This Design Subcontract (**“Subcontract**”), made this [●] day of [●], [●] (“**Effective Date**”)

**BETWEEN**

Kiewit Engineering Group Inc., a Delaware company with offices at 12510 E. Belford Avenue, Bldg. 2

Englewood, CO 80112 (“**Client**”);

**AND**

Gannett Fleming, Inc., a [●] company with offices at [●] (“**Designer**”).

Client and Designer are individually referred to as a “**Party**” and jointly referred to as the “**Parties**”.

**BACKGROUND**

A. On [●], [Insert Owner Name] (“Owner”) issued a request for proposals for the design and construction of the [Insert Project Name] (the “**Project**”).

B. On [●], Client and Designer entered into a Memorandum of Understanding (“**MOU**”) in connection with the Project.

C. [Insert Contractor Name] (“**Contractor**”), a Joint Venture led by an Affiliate of Client, intends to submit a proposal to Owner for the Project (“**Proposal**”).

D. If the Proposal is accepted by Owner, then Contractor and Owner will enter into the Prime Contract.

**TERMS AND CONDITIONS**

**ARTICLE 1.** Designer agrees to provide the Design Services in accordance with the terms of this Subcontract.

**ARTICLE 2.** The execution of the Prime Contract by Contractor and Owner is a condition precedent to the terms of this Subcontract becoming effective.

**ARTICLE 3.** The terms and conditions of the Prime Contract are hereby incorporated in this Subcontract by reference hereto and are a part of this Subcontract as if fully set forth herein. In the event of a conflict between the applicable terms of the Prime Contract and the terms of this Subcontract, the terms of this Subcontract will control but only if (i) the terms of the Prime Contract and the Subcontract are in contradiction such that Designer cannot comply with both; and (ii) nothing in either the Prime Contract or the Subcontract otherwise indicates which take precedence in that particular circumstance.. The General Provisions and the Exhibits set forth in this Article 3 are attached hereto and are both made a part of this Subcontract.

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| --- | --- |
| **Exhibit** | **Description** |
| A. | Scope of Services |
| B. | Compensation |
| C. | Designer’s Key Staff |
| D. | Key Milestones and Deliverables |
| E. | Certification of Payment and Unconditional Waiver of Claims |
| F. | DBE Additional Provisions |
| G. | Corporate Guarantee |

This Subcontract has been executed as of the date first set forth above.

|  |  |  |  |
| --- | --- | --- | --- |
| **Client** | | **Designer** | |
| By: |  | By: |  |
| Printed Name: |  | Printed Name: |  |
| Title: |  | Title: |  |

# **GENERAL PROVISIONS**

# **DEFINITIONS**

* 1. “**Additional Design Services**” means those Design Services referred to in Exhibit A, Section 2(D).
  2. “**Affiliate**” or “**Affiliates**” means any individual, corporation, limited liability company, joint venture, partnership, or similar entity that a Party is in control of, is controlled by, or is under common control with, where “control” means the power to direct management and policies of such individual or entity. For the avoidance of doubt, Contractor shall be considered an Affiliate of Client for purposes of this Subcontract.
  3. “**Basis of Design**” means the preliminary design prepared and furnished by Designer to Client pursuant to the MOU.
  4. “**Basis of Design Manual**” means the manual prepared pursuant to the MOU.
  5. “**Client Background IP Rights**” means IP Rights owned, created by or licensed to Client prior to the effective date of this Subcontract.
  6. “**Design Services**” mean all professional, technical, and supervisory personnel, services, equipment, materials and supplies necessary to prepare and provide the design concept and final design, including all related work necessary to enable Contractor to perform the construction specified in the Prime Contract, all to the extent necessary to perform those services specified in **Exhibit “A”**.
  7. “**Design Schedule**” means the current approved Primavera P6 resource loaded schedule for the performance of the Design Services.
  8. “**Designer Background IP Rights**” means IP Rights owned, created by or licensed to Designer prior to the effective date of this Subcontract, other than New IP Rights created prior to the effective date of this Subcontract.
  9. “**Direct Labor Costs**” means direct salary costs, excluding fringe, overhead and profit.
  10. “**IP Rights**” means any and all proprietary rights provided under patent law, copyright law, trade-mark law, design patent or industrial design law, or any other applicable statutory provision or otherwise arising at law or in equity anywhere in the world, including, without limitation, trade secret law, that may provide a right in works, documents, marks, ideas, formulae, algorithms, concepts, methodologies, techniques, inventions, or know-how, or the expression or use thereof, and any applications, registrations, licenses, sublicenses, agreements, or any other evidence of a right in any of the foregoing.
  11. “**New IP Rights**”means IP Rights that Designer conceives, develops, or creates or causes to be conceived, developed or created, solely or jointly with Contractor or others, in the course of performing Design Services (including Basic Design Services and Additional Design Services), and including any Proposal Design Services.
  12. “**Owner”** means [●], [Insert Owner Name] or any person or entity appointed by Owner to administer the Work on behalf of Owner.
  13. "**Prime Contract**" means all documents forming or by reference made a part of the contract between Contractor and Owner.
  14. “**Subcontract Price**” means all monies paid from Client to Designer under this Subcontract, including all amounts paid for Design Services, Success Fee, Mobilization, PSPL and Additional Design Services.

# **REPRESENTATIONS AND WARRANTIES**

# Designer represents and warrants that:

# It is in the business of designing permanent facilities and structures;

# It has the skill and experience necessary in designing facilities and structures of the type required for the Project;

# Neither it nor its Affiliates have made any payment or gift of money or other thing of value to a governmental official in connection with any matter that is the subject of this Subcontract or the Prime Contract and shall not make any such payment or gift;

# It shall deal with its customers, employees, contractors, and other Persons, organizations, and governments in a fair manner with honesty and integrity, observing high standards of personal and business ethics;

# It shall comply with all laws governing its activities regarding the Project, including all laws (to the extent applicable) in relation to corrupt practices; maintenance of business books and records; and antitrust and competition; and

# It is the owner of, or has valid licenses for, any and all exploitation of any kind of all Designer Background IP Rights.

# Designer acknowledges that:

# Contractor has provided Owner as part of the Proposal, a lump sum price for the Project;

# Client and Designer have agreed to and included in the Design Basis Manual the estimated quantities of material required to construct the Project (“**Basis of Design Quantities**”), as well as the assumptions due to, and the proper risks associated with, the preliminary nature of this design; and

# The Prime Contract lump sum price has been developed from the Basis of Design, including the Basis of Design Quantities.

# Client and Designer have formalized design scope delineation between Parties in advance of execution of this Subcontract.

# **DESIGNER OBLIGATIONS**

# General. Designer shall:

# Perform the Design Services in a prompt and diligent manner, in accordance with the Standard of Care described in Section 4 of this Subcontract, and in a manner that Contractor will be able to construct the Project consistent with the Design Schedule;

# Not delay, disrupt, interfere with, or hinder the work of Client, Contractor or other subcontractors of Contractor or Client;

# Be liable to Client for any and all claims arising out of the breach of this Subcontract, regardless of whether insurance coverage exists for such claims. and

# Perform the Design Services in a manner that meets all applicable Prime Contract requirements, criteria and specifications, unless expressly identified otherwise in Exhibit “A” Scope of Services.

# Quality Plan.

# Within thirty (30) days after Contractor and Owner execute the Prime Contract, or sooner if requested by Client, Designer shall develop a written, Project-specific Quality Plan, which meets the requirements of the Prime Contract and is consistent with Contractor’s quality program. Designer’s Quality Plan will include, but not be limited to, provisions for:

* + - 1. Checking and confirming calculations, plans, specifications and design reports;
      2. Interdisciplinary reviews and coordination;
      3. Constructability reviews by Client;
      4. Confirmation of compliance with Prime Contract requirements;
      5. Confirmation of compliance with computer-aided design and drafting standards; and
      6. Internal audits and assessment of audit findings.

# Client shall review and comment on Designer’s Quality Plan within fourteen (14) days and either accept it or reject it. If Client rejects Designer’s Quality Plan, then Designer shall respond to the comments and resubmit the plan within ten (10) days to Client. Such process will continue until Client accepts Designer’s Quality Plan. If the Prime Contract requires Owner’s acceptance of Designer’s Quality Plan, Designer shall meet the requirements of the Prime Contract and comments from Owner shall be deemed to be comments of Client.

# Design Schedule.

# The 120 Day Design Schedule developed in accordance with the MOU forms part of the Design Schedule.

# The Design Schedule includes the key milestone and deliverable dates set forth in **Exhibit “D”** and will be:

* + - 1. Consistent with the pre-bid design schedule jointly developed by Client and Designer pursuant to the MOU and included in the Proposal; and
      2. Updated by Client throughout the performance of the Design Services.

# Within ninety (90) days after Contractor and Owner execute the Prime Contract, or sooner if requested by Client, Designer shall participate in the Client’s development of the Design Schedule consistent with the Project approved baseline schedule, which Design Schedule shall be in Primavera P6.

# Legal Compliance. Designer shall:

# Perform the Design Services in accordance with all applicable laws, regulations, codes, ordinances, and the generally accepted standards of the various professions contributing to the design through Designer;

# Maintain all federal, state, provincial, and local licenses and permits required to perform the Design Services;

# Pay all taxes, licenses, and fees that may be imposed or charged upon the services, labor, material, or other things used in the performance of the Design Services;

# If Designer is a federal subcontractor pursuant to Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 and related implementing regulations, abide by all applicable laws, including without limitation: Equal Opportunity clauses set forth in 41 CFR §§ 60-1.4(a), 60-4.3(a), 60-300.5(a) and 60-741.5(a), 60-250.5(a). Among other things, these regulations: (i) prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, sexual orientation, gender identity, or national origin; and (ii) require that covered subcontractors take affirmative action to employ and advance the employment of individuals without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, protected veteran status, or disability. Unless exempted, the provisions set forth in 41 CFR §61-250.10, 41 CFR § 61-300.10, and 29 CFR Part 471, Appendix A to Subpart A, are incorporated by reference and are binding on Designer; and

# Fully comply with the provisions set forth in **Exhibit “F”** if Designer has one or more lower-tier design subcontractors that are certified for the Design Services under the Project DBE program (“**Certified DBE Sub-Designer**”).

* 1. Personnel. Designer shall:
     1. Provide sufficient personnel to perform the Design Services and designate one individual as Designer’s representative for the Project with full authority to represent Designer;
     2. Not remove any personnel set forth in **Exhibit “C”** (“**Key Personnel**”) from the Project without Client’s prior written approval, which will not be withheld unreasonably and subject to the Prime Contract requirements; and
     3. Remove and replace any personnel whose performance is determined to be unsatisfactory by Client.
  2. Liens and Claims. Designer shall:
     1. Promptly pay all proper accounts for work done or materials furnished under all contracts it enters into relating to the Project, excepting those sums required to be retained under the provisions of any applicable statute;
     2. Not by any act or omission cause, encourage, suffer or allow any lien or claim under any such statute or in equity to be made against Owner, Contractor, Client or Designer or to be filed or registered against the Project by reason of work, services or materials supplied or claimed to have been supplied to Designer or anyone holding any interest through or under Designer;
     3. Promptly take all steps required to affect a discharge of any lien so filed or registered at its own expense; and
     4. Provide with each invoice evidence satisfactory to Client and Owner that all amounts due for labor and material furnished by Designer in connection with performance of this Subcontract have been paid, including union health, welfare and pension fund payments and payroll taxes and releases of bond and lien rights by persons who have furnished labor, material or other things in the performance of this Subcontract using the same or a similar form as set forth as **Exhibit “E”**.
  3. Communications. Designer shall:
     1. Communicate with Contractor, Owner, Contractor’s and Client’s other subcontractors, and other Project stakeholders through Client; and
     2. Not issue news releases, statements to news media, interviews, or articles for publication related to the Project without the prior written consent of Client, and, when required, that of Owner during the term of this Subcontract.
  4. Executive Review Meetings. Designer shall provide the necessary executive personnel to attend and participate in:
     1. design kick-off meetings;
     2. monthly design management review meetings;
     3. quarterly progress meetings which will include review of any outstanding requests by Designer for Change Orders, costs v budget, current quantity analysis, schedule and client interface issues; and
     4. any other meetings Client may reasonably request.
  5. Quantities.
     1. The Basis of Design Manual provides guidance on any assumptions and/or interpretations made in establishing the Basis of Design Quantities.
     2. Basis of Design Quantities will be discussed as a standard agenda item in weekly design development meetings (task forces). Designer will notify Client in writing as it becomes aware of increases or decreases in Basis of Design Quantities, along with a preliminary reason or justification for the change. Client and Designer will hold a quantity workshop within 5 days of notification to review and determine acceptability.
     3. Client will perform an estimate of the revised quantities and will respond to Designer, in writing, within two (2) weeks regarding the acceptability of the quantity change.
     4. In the case of quantity changes that are not acceptable to Client, Designer will propose a plan for avoiding the quantity change. If it is not possible to avoid the quantity change within the contractual requirements, or to obtain design approval, Designer will notify Client accordingly.
     5. Designer shall track design quantities and compare them to Basis of Design Quantities. Design quantities will be updated no less than monthly and reviewed by Designer’s and Client’s management during regularly scheduled design review meetings which shall occur not less than monthly.

# **STANDARD OF CARE**

* 1. The standard of care for Designer under this Subcontract will be the care and skill ordinarily used by members of the design and engineering profession performing similar services under similar conditions in a similar geographic location (“**Standard of Care**”). Designer has reviewed the Prime Contract and represents that the Prime Contract does not establish a higher or different standard of care for the Design Services, unless expressly identified otherwise in **Exhibit “A”** Scope of Services.

# **PAYMENT**

* 1. Payment to Designer for all Design Services, any Additional Design Services and any changes or modifications pursuant to this Subcontract will be made by Client in accordance with **Exhibit “B”**.

# **CHANGE DIRECTIVES AND CHANGE ORDERS**

* 1. Client Initiated Changes. Client may at any time by written notice propose an addition, deletion, or revision in the Design Services (a “**Change Directive**”) and may include Additional Design Services as set forth in **Exhibit “A”**. Within fourteen (14) days of receiving a Change Directive, Designer shall provide an evaluation to Client explaining any impact on the Design Services including any impacts on the Design Schedule (“**Designer Evaluation**”). Failure of Designer to provide the Designer Evaluation as required herein will result in the Change Directive being deemed a no-cost change. Within fourteen (14) days of receiving the Designer Evaluation, Client shall provide an approval or rejection of the Designer Evaluation to Designer explaining the basis for any rejection (“**Client Response**”)The Designer Evaluations will be discussed by the Parties and, if agreed, Client shall issue a written order to Designer specifying the change in the Design Services, Design Schedule, or in the terms and conditions of this Subcontract (“**Change Order”)**.If Client and Designer cannot agree on the Designer Evaluation and Client Response, either Party may proceed to resolve the issues in accordance with Section 8.
  2. Contractor or Client Caused Changes. If an event occurs that Designer believes entitles it to additional compensation or time, and Section 6(C) does not apply, then Designer shall provide written notice to Client of such event within ten (10) days after Designer learns of the occurrence of such event.
     1. Within thirty (30) days of issuing the notice herein, Designer shall provide a comprehensive evaluation to Client explaining the impact on the Design Services including any impacts on the Design Schedule and any additional compensation being requested.
     2. If Client agrees with the request by Designer, Client will issue a Change Order within thirty (30) days of receipt of the comprehensive evaluation;
     3. If Client does not agree with the request by Designer, Client will reject the request within thirty (30) days of receipt of the comprehensive evaluation providing reasons for same and Section 8 will apply.
  3. Owner Caused Changes. If an event occurs that impacts Designer’s performance of the Design Services, and the event entitles Contractor to equivalent relief under the Prime Contract, Designer shall provide Client with written notice of such changes in time and form for Contractor to notify Owner in accordance with the Prime Contract. Subject to compliance with the Prime Contract and this Subcontract, Designer may request in writing that Client arrange for Contractor to present a change order request to Owner on Designer’s behalf. If requested by Designer and as permitted by Owner, Contractor and Client will involve Designer in discussions of Designer’s change order request with Owner.
     1. Designer shall have full responsibility for preparation and presentation of such change order requests and will bear all expense thereof, including attorneys’ fees. Designer will itemize and include all costs and additional time for such changes as part of the monthly Design Status Report.
     2. Designer shall provide a certification sufficient to satisfy the Prime Contract requirements with any change order request made under this Section 6(C). The certification must be in a form acceptable to Client and executed by an individual with knowledge of the relevant facts related to Designer’s change order request.
     3. Designer’s certification will state, at a minimum, that Designer has (i) investigated the basis for its claims, (ii) determined that its claim(s) are justified as to entitlement and for the relief requested; (iii) verified the adequacy of all back-up documentation; and (iv) no reason to believe, and does not believe, that the factual basis for Designer’s claim is falsely represented.
     4. If Designer’s change order request is considered and resolved separately by Owner, then Designer will be entitled to receive from Client the amount Contractor actually receives from Owner on Designer’s behalf.
     5. If Owner considers and resolves Designer’s change order request in combination with other change order requests submitted by Contractor, then Designer will be bound by Contractor’s determination, made in good faith, as to apportionment of any amounts received from Owner for change order requesters including Contractor and other subcontractor and in no event will Designer be entitled to receive from Client any amount greater than the amount Contractor actually receives from Owner.
     6. Designer shall defend and indemnify Contractor and Client and save Contractor and Client harmless from all liability arising out of or related to Designer’s change order certifications as described in 6.C.ii and iii.
  4. Continued Performance. Each Party shall proceed diligently with its performance under this Subcontract, pending final determination and resolution of any change order or any other dispute.
  5. Delay in Notification. If Designer fails to deliver the notices referred to in this Section 6 within the time periods referred to herein then Designer shall not be entitled to any additional compensation, extensions of time, amendments to the Design Schedule or any other relief from its obligations contained in this Subcontract, but with regard to claims pursuant to Section 6C only to the extent Designer’s failure to provide timely notice results in the Owner refusing to provide Contractor a corresponding adjustment under the Prime Contract.
  6. Documentation. With regard to any alleged impacts claimed by Designer to the Design Services, impacts on the Design Schedule, or Designer’s compensation, Designer shall provide Client with all back-up documentation, pricing information and support reasonably requested by Client.

# **TIME OF PERFORMANCE**

* 1. Time of the Essence. Time is of the essence of performance of this Subcontract.
  2. Failure to Maintain the Design Schedule.
     1. Upon written request by Client, Designer will furnish to Client such evidence as Client may require relating to Designer’s ability to fully perform this Subcontract in the manner and within the time set forth in the current approved Design Schedule.
     2. If Designer fails to perform the Design Services in accordance with the Design Schedule, or in Client’s good faith opinion Designer is not performing in a timely manner, Client will provide written notice of such non-performance. Designer shall provide, within five (5) days, a recovery plan (the “**Earned Value Recovery Plan**”) describing planned recovery actions, recovery staffing plan, and including a detailed recovery schedule.
     3. If Designer fails to provide the Earned Value Recovery Plan as required, or the Earned Value Recovery Plan is not acceptable to Client, acting reasonably, or Designer does not implement the Earned Value Recovery Plan, then Client may:
        1. By subcontract or otherwise and without prejudice to any other right or remedy, take over all or part of the Design Services and complete the performance of this Subcontract at Designer’s expense; or
        2. Without taking over the Design Services, provide the personnel necessary to remedy the situation at Designer’s expense.
     4. If Client takes over the Design Services as set forth under Section 7(B)(iii)(i), Designer shall provide Client all calculations, plans, specifications, documents, studies, and other documents relating to the Project that are in the possession of Designer for the purpose of performing the Design Services notwithstanding any dispute between the Parties. Designer shall remain responsible for any Design Services delivered or completed prior to the takeover by Client.

# **DISPUTE RESOLUTION**

* 1. Disputes Involving Owner: For any dispute that arises out of, or relates to, matters for which Owner may be responsible under the Prime Contract, Designer shall:
     1. Have full responsibility for the preparation and presentation of its claims, including timely notice to allow Contractor to comply with the terms of the Prime Contract, and will bear all expense related thereto, including attorneys' fees;
     2. Be bound to Client to the same extent that Contractor is bound to Owner, both by the terms of the Prime Contract and by all decisions or determinations made by Owner, board or court as authorized in the Prime Contract for resolving claims;
     3. Not be entitled to receive any greater amount from Client than Contractor is entitled to and actually does receive from Owner on account of Designer's claims, less any markups or costs incurred by Client and to which Contractor is otherwise entitled;
     4. Accept the amount, if any, received by Contractor from Owner as full satisfaction and discharge of the claims;
     5. Not take any other action with respect to the claims; and
     6. Be bound by Contractor's determination, made in good faith, of apportionment of any amounts received by Contractor from Owner on behalf of Designer and other claimants, including Contractor, whose work is affected by any act or omission of Owner.
     7. In the event Designer does not agree that Contractor made such apportionment in good faith and the amount due Designer, the dispute will be resolved in accordance with Section 8.B below.
  2. Disputes Not Involving Owner: Any claim, dispute or other matter in question between Client and Designer, arising out of or relating to either’s obligations to the other under this Subcontract not covered by Section 8(A), will be resolved as follows:
     1. A Party (the “**Disputing Party**”) will provide written notice of such dispute (the “**Dispute Notice**”) to the other Party.
     2. Within ten (10) days of the delivery of the Dispute Notice, Client’s and Designer’s designated representatives for the Project will meet and try to resolve the dispute.
     3. If the dispute is not resolved within thirty (30) days of delivery of the Dispute Notice, the Disputing Party will provide notice of such to the other Party. Within thirty (30) days of such further notice, representatives from executive management of Client and Designer not involved in the day to day operations of the Project will attempt to resolve the matter. If appropriate, representatives of Contractor may participate as well.
     4. If resolution cannot be reached by the Parties’ executive managers within one hundred twenty (120) days of the Dispute Notice, Client and Designer agree that the dispute will be resolved through binding and final arbitration. Such arbitration will be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.  The place of arbitration will be Denver, Colorado. The arbitration will be governed by the laws of the State of [project location]. Time is of the essence for any arbitration under this Subcontract and arbitration hearings shall take place within ninety (90) days of filing and awards rendered within one hundred twenty (120) days.  Arbitrator(s) shall agree to these limits prior to accepting appointment. The prevailing Party will be entitled to an award of reasonable attorney fees. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties. The Parties agree that failure or refusal of a Party to pay its required share of the deposits for arbitrator compensation or administrative charges will constitute a waiver by that Party to present evidence or cross-examine witness.  In such event, the other Party will be required to present evidence and legal argument as the arbitrator(s) may require for the making of an award.  Such waiver will not allow for a default judgment against the non-paying party in the absence of evidence presented as provided for above.
  3. This Subcontract will not be construed to compel, or confer any right to, any person or entity other than a Party to this Subcontract to use the procedure for settlement of disputes set forth in this Subcontract to settle a question arising in connection with the Project. Either Party’s subcontractors and Affiliates may be joined in the arbitration if the claims to be determined relate to such subcontractor(s) and Affiliates.
  4. The procedure for settlement of disputes provided for in this Section 8 will not be applicable to an action for bodily injury or property damage brought by a third party, insofar as either Client or Designer may desire to assert any rights of indemnity or contribution against the other with respect to the subject matter of such action.
  5. Each Party shall proceed diligently with its performance under this Subcontract, pending final determination and resolution of any dispute, unless otherwise agreed in writing.

# **INSURANCE *[Note: Section 9 to be revised as appropriate based on Designer’s and Client’s review of Prime Contract provisions regarding insurance.]***

Throughout the term of this Subcontract and thereafter as applicable, Designer shall maintain the insurance as required by Owner or the following insurance, which ever requires the greater coverage amounts, through insurers having an A.M. Best Company rating of A- VII or better:

* + 1. Commercial general liability insurance with bodily injury and property damage limits of not less than $2,000,000 combined single limit each occurrence and aggregate. This policy will include contractual liability coverage, excluding design liability obligations. Designer shall cause its commercial general liability policy to name Client, Contractor, Owner, and any others required in the prime contract as additional insureds;
    2. Automobile liability insurance with bodily injury and property damage limits of not less than $2,000,000 combined single limit each accident. Designer shall cause its automobile liability policy to name Client, Contractor, Owner, and any others required in the prime contract as additional insureds;
    3. Workers’ compensation insurance in accordance with statutory requirements and employers’ liability insurance with limits of not less than $1,000,000 for each accident. Designer shall cause its workers’ compensation policy to contain a waiver of subrogation in favor of Client, Contractor, Owner and other parties as required in the Prime Contract;
    4. Professional liability insurance, which Designer carries in the ordinary course of its business, with limits of not less than $10,000,000.00 per claim and in the aggregate. Such coverage shall (a) not exclude claims based on Designer’s delay, including failure to render professional services on time or complete any project on time, but only those consequential damages (b) commence no later than the effective date of this Subcontract, and (c) be continued for a period of not less than three (3) years after acceptance of the completed Project by Owner, and evidence to this effect will be provided to Client. Designer agrees to promptly notify Client of any cancellation ofcoverage or carrier status and shall furnish to Client such confirmation of coverage and status as Client may request.
    5. To the extent any claim arises out of the Design Services, Designer’s commercial general liability insurance, professional liability insurance and automobile liability insurance will be primary to any insurance carried by Client or its Affiliates. [with the exception of any project specific professional liability insurance procured as required by Section 9(B)].
  1. [Note: (The current intent is for KEGI to acquire the PSPL) If PSPL is to be obtained insert the following provision]

Throughout the term of this Subcontract and thereafter as applicable, [Designer/Client/Contractor as applicable] shall maintain Project Specific Professional Liability insurance (“**PSPL**”), with limits of not less than [$[●]] per claim and in the aggregate through insurers having an A.M. Best Company rating of A VIII or better. Such coverage will (a) not exclude claims based on Designer’s delay, including failure to render professional services on time or complete any project on time, (b) commence no later than the effective date of this Subcontract, and (c) be continued for a period of not less than five (5) years after acceptance of the completed Project by Owner, and evidence to this effect will be provided to the other Party. The Party which procures the insurance will promptly notify the other Party of any reduction or change in coverage or carrier status and will furnish to the other Party such confirmation of coverage and status as requested. [Designer/Client/Contractor as applicable] will promptly replace or restore any coverage lost or reduced. Client shall reimburse the Designer for the cost premium of any PSPL.

* 1. Designer will furnish Client certificates of insurance, including the provision that such insurance will not be cancelled without at least thirty (30) days' written notice to Client, except 10 days notice for nonpayment of premium.
  2. Nothing contained in this Section 9 will be construed as a limitation of Designer’s liability for damage or injury, including death, which arises out of Designer’s obligations under this Subcontract (including, for certainty, Designer’s indemnity and defense obligations) or law.

# **INDEMNIFICATION AND LIABILITY**

* 1. Designer Indemnity. Designer shall indemnify, and hold harmless, Client, Contractor, Owner, and any other person required to be indemnified under the Prime Contract, against and from any and all losses, liability, expenses (including reasonable legal fees), suits, claims, demands, and any causes of action, in each case incurred by or asserted against Client, Contractor, Owner, or any other person required to be indemnified under the Prime Contract, to the extent caused by Designer’s alleged or actual:
     1. Infringement or violation of any patent or IP Right;
     2. Breach of any obligation set forth in this Subcontract, including those obligations set forth in the Prime Contract related to the Design Services;
     3. Negligent act or omission in the performance of any of its obligations under this Subcontract;
     4. Failure to pay for all materials furnished and services and labor performed for Designer in connection with the Design Services, except if such claims, suits, or liens are the result of Client’s failure to timely pay Designer undisputed payment requests in accordance with the terms of this Subcontract;
     5. Failure to maintain all federal, state and local licenses and permits required for the performance of the Design Services; and.
     6. Act or omission in the performance of any of its obligations under this Subcontract resulting in strict liability pursuant to federal, state, or local law.

The indemnification required by this Section 10 (A) shall not be limited in any way by the limits, terms or conditions of any insurance policy.

* 1. Client’s Indemnity. Client shall, indemnify and hold harmless Designer against and from any and all losses, liability, expenses, suits, claims, demands, or causes of action asserted against Designer resulting from or arising out of damage or destruction of the property of a third party or injury to or the death of a third party to the extent caused by the negligence of Client or Contractor.
  2. Liability for Delay. Designer shall be liable for any and all delay-related damages of any kind that may be claimed by Client, Contractor or by Owner (including any liquidated damages) or third parties from Client or Contractor, but only to the extent such damages are caused by Designer’s failure to perform the Design Services in compliance with the Design Schedule. Designer’s maximum liability for such damages is limited to XX percent (XX%) of the Subcontract Price for performing the Design Services provided however, that any monies recovered under any PSPL policy shall not be included in this liability cap. The payment of such damages will not release Designer from its obligation to otherwise fully perform this Subcontract.
  3. Defense of Third-Party Claims. If a claim is asserted against Client or Contractor by Owner, a subcontractor or other third party not a Party to this Subcontract which is, in whole or in part, relating to or arising from the Design Services:
     1. Client will promptly give notice of such claim to Designer and Designer will assist and cooperate with Client in the resolution and defense of such claim or dispute to the extent that any such claims or disputes involve the Design Services under this Subcontract. Nothing herein shall lessen Designer’s obligations set forth in Section 10.A.
  4. Maximum Liability of Designer.

Designer’s total liability to Client for damages claimed by Client is limited to $25,000,000 or 100% of Subcontract Price whichever is greater, provided however, that any monies recovered under any professional liability insurance policy shall not be included in this liability cap. The cap on liability is not intended to limit or otherwise detract from the obligation of Designer to perform the Design Services for the amounts specified in Exhibit B (including cost overruns), and accordingly, the cap on liability will not be applicable in respect of:

* + 1. claims by third parties, or on behalf of third parties, other than Owner;
    2. any personal injury and death;
    3. abandonment, gross negligence, fraud and fraudulent misrepresentations or willful default or willful misconduct;
    4. breach of statutory duty or non-compliance with law as a result of fraud or willful misconduct by or on behalf of Designer;
    5. any damages arising in connection with a breach of Section 17 (Intellectual Property); or
    6. any damages arising in connection with a breach of Section 13 (Confidentiality).
  1. The provisions of this Section 10 will survive the termination of this Subcontract.

# **SET-OFF AND WITHHOLDING**

* 1. Client may set-off and deduct from any amounts due or to become due to Designer any sum or sums owed by Designer to Client or its Affiliates under this Subcontract.
  2. If Designer breaches any provision or obligation of this Subcontract, Client may retain out of any payments due or to become due to Designer an amount sufficient to protect Client and its Affiliates from any and all loss, damage or expense resulting from Designer’s breach(es), until Designer cures the breach as reasonably determined by Client or adjudicated by dispute resolution as stated in Section 8. Designer is to be notified in writing of any such withholding, and the basis for Contractor’s withholding, within five (5) days of any such withholding.

# **WAIVER OF CONSEQUENTIAL DAMAGES [NTD: Provisions to be conformed with Prime Contract provision, if any. In particular, exceptions to be back to back with Prime Contract]**

* 1. To the fullest extent permitted by law, neither Party will be liable to the other for any indirect, incidental, consequential, or special damages suffered by the such other Party, whether based on contract, tort or howsoever caused, except to the extent recoverable under any insurance policies in Section 9. The Parties agree, however, that any liquidated damages under the Prime Contract shall not be considered consequential damages for purposes of this Section 12.A.
  2. The limitation set forth in Section 12.A does not apply to claims initiated by Owner or other third parties orDesigner’s third-party indemnification obligations under Section 10.

# **CONFIDENTIALITY**

* 1. As used herein, “**Confidential Information**” of a Party means any and all financial, technical, proprietary, confidential, and other information, including data, reports, designs, information systems, trade secrets, innovations, interpretations, forecasts, analyses, compilations, studies, summaries, extracts, records, know-how, statements (written or oral) or other documents of any kind, to the extent they contain information concerning the business and affairs of a Party or its Affiliates, divisions and subsidiaries and the shareholders, directors, officers, employees, agents, advisors, members and controlling persons of such person and its affiliates, divisions and subsidiaries (**“Representatives**”), or any third parties who provided such information to a Party pursuant to a confidentiality arrangement, which the party or its Representatives provide to the other Party or its Representatives, whether furnished before or after the date hereof, and regardless of the manner in which it was furnished.
  2. Confidential Information does not include information which:
     1. Was or becomes generally available to the public other than as a result of a disclosure by the receiving Party or its Representatives;
     2. Was or becomes available to the receiving Party or its Representatives on a non-confidential basis prior to its disclosure hereunder, provided that the source of the information is not known by the receiving Party to be bound by a confidentiality agreement or otherwise prohibited from transmitting such information by a contractual, legal or fiduciary duty; or
     3. Was independently developed by the receiving Party without the use of any Confidential Information of the disclosing Party.
  3. Neither Party will, in any manner, directly or indirectly, communicate, publish, divulge or otherwise disclose, in whole or in part, Confidential Information of the other party, except that such Confidential Information may be disclosed to the Parties' Representatives who need to know such Confidential Information for purposes of carrying out its obligations under this Subcontract and the Prime Contract, it being understood that such Representatives will be advised by the Parties of the confidential nature of such information and will be bound by this Subcontract.
  4. In addition to all other rights and remedies available to the non-breaching Party, a Party will be liable for any breach of this Subcontract by its Representatives.
  5. Each Party will only use the Confidential Information of the other party solely for purposes of carrying out its obligations under this Subcontract and the Prime Contract and will not use the other Party’s Confidential Information in any way that is detrimental to the other party or its Representatives.
  6. In the event that either Party or any of its Representatives is requested or becomes legally compelled (by oral questions, interrogatories, requests for information or documents, subpoenas, civil investigative demand or similar process) to make any disclosure which is prohibited or otherwise constrained by this Subcontract, the receiving Party or Representative, as the case may be, will provide the disclosing Party with prompt notice of such request so that the disclosing Party may seek an appropriate protective order or other appropriate remedy and/or waives the receiving Party's or its Representative’s compliance with the provisions of this Subcontract. In the event that such protective order or other remedy is not obtained, or the disclosing party grants a waiver hereunder, the receiving Party or such Representative may furnish that portion (and only that portion) of the Confidential Information which the receiving Party or such Representative is legally compelled to disclose or else stand liable for contempt or suffer other censure or penalty; provided, however, that the receiving Party shall use its best efforts to obtain reliable assurance that confidential treatment will be accorded any Confidential Information so disclosed.
  7. Upon request of the disclosing Party, all written Confidential Information and all copies thereof (or portions thereof) in the possession of the receiving Party and its Representatives will either be promptly returned to the disclosing Party or destroyed, and if destroyed, the receiving Party will deliver to the disclosing Party a certificate attesting to such destruction; provided, however, that each Party may retain (one) 1 copy of the Confidential Information for record-keeping purposes.
  8. Designer will include a similar confidentiality clause in its agreements with its support designers.

# **TERMINATION**

* 1. This Subcontract will continue until the Project:
     1. Is accepted by Owner;
     2. Contractor has received final payment from Owner;
     3. All of Contractor’s obligations under the Prime Contract have been discharged; and
     4. Client has paid the Designer all amounts owed.
  2. The terms of this Subcontract that expressly or by implication survives this Subcontract will be enforceable beyond the term of this Subcontract.
  3. Client may terminate for cause this Subcontract if:
     1. Designer becomes insolvent or files for or is put in bankruptcy or makes a general assignment in favor of its creditors, or if all or any part of its property is put under receivership;
     2. Designer fails to cure a material breach in respect of any of its obligations hereunder within five (5) calendar days following receipt of a written notice from Client specifying the nature of such default or defaults; or
     3. Designer fails to perform the Design Services in a timely manner as specified in Section 7 of this Subcontract.
  4. Client may suspend or terminate this Subcontract, or any portion thereof, at any time without cause upon seven (7) days written notice to Designer. Upon receipt of such written notice of termination, Designer shall terminate the Design Services as instructed by Client. Designer will be paid for Design Services performed prior to the date of termination but unpaid (which amount will include any earned but unpaid margin) and for any reasonable and necessary direct costs incurred thereafter for orderly termination of the Design Services, but not to include future lost profits. In no event will costs be allowed in connection with termination of this Subcontract if incurred later than fifteen (15) days after the date of termination.
  5. If Client fails to timely pay any undisputed amounts due Designer under this Subcontract, and (i) such undisputed amounts were not deducted or retained by Client pursuant to Section 11; and (ii) Client has been paid such undisputed amounts by Owner under the Prime Contract for Design Services properly performed by Designer, then Designer may suspend its performance of the Design Services upon fifteen (15) business days written notice to Client, unless and until the undisputed amounts are paid.

# **ASSIGNMENT**

* 1. Neither this Subcontract nor the rights or obligations hereunder may be transferred, assigned, or delegable, whether directly by merger or acquisition by another entity or any part thereof without the prior written consent of the other Party and upon such terms as they may reasonably require.
  2. If a Party has reasonable grounds for refusing a request for consent received pursuant to Section 15(A), then the non-consenting Party will have the option to terminate this Subcontract in accordance with Section 14 of this Subcontract.

# **OWNERSHIP OF PLANS, SPECIFICATIONS, AND OTHER DOCUMENTS [NTD: Provisions to be conformed with Prime Contract provision, if any.]**

* 1. The plans, specifications, and other documents and electronic data produced specifically for this Project by Designer shall belong to both Designer and Client provided the Prime Contract does not provide that such documents belong to Owner.
  2. All reports, studies, conceptual designs, plans and specifications and related documents will be handed over to Client upon the completion of the Project, Designer being hereby authorized to retain a copy.
  3. Notwithstanding the foregoing, Client’s reuse of Designer’s plans, specifications, and other documents and electronic data on other projects without Designer’s involvement will be at Client’s sole risk and without legal liability to Designer.

# **INTELLECTUAL PROPERTY** **[NTD: Provisions to be conformed with Prime Contract provision, if any.]**

* 1. Designer represents that the processes or methods Designer will suggest to Client do not infringe any IP Rights of any third party. Should any such processes or methods infringe any such rights, Designer undertakes, at its own expense, to make the changes necessary to ensure that any IP Rights which any third party may have in respect of such processes or methods is not infringed, or to obtain the necessary authorizations on Client’s behalf.
  2. Designer shall retain its ownership in Designer Background IP Rights, where applicable, and to data bases, methodology, systems, processes, computer software, works of authorship, and other proprietary property. Designer Background IP Rights utilized in the performance of the Services shall remain the property of Designer unless otherwise agreed between Parties. Client shall not disclose confidential or proprietary information for any purpose without the prior written consent of Designer. Confidential and proprietary information is any information marked or identified in writing to the other party as such**.**
  3. By entering into the MOU or this Subcontract, or otherwise communicating to Client on matters relating to the Project, and for good and valuable consideration receipt of which is acknowledged, Designer shall:
     1. hold in trust for the sole right and benefit of, and agree to transfer and assign to, and hereby does transfer and assign to, Client the sole and exclusive right, title, and interest in and to any and all New IP Rights
     2. grant to each of Client and Owner a non-exclusive, irrevocable, worldwide, perpetual, transferrable and royalty-free license to freely use Designer Background IP Rights as may be necessary or desirable for the full, unrestricted, and perpetual use of the Proposal Design Services Deliverables, the Basic Design Services, the Additional Design Services, and anything made, used, or sold, or offered for sale, in connection with any of the foregoing
  4. For greater certainty, these rights of Client include, but are not limited to, the right to design, construct, operate, maintain, copy, execute, process, translate and incorporate with other materials for the Project using New IP Rights without obtaining the further consent of Designer.
  5. Designer waives its own moral rights in and to the New IP Rights. Designer has obtained or will obtain from its employees and subcontractors’ assignments of all their rights, title and interest in and to the New IP Rights and waivers of all of their moral rights in and to the same. Copies of these assignments and waivers from first authors must be provided to Client upon request, and the originals shall be available for inspection by Client and its agents on reasonable terms, all at Designer’s expense.
  6. To the extent allowed by the Prime Contract, Owner, Contractor and Client (as applicable), shall receive and be deemed to have retained an irrevocable, royalty-free, worldwide, non-exclusive, and perpetual license from Designer to:
     1. Make unfettered use of the New IP Rights as part of its technical know-how and stock-in-trade, including further exploitation, modification and improvement of the New IP Rights;
     2. Incorporate the New IP Rights into future or other projects; and
     3. Sublicense the New IP Rights to its clients as required in other projects.
  7. Client, Contractor and/or Owner shall have the sole and exclusive right, but no obligation whatsoever, to apply for, seek or obtain, register or enforce any registered rights in regard to New IP Rights, at either or both of their own cost and expense; in such event, Designer shall cooperate with all such application or registration procedures and requirements, including execution of any necessary documents.

# **GOVERNING LAW**

* 1. This Subcontract will be governed by the law that governs the Prime Contract and, to the extent such is not applicable, the laws of the state where the Project is situated.
  2. The site for jurisdiction and resolution of any legal dispute hereunder will be as described in the Prime Contract, as applicable, the federal and state courts of the state where the Project is situated.

# **CORPORATE GUARANTEE**

* 1. Designer will provide Client with an acceptable parent company or corporate guarantee, upon Client request.

# **COMPLETE CONTRACT**

* 1. This Subcontract sets forth the entire agreement of the Parties.
  2. Neither Party is responsible for any understandings or representations made by any of its officers, agents, representatives, or employees before the execution of this Subcontract, unless those understandings or representations are expressly set forth in this Subcontract.
  3. Except as provided in the MOU, unless specifically referenced in or attached to this Subcontract, no proposals or terms of any nature submitted by Designer before the execution of this Subcontract will be of any effect.

# **SEVERABILITY AND WAIVER**

* 1. The partial or complete invalidity of any one or more provisions of this Subcontract will not affect the validity or continuing force and effect of any other provision.
  2. The failure of either Party to insist upon the performance of any of the terms or conditions of this Subcontract or to exercise any right set forth in this Subcontract will not be construed as a waiver or relinquishment of any term, condition, or right contained in this Subcontract.

# **PRIORITY OF DOCUMENTS**

# In the event of any conflict or inconsistency between the provisions of this Subcontract (including the General Provisions and the Exhibits attached hereto) and the Prime Contract, unless otherwise provided in this Subcontract, this Subcontract shall govern.

# **MISCELLANEOUS**

* 1. Designer shall not subcontract portions of the Design Services without approval of Client.
  2. This Subcontract enures to the benefit of, and is binding upon, the Parties and their respective successors and permitted assigns.
  3. Designer shall comply with the Project health and safety plan, all applicable health and safety laws, and the requirements of the Prime Contract with respect to health and safety.
  4. This Subcontract may be executed in counterparts, each of which will be an original and each of which will constitute one and the same Subcontract. Each counterpart may consist of a number of copies hereof each signed by less than all, but together signed by all of the Parties. The exchange of signed copies of this Subcontract and signature pages by electronic or facsimile transmission will constitute effective execution and delivery of this Subcontract as to the Parties and may be used in lieu of the original of this Subcontract for all purposes. Signatures of the Parties transmitted electronically or by facsimile will be deemed to be the original signatures for all purposes.
  5. Any notice, request, demand or other communication required or permitted to be given or made under this Subcontract must be in writing and is sufficiently given or made if:
     1. Delivered in person at the applicable address set forth below;
     2. Sent by prepaid courier service to the applicable address set forth below; or
     3. Sent by electronic mail with a confirmation of delivery to that Party at the email address set forth below.

in the case of a notice to Client, addressed to it at:

Attention:

Email:

in the case of a notice to Designer, addressed to it at:

Attention:

Email:

* 1. Notices are deemed to be duly given or made if delivered, on the day of delivery, or if sent by facsimile, when the answer-back is received, or if sent by e-mail, on the date the email is received, as the case may be.
  2. The division of this Subcontract into Articles and Sections and Subsections are for convenience of reference only, and do not affect the interpretation of this Subcontract.
  3. Words in the singular include the plural and vice versa, and words importing gender include the masculine, feminine and neuter genders, in each case as the context requires.
  4. Technical or industry specific works or phases not otherwise defined in this Subcontract have the well-known meaning given to those terms as of the date of this Subcontract in the industry or trade in which they are applied or used.
  5. Reference to a statute means, unless otherwise stated, the statute and regulations, if any, under that statute, in force from time to time, and any statute or regulation passed and in force which has the effect of supplementing or superseding that statute or those regulations.
  6. References to dollars or $ means United States of America dollars, unless otherwise stated.
  7. References to day or days means calendar days, unless otherwise defined in the Prime Contract.
  8. Each of the Parties as to itself only hereby acknowledges, represents, warrants and agrees that it has obtained its own independent legal, financial, tax, technical and other advice on all issues relating to this Subcontract and all transactions contemplated under this Subcontract. This Subcontract shall be interpreted as would an agreement that has been negotiated and drafted by, and entered into between, commercially sophisticated Parties dealing at arm’s length.

# **General**

# Designer’s scope of services includes the Design Services and any Additional Design Services.

# 2. **Design Services**

* 1. General.
     1. Design Services comprise all of Designer’s scope of services, including those classified herein as Proposal Design Services (as defined in the MOU), Additional Design Services, Construction Quality Assurance Services, Hazardous/Harmful Materials Engineering, and Value Engineering which may be added by way of Change Order.
  2. Scope. To the extent of the services as defined here and in Exhibit “A-1”, Designer shall:
     1. Prepare and provide the design concept, the design, and the plans and specifications, including all related work, necessary to enable Contractor to perform the construction specified in the Prime Contract, except as specifically excluded in Section 2(C) below.
     2. Avoid deviations from the Basis of Design that would impact Contractor’s Proposal, unless such changes are first authorized in writing by Client.
     3. Assist Client in identifying all permits required for construction of the Project, and shall perform any Design Services as required to obtain such permits.
     4. Design the Project taking into account Contractor’s means and methods as timely provided by Client or Contractor to Designer. Designer shall incorporate safety in its design in compliance with the Prime Contract so that the constructability and operation and maintenance of its design include safety considerations
     5. Allow Client to participate in development of specific elements of design and engineering services related to the Design Services. Designer shall cooperate in coordinating any design and engineering works performed by Client or Client’s other Support Designers.
     6. Provide Client with final plans and specifications consistent with the Basis of Design and the quality parameters underlying the Proposal.
     7. Recommend and provide, as part of its performance under this Subcontract, any testing, sampling or subsurface, hydrological or other investigations of the site or existing facilities that it deems necessary or advisable for the performance of the Design Services.
     8. Upon request of Client, walk the site and discuss with Client the plans and specifications prior to construction of any portion of the Project.
     9. Provide Contractor and its subcontractors and suppliers with necessary clarifications, interpretations and corrections of the plans and specifications.
     10. Prepare as-built (record) plans from “red-lined” plans and/or other Project documentation of field changes provided by Client or Contractor.
     11. *[Note: TBD - As appropriate for the Project, include a subsection describing requirements for Designer to visit the site on a specified basis to conduct observations and to recommend to Client the rejection or remediation of any observed construction that does not conform to the plans and specifications.]*
  3. Exclusions and Clarifications *[Note: Complete as appropriate for the Project.]*
     1. The Design Services excludes:
  4. Additional Design Services. The following services may be included in Design Services by way of a Change Order:
     1. Hazardous Materials Support**.**  Designer shall:
        1. Investigate and prepare recommendations for remediation or disposal of hazardous materials encountered on the Project site.
     2. Field Design Support. Designer shall:
        1. Appoint a qualified, responsible member of the design team to be the contact person for all field design support services;
        2. Review working drawings for temporary work;
        3. Assist in evaluations of changes in field conditions or unanticipated different field conditions;
        4. Make revisions to the plans and specifications as necessitated by changed field conditions or as a result of a request by Client for changes in construction details after the issuance for construction of the subject plans and specifications; and
        5. Evaluate and assist in the resolution of work that does not conform to the plans and specifications. Such assistance may include, but is not limited to, rendering a professional opinion regarding the advisability or acceptability of incorporating the nonconforming work in the Project and revising the plans and specifications as required to remedy the nonconforming work.
     3. Geotechnical Services. Designer shall:
        1. Evaluate conditions in the field when they differ from those shown on the plans or differ from conditions anticipated in the design;
        2. Evaluate the data derived from the readings being made on the settlement monument plates at bridge foundations and surcharge areas, and recommend to Client the projected and actual end of the settlement period;
        3. Assist Client in providing interpretation of field conditions for fill compaction, placement and monitoring of wick drains or similar systems to accelerate subsoil consolidation, cut stability, embankment stability, limits of remedial excavation, and similar soil related conditions; and
        4. Determine elevations for pre-drilling piles and evaluate down-drag loads when changes from design, plans, and specifications are required during the performance of the Work.

iv. Shop Drawings. Designer shall review and approve (or take other appropriate action in respect of) Contractor’s submittals such as shop drawings, product data and samples, material certifications and such other submittals as may be required by the Prime Contract.

# **3*.* INTEGRATED PROJECT CONTROLS**

* 1. Within the first 30 days after project award, Designer and Client shall agree on a hierarchical work breakdown structure for defined scope items and design packages for purposes of tracking design progress. Designer and Client shall establish design progress claiming rules that will be used to track design progress on each scope item and design package. An example of the hierarchical work breakdown structure, design package plan and claiming rules are provided in Exhibit “A-6”.
  2. On a weekly basis, Designer shall provide progress claiming and input to Client’s “earned value” Integrated Project Controls system.
     1. Progress Claiming: Designer shall claim progress associated with each element and level of the WBS within Client’s Integrated Project Controls system no later than close of business Saturday each week and provide actual man-hours of services performed no later than close of business each Monday for the previous week.
     2. Progress Reporting: Once progress is claimed, Client will provide Designer earned value reports and information for the previous week.
  3. On a monthly basis, Designer shall provide to Client, the following information so that Client can prepare a monthly Design Progress Report for submission to Contractor:
     1. Narrative: Description of services (including the services of Designer’s subcontractors) performed during the previous reporting period; the current status of design; the identification of current design issues, including suggestions for resolution; description of services to be performed during the next period and documentation of potential change orders.
     2. Performance Measurement Report: A summary of schedule variances for each major element and level of the WBS, and a narrative description of management actions needed to resolve adverse variances.
     3. Forecasting: Designer shall provide estimate to complete (ETC) man-hours on a monthly basis for all work that has not been completed. Additionally, during the monthly forecasting, Designer shall provide current design package quantities based on the Unit of Measure (UOM) assigned to each scope item.
     4. MBE/SBE/DBE Report: A list of utilization of Minority Business Enterprise, Small Business, or Disadvantaged Business Enterprises, if required.
     5. Prime Contract Requirements: Information regarding the Design Services to meet progress and invoicing requirements required by the Prime Contract.
     6. Earned Value Recovery Plan and Report: Where Designer has been requested to provide an Earned Value Recovery Plan, Designer will provide a monthly update on the status of the Recovery Plan including a summary of actual cost of services performed, and a comparison of projected completion of design milestone deliverables to the current Design Schedule, including a revised staffing plan.

**4. LOCATION OF DESIGN SERVICES [Select as appropriate]**

A. The Design Manager and other discipline managers will be located at the Project office. Designer shall perform a substantial portion (minimum of [50%]) of the Design Services in the Project office.

B. The Design Manager and other discipline managers will be located at Designer’s DFW area office. Designer shall perform a substantial portion (minimum of [50%]) of the Design Services in that office. Designer will provide space during the design phase for Client’s design coordination personnel in Designer’s office.

**[REMAINDER OF THIS PAGE LEFT BLANK INTENTIONALLY]**

1. **General** 
   1. Design Services Fee. Client shall pay Designer for Design Services performed for the scope as described in Exhibit “A” Section 2B and 2C.
      1. Direct Labor Costs. Client shall pay Designer on a TBD Labor Multiplier times Direct Labor Costs
      2. Other Direct Costs. Client shall pay Designer an [actual cost or lump sum] of [$ insert sum] for Designer’s ODCs pertaining to the provision of Design Services including any costs for Project office space lease, furnishings, equipment and associated costs for janitorial services and utilities.
      3. Subconsultant Costs. Designer’s subconsultants will be compensated by Designer in accordance with a separate agreement between Designer and each subconsultant. The compensation section of all subconsultant subcontracts will be reviewed and approved by Client before final signature. Designer will be compensated for subconsultant work as billed by subconsultant, including subconsultant’s ODCs, and will receive a management fee equal to five percent (5%) of the value of each subcontract.
      4. Mobilization. Designer shall receive a mobilization fee in the amount of [$ insert sum] payable within forty-five (45) days of Client issuing notice to proceed to Designer. Such mobilization fee shall be included within the Designer’s first invoice.
      5. Project Specific Professional Liability Insurance Premium. Designer shall purchase and Client shall pay Designer for the premium of the Project Specific Professional Liability Insurance Policy **(“PSPL”)** upon receipt of invoice from Designer. The estimated price of the PSPL insurance policy is $\_\_\_\_\_\_\_.
   2. Success Fee. Designer shall be paid a success fee of [$ insert sum]. The success fee will be included in Designer’s first invoice.
   3. Subcontract Price Cap. All monies paid from Client to Designer under this Subcontract, including all amounts paid for Design Services and Additional Design Services not exceed [$ insert sum] (“Subcontract Price Cap”) without the written permission of the Client. Client shall not be liable for costs of the Design Services in excess of the Subcontract Price Cap absent written authorization adjusting the Subcontract Price Cap.
2. **Definitions and Clarifications**
   1. Direct Labor Cost (“**DLC**”): the actual wage and salary cost (before payroll deductions) incurred for the actual number of hours worked on the Project by Designer’s employees and employees of Designer’s affiliated companies (including temporary employees on loan from outside agencies).
      1. For purposes of DLC calculations, wages for temporary employees from outside agencies will be unburdened by employer’s payroll taxes, fringe benefits, agency costs or other payroll additives, and such wages will be reasonable and consistent with wage and salary rates for Designer’s permanent employees. DLC does not include the labor cost of:
         1. Clerical or administrative personnel, unless assigned to a dedicated Project office.

or

* + - 1. Officers, partners, or principals for their administrative duties; such labor costs will be considered part of overhead; provided however, if officers, partners, or principals will perform technical services on the Project, their technical services hours may be calculated as part of DLC, but only at labor rates commensurate with the type of services performed, provided that written approval is given by Client prior to the use of said individuals.
  1. Other Direct Cost (“**ODC**”): expenditures incurred by Designer and its subconsultants and specifically related to the Project for computer-aided design and drafting services, computer system maintenance, telephone, fax, other communications, copying and reproduction, postage and mailing, travel, lodging, and moving and other relocation costs. ODCs do not include costs for temporary labor.
  2. Labor Multiplier: a factor which, when multiplied by DLC, includes all of Designer’s DLC, direct overhead, indirect overhead and profit. Lease costs, including associated costs for janitorial services and utilities, for a dedicated Project office will be considered part of overhead.
  3. Clarification of Overtime Payment Terms. For any payment terms that are described as “DLC times a Labor Multiplier,” overtime labor will be treated as follows.
     1. The specified Labor Multiplier will be applied to the straight-time labor rate only, eliminating the premium portion from the calculation; and
     2. Upon prior approval, the premium portion of overtime labor will be paid with a 1.0 labor multiplier for exempt employees, 1.5 for non-exempt employees.

1. **Reserved**
2. **Additional Design Services**
   1. Except as provided in Section 4(B) of this Exhibit or for those Additional Design Services due to Owner’s Changes, Client will pay Designer for any Additional Design Services provided by Designer on the basis of DLC times a Labor Multiplier Rate of TBD, plus subconsultant costs and ODCs attributed to these services. A Labor Multiplier of TBD will be used for such services performed in the field using Contractor’s office facilities. Designer will be compensated for subconsultant work as billed by subconsultant, including subconsultant’s ODCs, and will receive a management fee equal to five percent (5%) of the value of each subcontract.
   2. Client will pay Designer for all construction quality assurance services on the basis of DLC times a Labor Multiplier of [TBD], plus subconsultant costs and ODCs attributed to these services. Designer will be compensated for subconsultant work as billed by subconsultant, including subconsultant’s ODCs, and will receive a management fee equal to five percent (5%) of the value of each subcontract.
3. **Progress Payment**
   1. Client shall make monthly progress payments to Designer within thirty (30) days after receipt of Designer’s invoice or within ten (10) days after receipt of Owner’s payment to Contractor for such services, whichever is later.
   2. Invoices will be in a form acceptable to Client and will separately account for any Additional Design Services.
   3. With each invoice to Client, Designer shall provide backup for the number of hours worked including employee name, actual hourly labor rate and the period during which the work was performed.
   4. Client shall pay Designer’s Other Direct Costs on a monthly basis according to the following schedule:

Month 1 xx% of the ODC lump sum amount

Month x through x xx% per month of the ODC lump sum amount

Month x through x xx% per month of the ODC lump sum amount

**[Note to Draft: Revise this payment table based on Design Schedule for Design Services.]**

* 1. For Design Services that are added by Change Order to the Prime Contract and have a lump sum method of payment, Designer’s monthly invoice shall be a share of the change order’s lump sum amount equal to the percentage of the change order work completed, less any amounts previously invoiced for the change order.
  2. Client shall withhold from each monthly payment five percent (5%) of the value of the invoice for retention. The retention shall become due and payable to Designer 14 days after Owner has accepted the design. **[Note: Revise as necessary to be consistent with the design approval process in the Prime Contract.]**
  3. Designer’s inclusion in an invoice of a Subconsultants’ costs shall constitute Designer’s certification that Designer has reviewed and approved the Subconsultants’ costs as eligible and appropriate for payment under the terms of Designer’s agreement with its Subconsultant.
  4. The acceptance of final payment will:
     1. Constitute full and complete payment for all costs (direct, indirect or other), overhead, profit, incidental expenses, and damages of any kind that were or may have been incurred or sustained by Designer in connection with the performance of this Subcontract; and
     2. Will be a waiver of all claims by Designer for compensation for any claims, except claims previously made in accordance with this Subcontract and not subsequently waived and which are further expressly reserved in writing by Designer with the submission of its final payment application.
     3. Consultant shall submit invoices, in a mutually agreed format, no later than the 10th day of each month to:

**Kiewit Engineering Group Inc.**

**Attn: Accounts Payable**

**12510 E. Belford Avenue, Bldg. 2**

**Englewood, CO 80112**

[**KIE\_Business\_Group@Kiewit.com**](mailto:KIE_Business_Group@Kiewit.com)

1. **Constructability Reviews** 
   1. Client will perform constructability reviews of plans and specifications prepared by Designer.
   2. Constructability Review Guidelines:

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| **Category** | **Description** | **Change Order** |
| Constructability Review **Before** Client’s Acceptance of Design Feature | Prior to a design feature being shown on the plans and accepted by Client, Client requests evaluation of an alternate design. | No Change Order. |
| Constructability Review **After** Client’s Acceptance of Design Feature | After a design feature is shown on the plans and accepted by Client, Client requests a change in design which has a design cost change in excess of $2,000. | Change Order issued for price adjusted upward or downward based on estimate of the change in design cost. If the cost of the change is less than $2,000, no adjustment will be made. |

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| **No.** | **Key Personnel Member** | **Position** |
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| **No.** | **Milestone or Deliverable** | **Dates** |
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**[INSERT FULL NAME OF DESIGN ENTITY]** has been paid and has received a progress payment in the sum of [$[●]] for the Design Services provided to **[INSERT FULL NAME OF CLIENT ENTITY]**in connection with the **[INSERT FULL NAME OF PROJECT]**, and does hereby release any mechanic's lien or bond claim right that undersigned has on the Project. This release covers a progress payment for all Design Services provided from [\_\_\_\_\_\_\_\_\_\_\_\_] to [\_\_\_\_\_\_\_\_\_\_\_\_]. The undersigned certifies that all its sub-designers performing Design Services in connection with the Project have been paid in full through the date set forth and hold Client, Contractor, Client’s sureties, Owner, and any other person to be indemnified under the terms of the Prime Contract harmless against any loss arising from the nonpayment thereof.

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1. If Designer has one or more lower-tier subcontractors that are certified for any part of the Design Services (“**Certified DBE Sub-Vendor**”), Designer warrants and guarantees the following:
   1. Designer and Certified DBE Sub-Vendor fully understand the DBE Program.
   2. Certified DBE Sub-Vendor is certified in the appropriate NAICS code (and) for the Design Services.
   3. Certified DBE Sub-Vendor will generate DBE Program participation credit toward the DBE Participation Goal in an amount equal to the amount agreed upon by the Parties.
   4. As applicable, Certified DBE Sub-Vendor will perform a “commercially useful function” in connection with the Design Services covered by this Subcontract, with its own forces.
2. Client will:
   1. Have good cause to require Designer to terminate its subcontract with the Certified DBE Sub-Vendor, without penalty or liability, if Certified DBE Sub-Vendor is decertified as a DBE or if for any reason Owner refuses to count any portion of the dollar amount of this Subcontract being used by Contractor to meet the specified DBE goal.
   2. Be entitled to recover from Designer any costs or damages it may suffer arising from Designer’s breach of these obligations or failure to abide by Owner’s DBE program or applicable law, including attorneys’ fees, and further including any penalties or increased costs attributable to obtaining a replacement DBE acceptable to Owner to complete the Design Services.
3. Client is not obligated to pay for Design Services performed by a Certified Sub-Vendor(s) that Client reasonably determines is not performing a “commercially useful function” (“**DBE Payment Condition**”).
4. Client will consider commercially useful function indicators recognized by applicable enforcement agencies when determining whether the DBE Payment Condition has been satisfied. These indicators include the following:
   1. Certified Sub-Vendor was responsible for and actually performed, managed, and supervised the full amount of the Design Services being counted towards the DBE Participation Goal with its own forces.
   2. Certified Sub-Vendor did not sub-subcontract a significantly greater portion of the Design Services than would be expected on the basis of normal industry practices.
   3. Certified Sub-Vendor produced written agreements with all its sub-vendors including equipment rental agreements, subcontracts, material purchase agreements, or trucking agreements upon demand.
   4. Certified Sub-Vendor, with respect to materials and supplies used for the Design Services, negotiated prices, determined quality and quantity, ordered the materials, and installed and paid for the material itself.
5. Sub-Vendor Agreements:
   1. Client may review or audit Designer’s sub-vendor agreements, including equipment rental agreements, subcontracts, material purchase agreements, trucking agreements, or any other agreements through which Designer intends to procure any part of the Design Services.
   2. If Client determines that any sub-vendor agreement does not comply with these DBE Additional Provisions, then Designer (at no additional cost to Client) shall:
      1. Terminate the sub-vendor agreement; or
      2. Undertake Client’s written direction with regard to the sub-vendor agreement, including modification of any terms deemed necessary to ensure compliance with these DBE Additional Provisions by Client. Client’s mere acceptance of a sub-vendor agreement is not to be construed as a waiver of a Subcontract obligation or as satisfaction of a Subcontract condition.
6. Designer will not to jeopardize Contractor’s ability to maximize available DBE Program participation credit for payments Contractor makes under this Subcontract.
7. Designer will deliver written notification to Client of any matter that may jeopardize Contractor’s ability to claim DBE Program participation credit for Subcontract payments at Designer’s earliest practicable opportunity.
8. Designer will ensure that the requirements and conditions of these DBE Additional Provisions bind every person or entity providing any part of the Design Services.

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