indicate quality and type of item desired, and DBE may request use of any equal material, product, thing, or service.

7.7.2 A request for substitution must be submitted to the Engineer for approval within the time period provided in the Specifications. If no time period is specified, the substitution request may be submitted any time within 35 days after the date of award of the Contract, or sufficiently in advance of the time needed to avoid delay of the Work, whichever is earlier.

7.7.3 All data substantiating the proposed substitute as an "equal" item must be submitted with the written request for substitution. DBE has the burden of proving the equality of the proposed substitution. DBE's failure to timely provide necessary submittals does not establish grounds for substitution.

7.7.4 If the proposed substitution is approved, DBE is solely responsible for any additional costs associated with the substituted item(s). If the proposed substitution is rejected, DBE shall, without delay, install the item specified.

7.7.5 Engineer's review of a proposed substitution shall not relieve DBE from any of its obligations under the Contract Documents. In the event DBE makes an unauthorized substitution, DBE shall be solely responsible for all cost impacts resulting therefrom, including, but not limited to, the cost of removal and replacement and the impact to other design elements.

7.8 **Testing and Inspection.**

7.8.1 DBE shall schedule all tests required by the Contract Documents in time to avoid any delay to the progress of the Work. DBE shall provide timely notice to all necessary parties as specified in the Contract Documents. City shall bear the initial cost of testing to be performed by independent testing consultants retained by City. However, DBE shall be responsible for the costs of any subsequent tests which are

required to substantiate compliance with the Contract Documents, and any associated remediation costs. In addition, if any portion of the Work which is subject to testing is covered or concealed by DBE prior to testing, DBE shall bear the cost of making that portion of the Work available for the testing required by the Contract Documents, and any associated repair or remediation costs.

7.8.2 All materials, equipment, and workmanship used in the Work shall be subject to inspection by City's Inspector at all times and locations during construction and/or fabrication. All manufacturers' application or installation instructions shall be provided to the Inspector at least ten (10) days prior to the first such application. DBE shall, at all times, make the Work available for inspection. Any Work that fails to comply with the requirements of the Contract Documents shall be promptly repaired, replaced, or corrected by DBE, at DBE's sole expense. In addition, if any portion of the Work is improperly covered or concealed by DBE prior to inspection, DBE shall bear the cost of making that portion of the Work available for inspection, and any associated repair or remediation costs.

7.8.3 If required off-site testing and/or inspection must be conducted at a location more than one hundred (100) miles from the Project site, DBE shall be responsible for the additional travel costs required for testing and/or inspection at such locations.

7.8.4 DBE shall be solely responsible for any delay occasioned by remediation of noncompliant Work.

7.9 **Clean up.** DBE shall regularly remove debris and waste materials and maintain the work areas in clean and neat condition. Prior to discontinuing work in an area, DBE shall clean the area and remove all rubbish along with its construction equipment, tools, machinery, waste and surplus materials. DBE shall, at all times, minimize and confine dust and debris resulting from construction activities. At the completion of the Work, DBE shall remove from the Worksite all of its equipment, tools, surplus materials, waste materials and debris.

7.9.1 Before demobilizing from the Worksite, DBE shall ensure that all surfaces are cleaned, sealed, waxed, or finished as applicable, and that all marks, stains, paint splatters, and the like have been properly removed from the completed Work and the surrounding areas.

7.9.2 If DBE fails to commence compliance with its cleanup obligations within two (2) business days following written notification from City or its representative, City may undertake appropriate cleanup measures without further notice and the cost of such shall be deducted from any amounts due or to become due the DBE in the next payment period.

7.10 **Instructions and Manuals.** DBE shall provide three (3) copies each of all instructions and manuals required by the Contract Documents. These shall be complete as to drawings, details, parts lists, performance data, and other information that may be required for City to easily maintain and service the materials and equipment installed pursuant to this Contract. All manufacturers' application or installation instructions shall be provided to the Inspector at least ten (10) days prior to the first such application. The instructions and manuals, along with any required guarantees, shall be delivered to the Engineer for review. DBE and/or its Subcontractors shall instruct City's personnel in the operation and maintenance of any complex equipment prior to final acceptance of the Work,

as may be required in the Contract Documents.

7.11 As-built Drawings. DBE and its Subcontractors shall maintain on the Worksite a separate complete set of Contract drawings which shall be used solely for the purpose of recording changes made in any portion of the Work in order to create as-built drawings. The as-built drawings shall be updated as changes occur, on a daily basis if necessary. Actual locations to scale shall be identified on the as-built drawings for all runs of mechanical and electrical work, including all site utilities, etc., installed underground, in walls, floors, or otherwise concealed. Deviations from the original drawings shall be shown in detail. The location of all main runs, whether piping, conduit, ductwork, drain lines, etc., shall be shown by dimension and elevation. DBE shall verify that all changes in the Work are depicted in the as-built drawings and shall deliver the complete set of as-built drawings to City and the Engineer for review and approval as the condition precedent to acceptance of the Work.

7.12 Existing Utilities. Pursuant to Government Code Section 4215, if, during the performance of the Work, Contract discovers utility facilities not identified by City in the Contract Documents, DBE shall immediately provide written notice to City and the utility. City assumes responsibility for the timely removal, relocation, or protection of existing main or trunkline utility facilities located on the Project site, if such utilities are not identified in the Contract Documents. DBE shall be compensated in accordance with the provisions of the Contract Documents for the costs of locating, repairing damage not due to DBE's failure to exercise reasonable care, and removing or relocating such utility facilities not indicated in the plans or specifications with reasonable accuracy, and for equipment on the Project necessarily idled during such work. DBE shall not be assessed liquidated damages for delay in completion of the Work, to the extent such delay was caused by City's failure to provide for removal or relocation of such utility facilities.

7.13 Lines and Grades. DBE shall set the stakes or marks necessary to establish the lines and grades required for the completion of the Work in accordance with the Contract Documents and based on benchmarks determined by the Engineer.

7.14 Disposal of Materials Outside of Street Right-of-Way. Unless otherwise specified in the Specifications or Design Build Documents, DBE is solely responsible for disposing of materials outside the street right-of-way and for all associated costs. Before disposing materials outside the street right-of-way, DBE shall 1) obtain a written release from the property City releasing City from any and all responsibility in connection with the disposal of material on that property; and 2) obtain permission from the Engineer to dispose of the material at the permitted location.

7.15 Emergency Contact. Prior to the commencement of Work on the Project, DBE shall provide contact information to the Engineer for the person designated by DBE to respond to any emergency that arises on the Worksite during the course of the Project. That person shall be responsible for responding to the Worksite within thirty (30) minutes following notification of an emergency by the City's Police or Fire Department, regardless of the time of day.

7.16 Right-of-Way. City shall provide the right-of-way for performance of the Work. DBE is solely responsible for any additional area required outside of the designated the right-of-way, unless otherwise provided in the Contract Documents.

7.17 Environmental Control. DBE shall not pollute any drainage course or its tributary inlets with fuels, oils, bitumens, acids, insecticides, herbicides or other harmful materials.

DBE and its Subcontractors shall at all times in the performance of the Work comply with all applicable federal, state, and local laws and regulations concerning pollution of waterways.

7.17.1 The DBE must comply with all applicable conditions of the State Water Resources Control Board national Pollutant Discharge Elimination System General Permit for Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity ("Storm Water Permit").

7.17.2 If required for the Work, a copy of the Storm Water Permit is on file in the City of Morgan Hill's principal administrative offices, and the DBE must comply with the same without adjustment of the Contract Price or the Contract Time. The DBE must timely and completely submit required reports and monitoring information required by the conditions of the Storm Water Permit for the Work. In addition to compliance with the Storm Water Permit, the DBE must comply with all other applicable state, municipal or regional laws, ordinances, rules or regulations governing discharge of storm water, including applicable municipal storm water management programs.

7.18 **Notice of Excavation.** Pursuant to Government Code Section 4216.2, except in an emergency, DBE shall contact the appropriate regional notification center, at least two (2) working days, but not more than fourteen (14) calendar days prior to commencing any excavation if the excavation will be conducted in an area that is known, or reasonable should be known, to contain subsurface installations, and if practical, DBE shall delineate with white paint or other suitable markings the area to be excavated.

7.19 **New Utility Connections.** DBE shall pay connection charges and meter costs for new permanent utilities required by the Contract Documents.

7.20 **Trenching and Excavations.**

7.20.1 DBE shall promptly, and before the following conditions are disturbed, provide written notice to City if the DBE finds any of the following conditions:

7.20.1.1 Material that DBE believes may be a hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with the provisions of existing law.

7.20.1.2 Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.

7.20.1.3 Unknown physical conditions at the site of any unusual nature, differing materially different from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents.

7.20.2 City shall promptly investigate the conditions and if City finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in DBE's cost of, or the time required for, performance of any part of the Work, shall issue a Change Order under the procedures describe in the Contract Documents.

7.20.3 In the event that a dispute arises between City and the DBE regarding any of the matters specified in subsection 7.20.1, above, DBE shall not be excused from any schedule completion date provided for in the Contract Documents, but shall proceed with all Work to be performed under the Contract. DBE shall retain any and all rights provided either by the Contract or by law which pertain to the resolution of disputes between DBE and City.

7.21 **Trenching of Five Feet or More.** Pursuant to Labor Code Section 6705, if the Contract Price exceeds twenty-five thousand dollars (\$25,000.00) and the Work includes the excavation of any trench or trenches of five feet (5') or more in depth, a detailed plan must be submitted to City and/or its civil or structural engineer, for acceptance in advance of the excavation. The detailed plan must show the design of shoring, bracing, sloping, or other provisions to be made for worker protection from the hazard of caving ground during the excavation. If such plan varies from the shoring system standards, it must be prepared by a registered civil or structural engineer. Use of a shoring, sloping, or protective system less effective than that required by the Construction Safety Orders is prohibited.

Article 8 Payment

8.1 **Schedule of Values.** Prior to commencing the Design Build Services, DBE shall prepare and submit to the Engineer a schedule of values apportioned to the various divisions and phases of the Design Build Services. Each line item contained in the schedule of values shall be assigned a value such that the total of all items required for the Design-Build Services shall equal the Contract Price.

8.2 **Progress Reports.** Following the last day of each month, or as otherwise required by City, DBE shall submit to the Engineer for approval, a monthly report on the Design Build Services performed during the preceding month including the cost of the Work performed during that preceding month. This progress report may be submitted in addition to or combined with the monthly cost report required pursuant to Article 2, above.

8.2.1 Each report must be itemized to include labor, materials, and equipment incorporated into the Work, and materials and equipment delivered to the Worksite, as well as authorized and approved Change Orders. Each progress report shall be supported by the DBE's Schedule of Values and any other substantiating data required by the Contract Documents.

8.3 **Acceptance of Work.** Neither City's acceptance of progress reports nor its partial or full use or occupancy of the Project constitutes acceptance of any part of the Work. City reserves the right to use or occupy completed portions of the Project prior to acceptance, and City shall be responsible for any damage resulting caused by City's use or occupation of the Project prior to acceptance. City's use or occupancy of the Project pursuant to this provision shall not be deemed beneficial occupancy of the Project, nor shall it operate to waive or abridge City's rights to the complete and timely completion of the Project, including, but not limited to, the right to assess liquidated damages for unexcused delay in completion.

8.4 **Setoff.** City is entitled to setoff any amounts due from DBE against the Contract Price.

8.5 Payment to Subcontractors and Suppliers. Each month, DBE shall promptly pay each Subcontractor and supplier the value of the portion of labor, materials, and equipment incorporated into the Work or delivered to the Worksite by the Subcontractor or supplier during the preceding month. Such payments shall be made in accordance with the requirements of the law, and those of the Contract Documents and applicable subcontract or supplier contract. As a condition precedent to City's acceptance of the Project, DBE must provide a duly executed unconditional release upon final payment, pursuant to California Civil Code section 8138 for each Subcontractor. DBE's failure to comply with all applicable prompt payment requirements under California law will be deemed a material breach of the Contract.

8.5.1 City will promptly notify DBE and transmit a copy any stop payment notice filed with City by any stop notice claimant. Within fourteen (14) calendars days following City's notice and transmission of the stop payment notice, DBE must a) provide written evidence, satisfactory to City, that the stop notice claimant has rescinded or released its stop payment notice; or b) must provide a release bond executed by an admitted surety insurer, in an amount equal to 125 percent of the claim stated in the stop payment notice, conditioned for payment of any amount the claimant recovers in an action on the claim, together with court costs if the claimant prevails.

8.6 Warranty of Title. DBE warrants that title to all work, materials, or equipment incorporated into the Work shall pass over to City free of any claims, liens, or encumbrances.

Article 9 Labor Provisions

9.1 Discrimination Prohibited. Discrimination against any prospective or present employee engaged in the Work on grounds of race, color, ancestry, national origin, ethnicity, religion, sex, sexual orientation, age, disability, or marital status is strictly prohibited. DBE and its Subcontractors are required to comply with all applicable Federal and California laws including, but not limited to, the California Fair Employment Practice Act, Government Code Sections 12900 et seq., Government Code Section 11135, and Labor Code Sections 1735, 1777.5, 1777.6, and 3077.5.

9.2 Labor Code Requirements.

9.2.1 Pursuant to Labor Code Section 1810, eight (8) hours of labor constitute a legal day's work under this Contract.

9.2.2 Pursuant to Labor Code Section 1813, DBE will forfeit to City as a penalty, the sum of twenty-five dollars (\$25.00) for each day during which a worker employed by DBE or any Subcontractor is required or permitted to work more than eight (8) hours in any one (1) calendar day or more than forty (40) hours per calendar week, except if such workers are paid overtime pursuant to Labor Code Section 1815.

9.2.3 DBE is responsible for compliance with the requirements governing employment and payment of apprentices, as set forth in Labor Code Section 1777.5, which is incorporated by reference herein.

9.3 Prevailing Wages. Each worker performing Work under this Contract must be paid

at a rate not less than the prevailing wage as defined in Sections 1771 and 1774 of the Labor Code. The prevailing wage rates are available online at <http://www.dir.ca.gov/dlsr>. DBE must post a copy of the applicable prevailing rates at the Worksite.

9.3.1 Pursuant to Labor Code Section 1775, DBE and any Subcontractor will forfeit to City as a penalty up to two hundred dollars (\$200.00) for each calendar day, or portion thereof, for each worker paid less than the applicable prevailing wage rate. DBE must also pay each worker the difference between the applicable prevailing wage rate and the amount actually paid to that worker.

9.4 **Payroll Records.** DBE must comply with the provisions of Labor Code Sections 1776 and 1812, which are incorporated by reference herein.

9.4.1 DBE and each Subcontractor must keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed in connection with the Work. Each payroll record must contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

9.4.1.1 The information contained in the payroll record is true and correct.

9.4.1.2 The DBE or Subcontractor has complied with the requirements of Labor Code Sections 1771, 1811, and 1815 for any Work performed by its employees on the Project.

9.4.2 A certified copy of an employee's payroll record must be made available for inspection or furnished to the employee or his or her authorized representative on request, to City, or to the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations, and as further provided by the Labor Code.

9.4.3 Upon notice of noncompliance with Labor Code Section 1776, DBE or Subcontractor has ten (10) days in which to comply with requirements of this section. If DBE or Subcontractor fails to do so within the ten (10) day period, DBE or Subcontractor shall forfeit a penalty of one hundred dollars (\$100.00) per day, or portion thereof, for each worker for whom compliance is required, until strict compliance is achieved. Upon request by the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement, these penalties will be withheld from progress payments then due.

Article 10 Safety Provisions

10.1 **Safety Precautions and Programs.** DBE and its Subcontractors shall be fully responsible for health and safety precautions and programs, and for the safety of persons and property in the performance of the Work. DBE and its Subcontractors shall comply with all applicable laws and regulations and seek to avoid injury, loss, or damage to persons or property by taking reasonable steps to protect its employees and other persons at the Worksite, materials and equipment stored on or off site, and property at or adjacent to the Worksite.

10.1.1 DBE shall immediately provide a written report to City of all recordable accidents and injuries occurring at the Worksite. If DBE is required to file an accident report with a government agency, DBE shall provide a copy of the report to City.

10.1.2 DBE's safety program shall comply with the applicable legal and regulatory requirements. DBE shall provide City with copies of all notices required by law or regulation.

10.1.3 Any damage or loss caused by DBE arising from the Work which is not insured under property insurance shall be promptly remedied by DBE.

10.1.4 If City determines, in its sole discretion, that any part of the Work or Worksite is unsafe, City may, without assuming responsibility for DBE's safety program, require DBE or its Subcontractor to cease performance of the Work and/or to take corrective measures to City's satisfaction. If DBE fails to promptly take the required corrective measures, City may perform them and deduct the cost from the Contract Price. DBE agrees it shall not be entitled to a Claim for damages, for an increase in Contract Price, or for a change in Contract Time based on DBE's compliance with City's request for corrective measures pursuant to this provision.

10.2 **Hazardous Materials.** Unless otherwise specified, this Contract does not include the removal, handling, or disturbance of any asbestos or other Hazardous Materials. If DBE encounters materials on the Worksite that DBE reasonably believes to be asbestos or other Hazardous Materials, and the asbestos or other Hazardous Materials have not been rendered harmless, DBE may continue Work in unaffected areas reasonably believed to be safe, but shall immediately cease work on the area affected and report the condition to the Engineer. No asbestos, asbestos-containing products or other Hazardous Materials shall be used in performance of the Work.

10.3 **Material Safety.** DBE shall maintain Material Safety Data Sheets ("MSDS") at the Worksite, as required by law, for materials or substances used or consumed in the performance of the Work. The MSDS shall be accessible and available to DBE's employees, Subcontractors, City, and City's representatives.

10.3.1 DBE shall be responsible for the proper delivery, handling, use, storage, removal, and disposal of all materials brought to the Worksite and/or used in the performance of the Work.

10.3.2 DBE shall ensure proper labeling on any material brought onto the Worksite so that any persons working with or in the vicinity of the material may be informed as to the identity of the material, any potential hazards, and requirements for proper handling, protections, and disposal.

10.4 **Use of Explosives.** When the use of explosives is necessary for the prosecution of the Work, DBE shall ensure that they are used with the utmost care to avoid endangering persons or property. All explosives shall be used and stored in strict accordance with all applicable federal, state, and local laws and regulations.

Article 11
Completion and Warranty Provisions

11.1. Final Completion.

11.1.1 When the Work required by this Contract is fully performed, DBE shall provide written notification to the Engineer requesting final inspection. Based on this inspection, the Engineer shall prepare a punch list of items that are incomplete, incorrectly installed, or not operating as required by the Contract Documents. The omission of any such item from this punch list shall not relieve the DBE from fulfilling all requirements of the Contract Documents.

11.1.2 The Engineer shall promptly deliver the punch list to DBE and specify the time by which all of the punch list items must be completed or corrected. Final Completion will be achieved upon completion or correction of all punch list items, as verified by inspection, and upon satisfaction of all other Contract requirements, including, but not limited to, all final submittals, to City's satisfaction. Once Final Completion is achieved, and the Project has been formally accepted by City, City shall file a notice of completion with the County Recorder.

11.2 Warranty.

11.2.1 DBE warrants that all materials and equipment shall be new unless otherwise specified, of good quality, in conformance with the Contract Documents, and free from defective workmanship and materials. DBE further warrants that the Work shall be free from material defects. At City's request, DBE shall furnish satisfactory evidence of the quality and type of materials and equipment furnished. DBE's warranty does not extend to damage caused by normal wear and tear, or improper use or maintenance.

11.2.2 DBE's warranty shall guarantee its work for a period of one (1) year from the date of recordation of the notice of completion, except when a longer guarantee is provided by a supplier or manufacturer, or is required by the Specifications. DBE shall obtain from its Subcontractors, suppliers and manufacturers any special or extended warranties to which City may be entitled, or which are required by the Contract Documents. As a condition precedent to acceptance, DBE shall supply City with all warranty and guarantee documents relevant to equipment and materials incorporated into the Work and guaranteed by their suppliers or manufacturers. The warranty provided herein applies to Work performed by DBE and its Subcontractors, and DBE expressly agrees to act as co-guarantor of such Work.

11.2.3 Upon written notice from City to DBE during the warranty period, DBE and/or its responsible Subcontractor shall promptly correct the defective Work at their own cost. If DBE and/or its responsible Subcontractor fails to correct defective Work within ten (10) days following notice by City, or sooner, if required by the circumstances, DBE expressly agrees that City may correct the defects to conform with Contract Documents at DBE's sole expense, and DBE agrees to reimburse City for its costs within thirty (30) days following City's submission of a demand for payment pursuant to this provision. If City is required to initiate legal action to compel DBE's compliance with this provision, and City is the prevailing party in such action, DBE shall be responsible for all of City's attorney's fees and legal costs expended to enforce DBE's warranty obligations herein in addition to any and all costs incurred by City to correct the defective Work.

11.2.4 To the extent products, equipment, systems or materials incorporated in the Work are specified by the City but purchased by the DBE and are inconsistent with selection criteria that otherwise would have been followed by the DBE, the DBE shall assist the City in pursuing warranty claims. All other warranties expressed or implied including the warranty of merchantability and the warranty of fitness for a particular purpose are expressly disclaimed.

11.2.5 The DBE shall secure required certificates of inspection, testing or approval and deliver them to the City.

11.2.6 The DBE shall collect all written warranties and equipment manuals and deliver them to the City in a format directed by the City.

11.2.7 With the assistance of the City's maintenance personnel, the DBE shall direct the checkout of utilities and start up operations, and adjusting and balancing of systems and equipment for readiness.

Article 12 Dispute Resolution

12.1 **Work Continuance and Payment.** Unless otherwise agreed in writing, the DBE shall continue the Work and maintain the approved schedules during any dispute mitigation or resolution proceedings.

12.2 **Claims.** This Article applies to and provides the exclusive procedures for any Claim arising from or related to the Contract or performance of the Work.

12.2.1 "Claim" means a separate demand by DBE for change in the Contract Time or Contract Price that has previously been submitted to City in accordance with the requirements of the Contract Documents, and which has been rejected by City, in whole or in part. A Claim shall only include the portion of a previously rejected demand that remains in dispute between DBE and City. DBE is not entitled to submit a Claim demanding a change in the Contract Time or the Contract Price, which has not previously been submitted to City in full compliance with Article 5 and Article 6, and subsequently rejected in whole or in part by City.

12.2.2 This Article is intended to provide the exclusive procedures for submission and resolution of Claims of any amount, and applies in addition to the provisions of Public Contract Code Sections 20104, et seq.

12.3 **Claims Submission.** The following requirements apply to any Claim subject to this Article:

12.3.1 The Claim must be submitted to City in writing and must include all of the documents necessary to substantiate the Claim. A Claim must be submitted within fifteen (15) days following the date that City notified DBE in writing that a request for a change in the Contract Time or Contract Price, duly submitted in compliance with Article 5 and Article 6, has been rejected in whole or in part. With the exception of any dispute regarding the amount of Final Payment, any Claim must be filed on or before the date of Final Payment, or will be deemed waived. A Claim disputing the amount of Final Payment must be submitted within fifteen (15) days of the effective

date of Final Payment, pursuant to Section 8.8 of Article 8, above. Strict compliance with these Claim submission deadlines is necessary to ensure that any dispute may be mitigated as soon as possible, and to facilitate cost-efficient administration of the Project. Any Claim that is not submitted within the specified deadlines will be deemed waived by DBE.

12.3.2 For any Claim of less than fifty thousand dollars (\$50,000.00), City will respond in writing within forty-five (45) days of receipt of the Claim, or may request, in writing, within thirty (30) days of receipt of the Claim, any additional documentation supporting the Claim or relating to defenses to the Claim that City may have against DBE.

12.3.2.1 If additional information is thereafter required, it may be requested and provided upon mutual agreement of City and DBE.

12.3.2.2 City's written response to the Claim, as further documented, will be submitted to DBE within fifteen (15) days after receipt of the further documentation or within a period of time no greater than that taken by DBE in producing the additional information, whichever is greater.

12.3.2.3 Any failure by City to respond within the times specified above may not be construed as acceptance of the Claim in whole or in part, or as a waiver of any provision of these Contract Documents.

12.3.3 For any Claim of over fifty thousand dollars (\$50,000.00), and less than or equal to three hundred seventy-five thousand dollars (\$375,000.00), City will respond in writing within sixty (60) days of receipt of the Claim, or may request, in writing, within thirty (30) days of receipt of the Claim, any additional documentation supporting the Claim or relating to the defenses to the Claim that City may have against DBE.

12.3.3.1 If additional information is thereafter required, it may be requested and provided upon mutual agreement of City and DBE.

12.3.3.2 City's written response to the Claim, as further documented, will be submitted to DBE within thirty (30) days of receipt of the further documentation, or within a period of time no greater than that taken by the DBE in producing the additional information or requested documentation, whichever is greater.

12.3.3.3 Any failure by City to respond within the times specified above may not be construed as acceptance of the Claim in whole or in part, or as a waiver of any provision of these Contract Documents.

12.3.4 For any Claim of over three hundred seventy-five thousand dollars (\$375,000.00), City will respond in writing within ninety (90) days of receipt of the Claim. City may request, in writing, within forty-five (45) days of receipt of the Claim, any additional documentation supporting the Claim relating to defenses to the Claim that City may have against the DBE.

12.3.4.1 If additional information is thereafter required, it may be requested and provided upon mutual agreement of City and DBE.

12.3.4.2 City's response to the Claim, as further documented, will be submitted to DBE within forty-five (45) days after receipt of the further documentation, or within a period of time no greater than that taken by DBE in producing the additional information or requested documentation, whichever is greater.

12.3.4.3 Any failure by City to respond within the times specified above may not be construed as acceptance of the Claim in whole or in part, or as a waiver of any provision of these Contract Documents.

12.3.5 Any Claim for additional payment must include a complete, itemized breakdown of all labor, materials, taxes, insurance, and subcontract, or other costs. Substantiating documentation such as payroll records, receipts, invoices, or the like, must be submitted in support of each claimed cost. Any Claim for an extension of time or delay costs must be substantiated with schedule analysis and narrative depicting and explaining claimed time impacts.

12.4 Meet and Confer.

12.4.1 For Claims less than or equal to three hundred seventy-five thousand dollars (\$375,000.00), if DBE disputes the City's written response, or City fails to respond within the time proscribed, DBE may notify City in writing, either within fifteen (15) days of receipt of City's response, or within fifteen (15) days of City's failure to respond within the time proscribed, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon receipt of the demand to meet and confer, City will schedule the meet and confer conference to be held within thirty (30) days, or later if needed to ensure the mutual availability of all of the individuals that each party requires to represent its interests at the meet and confer conference. The meet and confer conference will be scheduled at a location at or near City's principal office. If DBE fails to dispute City's response, in writing, within thirty (30) days after receipt of City's response, DBE's Claim will be deemed waived.

12.4.2 For any Claim greater than three hundred seventy-five thousand dollars (\$375,000.00), within thirty (30) days of receipt of City's response, DBE will respond in writing by accepting City's response and waiving any further right to pursue the Claim, or by disputing the City's response in whole or in part. If DBE disputes City's response, in writing, in whole or in part, City will schedule a meet and confer conference to be held within sixty (60) days, or later if needed to ensure the mutual availability of all of the individuals that each party requires to represent its interests at the meet and confer conference. The meet and confer conference will be scheduled at a location at or near City's principal office, and will be mandatory for both parties. If DBE fails to dispute City's response, in writing, within thirty (30) days after receipt of City's response, DBE's claim will be deemed waived.

12.5 Mediation and Statutory Claims.

12.5.1 For Claims less than or equal to three hundred seventy-five thousand dollars (\$375,000.00), if the Claim or any portion remains in dispute following the meet and confer conference, the parties may agree to mediation, as set forth in subsection 12.5.2, below, or DBE may file a claim as provided in Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code (a "Statutory Claim"). For the purposes of those

provisions, the running of the period of time within which a Statutory Claim must be filed will be tolled from the time the DBE submits its written Claim pursuant to subsections 12.2 and 12.3, above, until the time that Claim is denied as a result of the meet and confer process, including any period of time used by the meet and confer process. If the parties agree to mediation pursuant to subsection 12.5.2, below, the time for filing a Statutory Claim will be tolled until conclusion of the mediation by impasse.

12.5.2 For any Claim or any portion(s) of a Claim greater than three hundred seventy-five thousand dollars (\$375,000.00) that remains in dispute following the meet and confer conference, the parties agree to make a good faith effort to resolve the dispute through mediation as a condition precedent to filing a Statutory Claim and initiating litigation. The mediation will be scheduled within sixty (60) days following conclusion of the meet and confer process, with a mediator that the parties mutually agree upon. The mediation itself may take place more than sixty (60) days following conclusion of the meet and confer process to ensure the mutual availability of the selected mediator and all of the individuals that each party requires to represent its interests. The parties must share the costs of mediation equally, except costs incurred by each party for representation by legal counsel or any other consultant.

12.5.3 If the Claim or any portion remains in dispute following the mediation, DBE may file a Statutory Claim. For the purposes of this subsection the running of the period of time within which a Statutory Claim must be filed will be tolled from the time the DBE submits its written Claim pursuant to subsections 12.2 and 12.3, above, until the conclusion of the mediation by impasse.

12.5.4 Timely presentment of a Statutory Claim is a condition precedent to filing any legal action based on or arising from the Contract.

12.6 **Tort Claims.** This Article does not apply to tort claims and nothing in this Article is intended nor shall be construed to change the time periods for filing tort-based Statutory Claims.

12.7 **Arbitration.** It is expressly agreed, pursuant to California Civil Code Section 1296, that in any arbitration to resolve a dispute relating to this Contract, the arbitrator's award must be supported by law and substantial evidence.

12.8 **Damages.** DBE is not entitled to recovery of any alleged home office overhead. The Eichleay Formula may not be used for any recovery under the Contract. DBE is not entitled to consequential damages, including, but not limited to home office overhead or any form of overhead not directly incurred at the Worksite; lost profits; loss of productivity; lost opportunity to work on other projects; diminished bonding capacity; increased cost of financing for the Project; extended capital costs; non-availability of labor, material or equipment due to delays; or any other indirect loss arising from the Contract.

12.9 **Multiple Claims.** In the interest of efficiency, City, acting in its sole discretion, may elect to process multiple Claims concurrently, in which case the applicable procedures above will be based on the total amount of such Claims rather than the amount of each individual Claim. Any such election will not operate to change or waive any other requirements of this Article.

Article 13 Suspension and Termination

13.1 Suspension for Cause. In addition to all other remedies available to City, if DBE fails to perform or correct work in accordance with the Contract Documents, City may immediately order the Work, or any portion thereof, suspended until the cause for the suspension has been eliminated to City's satisfaction.

13.1.1 DBE shall not be entitled to an increase in Contract Time or Contract Price for a suspension occasioned by DBE's failure to comply with the Contract Documents.

13.1.2 City's right to suspend the Work shall not give rise to a duty to suspend the Work, and City's failure to suspend the Work shall not constitute a defense to DBE's failure to comply with the requirements of the Contract Documents.

13.2 Suspension for Convenience. City reserves the right to suspend, delay, or interrupt the performance of the Work in whole or in part, for a period of time determined to be appropriate for City's convenience, and not due to any act or omission by DBE or its Subcontractors. Upon notice by City pursuant to this provision, DBE shall immediately suspend, delay, or interrupt the Work as directed by City. The Contract Time shall be equitably adjusted by Change Order to reflect the delay impact occasioned by such suspension for convenience.

13.3 Termination for Default. DBE may be deemed in default if DBE refuses or fails to supply sufficient skilled workers, proper materials, or equipment to perform the Work within the Contract Time; to make prompt payment to its employees, Subcontractors, or suppliers; disregards laws, regulations, ordinances, rules, or orders of any public agency with jurisdiction over the Project; lacks financial capacity to complete the Work within the Contract Time; or is otherwise responsible for a material breach of contract.

13.3.1 Upon City's determination that DBE is in default, City may provide DBE and its surety written notice of default and intent to terminate the Contract.

13.3.2 Within seven (7) calendar days after notice of intent to terminate for default has been given, unless the default is cured or arrangements to cure the default have been made and memorialized in writing, to City's satisfaction, City may terminate the Contract by written notice to DBE with a copy to DBE's surety.

13.3.3 Time being of the essence in the performance of the Work, if DBE's surety fails to arrange for completion of the Work in accordance with the Performance Bond, within seven (7) calendar days from the date of the notice of termination, DBE's surety shall be deemed to have waived its right to complete the Work under the Contract, and City may immediately make arrangements for the completion of the Work through use of its own forces, by hiring a replacement DBE, or by any other means that City determines advisable under the circumstances. DBE and its surety shall be jointly and severally liable for any additional cost incurred by City to complete the Work following termination. In addition, City shall have the right to use any materials, supplies, and equipment belonging to DBE and located at the Worksite for the purposes of completing the remaining Work.

13.4 Termination for Convenience. City reserves the right to terminate all or part of the Contract for convenience upon written notice to DBE. Upon receipt of such notice, DBE shall immediately stop the Work, comply with City's instructions, and use its best efforts to

minimize further costs. In the event of termination for convenience, DBE shall be compensated as follows:

13.4.1 For the value of its Work performed to date, based on DBE's reasonable expenditures prior to notice of termination; and

13.4.2 Five percent (5%) of the total cost of the Work performed as of the date of notice of termination or five percent (5%) of the value of the Work yet to be completed, whichever is less.

13.4.3 The compensation set forth in subsections 13.4.1 and 13.4.2 shall not apply if the Contract is terminated for convenience prior to issuance of the Notice to Proceed. City expressly disclaims any liability whatsoever for any expenditures made in furtherance of the Project prior to issuance of the Notice to Proceed. DBE is solely responsible for all expenses it incurred prior to issuance of the Notice to Proceed except for any expenses specifically authorized in writing by City.

The parties agree that this sum constitutes full and fair compensation to DBE.

13.5 Provisions Remaining in Effect. Upon termination pursuant to this Article, the provisions of the Contract Documents remain in effect as to any claim, indemnity obligation, warranties, guarantees, submittals of as-built drawings, instructions, or manuals, or other such rights and obligations arising prior to the termination date.

Article 14 Miscellaneous Provisions

14.1 Assignment of Unfair Business Practice Claims. Pursuant to Public Contract Code Section 7103.5, DBE and its Subcontractors agree to assign to City all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Section 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to the Contract or subcontract. This assignment will be effective at the time City tenders Final Payment to DBE, without further acknowledgement by the parties.

14.2 Provisions Deemed Inserted. Every provision of law required to be inserted in the Contract Documents is deemed to be inserted, and the Contract Documents will be construed and enforced as though such provision has been included. If it is discovered that through mistake or otherwise that any required provision was not inserted, or not correctly inserted, the Contract Documents will be amended accordingly.

14.3 Waiver. No waiver of a breach, failure of any condition, or any right or remedy contained in or granted by the provisions of the Contract Documents will be effective unless it is in writing and signed by the party waiving the breach, failure, right, or remedy. No waiver of any breach, failure, right, or remedy will be deemed a waiver of any other breach, failure, right, or remedy, whether or not similar, nor will any waiver constitute a continuing waiver unless specified in writing by the waiving party.

14.4 Titles, Headings, and Groupings. The titles and headings used and the groupings of provisions in the Contract Documents are for convenience only and may not be used in the construction or interpretation of the Contract Documents or relied upon for any other

purpose.

14.5 **Statutory and Regulatory References.** With respect to any amendments to any statutes or regulations referenced in these Contract Documents, the reference is deemed to be the version in effect on the date that the Contract was awarded by City.