



Construction & Development

CONTRACT #CBX001

**DESIGN-BUILD SERVICES FOR
METRO-NORTH RAILROAD
PENN STATION ACCESS PROJECT**

**VOLUME 2
GENERAL PROVISIONS**

September 20, 2021

**GENERAL PROVISIONS
of the
DESIGN-BUILD CONTRACT**

September 20, 2021

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DESIGN-BUILD GENERAL PROVISIONS

CHAPTER 1.

GENERAL TERMS AND DEFINITIONS

ARTICLE 1.01 SERVICES TO BE PROVIDED

- A. The Design-Builder, as an independent contractor and not as an agent, employee or representative of MTA C&D or the MTA, shall perform, furnish and complete the Work as defined herein to the satisfaction of MTA C&D and the MTA and in accordance with Good Industry Practice, for the Contract Price and within the time limits permitted, and shall provide the warranties and guarantees for completing the Work required by the Contract.
- B. The Design-Builder shall protect, support and maintain all structures, properties, billboards, Utilities and facilities, which includes the MTA Group's property and facilities, property and facilities of Amtrak and other Railroads, properties and facilities of third parties located on Work site, and any other property whether owned by the MTA or any other person or entity, with their appurtenances and connections as the same may be affected by the Design-Builder's performance of the Work; and promptly reconstruct and restore all equipment, structures, properties, Utilities and facilities which are damaged thereby to at least as good a condition as existed before the Work was begun, to the satisfaction of MTA C&D and other owners thereof. All such work shall be known as "Miscellaneous and Incidental Work."
- C. In performing the Work and completing the Work, the Design-Builder shall also:
 - 1. undertake and complete all additional, collateral, and incidental Work as required and reasonably necessary to complete the Work in accordance with the Contract; and
 - 2. furnish all required labor, services, parts, materials, equipment, tools, labor, temporary light and power, shop drawings, installation drawings, working drawings, and incidentals reasonably necessary to complete the Work in accordance with the Contract, whether or not such details are expressly shown or specified, all at no additional cost.

ARTICLE 1.02 DEFINITIONS AND ABBREVIATIONS

A. DEFINITIONS:

See Appendix 1.02A to these General Provisions.

B. ABBREVIATIONS:

See Appendix 1.03B to these General Provisions.

ARTICLE 1.03 AUTHORITY OF MTA

- A. The MTA's authority under this Contract is subject to the provisions of this Contract that may entitle the Design-Builder to Equitable Adjustments in the Contract Price and the Milestones, and other provisions of this Contract that may provide express remedies to the Design-Builder.

- B. All authority, rights and responsibilities of the MTA under this Contract shall be exercised by MTA C&D acting for the MTA. All responsibilities and duties of the Design-Builder hereunder shall be owed to MTA C&D, as well as to the MTA. For these purposes, but without establishing MTA C&D as a contracting party, when the term MTA is used in this Article 1.03, it shall include MTA C&D acting for the MTA, unless otherwise indicated.
- C. The MTA may decide all questions that may arise:
1. relating to the interpretation of the Contract, and the MTA may alter, adjust and approve such interpretations;
 2. relating to the quality, quantity, value, fitness and acceptability of materials furnished or to be furnished and Work performed or to be performed, and as to the progress of the Work and the need for and manner of correcting any of the Work;
 3. relating to the need for and terms of delays, suspensions and accelerations;
 4. relating to the need for and terms of Added Work or Decreased Work;
 5. relating to the supervision, control and direction of Work on the Work Sites and the use thereof;
 6. relating to all questions related to payment, retention and backcharges; and
 7. relating to all questions as to the acceptable fulfillment of the Contract on the part of the Design-Builder.
- D. In the execution of the Work, the Design-Builder shall conform to all orders, directions and requirements of the MTA and shall perform the Work to the MTA's satisfaction. The Work shall at all stages be subject to the MTA's inspection. The MTA shall determine the acceptability and fitness of the quality of the Work, and its determination shall be final and binding on the Design-Builder. The MTA may stop any part of the Work if the methods or conditions are such that Defective Work might result, or if improper material or workmanship is being used, or if Unsafe Conditions exist.
- E. All labor, materials, devices, apparatus and processes of design and manufacture shall be at all times and places subject to the inspection of the MTA.
- F. Upon request, the MTA will promptly confirm in writing any valid oral Order or determination.
- G. Project CEO: The Project CEO and the Project CEO's delegate (if any) by written delegation as provided herein are authorized to exercise all authority and communicate all directions, approvals, decisions and interpretations of the MTA and MTA C&D to the Design-Builder. The Project CEO shall serve as the MTA and MTA C&D Contracting Officer for the Design-Builder under this Contract and all communication, submissions and filings by the Design-Builder to the MTA or MTA C&D shall be addressed to or copied to the Project CEO, in accordance with the Contract, unless directed otherwise.
- H. In the limited circumstances when the Project CEO is not available to conduct the MTA's business due to his or her absence from the Project, the Project CEO may designate in writing, delivered to

Design-Builder's Project Manager, another person to act in Project CEO's stead, with the same powers and responsibilities as those of the Project CEO, including the power to designate another delegate in the event of the delegate's own absence from the Project as specified herein. Each delegation shall be for a limited duration of time, which shall be stated in the delegation communication to the Design-Builder. For the duration of each such delegation, all communications and notices from the Design-Builder to the MTA shall continue to be directed to the Project CEO; and all communications and notices from the MTA to the Design-Builder shall be signed by the Project CEO's delegate on behalf of the Project CEO.

- I. MTA C&D reserves the right, at any time during the progress of the Work, to alter the scope of the Work, or omit any portion of the Work as it may deem reasonably necessary for the public interest. Exercise of this right includes making allowances for additions and deductions, with compensation made in accordance with the Contract Documents for the altered or omitted Work.

ARTICLE 1.04 DESIGN-BUILDER'S PROJECT MANAGER AND KEY PERSONNEL

- A. The Design-Builder's Project Manager shall be present or be represented at the Work Site at all times when Work is in progress, and shall be empowered to receive communications in accordance with this Contract on behalf of the Design-Builder. Prior to commencing the Work, the Design-Builder shall provide MTA C&D with phone numbers and email addresses of the Design-Builder's Project Manager and supervisory personnel, who shall be available to respond on a "24-hour" basis. During periods when Work is suspended, the Design-Builder shall designate an authorized representative acceptable to MTA C&D for any Emergency work that may be required. All communications delivered to the Design-Builder's Project Manager by MTA C&D in accordance with this Contract shall be binding upon the Design-Builder.
- B. Key Personnel must be devoted full time to their respective positions for the Project from Notice of Award until Final Completion. If extraordinary circumstances require substitution of Key Personnel during the Design-Builder's performance, the Design-Builder shall submit a request for substitution in accordance with Division 1 – General Requirements, Section 01 31 20, Key Personnel. The Design-Builder shall not remove or reassign Key Personnel until a satisfactory replacement has been approved in writing by the Project CEO.

ARTICLE 1.05 NOTICES

- A. Unless otherwise directed by MTA C&D, the Design-Builder shall utilize the ASITE web-based interface and the applicable forms incorporated therein ("ASITE") for issuing written notices, transmitting documents and receiving transmissions from MTA C&D, as set forth below and elsewhere in the Contract Documents or as otherwise specified by MTA C&D. The Design-Builder shall utilize ASITE for among other things:
 1. Notices of Change issued in accordance with General Provisions Article 8.02;
 2. Change Proposal Requests issued in accordance with Article 8.03;
 3. Change Proposals issued in accordance with Article 8.03;
 4. Submittals, re-submittals and responses, including, but not limited to, the shop drawings, working drawings, records drawings, samples and other submittals, issued in accordance with Article 2.01;

5. Requests for Information and responses issued in accordance with Article 2.02;
 6. All submittals and documentation issued in accordance with the Division 1-General Requirements and the Technical Provisions; and
 7. All other Notices.
- B. Nothing in this Article shall be deemed to serve as a waiver by MTA C&D of any requirements for the service of notice or process with respect to the filing of a claim or the institution of an action or proceeding as provided by law or elsewhere in this Contract.

ARTICLE 1.06 ORDER OF PRECEDENCE; RESOLUTION OF DISCREPANCIES

- A. The following rules of interpretation shall apply to this Contract and shall take priority over the order of precedence in Paragraph B below. If application of any of these rules resolves the inconsistency, ambiguity or discrepancy, it shall not be necessary to apply the order of precedence rule:
1. When one portion of the Contract Documents places upon the Design-Builder more detailed or more stringent requirements than another portion of the Contract Documents, this shall not be considered to be an inconsistency, ambiguity or discrepancy. The more detailed and more stringent requirement shall apply. If there is any disagreement as to which requirement is more detailed or more stringent, that which is more costly to perform shall be required unless agreed otherwise between the parties.
 2. In instances where design, material, installation techniques or requirements are introduced by a Design-Builder's Submittal that is accepted by MTA C&D, if there are differences between or among the Contract, the manufacturer's written requirements, the Submittals, and relevant codes and standards, the most stringent requirements shall apply in each instance. The Design-Builder shall perform the Work in accordance with the most stringent requirements at no increase to the Contract Price or change to the Milestones.
 3. In the event of a discrepancy between a drawing and figures written thereon, the figures, unless obviously incorrect, are to govern over scaled dimensions.
 4. If there is a conflict between a provision in this Contract and any applicable Law, then the Law shall be deemed to control, provided that if there is a requirement in this Contract that is more stringent than an applicable Law, then the parties agree that there is no conflict in the provisions and the more stringent Contract requirement shall prevail.
 5. Any undertakings by the Design-Builder in the Design-Builder's Proposal that are more advantageous to MTA C&D or confer additional benefits to MTA C&D beyond the requirements of the other Contract Documents constitute binding obligations of the Design-Builder. The attachment of the Design-Builder's Proposal as Exhibit A to the Design-Build Agreement does not and shall not waive or modify any requirements of the other Contract Documents except as specifically set forth in the ATC approvals referenced in Exhibit A to the Design-Build Agreement.
 6. If there is any ambiguity, conflict, or inconsistency in this Contract as a result of which an element of the Work could constitute both Option Work and Work which the Design-

Builder is obligated to perform without MTA C&D's exercise of an Option, then such element of the Work will be deemed to be part of the Design-Builder's base scope which it is obligated to perform without MTA C&D's exercise of an Option as part of its Contract Price and not as Option Work.

- B. All Contract Documents and subsequently issued amendments and supplemental information are essential parts of this Contract, and a requirement occurring in one is binding as though occurring in all. Except as stated in the foregoing rules of interpretation in Paragraph A above which control, in resolving any inconsistencies, conflicts, discrepancies, errors, or omissions between or among the documents comprising the Contract, the numerical order of precedence of certain Contract Documents shall be as set out in the Design-Build Agreement.
- C. Documents provided by MTA C&D to the Design-Builder that are identified as Reference Documents are not Contract Documents, are not part of the Contract, are not Contract Indications and are provided for information purposes only, without any representation, warranty, express or implied, undertaking or guarantee as to the accuracy, completeness, relevance, fitness for purpose or adequacy of the same, and that no such content has been or will be relied upon by the Design-Builder. However, the Design-Builder hereby acknowledges that it has read and has knowledge of the Reference Documents' content, and the Design-Builder shall be deemed to have knowledge of such content. If a document which is not otherwise identified as a "Reference Document" is expressly identified in the Contract Documents as "incorporated by reference," it is a Contract Document rather than a "Reference Document." Documents and standards expressly identified in this Contract as included in the Contract, or expressly incorporated by reference, are Contract Documents whether or not a full copy is included as part of the Contract or the RFP. Such incorporated Contract Documents shall for purposes of this Article 1.06.B. take the priority of the specific Contract Document within which they are identified and incorporated by reference.
- D. In the event of any other discrepancy or ambiguity, or if the Design-Builder reasonably believes that the requirements of the Contract Documents are not clearly defined therein, the Design-Builder shall promptly submit a question to MTA C&D for a written determination. Any action taken by the Design-Builder without such determination shall be at the Design-Builder's own risk and expense.
- E. The Design-Builder shall take no advantage of any patent or apparent error, omission or ambiguity in the Contract. With respect to any apparent or patent error, omission or ambiguity, the Design-Builder has a duty to inquire prior to submitting its Proposal. Should it fail to do so, the MTA C&D's interpretation shall prevail.
- F. In the event the Design-Builder discovers an error, omission, or that there is additional information necessary to execute the Work, the Design-Builder shall immediately notify MTA C&D. MTA C&D will then make such corrections and/or interpretations as it may deem necessary for fulfilling the intent of the Contract and shall advise the Design-Builder. MTA C&D's decision in relation thereto shall be final and conclusive upon the parties, subject to the Design-Builder's rights under Chapter 12. The Design-Builder shall provide all design, engineering, labor, materials, tools and equipment necessary to complete the Work shown and specified. Where additional details and/or clarifications are necessary in order to complete the Work shown or specified, the Design-Builder shall comply with the detail provided by MTA C&D and the cost of compliance shall be deemed included in the Contract Price. Failure of the Design-Builder to notify MTA C&D as required

herein shall be deemed a waiver of the Design-Builder's right to claim any adjustment to the Contract Price or any extension of the Contract Time for alleged Added Work or Change Work.

G. With respect to any ATCs:

1. statements, terms, concepts or designs set out therein apply solely with respect to the specific locations noted or the detailed components expressly defined;
2. statements, terms, concepts or designs set out therein are subject to any stated conditions given in the MTA C&D's approval of such ATC; and
3. the Design-Builder acknowledges that elements of ATCs are conceptual and agrees it is responsible for any errors, omissions or inconsistencies in, among or resulting from any ATC(s) and for any additional Work required as a result of design development in order to meet all Contract requirements as a result of the implementation of such ATC.

ARTICLE 1.07 CHARACTER OF WORK

- A. The Contract Documents establish the minimum requirements for the design and construction of the Project. Nothing therein shall be construed to limit the Design-Builder's full responsibility to perform the Work and deliver the Project, in all aspects. Any Work including designs, materials or equipment that may reasonably be inferred from the provisions of the Contract Documents or from prevailing custom or trade usage as being required to produce the intended result will be designed, furnished and performed by the Design-Builder whether or not specifically set forth.
- B. The Design-Builder shall provide materials and workmanship that are in accordance with Good Industry Practice. The Design-Builder shall provide equipment and materials that conform to the requirements of this Contract and are the most suitable grade of their respective kinds for their intended uses and the latest design of manufacturers regularly engaged in the production of such equipment or materials.
- C. Where materials or equipment are required by the Contract Documents to conform to codes or standards, third-party specifications or requirements of organizations, associations or societies, the current edition or the most recent revision of such standards, specifications or requirements as of the Award Date is to be used, subject to Change in accordance with Article 11, unless use of an earlier version is expressly specified in the Contract Documents. The Design-Builder shall furnish to MTA C&D upon request the manufacturer's written certification that such materials or apparatus conform to such standards, specifications or requirements. Such certifications shall not be binding or conclusive on MTA C&D and may be rejected at any time if incorrect, improper, or otherwise unsatisfactory. Failure of MTA C&D to request or reject any certification shall not release the Design-Builder from its full responsibility for the accurate and complete performance of the Work in accordance with the Contract Documents.
- D. The Design-Builder shall also perform the Work with the highest regard to the safety of life and property.
- E. Any approval given by MTA C&D shall not release the Design-Builder from its full responsibility for the accurate and complete performance of the Work in accordance with the Contract or from any duty, obligation or liability imposed upon it by the Contract or from responsibility for injuries to persons or damage to property.

- F. Any approval given by MTA C&D pursuant to any provision of the Contract shall be construed merely to mean that at the time the approval is given, MTA C&D had no reason for objecting; and no such approval shall release the Design-Builder from its full responsibility for the accurate and complete performance of the Work in accordance with the Contract or any duty, obligation, or liability imposed upon it by the Contract or from responsibility for injuries to persons or damage to property.

ARTICLE 1.08 GENERAL RULES OF INTERPRETATION

- A. The headings of the chapters, articles, paragraphs, and sections are inserted for convenience only and shall not affect the actual construction or interpretation of said chapter, article, paragraph, or section of this Contract.
- B. References to any agreement or other instrument shall be deemed to include such agreement or other instrument as it may, from time to time, be modified, amended, supplemented, or restated in accordance with its terms.
- C. Words not otherwise defined herein that have well-known technical or trade meanings are used herein in accordance with such recognized meanings.
- D. The terms “hereof,” “herein,” “hereby,” “herewith,” “hereto,” and “hereunder” shall be deemed to refer to this Contract. The words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation.” Whenever the words “approval,” “agreement,” “acceptance,” “acceptable,” “mutually agreed,” “satisfaction,” or “consent” or words of similar intent appear in this Agreement they shall be deemed to be qualified by the words “which shall not be unreasonably withheld or unduly delayed.”
- E. The Design-Builder acknowledges and agrees that it has thoroughly reviewed the terms of this Contract and both parties agree that the terms of this Contract are not to be construed against the drafter of the Contract.
- F. All communications between MTA C&D and the Design-Builder must be in writing, in accordance with Article 1.05 – NOTICES, unless expressly indicated otherwise.
- G. Whenever the context of any provision in the Contract so requires, any noun, including those terms defined in Article 1.02 – DEFINITIONS AND ABBREVIATIONS shall include its plural and singular form, and any pronoun shall include the corresponding masculine, feminine and neuter forms, both singular and plural.
- H. The words “including,” “includes” and “include” are deemed to be followed by the words “without limitation” whether or not such following words are expressly stated.
- I. If there is a conflict between a provision in this Contract and any Law, then the Law shall be deemed to control. Notwithstanding the foregoing, however, if there is a requirement in this Contract that is more stringent than an applicable Law, then the parties agree that there is no conflict in the provisions and the more stringent Contract requirement shall prevail.
- J. Unless otherwise stated in the Contract, Milestone computations shall be made in Days, even if the Milestone in question is specified as a date.

- K. Any period of time in Days will be computed to exclude the first and include the last Day.
- L. MTA C&D shall not be obligated to include in this Contract any explanation of the basis of or reasons for any Contract requirement. In the event that the Design-Builder believes an explanation would be beneficial for the performance of its Work, the Design-Builder may make a written request for an explanation.
- M. It is the intent of the Parties that the risks be allocated as set forth in this Contract. The exculpatory nature of any provision of this Contract may not be and shall not be a reason for non-enforcement in any dispute resolution forum.

ARTICLE 1.09 DESIGN RESPONSIBILITIES

- A. The Design-Builder shall, through its Designer of Record, advance the design of the Project through the various stages of design as necessary to produce Final Design Documents approved by MTA C&D for construction of the Work. If the Design-Builder proposes a change in the Contract documents, MTA C&D or Amtrak may require the Design-Builder to submit ten percent (10%) and thirty percent (30%) designs to MTA C&D for review and comment before proceeding further with design of the proposed change. The Design Documents shall integrate the Contract Drawings and all other applicable specifications into the overall design for the Project. The Final Design Documents, including the changes thereto, shall be signed and sealed by the Designer of Record.
- B. Review of the Design Documents by MTA C&D shall not relieve the Design-Builder of the responsibility for ensuring that the Designer of Record provides complete detailed Final Design Documents in accordance with the Contract requirements.
- C. The Design-Builder shall ensure the adequacy of the design; the accuracy of details and dimensions; compliance with applicable Laws; and compliance of each Design Document with the requirements of other Design Documents reviewed by MTA C&D.
- D. If any component or part of the design of the Project is performed by a Design Professional other than the Designer of Record, then the Designer of Record shall review and determine that the work of such Design Professional conforms to the Contract requirements.
- E. The standard of care for all design services performed under this Contract shall conform to the standard of care exercised by highly qualified professionals experienced in design disciplines to meet the objectives of the Project and practices used by members of the architectural or engineering professions, respectively.
- F. Unless otherwise directed by MTA C&D, no associated Work may proceed prior to completion and approval of Final Design Documents. The Design-Builder may elect to subdivide the Work and advance portions of the design separately to advance segments of the Work.

CHAPTER 2.

SUBMITTALS

ARTICLE 2.01 SUBMITTALS

- A. The Design-Builder shall schedule and submit Submittals to MTA C&D in accordance with the requirements of Division 1-General Requirements, Section 01 33 00, Submittal Procedures, and the Technical Provisions.
- B. Variations from the Contract requirements are permitted only by express permission given in writing by MTA C&D in response to an express request from the Design-Builder and are subject to appropriate adjustment in the Contract Price, Contract Schedule, and/or Milestones. If the Design-Builder fails to expressly request and describe such variations, as stated above, or if MTA C&D does not expressly authorize the variation in its request as stated above, then the Design-Builder shall not be relieved of the responsibility for executing the Work in accordance with the Contract even though such Submittals have been reviewed by MTA C&D. If Submittals include such variations and show a departure from the requirements of the Contract that MTA C&D finds to be in the interest of MTA C&D and to be so minor as not to necessitate a change in the Contract Price, Contract Schedule, or Milestones, then the Project CEO may, in writing, expressly authorize the deviation and allow the Work to proceed. Upon rejection, in whole or part, of any request for variation, MTA C&D shall not be responsible for any differential cost increase between what the Design-Builder may have expected to provide and what the Contract requires.
- C. The Design-Builder shall comply with all other submittal requirements under the Contract, including, but not limited to, requirements to submit supplementary drawings, boring drawings, technical data, operation and maintenance manuals, progress reports, progress photos, and affirmative action and participation reporting requirements.

ARTICLE 2.02 REQUESTS FOR INFORMATION

- A. In the event that the Design-Builder determines that some portion of the Contract Documents requires clarification or interpretation by MTA C&D, the Design-Builder shall submit a request for information (“Request for Information” or “RFI”) in writing to the Project CEO. Requests for Information may only be submitted by the Design-Builder. The Design-Builder shall clearly and concisely set forth the issue for which clarification or interpretation is sought and why a response is needed from MTA C&D. In the Request for Information, the Design-Builder shall set forth its own interpretation or understanding of the requirement along with reasons why it has reached such an understanding. The Design-Builder shall clearly identify that the RFI is “time sensitive” if it affects an activity which: (i) has commenced or will commence within fifteen (15) Work Days, and (ii) the activity is on a path with less than fifteen (15) Work Days of float.
- B. In no event will the number of Requests for Information be the basis for entitlement to any Equitable Adjustments or other adjustment or change to the Contract.
- C. MTA C&D will review all Requests for Information to determine whether they are Requests for Information within the meaning of the term. If MTA C&D determines that a Submittal is not a Request for Information, then it will be returned to the Design-Builder for re-submittal that contains all information required in Paragraph A.

- D. Responses to Requests for Information shall be issued within ten (10) Days of receipt of the RFI from the Design-Builder unless MTA C&D determines that a longer period of time is necessary to provide an adequate response. If a longer period of time is determined necessary by MTA C&D, then MTA C&D will, within ten (10) Days of receipt of the request notify the Design-Builder of the anticipated response time.
- E. Responses to Requests for Information from MTA C&D are not Contract Modifications and do not change any requirement of the Contract. In the event the Design-Builder believes that a response to a Request for Information causes a change to the requirements of the Contract, the Design-Builder shall give timely written notice of a change under Article 8.02 - CHANGES. Failure to give timely written Notice of Change shall waive the Design-Builder's right to seek additional time or cost under said Article.

ARTICLE 2.03 BRAND NAMES/SUBMISSION FOR OR-EQUAL STATUS FOR SPECIFIED MATERIAL

- A. Wherever the Contract Documents specify a particular brand, or make of material, or equipment is shown or specified, such material or equipment is to be regarded merely as a standard for the purpose of concisely indicating the requirements as to type, quality, performance, design and finish. Any material or equipment other than that specified will be acceptable if, in the opinion of the Project CEO, it is as satisfactory for the particular Work for which it is intended. The Design-Builder shall submit complete documentation in support of an "or equal" product for MTA C&D to make a determination on the equality of the alternate material or equipment. Any additional costs incurred by MTA C&D or Amtrak to make a determination for an "or equal" product, other than for the initial review of documents submitted in connection with a request or approval, shall be borne by the Design-Builder. The Project CEO may require that a presentation be made for any or-equal request. MTA C&D reserves the right to reject any such other material or equipment offered which is not approved as being equal in all respects to the named material or equipment for the Work for which it is to be used. Such rejection may be for any reason deemed appropriate by the Project CEO including, without limitation, the expense and/or time needed to evaluate such material or equipment.
- B. If the Design-Builder desires to have an "or equal" approved, upon notification, MTA C&D shall advise the Design-Builder of any requirements for approval of the item, including any pre-approved testing applicable.
- C. After award of the Contract, all "or equal" requests shall be submitted to the Project CEO no later than ninety (90) days before the Design-Builder's scheduled procurement or manufacture of the required item, based on the Design-Builder's approved Contract Schedule. Within thirty (30) days after receipt of the request and all documentation needed to evaluate the request, the Project CEO will notify the Design-Builder whether its request is rejected or accepted.

CHAPTER 3.

SUBCONTRACTS, ASSIGNMENTS

ARTICLE 3.01 SUBCONTRACTS

- A. **NO SUBCONTRACTING WITHOUT MTA APPROVAL** The Design-Builder shall not Subcontract any portion of the Work without MTA C&D's prior written approval of the Subcontractor. The Design-Builder's request for approval of each Subcontractor must specify whether it intends to apply the proposed Subcontract amount towards the participation goal specified in the Contract. The MTA reserves the right to disapprove any proposed Subcontractor, including any proposed substitute Subcontractor pursuant to Article 3.01.E., for reasonable cause (which cause may include consideration of the terms of the relevant Subcontract). For certainty, any voluntary or involuntary, direct or indirect, assignment or transfer, including through a change of control, of any Subcontractor, including between affiliates, shall be subject to MTA C&D's approval under this Article 3.01.A.

B. **DESIGN PROFESSIONAL SUBCONTRACTS**

All Design Professional Subcontracts must be approved by MTA C&D before any such Design Professional Subcontractor performs any Work on the Project. Each Design Professional Subcontract shall comply with the following requirements:

The Design Professionals shall provide a minimum level of insurance coverage specified in the Contract (Insurance Requirements). MTA C&D shall be named as an intended third-party beneficiary of each such Subcontract.

All plans, drawings, designs, specifications and other materials prepared by a Design Professional Subcontractor pursuant to a Subcontract shall become the property of MTA C&D.

Design Professional Subcontractors shall comply with MTA C&D requirements for preparation of specifications, drawings and other design documents as set forth in the Contract Documents, which must be attached to and incorporated in all Design Professional Subcontracts.

Except upon prior written approval of MTA C&D, Design Professional Subcontractors shall treat as confidential all information provided by the MTA Group in connection with the Project or generated by the Design Professional or other Design Professional Subcontractors on the Project.

MTA C&D shall have the right at any time, at its sole option, to assume any Design Professional Subcontract (or any lower tier Subcontract) if the Contract is terminated for any reason. In the event MTA C&D assumes a Design Professional Subcontract, the Design Professional Subcontractor shall be obligated to complete the performance of its obligations thereunder according to the terms thereof.

The Design-Builder shall insert into each and every Design Professional Subcontract a provision, reasonably satisfactory to MTA C&D, obligating the Design Professional Subcontractor in the event of any such termination of the Contract and assumption by MTA C&D of such Subcontract, to recognize such assumption by MTA C&D and continue to perform the Design Professional Subcontract under the direction of MTA C&D.

All Design Professional Subcontracts shall contain the following provisions:

a. DELIVERY OF MATERIAL TO MTA

Upon approval of the Final Design Documents by MTA C&D, the Design Professional Subcontractor shall deliver to MTA C&D all Design Documents, including but not limited to studies, reports, maps, surveys, data, design calculations, specifications, drawings, charts, photographs and all other material and exhibits prepared, developed or kept in connection with the Project. The Design Professional Subcontractor may retain copies of any items that may be required for the construction phase activities of the design services.

b. OWNERSHIP OF DOCUMENTS

All Design Documents prepared and furnished by the Design Professional Subcontractor shall become the property of MTA C&D upon the approval of the Final Design Documents by MTA C&D.

C. MTA C&D'S REVIEW OF PROPOSED SUBCONTRACTORS

MTA C&D shall review requests for approval of proposed Subcontracts and Subcontractors in accordance with the criteria and requirements of this Article and the Instructions to Proposers.

D. NON-APPROVED SUBCONTRACTORS

If a proposed Subcontractor is not approved, then the Design-Builder may propose another Subcontractor, or, if it chooses to perform such portion of the Work itself, the Design-Builder shall so notify MTA C&D.

E. NOTICE OF DELETION OR SUBSTITUTION OF SUBCONTRACTORS

The Design-Builder shall apprise MTA C&D of the proposed deletion or substitution of any Subcontractor, including pertinent information or reasons(s) therefore, and shall request approval for any substitute Subcontractor.

F. THE DESIGN-BUILDER'S OBLIGATION TO INFORM SUBCONTRACTORS

The Design-Builder shall fully inform all Subcontractors of all provisions and requirements of this Contract relating either directly or indirectly to the services to be performed and the equipment and/or materials to be furnished under such Subcontract, and the Subcontracts shall expressly stipulate that services performed and/or equipment and/or materials furnished shall comply with the requirements of the Contract. The Design-Builder shall insert into every first-tier Subcontract, and require the insertion into all lower-tier Subcontracts, all provisions required by this Contract and all Laws and regulations. All Subcontracts, which includes all first and lower tier Subcontracts, shall state that MTA C&D shall have the right to audit the records of Subcontractors in the same manner as it does the Design-Builder.

G. NON-WAIVER

Approval of any Subcontractor by MTA C&D shall not operate as a waiver of any right against the Design-Builder or third parties nor shall it relieve the Design-Builder of any of its obligations to perform the Work as herein set forth. Approval of the Subcontractor does not constitute MTA C&D approval of the Subcontract, or a waiver of the flow through requirements of this Contract.

H. MTA C&D'S RIGHT TO DIRECT TERMINATION OF SUBCONTRACTS

MTA C&D reserves the right to direct the Design-Builder to terminate any Subcontract if, during the term of this Contract: (i) the Subcontractor, a Subcontractor director, officer, principal, or managerial employee, or owner of at least ten percent (10%) interest in the Subcontractor, is convicted of a crime involving a public contract; (ii) significant concerns about the Subcontractor's integrity are raised based upon an evaluation of the events underlying any other determination; or (iii) an indictment or other allegation that the Subcontractor, a Subcontractor director, officer, principal, or managerial employee, or owner of at least ten percent (10%) interest in the Subcontractor, is involved in a criminal or other unlawful activity. Under no circumstance shall such terminated Subcontractor be entitled to any payment for anticipated lost profit or anticipated overhead on Subcontract Work performed after the date of termination.

I. APPLICABILITY OF PROVISIONS TO LOWER-TIER SUBCONTRACTORS

Each of the foregoing provisions shall be applicable to any further subcontracting of any part of the Work by a Subcontractor to another Subcontractor and, for the purposes of this Article, upon such further subcontracting, the Subcontractor of the next higher tier shall be deemed the Design-Builder. Provided however, any reporting to or submission to MTA C&D, as well as any direction or communication from MTA C&D, shall be done through the Design-Builder.

ARTICLE 3.02 MTA CONSENT REQUIRED FOR ASSIGNMENT

- A. This Contract shall be binding upon MTA and the Design-Builder and their successors and permitted assigns. Except as provided herein or as otherwise approved in advance in writing by MTA C&D, in its sole discretion, neither this Contract nor any interest herein nor any claim hereunder nor any sum or sums that may become due or owing to the Design-Builder as a result of the Design-Builder's performance hereof, shall be voluntarily or involuntarily, directly or indirectly (including through a change in control), sold, assigned, transferred, pledged, mortgaged or otherwise encumbered by the Design-Builder except in connection with any security bond required hereunder.
- B. Subcontracts Assignable to MTA or MTA C&D. Any instrument evidencing any agreement of Design-Builder with any Subcontractor or Vendor shall provide that, pursuant to terms in form and substance satisfactory, the rights and obligations of Design-Builder under such instrument (other than any right to enforce a performance or schedule guarantee for which liquidated damages are provided as a remedy) are assignable to MTA or MTA C&D or their respective successors and assigns, upon MTA's written request in the event of a partial or complete termination of the Contract.
- C. Assignment by the Design-Builder. The Design-Builder may assign its rights to receive payment under this Contract. The Design-Builder's assignment or subcontracting of any of its Work hereunder shall, in the absence of the prior written consent of MTA C&D, be ineffective to relieve the Design-Builder of its responsibility for the Work assigned or subcontracted.
- D. Any action by the Design-Builder which violates the provisions of Paragraph A, above, shall be deemed to be an Event of Default by the Design-Builder and MTA C&D shall have all rights and remedies available to it under law and equity, including termination of the Contract.

- E. In the event of the assignment of monies due or to become due to the Design-Builder under this Contract, MTA C&D may require that Design-Builder to provide MTA C&D with such information, documentation, and authorization as MTA C&D may deem appropriate.

ARTICLE 3.03 TRANSFER OF WORK; ASSIGNMENT OF MTA'S RIGHTS

- A. No provision of the Contract shall in any way be affected by the transfer or any subsequent re-transfer of title to the completed Work or any part thereof between or among the MTA, the MTA Group, and any of their subsidiaries and affiliates. For the purpose of the Contract, no such transfer shall be deemed to have taken place.
- B. Notwithstanding the foregoing, should the MTA from time to time formally assign to any of its subsidiaries or affiliates the MTA's rights under the Contract, then, to the extent of such assignment, such right shall be for the benefit of such affiliate or such subsidiary (as the case may be) which shall, to such extent, have direct rights to causes of action against the Design-Builder under the Contract.

ARTICLE 3.04 INELIGIBLE CONTRACTORS

- A. The Design-Builder represents that neither it, its principals as defined in 2 CFR Part 180.995, nor its Subcontractors:
 - 1. Are presently excluded, disqualified, debarred, suspended, proposed for debarment, declared ineligible to participate, or voluntarily excluded from participation in any federally assisted contract;
 - 2. Have been convicted within the three preceding years of any of the offenses listed in 2 CFR Part 180.800(a) or had a civil judgment rendered against them for one of those offenses within that time period;
 - 3. Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in 2 CFR Part 180.800(a); or
 - 4. Have had one or more public transactions (Federal, State or local) terminated within the preceding three years for cause or default.
- B. The Design-Builder shall comply with 2 CFR Part 180, Subpart C, as supplemented by 2 CFR Part 1200.
- C. If the Design-Builder learns that it, any of its principals, or a Subcontractor at any tier meets any of the criteria in Paragraph A of this Article, it must immediately notify the Project CEO in writing with a copy to the Office of the General Counsel of MTA C&D.
- D. The Design-Builder shall include the requirements in paragraphs A, B and C of this Article in all Subcontracts for \$25,000 or more and shall require its Subcontractors to include these requirements in their subcontracts at all tiers.
- E. The representations in Paragraph A of this Article are material representations of fact relied upon by MTA C&D in entering into the Contract with the Design-Builder.

CHAPTER 4.

PERFORMANCE AND CONTROL OF WORK

ARTICLE 4.01 COORDINATION AND COOPERATION WITH OTHER CONTRACTORS, UTILITIES, AND OTHER PUBLIC AGENCIES

A. COORDINATION WITH OTHER CONTRACTORS

1. MTA C&D and the MTA Group reserve the right at any time to contract for and perform other or additional work on or near the Work covered by the Contract or in or about the Work Site. MTA C&D reserves the right to afford such other contractors and other persons (including personnel of MTA C&D) access to the Work Site at such time and under such conditions as does not unreasonably interfere with the Design-Builder. The exercise of such reserved right shall not relieve the Design-Builder from its liability for risk of loss to the Work or from its responsibility to perform the Work.
2. The Design-Builder shall perform its Work continuously and diligently and shall conduct its Work so as to minimize interference with other contractors' work.
3. The Design-Builder shall cooperate with and coordinate its Work with all other contractors working on the Project or on any work authorized by MTA C&D in writing within the limits of the Work Site or adjacent thereto. MTA C&D shall require each contractor to conduct its work so as not to unreasonably interfere with or hinder the progress or completion of the work being performed by other contractors. The Design-Builder shall advise the Project CEO in writing of agreements pertaining to coordinating the Work with work by other contractors.
4. The Design-Builder shall arrange its Work and shall place, store and dispose of the materials and equipment being used so as not to interfere with the operations of any other contractor within or adjacent to the limits of the Work Site, and shall perform it in proper sequence to that of other authorized contractors. All of the coordination work, and effects of the interfaces, related to the contractors in or near the Work Site shall be at borne by Design-Builder at no cost to MTA C&D.
5. The Design-Builder shall schedule the order of performance of its Work activities in a manner that will minimize interference with the work of other parties.
6. If the Design-Builder considers that its Work has been affected by another contractor, it shall promptly inform the Project CEO in writing within two (2) Days of such occurrence. The Project CEO shall review the situation and if deemed necessary, will implement appropriate corrective action.
7. The Design-Builder, if required by the Contract Documents, shall make connections to materials or equipment furnished, set and/or installed by other contractors or by MTA C&D. No Work connecting to such materials or equipment provided by other contractors or MTA C&D shall be done without giving such other contractors and/or MTA C&D a reasonable length of time to complete their Work and until permission to proceed has been obtained from MTA C&D.

8. As deemed necessary by MTA C&D, monthly, bi-weekly, and/or weekly meetings will be conducted to schedule access, installation, work, storage and staging requirements between the adjacent contractors employed by MTA C&D and the Design-Builder. Meetings shall be attended by a representative of the Design-Builder empowered to commit to the field installation schedule, times, conditions and restrictions placed on work crews, and other such access terms and conditions. Scheduling meetings shall proceed for as long as there is need for joint work access at any facility, building, track area or Work Site. The schedule and/or coordination tasks identified in these meetings will be the responsibility of the Design-Builder and must be accomplished in a timely manner that will accommodate the Project schedule at no additional cost to MTA C&D.
9. The MTA shall impose requirements similar to those set forth in this Article 4.01 in its agreements with other contractors.

B. COOPERATION AND COORDINATION WITH UTILITIES, RAILROADS AND OTHER PUBLIC AGENCIES

1. The Design-Builder shall carry on the Work so that public authorities, public agencies, public departments, Utilities, Railroads, service providers, and their respective contractors may enter on the Work Site to make changes in their structures or to place new structures and connections therewith without interference. The Design-Builder shall have no claim for, and no allowance of any kind will be made, on account of any delay that may be due to or result from such changes, or placing new structures and connections therewith, except as provided in Article 6.07 – EXCUSABLE DELAYS/FORCE MAJEURE. Nothing contained herein shall be construed to hold the Design-Builder responsible for any acts or omissions by such public authorities, public agencies, public departments, Utilities, Railroads, service providers, and their respective contractors.
2. The Design-Builder shall coordinate directly with Utilities with respect to the performance of work and services required from the Utilities in relocating utility interferences as provided by the Contract Documents. The Design-Builder shall incorporate realistic times and durations for Utilities’ activities into the Contract Schedule and demonstrate the adequacy of such times and durations to MTA C&D’s satisfaction. Notwithstanding anything to the contrary stated herein, no act or omission of a Utility or delay in performance by a Utility prior to MTA C&D’s approval of the Contract Schedule shall support a claim by the Design-Builder for Excusable Delay.
3. The Design-Builder shall coordinate directly with Railroads with respect to the performance of work and services required from the Railroads in supporting the Project as provided by the Contract Documents. The Design-Builder shall incorporate realistic times and durations for Railroads’ activities into the Contract Schedule and demonstrate the adequacy of such times and durations to MTA C&D’s satisfaction. Notwithstanding anything to the contrary stated herein, no act or omission of a Railroad or delay in performance by a Railroad prior to MTA C&D’s approval of the Contract Schedule shall support a claim by the Design-Builder for Excusable Delay.

ARTICLE 4.02 PRELIMINARY OCCUPANCY

MTA C&D or another MTA Group entity may at any time during the performance of the Work install furnishings and equipment at the Work Site. Such preliminary occupancy shall in no event be construed as Substantial

Completion or Beneficial Occupancy even where MTA C&D or another MTA Group entity occupies a portion of the Work that had not been contemplated by the parties to be co-occupied during the performance of the Work; however, MTA C&D will be responsible for any resulting damage or loss to any portion of the Work caused by MTA C&D's preliminary occupancy.

ARTICLE 4.03 CONSTRUCTION MEETINGS

The Design-Builder's Project Manager shall attend weekly meetings or other recurring meetings with MTA C&D to review job progress, procurement, extra work claims, safety, quality, fire prevention and detection, job cleanliness and housekeeping, coordination of work with others, and other appropriate items. Additional meetings may be held at the request of the Project CEO or the Design-Builder.

ARTICLE 4.04 DESIGN-BUILDER'S CONSTRUCTION WORK SITE SUPERVISION AND LABOR

- A. The Design-Builder shall employ only competent and skilled supervision and personnel to perform the Work and shall remove from the Work Site any personnel that MTA C&D determines to be unfit or to be acting in violation of any provision of this Contract. The Design-Builder shall include this provision into every first-tier Subcontract, and require that all lower-tier Subcontracts include this provision.
- B. MTA C&D may, at its sole discretion, deny access to the Work Site to any individual, including individuals employed by Subcontractors or Vendors, by written notice to the Design-Builder. In the event an individual is excluded from the Work Site, the Design-Builder shall promptly replace such individual with another who is fully competent and skilled to perform the Work.
- C. The Design-Builder shall prohibit its employees and the employees of its Subcontractors and Vendors from smoking or vaping in any area (at the Work Site and other MTA property) that is designated by the MTA as a non-smoking area in accordance with New York State Public Health Law Article 13E and MTA policy.
- D. Qualification and submission requirements for superintendents, foremen, equipment operators or other personnel related to specific construction activities may be established in the Division 1-General Requirements or elsewhere in this Contract.

ARTICLE 4.05 DESIGN-BUILDER'S MANAGEMENT TEAM

- A. DESIGN-BUILDER'S MANAGEMENT TEAM
 - 1. The Design-Builder's Management Team to be assigned (and remain assigned) to this Project shall have sufficient management resources and ability and the necessary support staff to assure MTA C&D that the Work will be properly coordinated and managed to ensure that the entire Project will be completed on schedule and on budget.
 - 2. At a minimum, the Design-Builder's Management Team shall include the Key Personnel set forth in the Instructions to Proposers.
- B. MANAGEMENT TEAM QUALIFICATIONS AND FUNCTION

1. The Design-Builder shall submit a resume of each member of its Key Personnel, as well as for any other positions requested by MTA C&D, prior to Contract Award for MTA C&D's review and approval. The Design-Builder shall only use those individuals that have been approved by the MTA C&D for those positions. The Design-Builder shall verify and ensure the accuracy of all material facts in all resumes submitted throughout the entire duration of this Project for each member of the Design-Builder's Management Team.
2. The functions of the Design-Builder's Management Team shall include but are not limited to:
 - manage, schedule and coordinate all Work;
 - expedite and assure timely design, review, procurement, fabrication and delivery to the Work Site of all required materials and equipment in accordance with the approved Contract Schedule;
 - prepare and maintain a complete equipment and material list containing all schedule information relative to procurement, fabrication and delivery;
 - coordinate the startup, testing and placing in successful operation of all equipment installation and systems;
 - maintain, produce, and submit all Schedule Submittals, and take any necessary corrective action to maintain the approved schedule;
 - maintain lists of all Submittals showing the status of each item and dates for submission and approvals;
 - prepare and keep current reports concerning the status and progress of the Work including all related data; and
 - ensure implementation of the Quality Management Plan and Health and Safety Plan.
3. The Design-Builder's Management Team shall maintain an office at the Work Site and be available at or near the Work Site at all times during Work Days during execution of the Work. Qualified and approved deputies may stand-in for individuals on a temporary basis, so long as MTA C&D is notified of such temporary status.
4. The Design-Builder shall use those individuals who have been approved by MTA C&D, pursuant to Division 1 – General Requirements, Section 01 31 20, Key Personnel, and additional or replacement individuals approved by MTA C&D, pursuant to Division 1 – General Requirements, Section 01 31 20, Key Personnel for the Design-Builder's Management Team.
5. Requirements for other Design-Builder management personnel are set forth elsewhere in the Contract Documents.

ARTICLE 4.06 NOTIFICATION OF EXTRA WORK SHIFTS

The Design-Builder shall comply with the work hour schedule established for the Project. In the event the Design-Builder intends to work extra shifts, the Design-Builder must notify MTA C&D in writing and obtain MTA C&D's approval at least two (2) Business Days in advance unless the extra work is emergency in nature.

ARTICLE 4.07 SANITATION

At all times during the performance of the Work, the Design-Builder shall provide and maintain clean sanitary facilities for its employees and the employees of its Subcontractors and Vendors as required in Division 1 – General Requirements Section 01 50 00, Temporary Facilities and Utilities.

ARTICLE 4.08 LINES, GRADES AND MONUMENTS

- A. The Design-Builder shall be solely responsible for all surveying, layout and measuring required for performance of the Work. The Design-Builder shall include in its Contract Schedule and advise MTA C&D within a reasonable time in advance of the times and places at which it wishes to do the Work so that its horizontal and vertical control points may be checked by MTA C&D, at MTA C&D's discretion. Any Work done by the Design-Builder without being properly located shall be removed and replaced at the Design-Builder's expense.
- B. The Design-Builder shall carefully preserve all monuments, benchmarks, reference points and stakes. The Design-Builder will be responsible for the costs and expenses of replacement of any such items destroyed by the Design-Builder or any of its Subcontractors or Vendors, and for any associated problems, including loss of time. All surveys shall be performed by a surveyor who is registered in the State of New York, and tied into the USGS coordinate system.
- C. All Design-Builder lines, elevations and grades shall be tied into the primary control system established by MTA C&D. MTA C&D will make available to the Design-Builder field notes or drawings generated in establishing the primary control system for the Design-Builder's review. The Design-Builder shall carefully and accurately lay out all lines, elevations and grades for the Work under the Contract by using equipment and persons satisfactory to MTA C&D. The Design-Builder shall compare carefully all lines and elevations given on drawings with existing lines, elevations and grades and shall review discrepancies, if any, with MTA C&D prior to their use.
- D. If the Design-Builder or any of its Subcontractors or Vendors or any of their representatives or employees move or destroy or render inaccurate any survey control point, such control point shall be replaced by the Design-Builder at the Design-Builder's expense. No separate payment will be made for survey work performed by the Design-Builder.

ARTICLE 4.09 CLEAN-UP AND DISPOSAL OF DEBRIS

- A. The Design-Builder shall, at all times, keep its work areas in a neat, clean and safe condition, as required in Division 1- General Requirements, Section 01 70 10, Waste Management and Cleaning, and the Technical Provisions. Upon completion of any portion of the Work, the Design-Builder shall promptly remove from the work area all its equipment, construction plant, temporary structures and surplus materials not to be used at or near the same location during later stages of the Work.
- B. Upon completion of the Work and prior to Final Payment, the Design-Builder shall, at its expense, dispose of all rubbish, remove all plant, buildings, equipment and materials belonging to the Design-Builder to MTA C&D's satisfaction. The Design-Builder shall leave the premises in a neat, clean and safe condition.
- C. In event of the Design-Builder's failure to comply with the above requirements, MTA C&D may accomplish same and backcharge the Design-Builder accordingly.

ARTICLE 4.10 UTILITIES DURING PERFORMANCE OF WORK

The Design-Builder is responsible for the provision of all electric, gas, water, heat, lighting and other utilities and the costs for such provisions through Final Completion as required in Division 1- General Requirements, Section 01 50 00, Temporary Facilities and Utilities; except with respect to portions of the Work for which an earlier Beneficial Occupancy is taken; and except to the extent expressly provided otherwise in this Contract. With respect to any portion of the Work for which a Beneficial Occupancy is taken prior to Final Completion by the MTA Group, if the Design-Builder is required to perform concurrent Work, including but not limited to testing, the portion of utility costs reasonably allocable to the Design-Builder's Work shall be borne by the Design-Builder. Utilities used during the Work prior to Final Completion are treated as temporary power even if supplied through permanent circuits, lines, pipes or systems.

ARTICLE 4.11 CONFIDENTIAL INFORMATION; APPROVAL FOR PUBLICATION OF REPORTS AND PRESS RELEASES

A. DEFINITIONS FOR PURPOSES OF THIS ARTICLE:

1. The term "Design-Builder" includes the entity entering into this Contract, its principals, members, directors, officers and employees, and shall also be deemed to include its Subcontractors, Suppliers, consultants and agents, as well as their principals, members, directors, officers, employees, agents and consultants.
2. The term "Confidential Information" includes all information furnished to the Design-Builder by or on behalf of MTA C&D or Amtrak or otherwise learned or derived by the Design-Builder about or in connection with this Contract, the Project, or the Work or produced during the Work; or any other MTA Group policies, procedures, operations, data, or information. "Confidential Information" includes, but is not limited to, specifications, drawings, plans, diagrams, sketches, renderings and other technical data and information, as well as all Design Documents, signs, maps, surveys, design calculations, shop drawings, charts, photographs (including "progress photographs") and CADD materials, source code, software and media.

B. CONFIDENTIALITY REQUIREMENTS

1. The Design-Builder and the above-mentioned individuals or entities shall keep confidential all Confidential Information.
2. Confidential Information pertaining to the Project may only be utilized to perform the Work in connection with the Project; shall only be disclosed to and used by individuals who have a "need to know" the contents of such Confidential Information; and must be appropriately safeguarded by the Design-Builder from disclosure to anyone who is not so authorized by MTA C&D to have access thereto.
3. Neither the Design-Builder nor any of the above-mentioned individuals or entities may sell, transfer, disclose, display or otherwise make available to anyone any part of such Confidential Information without the prior written consent of MTA C&D.
4. The Design-Builder and the above-mentioned individuals or entities shall not, and hereby represent and warrant that it/they will not (nor will it/they through an agent or third party), unless expressly agreed to in writing by MTA C&D:

- a. send, ship, mail, deliver, email or otherwise transmit in or by any means whatsoever (whether manually, by machine, by facsimile or other electronic or digital technology or by other technology or method) any Confidential Information in any form (and if in electronic form, for any such Confidential Information to be transmitted to or reside in a computer or electronic device located) outside of the United States; or
 - b. enter into or issue an agreement, subcontract or other instrument to do so.
5. The Design-Builder shall require each of its employees, agents, consultants, Subcontractors and Suppliers working on the Project, or who may be exposed to such Confidential Information, to execute the Confidentiality and Non-Disclosure Agreements set forth in the Contract Documents. The Design-Builder shall collect, and maintain a file with all Confidentiality and Non-Disclosure Agreements at all times, as well as a list of all individuals and organizations whose Confidentiality and Non-Disclosure Agreements are in the file. The file and the list shall be subject to review by, and delivery to, MTA C&D at any time. Failure to execute any such Confidentiality and Non-Disclosure Agreement, or to deliver such agreement when requested by MTA C&D, may be deemed a material breach of the Contract.
6. In addition, the Design-Builder agrees to cooperate fully with MTA C&D and to provide any assistance necessary to ensure the confidentiality of the Confidential Information.
7. At any time during the term of this Contract or after, the Design-Builder shall forthwith deliver to MTA C&D any and all media containing any Confidential Information as MTA C&D shall request. The confidentiality obligations as set forth in this Article shall continue until specifically released by MTA C&D in writing, except where release thereof has been finally ordered by a court of competent jurisdiction.
8. The Design-Builder and the above-mentioned individuals or entities hereby represent and warrant that at Final Completion of the Project or upon its termination, any Confidential Information that is to be retained by it/them for archival/audit/legal purposes shall be: certified as such and identified in writing to MTA C&D, shall be maintained in a secure facility, and that it/they shall maintain care, custody and control over any and all media containing any Confidential Information while in such secure facility and until any and all media containing the Confidential Information are either returned to MTA C&D or destroyed as provided in paragraph 9, below.
9. Except as provided in paragraph 8 above, at the conclusion of the Project or upon its termination, unless otherwise instructed in writing by MTA C&D, the Design-Builder and the above-mentioned individuals or entities shall destroy its/their copies of any and all media containing all Confidential Information such that recognition or reconstruction of the Confidential Information is precluded. Unless otherwise permitted by MTA C&D: cross-cut shredding of hardcopy items; complete physical destruction of diskettes, floppies, CDs, DVDs, and any other recordable media; deleting of electronic items by permanent deletion or non-retrievable/irreversible placement in delete-overwrite status; are MTA C&D's required methods of such destruction with respect to documents or materials containing Confidential Information.

10. In the event the Design-Builder or any of the above-mentioned individuals or entities learns or believes that Confidential Information has been released or believes that Confidential Information is about to be released, they shall notify MTA C&D immediately. It/they shall promptly inform MTA C&D if it/they become aware of any violation of, or potential violation of, these Confidentiality requirements.
11. The Design-Builder will include this Article 4.11 and all confidentiality requirements in all Subcontracts, purchase orders, consulting agreements, or other agreements that involve the disclosure of Confidential Information for purposes of the Work; obligating all contracting parties to adhere to all requirements of the Design-Builder herein. This Article shall survive Final Completion of the Contract and shall remain a continuing obligation.

C. APPROVAL FOR PUBLICATION OF REPORTS

The Design-Builder and the above-mentioned individuals or entities shall neither publish nor circulate in any form or media any Confidential Information; or any reports, studies, analysis, recommendations, or any other materials of whatsoever nature relating to the Contract, the Work or the Project, whether or not prepared by the Design-Builder or any of the above-mentioned individuals or entities; without first obtaining the written approval of MTA C&D.

D. PRESS RELEASES

To the fullest extent permitted by law, the Design-Builder and the above-mentioned individuals or entities agree(s) that it/they will not issue any news release, make any announcement, or release any information, to the public, press or any publication or outlet, which release or information is wholly or partly related to its/their work under this Contract, without first obtaining the written approval of MTA C&D. The Design-Builder and the above-mentioned individuals or entities further agree(s) that it/they will not make speeches, take any photographs or videos, engage in public appearances, publish articles or otherwise publicize its Work under this Contract without the prior written approval of MTA C&D.

E. VIOLATIONS OF THIS ARTICLE

Breach of any of the foregoing provisions may be deemed by MTA C&D to be a material breach of the Contract. It is understood and agreed that in the event of any such breach by the Design-Builder of these provisions, damages or termination will not be an adequate remedy and MTA C&D shall, in addition, be entitled to injunctive relief to restrain any such breach or threatened breach.

F. REQUIREMENTS PERTAINING TO SECURITY-SENSITIVE INFORMATION AND PROTECTED DATA

If this Contract contains or identifies security-sensitive information or protected data or such information is disclosed to the Design-Builder, the Design-Builder understands and agrees that nothing contained in this Article shall be deemed to supersede any more stringent or more protective inconsistent requirements or provisions contained elsewhere in the Contract Documents, or in other applicable requirements, pertaining to such security-sensitive information. In the event of a conflict between provisions or requirements contained in this Article and those elsewhere in the Contract Documents pertaining to such security-sensitive information or to any Confidential Information, the more stringent or protective provision or requirement shall apply.

G. OTHER REQUIREMENTS

In addition to the above, the Design-Builder must also refer to and comply with any provisions of the Contract Documents addressing information security and document security. The provisions of this Article are in addition to and not in lieu of any other provisions relating to confidentiality or publicity elsewhere in this Contract.

CHAPTER 5.

SAFETY, HEALTH AND ENVIRONMENT

ARTICLE 5.01 SAFE AND PROPER CONDUCT OF DESIGN-BUILDER PERSONNEL

While on MTA Group property or otherwise performing the Work, the Design-Builder, its employees, and employees of the Design-Builder's Subcontractors shall conduct themselves in a safe and businesslike manner, conducive to a safe and efficient workplace.

ARTICLE 5.02 SAFETY AND HEALTH

- A. The Design-Builder shall be solely responsible for conducting operations under this Contract to avoid risk of harm to the health and safety of the public and to persons (including but not limited to all personnel) and property at or near the Work Site, and for inspecting and monitoring all equipment, materials and work practices to ensure compliance with its obligations under this Contract. Such measures shall include, but not be limited to, providing protection barriers and barricades, signs, navigation lights and buoys where marine work may be involved, and any additional measures required to comply with this Contract and applicable Laws.
- B. The Design-Builder's responsibility for safety shall apply continuously twenty-four (24) hours per day, every day, during the term of this Contract; the Design-Builder's responsibility for safety shall not be limited to normal working hours.
- C. The Design-Builder shall be solely responsible for developing and implementing a Health and Safety Plan (HASP) pursuant to the terms of this Contract. The Design-Builder's HASP shall, at a minimum, conform and comply with:
 - 1. all Laws governing safety and health in the workplace; and
 - 2. all applicable requirements of the Division 1-General Requirements and Technical Provisions.
- D. Irrespective of the issuance of the Notice to Proceed, physical Work on a Work site shall not commence until the Design-Builder's HASP is approved by MTA C&D in writing. The Design-Builder may, however, request permission from MTA C&D to commence a defined portion of its mobilization activities at a Work site while its HASP is being reviewed by MTA C&D; and shall only commence such Work in accordance with an express written approval from MTA C&D. In most cases such express approval shall be contingent upon the Design-Builder having an approved safety plan and an approved safety supervisor relating to such Work. The Design-Builder shall submit any proposed change to its HASP to MTA C&D for review and approval. Such change shall not be effective until the Design-Builder receives MTA C&D approval for same.
- E. To the fullest extent permitted by Law, the Design-Builder assumes all responsibility and liability with respect to the risks under this Contract in connection with all matters regarding the safety and health of its employees and the employees of the Design-Builder's Subcontractors and Vendors.
- F. The Design-Builder's failure to correct any Unsafe Condition or unsafe act by its employees, Subcontractors or Vendors may, at the sole discretion of MTA C&D, be grounds for an order by

MTA C&D to stop the affected Work or operations until the unsafe act or condition is corrected to MTA C&D's satisfaction and at the Design-Builder's expense.

- G. If the unsafe act or condition continues despite notice and reasonable opportunity to affect a resolution satisfactory to MTA C&D, MTA C&D may, at its sole discretion, correct the unsafe act or condition at the Design-Builder's expense or terminate this Contract pursuant to Chapter 11 – DESIGN-BUILDER'S DEFAULT.
- H. The Design-Builder shall assign to each Work Site(s) at least one (or more, as necessary to comply with the terms of this Article 5.02) safety coordinator(s) acceptable to MTA C&D in accordance with the Division 1-General Requirements, Section 01 35 10, Construction Safety Requirements. Such safety coordinator(s) shall be physically present at each Work site, shall have authority to correct unsafe acts and Unsafe Conditions caused or known by Design-Builder, its employees, and employees of the Design-Builder's Subcontractors, or Vendors, and shall participate in periodic safety meetings with MTA C&D. The Design-Builder shall instruct its personnel on the requirements of the Design-Builder's APP HASP and coordinate with Subcontractors and other MTA contractors active at the Work Site on safety matters required for the Work.
- I. The Design-Builder shall establish and maintain a security program consistent with the requirements of Division 1-General Requirements, Section 01 35 50, Security Procedures, and the Technical Provisions, and shall prepare and submit the Submittals required from the Design-Builder therein.

ARTICLE 5.03 DRUG AND ALCOHOL CERTIFICATIONS

- A. The Design-Builder certifies that it has read the MTA Construction & Development Company Drug and Alcohol Policy for Construction Contractors and Subcontractors (the "MTA C&D Drug and Alcohol Policy"), attached hereto as Appendix 5.03, and that it will comply with the terms of this policy during the duration of the Contract with the MTA. The Drug and Alcohol Testing Program shall be included in the Design-Builder's Safety and Health Plan. The Design-Builder shall bear the cost of the drug and alcohol testing, including labor costs.
- B. The Design-Builder understands that compliance with the MTA C&D Drug and Alcohol Policy is required for all construction contractors and subcontractors working on MTA C&D contracts, irrespective of whether the Contract is federally funded.
- C. For FRA funded contracts, the Design-Builder certifies that it will comply with all requirements of 49 C.F.R. Parts 40 and 219 (Control of Alcohol and Drug Use) during the term of the Contract and that it will submit a Part 219 compliance plan to the FRA for approval within thirty (30) days of receiving an MTA Notice of Award.
- D. For FTA funded contracts, in accordance with the requirements of 49 C.F.R. 655.83, the Design-Builder certifies that it has established and implemented an alcohol misuse and anti-drug use program that complies with the requirements of 49 C.F.R. Parts 40 and 655 (Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations) and that it will comply with all requirements of these Parts during the term of the Contract.

ARTICLE 5.04 ENVIRONMENTAL REQUIREMENTS

- A. Throughout performance of the Work, the Design-Builder shall conduct all operations in such a way as to minimize impact upon the natural environment and prevent any spread or release of contaminated or hazardous substances.
- B. The Design-Builder shall:
1. comply with all Laws governing environmental requirements and conduct the Work in accordance with the requirements of this Contract, including complying with permit requirements and Project plans and approvals;
 2. provide all documentation required by all levels of governing authority and MTA C&D concerning environmental requirements;
 3. provide and maintain effective planning and field control measures for the following activities:
 - wastewater discharges to land, surface water, or groundwater;
 - extraction/supply of water;
 - storm water management;
 - spill prevention and response;
 - erosion and sedimentation control;
 - air emissions and dust control;
 - noise and vibration control;
 - waste and hazardous waste management;
 - work area restoration, including revegetation; and
 - maintenance of traffic and pedestrians.

These measures include but are not limited to: obtaining certifications; conducting requisite analyses and monitoring of such activities as required by the Contract, permit conditions or other applicable law; using appropriate equipment; and proceeding in accordance with permit requirements.

4. develop and maintain a written environmental plan (“Environmental Management Plan”), which provides the Design-Builder’s plan to perform Work in compliance with all acts and procedures and all other requirements the Design-Builder must follow to comply with all Laws, regulations, permits and other requirements of applicable Law and this Contract. These requirements include but are not limited to those specified in the Division 1-General Requirements, and the Technical Provisions. The Design-Builder shall have sole responsibility for implementing and enforcing its Environmental Management Plan;
5. MTA C&D’s review of the Environmental Management Plan shall not relieve the Design-Builder of its obligations under this Contract or as imposed by Law, and the Design-Builder shall be solely responsible for the adequacy and effectiveness of its Environmental Management Plan;
6. comply with all access restrictions, including prohibitions on access to certain areas on or adjacent to the Work Site and require its personnel and those of its Subcontractors and

Vendors to comply with all signage and flagging related to such restricted areas. Restricted areas may include, but are not limited to: environmental mitigation study areas and cultural/historical/archaeological sites;

7. not proceed with any renovation or demolition Work until: (i) asbestos surveys have been completed and notifications have been delivered to the appropriate regulatory agencies, in accordance with any Technical Provisions relating to Asbestos Abatement and other applicable Laws and requirements; and (ii) MTA C&D specifically authorizes such work to proceed. Should asbestos-containing materials, in addition to those identified in completed surveys, be uncovered during performance of the Work, the provisions of Subparagraph 8 below shall apply;
8. immediately suspend Work activities in any area where any of the following are discovered: contaminated soil indicators (such as odor or appearance); unknown containers, piping, underground storage tanks or similar structures; or any other materials that are reasonably suspected to be toxic or hazardous. The Design-Builder shall then immediately notify MTA C&D of the discovery. MTA C&D will determine the area where Work activities are to be suspended and confirm the area in writing. Activity in such area shall only resume upon MTA C&D's written approval;
9. immediately suspend Work activities in any area where cultural resources or artifacts, items, or materials with archaeological or historical value are discovered, and immediately notify MTA C&D of the discovery. The Design-Builder shall ensure that no artifacts, items, or materials shall be disturbed or taken from the location of discovery. Neither the Design-Builder nor any of its Subcontractors or Vendors shall have property rights to such artifacts, items, or materials, which shall be secured and guarded until turned over to MTA C&D or the appropriate authorities. The Design-Builder shall also require that its personnel and those of its Subcontractors and Vendors comply with this subclause and respect all historic and archaeological sites in the area Work Site. Activity in such area shall only resume upon MTA C&D's written approval;
10. manage, handle, store, transport and dispose of all hazardous and non-hazardous waste generated by the Design-Builder during its Work in accordance with Laws (including the Resource Conservation and Recovery Act (RCRA) regulations and state special and hazardous waste programs). This managing, storing and disposing includes, but is not limited to: waste minimization; hazardous waste generator registration; hazardous materials inventory with Safety Data Sheets (SDS) for each hazardous material on site; employee training; hazardous waste spill management and reporting; proper storage of hazardous waste; equipment decontamination; preparation of manifests; onsite and offsite transport of hazardous waste; and selection and use of offsite final disposal facilities; and
11. fulfill its obligations under Article 10.03 – INDEMNIFICATION and Article 10.07 – ENVIRONMENTAL OBLIGATION AND INDEMNIFICATION which apply to any liability arising in connection with or incidental to the Design-Builder's performance or failure to perform as provided in Chapter 5 – SAFETY, HEALTH AND ENVIRONMENT.

ARTICLE 5.05 SITE VISITS BY HEALTH, SAFETY OR ENVIRONMENTAL OVERSIGHT AGENCIES

- A. The Design-Builder shall immediately notify MTA C&D upon receipt of notification of an inspection or other site visit (or where there is no prior notification, of the occurrence of an actual site visit) by any local, state or federal agency or body with responsibility for health, safety and/or environmental compliance, monitoring, oversight or other similar function (including, but not limited to, OSHA, USEPA, NYSDEC, NYSDOL and NYCDEP).
- B. The Design-Builder shall provide MTA C&D with copies of all citations, violations, reports, correspondence and other documents generated in connection with an actual or prospective site visit.

CHAPTER 6.

PROVISIONS RELATING TO TIME

ARTICLE 6.01 TIME FOR COMMENCEMENT AND COMPLETION OF WORK

The Design-Builder shall begin the Work on the date specified in the NTP, and shall thereafter perform the Work continuously and diligently while also complying with any Restraints and applicable restrictions. The Design-Builder shall complete the Work required to achieve each Milestone within the time specified in the Design-Build Agreement and shall complete all Work by the Contract Completion Date. Milestones, including the Contract Completion Date, may be duly adjusted in accordance with this Contract.

ARTICLE 6.02 DESIGN-BUILDER'S SCHEDULES

A. REQUIRED DESIGN-BUILDER'S SCHEDULES

1. The scheduling of all design, Submittals, procurement, and construction in accordance with the Milestones is the responsibility of the Design-Builder. The Design-Builder shall prepare and submit schedules for the MTA C&D's acceptance or approval in accordance with this Article 6.02 and the Division 1-General Requirements, Section 01 32 10. MTA C&D's approval of any of the Schedule Submittals is not a waiver of any requirement of the Contract and does not constitute adoption by MTA C&D of the Contract Schedules. The Design-Builder is responsible for correcting any error, omission or deficiency in the Schedule Submittals and the Contract Schedules.
2. MTA C&D's review, acceptance or approval of the Design-Builder's Schedule Submittals shall not release or relieve the Design-Builder from its obligation to fully and properly complete the Work, or any other duty, responsibility or liability imposed on it under this Contract, including, but not limited to the obligation to complete the Work in accordance with the Milestones. No such review, acceptance or approval shall constitute an agreement, concurrence or acquiescence on the part of the MTA C&D that the Design-Builder will be able to proceed with or complete the Project in accordance with the Contract Schedules contained in the reviewed, accepted or approved document, nor be deemed to constitute notice to MTA C&D as required by law or by Article 1.05 – NOTICES.
3. Neither the inclusion of changes into a Schedule Submittal by the Design-Builder, nor the acceptance or approval of or acquiescence in such change by MTA C&D shall be construed as constituting notice of a claim or an extension of the Contract Time under Article 6.05 – EXTENSIONS OF TIME.
4. The Design-Builder shall document any and all delays and shall provide detailed information to MTA C&D including but not limited to the following: the events or conditions responsible for the delay; the party or parties responsible for the delay; activities in the Current Contract Schedule affected by the delay; and the magnitude of the delay to the Design-Builder for achieving any Milestone. The Design-Builder shall submit documentation of any delays to MTA C&D on a monthly basis with its updates to the Contract Schedule.

B. USE OF SCHEDULE SUBMITTALS

MTA C&D shall use the Current Contract Schedule as a basis for evaluating the Design-Builder's performance and for reviewing Applications for Progress Payments.

C. REMEDIES FOR DELAY IN SUBMITTING OR FAILURE TO SUBMIT REQUIRED SCHEDULE SUBMITTALS

The Design-Builder acknowledges and agrees that timely submission of Schedule Submittals is essential to ensure the satisfactory prosecution and timely completion of the Work. If the Design-Builder fails to submit timely the required Schedule Submittals, MTA C&D may, in its discretion, and in addition to all other actions permitted under this Contract, direct the Design-Builder to take appropriate remedial measures, and/or withhold or delay all or part of any Progress Payments until the Design-Builder complies. Failure of the Design-Builder to submit Schedule Submittals in a timely manner shall be a basis for determination by MTA C&D that the Design-Builder is not prosecuting the Work with the diligence necessary to ensure completion within the Milestones and shall be an Event of Default under Chapter 11 – DESIGN-BUILDER'S DEFAULT.

D. DELAY RECOVERY

If, in the opinion of MTA C&D, the Design-Builder's progress falls behind the Baseline Contract Schedule or if the Current Contract Schedule demonstrates a potential Non-Excusable Delay that may affect timely completion of Work to achieve one or more Milestones, then the Design-Builder shall, without additional charge to MTA C&D, take any and all steps necessary to recover the delay to meet the Milestones ("Recovery Efforts"). Recovery Efforts that may be imposed by MTA C&D may include but are not limited to, requiring the Design-Builder to increase the number of shifts, increase the number of employees, initiate or increase overtime operations, increase days of work in the work week, increase construction plant production, order or reorder equipment or materials, or any combination of or all of the foregoing.

MTA C&D may also require the Design-Builder to submit for approval one or more recovery schedules that provide specific actions to be instituted and that demonstrate how the Design-Builder will recover lost schedule time and meet the Current Contract Schedule and the Milestones ("Recovery Schedules"). The Design-Builder shall provide such Recovery Schedules within ten (10) Work Days after MTA C&D's request for same. If MTA C&D believes that the Design-Builder's proposed Recovery Efforts are inadequate, then, as part of its review of the proposed Recovery Schedule, MTA C&D may identify other or additional specific Recovery Efforts to be undertaken by the Design-Builder. Once a Recovery Schedule is approved, the Design-Builder shall perform in accordance with that Recovery Schedule without additional cost to MTA C&D and incorporate such Recovery Schedule in the next Schedule Submittal. Recovery Efforts to meet the Milestones will not be considered justification for a Change or be treated as acceleration to the extent the delay to be recovered is a Non-Excusable Delay. To the extent Recovery Efforts required by MTA C&D result in actual recovery from Excusable Delay for which a time extension was otherwise due, the recovery may be treated as an acceleration and may be compensable. The Design-Builder shall cooperate with MTA C&D in identifying and implementing all reasonable mitigation efforts to overcome all delays in an efficient and cost-effective manner.

ARTICLE 6.03 SUBSTANTIAL COMPLETION AND FINAL COMPLETION

A. SUBSTANTIAL COMPLETION

1. “Substantial Completion” is the level of completion of all or a portion (Project Element) of the Work at which, in MTA C&D’s judgment: (a) the Design-Builder has completed the Work in accordance with the Contract Documents (except for Punch List items), with the requirements of any permits, licenses and certificates of compliance or occupancy required by Laws or by any governmental authority, and in accordance with the requirements of Amtrak; (b) there are no material or substantial variations in the Work from the Contract requirements; (c) the Work is fit for its intended purpose; and (d) where required, the Work has been substantially tested and commissioned by the Design-Builder, or by others as required, and has passed all testing and commissioning requirements. Upon Substantial Completion, MTA C&D shall issue a Certificate of Substantial Completion; however, the issuance of such Certificate shall not relieve the Design-Builder from its obligation to complete the Work. See Article 7.08 – SUBSTANTIAL COMPLETION PAYMENT.
2. The Design-Builder may submit a Notice to MTA C&D requesting that MTA C&D inspect the Work (or a portion of the Work) to determine whether Substantial Completion has been achieved. The Design-Builder shall only submit such Notice when it believes, in good faith, that it has achieved Substantial Completion for all or a portion of the Work. Upon such request, MTA C&D shall respond to the Design-Builder either by (a) issuing a Certificate of Substantial Completion, or (b) providing Notice to the Design-Builder that Substantial Completion has not yet been achieved. Notwithstanding the foregoing, MTA C&D is not obligated to perform a detailed inspection pursuant to such request or to identify all incomplete items. MTA C&D may make a determination of Substantial Completion in the absence of a request by the Design-Builder. MTA C&D has sole discretion in deciding whether to inspect and determine whether Substantial Completion of any portion of the Work has been achieved, prior to Substantial Completion of all Work.
3. The Design-Builder cannot achieve Substantial Completion until all deliverables including, but not limited to, training, spare parts, manuals, warranties, and all other documentation requirements of the Contract Documents have been completed or delivered, as applicable, and are acceptable to MTA C&D.
4. If MTA C&D determines that the Work is not capable of serving its intended purpose as required by the Contract or if any nonconforming Work, defects, omissions or incomplete items results in an unacceptable Punch List, MTA C&D will provide written notice to the Design-Builder that Substantial Completion has been denied and the reasons therefor. The status of the Work involved shall be considered to be unaffected by the Design-Builder’s request for initial inspection, and the Design-Builder shall continue to progress the Work in accordance with the Contract.
5. The Design-Builder shall notify MTA C&D in writing when it believes, in good faith, that it has corrected all nonconforming Work, defects, omissions or failures to complete noted by MTA C&D, and MTA C&D shall arrange for a follow-up inspection of the Work to determine whether or not the Design-Builder has achieved Substantial Completion.
6. If MTA C&D, in its sole discretion, elects not to take Beneficial Occupancy of the Work (or portions of the Work) upon Substantial Completion, the Risk of Loss as provided in Chapter 10 – DESIGN-BUILDER’S LIABILITY AND INSURANCE shall remain on the Design-Builder until the earlier of the following events: (a) MTA C&D takes Beneficial

Occupancy of the Work, or (b) issuance of the Certificate of Final Completion of the Work. In any case, the provisions of Article 10.04 – RISK OF LOSS TO THE WORK shall apply.

7. When issuing the Certificate of Substantial Completion, MTA C&D also shall issue a list of minor, incomplete, or unsatisfactory items that do not materially impair the usefulness of the Work or designated part of the Work for its intended purpose and that is developed by MTA C&D (“Punch List”). The Punch List also may contain other items, in MTA C&D’s discretion, such as Work that cannot be performed until MTA C&D or a third party performs Work that is not the Design-Builder’s responsibility. MTA C&D may add items of unsatisfactory Work to the Punch List at any time, and failure to include any item on a Punch List does not constitute a waiver of MTA C&D’s right to enforce the Contract Documents with respect to all aspects of the Work.
8. Upon Substantial Completion, the Design-Builder shall commence demobilization of its presence at the Work Site, and shall remove its tools, materials and equipment from the Work Site, except for personnel, tools, materials and equipment needed to complete the Punch List items, as approved by MTA C&D.

B. FINAL COMPLETION

1. “Final Completion” means completion of all Work (including all Punch List items) in accordance with the Contract Documents. The Design-Builder shall complete expeditiously and diligently all the Punch List items to achieve Final Completion. When the Design-Builder reasonably believes that it has reached Final Completion it shall provide written Notice to MTA C&D. MTA C&D shall conduct a Final Completion inspection. Final Completion shall occur when, in the opinion of MTA C&D, the Work, including all items contained in the Punch List issued with the Certificate of Substantial Completion, is complete in all respects. Upon Final Completion, MTA C&D shall issue a Certificate of Final Completion to the Design-Builder. The Certificate of Final Completion may identify specific outstanding claims of either MTA C&D or the Design-Builder that shall survive the Certificate of Final Completion. See Article 7.09 – FINAL COMPLETION PAYMENT.
2. If MTA C&D determines that the Work is unsatisfactory for any reason including due to nonconforming Work, defects, omissions or incomplete items, MTA C&D will notify the Design-Builder in writing that Final Completion has been denied and the reasons therefor. The status of the Work involved shall be considered to be unaffected by the Design-Builder’s request for inspection and the Design-Builder shall continue to progress the Work in accordance with the Contract.
3. The Design-Builder shall notify MTA C&D in writing when it has corrected all nonconforming Work, defects, omissions or failures to complete as noted by MTA C&D, and such Work is ready for inspection, and MTA C&D shall arrange for a follow-up inspection of the Work to determine whether or not the Design-Builder has achieved Final Completion.
4. In an Emergency, or if the Design-Builder fails to complete the Punch List items, MTA C&D, at its option, may complete the Punch List items, either with its own staff or with the staff of others. If MTA C&D completes the Punch List items, or any portion thereof, then the Design-Builder shall pay for MTA C&D’s costs for completing such Punch List

items, and such costs will be deducted from the Final Payment. Notwithstanding the foregoing, however, if MTA C&D completes the Punch List items because of an Emergency that is not the fault of the Design-Builder or its Subcontractors or Vendors, then the amount deducted from the Final Payment shall be based on MTA C&D's reasonable estimate of what it would have cost the Design-Builder to complete the Punch List items instead of MTA C&D's full costs for completing such Punch List items. In either case, if such costs exceed the amount that is due to the Design-Builder for the Final Payment, then the Design-Builder shall immediately pay such excess to MTA C&D upon demand.

5. Once achieved, Final Completion shall be final and conclusive except for:

- a. defects not readily ascertainable by MTA C&D;
- b. actual or constructive fraud; gross mistakes amounting to fraud;
- c. other errors which the Design-Builder knew or should have known about; or
- d. MTA C&D's rights under any Warranty or guarantee.

C. BENEFICIAL OCCUPANCY

The MTA may, in its sole discretion, determine that a discrete portion of the Work is sufficiently complete and fit for its intended purpose prior to Substantial Completion, and MTA C&D shall have the right to take exclusive or shared possession of or use such discrete portion of the Work ("Beneficial Occupancy"). Prior to Beneficial Occupancy, MTA C&D shall send a Notice to the Design-Builder of MTA C&D's intent to take Beneficial Occupancy and furnish the Design-Builder an itemized list of Work items remaining to be performed or corrected on such discrete portion of the Work. Failure to include any particular item on such itemized list shall not relieve the Design-Builder of responsibility for completion of the Work.

ARTICLE 6.04 FAILURE TO COMPLETE WORK ON TIME; LIQUIDATED DAMAGES

A. TIME IS OF THE ESSENCE

Time is of the essence in this Contract. The Design-Builder acknowledges and agrees that it is firmly obligated to meet the Milestones.

B. LIQUIDATED DAMAGES

1. If the Design-Builder fails to meet a Milestone, it shall be responsible for and shall pay to MTA C&D Liquidated Damages as set forth in the Design-Build Agreement. The Design-Builder shall pay the Liquidated Damages due to MTA C&D for each Day of unexcused delay in meeting each Milestone for which a daily Liquidated Damage amount is established.
2. In addition, if the Design-Builder fails to return a track affected by a scheduled outage by the end times of the available times periods, the Design-Builder shall also be subject to Liquidated Damages as set forth in the Contract Documents. If the Design-Builder demonstrates a consistent disregard for the scheduled track outages by not returning the

track back in a timely manner, MTA C&D may reduce the available track time provided to the Design-Builder.

3. Liquidated Damages for failure to complete the Work and Liquidated Damages for failure to return track to MTA C&D shall be cumulative.
4. The parties hereby acknowledge and agree that the MTA Group will sustain losses and damages if the Design-Builder fails to meet the Milestones, that the precise amount of such losses and damages is not readily ascertainable, that the Liquidated Damages represent a reasonable approximation by the parties at Award Date of such loss and damage and are not conspicuously disproportionate to the foreseeable losses and damages, and that the amounts set forth for Liquidated Damages are neither penal in nature nor constitute a forfeiture.

C. EFFECT OF SUBSTANTIAL COMPLETION ON LIQUIDATED DAMAGES

Upon Substantial Completion, Liquidated Damages shall cease to accrue, however, the Design-Builder shall be liable for any and all actual damages (subject to any damage limitations set forth in the Design-Build Agreement) incurred by MTA C&D after the date of actual Substantial Completion as a result of the Design-Builder's failure to complete all Work, including Punch List items, by the Final Completion Milestone.

D. DEDUCTING FOR DAMAGES

MTA C&D shall have the right to deduct Liquidated Damages owed by the Design-Builder, from any monies due, or which may become due, to the Design-Builder under this Contract or under other contracts with the MTA Group. If the amount of Liquidated Damages owed by the Design-Builder exceeds the amount remaining to be paid to the Design-Builder, then the Design-Builder shall pay the difference immediately upon demand by MTA C&D.

ARTICLE 6.05 EXTENSIONS OF TIME

The Design-Builder's right to any time extension or relief for Excusable Delay must arise under another Article of this Contract. The requirements of this Article are in addition to and not in lieu of the requirements of any other applicable Article. This Article does not preclude or affect the adjustment of Milestones or decreases in Contract Price under other clauses of this Contract.

A. PREREQUISITES TO EXTENSION OF TIME

The Design-Builder shall have no claim for damages of any kind, or any extension of the Milestones or increase to the Contract Price, on account of any delay, interruption or suspension of the Work, or any portion thereof (delays, interruptions, and suspension shall be referred to as "Delays") due to whatever cause, unless all of the following prerequisites are met:

1. the cause of the Delay is entirely beyond the control of the Design-Builder, the Subcontractors, and the Vendors and does not arise due to a Design-Builder Fault Event;
2. the Delay is Excusable in accordance with Article 6.07 – EXCUSABLE DELAYS/FORCE MAJEURE;

3. the cause of the Delay arises after the Proposal Date and neither was nor could have been anticipated by the Design-Builder before the Proposal Date and does not arise out of a risk assigned to or assumed by the Design-Builder under the Contract Documents;
4. the Delay unavoidably extends the execution of the Work beyond one or more Milestones, based on the Current Contract Schedule revised as stated in Article 6.06 – TIME IMPACT ANALYSIS.
5. the Design-Builder has met all requirements for submission and approval of the updated Current Contract Schedule;
6. the Design-Builder submits a Time Impact Analysis that demonstrates that the Delay adversely affects the critical path of the revised Current Contract Schedule and causes completion of the Work for one or more Contract Milestones to be delayed;
7. the Delay cannot be avoided or mitigated by the exercise of all reasonable precautions, efforts and measures by the Design-Builder, its Subcontractors, or Vendors;
8. the request for a time extension is not based on any claim that the Milestones, as originally established in the Contract, were inadequate to perform the Work;
9. is another clause in this Contract that provides for the extension of time as a remedy for the Delay or event; and
10. the Design-Builder provides timely Notice of Claim for a time extension and all documentation, as required below, and complies with the remainder of this Article.

B. SCHEDULE ANALYSIS PRINCIPLES

The following principles, as well as the principles set forth in the Division 1-General Requirements, Section 01 32 10 Contract Schedule Requirements, shall be applied to any schedule analyses of delay (including the Time Impact Analysis):

1. Adjustment or removal of any float suppression techniques, excessive or underestimated durations, or unreasonable logic used in the Baseline Contract Schedule or Current Contract Schedule shall be a prerequisite for any entitlement to an extension of any of the Milestones. This adjustment or removal by the MTA shall not be precluded by any previous approval or use of the Contract Schedules.
2. Concurrent Delay
 - a. A “Concurrent Delay” is the period of delay in which one critical path delay overlaps with another, in delaying the same Milestone.
 - b. If the Design-Builder is delayed during any period of time by two or more Concurrent Excusable Delays for which an extension may be due under this Article, then the Design-Builder shall only be entitled to one extension for the actual period of time completion of each Milestone will unavoidably be delayed and shall not be entitled to a separate extension for each one of the causes.

- c. To the extent an otherwise Excusable Delay is Concurrent with a Non-Excusable Delay, the resulting delay shall be Excusable Delay. To the extent the delay impact duration of one Concurrent Delay exceeds that of the other, the difference in durations is not a Concurrent Delay, and shall be considered on its own merits.
- 3. An “Early Completion Schedule” is one in which the Design-Builder schedules completion of the Work, or specified portions thereof, earlier than the Milestones specified in the Contract with MTA C&D’s prior written approval. The approval of any Early Completion Schedule by the MTA C&D shall not have the effect of changing the Milestones and does not result in the removal or use of float or in the Design-Builder’s claim to possession of the float or in decreasing float available to MTA C&D, even though such approved Early Completion Schedule may show less float. The Design-Builder shall not be entitled to an adjustment in time or damages for Delay to an Early Completion Schedule, unless the Delay meets all requirements of this Article 6.05. Delay is measured from the Milestones (as they may be contractually revised by Modification) and not from any date set forth in the Early Completion Schedule. The Milestones shall be revised only by a Modification.

C. NOTICE OF CLAIM FOR EXTENSION

As a condition precedent to the granting of any extension of time, the Design-Builder shall give Notice to MTA C&D within five (5) Days after the time when the Design-Builder knows or should have known of any cause that might under reasonably foreseeable circumstances result in Delay for which it may claim an extension of time (including those causes for which MTA C&D itself is responsible or of which MTA C&D has or should have knowledge). The Design-Builder must specifically state in such Notice that an extension is or may be claimed; identify the cause; and describe, as fully as practicable at that time, the nature and expected duration of the Delay and its effect on the completion of that part of the Work identified in such Notice.

D. FAILURE TO GIVE NOTICE

The required timely Notice, as set forth in Paragraph C immediately above, shall be of the essence for the Design-Builder’s obligations hereunder since: (1) the possible necessity for an extension of time may materially alter the scheduling plans and other actions of MTA C&D (2) with sufficient advance notice, MTA C&D might elect to attempt to mitigate the effect of a Delay for which an extension of time might be claimed; and (3) mere oral notice may cause dispute as to the existence or substance thereof. The failure of the Design-Builder to give Notice as required herein shall be conclusive waiver of any right that the Design-Builder may otherwise have for an extension of time for any adjustment of Milestones, for adjustment of the Contract Price for such Delay, or for adjustment of the Contract Price for an acceleration to recover from the Delay.

E. RECORDS TO SUPPORT CLAIM FOR EXTENSION

In order to be granted changes to the Milestones and/or adjustments of the Contract Price, the Design-Builder must affirmatively demonstrate to MTA C&D the extension or adjustment due, with adequate supporting records and documentation. The Design-Builder shall maintain adequate records and documentation in anticipation of the need to support any such claim.

F. REASONABLE EFFORTS TO RE-PLAN

The records supporting a claim for a change in a Milestone shall be based on the Current Contract Schedule. Such records shall show that the Design-Builder has taken all reasonable efforts, including planning, scheduling, rescheduling, and using all float time available for the activities being delayed, to avoid or mitigate the Delay. Actual Delays in activities which do not affect the critical path in the schedule shall not be the basis for an extension of time.

G. INCORPORATION INTO CONTRACT SCHEDULES

Upon adoption of a Modification due to a Change or Delay, the Design-Builder shall incorporate the Modification into the Current Contract Schedule and submit such revised Schedule to MTA C&D for approval.

H. DESIGN-BUILDER CLAIM FOR EXTENSION OF TIME

If the Design-Builder disagrees with a decision of MTA C&D regarding the time impact of a Change or Delay, the Design-Builder shall proceed in accordance with Article 12.01 – CLAIMS.

ARTICLE 6.06 TIME IMPACT ANALYSIS

As part of any Change Proposal or Claim Proposal in which an adjustment in Milestones is sought, the Design-Builder must submit to MTA C&D a written Time Impact Analysis, which, using the Current Contract Schedule, demonstrates the impact of each Change or Delay to the Milestones and to the Current Contract Schedule. If the Design-Builder does not submit a Time Impact Analysis for a specific Change or Delay in a timely manner, the Design-Builder will be deemed to have waived its rights to challenge the MTA C&D's determination of the time and cost due to the Design-Builder. The Time Impact Analysis shall:

- A. use the Current Contract Schedule as the basis for assessment of the time impacts of Changes, Delays, and other Contract events. If there are preceding Delays not yet included in the Current Contract Schedule, the Time Impact Analysis will first provide a revised Current Contract Schedule that clearly identifies any preceding Delays and shows their impact on the Current Contract Schedule. The revised Current Contract Schedule shall be the schedule used as the basis for demonstrating the time impact of the subject Change, Delay, or Contract event. The approved Current Contract Schedule shall remain in effect for all other purposes. All Time Impact Analyses shall be prepared by the Design-Builder in accordance with the requirements of Division 1-General Requirements, Section 01 32 10 Contract Schedule Requirements, and shall meet the additional requirements of Article 6.05 - EXTENSIONS OF TIME;
- B. include a narrative explaining the causal event of the Change or Delay and the effects of that event on the schedule activities and a fragnet(s) demonstrating the impact of that event on the Current Contract Schedule. A fragnet is an excerpt from the revised Current Contract Schedule into which a sequence of new activities and/or activity revisions has been inserted that reflects the effect of the Change or Delay event on the Current Contract Schedule's activities, their durations and their interrelationships; and
- C. demonstrate estimated time impact based on: (1) events of Change or Delay; (2) date of the Change, Delay, causal event, or the Unilateral Modification given to the Design-Builder; (3) status of construction as of that date, and (4) revisions to activities and activity durations unavoidably caused by the Change or Delay. Durations and dates of unaffected activities used in the analysis shall be those included in the Current Contract Schedule in effect at the time the Change or Delay was encountered, as adjusted for preceding Delays as stated above. The Design-Builder shall use

Primavera Project Planner's "target schedule" feature to illustrate the differences in the revised Current Contract Schedule before and after the Change or Delay.

ARTICLE 6.07 EXCUSABLE DELAYS/FORCE MAJEURE

A. An "Excusable Delay," is a delay that:

1. either: (a) results from an event as described in Article 6.07.C.; or (b) is either an Act of God or an event not otherwise specifically described in Article 6.07.C., and to be entirely due to some cause beyond the control and without the fault or negligence of the Design-Builder, the Subcontractors, and Vendors;
2. is not otherwise a Design-Builder Fault Event;
3. had not occurred or was not foreseeable at the Award Date, including by the Design-Builder conducting due diligence in accordance with Good Industry Practice; and
4. meets the prerequisites set forth in Article 6.05 A, above.

Any delay that is not an Excusable Delay shall be a Non-Excusable Delay.

B. If there is an Excusable Delay and MTA C&D determines that the Design-Builder meets all of the requirements for an extension of time set forth in Article 6.05 – EXTENSIONS OF TIME, then MTA C&D shall grant a time extension by changing the relevant Milestone(s) in a Modification. For Non-Compensable Excusable Delays, such time extension, if granted, shall be the Design-Builder's sole and exclusive remedy.

C. Excusable Delays may be caused by force majeure events. Force majeure events include but are not limited to: delays due to Acts of God, war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing, acts of the federal government, acts of the State or any political subdivision thereof, acts of municipalities, acts of other public agencies and authorities, acts of public service corporations, acts of others contracting with the MTA Group over whose acts the Design-Builder has no control, fires, floods, epidemics; strikes (except those caused by improper acts or omissions of the Design-Builder, the Subcontractors or Vendors) and extraordinary delays in delivery of materials caused by strikes, lockouts, wrecks, or freight embargoes, or excessive inclement weather (based on data from the National Oceanic and Atmospheric Administration).

For purpose of the foregoing:

1. "epidemics" shall be solely comprised of either (a) global pandemics or (b) epidemics in the New York Metropolitan Area, in either case recognized by the World Health Organization or the Centers for Disease Control and Prevention to arise from communicable diseases;
2. COVID-19 shall not qualify as an Excusable Delay except with respect to any effects of or responses to COVID-19 that had not occurred or were not foreseeable at the Award Date, which effects or responses may qualify as an Excusable Delay under Article 6.07.A.1(a), a Change in Law under Article 8.10.B., or a Change made under Article 8.11 – Changes to Standards, Specifications and Codes; and

3. acts of the federal government, acts of the State or any political subdivision thereof, acts of municipalities, acts of other public agencies and authorities, acts of public service corporations shall exclude acts which result in a Change in Law, for which purposes ARTICLE 8.10 – CHANGES IN LAW shall apply.
- D. An “Act of God” as used in this Article means a cataclysmic phenomenon of nature beyond the power of the Design-Builder to foresee or make preparation in defense of.
- E. Delays caused by agencies of the State of New York, agencies of the City of New York, agencies of the federal government, or any contractor of any of the foregoing; or public service force account contractors (including, but not limited to, Railroads and Utilities) shall be included as Excusable Delays if all other requirements are met.
- F. The Project CEO and the Design-Builder’s Project Manager will attempt to reach agreement on any potential Excusable Delay and resulting time extension. If they are unable to agree, then MTA C&D shall make a determination and if the Design-Builder disagrees with such determination, then its only recourse is to file a timely Notice of Change or Notice of Claim, as appropriate.

ARTICLE 6.08 COMPENSABLE DELAYS

- A. Except as otherwise specifically provided for in this ARTICLE, the Design-Builder agrees to make no claim for compensation or damages for delay of any kind in the performance of this Contract on behalf of itself, Subcontractors or Vendors whether occasioned by any act or omission of MTA C&D or any other entity within the MTA Group or any of their representatives (whether it is an Excusable Delay within the meaning of Article 6.05 - Extensions of Time or otherwise) and the Design-Builder agrees that any such claim shall be compensated for solely by an extension of time to complete performance of the Work as provided in Article 6.05. In this regard, the Design-Builder alone hereby specifically assumes the risk of such delays, including without limitation: delays in responding to Submittals; or the failure to render determinations, approvals, replies, inspections or tests of the Work, in a timely manner. Notwithstanding any provision of Paragraph B below, Design-Builder shall not be entitled to compensation or damages for delay of any kind relating to the delay of an intermediate Milestone (if such date(s) are provided for in the Contract Documents).
- B. A Delay that entitles the Design-Builder to an adjustment in Contract Price is called a “Compensable Delay.” A Delay that is not a Compensable Delay is a “Non-Compensable Delay.” To be considered as a Compensable Delay, a Delay must first meet all prerequisites for extension or increase in time set forth in Article 6.05 - “EXTENSIONS OF TIME”, including the requirement that the delay be an Excusable Delay and then meet all requirements of this Article 6.08. Only Delays of the types set forth in Paragraph C below are Compensable Delays.
- C. A Compensable Delay is an Excusable Delay that actually and necessarily delays the Design-Builder in meeting the Substantial Completion Milestone and is caused by: (a) MTA C&D’s failure to provide access to the Work Site, issuance of a Modification, or issuance of a Stop Work Order pursuant to ARTICLE 6.10 - Stop Work Order (Suspension of Work); or (b) other causes expressly identified as compensable in the Design-Build Agreement. If the Design-Builder demonstrates all elements of a Compensable Delay, then the Design-Builder shall be entitled to Impact Costs, if any, as set forth and defined in Article 8.04 C., “Impact Costs for Compensable Delays.” Failure or delay, except as expressly provided above and in the Design-Build Agreement, by MTA C&D, a Railroad or a Utility in providing a service such as, but not limited to, access and protection

personnel, flagging staff, inspectors, diversions or work trains shall not constitute a failure to provide access to the Work Site and is not compensable except to the extent provided in the Design-Build Agreement.

- D. Impact Costs shall only be allowed for periods of Compensable Delays which are not concurrent with any other non-Excusable Delays, or other Excusable Delays which do not give rise to Impact Costs.
- E. Acceptance by the Design-Builder of any payments made by MTA C&D in connection with this Article shall serve as a release to the MTA Group from all claims and liability to the Design-Builder arising out of such delay unless specifically reserved in writing with MTA C&D's consent.
- F. The Design-Builder shall have no right to rescind or terminate this Contract, and Design-Builder shall have no cause of action under any theory of quasi-contract or quantum meruit by reason of any delay, obstruction, or interference of any kind or duration whatsoever, and whether or not compensable hereunder.
- G. Should any other contractor performing Work on the Project sustain any damage or extra costs as a result of any act, omission or delay of the Design-Builder hereunder, the Design-Builder shall defend and indemnify the Indemnified Parties and hold the Indemnified Parties harmless against any claims or judgments resulting from the acts or omissions of the Design-Builder hereunder. The Design-Builder shall have no claim against MTA C&D or the MTA Group for damages or additional cost as a result of any act, omission or delay of any Utility or governmental entity other than the MTA Group, except (i) to the extent such act, omission or delay qualifies as a change under Article 8.10 – CHANGES IN LAWS, and (ii) to the extent provided in the Design-Build Agreement.

ARTICLE 6.09 RIGHT TO SUSPEND WORK AND CANCEL CONTRACT

If at any time during the prosecution of the Work MTA C&D shall determine that the Work is not being performed according to the Contract, or for the convenience of MTA C&D, then MTA C&D may proceed in any of the following ways:

- A. in accordance with Article 6.10, temporarily suspend the execution of the Work by the Design-Builder, and MTA C&D may then proceed with the Work under its own direction in such manner as will accord with the Contract Documents and be for the best interests of MTA C&D;
- B. in accordance with Articles 8.08 and 11.04, terminate the Design-Builder's Contract with or without default while it is in progress, and thereupon proceed with the Work by a new contract negotiated or publicly advertised, by the use of its own forces, by calling upon the Surety to complete the Work in accordance with the Contract Documents (in the case of termination for Design-Builder default) or by a combination of any such methods; or
- C. direct the Design-Builder to complete the Work under MTA C&D's direction in such a manner as will accord with the Contract Documents and be for the interests of MTA C&D.

The foregoing is a non-exclusive list of remedies available to MTA C&D, and MTA C&D's exercise of any such remedies does not foreclose or waive other remedies.

ARTICLE 6.10 STOP WORK ORDER (SUSPENSION OF WORK)

- A. MTA C&D may, at any time, by Notice to the Design-Builder, require the Design-Builder to stop or suspend all, or any part, of the Work, commencing upon receipt of such Notice. Any such Notice shall be specifically identified as a “Stop Work Order” issued pursuant to this Article 6.10. Thereafter, MTA C&D shall either:
1. cancel the Stop Work Order, or
 2. terminate the portion of the Work covered by such Stop Work Order as provided in Article 8.08 – TERMINATION FOR CONVENIENCE BY MTA C&D.
- B. If a Stop Work Order is cancelled by MTA C&D, the Design-Builder shall resume Work promptly.
- C. The Design-Builder’s entitlement to adjustments in Milestones and Contract Price as a result of a written Stop Work Order shall be limited to the following:
1. an adjustment in the Milestones, in accordance with all requirements set forth in Article 6.05 - EXTENSIONS OF TIME; and
 2. an Equitable Adjustment in price under Article 8.04C; except that no profit mark-up will be allowable on, or as part of, any such price adjustment.
- D. Notwithstanding the foregoing, in the event the Project CEO determines that the Stop Work Order was necessary due to (a) the Design-Builder’s Defective or incorrect Work, or (b) an Unsafe Condition or any other reason caused by or due to the fault or omission of the Design-Builder, the Subcontractors and/or the Vendors, then the Design-Builder shall not be entitled to an adjustment to the Milestones or the Contract Price as a result of the issuance of this Stop Work Order. A Design-Builder, Subcontractor and/or Vendor–caused suspension may be considered an Event of Default.
- E. MTA C&D may, at any time, issue a Change Proposal Request requesting a proposal from the Design-Builder for any Stop Work Order or potential Stop Work Order. The provisions of Article 8.03 - CHANGE PROCEDURE; MODIFICATIONS, shall apply to any such Change Proposal Request, provided that the Change Proposal and any adjustments eventually adopted shall be limited as set forth in this Article. If the parties are unable to reach agreement regarding an adjustment due to the Contract pursuant to this Article, then the provisions of Article 12.01 - CLAIMS shall apply.
- F. This Article shall not be construed as making compensable any otherwise Non-Compensable Excusable Delay, even if such Non-Compensable Excusable Delay is the subject of written correspondence or directives from MTA C&D.

CHAPTER 7.

PRICE AND PAYMENTS

ARTICLE 7.01 PRICE TO INCLUDE

- A. The Design-Builder shall perform the Work identified in the Contract Documents in accordance with the true intent and meaning of the Contract Documents without any further expense of any nature whatsoever to MTA C&D other than the consideration named in this Contract.
- B. The MTA shall pay and the Design-Builder shall accept the Final Contract Price as full compensation for all costs and expenses of completing the Work in accordance with the Contract, including, but not limited to: all labor and material required to be furnished under this Contract; all supervision, all overhead, expenses, fees and profits, including the cost of providing storage yard or facilities; all risks and obligations in connection with the Contract; costs for complying with safety and health requirements; any applicable fees or taxes; and all expenses due to any unforeseen conditions, obstacles, and difficulties, including labor, material, and/or equipment cost increases, encountered in the prosecution of the Work.
- C. Any part of the Work that is not specifically noted in the Contract but is required to achieve Final Completion shall be deemed to have been included by the Design-Builder in its Proposal Contract Amount and shall be performed as part of the Work, and no additional payment shall be made for such part of the Work. The Design-Builder agrees that it shall furnish and provide for the price set forth in the Design-Builder's Proposal, all the necessary supervision, labor, services, materials, equipment, tools, utilities, incidentals, and all other items of whatever nature to complete the Work and to achieve Final Completion in accordance with the Contract.

ARTICLE 7.02 DETAILED COST BREAKDOWN

- A. Not later than thirty (30) Days from Notice to Proceed the Design-Builder shall submit a "Detailed Cost Breakdown" of its Work. This Detailed Cost Breakdown shall allocate the Contract Price and appropriate detailed line item breakdown, as provided below. The items in the "Detailed Cost Breakdown" shall be called "Detailed Cost Breakdown Items" or "DCB Items." Once approved by MTA C&D for content, format and method of measurement for each DCB Item, the Detailed Cost Breakdown and the progress measured against it, will form the basis for Payment Requisitions and the determination of Progress Payments. The term "Detailed Cost Breakdown" shall refer to allocation and assignment of Contract Payment Item extended prices, not costs.
- B. The Detailed Cost Breakdown and the DCB Items shall meet the following requirements:
 - 1. The sum of all DCB Item prices shall be equal to the Contract Price and shall be coded, grouped and subtotaled by the Proposal Item Numbers identified in this Contract.
 - 2. The prices of those DCB Item which constitute a Contract Payment Item shall add to the Payment Item extended price. The Contract Payment Item extended price shall be realistically apportioned among the associated DCB Items based on the value and quantity of Work included in the DCB Item. The practice of front end loading (assigning a disproportionately high portion of a Payment Item extended price to early activities) is not permitted.

3. The price of each Contract Payment Item shall be distributed and assigned to one or more DCB Items; however, a DCB Item shall not be assigned price from more than one Contract Payment Item.
 4. Each DCB Item shall include its proportionate share of Payment Item overhead, profit, insurance, and all other expenses involved (excluding items which are included in the mobilization pay item). Activities which are indirect, overhead, management, supervisory or site support costs, or home office expenses, unless specifically listed as a Payment Item in the Contract shall not be DCB Items and shall not have a price allocated to them, since they are not paid independent of Contract Payment Items.
 5. The DCB shall be consistent with, but may be more detailed than, the Proposal Item Breakdown provided by the Design-Builder in its Proposal, unless otherwise expressly approved by MTA C&D. For certainty, MTA C&D shall not be bound by the Proposal Item Breakdown for purposes of determining whether to approve the Detailed Cost Breakdown or for any other purpose under this Contract.
- C. The Design-Builder's Detailed Cost Breakdown shall be reviewed and approved by MTA C&D. The Detailed Cost Breakdown will be revised by the Design-Builder and resubmitted for approval from time to time with the Design-Builder's Schedule Submittals, as the Work and Payment Items may be revised by Modification.

ARTICLE 7.03 PROMPT PAYMENT

- A. All payments will be made pursuant to Section 2880 of the Public Authorities Law (the "Prompt Payment Law") and the MTA's implementing rules, officially called the Statement of Rules and Regulations With Respect To Prompt Payment (the "Prompt Payment Statement"). Any terms used in this Chapter that are not defined herein, shall have the meanings ascribed in the Prompt Payment Statement. The Prompt Payment Statement is codified in Volume 21 of the New York Code of Rules and Regulations, Part 1002.
- B. In accordance with the Prompt Payment Statement, all payments will be made within thirty (30) days, excluding legal holidays, of the "Receipt of Invoice", subject to paragraphs D and E below. The "Receipt of Invoice" shall mean the date the completed Application for Payment, together with all necessary and required supporting documentation, is received at the "Designated Payment Office." Provided however that in the case of Substantial Completion and Final Completion Payments, the Receipt of Invoice date shall be the later of the foregoing receipt or the issuance by MTA C&D of the Certificate of Substantial Completion or Certificate of Final Completion, respectively. (That is, the time for payment for Substantial and Final Completion will not start to run any earlier than the occurrence of the Substantial or Final Completion as evidenced by the issuance of the respective Certificate.)
- C. The "Designated Payment Office" shall mean the office of the Project's Budget Manager, located at the address set forth in the Notice of Award for the Project Office and which may be changed at any time upon written notification to the Design-Builder.
- D. The MTA reserves the right to conduct an inspection or audit of any Application for Mobilization Cost Payment, any Application for Progress Payment, the Application for Substantial Completion Payment and the Application for Final Payment to verify that the amount to be paid is in accordance with the provisions of the Contract. The thirty day payment period will be tolled from

the date upon which MTA C&D provides Notice to the Design-Builder that an inspection or audit will be conducted, to the date of completion of that audit or inspection, but in no event will it be tolled for greater than forty-five (45) Days for this purpose.

- E. Notwithstanding anything to the contrary in the Contract, the Receipt of Invoice date shall be extended as stated below, whenever the audit or inspection reveals a defect or deficiency in delivered work, materials or services, or suspected improprieties of any kind, which might include, but is not limited to, a determination by MTA C&D that the Design-Builder is in breach of a material term of this Contract; or if the Application for Payment is rejected and returned under Article 7.04 F. below. In any such case, the respective Receipt of Invoice date shall be extended to the date that acceptable work, goods or services are delivered or provided, or the date that the impropriety is resolved, or the date that a corrected Application for Payment is submitted, as appropriate.
- F. Interest for late payments hereunder shall be payable in accordance with the Prompt Payment Statement.

ARTICLE 7.04 PAYMENTS – GENERAL REQUIREMENTS

- A. Payments include Mobilization Payments, Progress Payments, Substantial Completion Payment and Final Payment.
- B. Prior to determination of the Final Contract Price, payments will be made based upon the portion of the Contract Price which is payable under this Chapter.
- C. All payments are subject to all retainage, withholding, set-off, Liquidated Damages, or other deductions provided for in this Contract. Adjustments will be made on the Payment Requisition for any amounts previously paid, and for any retainage, withholding, set-off, Liquidated Damages or other deductions.
 - 1. To the extent the Design-Builder is aware of such adjustments, they shall be included in the Payment Requisition when submitted by the Design-Builder, however, MTA C&D reserves the right to unilaterally adjust the amount payable at any time.
 - 2. All unilateral MTA C&D adjustments, as well as adjustments on Pay Requisitions signed by the Design-Builder but expressly included in the Design-Builder's exceptions list under Article 7.05 C.2., below, are subject to the Design-Builder's right to file a timely Notice of Change under Article 8.02 - CHANGES or a timely Notice of Claim under Article 12.01 – CLAIMS, as appropriate. The date of adjustment on a Payment Requisition shall not result in restarting the time for filing the required Notice, when the time period for filing had previously commenced. Adjustments on Pay Requisitions signed by the Design-Builder which do not appear on the associated contemporaneous Design-Builder's exceptions list are accepted by the Design-Builder.
 - 3. Provided however that if an adjustment made by MTA C&D is the first notification to the Design-Builder that MTA C&D will assert the entitlement upon which the adjustment is based, the time within which the Design-Builder must file Notice shall commence upon the Design-Builder receiving notice of the adjustment.

- D. As a prerequisite to each payment, the Design-Builder shall have furnished to MTA C&D all documents and submissions required under this Contract for the previous month or such other period as is covered by the Application for Payment (unless specifically waived by MTA C&D). These documents and submissions include but are not limited to:
1. Schedule Submittals and any other scheduled required by the Contract Documents;
 2. Submittals Register;
 3. Design Documents and Other Submittals;
 4. As-Built Drawings prepared to date;
 5. Certification of Compliance with New York Public Authorities Law Section 1269
 6. DBE or MBE/WBE/SDVOB participation forms, as applicable;
 7. labor forces plan;
 8. tool box safety meeting minutes;
 9. certified payrolls;
 10. monthly progress report;
 11. procurement report;
 12. equipment schedule;
 13. daily shift reports;
 14. progress photographs; and
 15. Subcontractors' and Vendors' lien releases and waivers of liens.
- E. Submission of a Quality Management Plan setting forth the Design-Builder's policy and procedures for quality assurance that is acceptable to MTA C&D is a condition precedent to payment.
- F. MTA C&D reserves the right to reject and return any Application for Payment if it finds that any of the information and/or documents furnished in connection with the Application for Payment by the Design-Builder to be incomplete or incorrect, that the Work effort completed is not commensurate with the requested payment, that the Application for Payment is not in accordance with the terms of the Contract, that all necessary submissions for the time period have not been received from the Design-Builder or that all required supporting information has not been provided. In such case, the Design-Builder shall be notified of the reason for the rejection, and the Application for Payment shall be considered as not having been received by MTA C&D until corrected and properly re-submitted. MTA C&D reserves the right to withhold part, or all of, any payment for failure by the Design-Builder to furnish documents and submissions required by the Contract.

- G. If MTA C&D finds that the Application for Payment is acceptable, either as submitted or as adjusted, then the MTA shall pay the amount requested in the Application for Payment as adjusted. The Payment shall be in accordance with Article 7.03 – PROMPT PAYMENT.
- H. Any Approval of a Payment Requisition or Application for Payment is for the sole purpose of facilitating Progress Payments and is not to be relied on for any other purpose.
- I. No Application for Payment or Payment Requisition (other than for Final Payment) will be submitted by the Design-Builder or processed by the MTA unless the payment amount is at least ten thousand dollars (\$10,000).
- J. Any Payment made is subject to audit and (whether or not an audit is conducted) to subsequent correction and adjustment by the MTA should it be determined that an error was made, that any payment made was contrary to the Contract or Law, or that any information submitted by the Design-Builder was incorrect.

ARTICLE 7.05 THE APPLICATION FOR PAYMENT

- A. For each payment, the Design-Builder shall submit an original of an “Application for Payment” to the Project CEO.
- B. Each Application for Payment is a package consisting of:
 - 1. A Payment Cover Sheet and Summary Invoice which shall be on a form provided by MTA C&D and shall:
 - a. Include the following information:
 - (1) company name;
 - (2) Application for Payment number;
 - (3) date;
 - (4) amount of current payment requested;
 - (5) contract number; and
 - (6) Summary description of services and date(s) performed.
 - b. And include the following statement signed by the Design-Builder’s Authorized Representative:

“I certify that this Application for Payment, (including the Payment Cover sheet and Summary Invoice, Payment Requisition and all supporting documents) represents an accurate and complete measure of all the Work performed to the date indicated, and that the amount of Work performed; the labor, materials, and permanent equipment installed; and the materials not yet incorporated in the Work; and the payment requested, all as presented in this Application for Payment, are correct and in full compliance with the terms of the Contract and all authorized Modifications thereto.”

2. The Payment Requisition shall be signed by both the Design-Builder and the Project CEO in accordance with the Payment Requisition Process set forth below. The Payment Requisition shall be on a form provided by MTA C&D and shall consist of:
 - a. A computer generated tabular list of the Detailed Cost Breakdown Items, with a column showing allocated total price for each item; with additional Detailed Cost Breakdown Items to reflect current fully executed Modifications such that the amounts allocated to each Modification are clearly identifiable; and with subtotals showing how the DCB Items add to the Contract Payment Items; and
 - b. With an additional column showing the current earned value for each DCB Item agreed to during the joint inspection of the Work and Monthly Progress Meeting. The DCB earned values shall be totaled to compute a current price for all completed Work.
 - c. The amount of the current payment requested by the Design-Builder shall be calculated on the Payment Requisition by adjusting the price for all completed work (c. above) by subtracting retainage and all other adjustments, listed individually, and then by subtracting the total of previous payments.
3. The required supporting information and documents as set forth below and as required in the other provisions of this Chapter 7. The following items, covering the Work for which payment is being requested, will be submitted with all Applications for Payment:
 - a. certified payrolls;
 - b. monthly progress report;
 - c. procurement report;
 - d. equipment schedule;
 - e. progress photographs; and
 - f. Subcontractors' and Vendors' lien releases and waivers of liens in the form provided in the accompanying Appendix 7.05 to these General Provisions.

C. Payment Requisition Procedure:

1. Prior to the end of each month and also prior to the submission of Applications for the Substantial Completion Payment and Final Payment, the Design-Builder shall submit to the Project CEO a Draft Payment Requisition with the Design-Builder's proposed Detailed Cost Breakdown with current earned values, both as of the end of the month (or date of Substantial or Final Completion), and the other adjustments and lines filled in with the Design-Builder's proposed amounts.
2. Within two (2) Business Days after receipt of the Design-Builder's Draft Payment Requisition the Project CEO and the Design-Builder's Project Manager, or their designees, shall attempt to reach agreement on the earned value of each DCB Item, quantities complete and adjustments to current price. If they are able to agree they shall each sign

the agreed-to Payment requisition. If they are unable to agree, the Payment Requisition shall reflect the earned values, quantities and adjustments determined by the Project CEO, who shall sign the Payment Requisition as stated above. In such case the Design-Builder shall provide a separate list from the Payment Requisition, listing the specific Detailed Cost Breakdown Items and adjustments, with which it disagrees, identifying its proposed quantities and earned values for those items. When there is an exceptions list, the Design-Builder shall sign the Payment Requisition with the notation “agreed as to current quantities, earned values and adjustments except as noted in exception list dated [insert date].” However, irrespective of the foregoing, MTA C&D shall not process the Final Payment Application when there is an outstanding Design-Builder’s exceptions list. The signed Payment Requisition shall be included in the Design-Builder’s Application for Payment.

3. Payment for Detailed Cost Breakdown Items corresponding to (or including) a Unit Price Payment Item shall be based on the measured number of units. Payment for Detailed Cost Breakdown Items corresponding to Lump Sum Payment Items shall be on a percentage of completion basis. Payment for time and materials, not-to-exceed or allowance Detailed Cost Breakdown Items shall be based on approved Time and Material Records, determined in accordance with Article 8.04 - INTERIM TIME AND MATERIALS RECORD KEEPING AND EQUITABLE ADJUSTMENTS BASED ON TIME AND MATERIALS Paragraph G. Adjustment will be made on the Payment Requisition for any amounts previously paid and for any retainage, withholding, set-off, liquidated damages or other deductions

ARTICLE 7.06 MOBILIZATION PAYMENT

A. MOBILIZATION COSTS PAYMENT

The term “Mobilization Costs” shall mean the costs incurred for mobilization and set-up of temporary site facilities in accordance with this Article 7.06, under the Lump Sum Mobilization Payment Item included in the Detailed Cost Breakdown. Any payment due under this Article, as with all other payment, is subject to retainage, withholding, set-off, liquidated damages or other deductions set forth elsewhere in this Contract. Payment of the Mobilization Payment Item will be as follows:

1. A “Mobilization Costs Progress Payment” of the amount of Mobilization Costs, as described in B. below, actually incurred as of the date of the Payment Requisition, less amounts previously paid, as documented in the Application for Payment, up to but not to exceed 95% of the Lump Sum Mobilization Payment Item.
2. The remainder of the Lump Sum Mobilization Payment Item upon 50% completion of the Work.

B. PAYABLE MOBILIZATION COSTS

Mobilization Costs payable in Mobilization Cost Progress Payments include only the following:

1. Fair market value (“FMV”) of owned or purchased construction plant and equipment at the Work Site, including office equipment and furniture for field offices. The Design-Builder shall establish FMV for Design-Builder-owned equipment or plant not purchased

specifically for the Contract by obtaining and submitting an appraisal by an independent equipment appraisal firm. In the alternative to an appraisal, FMV for Design-Builder owned equipment or plant not purchased specifically for the contract, may, at the Design-Builder's request and in MTA C&D's discretion, be established by the Design-Builder through current open market price sheets published by one or more independent auction houses for the same model and age piece of equipment or plant, equipped in the same manner. The FMV for Design-Builder equipment or plant purchased specifically for the contract shall be established by the invoiced cost. Equipment or plant acquired from related business entities (corporate/company subsidiaries or affiliates, joint venture partners, etc.) shall be considered as Design-Builder-owned equipment for purposes of Mobilization Cost Progress Payments. Provided however, if MTA C&D disagrees with the claimed FMV or invoiced cost, the Mobilization Cost Progress Payment shall be based on the fair market value as determined by the MTA. For any equipment or plant for which there is a lien, security interest or encumbrance (such as a filed UCC-1), the amount payable hereunder shall be the fair market value or invoiced cost less the amount of such encumbrance. Lease and rental costs are not payable as part of Mobilization Cost Progress Payments.

2. The cost of transportation of construction plant and equipment to the Work Site, and unloading and assembly of such plant and equipment at the Work Site.
3. The cost of establishing the Design-Builder's and MTA C&D's Field Offices, any other temporary offices required by the Contract, the construction of temporary buildings and facilities at the Work Site, and at approved nearby or adjacent construction yards. Acquisition costs of furniture, computers and other equipment used in field offices and temporary facilities, if claimed in a Mobilization Cost Progress Payment, shall be included in and subject to item 1 above.
4. The actual paid premium for performance and payment bond based on actual cost incurred as supported by both paid receipts from the Surety and the Design-Builder's cancelled checks (copies of both sides), provided that the premium has not been included in any other pay item other than the Mobilization Pay Item, as evidenced by the Design-Builder's Detailed Cost Breakdown.

The cost principles set forth in Article 8.04 – EQUITABLE ADJUSTMENTS IN PRICE shall be applied in determining the Mobilization Costs Progress Payment, except as stated otherwise in 1 above.

C. PROCEDURE FOR SUBMITTING PAYMENT APPLICATION FOR MOBILIZATION COSTS

1. The Design-Builder shall include its request for payment of Mobilization Cost Progress Payments or other Mobilization Pay Item Payments in its regular Payment Requisition and include the supporting documentation within its regular Application for Payment package. Applications for Mobilization Progress Payments may be made at the beginning of each month after Notice to Proceed. The Mobilization Activities shall be identified as Detailed Cost Breakdown Items on the Design-Builder's Schedule Submissions. Any Application for Payment which requests payment of a Mobilization Cost Progress Payment shall include the following supporting documentation:
 - a. statement of accounts for actual expenditures of Mobilization Costs; and

- b. purchase receipts, invoice, bills of sale, ownership certifications or registrations, showing that the Design-Builder has acquired construction plant, construction equipment; and materials and supplies to be incorporated into temporary facilities. Materials, supplies and temporary facilities shall be free from all liens and encumbrances. With respect to plant or equipment upon which there is a security interest, lien or encumbrance, any document establishing the security interest, encumbrance, or the UCC –1 filing, and other documents evidencing the amount of the security interest and the secured party.
 - c. Receipted bills, certified copies of payrolls, and freight bills relating to transportation costs, loading and unloading, and installation of equipment, plant or temporary facilities.
 - d. other documents evidencing that the Design-Builder has expended the Mobilization Costs claimed, including records required for Interim Time and Materials record keeping under Article 8.04 G.
- 2. MTA C&D will review any Mobilization Costs claimed in a regular Application for Payment and approve their payment if it finds that the indicated mobilization efforts completed are commensurate with the requested payment, that all necessary submissions for the time period have been received from the Design-Builder, and that all other Contract requirements and prerequisites to payment have been met.
 - 3. For a Mobilization Payment, the Receipt of Invoice shall mean the date the Application for Payment, together with all necessary and required supporting documentation, is received at the Designated Payment Office.

D. MTA C&D PERMISSION REQUIRED FOR REMOVAL OF EQUIPMENT AND TEMPORARY FACILITIES

The Design-Builder shall not remove any plant or equipment and shall not dismantle any structures or facilities prepared or erected for the prosecution of the Work, whether paid under the Mobilization Costs Payment Item or not, prior to the completion of the Work or that portion of the Work to which their use pertains, without prior written permission of MTA C&D.

E. NO PROMISE TO PAY ALL COSTS TO MOBILIZE

The Lump Sum Mobilization Payment Item has been established to provide the Design-Builder with reimbursement for a substantial portion of its costs to mobilize. MTA C&D does not guarantee reimbursement of all of the Design-Builder's mobilization costs.

ARTICLE 7.07 PROGRESS PAYMENTS / MEASUREMENT OF PAYMENT

Subject to the provisions of the Contract Documents, monthly Progress Payments will be made to the Design-Builder for all Work performed in accordance with the Contract Documents. Each Application for Progress Payment for the immediately preceding month shall be prepared by the Design-Builder and submitted to MTA C&D for approval by the fifth (5th) day of each calendar month. Each Application for Progress Payment shall be for payment for the Work completed by the end of the preceding month.

A. SUBJECT OF PROGRESS PAYMENTS

The following items shall be the subject of Progress Payments:

1. Labor and Materials. The reasonable value of the services performed, including materials incorporated in the Work that have not been paid pursuant to any previous Application for Progress Payment or Application for Mobilization Costs. See Division 1-General Requirements, Section 01 20 00 for details on value calculations, as well as Article 7.02-DETAILED COST BREAKDOWN and Article 7.05 – THE APPLICATION FOR PAYMENT Paragraph C.
2. Not-Installed Materials. The reasonable value of material purchased and delivered and specially fabricated for inclusion in the Work but not yet incorporated into the Work. Such material and/or equipment must have been delivered to the Work Site or otherwise identified to the Contract and suitably stored and secured at an identified location acceptable to the MTA. The Design-Builder shall be responsible for all costs of storage, including taxes that may be levied as a result of such storage. Any amounts paid to the Design-Builder for any materials that subsequently become lost, damaged, or unsatisfactory shall be deducted from succeeding payments to the Design-Builder until replacements are provided. Irrespective of payment and ownership, risk of loss for uninstalled materials and equipment identified to the Contract shall be with the Design-Builder. Risk of loss in other cases shall be as determined elsewhere under this Contract.
3. Mobilization Progress Payments provided under Article 7.06 – MOBILIZATION PAYMENT.

B. SUPPORTING DOCUMENTS FOR PROGRESS PAYMENTS

The Design-Builder shall apply for Progress Payments by submitting an Application for Payment and the following additional supporting documentation (“Application for Progress Payment”):

1. The following documents related to all not-installed materials for which payment is requested:
 - a. approval by MTA C&D for the payment schedule for Not-Installed Materials
 - b. a Certificate of Title for the material or equipment without encumbrances, and the Design-Builder’s representation that all such material and equipment shall remain free and clear of and from all debts, claims, liens, mortgages, taxes, and encumbrances;
 - c. a copy of the Vendor’s true net invoices verifying material and/or equipment costs;
 - d. a Certificate of Compliance from the Vendor verifying that the material and/or equipment quality and quantity is in accordance with the Contract requirements;
 - e. the Design-Builder’s statement regarding the storage location of the non-installed material and indicating designated clear access when its location is other than on MTA property. If the property is privately owned, then the Design-Builder shall list the MTA as an additional lessee to the storage lease or other negotiated agreement between the Design-Builder and property owner(s). Such lease or other

agreement shall be without cost to the MTA and in form and substance satisfactory to the General Counsel of MTA C&D; and

- f. insurance coverage for the non-installed materials that is acceptable to the MTA.
2. A Design-Builder's affidavit certifying that it has paid to its Subcontractors and Vendors the amounts due to them for the Work performed and the materials furnished by each of them for amounts encompassed by any previous Progress Payments made to the Design-Builder and supporting Subcontractor and Vendor statements certifying their receipt of such amounts and certifying that the Subcontractors and Vendors have no claims pending against the Design-Builder except those listed such certified statements.
3. All lien releases, waivers of liens, and/or guarantees in connection with the Design-Builder's affidavit set forth immediately above in Subparagraph B.2.
4. The Design-Builder's certification of compliance with the minimum wage rates and other provisions and stipulations in accordance with applicable law, as required.
5. The verified statements required under the New York State Labor Law, Article 8, Section 220-a together with a copy of the Design-Builder's certified payroll.
6. Where this Contract requires reporting on progress toward fulfillment of a DBE goal, the Design-Builder's certification that it is in compliance with any provisions thereof as conditions precedent to payment.

ARTICLE 7.08 SUBSTANTIAL COMPLETION PAYMENT

- A. Upon issuance by MTA C&D of the Certificate of Substantial Completion in accordance with Article 6.03 – SUBSTANTIAL COMPLETION AND FINAL COMPLETION, the Design-Builder may submit an "Application for Substantial Completion Payment," requesting that the MTA pay the remainder of the Contract Price, less twice the value of any incomplete Work, and less any other adjustments as noted below of which the Design-Builder is aware.
- B. In addition to the Supporting Documentation required for Progress Payments as set forth in Article 7.06 – PROGRESS PAYMENTS, the Design-Builder must also submit the following supporting documentation with its Application for Substantial Completion Payment:
 1. A release of the MTA, the Indemnified Parties, and all other MTA Consultants, by the Design-Builder, in a form approved by the General Counsel of the MTA C&D, from all claims and liability to the Design-Builder for anything theretofore done or furnished for, or in any way relating to, the Work, except those claims expressly deleted from the scope of said release and those claims or potential claims pertaining to monies being withheld by the MTA.
 2. Full lien releases and waivers of lien from the Design-Builder, Subcontractors, and Vendors.
 3. A statement in writing of each and every alleged claim of the Design-Builder against the MTA.

4. Any other document or item(s) specifically required by the Contract as a condition precedent to the Substantial Completion Payment.
- C. MTA C&D REVIEW OF THE APPLICATION FOR SUBSTANTIAL COMPLETION PAYMENT:
1. MTA C&D will review the Application for Substantial Completion Payment and verify that it is proper, complete and in accordance with the terms of the Contract, that the indicated Work effort completed is commensurate with the request for Substantial Completion Payment, and that all necessary submissions for the time period have been promptly received from the Design-Builder.
 2. If the Work has been substantially and satisfactorily completed, as determined by the MTA, in its sole and absolute judgment, and the Certificate of Substantial Completion has been issued by MTA, the Design-Builder will be paid the sum of:
 - a. the entire value of the Work performed that has not been the subject of previous Progress Payments and is still due and owing to the Design-Builder; and
 - b. the amount of the percentage retention held pursuant to Article 9.02 – RETAINED PERCENTAGE; and
 - c. the remainder due under the Lump Sum Mobilization Payment Item; and
 - d. less an amount equal to twice the value of any Punch List items, as determined by the MTA, in accordance with Article 6.03 – SUBSTANTIAL COMPLETION AND FINAL COMPLETION; and
 - e. less an amount necessary to satisfy any actual or potential claims, liens, judgments, backcharges and/or similar actions against the Design-Builder that have not been satisfactorily resolved as well as any possible related costs and interest which may be incurred by MTA or the Indemnified Parties (See Additional Retention under Article 9.03 – WITHHOLDING MONEY TO SATISFY CLAIMS, LIENS OR JUDGEMENTS; ADDITIONAL RETENTION).
 - f. less deductions for Liquidated Damages, if any, and to any other withholdings, reductions or set-offs permitted under this Contract.

Payment of this amount shall be the “Substantial Completion Payment.”

ARTICLE 7.09 FINAL COMPLETION PAYMENT

- A. Prior to submission of the Application for Final Payment the Design-Builder may submit for MTA C&D approval a revised Detailed Cost Breakdown which reflects the agreed to Final Contract Price. In the alternative, MTA C&D may permit the Design-Builder to make adjustments on the application for Final Payment to reflect the Final Contract Price.
- B. All outstanding Design-Builder Claims, Disputes, adjustments and demands must be resolved prior to Final Payment. No Application for Final Payment will be processed if there is an

outstanding Design-Builder's exceptions list, or any outstanding Design-Builder's Claim or Design-Builder's Dispute.

C. SUBMISSION OF APPLICATION FOR FINAL PAYMENT

Upon issuance by MTA C&D of the Certificate of Final Completion in accordance with Article 6.03 – SUBSTANTIAL COMPLETION AND FINAL COMPLETION, the Design-Builder may submit an “Application for Final Payment,” requesting that the MTA pay the remainder of the Final Contract Price. In addition to the supporting materials required for a Progress Payment as set forth in Article 7.06 – PROGRESS PAYMENTS, the Design-Builder must also submit the following supporting items with its Application for Final Payment:

1. an affidavit stating that all payrolls, bills for materials and equipment, payments to Subcontractors and Vendors and other indebtedness connected with the Work for which the MTA might in any way be responsible, have been paid or otherwise settled;
2. if required by MTA C&D, other data establishing payment or satisfaction of all such obligations, such as receipts, releases, and waivers of liens arising out of the Contract, to the extent and in such form as may be designated by MTA C&D;
3. Full releases, discharges and waivers of any and all liens and claims by all Subcontractors and Vendors, and all Subcontractor and Vendor guarantees as required in the Contract. If any Subcontractor or Vendor refuses to furnish the required release, waiver, and guarantees, in the sole discretion of MTA C&D, the Design-Builder may furnish a Bond, satisfactory to MTA C&D, to indemnify the MTA, MTA C&D and the Indemnified Parties against any such lien or claim, or cost of making good on any guarantee. If any such lien or claim remains unsatisfied or unresolved after all payments are made to the Design-Builder, the MTA may, and the bond shall provide that the MTA may, require the bonding company to pay all proper liens and claims and any cost allowances. The writer of said Bond shall have the same qualifications as are specified elsewhere in this Contract for other Bonds and the Bond shall be in addition to the Payment Bond provided for elsewhere in this Contract;
4. an affidavit stating that all warranty documentation pursuant to Article 13.05 – WARRANTY has been provided to MTA C&D; and
5. the following notarized statement, which shall be included in the Application for Final Payment that is submitted by the Design-Builder after Final Completion of the Work:

“In consideration of the Metropolitan Transportation Authority (“MTA”) paying this final invoice together with the other invoices submitted by the Design-Builder to MTA C&D in connection with this Contract in the aggregate amount totaling _____ dollars (\$_____), the undersigned agrees to release and discharge the MTA, the Indemnified Parties and all other MTA Consultants, from all liability, claims and demands of any sort, arising or which may arise under this Contract, including but not limited to claims or demands for recovery of damages, losses, entitlement, or additional compensation, or for delay damages, loss of productivity, acceleration damages, extra labor or material furnished for or in connection with the Work which is the subject matter of this Contract. The Design-Builder agrees to hold harmless and indemnify the MTA and the Indemnified Parties from and

against any and all claims and demands, including but not limited to delay claims, claims of mechanics or material suppliers, any and all claims of other Design-Builders, Subcontractors, and consultants, and any and all liens, claims and demands for material furnished and provided and Work and labor performed, on the Work which is the subject matter of said Contract.”

D. REVIEW OF APPLICATION FOR FINAL PAYMENT

MTA C&D will review the Application for Final Payment and verify that the invoice and supporting documents are proper and in accordance with the terms of the Contract, and that the Work is complete. Any changes or corrections to the Application for Final Payment found necessary will be presented to the Design-Builder for its consideration. Within ten (10) Days thereafter, the Design-Builder shall submit the Application for Final Payment incorporating any changes or corrections made by MTA C&D together with any additional claims resulting therefrom. For the Final Payment, the Receipt of Invoice shall mean the date the changed and/or corrected Application for Final Payment, together with all necessary and required supporting documentation, is received at the Designated Payment Office.

E. PAYMENT OF FINAL PAYMENT INVOICE

The MTA will include in its final payment to the Design-Builder all claim amounts where such claims or a portion thereof have been mutually agreed to be the responsibility of the MTA and where the parties have agreed to the amounts to be paid in settlement of any such claims (“Final Payment”). The Final Payment will be payable upon satisfaction of the exception(s) noted therein.

F. ACCEPTANCE OF FINAL PAYMENT SHALL SERVE AS WAIVER FOR ALL DESIGN-BUILDER CLAIMS.

The Design-Builder understands and agrees that the Design-Builder’s acceptance of the Final Payment shall be a waiver of any and all Design-Builder claims for all Work performed under this Contract. Design-Builder hereby agrees that acceptance by the Design-Builder of the Final Payment shall represent (i) the payment of all compensation under this Contract, and (ii) the Design-Builder’s satisfaction with the total compensation received under this Contract.

G. The Design-Builder’s obligation to perform the Work, including achieving Final Completion, in accordance with the Contract shall be absolute. Neither approval of any partial or Final Payment by the MTA, nor the issuance of a Certificate of Substantial Completion, nor any payment by the MTA to the Design-Builder under the Contract, nor any use or occupancy of the Work or any part thereof by MTA C&D, nor any act of acceptance by MTA C&D nor any failure to do so, nor any correction of Defective Work by MTA C&D shall constitute an acceptance of Work that is not executed in accordance with the Contract.

H. Upon Final Completion, or upon termination, the Design-Builder shall deliver to MTA C&D, at its request, all books, writings, records, documents, drawings, or other reproductions, special data, tables and calculation, plans, designs, specifications, reports, studies, as-built drawings, Current Contract Schedule, surveys, maps, models, or other Work products and information pertaining to the Project that may be in its possession or in the possession of any of its Subcontractors.

ARTICLE 7.10 PAYMENT BY DESIGN-BUILDER TO SUBCONTRACTORS AND VENDORS

- A. The Design-Builder agrees to make all payments with respect to its Subcontractors and Vendors in accordance with Section 139-f of the State Finance Law. Nothing provided therein or herein shall create any obligation on the part of MTA C&D or Contracting Party to pay or to see to the payment by the Design-Builder of any monies to any Subcontractor or Vendor, nor create any relationship in contract or otherwise, implied or expressed, between any such Subcontractor or Vendor and MTA C&D or Contracting Party. The Design-Builder shall include in all subcontracts that:
- B. within fifteen (15) Days of the receipt of any payment from the MTA, the Design-Builder shall pay each of its Subcontractors and Vendors the proceeds from the payment representing the value of the Work performed and/or materials furnished by the Subcontractor and/or Vendor and reflecting the percentage of the Subcontractor's Work completed or the Vendor's material and/or equipment supplied in the invoice approved by MTA C&D and based upon the actual value of the Subcontract or purchase order, less an amount necessary to satisfy any claims, liens or judgments against the Subcontractor or Vendor which have not been suitably discharged, and less any retained amount as described in Section 139-f (2) of the State Finance Law;
- C. within fifteen (15) Days of the receipt of payment from the Design-Builder, the Subcontractor and/or Vendor shall pay each of its Subcontractors and vendors in the same manner as the Design-Builder has paid the Subcontractor/Vendor;
- D. any payment for Work performed or materials or equipment supplied that has been properly invoiced and is more than thirty (30) days due, shall bear interest at the rate set from time to time by the State Tax Commission.

ARTICLE 7.11 PAYMENTS RELATED TO GUARANTEE & WARRANTY OBLIGATIONS

- A. MTA C&D may withhold from any payments to be made to the Design-Builder prior to or subsequent to the commencement of any applicable guarantee period, such sums as may reasonably be necessary to ensure completion of guarantee and warranty obligations with respect to Defective Work, equipment, or materials that have been identified by MTA C&D.
- B. MTA C&D may deduct from any payment due to the Design-Builder an amount equal to its costs incurred on account of the Design-Builder's failure to fully perform its guarantee and warranty obligations.
- C. MTA C&D, prior to withholding or deducting any monies hereunder, shall give the Design-Builder notice of the Defective Work, equipment or material and the basis for the withholding or deduction.
- D. Upon MTA C&D's certification that the Design-Builder has fulfilled its guarantee and warranty obligations, the MTA will pay the Design-Builder any sums of money retained as provided in Paragraph A, above, subject to the Design-Builder's submission of any required documentation and/or compliance with any necessary obligation, as the case may be, in accordance with this Contract.

ARTICLE 7.12 SET OFFS, WITHHOLDING AND DEDUCTIONS

- A. The MTA shall pay the non-disputed portion of the Application for Payment; however, MTA C&D may disapprove and set-off, deduct and/or withhold any payment (in whole or in part, as may be applicable) if and to the extent that:
1. an invoice and/or supporting documentation (as set forth in Article 7.04 – PAYMENTS – GENERAL REQUIREMENTS or elsewhere in the Contract) is/are not correct and complete;
 2. the Work is covered by a previous Application for Payment;
 3. any material statement or representation in any invoice or other documentation submitted by the Design-Builder with respect to the Contract or the Work is or was untrue when made;
 4. the Design-Builder has failed to submit deliverables in accordance with the terms of the Contract, including without limitation, as may be applicable, manuals, As-Built Drawings, Safety Plan(s), QA/QC documentation, Schedule Submittals, and progress photographs or videos;
 5. such set-off, deduction and/or withholding is otherwise provided for in the Contract, including without limitation as set forth in Article 9.02 – RETAINED PERCENTAGE and Article 9.03 – WITHHOLDING MONEY TO SATISFY CLAIMS, LIENS OR JUDGEMENTS; ADDITIONAL RETENTION or is provided for under applicable law; or
 6. such set-off, deduction and/or withholding is for any unpaid legally enforceable debt owed by the Design-Builder to the MTA, or the MTA Group, as provided in the MTA's Prompt Payment Statement.
- B. MTA C&D shall promptly advise the Design-Builder in writing if MTA C&D disapproves of, or has set-off, deducted and/or withheld, all or any payment. Even if the Design-Builder disagrees with MTA C&D's action, the Design-Builder shall nonetheless immediately undertake all corrective or other action required by MTA C&D and shall continue to progress the Work expeditiously in accordance with the Contract. Any withholding that is ultimately held to have been wrongful shall be paid to the Design-Builder in accordance with the Prompt Payment Statement.

ARTICLE 7.13 PAYROLL CONTRIBUTIONS

The Design-Builder accepts full and exclusive responsibility for the payment of any and all contributions or taxes, or both, which include, but are not limited to, payment for unemployment insurance and retirement benefits, annuities, or any other benefits whatsoever, now or hereafter imposed under any law of the United States, the State of New York, and any local municipalities. The Design-Builder shall comply with all legislation, regulations, and rulings thereunder respecting any of the aforesaid contributions or taxes. If by law the MTA or MTA C&D is required to make such contributions for persons employed by the Design-Builder, then the Design-Builder shall then make full reimbursement to the MTA, and such contributions may be withheld, deducted or set-off against any payment due the Design-Builder. The Design-Builder shall furnish to MTA C&D weekly certified payrolls, enumerating the above, prepared the week following the pay period for the certified payroll.

ARTICLE 7.14 TAXES, DUTIES, ETC.

Except as provided in this Article, the Design-Builder covenants and agrees to pay all foreign, federal, state and municipal taxes, duties, imposts, assessments and charges arising out of or in connection with the performance of the Work, excluding MTA C&D supplied apparatus.

A. NEW YORK STATE SALES TAX

1. The Design-Builder represents that no amount of New York State sales or compensating use taxes on the sale to the Design-Builder of any personal property which will become an integral component part of the Work has been included in the price or prices set forth in the Proposal Contract Amount.
2. If any claim is made against the Design-Builder by the State of New York or any municipality thereof for sales or compensating use taxes in connection with such sale, the MTA will reimburse the Design-Builder in an amount equal to the amount of such tax required to be paid and actually paid by the Design-Builder in accordance with the requirements of law, provided that the Design-Builder follows the procedures stated in Paragraph B. below.

B. SALES TAX REIMBURSEMENT PROCEDURE

1. The MTA must be afforded the opportunity, before any payment of tax is made, to contest said claim in the manner and to the extent that the MTA may choose, and to settle or satisfy said claim, and to designate such attorney as MTA C&D may elect to designate who the Design-Builder agrees will be authorized to act on behalf of the Design-Builder for the purpose of contesting, settling and/or satisfying said claim; and
2. The Design-Builder shall give immediate notice to MTA C&D of any such claim, cooperate with MTA C&D and its designated attorney in contesting said claim and furnish promptly to MTA C&D and said attorney all information and documents necessary or which may become necessary to contest said claim, said information and documents to be preserved for six years after the date of final payment hereunder or longer if such a claim is pending or threatened at the end of such six years. If MTA C&D elects to contest any such claim, it will bear the expense of such contest.

ARTICLE 7.15 NO ESTOPPEL AND NO WAIVER

- A. The MTA shall not be precluded or estopped by any payment or certificate made or issued by the MTA, the MTA Group, or other officer, agent or appointee thereof under any provision of this Contract from, at any time either before or after the completion of all of the Design-Builder's obligations under this Contract and payment therefore pursuant to any Mobilization Payment, Progress Payment, Substantial Completion Payment, or Final Payment, showing the true and correct classification, amount, quality and character of the Work done and materials furnished by the Design-Builder, or from showing at any time that such certificate is untrue or incorrect or improperly made in any particular or that the Work and materials or any part thereof do not in fact conform to the requirements of this Contract. The MTA shall not be precluded or estopped, notwithstanding any certificate and payment in accordance therewith, from demanding and recovering from the Design-Builder such damages as it may sustain by reason of the Design-Builder's failure to comply with the Contract.

- B. Neither the acceptance by MTA C&D or by any of the employees or representatives of MTA C&D, nor any order, measurement or certificate issued by MTA C&D nor any order by MTA C&D for payment of money nor any payment for, nor acceptance of, the whole or part of the Work nor any extension of time, nor any possession taken by MTA C&D, the MTA Group or the employees or representatives of the MTA or the MTA Group, shall operate as a waiver of any portion of this Contract or of any power herein reserved to MTA C&D or of any right to damages herein provided, nor shall any waiver of any breach of this Contract be held to be a waiver of any other or subsequent breach.

ARTICLE 7.16 ALLOWANCE ITEMS

Allowance Items set aside an amount (the “Contract Allowance Amount”) to pay toward performance of certain identified work. The Contract Allowance Amount is not intended to, and does not indicate, the amount of work expected under the Allowance Item. The ultimate amount expended for the identified work could be either more or less than the original Contract Allowance Amount. Contract Payment or Proposal Items identified as Allowance Items shall be payable as follows and governed by the following provisions, as well as all other applicable Contract Documents:

- A. All Allowance Items shall have an identified description of the Work included in that Allowance Item and an Allowance Amount. Payment against the Allowance Item may only be made for this included Work. That Work will be priced and Progress Payments made based on one of the following as determined by the Project CEO after Contract Award:
1. Percentage complete Progress Payments made against a negotiated lump sum price for the item of work involved;
 2. Time and Materials in accordance with Article 8.04.F; or
 3. Payment at Negotiated Unit prices for the quantity of items used, completed or installed, when the items are included in the Allowance Item.

If a negotiated price for specific items of included work cannot be agreed-to, MTA C&D may set the price it is willing to pay and the Design-Builder may file an Arbitration or Litigation Notice under the Disputes provisions of this Contract in CHAPTER 12 within ten Days of the price being set if it disagrees with the price.

- B. Payments will be made up to and not to exceed:
1. The current Contract Allowance Amount for the Allowance Item; or
 2. Up to 50% more than the current Contract Allowance Amount of the Allowance Item, with the express written approval of the Project CEO, provided however, that there is a pending modification to increase the Allowance Item Amount by at least the overage amount being authorized, and also provided that there are sufficient funds remaining in the Contract to make such payments.
- C. The Contract Allowance Amount of the Allowance Item may be increased from time to time by Modification. A Modification will be required to include work in the Allowance Item which is not already included. Except in the case of express written approval for a 50% increase, in which case a Modification to cover that increase shall be issued, MTA C&D is not obligated to increase the Allowance Item Amount and may do so in its sole discretion.

D. TIME and COMPENSABLE DELAY:

1. No time extension shall be due for any Work included in the Allowance Item and paid for under the original Contract Allowance Amount of the Allowance Item.
2. When included Work is performed in accordance with an authorized increase in the Allowance Item beyond the original Contract Allowance Amount (by Modification or written authorization of the Project CEO as set forth above), and the performance of this Work results in entitlement to a time extension in accordance with Generals Chapter 6 - Provisions Relating to Time, and all prerequisites to entitlement of time extension included in Chapter 6 have been met, including, but not limited to, the requirement for timely notice of delay, the Design-Builder may be entitled to a time adjustment.
3. If any such time extension is compensable delay under Chapter 6, and all Contract prerequisites to compensable delay are met, the impact costs which may be due shall be charged against the Allowance Item.

E. Unless otherwise provided, with respect to Allowance Items:

1. the Design-Builder's overhead, profit and other expenses contemplated for Allowance Items are included in the Contract Price and not in the Contract Allowance Amounts;
2. no cost may be charged to a Contract Allowance Amount without MTA C&D's written approval;
3. no cost may be charged to a Contract Allowance Amount if the Design-Builder would have been required to incur such cost notwithstanding the work covered by the Contract Allowance Amount;
4. no cost may be charged to a Contract Allowance Amount for activities that were required as a result of an ATC;
5. no cost may be charged to a Contract Allowance Amount for activities on property acquired or leased by the Design-Builder;
6. no cost may be charged to a Contract Allowance Amount to address a condition resulting from any Design-Builder Fault Event; and
7. if costs properly charged to a Contract Allowance Amount are more than or less than the Contract Allowance Amount, then the Contract Price shall be adjusted accordingly by Modification, where the amount of the Modification shall be the difference between such actual costs and the Contract Allowance Amount, without mark-up.

CHAPTER 8.

CHANGES TO THE CONTRACT

ARTICLE 8.01 CLARIFICATION OF CONTRACT DOCUMENTS

MTA C&D shall have the right during the progress of the Work to clarify the Contract and the scope of the Work. To the extent that such clarification does not materially alter the Contract, the clarification shall not be deemed a Change to the Contract.

ARTICLE 8.02 CHANGES

A. MTA C&D may, at any time, without notice to the Sureties and without invalidating the Contract, make any change in the Work within the general scope of the Contract including, but not limited to, changes:

1. in the Contract Documents, including but not limited to the Contract Drawings and Specifications, technical requirements, and administrative requirements;
2. in the method, manner, or sequence of performance of the Work;
3. in the MTA-furnished facilities, services, materials, equipment or sites;
4. directing acceleration of the performance of the Work or extension in the schedule; and
5. modifying the Contract Schedule, Milestones or Restraints;

(each, a “Change”); provided, however, that no Change shall be valid or enforceable unless it is implemented by a Modification in accordance with Article 8.03, signed by the Project CEO, or a delegate who is expressly authorized in writing by the Project CEO to sign such Change or Modification, Termination or discharge.

Upon execution of a Bilateral Modification or issuance of a Unilateral Modification in accordance with Article 8.03B, the Design-Builder shall proceed diligently with the Work as changed. Nothing in this Article shall excuse the Design-Builder from its obligation to proceed with the Work, as changed, pending resolution of any issue, Claim or Dispute.

- B. Any addition to, or increase in, the Work shown in the Contract that results from a duly issued Change will be known as “Added Work.” Any decrease or deletion in the Work shown in the Contract which results from a duly issued Change will be known as “Decreased Work.” The Design-Builder shall not perform Added Work except pursuant to a duly issued Change expressly authorizing the performance of such Work. Added Work and Decreased Work shall be collectively referred to as “Change Work.”
- C. If the Design-Builder believes that any other Order from MTA C&D is or should be treated as a Change, the Design-Builder shall nevertheless comply therewith, but shall promptly, and prior to beginning the performance thereof and incurring costs attributable thereto, but no later than five (5) Days after receipt of the Order, provide a Notice of Change to the Project CEO. A “Notice of Change” is a Notice that expressly states on its face that it is a Notice of Change, and that expressly

identifies an Order and states both the contractual and factual basis for regarding the Order as a Change. The Design-Builder shall include a non-binding preliminary cost and time impact estimate with its Notice of Change. A Notice of Change is required to afford an opportunity to MTA C&D to (1) cancel or revise such Order; (2) assure that the Design-Builder keeps an accurate record of the materials, labor and other items involved; and/or (3) take such action it may deem necessary in light of the Design-Builder's Notice of Change.

- D. The failure of the Design-Builder to give written Notice of Change within the five (5) Days stated above shall be deemed a conclusive and binding acceptance by the Design-Builder that the Order is not a Change.
- E. Upon receipt and consideration of a Notice of Change, MTA C&D may modify or withdraw the Order or direction which is the subject of the Notice, it may issue a Change Proposal Request, it may issue a Change or it may deny the Notice of Change. The issuance of a Change Proposal Request should not be construed as acceptance of the Notice of Change nor does it constitute an admission of merit of, or liability for, the claimed Change.
- F. If MTA C&D determines that the Order is not a Change, in whole or part, then MTA C&D shall inform the Design-Builder of its denial of the Notice of Change. If MTA C&D does not respond or take action on the Notice of Change within thirty (30) Days of its delivery to the Project CEO, then the Notice of Change shall be deemed denied by MTA. In any event, the Design-Builder shall proceed diligently with the Work as ordered by the Project CEO.
- G. If any Change that includes Added Work or Decreased Work results in an increase or decrease in the Design-Builder's cost of performance of any part of the Work or in the time required to meet any Milestones, and the Design-Builder follows the procedures set forth in this Contract, then the Design-Builder shall be entitled to an "Equitable Adjustment" in Contract Price and/or to the Contract Schedule or Milestones. An Equitable Adjustment in the Contract Price is an adjustment to the Contract Price made in accordance with and as limited by this Contract, including without limitation Article 8.04 – **EQUITABLE ADJUSTMENTS IN PRICE**. An Equitable Adjustment in time is an adjustment to the schedule and Milestones made in accordance with and as limited by this Contract, including but not limited to the Articles of Chapter 6 – **PROVISIONS RELATING TO TIME**. The Design-Builder shall bear the burden of proving entitlement to, and the amount of, any Equitable Adjustment.
- H. If the Design-Builder intends to assert a Dispute as the result of a denial, in whole or part, of a Design-Builder's Notice of Change, or for an Equitable Adjustment for a Change, the Design-Builder shall file a timely Arbitration or Litigation Notice in accordance with Article 12.01 – **CLAIMS**. Once a timely Arbitration Notice or Litigation Notice is filed the Parties shall proceed in accordance with Chapter 12. An Arbitration Notice or Litigation Notice is not required for an issue which, as expressly stated in a Modification, is either reserved or expressly left for later determination (See Article 8.03 – **CHANGE PROCEDURE; MODIFICATIONS**).
- I. A denial of a Design-Builder's Notice of Change, in whole or part, shall become final and binding on the Design-Builder, without consideration of any prior reservation of rights, unless the Design-Builder delivers to the Project CEO a written Arbitration Notice or Litigation Notice, within the time specified and meeting the requirements of Chapter 12, unless MTA C&D, in its discretion, may agree in writing to an extension of the time in writing for such submission.

- J. Except as expressly provided in this Contract, no order, statement or conduct of MTA C&D, any other agency or organization, any consultant or Design-Builder of MTA C&D, or any employee, agent or representative of any of the foregoing shall be treated as a Change under this Chapter 8 or entitle the Design-Builder to an Equitable Adjustment.

ARTICLE 8.03 CHANGE PROCEDURE; MODIFICATIONS

A Change shall be issued in the form of a written modification to the Contract, executed by the parties or issued by MTA C&D in accordance with Paragraph B of this Article 8.03 (each, a “Modification”).

A. CHANGE PROPOSAL REQUEST AND DESIGN-BUILDER’S CHANGE PROPOSAL

1. A “Change Proposal Request” is a Notice from the Project CEO requesting a Change Proposal and/or Time Impact Analysis from the Design-Builder and identifying the proposed Change, any proposed Added or Decreased Work, and assigning an issue number for tracking purposes.
2. In response to a Change Proposal Request the Design-Builder shall provide a “Change Proposal” to the Project CEO including a detailed Equitable Adjustment Proposal complying with Article 8.04, and a Time Impact Analysis complying with Chapter 6. The Change Proposal shall be provided as promptly as practical, but no later than fourteen (14) Days after the Design-Builder’s receipt of the Change Proposal Request (or such longer period as may be specified in the Change Proposal Request).
3. MTA C&D may commence negotiations with the Design-Builder either before or after the Design-Builder responds to a Change Proposal Request.
4. A Change Proposal Request shall in no way obligate MTA C&D to the eventual execution of a Change or Modification. Neither the issuance of a Change Proposal Request or the preparation of a Change Proposal shall entitle the Design-Builder to any adjustment in Contract Price or Milestones.

B. CONTRACT MODIFICATIONS

1. If the parties are able to reach agreement on the terms and conditions of the Change and the Equitable Adjustment due, the Design-Builder and MTA C&D shall sign a bilateral Modification that shall constitute an all-inclusive equitable settlement for all changes and all costs and time impacts associated with such Change unless otherwise expressly stated in the Modification.
2. If the parties are unable to reach agreement on all terms and conditions of any Change, they may execute a Bilateral Modification that contains the provisions upon which they are able to agree and which expressly identifies the provisions reserved for future determination; provided, however, that a Bilateral Modification requires agreement regarding adjustment of the Contract Price (on either a fixed or not-to-exceed basis) for the Change Work. It is anticipated that matters left unresolved by a Modification will be the subject of expeditious negotiation between the parties. Subsequent Modifications may be issued until all matters relating to the Changed Work are resolved.

3. MTA C&D, by the Project CEO (or the Project CEO's expressly authorized delegate by written authorization), may issue Unilateral Modifications at any time. A Unilateral Modification does not require negotiations or the agreement or signature of the Design-Builder and shall have the force and effect of a Modification. In all cases the Design-Builder shall proceed diligently with the Work of a Unilateral Modification. A Unilateral Modification shall be final and binding on the Design-Builder, without consideration of any prior reservation of rights, unless the Design-Builder files a written Disputes Notice, within the time specified and meeting the requirements of Article 12.02 - COMMENCEMENT OF DISPUTES, APPLICATION OF DISPUTES RESOLUTION PROCEDURES.
4. MTA C&D may, in its discretion, issue a Unilateral Modification that directs that some or all of the work of the Change shall proceed, but that expressly reserves determination of any adjustments in the Contract Price or Milestones until after receipt of the Change Proposal, after which the remaining terms will be negotiated and resolved in a subsequent Modification.
5. If a Unilateral Modification reserves on the issue of direct costs for the Change, the Modification shall expressly set forth a "not to exceed" amount and provide that the Design-Builder shall perform as directed by the Modification up to the "not to exceed" amount on a time and materials basis. The Design-Builder shall notify MTA C&D when eighty percent (80%) of the not-to-exceed amount has been reached on a time and materials basis and shall cease performing such Work when the "not to exceed" amount has been reached unless further Work has been expressly authorized in writing by MTA C&D. The Design-Builder shall maintain and submit time and materials records in accordance with Article 8.04G, pending execution by the parties or issuance by MTA C&D of a subsequent Modification. Any additional cost or maintaining and submitting time and material records in accordance with this paragraph shall be deemed a direct cost of the Work in conjunction with determining a final price in a subsequent Modification.

ARTICLE 8.04 EQUITABLE ADJUSTMENTS IN PRICE

This Article establishes the requirements for pricing of Equitable Adjustments for which entitlement has been established pursuant to other applicable Articles of the Contract. Except as may be expressly stated elsewhere in this Contract, this Article shall also apply to any other pricing of Design-Builder's costs of performance or damages including but not limited to 12.01, 12.02, 6.10, 7.04, 7.06, 8.05, 8.08, and 11.06.

The total Equitable Adjustment due shall be the total net value of the applicable Equitable Adjustments under A, B and C below, or as otherwise determined under E or F. In no event will there be any double recovery. The Design-Builder shall maintain segregated cost records to support its entitlement to an Equitable Adjustment in price.

A. EQUITABLE ADJUSTMENTS FOR WORK FOR WHICH THERE IS A PRICE PROVIDED IN THE CONTRACT

1. Unit Price Work: When an Equitable Adjustment is for Added Work or Decreased Work of the same kind as other Unit Price Work, the Design-Builder shall accept full and final payment at the Unit Prices for the accepted quantities of Change Work performed, except as provided in Article 8.07 – INCREASED AND DECREASED CONTRACT QUANTITIES, with respect to quantities outside the range established therein. No

allowance will be made for any increased expenses or any damages whatsoever. Unless otherwise mutually agreed upon by the parties, a Contract Modification adding Work at existing Unit Prices shall not result in any revision to the estimated Proposal quantity used as the base quantity for purposes of Article 8.07.

2. Lump Sum Work: Unless otherwise mutually agreed upon by the parties, the Equitable Adjustment for deletion of a lump sum item shall be at the Contract lump sum price. However, if MTA C&D makes a determination, at any time, that the Contract lump sum price is unbalanced by being unreasonably low, or its application is otherwise inequitable, it shall notify the Design-Builder of such determination and the Equitable Adjustment shall be determined under B, below; and the Design-Builder may challenge that determination with a Notice of Change. If items are added which are similar to existing lump sum items, the Added Work will be priced under B below, unless otherwise mutually agreed.

B. EQUITABLE ADJUSTMENTS FOR WORK FOR WHICH NO PRICE IS CONTAINED IN THE CONTRACT.

The Equitable Adjustment for Change Work for which no price is contained in the Contract Documents shall be calculated as follows:

1. The Equitable Adjustment for Work for which no price is contained in the Contract shall be:
 - a. the estimated cost (or decrease in cost for Decreased Work) for technical salaries, direct labor, including in addition to wages, Health, Welfare and Pension benefits; employer's Social Security contributions; Employment Security Benefits; and such additional contributions and fringe benefits; all of which are required to be made by the Design-Builder as employer pursuant to bona fide collective bargaining labor agreements applicable to the Work and/or are required by authorized governmental agencies;
 - b. plus the estimated cost (or decrease in cost for Decreased Work) for materials;
 - c. plus the estimated cost (or decrease in cost for Decreased Work) for equipment;
 - d. plus the estimated cost (or decrease in cost for Decreased Work) for furnishing and installing additional (or decreased) temporary lighting and heating facilities required solely as a result of the Change;
 - e. plus a combined overhead, profit and other markup on the total of (a), (b),(c), (d) not to exceed twenty-one percent (21%);
 - f. plus a single additional five (5) % markup on Subcontractor costs reimbursing the Design-Builder for its own and for all higher tier Subcontractors' overhead and profit on Subcontractor work;
 - g. plus the actual increased cost (or decrease in cost) to the Design-Builder for any insurance required under the Contract;

- h. plus the proportionate increase (or decrease) in cost of prime Design-Builder surety bond due to the change, if actually paid and required by prior agreement with the Surety.
 - 2. The Equitable Adjustment for design Work made necessary by a Change may include direct wages, applicable overhead and other direct costs and a fixed fee to be negotiated and not to exceed ten percent (10%) of the direct costs including applicable overhead. The provisions of the Federal Acquisition Regulation Part 31.2 et seq. shall be the guide for the determination of the allow ability and allocability of the costs except that State and local taxes on net income shall not be allowed. In addition, the Design-Builder may be allowed a fixed G&A fee on subcontractors, which amount shall be negotiated and shall not exceed five percent (5%) of the subcontractor costs.
- C. The total adjustment shall be the net value of all increased and decreased costs, determined in accordance with this Article 8.04.
 - 1. Technical Salaries (item B.1.a above): The direct salaries of all engineers, professional, and technical personnel for the time they are employed directly in shall not include the salary of any officer or member of the Design Professional unless such officer or member is employed directly in performing such services in a nonsupervisory capacity, and in that event such officer's technical salary shall be reimbursed at a rate not to exceed that paid to the highest paid professional employed directly in performing such services
 - 2. Labor (Paragraph B.1.a above): Base labor rates shall be at the prevailing rates specified elsewhere in this Contract. Labor rates in excess of those identified as prevailing rates will be payable at the applicable prevailing rates unless the higher rates are established by bona fide collective bargaining labor agreements applicable to the Work. The Equitable Adjustment for direct labor shall include all labor classifications as required by those collective bargaining agreements when engaged in the actual and direct performance of the Change Work or Work necessarily affected by the Change. The direct labor adjustment shall not include overhead personnel. The 21% markup allowance shall be deemed to include administration, engineering and superintendence personnel both on and off site.
 - a. However, where additional on-site personnel who would otherwise be considered overhead personnel, or additional shifts for such personnel, are necessary due to the Change, at the sole discretion of the MTA, the necessary and reasonable additional labor for such personnel may be categorized as a direct cost of the Change.
 - 3. Materials (Paragraph B.1.b above): In addition to what is normally understood to be materials, hardware and equipment to be permanently installed in the Work shall be treated as materials for purposes of this Article and price and cost determinations, except as stated in C. 5. "Subcontracts," below. The Equitable Adjustment for materials will be the Design-Builder's net cost, including applicable discounts and freight, but excluding all taxes not applicable to MTA
 - 4. Equipment (Paragraph B.1.c above): Total compensation for equipment used in performing the Change Work shall be as follows:
 - a. Design-Builder or Subcontractor owned equipment shall be reimbursed at eighty percent (80%) of the monthly rate specified in the latest edition of the Rental Rate

Blue Book published by Equipment Guide Book Company, divided by one hundred seventy six (176) for each hour of operation, plus hourly operating costs for each hour of operation, directly applicable to the Change Work.

- b. Leased equipment shall be reimbursed in the same manner as the Design-Builder owned equipment above, except that equipment leased specifically for the change shall be at Design-Builder's net invoiced cost, not to exceed the amount allowed for Design-Builder or Subcontractor owned equipment as specified above.
 - c. Transportation costs for equipment shall be reimbursed if reasonable and allocable solely to the Change Work.
- 5. Temporary lighting and heating facilities (Paragraph B.1.d above): This item includes the cost of installation and materials/equipment required for additional (or decreased) temporary lighting and heating. It does not include cost of power and/or operation which are part of site overhead and are in the 21% markup allowance.
 - 6. Subcontracts (including Paragraph B.1.f above): Where some portion of the Change Work is performed or is to be performed by a Subcontractor of any tier, the price for the Subcontract Work shall be determined in accordance with this Article as if it were prime Contract Work based upon the costs incurred by the performing Subcontractor, including combined markup provided above. Then an additional mark-up of five (5) percent shall be applied. It is agreed that this single additional five (5) percent markup reimburses the Design-Builder for its own and for all higher tier Subcontractors' overhead and profit. This is a one-time markup regardless of tier of the Subcontractor performing the Work. This provision on Subcontracts shall not apply to Subcontracts with Vendors, in which case the pricing shall be as materials or equipment to be installed in the Work and supplied to the Design-Builder or next higher tier Subcontractor, as appropriate. Provided however when published competitive wholesale prices are unavailable for materials or equipment to be installed in the Work, MTA C&D may determine that this provision shall apply to the Vendor, with pricing determined, as with other Subcontracts, on a cost to Vendor basis hereunder.
 - 7. The Equitable Adjustment for technical salaries, labor, materials and equipment shall include the reasonable increased and decreased direct cost of other Work necessarily affected by the Change as well as the reasonable increased and decreased direct costs resulting from the actual Change Work.
 - 8. Markup Allowance (Paragraph B.1.e above): Except as otherwise specifically provided in this Contract, the twenty-one percent (21%) markup allowance shall be deemed to include the cost of heat and light; use and purchase of small tools, manual equipment, consumables (as defined above); upkeep of tools, administration and management, engineering, superintendence, insurance and bonds (except as otherwise provided as a direct charge in Paragraph B.1.g and B.1.h); and all other loss, damages, risks and expenses, which are not expressly allowed as a direct cost. Irrespective of the foregoing 21% limitation, MTA C&D may, in its sole discretion, provide more than 21% for such markups if it determines that the complexity and risk of the Change justifies such increase.
 - 9. All costs must be necessary and reasonable and shall be substantiated by acceptable accounting records provided by the Design-Builder.

D. IMPACT COSTS FOR COMPENSABLE DELAYS

1. The Design-Builder's sole and exclusive Equitable Adjustment in Price for all Compensable Delays (as defined in Article 6.08 – COMPENSABLE DELAYS) shall be for Impact Costs as limited herein and which are actually, reasonably and necessarily incurred and verifiable by appropriate documentation and are incurred solely as the result of the Compensable Delay. The Design-Builder's claim for Impact Costs for Compensable Delays affecting a Subcontractor shall provide proof of a pre-existing liability to that Subcontractor for the costs claimed. Impact Costs shall be subject to the requirements of A and B above, provided however that no mark-up percentages (neither combined, overhead, profit or Subcontractor) will be allowed on, added to or applied to Impact Costs.
2. "Impact Costs" shall include only the following:
 - a. Increased wages attributable to Work being performed by trades in a higher wage period.
 - b. Increased field office expenses (including increased labor costs for on-site time-dependent personnel who would otherwise be considered indirect or overhead personnel).
 - c. Increased cost to purchase materials.
 - d. Increased cost to store materials, to the extent that the Design-Builder can demonstrate that such storage is specific to this Project.
 - e. Cost incurred to keep the Work Site open, such as temporary power and sanitary facilities.
 - f. Extended insurance and bonding.
 - g. Cost of rented equipment, as determined in accordance with Paragraph C.4 above.
3. In no event will MTA C&D be required to pay Impact Costs, nor is MTA C&D liable under this Contract for sums, which are in the nature of consequential damages, decreased productivity or efficiency, profits or indirect costs which are not expressly included in subparagraph 2 above (such as Design-Builder's home office overhead and general and administrative expenses including claims preparation).
4. In no event shall allowable Impact Costs include any item of cost and expense otherwise payable under the Contract, including any related Equitable Adjustment for Change Work.
5. No double recovery of costs in both overhead mark-up and Impact Costs will be allowed. Where significant increased direct costs subject to overhead mark-up are associated with a Compensable Delay, MTA reserves the right to adjust subparagraphs 2.b. and 2.e. and the portion of subparagraph 2.g. associated with equipment costs normally included in overhead, to correct for double recovery. Any such correction shall take into account when the relevant costs are incurred.

E. DESIGN-BUILDER PROPOSALS

1. As part of any Claim under Article 12.01 – CLAIMS or Change Proposal under Article 8.03 – CHANGE PROCEDURE; MODIFICATIONS, the Design-Builder shall submit an Equitable Adjustment Proposal in writing to MTA C&D within the time specified and shall include all adjustments in Price claimed by the Design-Builder and permitted under the Contract Provisions. In the Equitable Adjustment Proposal, the Design-Builder shall itemize the stated prices, either lump sum or unit price, in sufficient detail to permit a full analysis of all direct labor, material, and equipment costs, and Subcontract costs. The Equitable Adjustment Proposal shall be in accordance with the cost principles established in this Article 8.04, as well as the requirements of Article 8.02 – CHANGES, Article 6.02 – DESIGN-BUILDER’S SCHEDULES, Article 6.05 – EXTENSIONS OF TIME, and Article 6.06 – TIME IMPACT ANALYSIS. Notice, proposal, or claim preparation costs, negotiation costs, disputes preparation or presentation costs, legal fees or interest shall not be allowable in any Equitable Adjustment.
2. The Design-Builder may submit, in addition to the required Equitable Adjustment Proposal, an alternative cost or price proposal. MTA C&D may, in its sole discretion, consider such additional information in its negotiations with the Design-Builder.
3. When the Equitable Adjustment includes an impact on other direct costs of the Work, the Design-Builder shall provide, as part of its Equitable Adjustment Proposal:
 - a. a breakdown, in labor, material, equipment and subcontract work (which shall similarly be broken down into labor, material and equipment); showing all direct costs the Design-Builder would have incurred for that work absent the change or compensable event, along with all cost and pricing data showing the Design-Builder’s experience on this Contract for similar work; and
 - b. for each such item of affected work, the Design-Builder shall also provide an equivalent breakdown of the reasonable and efficient, anticipated cost for that work after the Change or compensable event, broken down by material, labor and equipment, and subcontracted work (which shall similarly be broken down into labor, material, and equipment).

F. PAYMENT FOR CHANGE WORK UNDER A UNILATERAL CONTRACT MODIFICATION

The MTA may issue a unilateral Contract Modification, as set forth in Article 8.03 – CHANGE PROCEDURE; MODIFICATIONS. A unilateral Contract Modification may include an Equitable Adjustment based upon one or more of the following methods, in the sole discretion of the MTA:

1. Time and Materials in accordance with this Article 8.04;
2. Unit Prices for items for which a Unit Price appears in the Contract; provided, however, that the Unit Price for any unit quantities outside of the range established in Article 8.07 – INCREASED OR DECREASED CONTRACT QUANTITIES, may be equitably adjusted in accordance with that Article 8.07 and this Article 8.04; and/or
3. A fair cost estimate, as determined by MTA C&D, based on either actual costs, reasonably estimated costs, or some combination thereof, inclusive of mark-ups; all limited as set forth in this Article 8.04.

G. INTERIM TIME AND MATERIALS RECORD KEEPING AND EQUITABLE ADJUSTMENTS BASED ON TIME AND MATERIALS

1. Pending resolution of an Equitable Adjustment the Design-Builder shall maintain and submit time and materials records for the Work of, and Work affected by, the change or compensable event.
2. If MTA C&D issues a Unilateral Contract Modification providing payment of any portion of the Equitable Adjustment on time and materials basis, the Design-Builder shall accept the amount payable on a time and materials basis as full payment for that portion of the Work.
3. A bilateral Modification may provide for payment of all or part of an Equitable Adjustment on a time and materials basis.
4. The following procedures and principles shall apply in addition to those set forth elsewhere in Article 8.04 (including the mark-up percentages), to both interim Time and Materials records and Time and Materials Equitable Adjustments
 - a. When performing or recording Change Work on a time and materials basis, the Design-Builder shall maintain its separate records in such a manner as to provide a clear distinction between the direct costs of Work of the change or compensable event and the cost of other operations.
 - b. The Design-Builder shall prepare, and furnish the Day after such Work was performed to the MTA in duplicate, report sheets of each Day's Work performed on a time and materials basis ("Daily Report Sheet"). The Daily Report Sheet shall be in a format acceptable to MTA C&D and shall itemize the materials used, and shall cover the direct cost of the labor and the charges for equipment either owned or rented, whether furnished by the Design-Builder, Subcontractor or other forces. The Daily Report Sheet shall provide names or identifications and classifications of workers, the hours worked, and the size, type and identification number of equipment and hours operated.
 - c. The Design-Builder shall substantiate the cost of materials with valid copies of vendor's paid invoices. Such invoices shall be submitted with the Daily Report Sheets by the Design-Builder, or if not available at that time, they shall be submitted along with the Application for Payment. MTA C&D reserves the right to establish the cost of such materials at the lowest current wholesale prices at which such materials are available in the quantities delivered to the Work Site.
 - d. The Design-Builder shall sign the Daily Report Sheets.
 - e. MTA C&D will compare its records with the Design-Builder's Daily Report Sheets, make any necessary adjustment(s), and compile the costs of the Work involved to be paid for on a time and materials basis. When these Daily Report Sheets are agreed upon and signed by both parties, they shall become the basis of payment for the Work performed, but shall not preclude subsequent adjustment by MTA C&D based on a later audit or other documentation or evidence.

- f. Sign-off by an MTA C&D representative on the Daily Reports Sheets shall not be construed as agreement that the Work performed was Change Work, that the Work was performed expeditiously or efficiently, or that the total number of hours represents a reasonable time for the Work accomplished, but merely as an acknowledgement that the Design-Builder's forces worked the hours claimed.
- g. To be compensable, time and materials costs must be reasonable and efficient costs for the Work performed.

H. NO TOTAL COST METHOD PRICING

The Design-Builder shall not use the total cost method or adjusted total cost method in preparing or presenting any Equitable Adjustment Proposal, or any portion of an Equitable Adjustment Proposal. No Equitable Adjustment for increased costs under this Contract will be priced using either the total cost method or an adjusted total cost method of pricing, in whole or part. It is the Design-Builder's responsibility to maintain its records so as to identify the costs incurred for Change Work.

ARTICLE 8.05 VALUE ENGINEERING CHANGE PROPOSALS

- A. The Design-Builder, at any time, is encouraged to submit cost reduction proposals that may change the Prescriptive Specifications, Contract Drawings or other requirements of the Contract. Such proposals shall be identified as Value Engineering Change Proposals ("VECP") and each one shall be individually and sequentially numbered. For a VECP to be acceptable under this General Provision, it shall:
 - 1. be identified by the Design-Builder as a VECP;
 - 2. require a change to this Contract; and
 - 3. decrease the Contract Price.
- B. Each VECP that the Design-Builder submits shall be of sufficient detail to clearly define the proposed Change, including:
 - 1. a description of the difference(s) between the existing and the proposed Contract requirements and the comparative advantages and disadvantages of each difference;
 - 2. an estimate of any impacts on costs of maintenance and operations arising from the VECP;
 - 3. an identification of the proposed changes to the Contract requirements necessary if the VECP is accepted;
 - 4. an assessment of any impact on the Current Contract Schedule;
 - 5. a detailed estimate of the amount of the Design-Builder's gross savings that would result in accordance with Article 8.04 - EQUITABLE ADJUSTMENTS IN PRICE; and
 - 6. state the period of time for which the VECP is valid.

- C. MTA C&D may accept or reject part or all of any VECP at its sole discretion by giving the Design-Builder Notice thereof. Until such Notice is issued, the Design-Builder shall remain obligated to perform in accordance with the then-current Contract requirements. MTA C&D will endeavor to process VECPs expeditiously. However, MTA C&D shall not be liable for any delay in acting upon any VECP. The decision of MTA C&D as to acceptance of any such VECP shall be final and shall not be the subject of a Claim under Article 12.01 – CLAIMS.
- D. When a VECP submitted pursuant to this Article is accepted:
1. MTA C&D shall issue a Modification adjusting the Contract Price and modifying any other affected provisions of the Contract modified in accordance with this Article, Article 8.04 - **EQUITABLE ADJUSTMENTS IN PRICE** and any other applicable provisions of the Contract Documents.
 2. Any net savings resulting from the VECP change shall be shared between the Design-Builder and MTA C&D on the basis of fifty percent (50%) for the Design-Builder and fifty percent (50%) for MTA C&D. Net savings shall be determined by deducting from the Design-Builder's gross savings the Design-Builder's reasonable cost of developing and implementing the VECP (including any amount attributable to a subcontractor) both based on the cost methods detailed in Article 8.04.A or B, and as agreed to by MTA C&D.
 3. The Contract Price shall be reduced by the sum of 50% of the net savings to reflect MTA C&D's allocation of the net savings.
 4. The Design-Builder shall use its best efforts to include Value Engineering arrangements in any Subcontract, which in its judgment, appears to offer sufficient value engineering potential.

ARTICLE 8.06 DIFFERING SITE CONDITIONS

- A. The Design-Builder shall promptly, but no later than forty-eight (48) hours after first encountering or discovering conditions that the Design-Builder believes to be a Differing Site Condition, and before such conditions are disturbed, notify the Project CEO in writing of: (i) latent physical conditions at the site differing materially from those conditions indicated in the Contract ("Type 1 Condition"), or (ii) physical conditions at the Work Site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as occurring in work of the character provided for in this Contract but unknown to the Design-Builder until encountered during performance of the Work ("Type 2 Condition"). The Design-Builder's Notice shall identify the conditions encountered and how they differ from those indicated in the Contract or ordinarily encountered or generally recognized, and shall also explain if and how the conditions encountered will cause a material increase in the cost and/or time required for performance of the Work.
- B. MTA C&D shall promptly investigate such condition(s). Should MTA C&D determine that a Differing Site Condition exists as described in Article 8.06A. above, and which materially increases or decreases the cost or time required to perform the Work, the Project CEO shall notify the Design-Builder of that determination and issue a Change Proposal Request. The Design-Builder shall provide a detailed Change Proposal in accordance with the Contract, and the procedures with respect to potential Changes shall apply. MTA C&D shall make an Equitable Adjustment in the Contract Price and Time through a Modification.

- C. No claim for an Equitable Adjustment in cost or extension of time by the Design-Builder due to a Differing Site Condition shall be allowed unless: (i) the condition giving rise to such claim could not have been discovered during a reasonable site inspection prior to award (whether or not same was actually conducted) and (ii) the Design-Builder has given the Notice required in Article 8.06A. above and met the requirements in the Contract in Chapters 6 and 8.
- D. The requirements of the Contract concerning Equitable Adjustments and Changes shall apply to any Equitable Adjustment or Change under this Article 8.06.
- E. A Differing Site Condition shall exist, and the Design-Builder shall only be entitled to an Equitable Adjustment for a Differing Site Condition, if the encountered condition was in existence at the time of award of the Contract. If MTA C&D intends to rely on this requirement to deny a Differing Site Condition Claim, it must reasonably demonstrate that such condition was not in existence at the time of award.
- F. The Design-Builder is charged with knowledge of the information in the Reference Documents; however, information contained in Reference Documents cannot be the basis for a Type 1 Condition. Conditions disclosed in the Reference Documents are known conditions and are therefore may not be used by the Design-Builder to support a claim of a Type 2 Condition.
- G. For Differing Site Conditions that only affect the quantities of Unit Price Work, such unit prices shall not be adjusted due to the Differing Site Condition, and the Work shall be paid for at the Contract unit price, without the need for an adjustment or change. Notwithstanding the foregoing, however, if the Differing Site Condition causes the quantities of such Unit Price Payment Items to overrun or under-run the Equitable Adjustment threshold limits established in Article 8.07 - “Increased or Decreased Contract Quantities,” below, then the unit price shall be subject to Equitable Adjustment in accordance with the provisions of that Article 8.07.
- H. Pending final decision of any claim or dispute hereunder the Design-Builder shall proceed diligently with the performance of the Work and in accordance with MTA C&D’s directions.
- I. The term “Contract Indications” shall mean “conditions indicated in the Contract,” as that phrase is used in Paragraph 8.06 A. above in defining a Type 1 Condition, provided that, for purposes of this Article 8.06 – DIFFERING SITE CONDITIONS, “conditions indicated in the Contract” and therefore “Contract Indications”, shall be limited to express statements with respect to the quantities or conditions to be anticipated contained in the Contract Documents in the order of precedence set out in the Design-Build Agreement.
- J. The absence of an express indication shall not be considered an indication for purposes of a Type 1 Condition.
- K. When the Design-Builder becomes aware of a Differing Site Condition which may impact future Work (such as, but not limited to, a planned parallel tunnel drive); whether or not it impacts current Work, the Design-Builder shall provide the notice required in A. above, and shall plan its Work and take all reasonable steps to mitigate the impact of the Differing Site Condition on that future work. Failure to do so may result in disallowance of costs incurred to deal with the impact of the Differing Site Condition.
- L. All equipment (including but not limited to TBMs and dewatering equipment) shall be capable of performing the Work under all subsurface conditions reasonably foreseeable, including but not

limited to the full range of maximum through minimum values reported anywhere in the Contract Documents, irrespective of the order of precedence; and whether or not outside of any baseline or baseline range, if any. This does not preclude the Design-Builder's entitlement to a Differing Site Condition Equitable Adjustment in accordance with the other requirements of Article 8.06, as supplemented, in the event that the Design-Builder encounters a Differing Site Condition; but such an Equitable Adjustment shall not include the cost of equipment failure, replacement, or modification, or damage to equipment, or any lost time for equipment down time caused by such equipment failure, replacement, repair or modification, unless the conditions causing the incurrence of such cost materially exceed the aforementioned maximums or minimums.

ARTICLE 8.07 INCREASED OR DECREASED CONTRACT QUANTITIES

- A. Any quantities of Unit Price Work given on the Proposal Form are approximate only and are to be used solely for the comparison of Proposals received and to establish the Contract Price for the Work. MTA C&D does not represent or warrant that actual quantities of Unit Price Work performed will equal those given.
- B. With respect to any Unit Price Work for which an estimated quantity is set forth in the Contract Documents, the Unit Price shall apply regardless of the actual quantity of such item ultimately utilized in, or required by, the Work, whether due to a Change or any other variation; except where the actual quantity varies more than twenty-five percent (25%) above or below the estimated quantity stated in this Contract, MTA C&D shall review whether application of the contract Unit Price would cause a substantial inequity to either party, and, if so, the Unit Price will be changed by Equitable Adjustment in accordance with Article 8.03 – CHANGE PROCEDURE; MODIFICATIONS, Article 8.04 – EQUITABLE ADJUSTMENTS IN PRICE Paragraph B, and as limited below; as determined by MTA C&D.
- C. For increased quantities in excess of one hundred twenty-five percent (125%), the Equitable Adjustment shall apply only for the quantities in excess of one hundred twenty-five percent (125%). For those excess quantities the Equitable Adjustment shall replace the unit price with a new unit price, in accordance with Article 8.04. For decreased quantities below seventy-five percent (75%), the Equitable Adjustment shall apply to the total actual quantity and shall consist of a new unit price, in accordance with Article 8.04. For decreased quantities, the adjustment shall not be finalized until the Work related to that Payment Item has been completed as determined by MTA C&D.
- D. In no event shall allowances be made for loss of anticipated profits suffered or claimed by the Design-Builder resulting directly or indirectly from such increased or decreased quantities.
- E. Irrespective of the foregoing, if MTA C&D determines that any Unit Price set forth in the Design-Builder's Proposal is materially unbalanced, unreasonably low, or unreasonably high, MTA C&D may, at any time after award, notify the Design-Builder of this unbalancing. For any Unit Price Payment Item for which a notice has been provided, MTA C&D may, in its sole discretion, limit the application of the Contract Unit Price to the exact estimated quantity for that Unit Price Payment Item. In that case, MTA C&D may equitably adjust the unit price for any quantity above the Proposal estimated quantity, and the threshold set forth elsewhere in this Article 8.07 shall not apply. If the Design-Builder disagrees with the determination that a Unit Price is unbalanced or unreasonably high, it may proceed with a Claim in accordance with Article 12.01 – CLAIMS.

MTA C&D's determination of the Equitable Adjustment shall be subject to all provisions of the Contract and may also be the subject of a Notice of Claim.

ARTICLE 8.08 TERMINATION FOR CONVENIENCE BY MTA C&D

- A. In addition to all other rights or remedies as provided in this Contract or by law, MTA C&D, at any time, may terminate the Contract, in whole or in part, for MTA C&D's convenience, which may include a termination deemed to be required in the best interest of the State. Any such termination shall be effected by delivering to the Design-Builder a written Notice of Termination for Convenience specifying the extent to which performance of Work under the Contract is terminated and the date upon which the termination becomes effective. Upon receipt of the Notice of Termination for Convenience, the Design-Builder shall act promptly to minimize the expenses resulting from the termination.
- B. MTA C&D shall pay the Design-Builder for the Work performed by the Design-Builder and accepted by the Owner for the period extending from the end of the period covered by the last approved Payment Requisition up to the effective date of the termination, an amount determined in accordance with Article 7.04 – PAYMENTS-GENERAL REQUIREMENTS and Article 7.05 – THE APPLICATION FOR PAYMENT. In no event shall the Design-Builder be entitled to compensation in excess of the total consideration of the Contract. In no event shall Design-Builder be entitled to overhead or profit on the Work not performed.
- C. When the Contract, or any portion thereof is terminated pursuant to this provision before completion of all items of Work in the Contract, MTA C&D will reimburse the Design-Builder for costs actually incurred by the Design-Builder, Subcontractors and Vendors up to the effective date of such termination for the units or items of Work completed at the Contract Unit Price, or as mutually agreed for items of Work partially completed. MTA C&D will also reimburse the Design-Builder for costs of settling and paying claims arising out of the termination of Work under Subcontracts or orders, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination, provided the concurrence of the Project CEO in writing is obtained prior to the Design-Builder agreeing to any such settlement. No claim for loss of anticipated profits on uncompleted Work shall be made by the Design-Builder, Subcontractors and Vendors nor shall the State be liable for the loss of anticipated profits for such uncompleted Work.
- D. In the event of such termination, MTA C&D may take over the Work and prosecute the Contract to completion and may take possession of and may utilize such materials, appliances, and equipment on the Work Site and necessary or useful in completing the Work.
- E. Termination of the Contract or a portion thereof for convenience shall not relieve the Design-Builder of its responsibilities for the completed Work, nor shall it relieve its surety of its obligation as set forth in any Labor and Material Payment Bond concerning any just claims arising out of the Work performed.

ARTICLE 8.09 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

- A. For the Contract Price:
 - 1. The Design-Builder shall submit to MTA C&D, by not later than the date of submission of the Design-Builder's first invoice, a Certificate of Current Cost or Pricing Data breaking

down the cost items contained within its lump sum price for all of the Change Work, together with a certificate in the form appearing in Paragraph C below, executed by an authorized officer of the Design-Builder, certifying as to the accuracy and completeness of the information appearing therein. If any price, including profit or fee, negotiated in connection with this Contract, or any cost reimbursable under this Contract, was increased by any significant amount because (a) the Design-Builder or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, or (b) a subcontractor or prospective subcontractor furnished the Design-Builder cost or pricing data that were not complete, accurate, and current as certified in the Design-Builder's Certificate of Current Cost or Pricing Data, or (c) any of these parties furnished data of any description that were not accurate, then the price or cost associated with such negotiation or cost reimbursement shall be reduced accordingly and a Modification issued to reflect the reduction.

2. Any reduction in the Contract Price under Paragraph 1, above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (a) the actual Subcontract, or (b) the actual cost to the Design-Builder, if there was no Subcontract, was less than the prospective subcontract cost estimate submitted by the Design-Builder; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.
3. If the Project CEO determines under Paragraph A, above that a price or cost reduction should be made, the Design-Builder waives the following defenses:
 - a. The Design-Builder or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the Contract would not have been modified even if accurate, complete and current cost or pricing data had been submitted.
 - b. The Project CEO should have known that the cost or pricing data in issue were defective even though the Design-Builder or subcontractor took no affirmative action to bring the defect to the attention of the Project CEO.
 - c. The Contract was based on an agreement about the total cost of the Contract and there was no agreement about the cost of each item procured under the Contract.
 - d. The Design-Builder or Subcontractor did not submit a Certificate of Current Cost or Pricing Data.
4. Except as prohibited under Paragraph 5 below, an offset in an amount determined appropriate by the Project CEO based upon the facts shall be allowed against the amount of a Contract Price reduction if:
 - a. the Design-Builder certifies to the Project CEO that, to the best of the Design-Builder's knowledge and belief, the Design-Builder is entitled to the offset in the amount requested; and

- b. the Design-Builder proves that the defective cost or pricing data were available before the date of agreement on the price of the Contract (or price of the Modification) and that the data were not submitted to MTA C&D before such date.
- 5. Notwithstanding anything to the contrary herein, an offset shall not be allowed if:
 - a. the defective data was known by the Design-Builder to be defective when the Certificate of Current Cost or Pricing Data was signed; or
 - b. MTA C&D proves that the facts demonstrate that the Contract Price would not have increased in the amount to be offset even if the defective data had been submitted before the date of agreement on price.
- B. This Paragraph B shall become operative only for any Modification to this Contract involving a price adjustment expected to exceed \$100,000, except for which the price is (i) based on adequate price competition; (ii) based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or (iii) set by Laws or regulation.
 - 1. If any price, including profit or fee, negotiated in connection with any Modification under this Contract, or any cost reimbursable under this Contract, was increased by any significant amount because: (a) the Design-Builder or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data; or (2) a subcontractor or prospective subcontractor furnished the Design-Builder cost or pricing data that were not complete, accurate, and current as certified in the Design-Builder's Certificate of Current Cost or Pricing Data; or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the Contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this subparagraph becomes operative under Paragraph B, above.
 - 2. Any reduction in the Contract Price under Paragraph B.1 above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (a) the actual subcontract; or (b) the actual cost to the Design-Builder, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Design-Builder; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.
 - 3. If the Project CEO determines that a price or cost reduction should be made, the Design-Builder agrees not to raise the following matters as a defense:
 - a. The Design-Builder or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost of pricing data had been submitted.
 - b. The Project CEO should have known that the cost or pricing data in issue were defective even though the Design-Builder or subcontractor took no affirmative action to bring the character of the data to the attention of the Project CEO.

- c. The Contract was based on an agreement about the cost of each item procured under the Contract.
 - d. The Design-Builder or subcontractor did not submit a Certificate of Current Cost or Pricing Data.
- 4. Except as prohibited herein, an offset in an amount determined appropriate by the Project CEO based upon the facts shall be allowed against the amount of a Contract Price reduction if:
 - a. the Design-Builder certifies to the Project CEO that, to the best of the Design-Builder's knowledge and belief, the Design-Builder is entitled to offset in the amount requested; and
 - b. the Design-Builder proves that the cost or pricing data were available before the date of agreement on the price of the Contract (or price of the modification) and that the defective data were not submitted to MTA C&D before such date.
- 5. Notwithstanding anything to the contrary herein, an offset shall not be allowed if:
 - a. the defective data was known by the Design-Builder to be defective when the Certificate of Current Cost or Pricing Data was signed; or
 - b. MTA C&D proves that the facts demonstrate that the Contract Price would not have increased in the amount to be offset even if the defective data had been submitted before the date of agreement on price.
- C. Certificate of Cost and Pricing Data (This form must be completed by the Design-Builder to certify the cost and pricing data submitted).

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, the cost or pricing data submitted, either actually or by specific identification in writing, to the Project CEO, or to the Project CEO's representative in support of (identify the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., order no.) are accurate, complete, and current as of (Insert the day, month, and year when price negotiations were concluded and price agreement was reached.) This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and MTA that are part of the Proposal.

Firm: _____
Name: _____
Title: _____
Date: _____

(Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the Contract Price was agreed to.)

- D. The Design-Builder shall require all Subcontractors and Vendors to provide and certify cost and pricing data in the manner described in this Article 8.09. The Design-Builder shall include the

provisions of this Article 8.09 in all contracts with Subcontractors and Vendors who perform the Work.

ARTICLE 8.10 CHANGES IN LAWS

- A. The Design-Builder shall keep itself fully informed of all Laws affecting the Work or those engaged in the Work. If any discrepancy or inconsistency is discovered in the Contract in relation to any Laws, the Design-Builder shall report the same to the Project CEO in writing. The Design-Builder, its agents and employees shall at all times observe and comply with, and shall cause all of its Subcontractors and Vendors, and their agents and employees to observe and comply with all Laws.
- B. If during the term of this Contract there comes into effect the enactment, promulgation or adoption of any Law, a binding change in the judicial or administrative interpretation of any Law, or any modification (including repeal) of any Law, in each case not known or foreseeable at the time of the Award Date that (a) is both materially different from or inconsistent with Law as in effect prior to the coming into effect of the relevant change as referenced above and was not (in the same or substantially similar form and substance to that which later comes into effect) pending, passed or adopted, including in the form of a bill or draft, as of such date, and (b) does not constitute any such enactment, promulgation, adoption, change or modification of any Federal, State, or local trade, export, customs or sanctions law, Federal, State or local labor Law or Federal, State or local tax Law, (“Change in Law”), such change shall be considered under Article 8.02 – CHANGES, as if resulting from an Order by MTA C&D, if:
 - 1. the Change in Law requires or results in a change in the Contract Documents;
 - 2. the Change in Law materially affects performance of the Work; and
 - 3. the Design-Builder files a Notice of Change within five (5) Days of becoming aware of the Change in Law.
- C. A Change in Law may result in an Excusable Delay in accordance with Chapter 6, but shall not also result in entitlement to an Equitable Adjustment in Price or to a Compensable Delay, unless it necessarily:
 - 1. affects the Design-Builder’s method, manner, or sequence of execution of the Work; or results in acceleration or extension of the Work, or results in modifying the Contract Schedule, Milestone or Restraints; and
 - 2. does not also require or result in a Change as set forth in Article 8.02 – CHANGES.

ARTICLE 8.11 CHANGES TO STANDARDS, SPECIFICATIONS AND CODES

- A. The Design-Builder shall not be required to comply with any change or addition to, or replacement of, the standards, specifications or requirements of organizations, associations or societies referenced in Article 1.07 or that otherwise do not constitute a Change in Law, that occur after the Award Date, except pursuant to a Change.
- B. Without limiting the Design-Builder’s obligation to at all times comply with Law, if MTA C&D directs the Design-Builder to comply with any change or addition to, or replacement of, a standard,

specification or requirement, the Design-Builder may be entitled to an Equitable Adjustment pursuant to the Contract.

C. The Design-Builder shall only be entitled to an Equitable Adjustment from any such change, addition or replacement if and to the extent such Change:

1. was not known or foreseeable at the time of the Award Date;
2. is materially more onerous as applied to the Project, the Design-Builder or any Subcontractor or Vendor than the application thereof to similar projects of the MTA Group; and
3. does not arise as a result of or is not made in response to any Design-Builder Fault Event.

CHAPTER 9.

SECURITY FOR THE PERFORMANCE OF WORK

ARTICLE 9.01 PERFORMANCE AND PAYMENT BONDS

- A. The Design-Builder shall have furnished to MTA C&D a Performance Bond and Payment Bond, as set forth in the Instructions to Proposers, which shall be for 100% of the Contract Price or such other amount as provided in the Design-Build Agreement.
- B. The Design-Builder's Performance Bond and Payment Bond, when submitted, shall each be accompanied by a current Certificate of Qualifications pursuant to Section 1111 of the Insurance Law of the State of New York, and the Surety thereon shall be a Corporate surety licensed to do business in the State of New York, with an approved capacity to exceed the Total Contract Amount and in good standing under the laws of the State. Further, in order to be approved by the MTA, the Surety must have an underwriting limitation acceptable to the MTA and be rated by A.M. Best and Co at A- or higher.

ARTICLE 9.02 RETAINED PERCENTAGE

As additional security for the faithful performance of this Contract, MTA C&D shall deduct and retain from all Progress Payments five percent (5%) of the amount certified to be due thereunder (the "Retained Percentage"). This Retained Percentage shall be payable to the Design-Builder as part of the Substantial Completion Payment to be made after issuance of the Certificate of Substantial Completion.

ARTICLE 9.03 WITHHOLDING MONEY TO SATISFY CLAIMS, LIENS OR JUDGMENTS; ADDITIONAL RETENTION

- A. If at any time a claim, lien or judgment is made by any person, entity or corporation (including without limitation MTA or an Indemnified Party) against the Design-Builder or against any of the Indemnified Parties for which the Design-Builder is liable under this Contract or by Law, with respect to matters pertaining to the Work, then MTA C&D may retain an amount equal to one hundred twenty-five percent (125%) of the amount of such claim, lien or judgment or so much thereof as MTA C&D may deem reasonable. MTA C&D may also retain as Additional Retention any pending or potential backcharges, pending or potential Liquidated Damages or other amounts due from the Design-Builder under the Contract. Such Additional Retention is in addition to the other sums that MTA C&D is authorized to retain under this Contract. Amounts withheld by MTA C&D pursuant to this Paragraph are referred to herein as "Additional Retention". If the liability of any such party on a claim or lien for which Additional Retention is withheld by MTA C&D is finally adjudicated by a court of competent jurisdiction as evidenced by a lawful order or judgment, or if the Design-Builder's obligation to pay is finally decided by any other binding decision, or the Design-Builder admits that such claim(s) or lien(s) are valid, then the claim or lien or judgment may be paid from the amount so retained hereunder and credited against the payments due to the Design-Builder. Any balance left on the Additional Retention for a claim after application of a binding decision shall be paid to the Design-Builder.
- B. Should any claim, lien or judgment remain unsatisfied at the time the Substantial Completion Payment or Final Payment is due, MTA C&D shall have the right to retain out of either such payment a sum it determines to be sufficient to protect MTA C&D in regard to all such unsatisfied

claims, liens and judgments or unresolved amounts due or which may become due. In lieu of the foregoing, MTA C&D may require the Design-Builder to furnish other or additional security.

- C. Should the sum thus retained be insufficient to pay the amount determined to be due upon such claim, lien or judgment, the Design-Builder shall pay the amount of the deficiency to MTA C&D immediately upon demand by MTA C&D.
- D. Notwithstanding MTA C&D's right to withhold Additional Retention on account of a claim by anyone other than MTA C&D, MTA C&D, as an alternative, in whole or in part, may require adequate written assurance from the Design-Builder's insurance carrier or Surety on bonds required hereunder that the insurer or Surety will assume all responsibility in connection with the claim, including defending the Design-Builder and the Indemnified Parties under this Contract in any lawsuit and paying any judgment based on said claim. MTA C&D shall have sole discretion to determine the adequacy of the assurance so furnished.

ARTICLE 9.04 SUBSTITUTION OF APPROVED GOVERNMENT BONDS

- A. The Design-Builder may, from time to time, withdraw portions of the amounts so retained under Article 9.02 - RETAINED PERCENTAGE or monies otherwise withheld under the Contract, provided any such monies have not been applied by MTA C&D for reimbursement to itself or a third party in accordance with applicable provisions of the Contract, by depositing with MTA C&D's fiscal officer approved securities with a market value equal to the amount to be withdrawn.
- B. The Design-Builder shall pay to MTA C&D any service charge as may then be in effect for the custodial safekeeping of securities deposited with MTA C&D by the Design-Builder pursuant to the terms of this Contract.
- C. Approved bonds are:
 - 1. the United States Government;
 - 2. the State of New York; and
 - 3. the City of New York.

Other government bonds may be accepted for security in MTA C&D's sole discretion.

- D. All of the bonds deposited for security must be payable to, run in favor of, or be transferred to, MTA C&D. If in the opinion of MTA C&D, the government bonds diminish in market value, then, within ten (10) days after Notice, the Design-Builder shall deposit cash or government bonds to restore the value to that originally required. The Design-Builder's failure to deposit such additional cash or government bonds in accordance herewith shall be an Event of Default. In lieu of defaulting the Design-Builder, MTA C&D may allow the Design-Builder to proceed with the Work and may deduct from any monies then due or which thereafter may become due to the Design-Builder the amount necessary to restore the original valuation of such government bonds and to hold such amount in lieu thereof.
- E. MTA C&D shall pay to the Design-Builder all interest, dividends and other income on the government bonds, within a reasonable time when same is collected. If the government bonds are in the form of coupon bonds, the coupons shall be delivered to the Design-Builder as they

respectively become due; provided, however, that the Design-Builder shall not be entitled to interest, dividends or other income on any government bonds the proceeds of which MTA C&D has determined to use or apply as authorized under the Contract.

ARTICLE 9.05 USE OF MONIES WITHHELD

Deposits, retainage or other monies withheld, whether in cash or government bonds, shall be security for the faithful performance of the Contract by the Design-Builder, including the payment of claims, liens or judgments (as herein provided). In the event any default results in loss, damage or expense to MTA C&D, MTA C&D may apply such amounts withheld as may be necessary to compensate it for such loss, damage or expense, including liquidated damages.

ARTICLE 9.06 PAYMENT GUARANTEE

- A. In the event that the surety has made payment(s) pursuant to and in accordance with the Payment Bond in the full penal sum of the bond, such penal sum is less than 100% of the Contract Price and any additional claim(s) pursuant to Section 137 of the State Finance Law are made, MTA C&D shall, in accordance with the terms of Article 9.06, guarantee payment of all demands for (a) wages and compensation for labor performed and/or services rendered in connection with the Work and (b) materials, equipment and supplies provided in connection with the Work, whether incorporated into the Work or not, when demands have been filed with MTA as provided hereinafter by any person, firm, or corporation which furnished services, labor, material, equipment, supplies or any combination thereof, in connection with the Work performed hereunder (hereinafter referred to as the “beneficiary”) at the direction of MTA or the Design-Builder.
- B. The provisions of the guarantee set forth in Paragraph A are subject to the following limitations and conditions.
 - 1. The guarantee is made for the benefit of all beneficiaries as defined in Paragraph A, provided that those beneficiaries strictly adhere to the terms and conditions of Article 9.06.
 - 2. Nothing in Article 9.06 shall prevent a beneficiary providing labor, services or material for the Work from suing the Design-Builder for any amounts due and owing the beneficiary by the Design-Builder.
 - 3. All demands made against MTA pursuant to Article 9.06 shall be made within four (4) months from the date payment is due on the invoice submitted by the beneficiary to the Design-Builder for labor or services done or for materials, equipment or supplies delivered, or, if the demand is for wages, four (4) months from the date wages were due to be paid to the beneficiary.
 - 4. All demands made against MTA by such beneficiary shall be presented to the Project CEO along with all written documentation concerning the demand which the Project CEO deems appropriate or necessary, which may include, but shall not be limited to: the subcontract; any invoices presented to the Design-Builder for payment; the notarized statement of the beneficiary that the demand is due and payable; that a request for payment has been made of the Design-Builder and that the demand has not been paid by the Design-Builder within the time allowed for such payment by the subcontract; and copies of any correspondence between the beneficiary and the Design-Builder concerning such demand. MTA shall notify the Design-Builder that a demand has been made. The Design-Builder shall inform

MTA of any defenses to the demand, and shall forward to MTA any documents MTA requests concerning the demand.

5. MTA shall make payment only if, after considering all defenses presented by the Design-Builder, it determines that the payment is due and owing to the beneficiary making the demand.
 6. MTA will not initiate the payment process of Article 9.06 or make payment on a demand where the beneficiary making the demand has filed a lien against the Work or otherwise sues MTA prior to receiving a written notice from MTA that it will not pay the demand.
 7. No beneficiary shall be entitled to interest from MTA, or to any other costs, including but not limited to, attorneys' fees.
- C. Upon receipt by MTA of a demand pursuant to Article 9.06, MTA may withhold from any payment otherwise due and owing the Design-Builder under this Contract an amount sufficient to satisfy the demand.
- D. In the event MTA determines that the demand is valid, MTA shall notify the Design-Builder of such determination and the amount thereof, and direct the Design-Builder to immediately pay such amount to the beneficiary. In the event the Design-Builder, within seven (7) days of receipt of such notification from MTA fails to pay the beneficiary, such payment shall constitute an automatic and irrevocable assignment of payment by the Design-Builder to the beneficiary for the amount of the demand determined by MTA to be valid. The Design-Builder, without further notification or other process herein gives its unconditional consent to such assignment of payment to the beneficiary and authorizes MTA on its behalf to take all necessary actions to implement such assignment of payment, including without limitation the execution of any instrument or documentation necessary to effectuate such assignment.
- E. In the event that the amount otherwise due and owing to the Design-Builder by MTA is insufficient to satisfy such demand, MTA may, at its option require payment from the Design-Builder of an amount sufficient to cover such demand and exercise any other right to require or recover payment which MTA may have under law or contract.
- F. In the event MTA determines that the demand is invalid, any amount withheld pending MTA's review of such demand shall be paid to the Design-Builder, provided however, no lien has been filed. In the event a lien has been filed, MTA may continue to withhold payment to the Design-Builder as set forth in subparagraph C above and otherwise exercise its rights under the Contract Documents.
- G. The provisions of Article 9.06 shall not prevent MTA and the Design-Builder from resolving disputes in accordance with the Contract, where applicable.
- H. In the event MTA determines that the beneficiary is entitled to payment pursuant to Article 9.06, such determination and any defense and counterclaims raised by the Design-Builder shall be taken into account in evaluating the Design-Builder's performance.
- I. Nothing in this Chapter shall relieve the Design-Builder of the obligation to pay the claims of all persons with valid and lawful claims against the Design-Builder relating to the Work, and the Design-Builder agrees to indemnify MTA for all such claims.

- J. The Design-Builder shall not require any performance, payment or other bonds of any subcontractor if the Contract does not require such bonds of the Design-Builder.
- K. The payment guarantee made pursuant to Article 9.06 shall be construed in a manner consistent with Section 137 of the State Finance Law and shall afford the person furnishing labor or materials to the Design-Builder or the subcontractors in the prosecution of the Work under this Contract all of the rights and remedies afforded to such persons by such section, including but not limited to, the right to commence an action against MTA on the payment guarantee provided by Article 9.06 within the one (1) year limitations period set forth in Section 137(4)(b) of the State Finance Law.

ARTICLE 9.07 SURETY

- A. In the event a Surety becomes insolvent, or its license is revoked or suspended, or in the event a Surety is listed as an approved federal surety, and such federal approval is revoked or suspended, the Design-Builder, within ten (10) days after notice by MTA C&D, shall substitute other and sufficient surety or sureties; if the Design-Builder fails to do so, such failure shall be an Event of Default.
- B. In lieu of defaulting the Design-Builder under Section 9.07(A), the MTA C&D may allow the Design-Builder to continue the Work, in which event the MTA may deduct from any monies then due or which thereafter may come due to the Design-Builder the amount for which the surety shall be held and bound upon said bond. The monies so deducted may be held by the MTA C&D as collateral security for the performance of the conditions of the bonds and such monies shall in such case be deemed to have been paid to the Design-Builder under this Contract.

CHAPTER 10.

DESIGN-BUILDER'S LIABILITY AND INSURANCE

ARTICLE 10.01 INDEMNIFIED PARTIES

The term "Indemnified Parties," whenever referred to in this Contract, shall consist of those listed as such in the Design-Build Agreement and Appendix 10.05, Insurance Requirements.

ARTICLE 10.02 RESPONSIBILITY FOR INJURIES TO PERSONS AND PROPERTY

- A. The Design-Builder shall be solely responsible for (i) all injuries (including death) to persons, including, but not limited to, employees of the Design-Builder and Subcontractors and Indemnified Parties, and (ii) damage to property, including, but not limited to, property of the Indemnified Parties, the Design-Builder, and its Subcontractors. The liability hereunder shall be limited to such injuries or damage occurring on account of, or in connection with, the performance of the Work, whether or not the occurrence giving rise to such injury or such damage happens at the Work Site or whether or not sustained by persons or to property while at the Work Site.
- B. The Design-Builder's liability hereunder includes any injury (including death) or damage to property related to the performance of, including the failure to perform the Work under the warranty provisions of the Contract and miscellaneous incidental work.

ARTICLE 10.03 INDEMNIFICATION

- A. The Design-Builder's indemnification obligations will be as follows:
 - 1. The Design-Builder shall defend, indemnify and save harmless the Indemnified Parties to the fullest extent permitted by law, regardless of insurance coverage, from loss and liability upon any and all claims, losses and expenses, including, but not limited to, attorneys' fees, arising from, pertaining to, or relating to the Design-Builder's:
 - a. design and construction of the Project, including performance or non-performance of any of the Design-Builder's obligations pursuant to this Contract; and
 - b. breach of this Contract,including in each case a. and b.:
 - c. death or personal injury, regardless of the cause;
 - d. loss of or damage to any Indemnified Party's property (whether personal or real), equipment or facilities, including loss of use thereof, regardless of the cause; and
 - e. any claim by a third party against an Indemnified Party, including by any contractor performing Work on the Project for damage or extra costs sustained as a result of any act, omission or delay of the Design-Builder hereunder,

in each case regardless of whether such loss and liability, claim or expense is due in part to negligence of the Design-Builder, its Subcontractors, Indemnified Parties, or of any other persons, but excepting:

- f. bodily injuries and property damage to the extent adjudicated to be caused by the sole negligence of MTA C&D; and
 - g. is not of a type otherwise excluded, and which claim or loss: (i) arose from, or as a consequence of, the Design-Builder's performance (and not of any non-performance or breach) of its obligations under this Contract; and (ii) could not have been avoided by the Design-Builder due to this Contract specifying without deviation or discretion the manner of performance; and
2. The Design-Builder's foregoing obligation to defend, indemnify and save harmless includes:
- a. any and all fines, penalties and assessments levied against or imposed upon the Indemnified Parties and any other loss and liability to the extent caused by the Design-Builder's or a Subcontractor's or a Vendor's failure to comply with any and all applicable federal, state and local laws, rules and regulations governing the handling, transportation, disposal and abatement of asbestos, asbestos-containing materials, asbestos-contaminated materials, lead paint materials, petroleum, petroleum constituents, and all other environmentally regulated substances and hazardous materials; and
 - b. all loss and liability resulting from the Design-Builder's drilling and blasting operations or from the transport or handling of explosives, regardless of actual cause, and whether or not due in part to the negligence of an Indemnified Party or, or to the Design-Builder's or a Subcontractor, or of any other persons.

B. DEFINING "LOSS AND LIABILITY"

The term "loss and liability", as used herein, shall be deemed to include, but not be limited to, liability for the payment of workers' compensation benefits under the Workers' Compensation Law of the State of New York, or liability under the Federal Employers' Liability Act or similar statutes.

C. DESIGN-BUILDER'S LIABILITY IS ABSOLUTE

Except as otherwise provided in Paragraph A. above, the liability of the Design-Builder under this Article 10.03 is absolute and is not dependent upon any question of negligence on its part or on the part of its agents, officers, employees or Subcontractors or Vendors. The approval by any Indemnified Party of the methods of performing the Work, or the failure of any Indemnified Party to call attention to improper or inadequate methods or to require a change in methods or to direct the Design-Builder to take any particular precautions or to refrain from doing any particular thing shall not excuse the Design-Builder in the event of injury to persons or damage to property.

D. REPAIRS AT THE DESIGN-BUILDER'S EXPENSE

If any damage shall occur to any property of the Indemnified Parties (except that reasonably associated with the Work and then only that which is specifically required by this Contract) on account of the Work, and the Design-Builder is responsible therefore, MTA C&D shall have the right to cause such damage to be repaired, restored, or replaced by third parties or by MTA C&D and to charge the expense of such repairs to the Design-Builder. Whether such Work is performed by MTA C&D or third parties, MTA C&D may deduct the amount of such expense that may be incurred in repairing any such damage from any monies due or to become due to the Design-Builder under this Contract or under any other agreement between the Design-Builder and MTA C&D.

- E. If at any time, a claim is made by any person, firm, partnership or corporation against any of the Indemnified Parties for any injury or damage, or for any infringement of patents or copyrights as hereinafter provided, then the amount of such claim, or so much thereof as may be deemed reasonable by MTA C&D, may be retained by MTA C&D out of any monies then due or thereafter becoming due to the Design-Builder under the Contract (in addition to other sums, if any, elsewhere herein authorized to be so retained) as security for the payment of such claim or claims. In lieu of such retention, as set forth in Article 9.05 – BONDS IN LIEU OF RETENTION, MTA C&D may permit the posting of a bond, in a form satisfactory to it in its sole discretion, for the full amount of such claim or claims; such bond is to be held until such claim or claims are satisfied or otherwise discharged.

F. **PENALTIES**

In addition to the indemnification provisions elsewhere in this Contract, the Design-Builder shall be responsible for and shall defend, indemnify, and hold harmless the Indemnified Parties from all fines, penalties, costs, and loss of every kind whatsoever, imposed upon any of them, that may arise or result from, or by reason of the violation of any Law (as defined in Article 1.02 – DEFINITIONS AND ABBREVIATIONS) by, the Design-Builder and each of its Subcontractors and Vendors, and each of its and their respective officers, agents, and employees, in connection with the execution of the Work.

- G. The Design-Builder's indemnification obligations shall not be deemed limited or discharged by the procurement of any insurance.

ARTICLE 10.04 RISK OF LOSS TO THE WORK

- A. The Design-Builder assumes risk of loss or damage to the Work occurring prior to issuance of the Certificate of Final Completion of all the Work to the fullest extent permitted by Law, regardless of whether such loss or damage arises from acts or omissions (whether negligent or not) of the Design-Builder, MTA C&D or third persons, or from any cause whatsoever. When risk of loss to the Work (or a portion thereof) is transferred to MTA C&D, MTA C&D shall thereafter assume responsibility for the care, protection and ordinary upkeep (excluding the Design-Builder's warranty obligations) for said Work, except to the extent that the Design-Builder remains responsible for incomplete Work or is otherwise responsible for loss or damage as provided in this Contract.
- B. In the event that a part of the Work is subject to MTA C&D's Beneficial Occupancy prior to issuance of the Certificate of Final Completion of the Work, then, risk of loss for such specified part of the Work shall transfer to MTA C&D upon the issuance of the Beneficial Occupancy Certification; provided however that the Design-Builder shall continue to be liable for and bear

the risk of loss for any damage or loss to such part of the Work to the extent caused by acts or omissions of the Design-Builder, including but not limited to any Defective Work and acts or omissions in performing the portion of the Work Beneficially Occupied by MTA C&D.

- C. The Design-Builder's obligation hereunder is to immediately repair, replace and make good such loss or damage so as to restore the Work to the same character and condition as before the loss or damage occurred in accordance with the Contract without cost to MTA C&D.
- D. Risk of loss or damage to work trains, cranes, or special equipment supplied and operated by MTA C&D shall be on MTA C&D, but the Design-Builder shall be responsible for loss or damage thereto arising out of the Design-Builder's failure to fulfill a Contract obligation hereunder and for the negligence or willful act of the Design-Builder, its Subcontractors and its Vendors.
- E. The Design-Builder shall exercise due care and diligence to ensure that all Work, and all other work, materials and equipment, whether temporary or permanent (including items supplied by the Indemnified Parties) are at all times thoroughly protected from vandalism or theft, the weather, and any and all other damage prior to Final Completion. The Design-Builder shall provide watchmen and labor, materials, protective features such as tarpaulins, boards, boxing, frames, canvas guards, fireproofing, protective coatings and other safeguards as are necessary or as may be directed by MTA C&D. Any loss or damage resulting from the Design-Builder's failure to comply herewith shall be corrected or repaired by and at the Design-Builder's sole expense.

ARTICLE 10.05 INSURANCE

The Design-Builder shall procure and maintain during the term of the Contract, as such term may be extended from time to time, and shall cause all Design Professionals, Subcontractors and Vendors to procure and maintain, the required insurance coverages set forth in the Design-Build Agreement and otherwise comply with all obligations of the Design-Builder as set forth therein.

ARTICLE 10.06 ACCIDENTS

- A. The Design-Builder must promptly report in writing to the MTA all accidents whatsoever, occurring upon the Site, or arising out of or in connection with the performance of the Work (whether or not on or adjacent to the Work Site) which cause death, personal injury, or property damage, giving full details and statements of witnesses. In addition, if death or serious injury or serious damage is caused, the accident shall be reported immediately to the MTA orally and also promptly confirmed in writing.
- B. If any claim is made by any third person against the Design-Builder or any Subcontractor on account of any accident, the Design-Builder shall promptly report the claim in writing to the MTA giving full details of the claim.

ARTICLE 10.07 BLASTING INDEMNIFICATION

The Design-Builder shall defend, indemnify and hold harmless the Indemnified Parties to the fullest extent permitted by law, regardless of insurance coverage, for all loss and liability upon any and all claims and expenses, including but not limited to attorneys' fees, resulting from the Design-Builder's drilling and blasting operations or from the transport or handling of explosives, regardless of actual cause, and whether or not due in part to the negligence of an Indemnified Party, or to the Design-Builder or a Subcontractor, or of any other persons

ARTICLE 10.08 ENVIRONMENTAL OBLIGATIONS AND INDEMNIFICATION

- A. In fulfilling its obligations under the Contract, the Design-Builder shall comply, and the Design-Builder shall require all Subcontractors and Vendors to comply, with any and all Laws governing the handling, transportation, disposal and abatement of asbestos, asbestos-containing materials, asbestos-contaminated materials, lead paint materials, petroleum, petroleum constituents, and all other environmentally regulated substances and hazardous materials. The Design-Builder shall indemnify and hold harmless, without limitation, the Indemnified Parties from any and all fines, penalties and assessments levied against or imposed upon the Indemnified Parties to the extent caused by the Design-Builder's or a Subcontractor's or a Vendor's failure to comply with any and all applicable federal, state and local laws, rules and regulations governing the handling, transportation, disposal and abatement of asbestos, asbestos-containing materials, asbestos-contaminated materials, lead paint materials, petroleum, petroleum constituents, and all other environmentally regulated substances and hazardous materials.
- B. The indemnification obligations and liability of the Design-Builder under this Article shall in no way be limited by the amount of insurance coverage provided and shall continue beyond the expiration of the Contract for claims, losses, expenses, fines, penalties, liabilities and assessments that arise out of the Design-Builder's or its Subcontractors' performance during the term of the Contract.

CHAPTER 11.

DESIGN-BUILDER'S DEFAULT

ARTICLE 11.01 EVENT OF DEFAULT

A. An "Event of Default" shall mean any material breach of the Contract by the Design-Builder, including those instances specifically referred to in the Contract as a material breach or an Event of Default, and including the following events:

1. the Design-Builder fails to begin the Work, or any portion of the Work, in accordance with the Contract requirements;
2. the Design-Builder fails or refuses to meet any Milestones (including Substantial Completion);
3. the Design-Builder's rate of progress is endangering the execution of this Contract or the meeting of Milestones;
4. the Design-Builder abandons the Work or any portion of the Work;
5. the Design-Builder makes any misrepresentations under Article 14.10 – GENERAL REPRESENTATIONS AND WARRANTIES;
6. the Design-Builder fails or refuses to timely perform, comply or satisfy any material obligation under this Contract or violates any material provision of this Contract;
7. the Design-Builder unnecessarily or unreasonably delays the performance of services and/or the furnishing of materials or equipment pursuant to the execution of this Contract or causes a Work stoppage or Work suspension;
8. the Design-Builder fails or refuses to comply in any material respect with any Laws and such noncompliance reasonably could be expected to have a material adverse effect on the ability of Design-Builder to perform its obligations under this Contract or on any of the rights or obligations of MTA C&D;
9. the Design-Builder fails to submit any Schedule Submittal within the time required or the Design-Builder fails to submit a Recovery Schedule promptly after a request from MTA C&D to do so;
10. the Design-Builder fails to obtain an approval required by the Contract;
11. the Design-Builder fails to provide MTA C&D with any of the insurance certificates required;
12. the Design-Builder, after a Work stoppage or Work suspension in breach of this Contract, fails or refuses to commence performance of the Work within five (5) Days after Notice from MTA C&D of such unauthorized Work stoppage or Work suspension;

13. the Design-Builder is or becomes insolvent or bankrupt or ceases to pay its debts as they mature or makes an arrangement with or for the benefit of its creditors or consents to or acquiesces in the appointment of a receiver, trustee or liquidator for a substantial part of its property;
14. a bankruptcy, winding-up, reorganization, insolvency, arrangement or similar proceeding is instituted by or against the Design-Builder under any Law, which proceeding has not been dismissed within sixty (60) Days;
15. the levy of any distress, execution or attachment upon the property of the Design-Builder that substantially interferes with its performance hereunder;
16. any action or answer is taken or filed by the Design-Builder approving of, consenting to, or acquiescing in, any proceeding described in the preceding three Events of Default;
17. the Design-Builder fails to provide “adequate assurance” as required under Article 11.02 - REQUEST FOR ASSURANCE OF ABILITY TO PERFORM, below;
18. it is found that Schedule VI, Contractor Responsibility Form, Schedule VI-A, Contract-Specific Responsibility Form, or any certification or disclosure completed in accordance with Schedule VII, NYS Certification of Restrictions on Lobbying, which were submitted by Design-Builder with its Proposal, was intentionally false or intentionally incomplete;
19. after exhaustion of all rights of appeal, there occurs any disqualification, suspension, or debarment from bidding, proposing, or contracting with any state-level, interstate, or Federal authority (distinguished from ineligibility due to lack of financial qualifications) of the Design-Builder or any Subcontractor whose work is not complete at the date of the relevant exclusion and that remains a Subcontractor 90 days afterward;
20. it is found that any statement, certification or disclosure made in the Design-Builder’s Statement of Qualification was intentionally false or intentionally incomplete;
21. the Design-Builder fails to make any payment to the MTA C&D pursuant to or in relation to this Contract when due (unless such payment is the subject of a good faith dispute); or
22. any other breach by the Design-Builder of any of its material obligations other than a breach which constitutes one of the foregoing “Events of Default” or which is expressly excused.

- B. Upon the occurrence of an Event of Default, MTA C&D may either: (1) issue a Notice of Termination for Default; (2) provide the Design-Builder with an opportunity to cure by providing a “Cure Notice” (see below); (3) take any other action permitted under this Contract or at law; or (4) take no action. Any forbearance or delay in taking any action permitted shall not preclude taking that action at a future date.

ARTICLE 11.02 REQUEST FOR ASSURANCE OF ABILITY TO PERFORM

When, in the opinion of MTA C&D, reasonable grounds exist concerning the Design-Builder’s ability to perform the Work or any portion thereof, MTA C&D may request that the Design-Builder, within a reasonable time, provide written adequate assurance of its ability to perform in accordance with the Contract (“Assurance”). Such

Assurance must be provided by the Design-Builder within the time set forth in MTA C&D's request. If the Design-Builder fails to provide the Assurance, or if the assurance provided by the Design-Builder is inadequate in the judgment of MTA C&D, then such failure or inadequacy shall be an Event of Default.

ARTICLE 11.03 CURE NOTICE AND OPPORTUNITY TO CURE

- A. MTA C&D may provide the Design-Builder an opportunity to cure an Event of Default by providing a "Cure Notice" for any Event of Default. The Cure Notice shall specify the basis(es) for the Event of Default and the length of time that MTA C&D is willing to allow the Design-Builder to complete a cure. The time period allowed for Cure shall not be fewer than seven (7) Days nor more than forty-five (45) Days, at the sole discretion of MTA C&D.
- B. The Cure Notice may, but is not required to, identify specific actions that MTA C&D requires for cure and the length of time that MTA C&D is willing to allow the Design-Builder to commence a cure.
- C. If an Event of Default is not rectified to the satisfaction of MTA C&D within the time provided in the Cure Notice, MTA C&D may issue a Notice of Termination for Default or MTA C&D may extend at its sole discretion the time period allowed for cure as MTA C&D shall deem appropriate without waiving of any of its rights hereunder.

ARTICLE 11.04 NOTICE OF TERMINATION FOR DEFAULT

- A. Upon the occurrence of any Event of Default, MTA C&D shall have the right to issue a Notice of Termination for Default. MTA C&D may issue a Notice of Termination for Default for all of the Work or for the portion of the Work that MTA C&D deems to be affected by the Event of Default. The Notice of Termination for Default shall set forth the Event of Default on which such Termination is based and specify the Termination Date.
- B. In the event of a Termination for Default, MTA C&D shall have no liability to the Design-Builder except to pay for Work satisfactorily performed on the terminated part of the Contract prior to the effective date of such termination. Work that has been satisfactorily performed shall be paid, at the Unit Prices for Unit Price Work and the Lump Sum(s) Price for Lump Sum Work. For completed portions of Lump Sum Work for which there is an identified price in the approved Cost-Loaded Activities List, the Design-Builder shall be paid the identified price. MTA C&D shall determine the amount of satisfactory Work performed as a basis to determine the amount of compensation due the Design-Builder for all Work performed. MTA C&D shall deduct or set-off against any sum due and payable under this Article 11.04 any claims it may have against the Design-Builder.
- C. The Design-Builder shall not receive any compensation for any profit or anticipated administrative or indirect costs the Design-Builder might have reasonably expected to make or recover on the uncompleted portion of the Work.

ARTICLE 11.05 NOTICE TO SURETY NOT REQUIRED

Any Notice of Termination for Default, Cure Notice, or request for Assurance hereunder may be provided to the Design-Builder by MTA C&D without also providing copies or notice to the Sureties. No Surety Bond shall be invalidated because MTA C&D did not provide copies or notice to the Surety.

ARTICLE 11.06 ACTIONS UPON TERMINATION FOR DEFAULT

Unless otherwise specified in the Notice of Termination for Default, and in addition to those actions specified in such Notice, the Design-Builder shall take the following actions upon the Termination Date:

- A. discontinue execution of the Work to the extent specified in such Notice and place no further purchase orders or subcontracts to the extent that they relate to the performance of the terminated Work;
- B. prepare an inventory for and turn over to MTA C&D all data, designs, licenses, equipment, materials, plant, tools and property furnished by Design-Builder or provided by MTA C&D for performance of the terminated Work;
- C. promptly obtain cancellation of all purchase orders, subcontracts, rental, or any other agreement existing for performance of the terminated Work or assign those agreements as directed by MTA C&D, upon terms satisfactory to MTA C&D;
- D. cooperate with MTA C&D in the transfer of data, designs, licenses and information and disposition of Work in progress so as to mitigate damages;
- E. take such steps for continued protection of the Work as may be specified in such Notice or as may be reasonably necessary with immediate notice to MTA C&D of such steps. The Design-Builder shall be entitled to compensation for such protective Work under the cost principles applicable to Equitable Adjustments;
- F. with respect to purchase orders or Subcontracts that relate to the performance of the Work, specifically identified by MTA C&D in such Notice as orders or subcontracts to be assigned, the Design-Builder shall assign to MTA C&D, in the manner, at the time and to the extent directed by MTA C&D, all of the rights, title and interest of the Design-Builder;
- G. make reasonable diligent efforts to mitigate costs; and
- H. if any portion of the Work is not terminated, continue to perform such Work in accordance with all of the terms and conditions of the Contract.

ARTICLE 11.07 REMEDIES IN THE EVENT OF DEFAULT

- A. Upon a default by the Design-Builder, MTA C&D shall have the right to either complete the Work with its own forces and/or other Design-Builders or to require the Design-Builder's Surety to complete the Work under the Performance Bond hereunder. MTA C&D, in connection with its right to complete the Work, may take possession of and use any or all of the materials, plant, tools, equipment, supplies and property of every kind provided by the Design-Builder, and/or procure other materials, plant, tools, equipment, supplies and property for the completion of same, and to charge the expense of said labor, materials, plant, tools, equipment, supplies and property to the Design-Builder.
- B. If an Event of Default occurs, the Design-Builder shall be liable for all damages resulting from such Event of Default, including the difference between the Contract Price and the amount actually expended by MTA C&D to complete the Work, as well as liquidated damages for delay in the completion of the Work beyond the Substantial Completion Milestone. The Design-Builder shall

also remain liable for any other liabilities and claims related to the Contract. All damages may be deducted and paid out of such monies due the Design-Builder.

- C. MTA C&D also may bring any suit or proceeding for specific performance, for injunctive relief, to recover damages, to obtain any other relief or for any other purpose permitted under Law and/or under this Contract.
- D. MTA C&D may, in its sole discretion, waive a default by the Design-Builder; however, no such waiver, and no failure by MTA C&D to take action with respect to any default, shall be deemed a waiver of any subsequent default.
- E. If MTA C&D makes a determination pursuant to this Chapter 11 to hold the Design-Builder in default and to terminate all or portion of the Contract for cause, and it is determined subsequently for any reason whatsoever that Design-Builder was not in default or that the default was improper for any reason, the termination shall be deemed for all purposes to have been a Termination for Convenience in accordance with Article 8.08 – TERMINATION FOR CONVENIENCE BY MTA C&D. The Design-Builder agrees that it shall be entitled to no damages, allowance or expenses of any kind other than as provided in such Article 8.08 in connection with any such termination.

ARTICLE 11.08 MTA C&D MAY AVAIL ITSELF OF ALL REMEDIES

MTA C&D may avail itself of each and every remedy herein specifically given to it or now or hereafter existing at law or in equity or by statute, and each and every such remedy shall be in addition to every other remedy so specifically given or otherwise so existing and may be exercised from time to time and as often and in such manner as may be deemed expedient by MTA C&D; the exercise, or the beginning of the exercise, of one remedy shall not be deemed to be a waiver of the right to exercise, at the same time or thereafter, any other remedy.

CHAPTER 12.

DISPUTES

ARTICLE 12.01 CLAIMS

A. FOR EQUITABLE ADJUSTMENT IN CONTRACT PRICE OR MILESTONES

For all claims for Equitable Adjustments in Price or Milestones under this Contract the Design-Builder must first file a Notice of Change and follow the procedures set out in Chapter 8, resulting in one of the following events:

1. denial of the Notice of Change by the Project CEO,
2. a presumptive denial due to expiration of the time for MTA C&D response to the Notice of Change,
3. a Unilateral Modification, or
4. other Final Determination of the Project CEO; before the Design-Builder may initiate the Disputes Process by filing an Arbitration Notice or a Litigation Notice as defined below.

B. No claim by the Design-Builder shall be allowed hereunder if asserted after Final Payment has been made.

ARTICLE 12.02 INITIATION OF CLAIMS, APPLICATION OF DISPUTES RESOLUTION PROCEDURES

Claims shall be resolved pursuant to the following dispute resolution procedures:

1. If the Contract Price as awarded is less than One Hundred Million Dollars (\$100,000,000), (a) any individual claim of up to Five Million Dollars (\$5,000,000) arising out of an event listed in Article 12.01 - CLAIMS shall be resolved by binding Arbitration as described below in Article 12.03 – BINDING ARBITRATION, and (b) for any individual claim of Five Million Dollars (\$5,000,000) or more, the Parties may pursue all available legal and equitable remedies limited only by Article 12.04 – OTHER LEGAL REMEDIES.
2. If the Contract Price as awarded is One Hundred Million Dollars (\$100,000,000) or greater, (a) any individual claim of up to Ten Million Dollars (\$10,000,000) arising out of an event listed in Article 12.01 - CLAIMS shall be resolved by binding arbitration as described below in Article 12.03 – BINDING ARBITRATION, and (b) for any individual claim of Ten Million Dollars (\$10,000,000) or more, the parties may pursue all other available legal and equitable remedies limited only by Article 12.04 – OTHER LEGAL REMEDIES.
3. Notwithstanding the jurisdictional classifications outlined above, the parties may, by written agreement, submit a claim for adjudication by either of the methods described.

These procedures apply to the Design-Builder and to MTA C&D (on behalf of the MTA) and the MTA.

ARTICLE 12.03 DISPUTES RESOLUTION BY ARBITRATION

A. AUTHORITY OF THE ARBITRATOR TO ADJUDICATE DISPUTES UP TO ARBITRATION THRESHOLD.

The parties to this Contract hereby authorize and agree to the full and final resolution of all Disputes as to individual claims up to the applicable arbitration threshold as set forth in Article 12.02 (“Arbitrable Claims”) by binding arbitration before a neutral Arbitrator (defined below) acting in his or her personal capacity.

B. THE ARBITRATOR

1. The Arbitrator shall be an attorney located in the New York City metropolitan area who shall have experience in the field of construction law.
2. The Arbitrator shall be selected by the parties immediately following the Contract award from a pool of pre-qualified attorneys provided by MTA C&D in the RFP or otherwise selected by the parties.
3. The Arbitrator’s hourly fees shall also be posted by MTA C&D during the RFP process. The fees shall only be incurred if the Arbitrator actually performs any work to adjudicate a qualified dispute. Responsibility for the Arbitrator’s fees is discussed further in paragraph D.1 below.
4. The Arbitrator shall, once so selected, serve as Arbitrator for all qualified Disputes hereunder until any death, incapacity, resignation, disqualification for cause or removal (by mutual agreement of the parties) of the Arbitrator. In such event the parties shall agree on a successor Arbitrator from the pool of pre-qualified attorneys.

C. BINDING ARBITRATION PROCEDURE

1. Binding arbitration shall be initiated through a written submission by either party to the Arbitrator and the adverse party within thirty (30) days of the event giving rise to the right to initiate the Dispute Process under Article 12.01(A) (such submission hereinafter referred to as the “Arbitration Notice”).
2. The Arbitration Notice shall state on its face that it is an Arbitration Notice shall state an initial claim value and include a general statement of the nature of the claim. The Arbitration Notice shall also identify the event under Article 12.01.A giving rise to the claim.
3. A party’s failure to timely submit the Arbitration Notice shall constitute a waiver of the party’s right to pursue the claim in any forum.
4. The arbitration shall be conducted on the basis of written submissions by the parties provided pursuant to the procedures set forth herein, without presentation of oral testimony.
5. Within thirty (30) days after submission of the Arbitration Notice, the party initiating the arbitration must submit a Position Statement to the Arbitrator and the adverse party that includes a written explanation of the party’s claim and all documentary evidence necessary

in support of the party's claim. Following submission of the Position Statement, the adverse party shall have thirty (30) days to submit its Statement in Response to the Arbitrator and the initiating party, which shall include an explanation of the party's position in response and all documentary evidence necessary to support the party's stated position.

6. Failure or either party to timely submit the Position Statement or Statement in Response shall constitute a waiver of the party's rights to prosecute or respond to the subject claim being arbitrated.
7. The Arbitrator shall have the discretion to extend the time for the parties' submissions on the Arbitrator's own initiative or in response to a written request submitted by either party; such request shall not be unreasonably denied.
8. The Arbitrator shall render his or her determination in writing and deliver a copy of the determination to the parties within a reasonable time not to exceed sixty (60) days after the receipt of all submissions from the parties.
9. Prior to issuing a determination, the Arbitrator in his or her discretion and by written notice to both parties may request additional information or documents from a party, or the opportunity to meet with both parties to discuss the facts of the claim. Such a meeting shall not include oral testimony from any witness, including expert testimony. The Arbitrator is prohibited from meeting with or speaking to either party individually.
10. The parties are prohibited from requesting an in-person meeting with the Arbitrator, submitting any additional unsolicited supporting documents not included in the party's initial submission and from having any ex parte communication with the Arbitrator.
11. The Arbitrator's determination shall not be impaired or waived by any negotiations or settlement offers, or by any prior decision of others, which prior decisions shall be deemed subject to review, or by any termination or cancellation of this Contract.
12. The Arbitrator's determination shall be conclusive, final and binding on the parties, and shall constitute an "award" by the Arbitrator for the purposes of applicable law, and judgment may be entered thereon in any court of competent jurisdiction in accordance with Article 75 of the New York State Civil Practice Law and Rules or the Federal Arbitration Act.
13. It is expressly understood and agreed that the pendency of an arbitration hereunder shall at no time and in no respect constitute a basis for any modification, limitation or suspension of the Design-Builder's obligation to perform fully in accordance with the Contract and that the Design-Builder shall remain fully obligated to perform the Work notwithstanding the pendency of any such arbitration.

D. FEES, SETTLEMENT AND RELEASE AT FINAL COMPLETION

1. The parties shall share equally the fees due to the Arbitrator for conducting the arbitration.
2. Each Party shall bear its own attorneys' fees and disbursements in connection with the arbitration. The Arbitrator shall not award attorneys' fees and disbursements to either party.

3. It shall be a condition to the achievement of Final Completion that all disputes between the parties which are Arbitrable Claims shall be finally settled and all amounts due thereunder paid in full.

ARTICLE 12.04 OTHER LEGAL REMEDIES

A. COMMENCEMENT OF JUDICIAL PROCEEDINGS FOR DISPUTES OVER THE ARBITRATION THRESHOLD

1. The parties reserve their rights to pursue all available legal and equitable remedies to resolve Disputes as to individual claims over the arbitration threshold as set forth in Article 12.02.A including initiating litigation (“Litigable Claims”). However, if such litigation may only be pursued in a Court of competent jurisdiction of the State of New York, County of New York or the United States District Court for the Southern District of New York.
2. In the event the Design-Builder or MTA C&D intends to pursue any legal or equitable remedies described in 12.04.A.1 the party must submit a notice to the Project CEO of Design-Builder’s Authorized Representative with thirty (30) days of the event giving rise to the right to initiate the Dispute Process under Article 12.01(A) (such submission hereinafter referred to as the “Litigation Notice”). If a Litigation Notice is not served within said time period, the disputing party shall be deemed to have waived its right to pursue such legal or equitable remedy.
3. A party’s failure to timely submit a Litigation Notice shall constitute a waiver of the party’s right to pursue the claim in any forum.
4. If the action shall result in a recovery by MTA C&D or a credit for MTA C&D, then MTA C&D may offset said credit against the Contract Price.
5. The Design-Builder shall initiate any arbitration or limitation no later than six (6) months after the date of Substantial Completion of all Work set forth in the Certificate of Substantial Completion and in any event before the date of Final Completion set forth in the Certificate of Final Completion.

ARTICLE 12.05 SUBCONTRACTOR CLAIMS LIMITED

- A. This Chapter provides for resolution of claims between the Design-Builder and MTA C&D. Such claims may relate to Subcontractors’ work and/or may relate to pass through claims asserted by a Subcontractor or Vendor against the Design-Builder (collectively called “Subcontractor Claims”). In such case the claims addressed in this Chapter and under this Contract, including that portion related to Subcontractor Work or claims, solely address the rights and responsibilities of the Design-Builder and MTA C&D under this Contract.
- B. The Design-Builder shall include in all Subcontracts, and shall require its Subcontractors and Vendors to include in all lower-tier Subcontracts, provisions that any claim by a Subcontractor that is based on any alleged action or inaction, error or omission of MTA C&D must be brought to the attention of the Design-Builder so that the Design-Builder may timely assert same as a Design-Builder claim under ARTICLE 12.01 – CLAIMS and all provisions of this Contract, otherwise it is waived by the Subcontractor. The Design-Builder shall hold the Indemnified Parties harmless from any failure to include such provision in any Subcontract.

- C. If the Design-Builder decides to pursue a claim against MTA C&D that includes a Subcontractor Claim, the Dispute shall be processed and resolved in accordance with this Chapter and this Contract and shall be subject to the following additional conditions:
1. The Design-Builder shall identify clearly in all submissions that portion of the Dispute or Claim that involves Subcontractor Claims.
 2. The Design-Builder shall include, a certification executed by the Subcontractor's officer, partner, principal or representative, with authority to bind the Subcontractor and with direct knowledge of the facts underlying the Subcontractor Claim that the claim is made in good faith. The Design-Builder also shall submit a certification that:
 - a. the Subcontractor Claim has been thoroughly reviewed by the Design-Builder and is submitted by the Design-Builder in good faith and complies with all Contract requirements; and
 - b. the Design-Builder has no reason to believe and does not believe that the factual basis for the Subcontractor Claim is falsely represented.
 3. At any Arbitration hearing, the Design-Builder shall require that each Subcontractor or Vendor that is involved in the Dispute have present a representative who is authorized to bind the Subcontractor or Vendor, with actual knowledge of the facts underlying the Subcontractor Claim to assist in presenting the matter and to answer questions raised by Arbitrator and representatives of MTA C&D.
 4. Failure of the Design-Builder to include a Subcontractor Claim on behalf of its Subcontractor or Vendor (including pass-through claims) at the time of submission of the Design-Builder's Arbitration Notice or Litigation Notice shall constitute a release of MTA C&D by the Design-Builder on account of such Subcontractor Claims.
 5. The Design-Builder agrees that MTA C&D, by allowing this limited Subcontract in the dispute resolution process between the Design-Builder and MTA C&D, shall not be deemed to have created or recognized any claim, right, or cause of action by any Subcontractor or Vendor against MTA C&D, and the Design-Builder shall ensure that all Subcontracts include a provision indicating that Subcontractors and Vendors agree to same.
- D. Notwithstanding the foregoing, the claims and Disputes process in this Chapter shall not apply to:
1. any Subcontractor claim between the Subcontractor(s) or Vendor(s) and the Design-Builder that is not actionable by the Design-Builder against MTA C&D;
 2. any Subcontractor claim based on remedies expressly created by statute;
 3. any Subcontractor claim that is covered by insurance; or
 4. any Subcontractor claim that is actionable only against a bonding company.
- E. Nothing contained in Chapter 12 or elsewhere in the Contract is intended to create any claim or other right of action by a Subcontractor or vendor against MTA C&D or the MTA.

ARTICLE 12.06 CONTINUED PERFORMANCE REQUIRED

The Design-Builder shall proceed diligently with the Work during the pendency of any claim initiated under Article 12.02. No claim shall constitute a basis for any modification, limitation or suspension of the Design-Builder's obligation to promptly, continuously and fully perform its Work.

ARTICLE 12.07 LIMITATION OF JUDICIAL REVIEW, CHOICE OF LAW, CONSENT TO JURISDICTION AND VENUE

- A. This Contract shall be deemed to be executed in the City of New York, State of New York, regardless of the domicile of the Design-Builder; and shall be governed by and construed in accordance with the laws of the State of New York.
- B. The Design-Builder also agrees as follows:
 - 1. If MTA C&D or the MTA initiates any action against the Design-Builder in Federal Court or in New York State Court, service of process may be made on the Design-Builder either in person, wherever such Design-Builder may be found, or by registered mail addressed to the Design-Builder at its address as set forth in this Contract, or to such other address as the Design-Builder may provide to MTA C&D in writing.
 - 2. With respect to any action between MTA C&D and the Design-Builder commenced in New York State Court, the Design-Builder hereby expressly waives and relinquishes any rights it might otherwise have (i) to move to dismiss on grounds of forum non conveniens, (ii) to remove to Federal Court; and (iii) to move for a change of venue to a New York State Court outside New York County.
 - 3. With respect to any action between MTA C&D or the MTA and the Design-Builder commenced in Federal Court located in New York County, the Design-Builder expressly waives and relinquishes any right it might otherwise have to move to transfer the action to a United States Court outside the County of New York.
 - 4. If the Design-Builder commences any action against MTA C&D in a court located other than in the County and State of New York, upon request of MTA C&D, the Design-Builder shall either consent to a transfer of the action to a court of competent jurisdiction located in the State of New York, County of New York as above described or, if the court where the action is initially brought will not or cannot transfer the action the Design-Builder shall consent to dismiss such action without prejudice and may thereafter re-institute the action in a court of competent jurisdiction in New York County as above-described.

CHAPTER 13.

INSPECTION, TESTING, EXPEDITING AND WARRANTY

ARTICLE 13.01 INSPECTION OF WORK AND ADMINISTRATION OF BACKCHARGES

- A. All materials and each part or detail of the Work shall be subject to inspection by MTA C&D. MTA C&D shall be allowed access to all parts of the Work and shall be furnished with such information and assistance by the Design-Builder as is required to make a complete and detailed inspection (such assistance may include furnishing labor, tools, equipment, etc., at no increase in the Contract Price or extension of any Milestone). If MTA C&D so requests, the Design-Builder, at any time before Substantial Completion of the Work, shall remove or uncover such portions of the finished Work as may be directed. After examination, the Design-Builder shall restore said portions of the Work to the standard required by the Contract. Should the Work thus exposed or examined prove acceptable, the uncovering, or removing, and the replacing of the covering or making good of the parts removed will be paid for as a Change pursuant to Chapter 8; but should the Work so exposed or examined prove unacceptable, the uncovering or removing and the replacing of the covering or making good of the parts removed, will be at the Design-Builder's expense.
- B. If, under these inspection provisions of this Contract, the Design-Builder is notified by the Project CEO to correct defective or nonconforming Work, and the Design-Builder states or by its actions indicates that it is unable or unwilling to proceed with corrective action in a reasonable time, MTA C&D may, upon written notice, accomplish the redesign, repair, rework or replacement of nonconforming Work by the most expeditious means available and backcharge the Design-Builder for the costs incurred.
- C. The cost of backcharge work shall include:
1. incurred labor costs including all payroll additives;
 2. incurred net delivered material costs;
 3. incurred Subcontractor costs directly related to performing the corrective action;
 4. equipment and tool rentals at prevailing rates in New York City; and
 5. a reasonable and actual amount will be applied to the total of items 1., 2., and 3. above for overhead, supervision, and administrative costs in accomplishing the backcharge work.
- D. MTA C&D shall separately invoice or deduct from payments otherwise due to the Design-Builder the costs as provided herein. MTA C&D's right to backcharge is in addition to any or all other rights and remedies provided in this Contract or by law. The performance of backcharge work, on behalf of MTA C&D, shall not relieve the Design-Builder of any of its responsibilities under this Contract including but not limited to express or implied warranties, specified standards for quality, contractual liabilities and indemnifications, and its obligation to meet the Milestones.
- E. Any Work done or materials used without authorization by the Project CEO may be ordered removed and replaced at the Design-Builder's expense.

- F. The Design-Builder shall furnish written information, when requested by the Project CEO, stating the original sources of supply of all materials manufactured away from the actual Work Site. In order to insure a proper time sequence for required inspection and acceptance, this information shall be furnished at least two weeks (or as otherwise directed by the Project CEO) in advance of the incorporation in the Work of any such materials.
- G. For the purpose of observing and inspecting the Work that affects their respective jurisdictions, interests, properties or operations; inspectors for the municipalities, public agencies, public authorities, public departments, and the Utilities shall be permitted access to the Work, but, other than as required by Law, all orders and directives to the Design-Builder will be issued by MTA C&D. Such observation or inspection shall not result in any unit of government or political subdivision being considered a party to this Contract.
- H. The inspection of the Work shall not relieve the Design-Builder of any of its obligations to fulfill the terms of the Contract.
- I. Failure to reject any Defective Work or materials shall not in any way prevent later rejection when such defect is discovered or obligate MTA C&D to Certify either Substantial or Final Completion of the Work.
- J. Authorized representatives of MTA C&D may inspect or review the Design-Builder's Work in progress. In furtherance of such inspections and reviews, reports and documents, including those in the formative stage, shall be readily available in the Design-Builder's local office at all times during normal working hours.
- K. During the progress of the Work, the Design-Builder shall provide for the Project CEO, its staff, and all authorized visitors, means of safe access to all parts of the Work, such as scaffolds, ladders, transportation and any other required aids to facilitate the inspection work.
- L. The Project CEO shall have the right to travel on any and all of the Design-Builder's floating equipment and boats at all times.
- M. The Design-Builder shall equip all floating equipment with reliable marine-type radio communication equipment capable of consistent transmission and reception of messages within a range of five miles. This equipment shall also be made available to the Project CEO and staff whenever necessary.
- N. If any work is determined by the MTA to be Defective or not in conformance with this Contract the provisions of Article 13.05 – WARRANTY shall apply.

ARTICLE 13.02 REMOVAL OF DEFECTIVE OR UNAUTHORIZED WORK

Any and all portions of the Work determined to be Defective Work by the Project CEO shall be removed, repaired, replaced or made good by the Design-Builder, even if such Work may have previously been inspected and accepted or estimated for payment. If the Work or any part thereof shall be found Defective at any time prior to Final Completion of the Work, the Design-Builder shall make good such defect in a manner satisfactory to the Project CEO at no increase in the Contract Price or extension to any Milestone. Any Work performed beyond the lines and grades shown on the plans or as given, except as herein provided, or any extra work performed without written approval of the Project CEO, shall be considered unauthorized and at the expense of the Design-Builder; such Work will not be measured, nor will compensation be allowed therefore. Work so performed may be ordered

removed at the Design-Builder's expense. Upon failure of the Design-Builder to remove and satisfactorily dispose of any or all Defective or unauthorized Work and to remedy the same after being so notified, the Project CEO may cause such Defective Work to be remedied, removed or replaced or have such unauthorized Work be removed, and to deduct the costs therefore from any monies due or to become due the Design-Builder.

ARTICLE 13.03 TESTING

- A. Unless otherwise provided in the Contract, testing of equipment, materials or work shall be performed by the Design-Builder at its expense and in accordance with Contract requirements. Should tests in addition to those required by this Contract be desired by MTA C&D, the Design-Builder will be given reasonable notice to permit such testing. Such additional tests will be at MTA C&D's expense.
- B. The Design-Builder shall furnish samples as requested and shall provide reasonable assistance and cooperation necessary to permit tests to be performed on materials or Work in place including reasonable stoppage of Work during testing.

ARTICLE 13.04 EXPEDITING

The equipment and materials furnished and services performed under this Contract shall be subject to expediting by MTA C&D or its representatives who shall be afforded full and free access to the shops, factories and other places of business of the Design-Builder and its Subcontractors and Vendors for expediting purposes. As required by MTA C&D, the Design-Builder shall provide detailed schedules and progress reports for use in expediting and shall cooperate with MTA C&D in expediting activities.

ARTICLE 13.05 WARRANTY

- A. The Design-Builder warrants to MTA C&D that the equipment and materials furnished and services performed by the Design-Builder and its Subcontractors and Vendors:
 - 1. conform to the requirements of this Contract;
 - 2. are in accordance with Good Industry Practice in every respect;
 - 3. with respect to construction elements of the Work (excluding any design, architectural, or engineering services performed as part of the Work), equipment and materials only, are (a) of good quality, and free from unpermitted deviations and from any faults or defects affecting the condition, use, functionality, or operation of any element of the Work, including from any applicable defects in materials or workmanship or which are recognized to exist as a matter of Law, (b) of the most suitable grade of their respective kinds for their intended uses and the latest design of manufacturers regularly engaged in the production of such equipment or materials; and with respect to equipment be in good working condition and (c) with respect to items of the same type and rating identical.
- B. The Design-Builder warrants all equipment and material it furnishes and all services it performs against defects in design, equipment, materials and workmanship for a period from Work commencement to a date one (1) year after issuance by MTA C&D of the Certificate of Final Completion or from MTA C&D's acceptance of a Project Element pursuant to Article 6.03.D, unless a warranty period greater than one (1) year is specified in the Technical Provisions for equipment or materials (in which case the longer period shall apply).

- C. If at any time during the warranty period, MTA C&D or the Design-Builder discover any Defective Work or any other defect in the design, equipment, materials, or workmanship; immediate written notice shall be given to the other party. The Design-Builder shall, within a reasonable time, propose corrective actions to cure such defects to meet the requirements of this Contract.
- D. MTA C&D, at its sole discretion, may direct the Design-Builder in writing, and upon such direction, the Design-Builder agrees, to:
 - 1. rework, repair, or remove and replace defective equipment and materials or re-perform Defective Work to acceptable quality at a time and in a manner acceptable to MTA C&D;
 - 2. cooperate with others assigned by MTA C&D to correct such defects and pay to MTA C&D all actual costs reasonably incurred by MTA C&D in performing or in having performed corrective actions; or
 - 3. propose and negotiate in good faith an equitable reduction in the Contract price in lieu of corrective action.
- E. All costs incidental to corrective actions including demolition for access, removal, disassembly, transportation, reinstallation, reconstruction, retesting and re-inspection as may be necessary to correct the defect and to demonstrate that the previously Defective Work conforms to the requirements of this Contract shall be borne by the Design-Builder.
- F. The warranty shall be reinstated, as required, for a period of one (1) year for any item, and any interrelated item(s), that are so remedied, with the exception that when a manufacturer of equipment or material that is installed in the Work warrants such equipment or material for a longer period, then the longer warranty period shall apply. The reinstatement of the one (1) year warranty period for corrective work shall begin on the later of the date the corrective work is completed and the date the Project CEO has accepted in writing the corrective work.
- G. This Article must be included in each Subcontract entered into by the Design-Builder. This Article shall survive the completion of the Contract and shall remain a continuing obligation of the Design-Builder for the term of the warranties specified herein.

ARTICLE 13.06 OTHER WARRANTIES AND GUARANTEES

The Design-Builder shall comply with any other warranties, guarantees, and requirements, implied or specified, in the Contract, including, but not limited to, the General Provisions and the Technical Provisions.

ARTICLE 13.07 MANUFACTURERS' WARRANTIES AND GUARANTEES

- A. In addition to Article 13.05 – WARRANTY the Design-Builder shall obtain or provide, for the benefit of MTA C&D and its successors in interest, warranties or guarantees for the equipment, materials and work furnished by Vendors. Such warranties and guarantees are to run for the period set forth in the applicable specification of this Contract or, when not specified, the period customarily provided by the Vendor. The Design-Builder shall use its best efforts to enforce such warranties or guarantees on its own behalf or, if requested by MTA C&D, on behalf of MTA C&D. The Design-Builder shall provide all warranty documentation to MTA C&D prior to Final Completion or as otherwise required by this Contract.

- B. The Design-Builder shall provide all warranty documentation to MTA C&D prior to Final Completion or as otherwise required by this Contract. The Design-Builder shall submit warranties or guarantees for the equipment, materials and work furnished by the Design-Builder's Subcontractors and Vendors in warranty record books. The object of such books is to assemble all warranties and guarantees in an orderly manner. Such books shall be in hard cover binders, properly indexed and identified and shall be divided by equipment item or tag number, purchase order item or Contract item.

ARTICLE 13.08 PERFORMANCE GUARANTEES

Fulfillment of guarantees of performance of the Design-Builder's installed Work as a condition of Final Completion will be determined by the tests stipulated. The Design-Builder shall be responsible for all Work and costs involved in effecting replacement, changes, or adjustments necessary to fulfill these guarantees, whether or not they are expressly required by the Contract Documents.

CHAPTER 14.

MISCELLANEOUS PROVISIONS

ARTICLE 14.01 ENTIRE AGREEMENT AND AMENDMENTS

- A. This Contract represents the fully integrated agreement between the parties, and contains all the terms and conditions agreed upon by the parties hereto and supersedes all prior oral or written agreements, understandings, and commitments, and no other agreement, oral or otherwise, regarding the subject matter of this Contract shall be of legal effect, vary any of the terms contained herein, or otherwise bind either of the parties hereto.
- B. No waivers, changes, modification, or amendment of any provisions of this Contract shall be effective for any purpose unless it is reduced to writing, specifically references this Contract, and is signed by authorized representatives of both MTA C&D and the Design-Builder.
- C. The parties hereto agree and expressly intend that the Contract, which includes the Design-Build Agreement, all its listed exhibits, and each other document listed in Article 7 of the Design-Build Agreement, and any valid amendments, constitutes a single, non-severable, integrated Contract whose terms are interdependent and non-divisible.
- D. Subject to the express terms of this Contract, any term, condition, requirement, criteria, or specification set out or referenced in any part of this Contract is a binding contractual obligation.

ARTICLE 14.02 ALL LEGAL PROVISIONS DEEMED INCLUDED

It is the intent of the parties that each and every provision of law required to be inserted in this Contract should be and is deemed to have been inserted herein. If any such provision is not inserted or is not inserted in correct form, then this Contract shall be deemed amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party hereunder.

ARTICLE 14.03 SEVERABILITY

If this Contract contains any provision found to be unlawful, invalid, unconstitutional, or otherwise unenforceable, the same shall be deemed to be of no force and effect and shall be deemed stricken from the Contract without invalidating the binding force and effect of the enforceable portions of such provision or any other term and condition of the Contract after the deletion of such provision. Except as otherwise provided in this Contract, the remedies herein expressly reserved to MTA C&D and the Design-Builder, respectively, shall be in addition to any other remedies provided in law or at equity; provided, however, that neither MTA C&D nor the Design-Builder shall have the right to terminate this Contract except as expressly provided in Article 8.08 – TERMINATION FOR CONVENIENCE BY MTA C&D and Chapter 11 – DESIGN-BUILDER’S DEFAULT.

ARTICLE 14.04 ANTITRUST ASSIGNMENT

The Design-Builder hereby assigns, sells and transfers to MTA C&D all right, title and interest in and to any claim and cause of action arising under the antitrust laws of New York State or of the United States relating to the particular goods or services purchased or procured by MTA C&D under this Contract.

ARTICLE 14.05 INTELLECTUAL PROPERTY CLAIMS

- A. The term “Intellectual Property” shall mean any and all patents, registered and unregistered copyrights, registered and unregistered trademarks and service marks, trade dress, domain names, trade names, trade secrets, and other know-how.
- B. The term “know-how” shall mean and include, but is not limited to, any of the following that an individual or entity conceives, creates, develops, or reduces to practice solely for the purpose of this Contract: technological innovations (patentable and unpatentable); inventions; ideas; specifications; drawings, blueprints, or schematics; concepts and proofs thereof; methods; processes; calculations; test plans and procedures; surveys; operations and maintenance (O&M) manuals; technical information; expressions; marks; and copyrightable works (including software).
- C. All Intellectual Property contained in the Contract Documents, and which MTA C&D created, owns, or is subject to own, shall remain the property of MTA C&D; shall remain reserved for the exclusive use by MTA C&D; and shall not be used; made or offered to be made; reproduced; sold or offered to be sold; published; distributed; or exported without the express written consent of MTA C&D, except to the extent where it is necessary or required in connection with performance of the Work.
- D. The Design-Builder agrees to promptly and fully disclose to MTA C&D any patentable or unpatentable invention, technological improvement or derivative, or software that it conceives, creates, develops, or reduces to practice with respect to the Work or the performance of the Contract. The Design-Builder further agrees that the MTA shall be automatically granted a paid-up, worldwide, irrevocable, non-transferrable, non-exclusive, royalty-free license to make or use said patentable or unpatentable invention, technological improvement or derivative, or software for the purposes and duration of this Contract. Such license shall not be extended to other contractors, subcontractors, or parties, except to the extent that their work or activity is on behalf of the MTA with respect to the Work or the performance of this Contract.
- E. In the event such Intellectual Property, or portions thereof, used in the performance of the Work have been or may be patented or copyrighted by the Design-Builder or by others, or are subject to other protection from use or disclosure, then MTA C&D shall have a paid-up, worldwide, irrevocable, non-transferable, non-exclusive royalty-free perpetual license, to use the same for any purpose provided that if the Design-Builder does not have the right to grant such a license, the Design-Builder shall obtain for MTA C&D such rights of use as MTA C&D may request without separate or additional compensation, whether such Intellectual Property or portions thereof are patented or copyrighted or become subject to such other protection from use before, during, or after the performance of the Work.
- F. All Intellectual Property contained in the Contract Documents, and which the MTA created, owns, or is subject to own, shall remain the property of the MTA; shall remain reserved for the exclusive use by the MTA; and shall not be used; made or offered to be made; reproduced; sold or offered to be sold; published; distributed; or exported without the express written consent of the MTA, except to the extent where it is necessary or required in connection with performance of the Work.
- G. All materials, including their content, in which the Design-Builder has access to, or in which MTA C&D has furnished, or otherwise made available, to the Design-Builder, shall remain the property

of MTA C&D. At the conclusion or termination of the Contract, the Design-Builder agrees to return or destroy such materials in accordance with Article 4.11.

- H. All non-public documents (whether electronic or hard copy) in which the Design-Builder (1) owns the rights, title, and interest, (2) has prepared in connection with the Contract (whether prior to, on the day of, or subsequent to the execution of the Contract) and/or compiled for submission to MTA C&D, and (3) has submitted to MTA C&D, shall become the property of MTA C&D.
- I. Unless the Design-Builder had, prior to the deadline for Proposal submission, expressly informed MTA C&D of its reservation of rights to any or all of the content, specifying the item or items to which its reservation relates, including any Intellectual Property belonging solely to the Design-Builder, contained in each of said submitted non-public document, and MTA C&D has by Addendum waived the applicability of this Paragraph I to such specified material for all Bidders, the Design-Builder hereby automatically grants, without any compensation except as to what is specifically provided and agreed to herein, MTA C&D the right to make, reproduce, use, or dispose of said content for the purposes of this Contract, as well as future contracts, including those not involving the Design-Builder. Any statement or legend to the contrary on any of said submitted document shall be void and shall be of no effect.
- J. MTA C&D shall not own the rights to any of said content unless agreed upon otherwise through a separate, written signed agreement. Any statement or legend to the contrary on any of said submitted document shall be void and shall be of no effect.
- K. Indemnification from Intellectual Property Infringement Claims
 - 1. The Design-Builder shall have the obligation and responsibility for determining whether the use of any technology or methodology in connection with the Work is likely to be ruled an infringement, misappropriation, or misuse of Third Party Intellectual Property, including a violation of antitrust or other trade regulation, or is subject to any injunction that may prohibit the Design-Builder, under certain circumstances, from using, making, reproducing, installing, or disposing of any article under this Contract. Where the Design-Builder makes a positive determination, the Design-Builder shall promptly notify the Indemnified Parties to cease and desist further use of the potentially infringing technology or methodology.
 - 2. Likewise, where MTA C&D receives notice of any alleged claim or liability of intellectual property infringement, misappropriation of intellectual property, or misuse of intellectual property asserted against it by a third party, including any injunction or alleged claim or liability of a violation of antitrust or other trade regulation, asserted against it by a third party, any of which may constitute an indemnifiable claim or liability, MTA C&D shall promptly give notice to the Design-Builder. Upon receipt, the Design-Builder agrees to and shall promptly acknowledge receipt and cease and desist further use of the potentially infringing technology or methodology until further notice.
 - 3. Upon receipt of the above Design-Builder's cease and desist notice, MTA C&D shall promptly acknowledge receipt of said notice and comply. The Design-Builder shall then either (a) secure the right for MTA C&D to continue using the potentially infringing technology or methodology, or (b) recommend an equivalent, non-infringing technology or methodology, subject to the Project CEO's approval, that meets all functional and operational standards.

4. The Design-Builder and its insurer shall have the right to assume the defense of, including the employment of legal counsel and payment of all expenses in connection with, any claim attributable to the infringement, misappropriation, or misuse of any Third Party Intellectual Property, as well as any injunction or claim of a violation of antitrust or other trade regulation.
 - a. If the Design-Builder elects to assume said defense, MTA C&D shall cooperate with the Design-Builder in such defense. In addition, MTA C&D shall have the right to employ separate legal counsel in any such action and participate in the defense thereof. However, the fees and expenses of MTA-employed, separate legal counsel shall be at the expense of MTA C&D. Additionally, such fees and expenses shall not be subject to indemnification under this Article.
 - b. If the Design-Builder declines or fails to exercise this right, MTA C&D shall have the right to proceed to resist and dispose of such liability in such manner as it deems appropriate.
5. Except to the extent where any claim made against the Indemnified Parties for any infringement, misappropriation, or misuse of Third Party Intellectual Property, as well as any injunction or claim of a violation of antitrust or other trade regulation, arises from the Design-Builder's use of any technology or methodology that MTA C&D requires as per the Technical Specifications, the Design-Builder shall save harmless and indemnify the Indemnified Parties from and against all charges, costs, damages, expenses (including reasonable attorney's fees), and liabilities resulting from, arising out of, or are related to, such claim or injunction
6. Except where MTA C&D provides written consent, neither the Design-Builder nor its insurer, in the defense of any such claim or litigation, shall consent to the entry of any judgment or enter into any settlement, wherein such judgment or settlement fails to release MTA C&D, the Contracting Party, and their respective subsidiaries from all liability with respect to such claim or litigation.
- L. If MTA C&D should be enjoined from using any portion of the Work as to which the Design-Builder is to indemnify MTA C&D against patent claims, then MTA C&D may, at its option and without thereby limiting any other right it may have hereunder or at law or in equity, require that the Design-Builder: (i) supply at its own expense, temporarily or permanently, facilities not subject to such injunction and not infringing any patent; (ii) replace same with non-infringing materials, equipment, devices, or processes satisfactory to MTA C&D; or (iii) modify the materials, equipment, devices, or processes in a way satisfactory to MTA C&D, so that such items become non-infringing. Notwithstanding the foregoing, if the Design-Builder shall fail to do so, the Design-Builder shall, at its expense, remove such offending facilities and refund the cost thereof to MTA C&D or take such steps as may be necessary to ensure compliance by MTA C&D with such injunction, to the satisfaction of MTA C&D.
- M. The Design-Builder is responsible for determining whether a prospective Subcontractor or vendor is a party to any litigation involving patent copyright or trademark infringement, trademark, antitrust or other trade regulation claims or is subject to any injunction which may prohibit it from selling equipment to be used or installed under this Contract. The Design-Builder enters into any agreement with a party to such litigation at its own risk, and MTA C&D will not undertake to

determine the merits of such litigation; however, MTA C&D reserves the right to reject any article that is the subject of such litigation or injunction when, in its judgment, use of such article as a result of such circumstances would delay the Work or be unlawful.

ARTICLE 14.06 RELATIONSHIP BETWEEN THE MTA AND THIRD PARTIES

Except as may be expressly stated in this Contract, this Contract is solely for the benefit of MTA C&D and the Design-Builder. No other person or entity is intended to receive any benefit under this Contract or any of its provisions or as a result of its performance, and no other person or entity may claim any rights hereunder, except as specifically provided in the Contract. Express exceptions establishing third party beneficiaries of certain obligations of the Design-Builder include but are not limited to specific provisions with respect to affiliates of the MTA and their respective directors, officers and employees, and the PMC; the identification of Indemnified Parties in Chapter 10 – DESIGN-BUILDER’S LIABILITY AND INSURANCE; and obligations to other Design-Builders under Article 6.08 – COMPENSABLE DELAYS.

ARTICLE 14.07 AUDIT AND INSPECTION OF WORK AND RECORDS

The Design-Builder shall permit and cooperate with, and shall require its Subcontractors and Vendors hereunder to permit and cooperate with, representatives of MTA C&D, the federal government, the New York State Comptroller, and other relevant and authorized government representatives: (i) to inspect and review the Design-Builder’s materials, payrolls, records of personnel, invoices of material, and other relevant cost data, records, and accounts pertaining to the Work; (ii) to interview employees and personnel; and (iii) to audit the books, records, and accounts pertaining to the Project or the Contract. Upon request, the Design-Builder or Subcontractor or Vendor shall make such records available, at the Design-Builder’s, or Subcontractors’ or Vendors’, respectively, place of business during normal working hours during the time that the Work is being performed, or subsequent to the performance of all Work, and the Design-Builder and its Subcontractors and Vendors shall maintain all required records for six (6) years after the MTA has made Final Payment hereunder.

ARTICLE 14.08 DOCUMENTATION AND REQUIRED DATABASE MAINTENANCE

The Design-Builder, Subcontractors and Vendors shall maintain their records in accordance with generally accepted accounting principles and show actual costs of all items of labor, material, supplies, services and all other expenditures for which compensation is payable. Preservation of such records and documents shall be at the expense of the Design-Builder, Subcontractors, and Vendors, respectively.

ARTICLE 14.09 INDEPENDENT CONTRACTOR

The Design-Builder agrees that, in accordance with its status as an independent contractor, it will conduct itself and its affairs in a manner consistent with such status, that it will neither hold itself out as, nor claim to be a director, officer or employee of the MTA Group, their affiliates or subsidiaries, or of the State of New York or the City of New York, by reason hereof; further, the Design-Builder shall not make any claim, demand or application to or for any right or privilege applicable to a director, officer or employee of the MTA Group, their affiliates or subsidiaries, or of the State of New York, or of the City of New York, including but not limited to, Workers’ Compensation coverage, unemployment insurance benefits, Social Security coverage, or retirement membership or credit.

ARTICLE 14.10 GENERAL REPRESENTATIONS AND WARRANTIES

In order to induce MTA C&D to enter into and perform the services under this Contract, the Design-Builder hereby represents and warrants the following:

A. EXISTENCE; COMPLIANCE WITH LAW

The Design-Builder (i) is duly incorporated, organized, validly existing and in good standing as a corporation, joint venture, or other ongoing business concern, as applicable, under the laws of the jurisdiction of its incorporation and is duly qualified and in good standing under the laws of each jurisdiction where its ownership, lease, or operation of property in the conduct of its property or business requires, and (ii) has the power and authority and the legal right to conduct the business in which it is currently engaged and to enter into this Contract.

B. AUTHORITY

The Design-Builder has full power, authority and legal right to execute, deliver and perform the Contract. The Design-Builder has taken all necessary action to authorize the execution, delivery and performance of the Contract.

C. FINANCIALLY SOLVENT

The Design-Builder represents that it is financially solvent, experienced in and competent to perform the Work, and authorized by the laws of the State of New York and by any and all other applicable jurisdictional bodies to perform the Work.

D. FAMILIARITY WITH LAWS, SPECIFICATIONS, AND DRAWINGS

The Design-Builder represents that it has read and is familiar with: (i) all general and special federal, state, local and municipal Laws, ordinances, and regulations, and (ii) the standards referred to in any Contract Documents that may in any way affect the Work, the Design-Builder's performance of services hereunder, and those employed hereunder.

E. REVIEW PRIOR TO PROPOSAL

The Design-Builder represents that, prior to submitting its Proposal, it has carefully examined the Contract Documents together with the Work Sites of the proposed Work and the surrounding territory and satisfied itself as to the nature and location of the Work, the general and local conditions, including those bearing upon transportation, disposal, handling and storage of material, availability of labor, water, electric power, roads and uncertainties of weather, the conformation and condition of the ground, the character of apparatus and facilities needed preliminary to and during the execution of the Work and all other matters upon which information is reasonably obtainable and that can in any way affect the Work or the cost thereof under this Contract. The Design-Builder further acknowledges and represents that it has informed itself regarding all of the conditions affecting the Work to be done and labor and materials to be furnished for the completion of this Contract, including the existence of utilities, facilities, and structures of municipal and other public service corporations on, over, or under the Work Sites, and otherwise satisfied itself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the Work Sites, from exploratory work done by MTA C&D and made available to it, as well as from information presented on the Contract Drawings and in the Prescriptive Specifications that are part of this Contract and in the Reference Documents or otherwise secured by the Design-Builder by personal and other investigation and research.

F. NO LEGAL BAR

The execution and delivery of the Contract, and the execution of the Work under the Contract do not and will not violate any provision of any Law or by-laws of the Design-Builder, or of any mortgage, indenture, lease, contract,

or other agreement or undertaking to which the Design-Builder is a party or by which the Design-Builder or any of its properties or assets may be bound, and will not result in the creation or imposition of any lien on any of its properties or assets pursuant to the provisions of any such mortgage, indenture, lease, contract or other agreement or undertaking.

G. NO LITIGATION

Except as specifically disclosed to MTA C&D or MTA in writing prior to the date hereof, no claim, litigation, investigation or proceeding of or before any court, arbitrator or governmental authority is currently pending nor, to the knowledge of the Design-Builder, is any claim, litigation or proceeding threatening against the Design-Builder or against its properties or revenues that (i) involves a claim of defective design or workmanship in connection with any contract entered into by the Design-Builder, or (ii) if adversely determined, would have an adverse effect on the business, operations, property or financial or other condition of the Design-Builder. For purposes of this paragraph, a claim, litigation, investigation or proceeding may be deemed disclosed to MTA C&D if MTA C&D has received, prior to the date hereof, detailed written information concerning the nature of the matter involved, the relief requested, and a description of the intention of the Design-Builder to controvert or respond to such matter as a Notice in the manner required under Article 1.05 – NOTICES.

H. NO DEFAULT

The Design-Builder is not in default in any respect in the payment or performance of any of its obligations or in the payment or performance of any mortgage, indenture, lease, contract or other agreement or undertaking to which it is a party or by which it or any of its properties or assets may be bound, and no such default or event of default (as defined in any such mortgage, indenture, lease, contract, or other agreement or undertaking) has occurred and is continuing or would occur solely as a result of the execution and performance of the services under this Contract. The Design-Builder is not in default under any order, award, or decree of any court, arbitrator, or government binding upon or affecting it or by which any of its properties or assets may be bound or affected, and no such order, award or decree would affect the ability of the Design-Builder to carry on its business as currently conducted or the ability of the Design-Builder to perform its obligations under this Contract or any of the other financing to which it is a party.

I. NO INDUCEMENT OR GRATUITIES

1. The Design-Builder warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon any agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Design-Builder for the purpose of securing business.
2. In addition, the Design-Builder warrants that no gratuities or other inducements have been offered or given, or will be offered or given (in the form of entertainment, gifts, offers of employment, or any other thing of value), to any official or employee of the MTA Group. The Design-Builder further warrants that during the term of the Contract it shall not make any offers of employment to any MTA Group employee, or solicit or interview therefore, without obtaining the written approval of the employee's department supervisor.
3. Further, the Design-Builder warrants that to the best of its knowledge: (a) no member, director, officer, agent, or employee of the MTA or its affiliates or its subsidiaries, and no member of or delegate to the Congress of the United States is personally interested directly or indirectly in the Contract or the compensation to be paid thereunder; and (b) no

representation, statement or promise, oral or in writing, of the MTA, its affiliates or its subsidiaries, or its or their members, directors, officers, agents or employees has induced it to enter into the Contract, with the exception of those contained in the Contract.

4. For breach or violation of the foregoing warranties, the MTA shall have the right to cancel the Contract without liability or, at its discretion, to deduct from the Contract Price or otherwise to recover the full amount of such commission, percentage, brokerage or contingent fee, or gratuities, and to include the occurrence of such a breach or violation in assessments of the Design-Builder's responsibility in future Proposals.

ARTICLE 14.11 ANTIDUMPING

The Design-Builder agrees to indemnify and hold harmless the MTA from any dumping duty, loss or expense, including, but not limited to, attorneys' fees that the MTA may incur arising from any claim or demand alleging that the sale of the apparatus covered by this Contract at the price therefor stated herein violates the U.S. Antidumping Act, Title 19 U.S. Code Annotated, Section 160 et. seq.

ARTICLE 14.12 LAWS AND PERMITS

- A. Subject to Article 8.10 – CHANGES IN LAWS, the Design-Builder shall comply with all provisions of all Laws (as defined in Article 1.02 – DEFINITIONS AND ABBREVIATIONS), applicable to this Public Work; as well as all Laws that would affect the Work as if it were being performed for a private corporation except where different requirements are specifically set forth in the Contract.
- B. If the Work requires the Design-Builder to open, alter, remove, damage or otherwise affect property owned by a federal, state, or local government, the Design-Builder shall obtain in its own name any permit or license required to allow such property to be so affected; the Design-Builder shall not apply for any permit or license in the name of, or on behalf of, MTA C&D or take any other actions which would subject MTA C&D to any laws, ordinances, rules, regulations and orders from which it is exempt.
- C. Subject to Article 8.10 – CHANGES IN LAWS, the Design-Builder shall perform all Work in accordance with, and shall perform all work required by, all requirements and conditions of all permits applicable to the Work or Site, even if such permit is issued or revised after Contract Award and even if the Design-Builder is not responsible for obtaining the permit. The Design-Builder shall be responsible to familiarize itself with the regulations, standards and permitting requirements of the permitting agencies. The Design-Builder will coordinate with New York City agencies and other Federal, State and local agencies and comply with local requirements.
- D. It is the Design-Builder's Responsibility to obtain all permits/approvals necessary to perform the Work. The Design-Builder shall obtain at its own expense all permits, in the name of MTA C&D or Design-Builder as appropriate, in good time to proceed with and complete the Work in accordance with the project schedule. The Design-Builder shall also comply with the requirements of the Technical Provisions.
- E. The MTA is designated as the construction-permitting agency for the Project. This construction-permitting process is being administered by the MTA's Fire, ADA, and Code Compliance Office (FACC). Therefore, some permits or approvals shall be obtained directly through the FACC,

whereas others will be obtained directly through the applicable agency, with a copy of the permit/approval documents being routed through the Project CEO to the FACC.

1. In those instances where permits, licenses, or approvals, which are normally obtained from or issued by third party governmental agencies, are to be obtained from or through or issued by the MTA FACC, the MTA FACC is acting as a governmental licensing and permitting agency and not in a proprietary capacity as a Contracting Party.
 2. As such, for the limited purpose of determining compensable delays under Article 6.08.B, MTA FACC shall not be considered part of the “MTA Group”; and for the limited purpose of determining changes under Article 8.02, MTA FACC shall not be considered as “MTA”. Provided however that MTA FACC actions may qualify as Changes under Article 8.10 – CHANGES IN LAWS, if all prerequisites of that Article are met; and at all times MTA FACC shall be among the “Indemnified Parties” under this Contract.
- F. All permitting/approval agency (including MTA FACC) requirements, permit conditions, required forms and procedures are subject to post-Proposal identification, change and revision; and shall only result in entitlement to an Equitable Adjustment if entitlement exists under Article 8.10 – CHANGES IN LAW.
- G. The Design-Builder shall provide MTA C&D with engineering and design data and information and support with respect to construction of the Work, to the extent reasonably requested or required by MTA C&D.
- H. The Design-Builder will perform all necessary actions and will bear all risk of delay and/or all risk of cost and expense, in either case, associated with permits resulting from the incorporation of any ATC into this Contract.

ARTICLE 14.13 TRANSFER OF WORK; ASSIGNMENT OF MTA’s RIGHTS

- A. No provision of the Contract shall in any way be affected by the transfer or any subsequent re-transfer of title to the completed Work or any part thereof between or among the MTA, the MTA Group, and any of their subsidiaries and affiliates. For the purpose of the Contract, no such transfer shall be deemed to have taken place.
- B. Notwithstanding the foregoing, should the MTA from time to time formally assign to any of its subsidiaries or affiliates the MTA’s rights under the Contract, then, to the extent of such assignment, such right shall be for the benefit of such affiliate or such subsidiary (as the case may be) which shall, to such extent, have direct rights to causes of action against the Design-Builder under the Contract.

ARTICLE 14.14 PERIODS OF LIMITATION ON RIGHT TO SUE THE MTA

- A. No suit, action or proceeding shall lie or be maintained by the Design-Builder against the MTA upon any claim relating to, arising out of, or based upon the Contract, unless such suit, action or proceeding shall be commenced within the applicable period of limitation set forth in Section 217 of the New York State Civil Practice Law and Rules and in any event within the time required in Article 12.04.

- B. The provisions of this Article 14.14 do not constitute a waiver by the MTA or an agreement of the MTA to extend any other applicable statutory limitations on the period of time to commence any such suit, action, or proceeding should such statutory limitation provide for a shorter period of time than herein specified for commencement of same.

ARTICLE 14.15 CHOICE OF LAW, CONSENT TO JURISDICTION AND VENUE

This Contract is to be construed and enforced pursuant to the laws of the State of New York. The Design-Builder agrees to submit any and all controversies arising out of the Contract and not subject to the alternative dispute resolution provision set forth in Articles 12.03 and 12.04, to the New York State and Federal courts of competent jurisdiction located in New York County, City of New York, and State of New York and those courts only. The Design-Builder consents to the exclusive jurisdiction of such courts for purposes of adjudicating any such controversies. Design-Builder hereby waives any right to trial by jury in connection with any dispute, controversy, action, claim, counterclaim, crossclaim or defense arising out of or relating to this Contract.

ARTICLE 14.16 MTA C&D FURNISHED MATERIALS AND EQUIPMENT

Materials and equipment to be furnished by MTA C&D will be available at locations designated in the Division 1- General Requirements or Technical Provisions or if not designated, they will be delivered to the Work Site. Such MTA C&D furnished materials and equipment shall be hauled to and properly stored at the place of use by the Design-Builder at the Design-Builder's expense, including all necessary loading and unloading that may be involved. The Contract Price shall include all costs of storing, handling, and installing such MTA C&D-furnished materials and equipment.

ARTICLE 14.17 WAIVER

None of the provisions of this Contract shall be considered waived by either party unless such waiver is reduced to writing and signed by such party. Failure by MTA C&D to insist upon strict performance of any terms or conditions of this Contract, or failure or delay to exercise any rights or remedies provided herein or by law, or failure to notify the Design-Builder in the event of breach shall not release the Design-Builder from any of the obligations or warranties of this Contract and shall not preclude MTA C&D from exercising any rights or seeking any remedies available to it. No waiver shall be construed as a modification or an amendment of any of the provisions of this Contract or as a waiver of any past or future default hereunder or breach hereof, except as expressly stated in such waiver.

ARTICLE 14.18 COMMERCIAL ACTIVITIES

Neither the Design-Builder nor its employees shall establish any commercial activity or issue concessions or permits of any kind to third parties for establishing commercial activities on the Work Site or any other lands owned or controlled by the MTA Group.

ARTICLE 14.19 HEADINGS, CROSS REFERENCES

- A. Section headings and captions herein are inserted for convenience only and shall not affect the meaning or construction of any of the provisions hereof.
- B. If in this Contract there is a reference to an Article followed by an Article heading in brackets and they are in conflict, e.g. "Article 20.9 - "Example," the reference to the Article title and not the Article number shall control, unless clearly incorrect.

ARTICLE 14.20 COUNTERPARTS

This Contract may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which, when taken together, shall constitute one and the same instrument. Electronic signatures, and delivery of original signatures by facsimile, photocopy or electronic means, shall be deemed original signatures for purposes of this Contract and shall have the same legal and binding effect as an original signature.

CHAPTER 15.

FEDERAL PROVISIONS

The provisions of this Chapter 15 apply to this Contract if so provided in the Design-Build Agreement.

ARTICLE 15.01 GOVERNMENT ACCESS TO RECORDS AND REPORTS

- A. The Design-Builder agrees to provide the MTA, the FTA Administrator, the Comptroller General of the United States (“Comptroller General”) or any of their authorized representatives access to any books, documents, papers and records of the Design-Builder which are directly pertinent to this Contract for the purpose of making audits, examinations, excerpts and transcriptions. The Design-Builder also agrees, pursuant to 49 CFR Part 633.17 to provide the FTA Administrator or its authorized representatives including any Project Management Oversight Design-Builder access to the Design-Builder’s records and construction sites pertaining to a major capital project, defined at 49 USC §5302(a)1, which is receiving Federal financial assistance through the programs defined at 49 USC §5307 or 5311.
- B. The Design-Builder agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- C. The Design-Builder agrees to maintain all books, records, accounts and reports required under this Contract for a period of not less than three (3) years after the date of termination or expiration of this Contract, except in the event of litigation or settlement of claims arising from the performance of this Contract, in which case the Design-Builder agrees to maintain same until the MTA, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions thereto.
- D. The Design-Builder must plan the Work and appurtenant shipments, purchases, and personnel travel, so as to ensure Design-Builder’s full compliance with all requirements imposed by the laws, rules and regulations referred to in General Conditions Chapter 15 Federal Provisions, including, but not limited to, Article 15.04 Cargo Preference – Use of United States Flag Vessels, Article 15.11 Buy America, and Article 15.13 Fly America Act. MTA and FTA and its agencies may perform routine audits of the Design-Builder’s compliance with such requirements during or after the performance of the Contract. Design-Builder’s failure to comply with such requirements may result in MTA’s negative evaluation of the Design-Builder’s performance under this Contract.

ARTICLE 15.02 CIVIL RIGHTS

- A. Nondiscrimination: In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. §2000d and §2000e, Section 303 of the Age Discrimination Act of 1975, as amended, 42 USC §6102, section 202 of the Americans with Disabilities Act of 1990, 42 USC §12132, and the Federal Transit law at 49 USC §5332, the Design-Builder agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age or disability. In addition, the Design-Builder agrees to comply with applicable Federal Implementing regulations and other implementing requirements FTA may issue.
- B. Equal Employment Opportunity: In accordance with Title VII of the Civil Rights Act, as amended, 42 USC §2000e, and Federal Transit Law at 49 USC §5332, the Design-Builder agrees to comply

with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contracts Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 CFR Parts 60 et seq., (which implements Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 USC §2000e, and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of this Contract. Some of the salient requirements of 41 CFR Part 60 are set forth below:

1. Age: In accordance with Section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 USC § § 623 and Federal Transit Law at 49 USC § 5332, the Design-Builder agrees to refrain from discrimination against present and prospective employees by reason of age. In addition the Design-Builder agrees to abide by any applicable implementing requirements the Federal Transit Authority may issue.
2. Disabilities: In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 USC §12112, the Design-Builder agrees that it will comply with the requirements of the U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, the Design-Builder agrees to comply with any implementing requirements FTA may issue.
3. Race, Color, Creed, National Origin, Sex: The Design-Builder agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Design-Builder agrees to comply with any implementing requirements FTA may issue.

The Design-Builder agrees to include the requirements of this Article in each subcontract financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.

C. During the performance of this Contract, the Design-Builder agrees as follows:

1. The Design-Builder will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Design-Builder will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Design-Builder agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

2. The Design-Builder will, in all solicitations or advertisements for employees placed by or on behalf of the Design-Builder, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.
3. The Design-Builder will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice advising the labor union or workers' representative of the Design-Builder's commitment under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
4. The Design-Builder will comply with all provisions of Executive Order 11246 of September 24, 1965, and with the rules, regulations, and relevant orders of the Secretary of Labor.
5. The Design-Builder will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and the rules, regulations and orders of the Secretary of Labor, issued pursuant thereto, and will permit access to its books, records and accounts by the Secretary of Labor and the FTA for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
6. In the event of the Design-Builder's noncompliance with the nondiscrimination clauses of this Contract or with any of such rules, regulations, or orders, this Contract may be cancelled, terminated, or suspended in whole or in part and the Design-Builder may be declared ineligible for further federal or federally assisted contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by Law.
7. The Design-Builder will include the provisions of Paragraphs 1. through 7. of this subsection in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order 11246 of September 24, 1965, so that such provisions shall be binding upon each Subcontractor or Vendor. The Design-Builder will take such action with respect to any subcontract or purchase order as the Secretary of Labor or FTA may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that if a Design-Builder becomes involved in, or is threatened with, litigation with a Subcontractor or Vendor as a result of such direction, the Design-Builder may request the United States to enter into such litigation to protect the interests of the United States.

D. STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246)

1. As used in these specifications:
 - a. "Covered area" means the geographical area described in the solicitation from which this contract resulted;

- b. “Director” means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;
 - c. “Employer Identification Number” means the Federal Social Security Number used on the Employer’s Quarterly Federal Tax Return, U.S. Treasury Department Form 941.
 - d. “Minority” includes:
 - (1) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);
 - (2) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race);
 - (3) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and
 - (4) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).
2. Whenever the Design-Builder, or any Subcontractor at any tier, subcontracts a portion of the Work involving any construction trade, it shall physically include in each subcontract in excess of \$10,000 (ten thousand dollars) the provisions of these specifications and the Notice that contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.
3. If the Design-Builder is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Design-Builders must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Design-Builder or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Design-Builder or Subcontractor toward a goal in an approved Plan does not excuse any covered Design-Builder’s or Subcontractor’s failure to make good faith efforts to achieve the Plan goals and timetables.
4. The Design-Builder shall implement the specific affirmative action standards provided in Paragraphs 7.a. through 7.p. below. The goals set forth in the solicitation from which this Contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Design-Builder should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered construction Design-Builders performing construction work in geographical areas

where they do not have a federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the Work is being performed. Goals are published periodically in the Federal Register in notice form and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Design-Builder is expected to make substantially uniform progress toward its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Design-Builder has a collective bargaining agreement to refer either minorities or women shall excuse the Design-Builder's obligations under the specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.
6. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Design-Builder during the training period, and the Design-Builder must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.
7. The Design-Builder shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Design-Builder's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Design-Builder shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:
 - a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Design-Builder's employees are assigned to work. The Design-Builder, where possible, will assign two or more women to each Contract.

The Design-Builder shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Design-Builder's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

- b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Design-Builder or its unions have employment opportunities available, and maintain a record of the organizations' responses.
 - c. Maintain a current file of the name, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Design-Builder, this shall be documented in the file with the reason therefore, along with whatever additional actions the Design-Builder may have taken.

- d. Provide immediate written notification to the Director when the union or unions with which the Design-Builder has a collective bargaining agreement has not referred to the Design-Builder a minority person or woman sent by the Design-Builder, or when the Design-Builder has other information that the union referral process has impeded the Design-Builder's efforts to meet its obligations.
- e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Design-Builder's employment needs especially those programs funded or approved by the Department of Labor. The Design-Builder shall provide notice of these programs to the sources compiled under 7(b) above.
- f. Disseminate the Design-Builder's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Design-Builder in meeting its EEO obligations; by including it in any manual and collective bargaining agreement; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
- g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with on-site supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
- h. Disseminate the Design-Builder's EEO policy externally by including it in any advertising in the news media, and providing written notification to and discussing the Design-Builder's EEO policy with other Design-Builders and Subcontractors with whom the Design-Builder does or anticipates doing business.
- i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Design-Builder's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Design-Builder shall send written notification to organizations such as the above, describing the opening, screening procedures, and tests to be used in the selection process.
- j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Design-Builder's work force.

- k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.
 - l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.
 - m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Design-Builder's obligations under these specifications are being carried out.
 - n. Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.
 - o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction Design-Builders and vendors, including circulation of solicitations to minority and female Design-Builder associations and other business associations.
 - p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Design-Builder's EEO policies and affirmative action obligations.
8. Design-Builders are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7.a. through 7.p. above). The efforts of a Design-Builder association, joint Design-Builder-union, Design-Builder-community, or other similar group of which the Design-Builder is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7.a. through 7.p. of these specifications provided that the Design-Builder actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Design-Builder's minority and female work force participation timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Design-Builder. The obligation to comply, however, is the Design-Builder's and failure of such a group to fulfill an obligation shall not be defense for the Design-Builder's noncompliance.
9. A single goal for minorities and a separate single goal for women have been established. The Design-Builder, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Design-Builder may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Design-Builder has achieved its goals for women generally, the Design-Builder may be in violation of the Executive Order if a specific minority group of women is under-utilized).
10. The Design-Builder shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

11. The Design-Builder shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.
12. The Design-Builder shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Design-Builder who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.
13. The Design-Builder, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in Paragraph 7. above, so as to achieve maximum results from its efforts to ensure equal employment opportunity, or if the Design-Builder fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60-4.8.
14. The Design-Builder shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the MTA and to keep records.

Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, Design-Builders shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

E. AFFIRMATIVE ACTION REQUIREMENTS

NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY (EXECUTIVE ORDER 11246)

1. The Offeror's or Bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" set forth herein.
2. The goals and timetables for minority and female participation, expressed in percentage terms for the Design-Builder's aggregate workforce in each trade on all construction work in the covered area, are as set forth in Appendix 15.02 C. 2. to these General Provisions.
 - a. These goals are applicable to all Design-Builder's construction work (whether or not it is federal or federally assisted) performed in the covered area. If the Design-

Builder performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the Design-Builder is also subject to the goals for both its federally involved and non-federally involved construction.

- b. The Design-Builder's compliance with the Executive Order and the regulations in 41 CFR Part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4.3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract and in each trade, and the Design-Builder shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Design-Builder to Design-Builder or from project to project for the sole purpose of meeting the Design-Builder's goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR Part 60-4. Compliance with the goals will be measured against the total work hours performed.
3. The Design-Builder shall provide monthly reports on the Monthly Employment Utilization Report Form WF-257, set forth in Appendix 15.02.C.3 to these General Provisions, to the officials and addresses stated in 5. below.
4. As used in this Contract, the "covered area" is the City of New York in the State of New York.
5. Form WF-257 is to be completed by the Design-Builder and each of his Subcontractors and signed by an authorized officer or member of the Design-Builder or Subcontractor. The reports shall be filed by the 10th day of each month for the preceding month, by the Design-Builder and sent to:

New York State Department of Labor
Office of Affirmative Action Programs
One Main Street - Room 1109
Brooklyn, New York 11201
Attention: The Director
(718) 797-7805

and

Metropolitan Transportation Authority
Office of Civil Rights
Division of Business Programs
2 Broadway, 16th Floor
New York, NY 10004
Attention: Director – Office of Civil Rights

ARTICLE 15.03 NO OBLIGATION BY THE FEDERAL GOVERNMENT

- A. The Design-Builder acknowledges and agrees that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this Contract and shall not be subject to any obligations or liabilities to the MTA, the Design-Builder, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.
- B. The Design-Builder also agrees to include the requirements of this Chapter in all subcontracts issued pursuant to this Contract.

ARTICLE 15.04 CARGO PREFERENCE-USE OF UNITED STATES FLAG VESSELS

The Design-Builder herein agrees:

- A. To utilize privately owned United States-flag commercial vessels to ship at least fifty percent (50%) percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.
- B. To furnish within twenty (20) days following the date of loading for shipments originating within the United States or within thirty (30) working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, “on-board” commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (A) above to the Project CEO (through the Design-Builder in the case of Subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington DC 20590.
- C. To submit to MTA C&D, within 120 days after Notice of Award, a shipping plan setting forth, at a minimum the following information:
 - 1. A list of the items that the Design-Builder intends to ship, a description of the items, indicating their origin, the shipping weight of such items or groups of items, calculated by both gross tonnage and volumetric tonnage, and a statement of whether the items or groups of such items are to be shipped on US-flagged carriers.
 - 2. Method of transportation of the items from the point of origin to the Work Site or an entry point in the United States.
- D. To provide MTA C&D, when available and in any event not less than 10 days prior to shipment, details of the vessel on which the items are to be shipped and a copy of the proposed bill-of-lading.
- E. To provide MTA C&D, upon a written request, with all documents related to or demonstrating the Design-Builder’s compliance with the provisions of this Article, including, but not limited to, all requests for shipping quotes obtained by the Design-Builder and parties acting on its behalf, purchase orders and shipping authorizations, all communications with the U.S. Department of Transportation and its agencies, bills of lading, packing slips, and weight and volumetric calculations of the cargo that has been shipped or is anticipated to be shipped, under this Contract.

- F. To insert these requirements in all subcontracts issued pursuant to this Contract when the subcontract may involve the shipment of any equipment, material, or commodities.
- G. The Design-Builder agrees to provide MTA, upon a written request, with all documents related to and demonstrating Design-Builder's compliance with the provisions of this article, including, but not limited to, all requests for shipping quotes obtained by the Design-Builders and parties acting on its behalf, purchase orders and shipping authorizations, all communications with the U.S. Department of Transportation and its agencies, bills of lading, packing slips, and weight and volumetric calculations of the cargo that has been shipped or is anticipated to be shipped under this Contract.
- H. The Design-Builder agrees that MTA may conduct investigations and exercise any and all remedies available to it under the Contract based on the Design-Builder's failure to comply with this article, in addition and independent of any actions that may be taken against the Design-Builder by the U.S. Department of Transportation and any of its departments and agencies.

ARTICLE 15.05 OBLIGATIONS OF GOVERNMENT DESIGN-BUILDERS AND SUBCONTRACTORS UNDER REGULATIONS OF THE DEPARTMENT OF LABOR - OFFICE OF FEDERAL CONTRACT COMPLIANCE (41 CFR CHAPTER 60)

The Work performed under this Contract is subject to the Equal Employment Opportunity ("EEO") requirements of 41 CFR Part 60 which is incorporated herein by reference.

ARTICLE 15.06 DAVIS-BACON ACT (MINIMUM WAGES)

- A. All laborers and mechanics employed or working upon the site of the Work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the Project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act, 29 C.F.R. Part 3), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at the time of payment computed at rates not less than those contained in the Wage Determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Design-Builder and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 C.F.R. 5.5(a)(1)(iv); also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs that cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the Wage Determination for the classification of work actually performed, without regard to skill, except as provided at 29 C.F.R. 5.5(a)(4), laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The Wage Determination (including any additional classification and wage rates conformed under 29 C.F.R. 5.5(a)(1)(ii) and the Davis-Bacon poster

(WH-1321) shall be posted at all times by the Design-Builder and its Subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

B. The contracting officer shall require that any class of laborers or mechanics, including helpers, that is not listed in the Wage Determination and that is to be employed under the contract shall be classified in conformance with the Wage Determination.

1. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- a. Except with respect to helpers as defined in 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the Wage Determination; and
- b. The classification is utilized in the area by the construction industry; and
- c. The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the Wage Determination.

With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

2. If the Design-Builder and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

3. In the event the Design-Builder, laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for Determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

4. The wage rate (including fringe benefits where appropriate) determined pursuant to 29 C.F.R. 5.5(a)(i)(1)(B) or 29 C.F.R. 5.5(a)(i)(1)(C), shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

C. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Design-Builder shall either pay the benefit as stated in the Wage Determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

- D. If the Design-Builder does not make payments to a trustee or other third person, the Design-Builder may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, provided, that the Secretary of Labor has found, upon the written request of the Design-Builder, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Design-Builder to set aside in a separate account assets for the meeting of obligations under the plan or program.
- E. The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.
1. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:
 - a. The work to be performed by the classification requested is not performed by a classification in the wage determination; and
 - b. The classification is utilized in the area by the construction industry; and
 - c. The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.
 2. If the Design-Builder and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within thirty (30) days of receipt and so advise the contracting officer or will notify the contracting officer within the thirty (30) day period that additional time is necessary.
 3. In the event the Design-Builder, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination with thirty (30) days of receipt and so advise the contracting officer or will notify the contracting officer within the thirty (30) day period that additional time is necessary.
 4. The wage rate (including fringe benefits where appropriate) determined pursuant to the two preceding paragraphs of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

F. WITHHOLDING

MTA C&D shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the Design-Builder, under this Contract or any other Federal contract with the same recipient or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is withheld by the same Prime Design-Builder, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Design-Builder or any Subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the Work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the Project), all or part of the wages required by the Contract, FTA may, after written notice to the Design-Builder, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

G. PAYROLLS AND BASIC RECORDS

1. Payrolls and basic records relating thereto shall be maintained by the Design-Builder during the course of the Work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the Project). Such records shall contain the name, address, and Social Security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in Section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 C.F.R. 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in Section 1(b)(2)(B) of the Davis-Bacon Act, the Design-Builder shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual costs incurred in providing such benefits. Design-Builders employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.
2. a. The Design-Builder shall submit weekly for each week in which any Contract Work is performed a copy of all payrolls to FTA if FTA is a party to the contract; but if FTA is not such a party, the Design-Builder will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to FTA. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 C.F.R. 5.5(a)(3)(i). This information may be submitted in any form designed. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock No. 029-005-00014-1), U.S. Government Printing Office, Washington, D.C. 20402. The Prime Design-Builder is responsible for the submission of copies of payrolls by all Subcontractors.

- b. Each payroll submitted shall be accompanied by a “Statement of Compliance,” signed by the Design-Builder or Subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:
 - (1) That the payroll for the payroll period contains the information required to be maintained under 29 C.F.R. 5.5(a)(3)(i) and that such information is correct and complete;
 - (2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth at 29 C.F.R. Part 3;
 - (3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable Wage Determination incorporated into the contract.
- c. The weekly submission of a properly executed certification set forth on the reverse side of optional form WH-347 shall satisfy the requirement for submission of the “Statement of Compliance” required by 29 C.F.R. 5.5(a)(3)(ii)(B).
- d. The falsification of any of the above certifications may subject the Design-Builder or Subcontractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 231.
- e. The Design-Builder or Subcontractor shall make the records required under 29 C.F.R. 5.5(a)(3)(i) available for inspection, copying, or transcription by authorized representatives of FTA or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the Design-Builder or Subcontractor fails to submit the required records or make them available, FTA may, after written notice to the Design-Builder, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or make such records available may be grounds for debarment action pursuant to 29 C.F.R. 5.12.

H. APPRENTICES AND TRAINEES

- 1. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State apprenticeship agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State apprenticeship agency (where

appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Design-Builder as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage on the Wage Determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the Wage Determination for the work actually performed. Where a Design-Builder is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Design-Builder's or Subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable Wage Determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the Wage Determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringe benefits shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State apprenticeship agency recognized by the Bureau, withdraws approval of an apprenticeship program, the Design-Builder will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

2. Trainees Except as provided in 29 C.F.R. 5.16, the trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable Wage Determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the Wage Determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination, that provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the Wage Determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the Wage Determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Design-Builder will no longer be permitted

to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

3. Equal Employment Opportunity The utilization of apprentices, trainees, and journeymen under 29 C.F.R. Part 5 shall be in conformity with the Equal Employment Opportunity requirements of Executive Order 11246, as amended, and 29 C.F.R. Part 30.

I. COMPLIANCE WITH COPELAND ACT REQUIREMENTS

The Design-Builder shall comply with the requirements of 29 C.F.R. Part 3, which are incorporated herein by reference.

J. SUBCONTRACTS

The Design-Builder or Subcontractor shall insert in any subcontracts clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the FTA may by appropriate instructions require, and also a clause requiring the Subcontractors to include these clauses in any lower tier subcontracts. The Design-Builder shall be responsible for the compliance by any Subcontractor or lower tier Subcontractor with all the Contract clauses in 29 CFR 5.5.

K. CONTRACT TERMINATION: DEBARMENT

A breach of the contract clauses in 29 C.F.R. 5.5 may be grounds for termination of the contract, and for debarment as a Design-Builder and a Subcontractor as provided in 29 C.F.R. 5.12.

L. COMPLIANCE WITH DAVIS-BACON AND RELATED ACT REQUIREMENTS

All rulings and interpretations of the Davis-Bacon and related acts contained in 29 C.F.R. Parts 1, 3, and 5 are incorporated herein by reference.

M. DISPUTES CONCERNING LABOR STANDARDS

Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this Contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 C.F.R. parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Design-Builder (or any of its Subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

ARTICLE 15.07 OTHER FEDERAL PROVISIONS

A. CERTIFICATION OF ELIGIBILITY

By entering into this Contract, the Design-Builder certifies that neither it nor any person or firm that has an interest in the Design-Builder's firm is a person or firm ineligible to be awarded government contracts by virtue of Section 3(a) of the Davis-Bacon Act or 29 C.F.R. 5.12(a)(1).

No part of this Contract shall be subcontracted to any person or firm ineligible for award of a government contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 C.F.R. 5.12(a)(1).

The penalty for making false Statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

B. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (40 USC § 327-333 (1999); 29 CFR § 5 (1999); 29 CFR § 1926 (1998))

1. OVERTIME REQUIREMENTS

No Design-Builder or Subcontractor contracting for any part of the contract Work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any work week in which he or she is employed on such Work, to work in excess of forty hours in such work week unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such work week.

2. VIOLATION; LIABILITY FOR UNPAID WAGES; LIQUIDATED DAMAGES

In the event of any violation of the requirements of 29 C.F.R. 5.5(b)(1), the Design-Builder and any Subcontractor responsible therefore shall be liable for the unpaid wages. In addition, such Design-Builder and Subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of 29 C.F.R. 5.5(b)(1) in the sum of \$10.00 for each calendar day on which such individual was required or permitted to work in excess of the standard work week of forty hours without payment of the overtime wages required by 29 C.F.R. 5.5(b)(1). The MTA shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any monies payable on account of work performed by the Design-Builder or Subcontractor under any such contract or any other Federal contract with the same Design-Builder, or any other Federally-assisted contract subject to the contract work hours and Safety Standards act, which is held by the same Design-Builder, such sums as may be determined to be necessary to satisfy any liability of such Design-Builder or Subcontractor for unpaid wages and liquidated damages as provided in the clause set forth at 29 C.F.R. 5.5(b)(2).

3. WITHHOLDING FOR UNPAID WAGES AND LIQUIDATED DAMAGES

FTA or the MTA shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld, from any monies payable on account of work performed by the Design-Builder or Subcontractor under any such contract or any other Federal contract with the same Design-Builder, or any other Federally-assisted contract subject to the contract work hours and Safety Standards act, which is held by the same Design-Builder, such sums as may be determined to be necessary to satisfy any liability of such Design-Builder or Subcontractor for unpaid wages and liquidated damages as provided in the clause set forth at 29 C.F.R. 5.5(b)(2).

4. SUBCONTRACTS

The Design-Builder or Subcontractor shall insert in any Subcontracts the clauses set forth in Article 15.06F. through Q. inclusive and also a clause requiring the Subcontractors to include these clauses in all lower-tier Subcontracts. The Design-Builder shall be responsible for compliance by any Subcontractor or lower tier Subcontractor with the clauses set forth in Article 15.06F. through Q. inclusive.

C. ENERGY CONSERVATION (42 USC 6321 et. Seq.; 49 CFR Part 18)

The Design-Builder shall comply with the mandatory standards and policies relating to energy efficiency which are contained in the New York State Energy Conservation Plan issued in compliance with the Energy Policy and Conservation Act 42 U.S.C Section 6321 et. seq.

Flow Down: The Design-Builder also agrees to ensure that all Work performed under this Contract, including Work performed by any Subcontractor (at all tiers), is in compliance with the requirements of this ARTICLE.

D. ANTI-KICKBACK ACT

This Contract and all Work performed under this Contract is subject to the provisions of the Anti-Kickback Act of 1986 (41 U.S.C. 51-58) and 49 CFR Part 18 which are incorporated herein by reference.

E. CLEAN AIR AND WATER CLAUSES

1. CLEAN AIR AND WATER (40 CFR Part 15.31) :The Design-Builder agrees to the following:

- a. In the performance of the Contract to comply with all the requirements of Section 114 of the Clean Air Act (42 U.S.C. 7414) and Section 308 of the Clean Water Act (33 U.S.C. 1318) relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in Section 114 and Section 308 of the Air Act and the Water Act, and all regulations and guidelines issued to implement those acts before the award of this Contract;
- b. That no portion of the Work required by this Contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities for the duration of time the facility remains on the list unless and until the EPA eliminates the name of the facility from the listing;
- c. To use best efforts to comply with clean air standards and clean water standards at the facility in which the Contract is being performed; and
- d. To notify the MTA if a facility the Design-Builder intends to use is on the list of violating facilities or knows that it is recommended to be placed on the list.
- e. To insert the substance of this paragraph into any non-exempt subcontract, including this Subparagraph (5).

2. CLEAN WATER REQUIREMENTS (33 USC 1251 et seq.)

- a. The Design-Builder agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 USC 1251 et seq. The Design-Builder agrees to report each violation to the MTA and understands and agrees that the MTA will, in turn, report each violation as required to assure notification to the FTA and the appropriate U.S. EPA Regional Office

- b. The Design-Builder also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or part with Federal assistance provided by FTA.

3. CLEAN AIR REQUIREMENTS (42 USC 7401 et seq; 40 CFR 15.61; 49 CFR Part 18)

- a. The Design-Builder agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Clean Air Act, as amended, 42 USC § § 7401 et seq. The Design-Builder agrees to report each violation to the MTA and understands and agrees that the MTA will, in turn, report each violation as required to assure notification to the FTA and the appropriate U.S. EPA Regional Office
- b. The Design-Builder also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or part with Federal assistance provided by FTA.

F. ACCESSIBILITY FOR INDIVIDUALS WITH DISABILITIES

The Design-Builder shall comply with the provisions of 49 CFR, Part 27 and 41 CFR, Part 101-19.6 regarding accessibility for individuals with disabilities.

G. FTA BID PROTEST PROCEDURE (FTA C4220.1F)

The MTA has a written protest procedure to handle and resolve disputes relating to its procurements and shall in all instances disclose information regarding the protest to FTA. All protest decisions must be in writing. A protestor must exhaust all administrative remedies with the MTA before pursuing a protest with FTA.

H. NO FEDERAL GOVERNMENT OBLIGATIONS TO DESIGN-BUILDERS AND SUBCONTRACTORS

Absent the Federal Government's express written consent, and notwithstanding any concurrence in or approval of this Contract or any Subcontracts hereunder, the Federal Government shall not be subject to any obligations or liabilities to any Design-Builder or Subcontractor, or to any other third parties not a party to an agreement with the Federal Government.

I. FALSE OR FRAUDULENT STATEMENTS AND CLAIMS

- 1. The Design-Builder acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 USC §3801 et seq. and US DOT regulations, "Program Fraud Civil Remedies," 49 CFR Part 31, apply to its actions pertaining to this Contract. Upon execution of the underlying contract, the Design-Builder certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying contract or the FTA assisted project for which this contract work is being performed. In addition to other penalties that may be applicable, the Design-Builder further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Design-Builder to the extent the Federal Government deems appropriate.

2. The Design-Builder also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under authority of 49 USC §5307, the Government reserves the right to impose the penalties of 18 USC §1001 and 49 USC §5307(n)(1) on the Design-Builder, to the extent the Federal Government deems appropriate.
3. The Design-Builder also agrees to include the requirements of this Article in all subcontracts issued pursuant to this Contract.

ARTICLE 15.08 INTEREST OF MEMBERS OF OR DELEGATES TO THE UNITED STATES CONGRESS

In accordance with 41 U.S.C. Sec. 22, no member of or delegate to the United States Congress shall be admitted to any share or part of the Contract or any benefit derived therefrom.

ARTICLE 15.09 EXCLUSIONARY OR DISCRIMINATORY SPECIFICATIONS

Apart from inconsistent requirements imposed by Federal statute or regulations, the Design-Builder agrees that it will comply with the requirements of 49 U.S.C. §5323(h)(2) by refraining from using any Federal assistance to support procurements using exclusionary or discriminatory specifications.

ARTICLE 15.10 SEISMIC SAFETY

The Design-Builder agrees to apply the requirements of U.S. DOT regulations applicable to seismic safety requirements for U.S. DOT assisted construction projects at 49 C.F.R. Part 41, (including but not limited to 49 C.F.R. §41.117), and any implementing guidance FTA may issue, to the acquisition of any new building and to additions to any existing building. The Design-Builder will certify compliance to the extent required by the regulation. The Design-Builder agrees to ensure that all Work performed under this Contract including work performed by all Subcontractors is in compliance with the standards required by the Seismic Safety Regulations and the certification of compliance issued on the Project.

The seismic safety standards applicable to this Contract are contained in Section 2312 ICBO Uniform Building Code (UBC), as modified by the Appendix to Title 27, Chapter 1 (Volume 7), of the Administrative Code and Charter of the City of New York at RS 9-6 Earthquake Loads.

ARTICLE 15.11 BUY AMERICA

The Design-Builder shall comply with the provisions of 49 USC 5323(j), and its implementing regulations, 49 CFR Part 661 as well as the provisions of 49 USC 24405. The Design-Builder shall indemnify the Indemnified Parties from any loss, liability and expenses arising out of the Design-Builder's failure to comply with these Buy America requirements.

ARTICLE 15.12 RESTRICTIONS ON LOBBYING

- A. In accordance with the Byrd Anti-Lobbying Amendment, 31 USC 1352, as amended by the Lobbying Disclosure Act of 1995, P.L. 104-65 (to be codified at 2 USC § 1601, et seq.)- Contractors who apply or bid for an award of \$100,000 or more shall file the certification required by 49 CFR part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it

will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 USC 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 USC 1352. Such disclosures are forwarded from tier to tier up to the recipient.

B. The Design Builder will:

1. submit for itself the form entitled “Certification of Restrictions on Lobbying” and if applicable, the form entitled “Disclosure of Lobbying” (see **SCHEDULE XIII, Form A-3**);
2. Obtain and retain from all subcontractors or suppliers whose contracts will exceed \$100,000 the certification entitled “Certification of Restrictions on Lobbying” (see **SCHEDULE XIII, Form A-3**); and
3. Obtain from all subcontractors or suppliers, at any tier, whose contracts will exceed \$100,000, and submit to MTA C&D, if applicable, the form entitled “Disclosure of Lobbying” (see **SCHEDULE XIII, Form A-3**).

C. The Design-Builder, Subcontractor or supplier shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such Design-Builder, Subcontractor or supplier under Paragraphs B1 or B3 of this section. An event that materially affects the accuracy of the information reported includes:

1. A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or
2. A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or
3. A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

D. The Design-Builder’s completed Schedule XIII, Form A-3 is attached to the Contract and incorporated into the Contract documents.

E. Flow Down: The Design-Builder shall ensure that certifications completed by lower tier subcontractors or suppliers are attached to and incorporated into its subcontracts or agreements.

ARTICLE 15.13 FLY AMERICA ACT

- A. In accordance with the International Air Transportation Fair Competitive Practices Act of 1974, as amended, 49 USC §40118, in accordance with US GAO regulations, “Uniform Standards and Procedures for Transportation Transactions,” 4 CFR Part 52, and US GAO Guidelines for Implementation of the “Fly America Act,” the Design-Builder agrees to use US-flag air carriers

for international air transportation of personnel (and their personal effects) or property, to the extent that service by those carriers is available.

B. DEFINITIONS:

1. “International air transportation” – as used in this Article, means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.
2. “United States” – as used in this Article, means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and possessions of the United States.
3. “US-flag air carrier” – as used in this Article, means an air carrier holding a certificate under 49 USC §41102.

C. In the event that the Design-Builder selects a carrier other than a US-flag air carrier for international air transportation, the Design-Builder shall include a statement attached to its voucher(s) adequately explaining why service by US-flag air carriers was not available or why it was necessary to use foreign-flag air carriers (see US GAO Guidelines for Implementation of the “Fly America Act”).

D. The Design-Builder agrees to include the requirements of this Article in all Subcontracts that may involve international air transportation and to require its first-tier Subcontractors to include the requirements of this Article 15.13 in their lower-tier Subcontracts.

ARTICLE 15.14 INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION TERMS

The Contract includes, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the Contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1F, (or any current update thereof in effect on the date of this contract), are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA-mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Contract. The Design-Builder shall not perform any act, fail to perform any act, or refuse to comply with any MTA C&D requests which would cause the MTA to be in violation of the FTA terms and conditions. Notwithstanding the foregoing, however, if there is a requirement in this Contract that is more stringent than an FTA-mandated term, then the parties agree that there is no conflict in the provisions, and the more stringent Contract requirement shall prevail.

ARTICLE 15.15 FEDERAL CHANGES

The Design-Builder shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement available at transit.dot.gov between the MTA and FTA, as they may be amended or promulgated from time to time during or before the term of this Contract. The Design-Builder’s failure to so comply shall constitute a material breach of this Contract.

ARTICLE 15.16 PROMPT PAYMENT OF RETAINAGE AND PROGRESS PAYMENTS TO SUBCONTRACTORS

A. The Design-Builder agrees to include in all subcontracts a provision that the full amount of retainage owed to any Subcontractor which is attributable to such subcontract will be paid by the

Design-Builder within thirty (30) days of the date when all tasks called for in the subcontract have been accomplished and documented as required by MTA C&D and in accordance with 49 CFR 26.29.

- B. In addition to the other conditions precedent to the issuance of payment set forth in the Contract, the Design-Builder shall also certify as a condition precedent to the issuance of payment by MTA C&D that:
 - 1. all retainage owed to any Subcontractor was paid within thirty (30) days of the date when all tasks called for in the subcontract have been accomplished and documented as required by MTA C&D and in accordance with 49 CFR 26.29; and
 - 2. all Subcontractors have been paid, within thirty (30) days of MTA C&D's payment to the Design-Builder, the amount due to them for the work performed which was encompassed by any previous Progress Payments made to the Design-Builder.
- C. Any delay or postponement of the return of retainage by the Design-Builder to Subcontractors from the time frame set forth in Paragraph A., above, of this ARTICLE may occur only for good cause following written approval of MTA C&D.
- D. Any failure by the Design-Builder to comply with this ARTICLE deemed by MTA C&D to be material will be considered a material breach of the Contract.
- E. Flow Down: The requirements of this ARTICLE apply to subcontracts.

ARTICLE 15.17 RETURN OF SUBCONTRACT RETAINAGE TO DESIGN-BUILDER

- A. When all the tasks called for in a subcontract, including Subcontractor punch list work and deliverables, have been completed in a manner satisfactory to the Design-Builder, and have been accomplished and documented as required by MTA C&D, the Design-Builder may request that MTA C&D inspect the corresponding Work attributable to such subcontract so as to determine its acceptability to MTA C&D. In the event that MTA C&D accepts such corresponding Work attributable to such subcontract, and, after the Design-Builder has returned the full amount of retainage attributable to such subcontract to the Subcontractor, the Design-Builder may submit a written request for payment of such full amount of retainage so returned to the Subcontractor from the monies being retained by MTA C&D pursuant to ARTICLE 9.02 - RETAINED PERCENTAGE of the General Provisions. The request must be accompanied by the Design-Builder's certification that the full amount of retainage held by the Design-Builder with respect to the completed subcontract has been returned to the Subcontractor, which certification must indicate the dollar value of retainage so returned to the Subcontractor.
- B. Unless MTA C&D elects to return less than the dollar value of retainage certified by the Design-Builder to have been returned to the Subcontractor, as provided below in this Paragraph B., upon the Design-Builder's submission of the written request for payment as set forth above, MTA C&D will return to the Design-Builder the amount of retainage set forth in the Subcontractor's certification required by Paragraph A., above, of this ARTICLE, such payment to be made within thirty (30) days from the date of MTA C&D's receipt of such written request in accordance with MTA C&D's Prompt Payment Rules. The required supporting documentation for the Design-Builder's entitlement to such payment shall be the Design-Builder's certification described in Paragraph A above. Notwithstanding the foregoing, MTA C&D, at its sole discretion, may elect

to return an amount equal to five (5) percent of MTA C&D's estimate of the value of the Work encompassed within the completed subcontract and may also elect, at its sole discretion, to reduce the amount of retainage returned if the acceptability of the Work encompassed within the completed subcontract cannot be determined in the absence of completion of other portions of the Work that have not been completed.

- C. Any acceptance of Work by MTA C&D under this ARTICLE shall have no effect on MTA C&D's determinations regarding the completeness and fitness of the Work for its intended purpose, or its compliance with the Contract.
- D. Flow Down: The requirements of this ARTICLE do not flow down to the subcontracts.

ARTICLE 15.18 RESTRICTIONS ON TELECOMMUNICATIONS EQUIPMENT AND SERVICES

This Contract is subject to 2 CFR 200.216 and Section 889 of Public Law 115-232, the National Defense Authorization Act for Fiscal Year 2019. The Design-Builder shall not provide under this Contract any equipment or services prohibited by those laws and regulations.

ARTICLE 15.19 SUPPLEMENTAL TITLE VI PROVISIONS (CIVIL RIGHTS ACT)

During the performance of this contract, the Design-Builder, for itself, its assignees and successors in interest agrees as follows:

- A. Compliance with Regulations: The Design-Builder shall comply with the Regulation relative to nondiscrimination in Federally-assisted programs of the Department of Transportation of the United States, Title 49, Code of Federal Regulations, Part 21, and the Federal Highway Administration (hereinafter "FHWA") Title 23, Code of Federal Regulations, Part 200 as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.
- B. Nondiscrimination: The Design-Builder, with regard to the work performed by it during the contract, shall not discriminate on the grounds of race, color, or national origin, sex, age, and disability/handicap in the selection and retention of Subcontractors, including procurements of materials and leases of equipment. The Design-Builder shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR, section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.
- C. Solicitations for Subcontractors, Including Procurements of Materials and Equipment: In all solicitations either by competitive bidding or negotiation made by the Design-Builder for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Design-Builder of the Design-Builder's obligations under this contract and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin, sex, age, and disability/handicap.
- D. Information and Reports: The Design-Builder shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by MTA C&D or the FHWA to be pertinent to ascertain compliance with such Regulations, orders and

instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information the Design-Builder shall so certify to MTA's Office of Civil Rights or FHWA, as appropriate, and shall set forth what efforts it has made to obtain the information.

- E. Sanctions for Noncompliance: In the event of the Design-Builder's noncompliance with the nondiscrimination provisions of this contract, MTA C&D shall impose such contract sanctions as it or the FHWA may determine to be appropriate, including, but not limited to:
 - 1. withholding of payments to the Design-Builder under the contract until the Design-Builder complies, and/or
 - 2. cancellation, termination or suspension of the contract, in whole or in part.
- F. Incorporation of Provisions: The Design-Builder shall include the provisions above in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto.
- G. The Design-Builder shall take such action with respect to any subcontract or procurement as MTA C&D or the FHWA or the FTA may direct as a means of enforcing such provisions including sanctions for non-compliance, provided, however, that, in the event a Design-Builder becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Design-Builder may request MTA to enter into such litigation to protect the interests of MTA C&D, and, in addition, the Design-Builder may request the United States to enter into such litigation to protect the interests of the United States.

ARTICLE 15.20 ARRA REPORTING AND RECORD KEEPING REQUIREMENTS AND STATE JOB POSTING REQUIREMENTS

- A. The Design-Builder shall complete Form 1589 on a monthly basis. If the Form 1589 is not properly completed and submitted by the scheduled submittal date, the MTA C&D may withhold the related monthly billing request. There will be no additional compensation for this reporting activity and Form 1589 will be required in both paper and electronic formats. A copy of this form and an instruction sheet are included as [attachment]. An electronic format (MS Excel) of this form is available for download at <http://www.nysdot.gov/recovery> by selecting the "Reporting Requirements" option. All reporting entities must have a Dunn & Bradstreet Unique Identification Number (DUNS) and must include their DUNS on the subject form and shall complete a Form 1589 and include the signed original form with the monthly billing request package to the MTA. If a billing request is not available for submittal by the 10th of the month, Form 1589 shall be submitted separately with supporting documentation to the Project CEO. The Design-Builder shall submit individual Form 1589s covering their employees and any subcontractor and/or subconsultant firms employees used in the progression of the contract Work. Subcontractors and subconsultants are not required to have a DUNS number. If no work is progressed during a reporting period, a Form 1589 is still to be submitted with "ZEROS" indicated.
- B. The Design-Builder shall complete the MTA EB 10-013 Form on a monthly basis. If the form is not properly completed and submitted by the scheduled submittal date, the MTA C&D may withhold the related monthly billing request. A copy of this form is included as [attachment]. An electronic format (MS Excel) of this form is available for download at <https://www.nysdot.gov/recovery> by selecting the "Reporting Requirement" option. All reporting

entities shall complete the EB 10-013 form and include the signed original form with the monthly billing request package to the Project CEO. If a billing request is not available for submittal by the 10th of the month, the form shall be submitted separately with supporting documentation to the Project CEO. The Design-Builder shall submit individual EB 10-013 Forms covering DBE certified subcontractors, subconsultants, material providers or other service provider firms used in the progression of the contract work. If no DBE firms have been utilized by the Design-Builder, the monthly EB 10-013 form is still to be submitted with "\$0.00" indicated.

ARTICLE 15.21 NATIONAL INTELLIGENT SYSTEM ARCHITECTURE & STANDARDS

- A. To the extent applicable, the Design-Builder shall ensure that all Work performed under this Contract complies with the National Intelligent Transportation System Architecture and Standards to the extent required by 23 U.S.C., § 512 and complies with the provisions of FTA Notice, "FTA National ITS Architecture Policy on Transit Projects," 66 Federal Register 1455 et seq., January 8, 2001 and any other published policies or implementing directives FTA may issue at a later date.
- B. Flow down: Where applicable, the Design-Builder acknowledges that it is responsible for ensuring that Subcontractors (at all tiers) comply with the requirements of this Article.

ARTICLE 15.22 SECURITY SENSITIVE INFORMATION

- A. The Design-Builder shall protect and take measures to ensure that its Subcontractors at each tier protect "Sensitive Security Information", as defined at 49 CFR Part 15 and 49 CFR Part 1520, made available by MTA C&D in connection with this Contract to ensure compliance with 49 U.S.C. Section 40119(b) and implementing DOT regulations at 49 CFR Part 15 and with 49 U.S.C. Section 114(s) and implementing Department of Homeland Security regulations at 49 CFR Part 1520.
- B. Flow Down: The Design-Builder agrees to include these requirements in each Subcontract (at every tier).

ARTICLE 15.23 RECYCLED PRODUCTS

- A. The Design-Builder agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. 6962), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 CFR Part 247.
- B. Flow Down: These requirements flow down to all Design-Builder and Subcontractor tiers.

ARTICLE 15.24 VETERANS PREFERENCE

- A. The Design-Builder agrees to comply with the requirements of 49 U.S.C. 5325(k), as amended by the Moving Ahead for Progress in the 21st Century Act (MAP-21), which requires the Design-Builder to give a hiring preference, to the extent practicable, to veterans (as defined in 5 U.S.C. 2108) who have the requisite skills and abilities to perform the Work required under the Contract.
- B. This Article shall not be understood, construed or enforced in any manner that would require the Design-Builder to give a preference to any veteran over any equally qualified applicant who is a

member of any racial or ethnic minority, female, an individual with a disability, or a former employee.

- C. The Design-Builder shall ensure that its hiring practices reflect the requirements of this Article and shall, upon request, provide to MTA C&D personnel data which reflects compliance with the terms contained herein.

ARTICLE 15.25 SAFE OPERATION OF MOTOR VEHICLES

- A. **Seat Belt Use.** The Design-Builder is encouraged to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company-owned vehicles, company- A-60 rented vehicles, or personally operated vehicles. The terms “company-owned” and “company-leased” refer to vehicles owned or leased either by the Design-Builder or MTA.
- B. **Distracted Driving.** The Design-Builder agrees to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers, including policies to ban text messaging while using an electronic device supplied by an employer, and driving a vehicle the driver owns or rents, a vehicle Design-Builder owns, leases, or rents, or a privately-owned vehicle when on official business in connection with the Work performed under this Contract.

ARTICLE 15.26 CURRENT OR PROSPECTIVE LEGAL MATTERS

- A. The Design-Builder shall promptly notify the FTA Chief Counsel and the FTA Regional Counsel for FTA Region 2 of any current or prospective legal matter with respect to this Contract that may affect the Federal Government.
- B. **Flowdown:** The Design-Builder shall include an equivalent provision in each subcontract and shall ensure that such provision is included in subcontracts at any tier.

CHAPTER 16.

NEW YORK STATE PROVISIONS

ARTICLE 16.01 DEBARMENT

This Contract is subject to the debarment provisions of Public Authorities Law §1279-h.

ARTICLE 16.02 NON-DISCRIMINATION

The Design-Builder agrees, as required by Section 220-e (as amended) of the New York State Labor Law, that in hiring employees for Work under this Contract, or any subcontract hereunder, neither the Design-Builder or its Subcontractors, nor any person acting on its behalf or on behalf of such Subcontractor, shall by reason of race, creed, color, sex, national origin or disability discriminate against any person who is qualified and available to perform the Work to which the employment relates. Neither will the Design-Builder, its Subcontractors nor any person acting on its behalf or on behalf of such Subcontractor, discriminate against or intimidate any employee hired for the performance of Work under this Contract on account of race, creed, color, sex, national origin or disability. The Design-Builder agrees that there may be deducted from the amount payable to it under this Contract a penalty of fifty dollars (\$50.00) for each person for each calendar day during which such person was discriminated against or intimidated in violation of these provisions of the Contract, and that for a second or subsequent violation of this clause, the Contract may be canceled and all monies due or to become due may be forfeited. The application of these provisions of this Article shall be limited to operations performed within the territorial limits of the State of New York.

ARTICLE 16.03 NEW YORK STATE LABOR LAW

- A. The Design-Builder agrees that it will cause all persons employed upon the Work, including its Subcontractors, agents, officers and employees, to comply with all applicable laws in the jurisdiction in which the Work is performed. The Design-Builder further agrees to comply with the requirements of the New York State Labor Law. More particularly, if any part of the Work falls within the purview of the State Labor Law, the Design-Builder agrees as to such part of the Work to comply therewith, including Sections 220, 222, and 223 thereof, as amended and supplemented.
- B. In conformity with such sections of the Labor Law, the Design-Builder agrees and stipulates that no laborer, workman or mechanic in the employ of the Design-Builder, Subcontractor or other person doing or contracting to do the whole or a part of the Work shall be permitted or required to work more than eight hours in any one calendar day, nor more than five days in any one week, except in cases of extraordinary emergency as defined in Section 220 of the Labor Law; and further that all wages paid for a legal day's work as herein before defined to all classes of such laborers, workmen or mechanics upon the Work or upon any material to be used upon or in connection therewith shall be not less than the prevailing rate of a day's work at the time the Work is performed in the same trade or occupation, in the location as defined in said Section 220 of the Labor Law wherein the physical Work is being performed, and shall be paid in cash; except as otherwise permitted by Section 220 of the Labor Law and that each laborer, workman or mechanic employed by the Design-Builder or by any Subcontractor or other person on, about, or upon the Work shall receive the wages and supplements provided for in said Section 220 of the Labor Law. In obedience to the requirements of Section 222 and 222-a of the Labor Law, as amended and

supplemented, the Design-Builder further agrees that if the provisions of the said Section 222 and 222-a are not complied with, the Contract shall be void.

ARTICLE 16.04 WORKER’S COMPENSATION LAW (NYS FINANCE LAW SECTION 142)

If the Work shall fall within the purview of the provisions of Chapter 615 of the Laws of 1922, known as the Worker’s Compensation Law, and acts amendatory thereof, the Contract shall be void and of no effect unless the person or corporation making or performing the same shall secure compensation for the benefit of, and keep insured during the life of the Contract the employees engaged thereon in compliance with the provisions of said law.

ARTICLE 16.05 WAGE RATES (NEW YORK STATE)

- A. The Commissioner of Labor of the State of New York, in pursuance of the provisions of Section 220 of the New York Labor Law, has ascertained and determined the schedule of supplements to be provided and wages to be paid workmen, laborers and mechanics engaged in the Work. These are listed in the Prevailing Rate Schedule included in Appendix 16.05.A which is incorporated herein. The supplements and wages listed in the Prevailing Rate Schedule are subject to redetermination, to account for changes occurring after the date of the Contract whereupon the Design-Builder shall be required to provide such redetermined supplements and to pay such redetermined wages. The Secretary of Labor of the United States of America, under the Federal Davis-Bacon Act, has also established minimum wage and supplement rates. If this Contract is federally funded, those Davis-Bacon rates are included in Appendix 15.06 and must be paid to laborers and mechanics employed on the Work. Where there are differences between the Davis-Bacon rates for any particular job classification and those established by the Commissioner of Labor of the State of New York, the higher rate shall apply.
- B. Pursuant to Labor Law Section 220 (3-a) (a) the appropriate schedule of prevailing wages and benefits must be posted in a prominent and accessible place on the Work Site. The Design-Builder shall post Public Work Project posters regarding prevailing wages which may be obtained from the MTA or the Office of the New York City Comptroller. The Design-Builder shall provide all workers with a written notice, informing them of the prevailing wage requirements for the job and require that each worker sign a statement or declaration that attests that they have been given this information. The Design-Builder shall furnish the MTA with copies of certified payrolls at least once a month, and shall maintain a copy at the Work Site.
- C. Paragraph A of this Article notwithstanding, if the Work includes work performed on New York City Transit Authority facilities, the Prevailing Rate Schedule for such work shall be the Construction Worker Schedule and the Construction Apprentice Schedule issued by the New York City Comptroller which is included in Appendix 16.05.C. For such work, the Design-Builder shall comply with Title 44, Chapter 2, of the Rules of the City of New York (“Comptroller’s Prevailing Wage Law Regulations”). For such work, if there is any discrepancy between the wage rates and supplements established by the Commissioner of Labor of the State of New York, the Davis-Bacon rates and supplements set forth in Appendix 15.06, if any, and those required in this Paragraph C, the discrepancy shall be resolved by applying the higher rates and supplements. The supplements and wages listed in the Prevailing Rate Schedule are subject to redetermination, to account for changes occurring after the date of the Contract whereupon the Design-Builder shall be required to provide such redetermined supplements and to pay such redetermined wages.
- D. Paragraph A of this Article notwithstanding, if the Work includes work performed in the State of Connecticut, then for such work the Design-Builder shall pay wage rates and supplements that are not less

than those set forth in Appendix 16.05.D. The supplements and wages listed in Appendix 16.05.D are subject to redetermination, to account for changes occurring after the date of the Contract whereupon the Design-Builder shall be required to provide such redetermined supplements and to pay such redetermined wages. The Secretary of Labor of the United States of America, under the Federal Davis-Bacon Act, has also established minimum wage and supplement rates. If this Contract is federally funded, those Davis-Bacon rates are included in Appendix 15.06 and must be paid to laborers and mechanics employed on the Work. Where there are differences between the Davis-Bacon rates for any particular job classification and those established by the Commissioner of Labor of the State of Connecticut, the higher rate shall apply.

ARTICLE 16.06 EQUAL EMPLOYMENT OPPORTUNITY (NYS EXECUTIVE LAW SECTION 312)

The Design-Builder agrees to the terms and conditions of non-discrimination as set forth within. The Bidder, as a precondition to entering into a valid and binding contract, shall during the Execution of this Contract, agree to the following:

- A. The Design-Builder will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status. The Design-Builder will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. The Design-Builder shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on this Contract. For these purposes, affirmative action shall apply in the areas of recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.
- B. The Design-Builder shall state in all solicitations or advertisements for employees that, in the performance of this Contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.
- C. At the request of the MTA, the Design-Builder shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Design-Builder's obligations herein.
- D. After an award of this Contract, the Design-Builder shall submit to MTA C&D a workforce utilization report, in a form and manner required by MTA C&D, of the work force actually utilized on this contract, broken down by specified ethnic background, gender, and Federal Occupational Categories or other appropriate categories specified by MTA C&D.
- E. Prior to the award of this contract, the Design-Builder shall submit an Equal Employment Opportunity (EEO) Policy Statement and an EEO-1 form, to the MTA within the time frame established by the MTA in accordance with Schedule II.
- F. Within sixty (60) Days of the issuance of the Notice to Proceed, the Design-Builder shall submit a staffing plan, in a form and manner required by the MTA, which shall contain information on

employees projected to work on activities related to the contract. This information must be broken down by specified ethnic background, gender, and Federal Occupational Categories/related job titles.

- G. For construction contracts, after the Notice of Award, the Design-Builder shall submit on a monthly basis, in a form and manner required by the MTA, throughout the life of the Contract, a workforce utilization report which details employee's hours worked on activities related to this Contract. This information must be broken down by specified ethnic background, gender, and Federal Occupational Categories/related job titles.
- H. The Design-Builder agrees to include the language of the provisions of paragraphs A. G. above in every Subcontract in such manner that the requirements of the provisions will be binding upon each Subcontractor and each party to this Contract as to work in connection with this Contract, including the requirement that Subcontractors and parties to this Contract shall undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and, when requested, provide to the Design-Builder information on the ethnic background, gender, and Federal Occupational Categories/related job titles of the employees to be utilized on this Contract.

ARTICLE 16.07 ASIAN LONG HORNED BEETLE

- A. Any Work under this Contract, whether performed by the Design-Builder or any of its Subcontractors, that involves the handling or removal of any "host material" originating from within the Asian Longhorned Beetle ("ALB") quarantine zone, as defined by New York State Department of Agriculture and Markets ("NYSDAM"), must be performed: (1) in accordance with Federal, State and local laws and regulations regarding the eradication of the ALB, including Part 139 of the New York State Agriculture and Markets Law ("NYS AML"); and (2) by a Contractor (or Subcontractor) that is certified by NYSDAM, to perform such Work. Copies of such certification must be provided to MTA C&D before any Work involving host material is commenced.
 - 1. "Host material" generally includes all firewood (of hardwood species) and trees, logs, green lumber, stumps, roots, branches (whether living, cut or dead) that is one-half inch or more in diameter and one of the trees listed in NYS AML Part 139.3.
- B. Prior to the handling or disposal of any host material within the quarantine zone, an NYSDAM-certified person must perform an inspection for the presence of ALB infestation.
 - 1. If an ALB infestation is detected, then all Work related to the handling or disposal of that host material must cease and the Design-Builder shall immediately contact the Project CEO for further action. Work involving the infested host material may not restart until written notification to proceed is received from the Project CEO.
 - 2. If no ALB infestation is detected, then the host material, if living, may be left untouched. If the host material was discovered cut, dead or to be removed, it must be handled or disposed of pursuant to the regulations set forth by NYSDAM.

ARTICLE 16.08 TROPICAL HARDWOODS

- A. Unless otherwise specified in this Contract or unless the Design-Builder has received written permission from the MTA, the furnishing or supplying of “tropical hardwood” and “tropical wood products” as defined in New York State Finance Law Section 165(1)(b) is not permitted in connection with the performance of this Contract. The provisions of Section 165 are incorporated in this Contract by reference.
- B. A list of tropical hardwoods is as follows:

Scientific Name	Common Name
Vouacapous americana	Acapu
Pericopsis elata	Afromosis
Shorea almon	Almon
Peltogyne spp	Amaranth
Guibourtia ehie	Amazaque
Aningeris spp.	Aningeria
Dipterocarpus grandiflorus	Apilong
Ochroma lagopus	Balsa
Virola spp.	Banak
Anisoptera thurifera	Bella Rose
Guibourtis arnoldiana	Benge
Deterium Senegalese	Boire
Guibourtis demeusil	Bubinga
Prioria copaifera	Cativo
Antiaris africana	Chenchen
Dalbergis retusa	Concobola
Cordia spp.	Corida
Diospyros spp.	Ebony
Aucoumes klaineana	Gaboon
Chlorophors excelsa	Iroko
Acacia koa	Koa
Pterygota macrocarpa	Koto
Shorea negrosensis	Red Lauan
Pentacme contorta	White Lauan
Shores ploysorma	Tanguile
Terminalia superba	Limba
Aniba duckei	Louro
Kyaya ivorensis	Africa Mahogany
Swletenia macrophylla	Amer. Mahogany
Tieghemella leckellii	Makora
Distemonanthus benthamianus	Movinqui
Pterocarpus soyauxii	African Padauk
Pterocarpus angolensis	Angola Padauk
Aspidosperma spp.	Peroba
Peltogyne spp.	Purpleheart
Gonystylus spp.	Ramin
Dalbergia spp.	Rosewood
Entandrophragma cylindricum	Sapela

Scientific Name	Common Name
Shorea philippinensis	Sonora
Tectona grandis	Teak
Lourea trichiloides	Tigerwood
Millettia laurentii	Wenge
Microberlinia brazzavillensis	Zebrawood

C. A list of non-tropical hardwoods is as follows:

Scientific Name	Common Name
Fraxinus americana	Ash
Tilia americana	Basswood
Fagus grandifolia	Beech
Betula papyrifera	Birch
Juglans cinerea	Butternut
Prunus serotina	Cherry
Populus spp.	Cottonwood
Ulmus spp.	Elms
Nyssa sylvatica	Black Gum
Liquidambar styraciflua	Red Gum
Celtis laevigata	Hackberry
Hicoria spp.	Hickory
Acer spp.	Maples
Quercus spp.	Oaks
Hicoria spp.	Pecan
Liriodendron tulipifera	Yellow Poplar
Platanus occidentalis	Sycamore
Juglans nigra	Black Walnut

ARTICLE 16.09 HAZARD COMMUNICATION STANDARD (29 CFR 1910.1200) (EMPLOYEE RIGHT-TO-KNOW - NYS LABOR LAW ARTICLE 28)

New York State and Federal law mandate that the MTA advise its workers about the health effects of any toxic substances to which they may be exposed. In order to properly inform employees of the composition and effects of toxic substances, the MTA must keep on file Safety Data Sheets (SDS) for each product delivered for use or used at the MTA facilities. The following duties are incumbent upon the Design-Builder (including but not limited to Subcontractors, distributors, manufacturers, Vendors, or any other company or individual):

- A. Prior to shipment, the Design-Builder shall supply an SDS to the MTA for each toxic substance delivered to or used at a Work location or Work Site frequented by the MTA employees. All SDS sheets and product labels must reference the MTA item numbers when specified. The required documents must be submitted to the Project CEO.
- B. All SDS shall contain all health hazard information as required under Federal OSHA Regulations, including:

- identity of manufacturer, with emergency telephone number
 - hazardous ingredients, with specific work exposure limits
 - physical and chemical characteristics
 - physical hazards
 - reactivity data
 - health hazards, with target organs
 - precautions for safe handling and use (including emergency procedures)
 - control measures used to reduce potential harmful exposure
 - emergency first aid procedures
 - spill or leak clean-up procedures
 - waste disposal information
- C. Manufacturer's product labeling shall include the following:
- identity of chemical compound
 - identity of manufacturer and emergency telephone number
 - health hazards with target organs
 - storing and handling instructions
 - protective equipment, including protective equipment symbols
 - first aid instructions
 - spill or leak clean-up procedure
- D. The Design-Builder shall supply an updated SDS whenever a product is modified.
- E. Submittal of an SDS does not constitute the acceptance of the product by the MTA. If the Design-Builder fails or refuses to comply with these provisions, the MTA may declare the Design-Builder to be in default and exercise its rights under the termination provisions of this Contract.
- F. Safety Data Sheets should be available through the product distributor and/or manufacturer. However, lack of availability does not release the Design-Builder of the obligation to provide the SDS as outlined in this Paragraph.

ARTICLE 16.10 PUBLIC OFFICERS LAW SECTION 73(8)

The Design-Builder is hereby informed that New York State Public Officers Law Section 73(8), which restricts certain activities by former officers and employees of public agencies, shall apply to this Contract. The Design-Builder shall not permit the violation of this statute by any person. Without limitation to any other remedies that the MTA may have, the Design-Builder shall take all necessary actions, to the satisfaction of the MTA, to remedy any violation of this statute.

ARTICLE 16.11 NEW YORK STATE PROCUREMENT DISCLOSURE

- A. New York State Executive Order Number 127, Providing For Additional State Procurement Disclosure ("EO 127") requires that Design-Builder, at such time as MTA C&D contemplates issuing a contract modification that requires MTA C&D Board approval, may be required to provide the identities of "every person or organization retained, employed or designated by or on behalf" of the Design-Builder in order "to attempt to influence the procurement process and whether such person or organization has a financial interest in the procurement."

- B. The Design-Builder is required to disclose findings of non-responsibility due to intentional provision of false or incomplete information to a covered agency or authority within the past five years with respect to EO 127.
- C. The Design-Builder is required to certify that the information provided as required by this Article is complete, true and accurate.
- D. In the event and at such time that a Modification is required and such modification is subject to EO 127, MTA C&D will notify the Design-Builder in writing of the implementation of these requirements and will provide the Design-Builder with the forms required for compliance with EO 127.
- E. The Design-Builder will be required to submit the completed Disclosure Forms and Certification with its Change Proposal. Such obligations continue during the term of the Contract.
- F. The Design-Builder may be in default in the event it is found that the “Certification of Compliance” the Design-Builder was required to submit was intentionally false or intentionally incomplete. Upon such finding, MTA C&D may exercise its termination right by providing written notification to the Design-Builder in accordance with the terms of this Contract.

ARTICLE 16.12 COMPLIANCE WITH SECTION 1269-G OF PUBLIC AUTHORITIES LAW

- A. The Design-Builder shall comply fully with Section 1269-G of the Public Authorities Law.
- B. No later than 90 Days from this Contract’s effective date, Design-Builder shall file with MTA C&D a certification signed by an officer of Design-Builder and sworn to under the penalties of perjury that Design-Builder has posted and distributed the information specified in Section 1269-g(2) in the manner required by Section 1269-g(1). Section 1269-g(1) requires Design-Builders to (a) post the required information in one or more conspicuous places at each major workplace site where persons on the Project are most likely to see it; (b) post the required information on its internet and intranet web site (if it has one) or provide a conspicuous hyperlink (labeled “Protections for Reporting Fraud In New York”) to the applicable part of the MTA’s Web site; and (c) distribute the required information to persons, including employees and managers, who work on the project by including it in an employee handbook or by sending an e-mail.
- C. MTA C&D has posted on its Web site, www.mta.info, a page providing the information specified in Section 1269-g(2), and also a sample statement. Posting and distributing that statement in the manner required by Section 1269-g(1) will satisfy the Design-Builder’s disclosure obligations under Section 1269-g.
- D. The Design-Builder shall insert into every first-tier Subcontract, and require the insertion into any lower-tier Subcontract, a provision requiring each Subcontractor to comply with Section 1269-g, and requiring each Subcontractor, no later than 90 days from the effective date of each Subcontract, to file with Design-Builder a certification signed by an officer of such Subcontractor and sworn to under the penalties of perjury that such Subcontractor has posted and distributed the information specified in Section 1269-g(2) in the manner required by Section 1269-g(1). In complying with their disclosure obligations, Subcontractors may also rely on the sample statement posted by MTA C&D on its web site.

- E. No later than 90 Days from the effective date of each Subcontract of any tier, Design-Builder shall file with MTA C&D a copy of the Subcontractor's certification filed with it pursuant to the preceding paragraph.
- F. Material compliance by the Design-Builder with these provisions of the Contract and with Section 1269-g shall be material condition of payment. The Design-Builder shall insert into every first-tier Subcontract, and require the insertion into all lower tier subcontracts, a provision stating that material compliance by a Subcontractor with Section 1269-g shall be a material condition of payment under such Subcontract. Each request for payment submitted by the Design-Builder shall include a certification signed by an officer of the Design-Builder and sworn to under penalties of perjury certifying that the Design-Builder and every Subcontractor has continued to comply with the requirements of Section 1269-g."

ARTICLE 16.13 PUBLIC AUTHORITIES LAW Sec. 2879-a COMPTROLLERS APPROVAL OF CONTRACTS

The Design-Builder is hereby specifically informed of New York State Public Authorities Law ("PAL") Section 2879-a, which, among other things: authorizes the Comptroller of the State of New York, at his or her discretion, to review State authority contracts in excess of \$1 million which are awarded noncompetitively or which are to be paid in whole or part from monies appropriated by the State, including review of the Contract amendments; establishes that contracts subject to review will not be valid enforceable contracts without first having been approved by the Comptroller; provides for the contract to become valid and enforceable if the Comptroller has not approved or disapproved a contract within 90 days of submission; requires the Comptroller to promulgate such rules and regulations as may be necessary, including but not limited to the standards for determining which contracts will be subject to review and for approving such contracts; excludes (per §2879-a (3)) from prior approval requirements certain contracts, however, these contracts must be filed with the Comptroller within 60 days after execution.

Pursuant to said PAL Section 2879-a the Comptroller of the State of New York may adopt or has adopted regulations providing for, among other things: the standards for the Comptroller's determination of State authority contracts and contract amendments subject to the Comptroller's approval; the criteria for the Comptroller's approval of such contracts and contract amendments; the responsibilities of State authorities with respect to the filing of exempt contracts, exempt contract amendments, certain eligible contracts and certain eligible contract amendments; and the procedural requirements for overall compliance with PAL §2879-a.

ARTICLE 16.14 GRAND JURY TESTIMONY

In accordance with New York State Finance Law 139-b, Disqualification to Contract with State, the following shall apply:

- A. Upon refusal of the Design-Builder as an individual or as member, partner, director or officer of the Design-Builder, if the Design-Builder be a firm, partnership or corporation, when called before a grand jury, head of state department, temporary state commission, or any other state agency, or the organized crime task force in the department of law, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation or to answer any relevant questions concerning any transaction or contract entered into with the State, or any political subdivision thereof, or a public authority or with any public department, agency or official of the State or any political subdivision thereof, when immunity has been granted to the witness against subsequent use of such testimony, or any evidence derived therefrom in any subsequent criminal proceeding:

1. Such individual, or any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified for a period of five (5) years after such refusal from submitting bids for, or entering into or obtaining any contracts, leases, permits or licenses with MTA Group or submitting bids for or entering into, or obtaining any contracts, leases, permits or licenses which will be paid out of any monies under the control of or collected by the City, the MTA Group and/or shall be subject to such other action appropriate under the circumstances; and
2. this Contract and any and all such existing contracts, leases, permits or licenses made with or obtained by any such individual or with or by the firm, partnership, or corporation of which he/she is a member, partner, director or officer may be cancelled or terminated by the City, the MTA Group or be subject to such action appropriate under the circumstances thereto without incurring any penalty or damages on account of such cancellation or termination, but any monies owing for goods delivered, Work done, or rentals, permit or license fees due, prior to the cancellation or termination, shall be paid.

ARTICLE 16.15 DIESEL EMISSIONS REDUCTION ACT OF 2006

- A. The Design-Builder represents that, in connection with activities relating to this Contract, it will be in compliance with the New York Diesel Emissions Reduction Act of 2006 (“DERA”), as codified at 6 NYCRR 6 Part 248 and in the Section 19-0323 of the Environmental Conservation Law, and its implementing regulations.
- B. The Design-Builder:
 1. Will use ultra-low sulfur diesel fuel (< 15ppm) in all heavy-duty diesel vehicles (>8500 lbs. G.V.W.R.) (“HDVs”) employed at or on MTA Work Sites in rendering services or providing materials or equipment hereunder unless said vehicles are otherwise exempt.
 2. Represents that all of its affected vehicles will meet the Particulate Matter (PM) and Oxides of Nitrogen (NOx) emission standards required by DERA through: 1) utilization of devices certified by the EPA or California Air Resources Board that achieve reductions in PM and NOx at the highest classification level for emission control strategies that is applicable to the particular engine and application (“Best Available Retrofit Technology”); 2) utilization of engines certified to meet the 2007 EPA standard for PM (0.01g/bhp-hr) as set forth in section 86.007-11 of Title 40 of the Code of Federal Regulations or to any subsequent USEPA standard that is at least as stringent; or 3) employment of alternative fuel vehicles which do not operate on diesel fuel (“alternative fuel” means natural gas, propane, ethanol, methanol, gasoline [when used in hybrid electric vehicles only], hydrogen, electricity, fuel cells, or advanced technologies that do not rely solely on diesel fuel or a diesel/non-diesel mixture).
- C. If the Design-Builder has secured a waiver from the Best Available Retrofit Technology (“BART”) or ultra-low sulfur diesel fuel requirements from the New York State Department of Environmental Conservation, the Design-Builder shall present same to MTA with its Proposal.
- D. The Design-Builder understands and acknowledges that MTA is required to submit an annual report detailing compliance with DERA by MTA and its contractors and subcontractors. The Design-Builder agrees that it will, for itself and its Subcontractors, provide and require to be provided, no later than September 1st of each calendar year, the following information as to any

covered vehicles performing Work on any MTA Work Site at which Work is to be performed pursuant to this Contract:

1. the number of diesel-fuel powered motor vehicles owned or operated,
2. the number of such vehicles that were powered by ultra-low sulfur diesel fuel,
3. the total number of on road diesel fuel-powered motor vehicles owned or operated having a GVWR of more than 8500 pounds,
4. the total number of off road vehicles owned or operated,
5. the number of such on road and off road vehicles that utilized BART, including a breakdown by BART installation date, vehicle model, VIN (if applicable), engine year and the type and classification level of technology used for each vehicle including the CARB designated diesel emission control strategy family name, if applicable,
6. the number of such vehicles that have been replaced/repowered with an engine certified to the applicable 2007 US EPA standard for PM as set forth in section 86.007-11 of Title 40 of the Code of Federal Regulations or to any subsequent US EPA standard for PM that is at least as stringent,
7. the number of such vehicles that have been replaced with alternative fuel vehicles,
8. the number of inventoried HDVs retired,
9. identification of all ultra-low sulfur diesel waivers, findings, and renewals of such findings, which, for each waiver, shall include, but not be limited to, the quantity of diesel fuel needed to power diesel fuel-powered motor vehicles owned or operated; and specific information concerning the availability of ultra-low sulfur diesel fuel,
10. identification of BART waivers issued to the Design-Builder,
11. the quantity of ultra-low sulfur diesel fuel used,
12. a statement of compliance indicating the percent of inventoried HDVs meeting the law's requirements according to the schedule set forth in the law (100% by December 31, 2010), and
13. any other information that may be required by the New York State Department of Environmental Conservation.

ARTICLE 16.16 IRAN ENERGY SECTOR DIVESTMENT CERTIFICATION

- A. Pursuant to New York State Finance Law § 165-a, Iran Divestment Act of 2012, the Office of General Services is required to post on its website a list of persons who have been determined to engage in investment activities in Iran ("the List"), as defined in that Act. Under Public Authorities Law § 2879-c, Iranian Energy Sector Divestment, the MTA may not enter into or award a Contract unless it obtains a certification from the Bidder that it is not on the List.

- B. Each person and each person signing on behalf of any other party, certifies, under penalty of perjury, to the best of its knowledge and belief that each person is not on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the State Finance Law, located at <http://ogs.ny.gov/about/regs/docs/ListofEntities.pdf>. For the purposes of this certification, a person shall mean, as defined in paragraph (e) of subdivision one of section one hundred sixty-five-a of the state finance law, any natural person, corporation, company, limited liability company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group. In the case of a joint Bid, each party thereto certifies as to its own organization
- C. In the event, the Design-Builder is unable to certify that it is not on the List, it must furnish a signed statement along with its Bid setting forth in detail the reasons therefor. Such statement will be evaluated by the MTA, and the MTA may enter into a contract with the Design-Builder if it is able to demonstrate that: a) its investment activities in Iran were made before April 12, 2012; b) its investment activities in Iran have not been expanded or renewed after April 12, 2012; and c) it has adopted, publicized and is implementing a formal plan to cease its investment activities in Iran and to refrain from engaging in any new investments in Iran. If the Design-Builder's statement is not found satisfactory in the opinion of the MTA, the Design-Builder may not be eligible for award of this Contract.

ARTICLE 16.17 EXECUTIVE ORDER. NO. 177 CERTIFICATION

- A. The New York State Human Rights Law, Article 15 of the Executive Law, prohibits discrimination and harassment based on age, race, creed, color, national origin, sex, pregnancy or pregnancy-related conditions, sexual orientation, gender identity, disability, marital status, familial status, domestic violence victim status, prior arrest or conviction record, military status or predisposing genetic characteristics.
- B. The Human Rights Law may also require reasonable accommodation for persons with disabilities and pregnancy-related conditions. A reasonable accommodation is an adjustment to a job or work environment that enables a person with a disability to perform the essential functions of a job in a reasonable manner. The Human Rights Law may also require reasonable accommodation in employment on the basis of Sabbath observance or religious practices.
- C. Generally, the Human Rights Law applies to:
 - 1. all employers of four or more people, employment agencies, labor organizations and apprenticeship training programs in all instances of discrimination or harassment;
 - 2. employers with fewer than four employees in all cases involving sexual harassment; and,
 - 3. any employer of domestic workers in cases involving sexual harassment or harassment based on gender, race, religion or national origin.
- D. In accordance with Executive Order No. 177, the Design-Builder hereby certifies that it does not have institutional policies or practices that fail to address the harassment and discrimination of individuals on the basis of their age, race, creed, color, national origin, sex, sexual orientation, gender identity, disability, marital status, military status, or other protected status under the Human Rights Law.

- E. Executive Order No. 177 and this certification do not affect institutional policies or practices that are protected by existing law, including but not limited to the First Amendment of the United States Constitution, Article 1, Section 3 of the New York State Constitution, and Section 296(11) of the New York State Human Rights Law.

**ARTICLE 16.18 COMPLIANCE WITH STATE FINANCE LAW SECTIONS 139-J AND 139-K
(THE “LOBBYING LAW”)**

- A. The Design-Builder acknowledges that all procurements by the MTA in excess of \$15,000 annually, are subject to New York State’s State Finance Law Sections 139-j and 139-k, effective January 1, 2006 (the “Lobbying Law”).
- B. Pursuant to the Lobbying Law, all “contacts” (defined as oral, written or electronic communications with the MTA intended to influence a procurement) during a procurement must be made with the designated Contracting Officer only. Exceptions to this rule include written questions during the procurement process, communications with regard to protests, and contract negotiations. Nothing in the Lobbying Law inhibits any rights to make an appeal, protest or complaint under existing administrative or judicial procedures.
- C. Violations of the policy regarding permissible contacts must be reported to the appropriate MTA officer and investigated accordingly. The first violation may result in a determination of non-responsibility and ineligibility for award to the violator and its subsidiaries, and any related or successor entity with a substantially similar function, management, board of directors officers and shareholders. The penalty for a second violation within four (4) years is ineligibility for bidding/proposing on a procurement and/or ineligibility from being awarded any contract for a period of four (4) years from the date of the second final determination. The MTA is required to notify the New York State Office of General Services (“OGS”) of any determinations of non-responsibility or debarments due to violations of the Lobbying Law, and OGS shall publish a list of these entities on its website. Violations found to have “knowingly and willfully” occurred must be reported to the President of MTA Construction and Development Company as well as OGS.
- D. New York State Finance Law §139-k(2) requires the MTA to obtain specific information regarding prior non-responsibility determinations. This information must be collected in addition to the information that is separately obtained pursuant to State Finance Law §163(9). In accordance with State Finance Law §139-k, an offerer (as such term is defined in the Lobbying Law) must be asked to disclose whether there has been a finding of non-responsibility made within the previous four (4) years by any governmental entity due to: (a) a violation of State Finance Law §139-j; or (b) the intentional provision of false or incomplete information to a governmental entity. As part of its responsibility determination, State Finance Law §139-k (3) mandates consideration of whether an offerer fails to timely disclose accurate or complete information regarding the above non-responsibility determination. In accordance with law, no contract shall be awarded to any offerer that fails to timely disclose accurate or complete information under this section, unless the factual elements of the limited waiver provision can be satisfied on the written record.
- E. The Design-Builder has a continuing obligation to the MTA to disclose accurate and complete information regarding a determination of non-responsibility which extends throughout the duration of any contract award. If at any time the information supplied by the Design-Builder is no longer accurate due to changed circumstances, the Design-Builder must promptly provide the MTA with a certification.

- F. The Design-Builder affirms that it understands and agrees to comply with the policies regarding permissible contacts in accordance with New York State Finance Law Sections §139-j and §139-k.
- G. The Design-Builder certifies that all information provided to the MTA with respect to New York State Finance Law §139-j and §139-k is complete, true and accurate.
- H. The Design-Builder acknowledges that the Lobbying Law applies to the initial procurement as well as any amendment to the procurement after the affirmation is received, including but not limited to, contract, contract extensions, modifications and change orders.
- I. The Design-Builder acknowledges that it has a continuing obligation to the MTA to disclose accurate and complete information regarding a determination of non-responsibility which extends throughout the duration of any contract award.

**ARTICLE 16.19 VENDOR ASSURANCE OF NO CONFLICT OF INTEREST OR
DETRIMENTAL EFFECT**

- A. The Design-Builder offering to provide services pursuant to this Contract attests that its performance of the services outlined in this Contract does not and will not create a conflict of interest with nor position the Design-Builder to breach any other contract currently in force with the MTA or the State of New York. In this Article, the term “State” shall mean the MTA and the State of New York.
- B. The Design-Builder attests that it will not act in any manner that is detrimental to any State project on which the Design-Builder is rendering services. Specifically, the Design-Builder attests that:
 - 1. The fulfillment of obligations by the Design-Builder does not violate any existing contracts or agreements between the Design-Builder and the State;
 - 2. The fulfillment of obligations by the Design-Builder does not and will not create any conflict of interest, or perception thereof, with any current role or responsibility that the Design-Builder has with regard to any existing contracts or agreements between the Design-Builder and the State;
 - 3. The fulfillment of obligations by the Design-Builder does not and will not compromise the Design-Builder’s ability to carry out its obligations under any existing contracts between the Design-Builder and the State;
 - 4. The fulfillment of any other contractual obligations that the Design-Builder has with the State will not affect or influence its ability to perform under any contract with the State resulting from this Contract;
 - 5. During solicitation and performance of this Contract, the Design-Builder will not knowingly take any action or make any decision which creates a potential for conflict of interest or might cause a detrimental impact to the State as a whole including, but not limited to, any action or decision to divert resources from one State project to another;
 - 6. In fulfilling obligations under each of its State contracts, including any contract which results from this solicitation, the Design-Builder will act in accordance with the terms of

each of its State contracts and will not knowingly take any action or make any decision which might cause a detrimental impact to the State as a whole including, but not limited to, any action or decision to divert resources from one State project to another;

7. No former officer or employee of the State who is now employed by the Design-Builder, nor any former officer or employee of the Design-Builder who is now employed by the State, has played a role with regard to the administration of this contract procurement in a manner that may violate section 73(8)(a) of the State Ethics Law;
8. The Design-Builder has not and shall not offer to any employee, member or director of the State any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence said employee, member or director, or could reasonably be expected to influence said employee, member or director, in the performance of the official duty of said employee, member or director or was intended as a reward for any official action on the part of said employee, member or director;
9. No appointed or elected official, member or other officer or employee of the city of New York, or of the State, or MTA or its subsidiaries or affiliates: i) is interested, directly or indirectly, in any manner whatsoever in or in the performance of the contract or in the supplies, the Work, or business to which it relates or in any portion of the profits thereof; or ii) has been or will be offered or given any tangible or intangible consideration in connection with this Contract;
10. The Design-Builder covenants that neither it nor, to the best of its knowledge after diligent inquiry, any director, officer, owner or employee of the Design-Builder or any person or entity with a 10% or more interest in the Design-Builder has any interest nor shall they acquire any interest, directly or indirectly, which would conflict in any manner or degree with the faithful performance of the Contract hereunder; and
11. In the event the Design-Builder has no prior knowledge of a conflict of interest as set forth in paragraphs 9 or 10 above and hereafter acquires information which indicates that there may be an actual or apparent violation of any of the above, the Design-Builder shall promptly bring such information to the attention of the Chief Procurement Officer, the Contracting Officer for the Contract, and the Project CEO. The Design-Builder shall thereafter cooperate with the review and investigation of such information, and comply with any instructions it receives from the Chief Procurement Officer or the Project CEO in regard to remedying the situation.

ARTICLE 16.20 STATEMENT OF NON-COLLUSION

- A. By submission of its Proposal, the Design-Builder and each person signing on behalf of the Design-Builder certifies, and in the case of a joint Bid, each party thereto certifies as to its own organization, under penalty of perjury, that to the best of their knowledge and belief:
 1. The prices in the Proposal were arrived at independently without collusion, consultation, communications, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other Proposer or with any competitor;

2. Unless otherwise required by law, the prices in the Proposal were not knowingly be disclosed by the Design-Builder prior to the deadline for Proposal submission, directly or indirectly, to any other Proposer or to any competitor; and
 3. No attempt was made or will be made by the Design-Builder to induce any other person, partnership or corporation to submit or not to submit a Bid for the purpose of restricting competition.
- B. A Proposal will not be considered for award, nor will any award be made where 1, 2, and 3, above have not been complied with; provided however, that if in any case the Design-Builder cannot make such certification, the Design-Builder shall so state and shall furnish to the Contracting Officer a signed statement which sets forth in detail the reasons therefor.
- C. The fact that the Design-Builder (a) has published price lists, rates, or tariffs covering items being procured, (b) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (c) has sold the same items to other customers at the same prices being bid, does not constitute, without more, a disclosure within the meaning of paragraph A herein.
- D. If, for any reason, the information in this Article is not accurate at the deadline for Proposal submission or at the time of Award, the Design-Builder must explain the reason in detail in a statement to the Contracting Officer. Absent such an attached explanation, the Design-Builder certifies that the provisions in this Article are complete and accurate. If at any time the Design-Builder becomes aware that a representation in this Article is no longer complete and accurate, the Design-Builder shall promptly inform the Contracting Officer and the Project CEO.

CHAPTER 17.

BUSINESS ENTERPRISE PARTICIPATION PROVISIONS

The provisions of Article 17.01 shall apply if the Contract receives Federal funding as stated in the Design-Build Agreement. The provisions of Article 17.02 shall apply if the Contract does not receive Federal funding.

ARTICLE 17.01 FEDERAL DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION REQUIREMENTS

A. POLICY

It is the policy of the Metropolitan Transportation Authority (“MTA”) and its subsidiary and affiliated agencies that Disadvantaged Business Enterprises (“DBEs”) are provided the opportunity to participate in the performance of this contract. Each Proposer shall take all necessary and reasonable steps to ensure that DBEs participate and perform Work on this Contract.

B. GOAL

The MTA Department of Diversity and Civil Rights has established a goal for DBE participation on this Contract, set forth in the Design-Build Agreement, which the Proposer will be encouraged to meet.

- C. The MTA Department of Diversity and Civil Rights is responsible for determining compliance by the Proposer with DBE Program requirements established in this contract. The successful Proposer shall make all DBE Program submissions required by this contract to the MTA Agency Manager with a copy to the MTA Department of Diversity and Civil Rights. **DEFINITIONS**

1. **Certification** means the process by which a business demonstrates to MTA Department of Diversity and Civil Rights or to a New York State Unified Certification Program Certifying Partner (“NYSUCP”), that it meets the requirements to be a DBE under USDOT regulations set forth in 49 C.F.R. Part 26.
2. **Disadvantaged Business Enterprise or DBE** is a for-profit small business concern (a) that is at least 51% owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which at least 51% of the stock is owned by one or more such individuals; and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
3. **New York State Unified Certification Program Certifying Partners** include the Metropolitan Transportation Authority, the Niagara Frontier Transportation Authority, the New York State Department of Transportation, and the Port Authority of New York & New Jersey.
4. **Socially and economically disadvantaged individual** means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

- a. Any individual the MTA Department of Diversity and Civil Rights or a NYSUCP Certifying Partner finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- b. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (1) **Black Americans** which includes persons having origins in any of the Black racial groups of Africa;
 - (2) **Hispanic Americans** which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South America or other Spanish or Portuguese culture or origin, regardless of race;
 - (3) **Native Americans** which includes persons who are enrolled members of a federally or State recognized Indian tribe, American Indians, Eskimos, Aleuts or Native Hawaiians;
 - (4) **Asian-Pacific Americans** which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (5) **Subcontinent Asian Americans** which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - (6) **Women**
 - (7) Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (“SBA”), at such time as the SBA designation becomes effective.

D. THE DBE PROGRAM

In accordance with 49 C.F.R. Part 26, the MTA has established a DBE Program that applies to all of its subsidiary and affiliated agencies, except MTA Bridges and Tunnels, which is not subject to DBE regulations. The Design-Builder may review a copy of the program and obtain a copy of a current list of certified DBEs from the MTA Department of Diversity and Civil Rights, 2 Broadway, 16th Floor, New York, New York 10004 or by calling (646) 252-1378. The NYUCP Directory may also be accessed on the Internet at: www.biznet.nysucp.net.

In the event the MTA Department of Diversity and Civil Rights determines that a firm identified by the Design-Builder as a DBE Subcontractor on the Schedule of DBE Participation (Form A) and accompanying Intent to Perform as a DBE Subcontractor/Subconsultant/Joint Venture (Form B) is not a certified DBE, the Design-Builder shall be informed and will be provided with an opportunity to substitute a certified DBE for consideration by the MTA Department of Diversity and Civil Rights consistent with applicable provisions of 49 C.F.R. Part 26.

E. DBE OBLIGATION

The Design-Builder agrees to take all necessary and reasonable steps to ensure that DBEs have the opportunity to compete for and perform Work under this Contract. If the Final Contract Price is increased as a result of change orders, the Design-Builder shall make a good faith effort to achieve a commensurate increase in DBE participation. Submission of the Proposal constitutes a certification and representation by the Design-Builder that good faith efforts will be made to satisfy the DBE goal requirement.

Furthermore, the Design-Builder agrees that the following clause applies to this Contract:

“The Design-Builder or Subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Design-Builder shall carry out applicable requirements of 49 C.F.R. Part 26 in the award and administration of USDOT-assisted contracts. Failure by the Design-Builder or Subcontractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the MTA Agency or MTA deems appropriate.”

The Design-Builder also agrees to ensure that the above clause is placed in every contract or subcontract resulting from this project.

F. PROMPT PAYMENT OF RETAINAGE AND PROGRESS PAYMENTS TO SUBCONTRACTORS

1. The Design-Builder agrees to include in all subcontracts a provision that the full amount of retainage owed to any Subcontractor which is attributable to such subcontract will be paid by the Design-Builder within thirty (30) days of the date when all tasks called for in the subcontract have been accomplished and documented as required by the MTA and in accordance with 49 CFR 26.29.
2. In addition to the other conditions precedent to the issuance of payment set forth in the Contract, the Design-Builder shall also certify as a condition precedent to the issuance of payment by the MTA that:
 - a. all retainage owed to any Subcontractor was paid within thirty (30) days of the date when all tasks called for in the subcontract have been accomplished and documented as required by the MTA and in accordance with 49 CFR 26.29; and
 - b. all Subcontractors have been paid, within thirty (30) days of the MTA's payment to the Design-Builder, the amount due to them for the work performed which was encompassed by any previous Progress Payments made to the Design-Builder.
3. Any delay or postponement of the return of retainage by the Design-Builder to Subcontractors from the time frame set forth in subsection 1 above of this paragraph, may occur only for good cause following written approval of the MTA.
4. Any failure by the Design-Builder to comply with this paragraph deemed by the MTA to be material will be considered a material breach of the contract.
5. The requirements of this paragraph apply to Subcontracts.

G. RETURN OF SUBCONTRACT RETAINAGE TO DESIGN-BUILDER

1. When all tasks called for in a subcontract, including Subcontractor punch list Work and deliverables, have been completed in a manner satisfactory to the Design-Builder, and have been accomplished and documented as required by MTA C&D (see also paragraph G above), the Design-Builder may request that MTA C&D inspect the corresponding work attributable to such subcontract so as to determine its acceptability to MTA C&D. In the event that MTA C&D accepts such corresponding work attributable to such subcontract and after the Design-Builder has returned the full amount of retainage attributable to such subcontract to the Subcontractor (see paragraph G above), the Design-Builder may submit a written request for payment of such full amount of retainage so returned to the Subcontractor from the monies being retained by MTA C&D pursuant to its contract provisions pertaining to retainage. The Design-Builder's request must be accompanied by the Design-Builder's certification that the full amount of retainage held by the Design-Builder with respect to the completed subcontract has been returned to the Subcontractor, which certification must indicate the dollar value of retainage so returned to the Subcontractor.
2. Unless MTA C&D elects to return less than the dollar value of retainage certified by the Design-Builder to have been returned to the Subcontractor, as provided below in this subsection, upon the Design-Builder's submission of the written request for payment as set forth above, MTA C&D will return to the Design-Builder the amount of retainage set forth in the Design-Builder's certification required by subsection 1 above, of this paragraph, such payment to be made within thirty (30) days from the date of MTA C&D's receipt of such written request in accordance with MTA's Prompt Payment Rules. The required supporting documentation for the Design-Builder's entitlement to such payment shall be the Design-Builder's certification described in subsection 1 above, of this paragraph. Notwithstanding the foregoing, in lieu of returning the full amount of retainage set forth in such Design-Builder's certification, MTA C&D, at its sole discretion, may elect to return an amount equal to five percent (5%) of MTA C&D's estimate of the value of the work encompassed within the completed subcontract.
3. Any acceptance of work by MTA C&D under this paragraph shall not be deemed to constitute findings by MTA C&D that the work of the entire contract is complete, or is fit for its intended purpose, or that the Design-Builder's performance has been in compliance with the contract.
4. The requirements of this paragraph do not apply to subcontracts.

H. SUBMISSION OF DBE UTILIZATION PLAN

The Design-Builder shall have submitted a completed Schedule of DBE Participation (Form A) and Intent to Perform as a DBE Subcontractor/Subconsultant/Joint Venture (Form B) for each DBE firm identified on the Form A. The Schedule of DBE Participation must demonstrate that the level of DBE participation will satisfy the DBE goal in paragraph B of this document. If the level of DBE participation is less than the DBE goal, the Design-Builder must submit evidence of its good faith efforts to satisfy the DBE goal as provided in paragraph K herein.

By listing a firm on its Schedule of DBE Participation (Form A) and the accompanying Intent to Perform as a DBE Subcontractor/Subconsultant/Joint Venture (Form B), the Design-Builder is representing the following:

1. It intends to use the firm for the work specified in the Schedule of DBE Participation Form (Form A) and the accompanying Intent to Perform as a DBE

Subcontractor/Subconsultant/Joint Venture Form (Form B), including any change order work required to perform the work specified;

2. On the basis of information known to it and after reasonable inquiry, it believes such firm is a certified DBE and is technically and financially qualified to perform the work specified and that the firm is available to perform the work;
3. It will enter into a subcontract with such DBE (or an approved substitute), subject to the terms and conditions of this contract and provided that the DBE is certified by the MTA Department of Diversity and Civil Rights or a NYSUCP Certifying Partner, for the work described and at the price set forth in the Schedule of DBE Participation (Form A) and accompanying Intent to Perform as a DBE Subcontractor/Subconsultant/Joint Venture Form (Form B);
4. It will not substitute a DBE firm listed in its Schedule of DBE Participation Form (Form A) and accompanying Intent to Perform as a DBE Subcontractor/Subconsultant/Joint Venture Form (Form B), unless the MTA Agency provides prior written approval in accordance with paragraph L below; and
5. If the Design-Builder is a DBE and lists itself on the Schedule of DBE Participation Form (Form A) and accompanying Intent to Perform as a DBE Subcontractor/Subconsultant/Joint Venture Form (Form B), that it will perform the work specified therein with its own workforce.

I. CREDIT TOWARD DBE GOAL

The Design-Builder shall not receive credit toward meeting the DBE goal unless the MTA Department of Diversity and Civil Rights or a NYSUCP Certifying Partner has certified the DBE firm as eligible. Only the value of the work actually performed by the DBE will be counted toward the DBE goal. The MTA Department of Diversity and Civil Rights will use the following guidelines to determine the amount to be counted toward the DBE goal:

1. The MTA Department of Diversity and Civil Rights will credit the entire amount of that portion of a construction contract (or other contract not covered by subsection 3 of this paragraph) that is performed by the DBE's own forces. The MTA Department of Diversity and Civil Rights will include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE Subcontractor purchases or leases from the Design-Builder or its affiliates).
2. The MTA Department of Diversity and Civil Rights will credit the entire amount of fees or commissions charged by a DBE firm providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, toward the DBE goal, provided the MTA Department of Diversity and Civil Rights determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
3. When a DBE subcontracts part of the Work to another firm, the value of the subcontracted Work may be counted toward DBE goals only if the DBE's Subcontractor is itself a

certified DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward the DBE goal.

4. When a DBE performs as a participant in a joint venture, the MTA Department of Diversity and Civil Rights will count a portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the Work of the Contract that the DBE performs with its own forces toward the DBE goal.
5. The MTA Department of Diversity and Civil Rights will credit expenditures to a DBE Subcontractor toward the DBE goal, only if the DBE is performing a commercially useful function on the contract.
6. Commercially Useful Function (For DBEs Other Than Trucking Companies)
 - a. A DBE performs a commercially useful function when it is responsible for execution of the Work of the Contract and is carrying out its responsibilities by actually performing, managing, and supervising the Work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the Contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the MTA Department of Diversity and Civil Rights will evaluate the amount of Work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the Work it is actually performing and the DBE credit claimed for its performance of the Work, and other relevant factors.
 - b. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the MTA Department of Diversity and Civil Rights will examine similar transactions, particularly those in which DBEs do not participate.
 - c. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the Work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the MTA Department of Diversity and Civil Rights will presume that it is not performing a commercially useful function.
 - d. When a DBE is presumed not to be performing a commercially useful function as provided in subsection (6) (c) of this paragraph, the DBE may present evidence to rebut this presumption.
7. Commercially Useful Function (For DBE Trucking Companies)

The MTA Department of Diversity and Civil Rights will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

- a. The DBE trucking company must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - b. The DBE trucking company must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - c. The DBE trucking company will receive credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - d. The DBE trucking company may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE, which leases trucks from another DBE, will receive credit for the total value of the transportation services the lessee DBE provides on the contract.
 - e. The DBE trucking company may also lease trucks from a non-DBE firm, including an owner-operator. The DBE, which leases trucks from a non-DBE, is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of transportation services provided by the lessees, since these services are not provided by a DBE.
 - f. For purposes of this paragraph, a lease must indicate that the DBE trucking company has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE trucking company absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.
8. The MTA Department of Diversity and Civil Rights will credit toward the DBE goal expenditures with DBEs for materials or supplies as provided in the following:
- a. If the materials or supplies are obtained from a DBE manufacturer, the MTA Department of Diversity and Civil Rights will credit 100 percent of the cost of the materials or supplies toward DBE goals. For purposes of this section, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
 - b. If the materials or supplies are purchased from a DBE regular dealer, the MTA Department of Diversity and Civil Rights will credit 60 percent of the cost of the materials or supplies toward the DBE goal. For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such

bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealer's own distribution equipment must be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph.

- c. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, the MTA Department of Diversity and Civil Rights will credit toward the DBE goal the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a work site, provided that the MTA Department of Diversity and Civil Rights determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. The MTA Department of Diversity and Civil Rights will not credit any portion of the cost of the materials and supplies themselves toward DBE goals.
- 9. If a firm is not currently certified as a DBE in accordance with 49 C.F.R. Part 26 at the time of the execution of the Contract, the MTA Department of Diversity and Civil Rights will not credit the firm's participation toward the DBE goal, except as provided for in 49 C.F.R. Section 26.87(i).
 - 10. When a firm loses its DBE certification, the MTA Department of Diversity and Civil Rights will follow the applicable regulations in 49 C.F.R. Section 26.87(i).
 - a. If a subcontract has not been executed with the firm prior to notification of its ineligibility, any participation by the ineligible firm will not be counted toward the contract or overall goal. The MTA will direct the Design-Builder to meet the DBE goal with an eligible DBE firm or demonstrate good faith efforts to do so.
 - b. If a subcontract has been executed with the firm prior to notification of its ineligibility, the Design-Builder may continue to receive credit toward the DBE goal for the firm's Work.
 - c. The Design-Builder shall not include any provision in its subcontract(s) which is inconsistent with this article.
 - 11. The MTA Department of Diversity and Civil Rights will not credit toward the DBE goal the participation of a DBE Subcontractor until the amount being counted toward the goal has actually been paid to the DBE.

J. DBE MODIFICATIONS

In the event that the Design-Builder wishes to modify its Schedule of DBE Participation (Form A) after its submission or after the Contract is awarded, then the Design-Builder must request approval for the modification from the Project CEO, in writing, with a copy mailed to the MTA Department of Diversity and Civil Rights. If the Design-Builder intends to terminate and/or substitute a DBE firm, it must also provide written notice to the DBE Subcontractor, with a copy to the Project CEO, of the Design-Builder's intent to terminate and/or substitute

the firm. A prime Design-Builder may not, without MTA C&D's and the MTA Department of Civil Rights' prior consent, terminate for convenience a DBE Subcontractor approved under this contract and then perform the work of the contract with its own forces or those of an affiliate. A Modification includes any change to items of work, material, services, subcontract value or DBE firms, which differ from those identified on the approved Schedule of DBE Participation. When a DBE Subcontractor is terminated or fails to complete its Work for any reason, the Design-Builder must make good faith efforts to find another DBE Subcontractor to substitute for the original DBE. These good faith efforts must be directed at finding other DBEs to perform at least the same amount of Work under the Contract as the former DBE to the extent needed to meet the contract goal. The Design-Builder must provide the Project CEO, with a copy mailed to the MTA Department of Diversity and Civil Rights, with any and all documents and information as may be requested with respect to the modification. If the MTA Department of Diversity and Civil Rights determines that the Design-Builder failed to make good faith efforts, MTA C&D may consider such failure a breach of contract, entitling the MTA Agency to remedies provided herein, in addition to any other available remedy.

K. EEO/NON-DISCRIMINATION

1. During the performance of this contract, the Design-Builder agrees as follows: The Design-Builder will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Design-Builder will take affirmative action to ensure that all applicants are employed and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. The Design-Builder further agrees to comply with all provisions of Executive Order 11246 and applicable regulations, 41 C.F.R. Parts 60-4.

L. INTEGRITY MONITORING

MTA Department of Diversity and Civil Rights is responsible for monitoring compliance by the Design-Builder, Subcontractors and others with all relevant laws, rules, regulations, and Contract provisions governing the DBE program. MTA Department of Diversity and Civil Rights monitors contracts to detect and deter fraud, especially as it relates to the use of DBE firms.

MTA Department of Diversity and Civil Rights will perform on-site investigations and payment verifications; review relevant Design-Builder and Subcontractor documents, including but not limited to financial records, certificates and licenses, certified payroll reports, employee sign-in sheets. Representatives from MTA Department of Diversity and Civil Rights will interview Design-Builders and Subcontractors' employees either on-site, at our offices, or at any other location MTA Department of Diversity and Civil Rights determines is in the best interest of the MTA Agencies.

The Design-Builder and Subcontractors shall cooperate fully with MTA Department of Diversity and Civil Rights staff and shall provide all requested documents immediately upon request. MTA C&D may consider failure to cooperate a breach of contract, entitling MTA C&D to remedies provided herein, in addition to any other available remedy.

M. REPORTING AND RECORDKEEPING

1. The Design-Builder shall submit documentation concerning its performance in meeting the DBE goal during the term of the contract.
 - a. If the duration of this Contract is less than one (1) year, within 60 days from Notice of Award, unless such time is extended by MTA C&D in writing, the Design-

Builder must enter into written subcontract agreements with the DBEs listed in its Schedule of DBE Participation Form (Form A) and accompanying Intent to Perform as a Subcontractor/Subconsultant/Joint Venture Form (Form B) or with substitute DBEs approved by the MTA Department of Diversity and Civil Rights.

- b. If the duration of this Contract is one (1) year or more, not later than 30 days before a Subcontractor commences Work on the Contract, unless extended by MTA C&D in writing, the Design-Builder must enter into written subcontract agreements with the DBEs listed in its Schedule of DBE Participation Form (Form A) and accompanying Intent to Perform as a Subcontractor/Subconsultant/Joint Venture Form (Form B) or with substitute DBEs approved by the MTA Department of Diversity and Civil Rights.
 - c. The Design-Builder immediately upon execution shall provide copies of the Design-Builder's executed subcontract agreements with DBEs to the Project CEO, and upon request to the MTA Department of Diversity and Civil Rights.
 - d. The Design-Builder must submit subcontract agreement modifications with DBEs any time a significant change in any items of work, material, services, or subcontract value is agreed upon.
2. The Design-Builder must submit a schedule outlining when the DBE Subcontractors will commence and complete Work on the Project.
 3. The Design-Builder must submit monthly reports on progress towards meeting its DBE goal. The Monthly DBE Progress Reports (Form E), transmitted with the contract documents, shall be mailed to the Project CEO, and upon request to the MTA Department of Diversity and Civil Rights.
 4. The Design-Builder must promptly notify the Project CEO of any situation in which any regularly scheduled Progress Payment is not made to a DBE.
 5. The Design-Builder must promptly inform in writing, the Project CEO when it has reason to believe its attainment of the DBE participation goal is in jeopardy. In this regard, the Design-Builder must inform the Project CEO, in writing with supporting documentation, immediately upon learning that a DBE firm is unable or unwilling to perform the subcontracted services.
 6. The willful making of false statements or submission to MTA or any of its Agencies of incorrect information shall constitute a breach of the contract.

N. REMEDIES FOR DESIGN-BUILDER'S DEFAULT AFTER AWARD AND EXECUTION

The Design-Builder's material failure to satisfy the requirements of the DBE provisions set forth above shall constitute a material breach of the Contract. A default under these obligations, including but not limited to a failure to meet the DBE goal set forth in the Schedule of DBE Participation Form (Form A), or to demonstrate good faith efforts to meet the DBE goal, may result in one or more of the following:

1. A finding that the Design-Builder is not a responsible contractor for purposes of future contract awards;

2. Assessment of damages;
3. Issuance of a Stop Work Order;
4. Suspension of payments;
5. Termination of the contract;
6. Any other available remedy.

O. PROHIBITION OF AGREEMENTS TO RESTRICT COMPETITION

Agreements between the Design-Builder and a DBE in which the DBE agrees not to provide subcontracting quotations to any other firms are prohibited.

ARTICLE 17.02 NEW YORK STATE BUSINESS ENTERPRISE PARTICIPATION REQUIREMENTS

It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development
Division for Small Business
30 South Pearl St -- 7th Floor
Albany, New York 12245
Telephone: 518-292-5220
Fax: 518-292-5884 <http://www.empire.state.ny.us>

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development
Division of Minority and Women's Business Development
30 South Pearl St -- 2nd Floor
Albany, New York 12245
Telephone: 518-292-5250
Fax: 518-292-5803
<http://www.empire.state.ny.us>

The Omnibus Procurement Act of 1992 requires that by signing this Contract, as applicable, the Design-Builder certify that whenever the total bid amount is greater than \$1 million:

- a. The Design-Builder has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;
- b. The Design-Builder has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

- c. The Design-Builder agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Design-Builder agrees to document these efforts and to provide said documentation to the State upon request; and
- d. The Design-Builder acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

CHAPTER 18.

WAGE RATE SCHEDULES

ARTICLE 18.01 NOT USED

ARTICLE 18.02 NEW YORK CITY WAGE RATE SCHEDULES

The New York City Prevailing Wage Rate Schedule issued for this Work is set forth at <https://apps.labor.ny.gov/wpp/publicViewPWChanges.do?method=showIt>. As stated therein, if there are differences between the applicable Federal and State Rates for a job classification, the higher rate and supplementals shall apply. Redetermined supplementals and wage rates may be issued periodically, and in accordance with applicable law the redetermined rates and supplementals shall apply. The Design-Builder shall be solely responsible for paying its employees at the correct wage rate.

APPENDICES

Appendix 1.02A – Definitions

Appendix 7.05.B.3(f) – Lien Release and Waiver of Lien Forms

Appendix 10.05 – Insurance Requirements

APPENDIX 1.02A - DEFINITIONS

Wherever in this Contract the following terms or pronouns in place of them are used, the intent and meaning shall be as follows (subject to any additional requirements, conditions, limitations and provisions applicable to such terms set forth elsewhere in the Contract Documents):

ADDED WORK – has the meaning ascribed to it in General Provisions Article 8.02 – CHANGES.

ADDENDUM – a written instrument issued by MTA C&D, expressly identified as an Addendum and modifying the RFP.

ADDITIONAL RETENTION – has the meaning ascribed to it in General Provisions Article 9.03 – WITHHOLDING MONEY TO SATISFY CLAIMS, LIENS OR JUDGMENTS; **ADDITIONAL RETENTION Paragraph A.**

ALLOWANCE ITEM – means Work covered by a Contract Allowance Amount as stated in the Design-Build Agreement.

AMTRAK – National Railroad Passenger Corporation.

APPLICATION FOR FINAL PAYMENT – the set of documents used by the Design-Builder to request Final Payment, including the invoice, affidavits, and supporting documents required under General Provisions Articles 7.09 – FINAL COMPLETION PAYMENT and 7.07 - PROGRESS PAYMENTS/ MEASUREMENT OF PAYMENT.

APPLICATION FOR PAYMENT – the set of documents used by the Design-Builder to request payments, including the invoice, affidavits, and supporting documents required under General Provisions Article 7.07 – PROGRESS PAYMENTS/MEASUREMENT OF PAYMENT, and the remainder of General Provisions Chapter 7 PRICE AND PAYMENTS. The term “Application for Payment” includes the Application for Mobilization Payment, Application for Progress Payments, and Application for Substantial Completion Payment, and Application for Final Payment.

ARBITRABLE CLAIMS – has the meaning ascribed to it in General Provisions Article 12.03 – DISPUTES RESOLUTION BY ARBITRATION.

ARBITRATION NOTICE – has the meaning ascribed to it in General Provisions Article 12.03 – DISPUTES RESOLUTION BY ARBITRATION. **AS-BUILT DRAWINGS** – as used in the General Provisions, shall mean Record Drawings.

ASSURANCE – has the meaning ascribed to it in General Provisions Article 11.02 – REQUEST FOR ASSURANCE OF ABILITY TO PERFORM.

ATC – an alternative technical concept approved by MTA C&D in accordance with the RFP and included in the Proposal and incorporated into this Contract and attached as part of Exhibit A to the Design-Build Agreement.

AUTHORITY HAVING JURISDICTION– has the meaning provided in Division 1 - General Requirements, Section 01 33 40, Code Compliance.

AWARD DATE – the date the Notice of Award is delivered.

BASELINE CONTRACT SCHEDULE – has the meaning ascribed to it in General Provisions Article 6.02 – **DESIGN-BUILDER’S SCHEDULES** and in the Technical Provisions.

BENEFICIAL OCCUPANCY – has the meaning ascribed to it in General Provisions Article 6.03C – **SUBSTANTIAL COMPLETION AND FINAL COMPLETION**.

BILATERAL MODIFICATION – A Modification executed by MTA C&D and the Design-Builder.

BLUE BOOK – the Rental Rate Blue Book (Volume 1), published by Primedia Information Inc.

BONDS, PERFORMANCE BONDS, PAYMENT BONDS – have the meanings ascribed to them in the Proposers Requirements Section of the RFP and in General Provisions Article 9.01 – **PERFORMANCE AND PAYMENT BONDS**.

BUSINESS DAYS – Monday through Friday excluding legal holidays recognized in the State of New York.

CDOT – the Department of Transportation of the State of Connecticut.

CERTIFICATE OF CURRENT COST OR PRICING DATA – the certificate to be submitted by the Design-Builder under General Provisions Article 8.09 – **REQUIRED COST OR PRICING DATA: PRICE REDUCTION FOR DEFECTIVE COST AND PRICING DATA**.

CERTIFICATE OF FINAL COMPLETION – has the meaning ascribed to it in General Provisions Article 6.03 – **SUBSTANTIAL COMPLETION AND FINAL COMPLETION**.

CERTIFICATE OF SUBSTANTIAL COMPLETION – has the meaning ascribed to it in General Provisions Article 6.03 – **SUBSTANTIAL COMPLETION AND FINAL COMPLETION**.

CHANGE – a change to the Work within the general scope of the Contract as set forth in General Provisions Article 8.02 – **CHANGES**.

CHANGE IN LAW – has the meaning ascribed to it in General Provisions Article 8.10 – **CHANGES IN LAW**.

CHANGE PROPOSAL – has the meaning ascribed to it in General Provisions Article 8.03 – **CHANGE PROCEDURE; MODIFICATIONS**.

CHANGE PROPOSAL REQUEST – has the meaning ascribed to it in General Provisions Article 8.03 – **CHANGE PROCEDURE; MODIFICATIONS**.

CHANGE WORK – has the meaning ascribed to it in General Provisions Article 8.02 – **CHANGES**.

CLAIM – has the meaning ascribed to it in General Provisions Article 12.01 – **CLAIMS**.

CLAIM PROPOSAL – has the meaning ascribed to it in General Provisions Article 12.01 – **CLAIMS**.

COMPENSABLE DELAY – has the meaning ascribed to it in General Provisions Article 6.08 – **COMPENSABLE DELAYS**.

CONCEPT DESIGN DRAWINGS – has the meaning ascribed to it in the Design-Build Agreement.

CONCURRENT DELAY – has the meaning ascribed to it in General Provisions Article 6.05 – EXTENSIONS OF TIME Paragraph B.2.

CONTRACT – the written agreement between MTA C&D and the Design-Builder for the performance of all of the Work by the Design-Builder, which agreement consists of the Contract Documents, amended, supplemented and modified by MTA C&D and the Design-Builder in accordance with the terms thereof.

CONTRACT ALLOWANCE ITEM – has the meaning ascribed to it in General Provisions Article 7.16 – ALLOWANCE ITEMS.

CONTRACT COMPLETION DATE – the time limit specified in the Contract (stated as a specific number of Days following Notice to Proceed), for the Design-Builder to achieve Final Completion, as such date may be extended in accordance with the terms of General Provisions Article 6.05 – EXTENSIONS OF TIME.

CONTRACT DRAWINGS – the drawings included in the RFP, which, together with the Specifications, set forth the basis of design for portions of the Project.

CONTRACT DOCUMENTS – has the meaning ascribed to it in the Design-Build Agreement.

CONTRACT INDICATIONS – has the meaning ascribed to it in General Provisions Article 8.06 – DIFFERING SITE CONDITIONS.

CONTRACT PRICE – the lump-sum price agreed to by MTA C&D and the Design-Builder for the Work set forth in Design-Build Agreement Article 2.1, as it may be modified from time to time by Modification.

CONTRACT SCHEDULE – has the meaning ascribed to it in General Provisions Article 6.02 – DESIGN-BUILDER’S SCHEDULES and in the Technical Provisions.

COVID-19 – the respiratory disease identified by the Centers for Disease Control and Prevention as the ‘coronavirus disease 2019’, abbreviated as ‘COVID-19’.

CSHP or SAFETY AND HEALTH PLAN – the Design-Builder’s safety and health plan, as set forth in General Provisions Article 5.02 – SAFETY AND HEALTH, which shall include the Design-Builder’s Security Plan as an appendix to the CSHP.

CURRENT CONTRACT SCHEDULE – has the meaning ascribed to it in General Provisions Article 6.02 – DESIGN-BUILDER’S SCHEDULES.

DAILY REPORT SHEET – has the meaning ascribed to it in General Provisions Article 8.04 – INTERIM TIME AND MATERIALS RECORD KEEPING AND EQUITABLE ADJUSTMENTS BASED ON TIME AND MATERIALS Paragraph G.

DAYS – all references to “days” or “Days” mean calendar days unless otherwise noted.

DECREASED WORK – has the meaning ascribed to it in General Provisions Article 8.02 – CHANGES.

DEFECTIVE WORK – Work that is unsatisfactory, deficient, damaged, does not conform to the Contract, or does not meet the requirements of an inspection, test, or approval, or Work that is associated with Punch List items that the Design-Builder fails to complete within a reasonable time after issuance of the Punch List by MTA C&D.

DELAY – any delay, interruption or suspension of any portion of the Work, as further defined in General Provisions Article 6.05 – EXTENSIONS OF TIME.

DESIGN-BUILD AGREEMENT – the Agreement between MTA C&D and the Design-Builder forming part of the Contract.

DESIGN-BUILDER – the individual, partnership, corporation, company, joint venture or firm, its permitted successors and assigns, that enters into the Contract to perform the Work.

DESIGN-BUILDER FAULT EVENT – an event that arises directly or indirectly as a result of any breach of Law, permit, or any Contract Document, or any act or omission, fraud, willful misconduct, criminal conduct, recklessness, bad faith, or negligence by or of the Design-Builder, any member of the Design-Builder, any Subcontractor, any Vendor, any other persons for which the Design-Builder is legally or contractually responsible, and employees, agents, officers, directors, representatives and consultants of any of each of the foregoing.

DESIGN-BUILDER’S CONSTRUCTION MANAGEMENT TEAM – has the meaning ascribed to it in General Provisions Article 4.05 – CONSTRUCTION MANAGEMENT.

DESIGN-BUILDER’S PROJECT MANAGER – the Design-Builder’s on-site designated representative responsible for overall Project management.

DESIGN-BUILDER’S PROPOSAL - the proposal submitted by the Design-Builder, together with any revisions thereto, as accepted by MTA C&D in the form attached as Exhibit A to the Design-Build Agreement.

DESIGN-BUILDER’S QUALITY MANAGER – the individual employed by the Design-Builder who is responsible for the overall Quality Plan of the Design-Builder, including the quality of management, design and construction.

DESIGN-BUILDER’S SAFETY MANAGER – the individual employed by the Design-Builder who is responsible for the safety plans of the Design-Builder and the safe performance of the Work.

DESIGN DOCUMENTS – maps, plans, drawings, specifications, reports, calculations, records, submittals, and other specified documents prepared by the Design Professionals in the course of performing Project engineering and design Work at any stage of the Project. The words “Final Design Documents” or “Released For Construction Documents” mean collectively plans, specification, drawings and other documents prepared and developed by the Designer-of-Record to one hundred percent 100%) completion.

DESIGN MANAGER – the New York-licensed Professional Engineer having primary responsibility for coordination and oversight of all Design Documents.

DESIGN QUALITY ASSURANCE MANAGER – the New York-licensed Professional Engineer employed by the Designer of Record who reports directly to the Design-Builder’s Quality Manager and is responsible for the QA/QC of all Work prepared by the Design Professionals, including all Design Documents.

DESIGN PROFESSIONAL – The Designer of Record or any other engineer, architect, landscape architect, surveyor, geologist or specialty consultant engaged by the Design-Builder or the Designer of Record to perform design services for the Project.

DESIGN REVIEW – the Design-Builder’s comprehensive and systematic examination of the Design Documents to verify that they are in conformance with the requirements of the Contract Documents.

DESIGNER OF RECORD - the professionally licensed Design-Builder principal, specialized Subcontractor, or in-house designer that leads the team furnishing or performing the design of the Project in accordance with the Contract requirements.

DESIGNATED PAYMENT OFFICE – the office set forth in the Notice of Award and described in further detail in General Provisions Article 7.04A – PAYMENTS – GENERAL REQUIREMENTS.

DETAILED COST BREAKDOWN – has the meaning ascribed to it in General Provisions Article 7.02 – DETAILED COST BREAKDOWN.

DETAILED COST BREAKDOWN ITEMS or DCB Items– has the meaning ascribed to it in General Provisions Article 7.02 – DETAILED COST BREAKDOWN.

DIFFERING SITE CONDITION – means a Type 1 Condition or Type 2 Condition as defined in General Provisions Article 8.06 – DIFFERING SITE CONDITIONS.

DIVISION 1 – GENERAL REQUIREMENTS or DIVISION 1 - attached to the Design-Build Agreement.

EARLY COMPLETION SCHEDULE – has the meaning ascribed to it in General Provisions Article 6.05 – EXTENSIONS OF TIME Paragraph B.

EMERGENCY – a situation involving danger to life, safety, or property or that is essential to the efficient operation of, or to adequately provide the service to MTA Group, and that requires immediate corrective action.

ENVIRONMENTAL MANAGEMENT PLAN – Design-Builder’s environmental management plan, as set forth in General Provisions Article 5.03 – ENVIRONMENTAL REQUIREMENTS.

EQUITABLE ADJUSTMENT – means adjustment on account of a Change as provided in General Provisions Article 8.02 – CHANGES and subject to the further requirements in General Provisions Articles 8.04 – EQUITABLE ADJUSTMENTS IN PRICE and 6.05 – EXTENSIONS OF TIME.

EQUITABLE ADJUSTMENT PROPOSAL – has the meaning ascribed to it in General Provisions Article 8.03 – CHANGE PROCEDURE; MODIFICATIONS and subject to the further requirements in General Provisions Article 8.04 – EQUITABLE ADJUSTMENTS IN PRICE.

EQUITABLE ADJUSTMENT TO MILESTONES –has the meaning ascribed to it in General Provisions Article 8.02 “CHANGES.” Other requirements also appear in General Provisions Article 6.05 – EXTENSIONS OF TIME.

EVENT OF DEFAULT – has the meaning ascribed to it in General Provisions Article 11.01 – EVENT OF DEFAULT.

EXCUSABLE DELAY – has the meaning ascribed to it in General Provisions Article 6.07 – EXCUSABLE DELAYS/FORCE MAJEURE.

FINAL COMPLETION – has the meaning ascribed to it in General Provisions Article 6.03 – SUBSTANTIAL COMPLETION AND FINAL COMPLETION.

FINAL CONTRACT PRICE – the final total of all sums paid or to be paid by MTA C&D or the MTA to the Design-Builder in accordance with the Contract for the execution and completion of the Work; the Final Contract

Price is the Contract Price as set forth in the Design-Build Agreement adjusted to include all price adjustments pursuant to Modifications and backcharges.

FINAL DESIGN DOCUMENTS– the signed and sealed Design Documents.

FINAL PAYMENT – has the meaning ascribed to it in General Provisions Article 7.09 – FINAL PAYMENT.

FINAL PROPOSAL– the Proposal submitted by the Design-Builder, including all clarifications, revisions, and supplements, accepted by MTA C&D.

FORCE ACCOUNT WORK – the work that the Railroads are responsible for performing (and which therefore does not comprise part of the Work) in accordance with the Contract.

FORCE MAJEURE EVENT – has the meaning ascribed to it in General Provisions Article 6.07 – EXCUSABLE DELAYS/FORCE MAJEURE.

FRAGNET – has the meaning ascribed to it in General Provisions Article 6.06 – TIME IMPACT ANALYSIS.

FTA – the Federal Transit Administration or its predecessor the Urban Mass Transportation Administration (UMTA).

GOOD INDUSTRY PRACTICE – that degree of skill, care, prudence, foresight, and practice that would reasonably and ordinarily be expected from time to time of a skilled and experienced professional designer, engineer, or constructor, as applicable, engaged in the same type of activity in the New York metropolitan area as that of the Design-Builder, or any other person to which such term relates, seeking to comply with all Laws, and to meet or exceed best modern practice and standards generally as observed by such professionals, when performing the same type of obligations and responsibilities in the New York metropolitan area as the obligations and responsibilities of the Design-Builder under this Contract and/or the obligations and responsibilities of such person to which such term relates in each case under the same or similar circumstances (including taking account of the design-build nature of this Contract).

GENERAL PROVISIONS – the general provisions of the Contract set forth in the General Provisions volume.

HEALTH AND SAFETY PLAN (HASP) – as defined in Division 1 – General Requirements, Section 01 35 10, Construction Safety Requirements.

HISTORIC PROPERTY – any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion in the National Register of Historic Places or other AHJ.

HOLD POINT– mandatory inspection points identified by the Design-Builder or MTA C&D beyond which Work cannot proceed until the required inspections have been performed and a written release issued by the Design-Builder's Quality Manager.

INDEMNIFIED PARTIES - the parties set forth in General Provisions Article 10.01 – INDEMNIFIED PARTIES including their officers, directors, employees, agents, subsidiaries, and affiliates.

INTELLECTUAL PROPERTY –has the meaning ascribed to it in General Provisions Article 14.05 – INTELLECTUAL PROPERTY CLAIMS.

KEY PERSONNEL – the Design-Builder’s Project Manager, the Design-Builder’s Quality Manager, the Design Manager, the Design Quality Engineer, the Design-Builder’s Safety Engineer and any other Design-Builder personnel identified as Key Personnel in the Contract Documents.

LAWS – all laws, statutes, by-laws, resolutions, ordinances, orders, codes, rules, and regulations, whether federal, state or local and all orders, judgments, awards, or decrees of any court or government.

LIQUIDATED DAMAGES – has the meaning ascribed to it in General Provisions Article 6.04 – FAILURE TO COMPLETE WORK ON TIME; ACTUAL & LIQUIDATED DAMAGES.

LIRR or LONG ISLAND RAIL ROAD – Long Island Rail Road Company, a body corporate and politic constituting a public benefit corporation of the State of New York duly created and established and validly existing under the provisions of Title 11 of Article 5 of the New York Public Authorities Law, and any successor entity.

LITIGABLE CLAIMS – has the meaning ascribed to it in General Provisions Article 12.04 – OTHER LEGAL REMEDIES.

LITIGATION NOTICE – has the meaning ascribed to it in General Provisions Article 12.04 – OTHER LEGAL REMEDIES.

LUMP SUM PRICE – a single all-inclusive price which provides compensation for an identified Payment Item as described in the Contract.

LUMP SUM WORK – an identified item of Work that is to be performed by the Design-Builder for a Lump Sum Price.

MATERIAL – any approved substance or material to be incorporated into the Work.

METRO-NORTH or METRO-NORTH COMMUTER RAILROAD COMPANY – Metro North Commuter Railroad Company, a body corporate and politic constituting a public benefit corporation of the State of New York duly created and established and validly existing under the provisions of Title 11 of Article 5 of the New York Public Authorities Law, and any successor entity.

MILESTONE – a time limit specified in the Design-Build Agreement (stated as a specified number of Days or months following Notice to Proceed), for the Design-Builder to complete a separate and distinct portion of the Work, as such Milestone may be extended in accordance with the terms of General Provisions Article 6.05 – EXTENSIONS OF TIME.

MISCELLANEOUS AND INCIDENTAL WORK - has the meaning ascribed to it in General Provisions Article 1.01 – SERVICES TO BE PERFORMED.

MOBILIZATION COSTS – has the meaning ascribed to it in General Provisions Article 7.06 – MOBILIZATION PAYMENT.

MODIFICATION – has the meaning ascribed to it in General Provisions Article 8.03 – CHANGE PROCEDURE; MODIFICATIONS.

MTA or METROPOLITAN TRANSPORTATION AUTHORITY – Metropolitan Transportation Authority, a body corporate and politic constituting a public benefit corporation of the State of New York duly created and

established and validly existing under the provisions of Title 11 of Article 5 of the New York Public Authorities Law, and any successor entity. For purposes of clarity, any reference to “MTA” shall include MTA C&D.

MTA BRIDGES AND TUNNELS or TBTA or MTA B&T – the Triborough Bridge and Tunnel Authority, a public benefit corporation existing by virtue of the Public Authorities Law - Title 3 of Article 3.

MTA CONSTRUCTION & DEVELOPMENT COMPANY or MTA C&D – a public benefit corporation of the State of New York duly created and established and validly existing under the provisions of Article 5, Title 11 of the New York Public Authorities Law.

MTA DELAY – a delay by MTA C&D in performing express obligation of MTA C&D under the Contract Documents within the agreed time for performance of such obligation.

MTA GROUP – the MTA, the Long Island Rail Road, Metro-North Commuter Railroad Company, New York City Transit Authority, MTA Bridges and Tunnels, the MTA Construction & Development Company and all other subsidiaries and affiliates of MTA and any successors thereto.

NON-COMPENSABLE DELAY – has the meaning ascribed to it in General Provisions Article 6.08 – COMPENSABLE DELAYS.

NON-EXCUSABLE DELAY – has the meaning ascribed to it in General Provisions Article 6.07 – EXCUSABLE DELAYS/ FORCE MAJEURE.

NOTICE – means a notice given by either party as required by or in connection with the Contract.

NOTICE OF AWARD – the written notice to the Proposer that it is awarded the Contract, which includes delivery of the signed Contract form.

NOTICE OF CHANGE – has the meaning ascribed to it in General Provisions Article 8.02 – CHANGES.

NOTICE OF CLAIM – has the meaning ascribed to it in General Provisions Article 12.01 – CLAIMS.

NOTICE TO PROCEED or NTP – a written notification from MTA C&D to the Design-Builder issued after or concurrent with the execution of this Contract, which authorizes and directs the Design-Builder to proceed with the performance of the Work.

NOTICE OF TERMINATION – either a Notice of Termination for Default as defined in General Provisions Article 11.04 - NOTICE OF TERMINATION FOR DEFAULT; or, a Notice of Termination for Convenience as defined in General Provisions Article 8.08 – TERMINATION FOR CONVENIENCE BY MTA C&D.

NYAR or NEW YORK AND ATLANTIC RAILWAY – the Railroad that currently leases and operates the freight portion of the Long Island Rail Road.

NYCT or NEW YORK CITY TRANSIT AUTHORITY – a body corporate and politic constituting a public benefit corporation of the State of New York duly created and established and validly existing under the provisions of Title 9 of Article 5 of the New York Public Authorities Law, and any successor entity.

NYSDOT – New York State Department of Transportation.

OPTION – an option exercisable by MTA C&D to add or modify the Work for an agreed adjustment of the Contract Price as stated in the Design-Build Agreement.

OPTION WORK – work covered by Options as stated in the Design-Build Agreement, which becomes part of the Contract Work to the extent that MTA C&D exercises the Options.

ORDER – an order, direction, or communication from MTA C&D to the Design-Builder relating to this Contract and/or the Work to be performed hereunder including Unilateral Modifications. (See General Provisions Article 8.02 “CHANGES.”)

OWNER CONTROLLED INSURANCE PROGRAM or OCIP – has the meaning ascribed to it in the Design-Build Agreement.

PARTICIPATION GOALS – the percentages established in accordance with General Provisions Article 17.01 – **CONTRACT PARTICIPATION PROVISIONS**.

PAYMENT ITEM – a portion of the Work for which the Contract establishes a price (included as part of the Contract Price) to be paid the Design-Builder.

PAYMENT REQUISITION – has the meaning ascribed to it in General Provisions Article 7.05 – **THE APPLICATION FOR PAYMENT**.

PAYMENT REQUISITION DELIVERY DATE – the date the Design-Builder delivers a Payment Requisition signed on behalf of the Design-Builder to MTA C&D.

PMC or PROJECT MANAGEMENT CONSULTANT – a duly authorized independent firm engaged by MTA C&D to assist MTA C&D in the performance of technical support, inspection and administration of the Project.

PRELIMINARY SCHEDULE – has the meaning ascribed to it in General Provisions Article 6.02 – **DESIGN-BUILDER’S SCHEDULES** and the Technical Provisions.

PRESCRIPTIVE SPECIFICATIONS – the technical directions, provisions and requirements of the Contract as amended or modified, together with any other Contract requirements pertaining to the Work to be provided, the method and manner of performing the Work, or the quantities and qualities of materials or equipment to be furnished under the Contract.

PRICE PROPOSAL – the schedule of Payment Items included in the Price Proposal Form of the RFP as completed by the Design-Builder and submitted as part of its Proposal.

PRIMAVERA PROJECT PLANNER or P6 – the software program, Version 6 or later, that is to be used by the Design-Builder for scheduling the Work and for Schedule Submittals.

PROGRESS PAYMENT(S) – has the meaning ascribed to it in General Provisions Article 7.07 – **PROGRESS PAYMENTS/MEASUREMENT OF PAYMENT**.”

PROJECT – the project identified in the Design-Build Agreement and other Contract Documents.

PROJECT CEO – the individual designated by MTA C&D to serve in the capacity of MTA C&D’s chief executive officer for the Project with the authority set forth in General Provisions Article 1.03 – **AUTHORITY OF THE MTA** Paragraph G.

PROJECT ELEMENT– an individual component, system, or subsystem of the Work.

PROPOSAL DATE – the date on which Proposals were opened by MTA C&D.

PROPOSER – the individual, partnership, corporation, company, joint venture or organization that submitted the Proposal.

PROPOSAL ITEM BREAKDOWN – Form [4] to the Design-Builder’s Proposal.

PROPOSAL REQUIREMENTS – the section of the RFP that sets forth the requirements for proposals.

PUNCH LIST – has the meaning ascribed to it in General Provisions Article 6.03 – SUBSTANTIAL COMPLETION AND FINAL COMPLETION.

QUALITY ASSURANCE– all planned and systematic actions performed by the Design-Builder to demonstrate that the Work complies with the Contract Documents and that all Elements of the Work will perform satisfactorily for the purpose intended.

QUALITY CONTROL– all activities performed by the Design-Builder as to the design, production, and construction processes to control the level of quality being produced in the end product.

QUALITY MANAGEMENT PLAN – as defined in Division 1 – General Requirements, Section 01 40 10, Quality Management.

RAILROAD – has the meaning given to it in Division 1 – General Requirements, Section 01 14 33 (Requirements for Railroad Operations).

RAILROAD-SUPPLIED SERVICES – has the meaning ascribed to it in the Design-Build Agreement.

RECOVERY EFFORTS – has the meaning ascribed to it in General Provisions Article 6.02 – DESIGN-BUILDER’S SCHEDULES Paragraph D.

RECOVERY SCHEDULE – has the meaning ascribed to it General Provisions Article 6.02 – DESIGN-BUILDER’S SCHEDULES Paragraph D.

REFERENCE DOCUMENTS – has the meaning ascribed to it in General Provisions Article 1.06 – ORDER OF PRECEDENCE, RESOLUTION OF DISCREPANCIES.

REQUEST FOR INFORMATION or RFI – has the meaning ascribed to it in General Provisions Article 2.02 – REQUESTS FOR INFORMATION.

RESTRAINT – a restriction set forth in the Contract Documents on the Design-Builder’s access to an area, structure or Work Site, in whole or in part, or other restriction on the Design-Builder’s performance of the Work.

REVIEW - when used in reference to review by MTA C&D of any Submittal, has the meaning ascribed to it in General Provisions Article 2.01 – SUBMITTALS and in the Technical Provisions.

RFP or REQUEST FOR PROPOSALS – the written solicitation issued by MTA C&D seeking Proposals for the Project and its Work to be performed, in response to which a Proposal may be submitted by a Proposer.

RIGHT-OF-WAY – that area which has been laid out or acquired for railroad or Project purposes.

SCHEDULE SUBMITTALS – all schedules and schedule-related items required to be submitted by the Design-Builder as set forth in the Technical Provisions.

SECURITY PLAN - a portion of the security program to be established and maintained by the Design-Builder as set forth in Paragraph M of General Provisions Article 5.02 – SAFETY AND HEALTH Paragraph M and which shall be an appendix to the Design-Builder’s CSHP.

SHOP DRAWINGS – Design-Builder submittals in the form of drawings, diagrams, illustrations, standard schedules, performance charts, instructions, catalogue cuts, lists and other data in which the Design-Builder or its Subcontractors or Vendors detail how they will meet the Contract requirements, as required by the Contract and subject to General Provisions Article 2.01 – SUBMITTALS.

SPECIAL INSPECTION– the inspection required of materials, installation, fabrication, erection or placement of components and connections that requires special expertise to ensure compliance.

STATE – the State of New York.

STOP WORK ORDER – has the meaning ascribed to it in General Provisions Article 6.10 – STOP WORK ORDER & SUSPENSION OF WORK.

SUBCONTRACT – a contract between the Design-Builder and a Subcontractor (a first tier Subcontract) or between two Subcontractors (lower tier Subcontracts) providing for the performance or supply of a portion of the Work. A Subcontract may be in the form of a purchase order.

SUBCONTRACTOR – any person, firm or corporation, other than the employees of the Design-Builder performing work as part of their employment, who contracts either directly with the Design-Builder, or indirectly thru other Subcontractors, to perform or provide a portion of the Work, including furnishing labor, materials, and/or equipment. Vendors are a subset of Subcontractors. Subcontractors that contract directly with the Design-Builder are referred to as first-tier Subcontractors, and Subcontractors who contract with other Subcontractors are referred to as lower-tier Subcontractors.

SUBMITTALS – all those items, including Design Documents, Shop Drawings, Schedule Submittals, samples, test procedures, documents data, manuals, drawings, reports, photos, and samples submitted by the Design-Builder in response to requirements in the Contract.

SUBMITTALS REGISTER – an accurate and current registry of all Submittals that includes the date of submission of a Submittal by the Design-Builder, the Submittal number (all Submittals are to be numbered consecutively), a description of the Submittal, a reference to the Division 1- General Requirements or Technical Provisions section that requires such Submittal, the status of each item, and the dates for submission and approval and as further defined in General Provisions Article 2.01 – SUBMITTALS Paragraph F.

SUBSTANTIAL COMPLETION – has the meaning ascribed to it in General Provisions Article 6.03 – SUBSTANTIAL COMPLETION AND FINAL COMPLETION

SUBSTANTIAL COMPLETION PAYMENT - has the meaning ascribed to it in General Provisions Article 7.08 – PAYMENT UPON SUBSTANTIAL COMPLETION.

SUGGESTED METHOD – has the meaning ascribed to it in General Provisions Article 2.01- SUBMITTALS.

SUPPLIER– any person or entity not perform work at the Work Site that supplies machinery, equipment, materials, hardware, software, systems or any other appurtenances to the Design-Builder in connection with the performance of the Work.

SURETY – a company that provides the Bidders, the Design-Builder, and the Subcontractors with one or more of the required security bonds and that meets the requirements for Sureties set forth in the Bidder’s Requirements section and in General Provisions Article 9.01 - PERFORMANCE AND PAYMENT BONDS.

TEMPORARY MATERIALS or TEMPORARY WORK– materials utilized only as erection aids or devices, or as part of the Design-Builder’s support of excavation or used in other means methods and techniques in the performance of the Work and which does not become a permanent part of the Work.

TERMINATION – with respect to Termination for Convenience, has the meaning ascribed to it in General Provisions Article 8.08 - TERMINATION FOR CONVENIENCE BY THE MTA C&D; and with respect to Termination for Default, has the meaning ascribed to it in General Provisions Chapter 11 - DESIGN-BUILDER’S DEFAULT.

TERMINATION DATE – the date upon which a Termination is effective as provided in General Provisions Article 8.08 – TERMINATION FOR CONVENIENCE BY MTA C&D or General Provisions Article 11.04 – NOTICE OF TERMINATION FOR DEFAULT.

TERMINATION FOR CONVENIENCE (BY THE MTA) – has the meaning ascribed to it in General Provisions Article 8.08 – TERMINATION FOR CONVENIENCE BY MTA C&D.

TERMINATION FOR DEFAULT – has the meaning ascribed to it in General Provisions Chapter 11 – DESIGN-BUILDER’S DEFAULT.

TIME IMPACT ANALYSIS – has the meaning ascribed to it in General Provisions Article 6.06 – TIME IMPACT ANALYSIS.

TYPE 1 CONDITION – has the meaning ascribed to it in General Provisions Article – 8.06 DIFFERING SITE CONDITIONS

TYPE 2 DIFFERING SITE CONDITION – has the meaning ascribed to it in General Provisions Article 8.06 - DIFFERING SITE CONDITIONS.

UNILATERAL MODIFICATION – a Modification issued by MTA C&D that is not executed by the Design-Builder.

UNIT PRICE – the price of a Payment Item which provides for payment of multiple units on a per unit basis. The units and the quantity for evaluation purposes that are identified in the Price Schedule and measurement and payment sections of the Contract Documents, subject to General Provisions Article 8.07 - INCREASED AND DECREASED CONTRACT QUANTITIES.

UNIT PRICE WORK – Work that is to be executed by the Design-Builder for payment on a Unit Price basis.

UNSAFE CONDITION - an unsafe condition is a condition that gives rise to the imminent possibility of serious injury to workers or the public, of serious damage to property or the environment, or of affecting the safe movement of trains.

UTILITIES or UTILITY OWNER– utility companies (including but not limited to electric, gas, power, water, sewer, telephone, communication, etc.), utility departments or agencies, natural gas pipeline companies, cable TV companies, or other such owner/operator of utilities that are operated or maintained in, on, under, over, or across public right-of-way or public or private easements.

VALUE ENGINEERING CHANGE PROPOSAL (VECP) – has the meaning ascribed to it in General Provisions Article 8.05 - VALUE ENGINEERING INCENTIVE.

VENDOR – a Subcontractor which furnishes materials, equipment or supplies for incorporation in or use in connection with the Work; and who does not provide labor other than incidental to the supply of its material, equipment or supplies. Vendors who contract directly with the Design-Builder are referred to as first-tier Vendors, and Vendors who contract with Subcontractors or other Vendors are referred to as lower-tier Vendors.

WARRANTY– an assurance by the Design-Builder that the Work is free of defects, conforms to professional engineering principles in the State of New York, and meets the requirements of the Contract Document for which the Design-Builder shall repair or replace Work within the warranty period.

WORK – all planning, design, architectural and engineering services, labor, materials, transportation, plant, tools, equipment, deliverables, supplies, product and other services and incidentals required for the proper design and construction of the Project as required by the Contract, and the performance of all other duties and obligations imposed on the Design-Builder by the Contract, including Added Work, Miscellaneous and Incidental Work, Punch List items and work to be performed pursuant to the warranty provisions of the Contract. The “Work” includes preparation of all Design Documents, design clarifications and construction phase Design Professional services, all physical Work to be performed on the Work Sites and other work including preparation of all Submittals, shop plans, calculation services, expediting, estimating, computations, and all other required administrative services, and, when performed off of the Work Sites, the furnishing of materials and equipment, fabrication of material, parts and components, execution of equipment system tests etc., and Miscellaneous and Incidental Work; and whenever the term “execution” is used with reference to the Work, it includes the performance of services and furnishing of materials. For certainty, the Work excludes Force Account Work.

WORK DAY – the days of the year on which work is normally performed by the Design-Builder’s Work Force. Work Days are normally defined for a particular craft or trade, and exclude holidays normally celebrated by that craft or trade.

WORKING DAYS – the days established in the Contract Schedule or Current Contract Schedule as days on which Work may be scheduled, as defined by the calendars in the CPM Schedules. A Working Day in one calendar is not necessarily a Working Day in another calendar.

WORK SITES – the actual Project locations identified in this Contract for performance of the physical Work and those other locations designated and declared by MTA C&D as Work Sites for performance of any part of the Work by the Design-Builder or its Subcontractors.

APPENDIX 7.05.B.3(F) – LIEN RELEASE AND WAIVER OF LIEN FORMS

APPENDIX 7.05.B.3(f) – LIEN RELEASE AND WAIVER OF LIEN FORMS

SUBCONTRACTOR/VENDOR's PARTIAL RELEASE AND WAIVER OF MECHANICS' AND SUPPLIERS' LIENS

Project Owner: Metropolitan Transportation Authority (MTA)
347 Madison Avenue
New York, NY 10017

MTA Project: _____
MTA Contract No.: _____
MTA Contract Title: _____
Contractor: _____

TO ALL WHOM IT MAY CONCERN:

WHEREAS the undersigned subcontractor/vendor _____ has been employed by above-referenced Contractor to furnish labor and/or materials and/or equipment for the above referenced project.

NOW, THEREFORE, in consideration of the partial payment on behalf of the Contractor to the undersigned of

\$ _____, which payment brings the aggregate payments to date to

\$ _____ on account of the Work, the undersigned subcontractor/vendor:

- (1) hereby covenants and agrees not to claim or file a mechanic's lien or other lien against the Project property or Project funds or any parts thereof for any work performed, or labor, services, equipment and/or materials furnished, through the date hereof for which and only to the extent subcontractor/vendor has received payment, and waives any and all liens, claims or rights to file any lien or liens or claims against the Owner and Contractor or the Property on amount of work performed, or labor, services, equipment and/or materials furnished, through the date hereof for which and only to the extent subcontractor/vendor has received payment.
- (2) hereby agrees to promptly pay and release of record all mechanic's, materialman's and like liens filed at any time by others in connection with the Work that has been performed or furnished through the date hereof to the extent required by subcontractor/vendor pursuant to the Contract.
- (3) in addition to and not in substitution for the foregoing agreements, agrees to pay out of the Partial Payment to the Sub-subcontractors, vendors and mechanics listed on the application for payment for which such Partial Payment has been made up to the respective amounts set forth opposite their names (but not in excess of the actual amounts owed to them to date), and to furnish lien waivers from such subcontractors, vendors and mechanics upon the making of each payment, including upon completion of the Work to the extent required by the Contract,

IN WITNESS WHEREOF, the above-identified subcontractor/vendor has caused these presents to be executed this _____ day of _____, 20____, by an officer or duly authorized agent.

SEAL

By: _____

Title: _____

UNIFORM FORM CERTIFICATE OF ACKNOWLEDGMENT

State of: _____)

) ss.

County of: _____)

On the _____ day of _____ in the year _____ before me, the undersigned, a Notary Public in and for said State, personally appeared _____, personally known to be or proved on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to be that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

SEAL

By: _____
(Notary)

APPENDIX 10.05 – INSURANCE REQUIREMENTS

ARTICLE I INSURANCE TO BE PROVIDED BY CONTRACTOR AND SUBCONTRACTORS

The term “Contractor” as used herein shall refer to any third party entering into a contract (“Contract”) with MTA C&D/MTA. As such, the term may encompass Contractors, Consultants and Design-Builders. The term “Work” as used in this document shall refer to all work or services of the Contractor in connection with such Contract.

SECTION A. INSURANCE SCHEDULE

The Contractor shall procure, at its sole cost and expense, and shall maintain at all times during the term of this Contract, through Final Completion, including any warranty period if applicable, and for such longer period of time if specified, the following classes of insurance in the form and limits indicated by the checked boxes set forth below and as outlined in **Article I, Section B. Insurance Requirements.**

<u>INSURANCE</u>		<u>MINIMUM AMOUNTS</u>	
<input checked="" type="checkbox"/>	Workers’ Compensation (for off-site operations only)		Statutory Limits
<input checked="" type="checkbox"/>	Employer’s Liability		\$1,000,000
<input type="checkbox"/>	Longshore & Harbor Workers’ Endorsement		
<input type="checkbox"/>	Maritime Coverage Endorsement (Jones Act)		
<input checked="" type="checkbox"/>	Commercial General Liability (amount is each occurrence) (for off-site operations only)	\$	\$5,000,000
<input checked="" type="checkbox"/>	Business Automobile Liability (amount is each accident)	\$	\$5,000,000
<input checked="" type="checkbox"/>	Professional Liability (Project Specific Coverage)	\$	\$15,000,000
<input checked="" type="checkbox"/>	Contractors Pollution Liability	\$	\$5,000,000
<input type="checkbox"/>	Other	\$	
<input type="checkbox"/>	Other	\$	
<input type="checkbox"/>	Other:	\$	

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SECTION B. INSURANCE REQUIREMENTS

1. **Workers' Compensation Insurance (for off-site operations only)** as required by statute in the State in which the Work will be performed. For Work conducted in the State of New York, Employer's Liability Insurance with limits of not less than \$1,000,000 bodily injury per accident; \$1,000,000 bodily injury per disease; and \$1,000,000 annual aggregate. For Work conducted outside the State of New York, Employer's Liability Insurance requires limits of not less than \$2,000,000 bodily injury per accident; \$2,000,000 bodily injury per disease; and \$2,000,000 annual aggregate and must provide proof that its Workers' Compensation Insurance policy has been endorsed to include "Other States Coverage."
 - If Contractor leases one or more employees through the use of a payroll, employee management, or other similar company, then Contractor must procure worker's compensation insurance written on an "if any" policy form, including an endorsement providing coverage for alternate employer/leased employee liability.
 - If the Work will involve, in whole or in part, work or operations on the navigable waters of the United States or on a flagged vessel, then Contractor shall obtain coverage pursuant to the Jones Act and/or the Longshoremen's and Harbor Worker's Compensation Act as applicable.
2. **Commercial General Liability ("CGL") Insurance (for off-site operations only)** covering claims for personal and advertising injury, bodily injury (including death) and property damage arising out of the Work and in a form providing coverage no less broad than that of ISO Commercial General Liability Insurance policy (Occurrence Form, number CG 00 01). Such insurance shall provide coverage for all operations including the products-completed operations hazard, and shall be maintained for a period of at least ten (10) years after Final Completion, subject to the limitation of any applicable statute. The limits of such insurance shall renew annually and not be less than the amount set forth in **Article I, Section A. Insurance Schedule** and shall comply with the following provisions:
 - Primary General Liability limits may be satisfied by Umbrella/Excess insurance;
 - The policy shall include independent contractor and contractual liability coverages;
 - The policy shall not contain any contractual exclusion relative to New York Labor Laws or any other exclusions or limitations directed toward any types of projects, materials or processes involved in the Work.
 - The policy shall not contain any of the following exclusions: subcontractor's exclusion; construction defect exclusion; leased worker exclusion; cross liability exclusion; crane exclusion; and demolition exclusion or "explosion, collapse and underground" exclusion.
 - The policy shall include Contractors Limited Professional – CG 22 79 covering Design Build Contracts;
 - For construction Work taking place within 50 feet of a railroad, the policy must include:
 - Contractual Liability – Railroads CG 24 17 listing the Scheduled Railroad and Designated Job Site.
 - Coverage for claims for bodily injury asserted by a railroad employee of an additional insured; any Employer's Liability Exclusion which may otherwise operate to exclude such coverage shall be removed.
3. **Business Automobile Liability Insurance** under Symbol 1 covering any owned, non-owned, and hired vehicles on and off-site for claims arising out of the ownership, maintenance or use of any auto. Such insurance shall provide coverage at least as broad as the standard ISO Automobile Liability policy (CA 00 01, CA 00 05, CA 00 12, CA 0020), with limits not less than the amount set forth in **Article I, Section A. Insurance Schedule**. If the Work involves transportation of hazardous or regulated substances, hazardous or regulated wastes and/or hazardous or regulated materials, Contractor shall provide pollution

auto coverage equivalent to that provided under the ISO pollution liability-broadened coverage for covered autos endorsement (CA 99 48), and the Motor Carrier Act endorsement (MCS 90). Any statutorily required “No-Fault” benefits and uninsured/underinsured motorist coverage shall be included.

4. **Professional Liability Insurance (Project Specific)** covering damage for liability arising out of any negligent act, error, or omission in the rendering of or failure to render professional services by the Contractor and by any partner, subcontractor or consultant of the Contractor providing construction management, architectural, engineering, and/or surveying services, and/or any party whose Work involves the preparation of plans or drawings, with limits not less than the amount set forth in **Article I, Section A. Insurance Schedule** per claim and annual aggregate. Such policy shall not contain any exclusions directed toward any types of projects, materials, services, or processes involved in the Work. The retroactive date for coverage will be no later than the commencement of professional services on the project and be maintained for a period of at least ten (10) years after completion of the professional services, subject to the limitation of any applicable statute. In the event of cancellation or non-renewal, the discovery period for insurance claims will be at least five (5) years or otherwise as by agreement with MTA C&D/MTA. Coverage shall include, but not be limited to:

- Coverage for bodily injury and property damage;
- Construction Management must be listed as a Professional Service covered by the policy without being subject to limitation by a specific definition (for Construction Managers only);
- Technology Services must be listed as a covered service with respect to Building Information Modeling (BIM) hosting and management responsibilities (for Projects utilizing BIM);
- Limited contractual liability and defense costs for MTA C&D/MTA;
- “Indemnified Party Endorsement” covering MTA C&D/MTA for liabilities, damages, and attorneys’ fees and related cost due to any claim asserted by a third-party against any Indemnified party listed herein.

5. **Contractors Pollution Liability Insurance:** If the Contract involves environmentally regulated substances or hazardous material exposures, the Contractor shall provide pollution liability insurance with limits not less than \$5,000,000 per occurrence and general aggregate on a per project basis including completed operations coverage to be maintained for at least three (3) years after final completion of the Work. Policy shall cover environmental damage resulting from pollution conditions that arise from the operations of the contractor or subcontractor, as applicable, and described under the scope of services of this contract. Coverage must apply to sudden and non-sudden pollution conditions including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants, silt or sediment into or upon land, the atmosphere or any watercourse or body of water, provided such conditions are not naturally present in the environment in the concentration or amounts discovered, unless such natural condition(s) are released or dispersed as a result of the performance of Covered Operations. Such insurance shall include but not be limited to:

- Bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death; medical monitoring
- Physical injury to or destruction of tangible property of parties other than the Insured including the resulting loss of use and diminution in value thereof; Loss of use, but not diminution in value, of tangible property of parties other than the Insured that has not been physically injured or destroyed
- Natural Resource Damages;
- Cleanup Costs

- Transportation and Non-Owned Disposal Site coverage (with no sunset clause/restricted coverage term) if Contractor or subcontractor is disposing of contaminated material (s)
- No exclusions for asbestos, lead paint, silica or mold/fungus/legionella
- Defense including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages

SECTION C. GENERAL INSURANCE REQUIREMENTS.

The following requirements are applicable to all insurance coverages required under this Contract, except to the extent otherwise indicated:

- 1. Insurer Requirements.** All policies of insurance shall be placed with insurers acceptable to MTA C&D/MTA. The insurance underwriter(s) must be duly licensed or an approved Surplus Lines insurer authorized to do business in the state where the Work is to be performed and must have a financial rating of A-/VII or better in the most recent edition of Best's Key Rating Guide or otherwise satisfactory to MTA C&D/MTA.
- 2. Right to Request.** Contractor shall increase required insurance amounts upon direction by MTA C&D/ MTA.
- 3. Additional Insureds.** *All insurance required under Article I, Section B. Insurance Requirements (except for Workers' Compensation, Professional liability or otherwise noted), shall name the parties listed in Article I, Section E as Additional Insureds* and shall include their respective subsidiary and affiliated companies, their Boards of Directors, officers, employees, representatives, and agents (hereinafter, collectively the "Additional Insureds"). For the Commercial General Liability insurance, additional insured status must be provided for ongoing and completed operations on ISO forms or their equivalent at least as broad as CG 20 10 and CG 20 37 – alternatively CG 20 38 and CG 20 37. No other General Liability Additional Insured endorsement will be accepted unless approved by MTA C&D/MTA.
- 4. Primary and Non-Contributory.** Each policy required in **Article I, Section B. Insurance Requirements**, including primary, excess, and/or umbrella, shall provide that the insurance provided to the Additional Insureds is primary and non-contributory, such that no other insurance or self-insured retention carried or held by MTA C&D/MTA shall be called upon to contribute to a loss covered by insurance for the Contractor.
- 5. Breadth of Coverage.** All policies shall provide coverage to the Additional Insureds that is at least as broad as that provided to the first named insured on each policy. In the event that any policy provided in compliance with this contract states that the coverage provided to an Additional Insured shall be no broader than that required by contract, or words of similar meaning, the parties agree that nothing in this contract is intended to restrict or limit the breadth of such coverage. The limits of insurance stated above for each type of insurance are minimum limits only. If design-builder's policy provides greater limits, then the Additional Insureds shall be entitled to, or to share in, the full limits of such policy, and this Contract shall be deemed to require such full limits.
- 6. Cross Liability.** The policies shall contain no cross liability exclusions that apply to the Additional Insureds, and there may not be any restrictions in any policy that limits coverage for a claim brought by an Additional Insured against a named insured.
- 7. Wrap-Up Exclusions.** If Contractor's policies include a controlled insurance program, wrap-up policy or project specific policy exclusion, such exclusion shall be written on ISO endorsement CG 21 54 12 19. If Contractor cannot secure that endorsement, under no circumstances shall its policies include any OCIP or wrap-up exclusionary endorsement(s) that exclude coverage under the policy when a subcontractor is not enrolled in the OCIP or when a claim occurs outside of the OCIP-defined Project site.
- 8. Other Exclusions.** The policies shall contain no Action Over Exclusion; Injury to Contractors or Subcontractors and Their Workers Exclusion; Labor Law Exclusion; Employers Liability Exclusion;

Construction Exclusion; Contractual Liability Exclusion; “Designated States Exclusion,” or “Designated Work Exclusion” (state/location); Classification (codes) Limitation/Scope of Work/Height Exclusions.

- 9. Waiver of Subrogation.** To the fullest extent permitted by law, Contractor will require all insurance policies required in **Article I, Section B. Insurance Requirements** to include clauses stating each insurer will waive all rights of recovery against MTA C&D/MTA. All waivers provided herein shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, or (b) did not pay the insurance premium directly or indirectly, and whether or not such individual or entity has an insurable interest in any property damaged.
- 10. Self-Insured Retentions.** None of the insurance required in **Article I, Section B. Insurance Requirements** shall be subject to any self-insured retention greater than \$500,000 without MTA C&D/MTA written approval.
- 11. Subcontract Agreements.** Contractor shall by appropriate written agreements flow down the requirements for i) the waiver of subrogation for all required insurance, and ii) Additional Insured coverage for all required insurance and iii) other requirements of this Section to all tiers of subcontractors, for all insurance required of such subcontractors by Contractor for the Work.
- 12. No Limitation.** Nothing in this Section shall be construed as limiting in any way the extent to which Contractor may be held responsible for payment of damages resulting from their operations. Contractor’s obligations to procure insurance are separate and independent obligations, and shall not limit Contractor’s contractual indemnity and defense obligations. MTA C&D/MTA does not represent that coverages and limits required in this Contract will necessarily be adequate to protect Contractor.
- 13. Notice of Cancellation or Non-Renewal.** The Contractor agrees to notify MTA C&D/MTA thirty days prior to any cancellation, non-renewal or material change to any insurance policies required in **Article I, Section B. Insurance Requirements**. Such notification shall be submitted to Attention: OCIP Administrator, MTA Risk & Insurance Management, 2 Broadway, 21st Floor, New York NY 10004.
- 14. Notice of Occurrence.** The Contractor shall immediately send to the Office of the General Counsel, MTA Construction & Development (with a copy to the Project Manager), 2 Broadway, 8th Floor, New York, NY 10004, a notice of any occurrence likely to result in a claim against MTA C&D, and shall also file as soon as possible thereafter with the Office of the General Counsel, MTA Construction & Development at the address provided above in this paragraph detailed sworn proof of interest and loss with the claim. Contractor shall cooperate in all respects in securing insurance coverage under the required insurance. This paragraph shall survive the expiration or earlier termination of the Contract.
- 15. Insurance Not in Effect:** If at any time during the period of this Agreement, insurance as required is not in effect or proof thereof is not provided, MTA C&D/MTA shall have the option to: (i) direct the Contractor to suspend Work or operations with no additional cost or extension of time due on account thereof; or (ii) treat such failure as an Event of Default.
- 16. Conformance to Law.** If applicable law limits the enforceability of any of the foregoing requirements, the Contractor shall be required to comply with the foregoing requirements to the fullest extent of coverage and limits allowed by applicable law and the provisions of insurance shall be limited only to the extent required to conform to applicable law.

SECTION D. EVIDENCE OF INSURANCE.

- 1. Submission of Insurance:** Contractor must submit evidence of all required insurance by email to the Contracts Representative.

2. Acceptable Forms of Insurance:

- ACORD 25: Certificate of Insurance
- ACORD 855: NY Construction Certificate of Liability Addendum
- ACORD 28: Certificate of Commercial Property Insurance
- ACORD Binder or Insurance Policy
- Workers' Compensation (Alternative Options):
 - C-105.2 – Certificate of Workers' Compensation Insurance; or
 - U-26.3 – Certificate of Workers' Compensation from the State Insurance Fund; or
 - GSI-105/SI-12 – Certificate of Workers' Compensation Self Insurance; or
 - CE-200 – Attestation of Exemption when Contractor meets the requirements (e.g.) Sole Proprietor

3. Certificate of Insurance - The following minimum details must be referenced on the certificate:

- Policy coverage details (e.g.) policy term, policy number, per occurrence/per project; limits/sub-limits, aggregate limits, deductibles, self-insured retentions, and insurance carrier name and corresponding NAIC #
- Contract Identifier (e.g.) Contract #, RFP #, or Entry Permit #
- Location and Description of Work
- Indemnified parties as an additional insured including primary and noncontributory coverage and waiver of subrogation in favor of MTA C&D/MTA
- Certificate Holder must list MTA C&D/MTA name and address
- Certificate of Insurance must be signed by an authorized insurance representative

4. Endorsements (*where applicable*):

- General Liability Additional Insured (CG 20 10 and CG 20 37) or (CG 20 38 and CG 20 37)
- General Liability - Primary and Non-Contributory CG 20 01 or equivalent
- General Liability – Per Project Aggregate, where applicable
- General Liability – Indemnified Party
- Automobile Liability - MCS 90 and CA 99 48
- Contractor's Pollution – Non-Owned Disposal Site and Transportation Coverage
- Waiver of Subrogation (most recent NCCI/ISO or equivalent as applicable)
- Joint Venture (JV) – If the Contractor/Consultant is a Joint Venture, General Liability Insurance must be provided in the name of the Joint Venture. Alternatively, a Named Insured Endorsement listing the Joint Venture may be accepted.

5. Insurance Binder / Policy (*Applicable to Railroad Protective Liability and Builder's Risk/Installation Floater*).

If a policy is not submitted, the insurance binder must include the following minimum details:

- Policy coverages and details (e.g.) policy term, policy number, limits/sub-limits, aggregate limits, deductibles, self-insured retentions, insurance carrier name and applicable NAIC #
- Contract Number or Entry Permit Number; Designated Contractor; Location and Description of Work

- Indemnified parties as either a named insured or additional named insured
- Binder must be issued and signed by the authorized insurance company or their authorized insurance agent
- Binder may be accepted pending issuance of the policy. Policy must be submitted within 30 days from binder effective date.

6. Not Used

- 7. Renewal Insurance:** The Contractor shall provide renewal or replacement policies of insurance with terms and conditions no less favorable than the expiring coverages. The Contractor must submit evidence of renewal insurance to MTA C&D/MTA.
8. Failure of the MTA C&D/MTA to demand such COIs or other evidence of full compliance with these insurance requirements, or failure of the MTA C&D/MTA to identify a deficiency from evidence provided, will not be construed as a waiver of the Contractor's obligation to maintain such insurance. MTA C&D/MTA acceptance of any COI evidencing the required coverages and limits does not constitute approval or agreement by the MTA C&D/MTA that the insurance requirements have been met or that the insurance policies shown in the COI are in compliance with the requirements.

MTA C&D/MTA has the right, but not the obligation, to prohibit Contractor from entering the Project Site until MTA C&D/MTA receives all COIs or other evidence that insurance has been placed in complete compliance with these requirements.

SECTION E. REQUIRED INDEMNITEES (by Location of Work)

In addition to the entities listed below, the Required Indemnitees shall include those entities designated as Indemnified Parties in the Contract.

☒ **All MTA C&D Agreements (Except 2 Broadway):** MTA Construction & Development (MTA C&D), New York City Transit Authority ("NYCT"), Metro-North Commuter Railroad Company ("MNR"), Long Island Rail Road ("LIRR"), MTA Bus Company ("MTA Bus"), Triborough Bridge & Tunnel Authority ("B&T"), Metropolitan Transportation Authority ("MTA") and its subsidiaries and affiliates, and the City of New York and the state of New York and the respective affiliates and subsidiaries existing currently or in the future of and successors to each Indemnatee or Indemnified Party listed herein.

☐ **2 Broadway Agreements (when Work is done at 2 Broadway):** MTA Construction & Development (MTA C&D), New York City Transit Authority ("NYCT"), Metro-North Commuter Railroad Company ("MNR"), Long Island Rail Road ("LIRR"), MTA Bus Company ("MTA Bus"), Triborough Bridge & Tunnel Authority ("B&T"), Metropolitan Transportation Authority ("MTA") and its subsidiaries and affiliates, and the City of New York (as owner) and the state of New York (state) and the respective affiliates and subsidiaries existing currently or in the future of and successors to each Indemnified Party listed herein, United States Trust Company of New York as Trustee under the 2 Broadway Ground Lease Trust, Two Broadway LLC, ZAR Realty, CBRE, Inc. and any successor thereto as property manager and the respective affiliates and subsidiaries existing currently or in the future of and successors to each indemnified party listed herein.

□48 East 50th St Agreements: MTA Construction & Development (MTA C&D), New York City Transit Authority (“NYCT”), Metro-North Commuter Railroad Company (“MNR”), Long Island Rail Road (“LIRR”), MTA Bus Company (“MTA Bus”), Triborough Bridge & Tunnel Authority (“B&T”), Metropolitan Transportation Authority (“MTA”) and its subsidiaries and affiliates, and the City of New York (as owner) and the state of New York (state) and the respective affiliates and subsidiaries existing currently or in the future of and successors to each indemnified party listed herein, and CBRE, Inc. and any successor thereto as property manager.

□333 West 34th St (BSC) Agreements: MTA Construction & Development (MTA C&D), New York City Transit Authority (“NYCT”), Metro-North Commuter Railroad Company (“MNR”), Long Island Rail Road (“LIRR”), MTA Bus Company (“MTA Bus”), Triborough Bridge & Tunnel Authority (“B&T”), Metropolitan Transportation Authority (“MTA”) and its subsidiaries and affiliates, and the City of New York (as owner) and the state of New York (state) and the respective affiliates and subsidiaries existing currently or in the future of and successors to each Indemnified Party listed herein, BPREP 333 W 34th LLC & CBRE, Inc. and any successor thereto as property manager.

[The MTA Guidelines & Instructions for Submission of Evidence of Insurance and Mocked-up Samples of how to complete the ACORD Certificate forms begin on the next page.]



Guidelines -
Instructions for ACOR



Acord 25
samplev2.pdf



ACORD 101.pdf



Acord 855 NY
Electronic sample fina

ARTICLE II REQUIRED INSURANCE OWNER CONTROLLED INSURANCE PROGRAM (OCIP or WRAP-UP)

SECTION A DEFINITIONS

The following definitions are for the purposes of this Article only.

1. “Owner” is defined as the MTA Construction and Development Company (MTA C&D), the New York City Transit Authority (NYCT), Long Island Rail Road (LIRR), Metro-North Commuter Railroad (MNR), the Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA), the Staten Island Rapid Transit Operating Authority (SIRTOA), the Metropolitan Transportation Authority (MTA), its subsidiaries and affiliates.

Whenever in this Article the approval, consent, concurrence or permission of the Owner is required or authorized (“approval”), the approval of the MTA Risk and Insurance Management Department (MTA RIM) shall be deemed the approval of the MTA C&D, NYCT, LIRR, MNR, MaBSTOA, SIRTOA, the MTA and its subsidiaries and affiliates, as applicable.

2. MTA RIM is defined as Metropolitan Transportation Authority Risk and Insurance Management Department, which is responsible for securing OCIP insurance, administering the OCIP and approving contractor supplied insurance.
3. The term “Insured” or “Named Insured” shall mean Owner, Contractor, any firm retained by Owner as applicable, and Subcontractors at each tier named in a policy or a Certificate of Insurance signed by a duly authorized representative of the Insurer.
4. The term "Insurance Broker" shall mean an individual or organization representing the Owner in soliciting, negotiating or buying coverage and rendering services related to these functions.
5. The term “Insurer” shall mean the insurance carrier providing any or all of the insurance to be provided by Owner under the OCIP.
6. The term “Site” or “Work Site” shall mean the location(s) described or provided in the Contract and any additional locations subsequently approved by the Owner.
7. The Term “Certified Payroll” shall mean a detailed weekly payroll listing, subject to the standard exclusions and provisions of the New York Compensation Manual, of the Contractor and its Subcontractors of each tier, certified by affidavit, showing the hours and days worked by employees at the Site, the employee’s occupation, the hourly wage rate paid, and the supplements paid or provided. The affidavit shall be in the form of United States Department of Labor Statement of Compliance (Budget Bureau Form 44-R1093) or equivalent.
8. The term “OCIP” or “Wrap-up” shall mean Owner provided and paid insurance program with the insurance coverage and limits described in this Article.
9. The Term “Excluded Contractors” shall mean:

- a. Contractor or its Subcontractors not covered by the OCIP following Final Completion (the Warranty Period, as defined in the General Provisions of the Contract, is not covered), termination, or modification of the OCIP; and
 - b. Contractor or its Subcontractors which the Owner has elected to exclude from the OCIP. The following types of contractors and subcontractors are typically excluded: Remediation contractors involved in abatement of lead, asbestos, and hazardous substances; Professional service providers such as architects, engineers, surveyors or testing services; security patrol or guard services; photographers and videographers; and Contractors performing structural demolition involving blasting or any other blasting operations.
10. "Exempted Contractors" shall mean:
- a. Subcontractors whose functions are principally to supply materials, personnel, parts or equipment to and from the Site or which are engaged solely in the delivery, loading, hauling, and/or unloading of material to or from the Site including, but not limited to, hazardous materials transport companies, vendors, suppliers, fabricators, material dealers, drivers, delivery persons, truckers/haulers, equipment rental companies and crane owner/operators; and
 - b. Subcontractors not working at the Site (such as vendors, suppliers, fabricators, material dealers, etc.) and others which occasionally visit the Site.
11. "On-Site Insurance Administrator" is defined as a representative of the Insurance Broker who handles insurance enrollment, claims and other matters relating to the OCIP.
12. "Project Insurance Manual" is the document which details the parameters of the OCIP. The Project Insurance Manual is hereby incorporated by reference into the Contract. The failure of the Owner to physically include the Manual in the Bid/Solicitation Documents shall not relieve Contractor of any of the obligations contained therein.

SECTION B INSURANCE TO BE PROVIDED BY OWNER

- 1. The Owner, prior to the commencement of the Work, will provide and maintain at its own expense, the following insurance coverage for the benefit of the Contractor and Subcontractors performing Work at the Work Site. Except as otherwise provided below, such insurance coverage will continue in force until Final Completion and acceptance of the Work by the Owner (Warranty Period is not covered). Insurance provided by the Owner applies only to operations of and for each Insured at the Site. It does not apply to the operations of any Insured in its regularly established main or branch office, factory, warehouse, or similar place or any other job site. Excluded Contractors and Exempted Contractors will not be covered by the insurance provided by the Owner.
 - a. **Workers' Compensation Insurance** in compliance with the laws of the State of New York, including Employer's Liability Insurance (with limits of not less than \$2,000,000 covering the Owner, Contractor and Contractor's designated Subcontractors for operations performed in connection with the Work at the Work Site). A separate policy will be issued for each Insured. Policies will be renewed and continued until Final Completion and acceptance of the Work, if necessary.

- b. **Commercial General Liability Insurance** (excluding Automobile/Contractor's Pollution Liability and Errors and Omissions), in the Owner's name in the standard ISO CGL occurrence form (CG 00 01 04 13) or its equivalent approved by MTA RIM, with all Contractors and Subcontractors named as Insured and all other Indemnified Parties under the Contract as additional insured. The City of New York is an additional insured only with respect to its interest as landlord of Owner property or as an indemnified party.

(1) **Bodily Injury and Property Damage:**

Total combined per occurrence Limit of Liability for all Insureds is \$3,000,000 subject to a \$6,000,000 per location/project general aggregate capped annually at \$100,000,000 and \$6,000,000 products and completed operations aggregate.

The Contractor will be responsible at its own expense for the first \$25,000 of each occurrence for bodily injury or property damage to the extent losses payable are attributable to Contractor's acts or omissions, or the acts or omissions of its Subcontractor or any other entity or person for whom it may be responsible. This obligation shall remain uninsured by Contractor and will not be covered by the OCIP Insurance Policies. In the event the bodily injury or property damage is the direct result of the Contractor's or Subcontractor's deliberate acts or failure to follow prescribed safety measures, the obligation increases to \$50,000 per each occurrence. Examples include property damage as the result of trespass, intentional destruction of property owned by others, striking a marked or known utility when hand digging to locate that utility is not performed, failure to follow the approved Safe Work Plan, and failure to adhere to safety recommendations issued by Owner.

(2) **Coverage Details:**

Standard Commercial General Liability Form CG 00 01

- Contractual Liability
- Contractual Liability Exclusion, applicable to Work performed within 50 feet of railroad tracks, will be deleted
- Products/Completed Operations – extending 6 years or statute of repose, whichever is shorter, after project completion (The limits for products/completed operations shall apply as a one time separate aggregate limit for the entire extension period.)
- Non-Owned Watercraft (Less than 26 feet in length)
- Notice of Occurrence, Offence or Injury
- Knowledge of Occurrence or Offence
- Joint and Several Amendment
- Total Pollution Exclusion with Hostile Fire Exception (CG 21 55 09 99)

- Other Exclusions Include but not limited to: Asbestos, Lead, NY Silica, Fungi or Bacteria, Exterior Insulation and Finish Systems (EFIS), Nuclear Energy, Professional Liability (CG 22 79 04 13) and Employment Related Practices.
 - This list may not be comprehensive. A comprehensive list of coverage provisions, endorsements, exclusions, and amendments is found in the actual policies.
- c. **Excess Liability Insurance** shall have a limit of \$297,000,000 each occurrence, subject to a \$299,000,000 general aggregate, in excess of the underlying Limits and Terms as set forth in coverage items above. Regardless of the number of Contractors and Subcontractors, on the underlying policies, the total Limit for all of the liability policies shall not exceed \$297,000,000, in the general aggregate and the products/completed operations aggregate. The Excess Policy is extended to “drop down” and becomes primary in the event primary limits or aggregate limits are exhausted. These excess limits are shared with other projects covered under the MTA OCIP Capital Plan Bridge Program.
- (1) The Products and Completed Operations Aggregate is the total amount available for all Insureds for the five-year extension period.
 - (2) The insurance provided under the OCIP will not extend coverage for Products Liability to any Insured, Excluded Contractor, Exempted Contractor, or others for any product manufactured, assembled, or otherwise worked upon away from the Site, unless such manufacturing or assembly is expressly required by the Contract between Owner and Contractor.
- d. **Builders Risk/Installation Floater Insurance Policy** covering the interests of each Insured, including Contractors and Subcontractors, as their interests may appear, in all real and personal property owned, used or intended for use or hereafter created, installed or acquired, including while in the course of building, erection, installation and assembly. Tools owned by mechanics, and machinery, tools and equipment and other personal property of any kind owned, rented or in the care, custody and control of the Contractors and Subcontractors used in the building, erection, assembly and installation will **not** be covered.

Coverage provided by this policy shall be governed by the actual policy language and shall exclude those risks normally excluded from such policies and shall provide limits commensurate with the exposures and as negotiated by the MTA RIM in the amount equal to the value of the Contract price up to a maximum amount of \$100,000,000 per occurrence. The affected Contractor/Subcontractor shall be responsible for the first \$50,000 for each incident where the Contractor/Subcontractor is seeking coverage under this policy, as well as, regarding any occurrence the cause of which is the fault of any Contractor or Subcontractor. (The \$50,000 will not be covered by any OCIP insurance policy.)

SECTION C NOTES AND ADDITIONAL CONDITIONS:

1. Contractor and all Subcontractors will be furnished a copy of certificate of insurance as evidence of coverage.
2. All Premiums for the insurance set forth in **ARTICLE II, SECTION B**, above, will be paid by the Owner, and any and all adjustments, including return premiums and dividends for Workers' Compensation Insurance, General Liability Insurance and Builders All-Risk Insurance shall be paid to and belong to the Owner. Contractor and all Subcontractors will execute any instruments of assignment necessary to permit Owner receipt of these adjustments.
3. Loss, if any, covered by the All Risk Builders Insurance policy is to be adjusted by and payable to the Owner.
4. With respect to Workers' Compensation, Employers' Liability and General Liability, Contractor and all Subcontractors should inform their insurance brokers or agents not to include rating data from Work at the Site in their reporting procedures for the calculation of premiums or otherwise.
5. Waiver of Subrogation - To the extent Contractor or its Subcontractors are Insured under a policy of insurance provided under the OCIP, they each hereby waive their right and the right, if any, of their insurers, to obtain subrogation against others insured by the OCIP. In addition, the OCIP underwriters hereby waive their right of subrogation against the named Insured.
6. The Contractor and Subcontractors shall cooperate with and assist, in every possible manner, the representatives of the Owner, the Insurance Broker and Insurers with respect to:
 - a. Accident Prevention and Claims Procedures.
 - b. The adjustment of all claims arising out of operations within the scope of the Contract, including litigation of such claims.
7. The Contractor and Subcontractors shall cooperate with and assist all insurance companies issuing any of the policies of insurance mentioned above in the preparation of all necessary pertinent payroll audits for the purposes of developing and determining all premiums thereunder and shall keep their records relating to the Contract in such a manner that said records can readily be separated from other work the Contractors and Subcontractors are doing.
8. The Contractor and Subcontractors shall cooperate with any audit and inspection requests.
9. Owner shall have no obligation to provide insurance other than specified in this Article and in the Project Insurance Manual. Contractor/Subcontractors shall review the coverage, limits of liability and insurance policies to satisfy themselves that the coverage meets their needs. Nothing contained herein shall be deemed to place any responsibility on Owner for ensuring that the insurance required herein is sufficient for the conduct of Contractor's or Subcontractor's businesses. Owner assumes no responsibility for providing coverage in excess of the policy limits. Owner reserves the right to furnish other insurance coverage of various types and limits. The furnishing of insurance by Owner through the OCIP shall

in no way relieve or limit or be construed to relieve or limit Contractor or any Subcontractor of any responsibility or obligation whatsoever otherwise imposed by this Article or the Contract, including any indemnity obligation which Contractor or any Subcontractor has to Owner pursuant to other sections of the Contract. Contractor acknowledges that Owner is not an agent, partner or guarantor of the OCIP insurance carriers and is not responsible for any claims or disputes between Contractor and the insurance carriers.

10. While it is the intent of the Owner to keep the OCIP in force until Final Completion and acceptance of the Work, the Owner reserves the right to exclude Contractor or Subcontractor(s) or terminate or modify the OCIP or any portion thereof at any time. To implement this right, the Owner shall provide at least 45 days advance written notice to the Contractor or Subcontractors covered under the OCIP.

In the event Owner elects to terminate or modify the OCIP, the Contractor or affected Subcontractors shall immediately be required to obtain insurance coverage in accordance with Section D of this Article and the reasonable cost of such insurance will be reimbursed by the Owner. If the OCIP is terminated or modified by the Insurer due to the actions or inactions of the Contractor or its Subcontractors, the Contractor or affected Subcontractors shall immediately be required to obtain insurance coverage in accordance with Section D of this Article and the cost of such insurance will be the responsibility of the Contractor or Subcontractors. Written evidence of insurance coverage shall be provided to the OCIP On-Site Administrator, c/o MTA, Risk and Insurance Management Department, 2 Broadway, 21st Floor, New York NY 10004. All insurance secured by Contractor or its Subcontractors pursuant to this Section shall be in policies subject to Owner's reasonable approval as to form, content, limits of liability, cost and issuing company.

11. The Contractor shall incorporate into all subcontract agreements and ensure that its Subcontractors incorporate in subcontract agreements at all tiers all of the relevant provisions regarding Subcontractor requirements and obligations. Contractor shall be responsible for providing each Subcontractor with a copy of the Project Insurance Manual and requiring contractually that each Subcontractor comply with the provisions contained therein and this Article.
12. No Property Insurance Coverage is provided for personal or business property, equipment, and office equipment, owned or used by the Contractor or Subcontractor other than as described herein. In the event the Contractor or Subcontractor maintains such insurance, such insurance shall include an insurer's waiver of subrogation in favor of the Owner.
13. The Contractor and/or Subcontractors may purchase such additional coverage(s) as they deem necessary for their own account, at their own expense and through their own efforts for exposures not covered by the OCIP. Any type, quality or quantity of insurance coverage or increase in limits not provided by the OCIP which the Contractor/Subcontractors require for their own protection or as may be required by applicable law will be the responsibility of each Contractor/Subcontractors at their own expense.
14. The On-Site Insurance Administrator must be promptly notified by the Contractor at the completion of each Subcontractor's Work at the Site.

15. The insurance coverage referred to in this Article is set forth in full in the respective insurance policy forms, and the descriptions of such policies contained in this Article or in the Project Insurance Manual are not intended to be complete or to alter or amend any provision of the actual insurance policies. In matters, if any, in which the description may be conflicting with such instruments, the provisions of the actual insurance policies shall govern.

SECTION D INSURANCE FURNISHED BY EXCLUDED CONTRACTORS:

In addition to the requirements contained in **Article I, Section B. Insurance Requirements** above, each Excluded Contractor, as defined in this Section, shall furnish and maintain in force at all times during this Contract until Final Completion the following policies of insurance for Work at the Site:

1. **Commercial General Liability Insurance** (I.S.O. CG 00 01 04 13 Form or equivalent if approved by the MTA C&D/MTA) in the Contractor's name with limits of liability specifically written for this Contract of not less than \$5,000,000 for each occurrence. The Products/Completed Operations Aggregate Limit for injuries to persons (including death) and damage to property must also be not less than \$5,000,000 for each occurrence. The limits may be provided in the form of a primary policy or combination of primary and umbrella/excess policy. When the minimum contract amounts can only be met when applying the umbrella/excess policy, the umbrella/excess policy must follow form of the underlying policy and be extended to "drop down" to become primary in the event the primary limits are reduced, or aggregate limits are exhausted. Such insurance shall be primary and non-contributory to any other valid and collectible insurance of MTA C&D/MTA and must be exhausted before implicating an available MTA policy.

Such policy should be written on an occurrence form and shall include:

- a. Contractual coverage for liability assumed by the Contractor under this Contract.
- b. Personal and Advertising Injury Coverage.
- c. Products and Completed Operations extending at least one year after Final Completion.
- d. Independent Contractors Coverage
- e. "XCU" coverage (Explosion, Collapse, and Underground Hazards) where necessary.
- f. Contractual Liability Exclusion, applicable to construction or demolition operations to be performed within 50 feet of railroad tracks, must be removed, where necessary and applicable to the Work.
- g. Coverage for claims for bodily injury asserted by an employee of an additional insured must be provided, and any Employer Liability Exclusion which may otherwise operate to exclude such coverage shall be removed; and
- h. Additional Insured Endorsement (I.S.O. Form CG 20 10 and Additional Insured Completed Operations I.S.O. Form CG 20 37 or equivalent

approved by the MTA C&D/MTA) naming the Owner and all other Indemnified Parties under this Contract as additional insured.

2. **Workers' Compensation Insurance** complying with the statutory requirements of the State of New York, covering all employees of the Contractor. Employer's Liability Insurance coverage with limits of not less than \$2,000,000 each accident or disease shall be included. When applicable, the policy shall be endorsed to include the Longshore and Harbor Workers' Compensation Act and/or Maritime Coverage Endorsement (Jones Act Endorsement).
 - a. **Longshore & Harbor Workers' Compensation Act Endorsement** - When Work will be performed on or over navigable waterways, a Longshore and Harbor Workers Endorsement shall be provided to cover the employees for wages, transportation, maintenance and cure, in accordance with applicable laws.
 - b. **Maritime Coverage Endorsement (Jones Act)** - When operations are to be performed upon navigable waterways and barges, Tug Boats, or other vessels on the ocean or on intra-coastal rivers and canals, or when drivers, divers, and underwater personnel are utilized, a Maritime Coverage Endorsement shall be provided to cover the seamen, masters and members of a crew in accordance with applicable laws, providing remedy for damage or injury in the course of employment.

SECTION E NOTIFICATION OF CONTRACT AWARD AND REQUEST FOR INSURANCE

When the Owner advises a successful bidder/proposer of the award of a Contract, the Owner will also notify the Insurance Broker. Notification to the Insurance Broker is required of Contractor and all Subcontractors.

Any Work to be subcontracted by a Contractor must be reported to and approved by the Owner.

1. Contractors and all Subcontractors are required to complete the Contractor Insurance Information and enrollment form and return it to the designated On-Site OCIP Insurance Administrator. Upon receipt of this completed form, the designated On-Site OCIP Insurance Administrator will arrange for and send to the eligible Contractor or eligible Subcontractors:
 - a. A Certificate of Insurance evidencing Workers' Compensation and Employers' Liability coverage. The original policy providing coverage will be sent as soon as practicable.
 - b. A Certificate of Insurance evidencing Commercial General Liability coverage. A copy of the original policy will be provided upon written request.
 - c. A Certificate of Insurance evidencing Umbrella Liability Insurance, if requested.
 - d. A Certificate of Insurance evidencing All Risk Builders Risk Insurance.

SECTION F ADDITIONAL PROVISIONS

1. Contractor and Subcontractors shall not violate or knowingly permit to be violated any conditions of the policies of insurance provided by Owner under the terms of this Article. All requirements and obligations imposed on the Contractor by this Article, the Insurance Manual or the insurance policies referred to herein shall likewise, by Contractor or otherwise, be imposed on, assumed and performed by each of the Subcontractors.
2. The Contractor agrees and will require each Subcontractor to agree to keep and maintain an accurate and classified record of its payroll data and information in accordance with the requirements of the Insurer and as required in the Project Insurance Manual. The Contractor and its Subcontractors agree to permit their books and records to be examined and audited periodically by the Insurer, Owner or their respective representatives. Prior to start of Work, the Contractor shall furnish and cause its Subcontractors to furnish to Owner or its designee, in a form satisfactory to Owner, an estimate of direct labor cost (listed by Standard Workers' Compensation Insurance classification) to be incurred in connection with the Work at the Site, and the total price due each Subcontractor under its contract. Contractor shall provide Owner as requested or required with Payrolls for all on-site labor performed by Contractor and its Subcontractors. "Certified Payrolls" submitted in accordance with the Labor Law will satisfy this requirement as well, provided that additional data needed for insurance audit purposes are included.
3. Contractor shall deliver to the designated On-Site OCIP Insurance Administrator prior to the commencement of the Work, satisfactory evidence of insurance coverage for Contractor on a standard ACORD form or other form as required by Owner. Upon request, copies of the actual insurance policies or renewals or replacements thereof shall be promptly submitted to Owner. All policies of insurance the Contractor or Subcontractor are required to secure and maintain in accordance with this Article will be placed with A.M. Best-rated insurance companies' satisfactory to Owner and shall provide sixty (60) days prior written notice of cancellation, non-renewal or reduction of coverage. Contractor will be responsible to pay all insurance premiums including any charges for required waivers of subrogation or the endorsement of Additional Insureds. All Insurance furnished by Contractor or its Subcontractors will be in full force and effect during Contractor's performance under the Contract or as otherwise required by the Contract. The coverage and limits of insurance required in this Article will not be construed as a limitation of liability to Owner or in any way modify the Contractor's or its Subcontractor's obligations to indemnify Owner pursuant to this Article or elsewhere in the Contract. Contractor's failure to deliver satisfactory evidence of coverage shall not be construed as a waiver of Contractor's obligation to provide the required insurance coverage. Contractor shall be responsible for obtaining satisfactory evidence of insurance coverage from each of its Subcontractor's prior to commencement of Subcontractor's Work.
4. Nothing contained in this Article shall relieve the Contractor and its Subcontractors of their respective obligations to exercise due care in the performance of their duties in connection with the Work and complete the Work in strict compliance with the Contract.

The term “Contractor” as used in this document shall refer to any third party entering into a contract (“Contract”) with MTA Construction & Development Company (“MTA C&D”) acting on behalf of the Metropolitan Transportation Authority (“MTA”). MTA C&D, MTA and the Operating Agency, as defined below, are referred to herein collectively as MTA. As such, the term “Contractor” may encompass, without limitation, Contractor, Consultant or Design-Builder. The term “Work” as used in this document shall refer to all work or services of the Contractor in connection with such Contract. The term “Operating Agency” shall mean the agency or agencies indicated in Section F below.

The Contractor shall procure at its sole cost and expense, and shall maintain at all times during the term of this Contract through Final Completion, including any warranty period if applicable, and for such longer period of time if specified, such policies of insurance as herein set forth. The Contractor shall furnish MTA satisfactory proof of coverage with classes of insurance and limits as required in **Section A. Insurance Schedule** and described in Section **B. Insurance Coverages**.

SECTION A. INSURANCE SCHEDULE:

<u>INSURANCE TYPE</u>		<u>MINIMUM AMOUNTS</u>	
<input checked="" type="checkbox"/>	Workers’ Compensation / Employer’s Liability	\$	Statutory Limits / \$1,000,000
<input checked="" type="checkbox"/>	Commercial General Liability	\$	2,000,000
<input checked="" type="checkbox"/>	- General Aggregate (Per Project)	\$	4,000,000
<input checked="" type="checkbox"/>	- Products/Completed Operations Aggregate	\$	4,000,000
<input checked="" type="checkbox"/>	Business Automobile Liability	\$	5,000,000
<input checked="" type="checkbox"/>	Umbrella/Excess Liability	\$	298,000,000
<input checked="" type="checkbox"/>	- Aggregate	\$	298,000,000
<input checked="" type="checkbox"/>	Contractor’s Pollution Liability	\$	5,000,000
<input checked="" type="checkbox"/>	Builder’s Risk/Installation Floater	\$	Total Contract Cost
<input checked="" type="checkbox"/>	Professional Liability	\$	15,000,000
<input type="checkbox"/>	Valuable Papers		
<input type="checkbox"/>	Technology Errors & Omissions	\$	
<input type="checkbox"/>	Cyber and Privacy Liability	\$	
<input type="checkbox"/>	Protection & Indemnity	\$	
<input type="checkbox"/>	Railroad Protective Liability	\$	
<input type="checkbox"/>	Other:	\$	

SECTION B. INSURANCE COVERAGES:

1. Workers' Compensation Insurance as required by statute in the state in which the Work will be performed. Employer's Liability Insurance with limits not less than the amount set for in **Section A. Insurance Schedule** for bodily injury per accident; bodily injury per disease; and annual aggregate. For work conducted outside the State of New York, Employer's Liability Insurance limits shall not be less than \$2,000,000 bodily injury per accident; \$2,000,000 bodily injury per disease; and \$2,000,000 annual aggregate and must provide proof that its Workers' Compensation Insurance policy has been endorsed to include "Other States Coverage".

- If Contractor leases one or more employees through the use of a payroll, employee management, or other similar company, then Contractor must procure worker's compensation insurance written on an "if any" policy form, including an endorsement providing coverage for alternate employer/leased employee liability.
- If the Work will involve, in whole or in part, work or operations on the navigable waters of the United States or on a flagged vessel, then Contractor shall obtain coverage pursuant to the Jones Act and/or the Longshoremen's and Harbor Worker's Compensation Act as applicable.

2. Commercial General Liability Insurance covering claims for personal and advertising injury, bodily injury (including death) and property damage arising out of the Work and in a form providing coverage as broad as the ISO Commercial General Liability Insurance policy (Occurrence Form, number CG 00 01). Such insurance shall be written specifically for this contract and provide coverage for all operations including the products-completed operations hazard, to be maintained for a period of at least five (5) years after Final Completion, subject to the limitation of any applicable statute. The limits of such insurance shall renew annually and not be less than the amount set forth in **Section A. Insurance Schedule**.

The policy shall also comply with the following provisions:

- Primary General Liability limits may not be satisfied by umbrella / excess liability insurance;
- Policy shall include independent contractor and contractual liability coverages;
- The policy shall not contain any contractual exclusion relative to labor laws or any other exclusions or limitations directed toward any types of projects, materials or processes involved in the Work;
- The policy shall not contain any of the following: action over exclusion; injury to contractor or subcontractors and their workers exclusion; construction exclusion; construction defect exclusion; "designated states exclusion," or "designated work exclusion" (state/location); classification (codes) limitation/scope of work/heights exclusions; leased worker exclusion; crane exclusion; demolition exclusion or "explosion, collapse and underground" exclusion;

- The policy shall not contain cross liability exclusions that apply to the additional insureds, and there may not be any restrictions in any policy that limits coverage for a claim brought by an additional insured against a named insured;
- Coverage shall contain no provision that would prevent, preclude or exclude any claim or loss involving bodily injury or physical damage resulting from a cybersecurity incident;
- Coverage shall contain no provision that would prevent, preclude or exclude any claim or loss involving bodily injury or physical damage resulting from an unmanned aircraft or drone incident, where applicable;
- Construction work taking place within 50 feet of a railroad must include:
 - Contractual Liability – Railroads CG 24 17 listing the Scheduled Railroad and Designated Job Site.
 - Coverage for claims for bodily injury asserted by a railroad employee of an additional insured and any employer’s liability exclusion which may otherwise operate to exclude such coverage shall be removed.
- For Design Build Contracts, the policy shall also include:
 - “Project specific” coverage
 - Contractors Limited Professional coverage – CG 22 79

3. Business Automobile Liability Insurance covering any owned, non-owned, or hired vehicles, whether on or off-site, for claims arising out of the ownership, maintenance or use of any such vehicle. The policy shall be extended to include employees of any insured acting in the scope of their employment. Such insurance shall provide coverage as broad as the standard ISO Comprehensive Automobile Liability policy (CA 00 01, CA 00 05, CA 00 12, CA 0020), with limits not less than the amount set forth in **Section A. Insurance Schedule** for each accident on a combined single limit. If the Work involves transportation of hazardous or regulated substances, hazardous or regulated wastes and/or hazardous or regulated materials, Contractor shall provide pollution auto coverage equivalent to that provided under the ISO pollution liability-broadened coverage for covered autos endorsement (CA 99 48) and the Motor Carrier Act endorsement (MCS 90). Any statutorily required “No-Fault” benefits and uninsured/underinsured motorist coverage shall be included.

4. Umbrella/Excess Liability Insurance with limits not less than the amount set forth in **Section A. Insurance Schedule**, written on an occurrence basis in excess of the limits for commercial general liability, employer’s liability, and business automobile liability insurance *which is at least as broad as each of the underlying policies*. The umbrella/excess liability policies shall be written on a “drop-down” and “follow form” basis, with only such exceptions expressly approved by MTA.

5. Contractors Pollution Liability Insurance with limits not less than the amount set forth in **Section A. Insurance Schedule** per occurrence and general aggregate on a per project basis including completed operations coverage to be maintained for at least five (5) years after final completion of the work. Policy shall cover environmental damage resulting from pollution conditions that arise from the operations of the contractor or subcontractor, as applicable, and described under the scope of services of this contract. Coverage must apply to sudden and non-sudden pollution conditions including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes,

acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants, silt or sediment into or upon land, the atmosphere or any watercourse or body of water, provided such conditions are not naturally present in the environment in the concentration or amounts discovered, unless such natural condition (s) are released or dispersed as a result of the Work. Such insurance shall include but not be limited to:

- Bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death; and medical monitoring
- Physical injury to or destruction of tangible property of parties other than the Insured including the resulting loss of use and diminution in value thereof; Loss of use, but not diminution in value, of tangible property of parties other than the Insured that has not been physically injured or destroyed
- Natural resource damages
- Cleanup costs
- Transportation and non-owned disposal site coverage (with no sunset clause/restricted coverage term) if Contractor or subcontractor is disposing of contaminated material (s)
- No exclusions for asbestos, lead paint, silica or mold/fungus/legionella
- Defense including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages

6. Professional Liability Insurance covering damage for liability arising out of any negligent act, error, or omission in the rendering of or failure to render professional services by the Contractor and any partner, subcontractor or consultant of the Contractor including but not limited to construction / project management, architectural, engineering, specifications, installation, modification, abatement, replacement or approval of products, materials or processes containing pollutants, and the failure to advise of or detect the existence or the proportions of pollutants and/or surveying services, and/or any party whose work involves the preparation of plans or drawings, with limits not less than the amount set forth in **Section A. Insurance Schedule** per claim and annual aggregate. Such policy shall not contain any exclusions directed toward any types of projects, materials, services, or processes involved in the work. The retroactive date for coverage will be no later than the commencement of professional services of the project and shall be maintained for a period of at least three (3) years after completion of the professional services, subject to the limitation of any applicable statute. In the event of cancellation or non-renewal, the discovery period for insurance claims will be at least three (3) years or otherwise as by agreement with MTA. The policy shall also include the following coverages, when applicable:

- Construction Management must be listed as a Professional Service covered by the policy without being subject to limitation by a specific definition (for Construction Managers only)
- Technology Services must be listed as a covered service with respect to BIM hosting and management responsibilities (Projects utilizing BIM)
- Limited contractual liability and defense costs for MTA.

- For Design Build Contracts, the policy must include:
 - “Project Specific” coverage
 - “Indemnified Party Endorsement” covering MTA for liabilities, damages, and attorneys’ fees and related cost due to any claim asserted by a third-party against MTA.

7. Valuable Papers and Records Insurance covering the cost to repair or replace with like kind and quality including the cost of gathering and/or assembling information, with limits of liability not less than the amount set forth in **Section A. Insurance Schedule**. MTA shall be named as loss payee as their interests may appear and all rights of subrogation against MTA and their agents or assigns shall be waived.

8. Builder’s Risk / Installation Floater Insurance written on a primary replacement cost basis and completed value or reporting form in an amount equal to the total contract costs as set forth in **Section A. Insurance Schedule**. *[If the project does not involve new or major reconstruction, an **Installation Floater** may be acceptable for the improvement, remodel, modification, alteration, conversion or adjustment to existing buildings, structures, processes, machinery and equipment. When work involves installation of equipment, the policy limit may be equal to the replacement cost of the highest inventory value being repaired or worked on at any one time.]* Said policy shall not contain a coinsurance provision. The Contractor shall be the First Named Insured and subcontractors of all tiers as Insureds. All premium considerations and deductibles are the sole responsibility of the Contractor. The Operating Agency, MTA C&D and MTA must be listed, each individually, as Additional Named Insureds and Loss Payees. The Loss Payees shall have full power to adjust and settle all losses and claims in collaboration with the Contractor. Insurance shall be in force until the Work is completed and accepted by MTA.

The Policy shall be on an “all-risk” policy form, covering any and all real and personal property including without limitation, coverage for terrorism, flood and earthquake, insuring against the perils of fire (with extended coverage) and physical loss or damage including without duplication of coverage, theft, vandalism, mold, glass breakage, malicious mischief, collapse, falsework, temporary buildings, testing and startup. Coverage shall include all below and above ground structures, water and sewer mains, for property damage to any building, structure, machinery, equipment, material and supplies impaired, broken, repaired, damaged or destroyed (including owner provided material, equipment and cost of owners dedicated project support labor), used or intended for use including while in the course of construction, building, erection, installation and assembly or acquired provided such property is intended to be permanently located in or on the building or structure. Subcontractors’ temporary structures, tools, equipment and other materials not to become a permanent part of the completed structure are excluded from coverage. MTA shall not be responsible for such loss, theft, or disappearance of tools or equipment. Coverage shall extend to include reasonable compensation for Architect’s and Contractor’s services and expenses required as a result of such insured loss.

The policy shall also include the following coverages:

- Natural disasters such as flood, windstorm, and earth movement (including but not limited to earthquake, landslide, earth sinking, rising or shifting, volcanic eruption, explosion or effusion and all naturally occurring or due to man-made or other artificial causes);
- Contractors expediting expense and extra expense;
- Coverage extensions addressing changes in law, ordinance or regulation and increased cost of construction;
- Resultant damage including amendment of exclusions (if necessary) pertaining to error in design, plans and or faulty workmanship;
- Loss valuation - Coverage shall be provided on a “Replacement Cost” basis with a policy modification to cover all cost to repair or replace the structure or work (including overhead and profits) and based on replacement cost calculations at the 'time of repair or replacement';
- Materials and equipment stored offsite and while in transit. The minimum limit of insurance shall be equal to the maximum storage value at the largest storage location considering the value of all material or equipment located at the off-site storage location. A separate limit shall be applicable to material and equipment while in transit which represents the maximum value of the material or equipment in any one transit conveyance;
- Beneficial occupancy - The policy must permit partial or beneficial occupancy prior to the final acceptance of the work;
- Debris removal equal to a minimum sum insured representing 25% of the replacement cost of the project;
- Equipment breakdown coverage / hot testing coverage shall be included in the policy providing coverage during installation and testing operations including but not limited to performance testing of any machinery, equipment, electrical apparatus, traction power systems, signal systems and associated controls etc.;
- For Design Build contracts, policy shall include the coverage extension – London Engineering Group – Improvement Consequences – aka – “LEG” or equivalent.

Evidence of Builder’s Risk/Installation Floater Insurance requires submission of the policy and approval is conditioned upon MTA’s review of the final policy form. A binder may be accepted pending issuance of the policy. Policy must be submitted within 30 days from binder effective date.

9. Technology Errors and Omissions Insurance coverage for liability from errors, omissions or negligent acts in rendering or failing to render computer or information technology services and technology products including bodily injury. Coverage for violation of software copyright shall be included and shall cover the failure of products to perform the intended function or serve the intended purpose. Services insured shall include, as applicable:

- Systems analysis
- Systems programming
- Data processing
- Systems integration
- Outsourcing including outsourcing of development and design work
- Systems design, consulting, development and modification
- Training services relating to computer software or hardware
- Management, repair and maintenance of computer products, networks and systems
- Marketing, selling, servicing, distributing, installing and maintaining computer hardware or software
- Data entry, modification, verification, maintenance, storage, retrieval or preparation of data output.

The policy shall not contain a provision that would prevent, preclude or exclude liability triggered by or connected to a network failure, system failure or the disclosure of private information. Coverage under the policy shall extend to actual or alleged acts, errors or omissions committed by Contractor or its agents, subcontractors, independent contractors or employees.

The policy shall be on a per occurrence basis with limits not less than the amount set forth in **Section A. Insurance Schedule**. If the policy is subject to an aggregate limit, replacement insurance will be required if the aggregate is exhausted. Contractor shall be responsible for all claim expenses and loss payments. If insurance is provided on a claims-made basis, Contractor must maintain continuous coverage during the term of the Contract and include the following:

- Policy retroactive date coincides with or precedes Contractor's start of provision of services under the Agreement and shall continue until the termination of the Agreement (including subsequent policies purchased as renewals or replacements);
- Policy allows for reporting of circumstances or incidents that might give rise to future claims; and
- If insurance is terminated for any reason, Contractor agrees to purchase an extended reporting provision of at least two (2) years to report claims arising from services performed in connection with the Agreement.

10. Cyber and Privacy Liability Insurance Covering MTA's proprietary information or the personally identifiable information of MTA employees, customers or other third parties in an electronic format, or impacts systems where such information is stored, processed, analyzed, or transmitted. The Contractor shall maintain coverage for costs, expenses, lost revenues, fines, penalties, losses, settlements, and/or consent decrees, if applicable, related to the following:

- Liability resulting from the actual or suspected disclosure, unauthorized access, destruction, loss, alteration, misappropriation, or unlawful acquisition of commercial and/or personally identifiable information that is deemed confidential

by MTA or is otherwise considered to be confidential or protected from disclosure by law or agreement, and shall extend to include indemnification of MTA's investigation, notification, regulatory response, and remedial action costs, including attorney's fees, in the event of an actual or alleged security or data breach, whether or not required by statute; including alleged theft of data in any form;

- System failure or interruption and related costs, liabilities, and lost revenues, with a waiting period of no more than 8 hours;
- Information security incidents, including but not limited to, social engineering, phishing, fraudulent transfer, ransomware, denial of service attacks, or transmission of malicious code;
- Liability resulting from actual or suspected disclosure, unauthorized access, destruction, loss, alteration, misappropriation, or unlawful acquisition of electronic information and electronic assets or liability for economic harm suffered by others from an actual, suspected, or alleged failure of Contractor's computer or network security, whether the attack originated internally or externally;
- Defense of any regulatory action, litigation, or other actual or anticipated adversarial proceeding involving an alleged breach of privacy, confidentiality, integrity or availability of information and shall extend to include investigation expenses, including legal counsel, a crisis communications firm and computer forensic/cybersecurity experts, and indemnification for fines, penalties, liability, and any other resulting costs;
- Retaining a computer forensic/cybersecurity incident response firm;
- Retaining a crisis communications firm;
- Hardware replacement;
- Software replacement;
- Data asset protection and the costs to recollect, restore, or recreate electronic data, software or other applications that have been altered, corrupted, destroyed, deleted, or damaged by a computer attack;
- The cost of notifying individuals, government agencies, credit reporting agencies, and other entities of a security or data breach;
- The cost of credit monitoring services, call center services, and any other causally related crisis management services and expenses for up to two (2) years to support those affected;
- Cyber extortion threats or extortion relating to an actual or alleged breach of computer security and or actual or alleged release of confidential information;
- Coverage shall contain no provision that would prevent, preclude or exclude a claim triggered by or connected with an actual or suspected act of cyber terrorism, cyberwar, or hostilities between/among nations. Coverage shall contain no provision that would prevent coverage based upon the reasonableness of information security efforts;
- Coverage shall contain no provision that would prevent, preclude or exclude any claim or loss triggered by or connected with an alleged breach of any privacy policy or of any contractual obligation with MTA;
- Coverage shall contain no provision that would prevent, preclude or exclude any claim or loss involving employee-owned computer or mobile devices used in furtherance of the Contractor's or MTA's business;

- Coverage shall contain no provision that would prevent, preclude or exclude loss for physical or bodily injury if such physical or bodily injury arises out of mental anguish, mental injury, shock, humiliation, or emotional distress;
- Coverage under the policy shall extend to actual or alleged acts, errors or omissions committed by Contractor or its agents, subcontractors, independent contractors or employees;
- Coverage shall contain language specifying that any consent required from the insurer shall not be unreasonably withheld;
- Coverage shall contain severability for the insured organization for any intentional act exclusions and shall include consequential or vicarious liabilities and direct losses for the wrongful acts or failures of Contractor and of MTA. Additionally, such policy shall cover consequential or vicarious liabilities and direct losses; and
- This coverage shall have the “Insured v. Insured” exclusion amended to allow an “Additional Insured” to bring a claim against the Named Insured.

The policy shall be on a per occurrence basis with limits not less than the amount set forth in **Section A. Insurance Schedule**. If the policy is subject to an aggregate limit, replacement insurance will be required if the aggregate is exhausted. Contractor shall be responsible for all claim expenses and loss payments. If any insurance coverage part is provided on a claims-made basis, Contractor must maintain continuous coverage during the term of the Contract and include the following:

- Policy retroactive date coincides with or precedes Contractor’s start of services under the Contract and shall continue until the termination of the Contract (including subsequent policies purchased as renewals or replacements);
- Policy allows for reporting of circumstances or incidents that might give rise to future claims;
- No bar to coverage due to untimely notice unless the insurer has suffered actual prejudice due to such untimely notice; and
- If insurance is terminated for any reason, Contractor agrees to purchase an extended reporting provision of at least two (2) years to report claims arising from services performed in connection with the Contract.

11. Protection & Indemnity Insurance covering all marine hazards and injuries to crew members (if not provided through other insurance) when any watercraft such as boats or barges are used. Coverage must include bodily injury to passengers, third parties and property damage to wharves, piers and other structures and loss or damage to other vessels not caused by collision. Policy shall have limits not less than the amount set forth in **Section A. Insurance Schedule**.

12. Railroad Protective Liability Insurance (*Applicable for Work in the State of CT*) when work is within 50 feet of a railroad, subway or similar tracked conveyance or requires flag or protective measures by MTA or its subsidiaries and affiliates or their respective employees. Policy shall be issued on a per occurrence basis (ISO/RIMA CG 0035 or equivalent) with limits not less than the amount set forth in **Section A. Insurance Schedule**. The policy shall cover the work to be performed at the

designated job site for damages arising out of bodily injury or death, physical damage to or destruction of property, including damage to the Insured's own property and conforming to the following:

- Policy shall name the Operating Agency, MTA C&D, and MTA as "Named Insureds."
- Policy must be endorsed to provide coverage for claims arising from injury to railroad employees covered by Federal Employer's Liability Act (FELA).
- Policy must indicate the name and address of the designated contractor, job location and description of work, and Contract number.

SECTION C. GENERAL INSURANCE REQUIREMENTS.

The following requirements are applicable to all insurance coverages required under this Contract, except to the extent otherwise indicated.

- i. **Insurer Requirements.** All policies of insurance shall be placed with insurers acceptable to MTA. The insurance underwriter (s) must be duly licensed or approved Surplus Lines insurer in the state where the Work is to be performed and must have a financial rating of A-/VIII or better in the most recent edition of AM Best's Key Rating Guide or otherwise satisfactory to MTA.
- ii. **Insurance Policies.** The Contractor shall furnish certified copies of all insurance policies required to be maintained under this Contract within ten (10) business days after receiving MTA's request.
- iii. **Breadth of Coverage.** All policies (*except for Workers' Compensation and Professional Liability, unless otherwise noted*) shall provide coverage to the Additional Insureds, as defined below, that is at least as broad as that provided to the first named insured to each policy. In the event that any policy provided in compliance with this Contract states that the coverage provided to an additional insured shall be no broader than that required by Contract, or words of similar meaning, the parties agree that nothing in this Contract is intended to restrict or limit the breadth of such coverage. The limits of insurance stated for each type of insurance are minimum limits only. If the Contractor's policy provides greater limits, then the Additional Insureds shall be entitled to, or to share in, the full limits of such policy, and this Contract shall be deemed to require such full limits.
- iv. **Right to Request Additional Insurance.** Upon direction by MTA, the limits of coverage amounts may be increased, or additional types of insurance may be required if reasonable and appropriate.
- v. **Additional Insureds.** *All insurance (except for Workers' Compensation and Professional Liability, unless otherwise noted) required under Sections A and B shall name the parties listed in Section E as Additional Insureds* and shall include their respective subsidiary and affiliated companies, their Boards of Directors, officers, employees, representatives, and agents (hereinafter, collectively the "Additional Insureds"). For Commercial General Liability Insurance, additional insured coverage must be provided on ISO forms or their equivalent and shall be at least as broad as CG 20 10 /CG 20 38 and CG 20 37. No other General Liability Additional Insured endorsement will be accepted unless approved by MTA.
- vi. **Primary and Non-Contributory.** Each policy required, including primary, excess, and/or umbrella, shall provide that the insurance provided to the Additional Insureds is primary and non-contributory, such that no other insurance or self-insured retention carried or held by MTA shall be called upon to contribute to a loss covered by insurance for the named insured.
- vii. **Waiver of Subrogation.** To the fullest extent permitted by law, Contractor will require all insurance policies to include clauses stating each insurer will waive all rights of recovery. All waivers provided herein shall apply to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification,

contractual or otherwise, or (b) did not pay the insurance premium directly or indirectly, and whether or not such individual or entity has an insurable interest in any property damaged.

- viii. Self-Insured Retentions. None of the insurance required shall be subject to any self-insured retention greater than \$500,000 without approval by MTA.
- ix. Subcontract Agreements. Contractor shall by appropriate written agreements flow down the requirements for (i) waiver of subrogation (ii) additional insured coverage and (iii) other requirements of this Section to all tiers of subcontractors, for all insurance required of such subcontractors by Contractor for the Work.
- x. No Limitation. Nothing contained in the Insurance Requirements shall be construed as limiting in any way the extent to which Contractor may be held responsible for payment of damages resulting from their operations. Contractor's obligations to procure insurance are separate and independent of and shall not limit Contractor's contractual indemnity and defense obligations. MTA does not represent that coverages and limits required in this Contract will necessarily be adequate to protect Contractor.
- xi. Notice of Cancellation or Non-Renewal. The Contractor agrees to notify MTA thirty (30) days prior to any cancellation, non-renewal or material change to any insurance policies required. Notice shall be sent electronically to the "*designated*" email address assigned to this contract via the MTA Certificate of Insurance Management System (CIMS), ComplianzTM.
- xii. Notice of Occurrence. The Contractor shall immediately send to MTA C&D's General Counsel (with a copy to the Project Manager), 2 Broadway, 8th Floor, New York, NY 10004, a notice of any occurrence likely to result in a claim against MTA, and shall also send to the General Counsel detailed sworn proof of interest and loss with the claim. This paragraph shall survive the expiration or earlier termination of the Contract.
- xiii. Insurance Not in Effect: If, at any time during the period of this Contract, insurance as required is not in effect, or proof thereof is not provided to MTA, MTA shall have the options to: (i) direct the Contractor to suspend work or operation with no additional cost or extension of time due on account thereof; or (ii) treat such failure as an Event of Default.
- xiv. Conformance to Law. If applicable law limits the enforceability of any of the foregoing requirements, then Contractor shall be required to comply with the foregoing requirements to the fullest extent of coverage and limits allowed by applicable law and the provisions of insurance shall be limited only to the extent required to conform to applicable law.

SECTION D. EVIDENCE OF INSURANCE.

1. **Insurance Submission.** Prior to contract award, the Contractor must submit initial evidence of all required insurance to the Contracts Representative.
2. **Insurance Compliance.** After the Contractor's insurance has been approved, a "compliant message" will be sent to the Contractor via the MTA Certificate of Insurance Management System (CIMS), the Complianz™. This message will also include a "designated" email address for submission of all insurance renewals, specific to this Contract. The Contractor shall endeavor to provide renewal or replacement policies of insurance two (2) weeks from the policy expiration date with terms and conditions no less favorable than expiring.
3. **Insurance Confirmation.** MTA's acceptance of any certificate of insurance evidencing the required coverages and limits does not constitute approval or agreement by MTA that the insurance requirements have been met or that the insurance policies shown in the certificate of insurance are compliant with these requirements. Failure of MTA to demand such certificates of insurance or other evidence of full compliance with these insurance requirements, or failure of MTA to identify a deficiency from evidence provided, will not be construed as a waiver of the Contractor's obligation to maintain such insurance.
4. **Non-Compliant Insurance.** MTA has the right of prohibiting the Contractor from entering the Project Site until MTA receives all certificates of insurance or other evidence that insurance is compliant.

5. Proof of Insurance:

a. Acceptable Forms

- ACORD 25: Certificate of Insurance
- ACORD 855: NY Construction Certificate of Liability Addendum
- ACORD 28: Certificate of Commercial Property Insurance
- ACORD Binder or Insurance Policy
- Workers' Compensation:
 - C-105.2 – Certificate of Workers' Compensation Insurance; or
 - i. U-26.3 – Certificate of Workers' Compensation from the State Insurance Fund; or
 - ii. GSI-105/SI-12 – Certificate of Workers' Compensation Self Insurance; or
 - iii. CE-200 – Attestation of Exemption when Contractor meets the requirements (e.g.) Sole Proprietor

b. Certificate of Insurance - The following minimum details must be referenced on the certificate:

- Policy coverage details (e.g.) policy term, per occurrence/per project; limits/sub-limits, aggregate limits, deductibles, self-insured retentions, insurance carrier name and corresponding NAIC #
- Contract Identifier (e.g.) Contract #, RFP #, or Entry Permit #
- Location and Description of Work

- Additional Insureds listed in Section E including primary and noncontributory coverage and waiver of subrogation in favor of MTA
- Certificate Holder must list MTA
- Certificate of Insurance must be signed by an authorized insurance representative

c. Endorsements (*where applicable*):

- General Liability Additional Insured (CG 20 10/CG 20 38 and CG 20 37)
- General Liability - Primary and Non-Contributory CG 2001 or equivalent
- General Liability - Per Project Aggregate (CG 25 03 or equivalent)
- General Liability - Contractors Limited Professional (CG 22 80 or equivalent)
- Professional Liability – Indemnified Party
- Business Automobile Liability - Additional Insured, MCS 90 and CA 99 48
- Contractor’s Pollution Liability - Additional Insured, Non-Owned Disposal Site and Transportation Coverage
- Waiver of Subrogation (most recent NCCI/ISO or equivalent as applicable)
- Primary and Non-Contributory

d. Insurance Binder / Policy (*Applicable to Railroad Protective Liability and Builder’s Risk/Installation Floater*)

An insurance binder must include the following minimum details:

- Policy coverages and details (e.g.) policy term, limits/sub-limits, aggregate limits, deductibles, self-insured retentions, insurance carrier name and applicable NAIC #
- Contract number or entry permit number; designated contractor; location and description of Work
- The Operating Agency, MTA C&D, and MTA must be listed as Named Insureds.
- Binder must be issued and signed by the authorized insurance company or their authorized insurance agent
- Binder may be accepted pending issuance of the policy. Policy must be submitted within 30 days from binder effective date.

e. Joint Venture:

Evidence of General Liability and Umbrella/Excess Liability insurance must be submitted in the name of the Joint Venture. Alternatively, each Joint Venture Party may submit separate insurance covering the Joint Venture as a Named Insured.

SECTION E. ADDITIONAL INSUREDS

All entities listed following each checked box below shall be Additional Insureds.

☒ **1. MTA C&D**

MTA Construction & Development Company (“MTA C&D”), New York City Transit Authority (“NYCT”), Metro-North Commuter Railroad Company (“MNRR”), The Long Island Rail Road Company (“LIRR”), MTA Bus Company (“MTA Bus”), Triborough Bridge and Tunnel Authority (“TBTA”), Metropolitan Transportation Authority (“MTA”) and its subsidiaries and affiliates, their Boards of Directors, officers, employees, representatives, and agents, the State of New York, and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☐ **2. NYCT**

New York City Transit Authority (“NYCT”), Manhattan and Bronx Surface Transit Operating Authority (“MaBSTOA”), Staten Island Rapid Transit Operating Authority (“SIRTOA”), Metropolitan Transportation Authority (“MTA”) including its subsidiaries and affiliates, MTA Construction & Development Company (“MTA C&D”), MTA Bus Company (“MTA Bus”), and the City of New York (“City” as Owner) and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☐ **3. MTA BUS**

MTA Bus Company (“MTA Bus”), MTA Construction & Development Company (“MTA C&D”), Metropolitan Transportation Authority (“MTA”), including its subsidiaries and affiliates, State of New York, City of New York, PBS Capital LLC, MIU Realty, LLC, JLK Capital, LLC, Green Bus Holding Corp., Jamaica Bus Holding Corp., Triboro Coach Holding Corp. and New York Bus Services and its affiliates and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☐ **4. TBTA**

Triborough Bridge and Tunnel Authority (“TBTA”), MTA Construction & Development Company (“MTA C&D”), Metropolitan Transportation Authority (“MTA”) and its subsidiaries and affiliates and the State of New York and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☒ **5. LIRR**

Long Island Rail Road (“LIRR”), MTA Construction & Development Company (“MTA C&D”), Metropolitan Transportation Authority (“MTA”) and its subsidiaries and affiliates and New York & Atlantic Railway Company (when applicable) Anacostia Rail Holdings and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed in this paragraph and subparagraphs 5.a – 5.e below.

Additional entities based on location of work:

☐ **a. Penn Station**

National Railroad Passenger Corp. (“Amtrak”), NJ Transit Corporation, and NJ Transit Rail Operations, Inc.

☐ **b. West Side Yard**

National Railroad Passenger Corp. (“Amtrak”), NJ Transit Corporation, NJ Transit Rail Operations, Inc., Consolidated Rail Corporation and CSX Transportation Inc., and Triborough Bridge and Tunnel Authority (“TBTA”).

☐ **c. Sunnyside Yard**

National Railroad Passenger Corp., (“Amtrak”), NJ Transit Corporation, NJ Transit Rail Operations, Inc. and New York & Atlantic Railway Company (when applicable).

☐ **d. Jamaica**

Port Authority of NY & NJ.

☐ **e. Moynihan Train Hall**

☒ **6. MNRR**

Metro-North Railroad (“MNRR”), MTA Construction & Development Company (“MTA C&D”), and Metropolitan Transportation Authority (“MTA”) and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein

Additional entities based on location of work:

☐ **a. Grand Central Terminal**

Midtown Trackage Ventures LLC, the State of Connecticut, Connecticut Department of Transportation (“CDOT”), Jones Lang LaSalle Americas, Inc./LPI (when applicable), and the respective affiliates and subsidiaries existing currently or in the future of and successors to each entity listed in this paragraph 6.a.

☐ **b. Hudson Line**

Midtown Trackage Ventures LLC, State of Connecticut and Connecticut Department of Transportation (“CDOT”), National Railroad Passenger Corp (“AMTRAK”), CSX Transportation, Inc. & New York Central Lines, LLC, and Delaware & Hudson Railway Company Inc. (“D&H”), LAZ Parking New York/New Jersey, LLC (where applicable) and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☐ **c. Harlem Line**

Midtown Trackage Ventures LLC, State of Connecticut and Connecticut Department of Transportation (“CDOT”), CSX Transportation Inc. and New York Central Lines, LLC, LAZ Parking New York/New Jersey, LLC (where applicable) and the respective

affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☐ **d. Beacon Line**

Danbury Terminal Railroad Company, Maybrook Railroad Company and Housatonic Railroad Company, LAZ Parking New York/New Jersey, LLC. (where applicable) and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☒ **e. New Haven Line Including All Branches**

State of Connecticut and Connecticut Department of Transportation (“CDOT”) National Railroad Passenger Corporation (“AMTRAK”), CSX Transportation, Inc. & New York Central Lines, LLC, and Providence & Worcester Railroad Company (“P&W”), LAZ Parking New York/New Jersey, LLC. (where applicable) and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☐ **f. West of Hudson Lines (including Port Jervis Line, Pascack Valley Line and Piermont Branch):**

New Jersey Transit Rail Operations, Inc. (“NJT”), New Jersey Transit Corporation and Norfolk Southern Railway Company & Pennsylvania Lines LLC and the respective affiliates and subsidiaries existing currently or in the future and successors to each entity listed herein.

☐ **Other:**

SECTION F. OPERATING AGENCY

The term “Operating Agency” shall mean the agency or agencies indicated by the checked box or boxes below.

- ☐ **NYCT** - New York City Transit Authority (“NYCT”)
- ☐ **MTA BUS** - MTA Bus Company (“MTA Bus”)
- ☐ **TBTA** - Triborough Bridge and Tunnel Authority (“TBTA”)
- ☒ **LIRR** - Long Island Rail Road (“LIRR”)
- ☒ **MNRR** - Metro-North Railroad (“MNRR”)