

Progressive Design- Build Agreement

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Document No. 544

Second Edition, 2024

© Design-Build Institute of America
Washington, D.C.





Design-Build Institute of America - Contract Documents
LICENSE AGREEMENT

By using the DBIA Contract Documents, you agree to and are bound by the terms of this License Agreement.

- 1. License.** The Design-Build Institute of America (“DBIA”) provides DBIA Contract Documents and licenses their use worldwide. You acknowledge that DBIA Construction Documents are protected by the copyright laws of the United States. You have a limited nonexclusive license to: (a) Use DBIA Contract Documents on any number of machines owned, leased, or rented by your company or organization; (b) Use DBIA Contract Documents in printed form for bona fide contract purposes; and (c) Copy DBIA Contract Documents into any machine-readable or printed form for backup or modification purposes in support of your permitted use.
- 2. User Responsibility.** You assume sole responsibility for the selection of specific documents or portions thereof to achieve your intended results, and for the installation, use, and results obtained from the DBIA Contract Documents. You acknowledge that you understand that the text of the DBIA Contract Documents has important legal consequences and that consultation with an attorney is recommended with respect to use or modification of the text. You will not represent that any of the contract documents you generate from DBIA Contract Documents are DBIA documents unless (a) the document text is used without alteration or (b) all additions and changes to, and deletions from, the text are clearly shown.
- 3. Copies.** You may not use, copy, modify, or transfer DBIA Contract Documents, or any copy, modification, or merged portion, in whole or in part, except as expressly provided for in this license. Reproduction of DBIA Contract Documents in printed or machine-readable format for resale or educational purposes is expressly prohibited. You will reproduce and include DBIA’s copyright notice on any printed or machine-readable copy, modification, or portion merged into another document or program.
- 4. Transfers.** You may not transfer possession of any copy, modification, or merged portion of DBIA Contract Documents to another party, except that a party with whom you are contracting may receive and use such transferred material solely for purposes of its contract with you. You may not sublicense, assign, or transfer this license except as expressly provided in this Agreement, and any attempt to do so is void.
- 5. Term.** The license is effective for one year from the date of purchase. DBIA may elect to terminate it earlier, by written notice to you, if you fail to comply with any term or condition of this Agreement.
- 6. Limited Warranty.** DBIA warrants the electronic files or other media by which DBIA Contract Documents are furnished to be free from defects in materials and workmanship under normal use during the Term. There is no other warranty of any kind, expressed or implied, including, but not limited to the implied warranties of merchantability and fitness for a particular purpose. Some states do not allow the exclusion of implied warranties, so the above exclusion may not apply to you. This warranty gives you specific legal rights and you may also have other rights which vary from state to state. DBIA does not warrant that the DBIA Contract Documents will meet your requirements or that the operation of DBIA Contract Documents will be uninterrupted or error-free.
- 7. Limitations of Remedies.** DBIA’s entire liability and your exclusive remedy shall be: the replacement of any document not meeting DBIA’s “Limited Warranty,” which is returned to DBIA with a copy of your receipt, or at DBIA’s election, your money will be refunded. In no event will DBIA be liable to you for any damages, including any lost profits, lost savings, or other incidental or consequential damages arising out of the use or inability to use DBIA Contract Documents even if DBIA has been advised of the possibility of such damages, or for any claim by any other party. Some states do not allow the limitation or exclusion of liability for incidental or consequential damages, so the above limitation or exclusion may not apply to you.
- 8. Acknowledgment.** You acknowledge that you have read this agreement, understand it, and agree to be bound by its terms and conditions and that it will be governed by the laws of the District of Columbia. You further agree that it is the complete and exclusive statement of your agreement with DBIA which supersedes any proposal or prior agreement, oral or written, and any other communications between the parties relating to the subject matter of this agreement.

INSTRUCTIONS

For DBIA Document No. 544 Progressive Design-Build Agreement (2024 Edition)

Checklist

Use this Checklist to ensure that the Agreement is fully completed and all exhibits are attached.

_____	Page 1	Owner's name, address, and form of business
_____	Page 1	Design-Builder's name, address, and form of business
_____	Page 1	Project name and address
_____	Section 2.1.7	Identify other exhibits to the Agreement
_____	Section 4.3.2	Complete blanks for additional sum for use of Work Product
_____	Section 5.2.1	Complete blanks for calendar days and note the optional language that is provided
_____	Section 5.2.2	Insert any interim milestones (optional)
_____	Section 5.4	Complete blanks for liquidated damages and note the optional provisions that are provided
_____	Section 5.5	If the parties select the option provided, they must insert an amount
_____	Section 5.6	Complete blanks for early completion bonus and note the optional provision that is provided
_____	Section 5.7.1	Complete blank for calendar days for owner review
_____	Section 5.7.2	Complete blank for calendar days for Owner review and response
_____	Section 6.1.1	Complete blank for Phase 1 Services price
_____	Section 6.1.3	Insert basis for pricing specific Work (optional)
_____	Section 6.2	Complete blank for Lump Sum pricing (optional)
_____	Section 6.3.1	Choose markups for changes
_____	Section 6.4.1	Choose basis for Fee and complete blanks and note optional provision that is provided
_____	Section 6.4.2.1	Insert financial arrangements for adjustments and note optional provisions
_____	Section 6.5.1.3	Complete blanks for markup; insert or attach personnel names, etc.
_____	Section 6.5.1.4	Note optional language that is provided
_____	Section 6.5.1.23	Note optional language that is provided
_____	Section 6.6.1	Complete blanks for guaranteed maximum price and note the optional language that is provided
_____	Section 6.6.2	Complete blanks for contingency amount
_____	Section 6.6.3	Complete blanks for savings amounts and note optional language that is provided
_____	Section 6.7.4	Note the optional provision that is provided
_____	Section 6.8.1	Insert any performance incentives (optional)
_____	Section 7.2.1	Complete blanks for day of month
_____	Section 7.3.1	Complete blanks for retention percentage and note optional provision
_____	Section 7.3.2	Note optional provision

Checklist (Continued)

Use this Checklist to ensure that the Agreement is fully completed and all exhibits are attached.

_____	Section 7.5	Complete blanks for interest rate
_____	Section 8.1	Choose overhead/profit method for termination for convenience
_____	Section 8.2.1	Complete blanks for percentages
_____	Section 8.2.2	Complete blanks for percentages
_____	Section 9.1.1	Insert Owner's Senior Representative's name, etc. (optional)
_____	Section 9.1.2	Insert Owner's Representative's name, etc. (optional)
_____	Section 9.2.1	Insert Design-Builder's Senior Representative's name, etc. (optional)
_____	Section 9.2.2	Insert Design-Builder's Representative's name, etc. (optional)
_____	Section 10.1	Attach Insurance Exhibit
_____	Section 10.2	Insert amount and conditions of bonds or other security and note the options that are provided
_____	Section 11.1	Insert any other provisions (optional) or exhibits or documents incorporated or referenced in the Agreement
_____	Section 12	Complete blank for rate
_____	Last Page	Owner's and Design-Builder's execution of the Agreement
_____	Exhibit A	Previously authorized design agreement dated November 6, 2024 And Contract Amendment No. 1, dated January 8, 2025
_____	Exhibit B	Long-lead items

General Instructions

No.	Subject	Instruction
1.	Standard Forms	Standard form contracts have long served an important function in the United States and international construction markets. The common purpose of these forms is to provide an economical and convenient way for parties to contract for design and construction services. As standard forms gain acceptance and are used with increased frequency, parties are able to enter into contracts with greater certainty as to their rights and responsibilities.
2.	DBIA Standard Form Contract Documents	Since its formation in 1993, the Design-Build Institute of America (“DBIA”) has regularly evaluated the needs of owners, design-builders, and other parties to the design-build process in preparation for developing its own contract forms. Consistent with DBIA’s mission of promulgating best design-build practices, DBIA believes that the design-build contract should reflect a balanced approach to risk that considers the legitimate interests of all parties to the design-build process. DBIA’s Standard Form Contract Documents reflect a modern risk allocation approach, allocating each risk to the party best equipped to manage and minimize that risk, with the goal of promoting best design-build practices.
3.	Use of Non-DBIA Documents	To avoid inconsistencies among documents used for the same project, DBIA’s Standard Form Contract Documents should not be used in conjunction with non-DBIA documents unless the non-DBIA documents are appropriately modified on the advice of legal counsel. Moreover, care should also be taken when using different editions of the DBIA Standard Form Documents on the same project to ensure consistency.
4.	Legal Consequences	DBIA Standard Form Contract Documents are legally binding contracts with important legal consequences. Contracting parties are advised and encouraged to seek legal counsel in completing or modifying these Documents.
5.	Reproduction	DBIA hereby grants to purchasers a limited license to reproduce its Documents consistent with the License Agreement accompanying these Documents. At least two original versions of the Agreement should be signed by the parties. Any other reproduction of DBIA Documents is strictly prohibited.
6.	Modifications	<p>Effective contracting is accomplished when the parties give specific thought to their contracting goals and then tailor the contract to meet the unique needs of the project and the design-build team. For that reason, these Documents may require modification for various purposes including, for example, to comply with local codes and laws, or to add special terms. DBIA’s latest revisions to its Documents provide the parties an opportunity to customize their contractual relationship by selecting various optional contract clauses that may better reflect the unique needs and risks associated with the project.</p> <p>Any modifications to these Documents should be initialed by the parties. At no time should a document be re-typed in its entirety. Re-creating the document violates copyright laws and destroys one of the advantages of standard forms – familiarity with the terms.</p>
7.	Execution	It is good practice to execute two original copies of the Agreement. Only persons authorized to sign for the contracting parties may execute the Agreement.

Specific Instructions

Section	Title	Instruction
General	Purpose of This Agreement	<p>DBIA Document No. 544 (“Agreement”) should be used for progressive design-build projects. Progressive Design-Build allows an Owner to complete a Design-Build project in two phases. In Phase 1, Owner completes preliminary design, sets the construction plan, and establishes the Phase 2 costs to complete final design and the planned construction. This Agreement allows for Owner to pay Design-Builder for design services and construction work in Phase 2 using Cost of the Work plus a Fee, with or without a Guaranteed Maximum Price (“GMP”), or Lump Sum.</p> <p>If there is uncertainty about Owner’s final design Project Criteria after Phase 1, or the final design Project Criteria remain to be developed by Owner and Design-Builder together during Phase 2, a cost-plus/GMP contracting approach is desirable.</p> <p>If there is certainty as to Owner’s Project Criteria and project design after Phase 1, a lump sum fixed price for the completion of all design and construction services in Phase 2 may be suitable, especially when Owner procures Design-Builder’s services by competitive means.</p>
General	Purpose of These Instructions	These Instructions are not part of this Agreement, but are provided to aid the parties in their understanding of the Agreement and in completing the Agreement.
General	Related Documents	This Agreement shall be used in conjunction with the General Conditions of Contract. Other related Contract Documents are listed in Article 2 of this Agreement.
General	Date	On Page 1, enter the date when both parties reach a final understanding. It is possible, due to logistical reasons, that the dates when the parties execute the Agreement may be different. Once both parties execute the Agreement, the effective date of the Agreement will be the date recorded on Page 1. This date does not, however, determine Contract Time, which is measured according to the terms of Article 5.
General	Parties: Owner and Design-Builder	On Page 1 enter the legal name and full address of Owner and Design-Builder, as well as the legal form of each entity, e.g., corporation, partnership, limited partnership, limited liability company, or other.
1.3	Contract Price Amendment and Proposal	<p>When a GMP or Lump Sum is established after execution of this Agreement for Phase 2 work, the Proposal must be attached to the Contract Price Amendment pursuant to Section 1.3.2. Both the Contract Price Amendment and Proposal will include those Basis of Design Documents Design-Builder uses as the basis for its Contract Price.</p> <p>This Agreement provides the parties flexibility in establishing the Phase 2 Contract Price. Parties can establish a GMP or Lump Sum for Phase 2 after entering into this Agreement, or elect to proceed on the basis of costs plus a fee, without a GMP or Lump Sum.</p> <p>If a GMP or Lump Sum method is elected, the GMP or Lump Sum should not be established until the Basis of Design Documents is sufficiently defined during Phase 1 to make the GMP or Lump Sum realistic and meaningful. Setting it too early does not permit reasonable opportunity for scope definition and evaluation of Project risk. On the other hand, setting it too late may not achieve Owner’s objective of having an early price guarantee to enable it to make decisions relative to the Project.</p>
1.3.1.4	Schedule	Given that expedited delivery is one of the primary factors driving many owners to select the design-build method, DBIA strongly believes that the parties should discuss and understand what each party must do to support the Project schedule. The entire Work, both design and construction, should be scheduled. The schedule should indicate the dates for the start and completion of the various stages of the Work, including the date when Owner information and approvals are required, and any Owner-created constraints. The Agreement also provides flexibility to establish the Scheduled Substantial Completion Date prior to submission of the Proposal.

Section	Title	Instruction
1.3.2.2	Acceptance of Proposal	If Owner accepts the Proposal, the parties should amend this Agreement to add the final Proposal as a Contract Document pursuant to Section 2.1.2.
1.3.2.3	Failure to Accept the Proposal	<p>This Agreement provides three options for Owner in the event it fails to accept the Proposal and two choices for Design-Builder if Owner fails to exercise any of the three options. These options are specifically designed to prevent one party from receiving a windfall in the event the parties cannot agree on the GMP or Lump Sum and the Agreement is terminated. This Agreement also states when the Agreement terminates or the Agreement is deemed completed if Owner fails to exercise one of the options.</p> <p>The parties should take note that if Owner exercises its option to terminate for convenience, or Design-Builder suspends performance, Design-Builder will not be entitled to payment for uncompleted Work provided by Section 8.2. However, additional payment for Owner's use of Work Product will be due Design-Builder pursuant to Section 4.3, if Owner proceeds to complete the Project using Design-Builder's Work Product.</p>
2.1	Order of Precedence	The Contract Documents are listed in Section 2.1 in the order of their precedence. The Contract Price Amendment and Proposal are based on the Basis of Design Documents, which are comprised of various documents. The parties should strongly consider establishing the priority of the various documents comprising the Contract Price Amendment or Proposal to avoid disputes should discrepancies arise among the documents. Moreover, Section 2.1.7 recognizes that there may be other exhibits attached to this Agreement. If this is the case, the parties should discuss whether these exhibits should be part of the Basis of Design Documents. If these exhibits are not made part of the Basis of Design Documents, these exhibits will not take priority over the Basis of Design Documents in the event of a conflict.
2.1.5	Construction Documents	After execution of the Agreement, and consistent with the requirements of Section 2.4 of the General Conditions of Contract, Design-Builder will prepare Construction Documents, subject to Owner's review and approval.
3.3	Definitions	Terms, words and phrases used in the Agreement shall have the same meanings used in the General Conditions of Contract.
3.4	Design Specifications	Owner is cautioned that consistent with legal precedent, if it includes design specifications in its Project Criteria Design-Builder is entitled to rely on the information provided and to the extent said information is not accurate, Design-Builder is entitled to an adjustment in the Contract Price and/or Contract Time. Accordingly, Owner should consider using performance specifications to avoid such potential liability.
4.1	Work Product	This Agreement provides that Design-Builder shall retain ownership of the Work Product it produces, but obligates Design-Builder to grant a limited license to Owner to use the Work Product according to the terms and circumstances described in Sections 4.2, 4.3, 4.4 and 4.5.
4.2	Owner's Limited License Upon Payment in Full	Design-Builder shall grant Owner, at Owner's sole risk, a limited license to use the Work Product at the completion of the Work in connection with Owner's occupation of the Project. This Section also provides the parties with the option of transferring ownership of some or all of the Work Product to Owner upon payment in full for all Work performed. Generally, where Owner desires ownership of Work Product, it is sufficient to transfer ownership of unique architectural and design elements.

Section	Title	Instruction
4.3	Owner's Limited License Upon Owner's Termination for Convenience or Design-Builder's Election to Terminate	Owner should not use the Termination for Convenience Clause to obtain Design-Builder's valuable design concepts, and then seek lower bids from other design-builders. Therefore, where Owner terminates this Agreement for its convenience, and then decides to complete the Project with its own or third-party forces, Design-Builder shall grant Owner the rights set forth in Section 4.3, provided Owner pays Design-Builder all amounts due Design-Builder as required by the Contract Documents, including paying Design-Builder an additional sum per Section 4.3.2 for the use of the Work Product. In the event Design-Builder elects to terminate this Agreement for cause, for reasons set forth in Section 11.4 of the General Conditions of Contract, these same conditions apply to Owner's use of the Work Product.
4.3.2	Additional Compensation	To minimize disputes, the parties should negotiate prior to the execution of the Agreement the amount Owner shall pay Design-Builder for the use of Design-Builder's Work Product in the event Owner terminates this Agreement for its convenience or Design-Builder elects to terminate this Agreement for cause. Enter this amount.
4.4	Owner's Limited License upon Design-Builder's Default	If Design-Builder is properly terminated for default, Owner is granted a limited license to use the Work Product, to complete the Project, and Owner shall thereafter have the same rights and obligations as set forth in Section 4.3.
4.5	Owner's Indemnification for Use of Work Product	Owner's use or alteration of the Work Product shall be at its sole risk, and Owner must agree to defend, indemnify, and hold harmless Design-Builder and anyone working by or through Design-Builder, including Design Consultants of any tier.
5.1	Date of Commencement	Design-Builder's obligation to commence work is triggered by its receipt of a Notice to Proceed unless the parties mutually agree otherwise.
5.2.1	Substantial Completion of the Entire Work	Enter the calendar days of duration by which Substantial Completion has to be achieved. The parties in this Section have the option of modifying the definition of Substantial Completion set forth in the General Conditions of Contract. If this option is selected, Substantial Completion will be deemed to be achieved no later than the date a Temporary Certificate of Occupancy is issued if applicable to the Project.
5.2.2	Interim Milestones	It may be that some portions of the Work must be completed in phases or within a prescribed period of time to accommodate Owner's needs. The parties may, at their option, identify these portions of the Work to be completed prior to Substantial Completion of the entire Work. Enter the calendar days, starting from the Date of Commencement, for achieving Substantial Completion of these identified portions of the Work. If these portions of the Work are required to be substantially completed by certain milestone dates, enter those dates. As presently drafted, no remedy is provided to Owner if an interim milestone is not met. If Owner has special requirements as it relates to interim milestones, Owner may want to consider a remedy for Design-Builder's failure to meet an interim milestone, as well as providing a bonus to Design-Builder for satisfying such interim milestone.

Section	Title	Instruction
5.4	Liquidated Damages	<p>Owner should make a good faith evaluation of the amount that is reasonably necessary to compensate it for delay. Owner should not establish liquidated damages to penalize Design-Builder. Moreover, in the event a GMP or Lump Sum is not established upon execution of the Agreement, it appears prudent for the parties to refrain from establishing liquidated damages until such time as the GMP or Lump Sum is established.</p> <p>Section 5.4 establishes a grace period between the Scheduled Substantial Completion Date and the assessment of liquidated damages in order to prevent disputes as to which party bears responsibility for only a few days of delay. The parties should enter the calendar days that may pass following the Scheduled Substantial Completion Date before liquidated damages will be assessed.</p> <p>The parties are also provided the option of establishing liquidated damages if the Design-Builder fails to achieve Final Completion within a specified number of days after Substantial Completion. If this option is selected, the parties must negotiate the number of days, as well as the liquidated damages amount. The parties in negotiating liquidated damages should keep in mind that the amount of liquidated damages for failing to achieve Final Completion should be a considerably scaled down amount and should reflect the financial harm to Owner. In no case should the total amount of liquidated damages for the Project exceed an amount that is reasonably necessary to compensate Owner for Project delay.</p> <p>The parties also have the option here of eliminating liquidated damages altogether in which case Owner can recover actual damages for Project delay at an amount that is capped by the parties. Owner is cautioned that it still cannot recover consequential damages under Section 10.5.1 of the General Conditions of Contract.</p>
5.5	Liquidated Damages Cap	The parties can agree to cap liquidated damages at a negotiated amount.
5.6	Early Completion Bonus	If the Project economics justify liquidated damages, then it is appropriate to couple these liquidated damages with an early completion bonus. The parties should enter the number of calendar days prior to the Scheduled Substantial Completion Date that will set the Bonus Date. Also, enter the amount of the bonus to be paid per day that will allow Owner to share with Design-Builder the economic benefits of early completion. Moreover, in the event a GMP or Lump Sum is not established upon execution of the Agreement, it appears prudent for the parties to refrain from establishing an early completion bonus until such time as the GMP or Lump Sum is established. The parties also have the option in Section 5.6 of capping the early completion bonus at a negotiated amount.
Optional Provision in 5.6	Compensation for Force Majeure Events	The parties are provided the opportunity of providing Design-Builder the right to receive compensation for Force Majeure Events. By selecting this option, the parties agree to modify Section 8.2.2 of the General Conditions of Contract, in which case the parties must negotiate how many cumulative days of Force Majeure delays must occur before Design-Builder is entitled to either a negotiated amount per day for delay or the direct costs it has incurred as a result of such delay.

6.1	GMP or Lump Sum at Agreement Execution	<p>Enter the GMP or Lump Sum for Phase 2 Services, if appropriate. Attach as an amendment to this Agreement the Basis of Design Documents used to establish the GMP or Lump Sum. These documents comprise the Contract Price Amendment which shall become a Contract Document pursuant to Section 2.1.2 of the Agreement. Design-Builder does not guarantee any specific line item provided as part of a GMP.</p> <p>By selecting the alternate option if using a GMP, Design-Builder agrees to guarantee the line item in its GMP for general conditions costs only. Design-Builder agrees that it is responsible for paying general conditions costs in excess of this line item. Design-Builder does not guarantee any other line items in the GMP.</p>
6.1.3	Optional Pricing	<p>This Agreement allows the parties the flexibility to establish within the Contract Price a different payment basis for certain portions of the Work which may be necessary to permit Design-Builder to furnish Owner with a GMP or Lump Sum.</p>
6.4.1	Design-Builder's Fee	<p>Enter the amount of Design-Builder's Fee as a sum certain or as a percentage of the Cost of the Work. Design-Builder's Fee shall be commensurate with the services it provides and the risk it assumes in providing single point responsibility to Owner.</p>
6.4.2	Adjustments to Design-Builder's Fee	<p>For additive Change Orders, the parties must negotiate the Fee Design-Builder will receive. For deductive Change Orders, the parties have the option by checking the appropriate box of whether there will be no additional reduction or whether there will be an additional reduction based on a negotiated percentage.</p>
6.5.1.3	Wages for Design-Builder's Employees at Principal or Branch Offices	<p>DBIA endorses reimbursing salaries and associated benefits of Design-Builder's Project personnel, such as accountants, stationed at offices other than the field office, when to do so is more efficient and cost effective. Enter the percentage markup to be applied for Project-related overhead associated with such personnel. Insert, or attach as an exhibit, a list of such personnel and their job functions.</p>
6.5.1.4	Employee Benefits	<p>It may be simpler for the parties to agree on a multiplier (rather than actual costs) to compensate Design-Builder for employee benefits. Accordingly, the parties may want to insert the multiplier to be applied to the wages and salaries of its reimbursable employees.</p>
6.5.1.7	Costs for Defective/Non-Conforming Work	<p>The Cost of the Work shall include the costs to repair or correct defective or non-conforming Work (including warranty or corrective work performed after Substantial Completion) unless caused by Design-Builder's negligence. DBIA believes that Design-Builder should not be penalized for inadvertent mistakes which are inevitable when designing and constructing a Project. To do so would encourage ultra-conservatism in every task, the ultimate cost of which would be greater than a proactive approach to performing the Work, which includes ordinary mistakes or inadvertence.</p>
6.5.1.23	Warranty Escrow	<p>At this section, the parties are provided the opportunity to establish prior to Final Completion an escrow account in a negotiated amount to be used to reimburse Design-Builder for its costs incurred in performing warranty Work if a GMP is used. If funds remain in the escrow account after the expiration of the warranty period, the funds are returned to Owner subject to Design-Builder's share of any savings. Note that even if the escrow account is exhausted, if funds remain under the GMP, Owner is still obligated to reimburse Design-Builder for its warranty Work.</p>

6.6.2	GMP Contingency	<p>Enter the amount of Design-Builder's Contingency if using a GMP. The Contingency is for the exclusive use of Design-Builder and covers all unanticipated costs incurred that are not the basis of a Change Order. This section sets forth by way of example only the type of costs that would be funded out of the Contingency. Other costs such as, but not limited to, any deductibles Design-Builder is obligated to pay would be subject to reimbursement. Design-Builder is also required to provide Owner with a monthly status report accounting for the Contingency, including all reasonably foreseen uses and potential uses, of the Contingency for the upcoming three months.</p> <p>While not provided for in the Contingency provision, DBIA recognizes that there may be situations where Owner will want to recapture the Contingency prior to Final Completion. For example, Owner may want to use amounts in the Contingency to fund changes to the Project. Owner's desire must be balanced against Design-Builder's need to use the Contingency to fund unanticipated costs for which it is liable. An option to consider to accommodate both interests is to establish an "Owner's Contingency" and a "Design-Builder's Contingency" in the GMP. If this option is used, any savings clause in the agreement should be drafted appropriately to address these pools of funds.</p>
6.6.3	Savings	<p>One of the benefits of a GMP approach is the possibility that with good management by Design-Builder and timely support from Owner the actual Cost of the Work and Fee may be less than the GMP. This creates a savings pool that should result in a benefit to both Design-Builder and Owner. Sharing these savings creates an incentive for Design-Builder to save costs. Some factors to consider in determining how the Savings are shared include the timing for the establishment of the GMP and the amount of Design-Builder's Fee established under Section 6.4.1.</p>
6.6.3.1	Savings Calculations	<p>This section provides that if the actual Cost of the Work and Design-Builder's Fee is less than the GMP, as such GMP may have been adjusted, the savings, if any, shall be shared. The Agreement offers two choices for distributing Savings. Choose a method and enter the appropriate figures.</p>
6.7.4	Allowance Value	<p>This section recognizes that the parties may agree that certain items of Work should be treated as an Allowance Item and priced based on Allowance values. The Allowance Value for which Design-Builder will be entitled to receive compensation includes direct cost of labor, materials, equipment, transportation, taxes, and insurance associated with the Allowance Item. All other costs associated with the Allowance Item, such as design fees, general conditions costs, and Fee are deemed to be included in the Contract Price. However, by checking the box, the parties agree that in the event the actual cost of the Allowance Item is greater than or less than the Allowance Value by a negotiated percentage, then Design-Builder's right to Fee and markup shall be determined pursuant to Section 6.4.</p>
6.8	Performance Incentives	<p>In addition, for the potential of Design-Builder to share in Savings as set forth in Section 6.6.3, there may be other performance incentives that will influence Project success. Such incentives may include award fees tied to Design-Builder achieving certain standards relative to client satisfaction, safety, and personnel retention. The parties are encouraged to discuss the use of such incentives during negotiation of this Agreement. Any agreement on the use of incentives should be set forth in an exhibit attached to this Agreement.</p>
7.2.1	Progress Payments	<p>Enter the day of the month when Design-Builder shall submit its Application for Payment.</p>

7.3.1	Retainage	<p>Enter the percentage Owner will retain from Progress Payments to Design-Builder until fifty percent (50%) of the Work is completed. Owner should recognize that it creates undue hardship to hold retainage on Subcontractors that have completed their work early in the Project. Owner should accordingly consider releasing retainage on Subcontractors that complete work early in the Project, providing that these Subcontractors have satisfactorily performed their portion of the Work.</p> <p>The parties are provided the option of modifying the retainage provision by checking the box. This option excludes from retainage the Design-Builder's general conditions costs and amounts paid to Design-Builder's Design Consultant. The rationale for selecting this option is that Design-Builder is obligated to pay its general conditions costs in full each month and that under the design-bid-build delivery method, Owner typically does not retain sums from its Designer.</p>
7.3.2	Release of Retainage	<p>This section requires Owner to release retainage to Design-Builder. If Design-Builder and Owner have established a warranty reserve in accordance with Section 6.5.1.23, the parties shall establish an escrow account at this time.</p>
7.5	Interest	<p>The parties should enter the rate at which interest will accrue on Design-Builder's payments if unpaid five (5) days after due. Late payment creates a hardship for Design-Builder, its Design Consultants, and Subcontractors.</p>
7.6	Record Keeping	<p>Owner is provided access to Design-Builder's accounting information as it relates to Costs of the Work. However, if the parties have agreed to multipliers or markups, the time to challenge and negotiate those percentages is at the time the parties execute the Agreement and not during the Project or after it has been completed. Accordingly, Owner can at any time audit these percentages only to confirm that such percentage has been properly charged and not to challenge the composition of such percentage.</p>
8.1	Termination for Convenience: Overhead and Profit	<p>The parties should choose prior to execution of the Agreement the method that will be used to determine overhead and profit paid to Design-Builder in the event Owner terminates Design-Builder for its convenience. The parties may choose to set percentage rates for overhead and profit prior to execution of the Agreement, or may choose to determine reasonable sums to be paid for overhead and profit at the time of the termination. If the parties choose to set overhead and profit rates prior to execution of the Agreement, the percentages should be entered in Section 8.1.</p>
8.2	Termination for Convenience: Additional Payments	<p>Although it is important for Owner to have a process for terminating this Agreement for convenience, the process must consider the interests of Design-Builder. If Owner terminates this Agreement for its own convenience, compensating Design-Builder for its costs will not be adequate because Design-Builder will have committed its resources for a small amount of revenue. Therefore, in addition to the overhead and profit paid in Section 8.1, Owner shall pay Design-Builder an additional sum, calculated as a percentage of the remaining balance of the Contract Price or, if a GMP or Lump Sum has not been established, the remaining balance of the most recent estimated Contract Price. Enter the percentages Owner shall pay Design-Builder if Owner terminates this Agreement for its own convenience prior to or after the start of construction.</p>
8.3	Termination for Convenience: Owner's Use of Work Product	<p>Owner should not use the Termination for Convenience clause to obtain Design-Builder's valuable design concepts and then seek lower bids from another design-builder. If Owner terminates this Agreement for its own convenience, and chooses to proceed with the Project using Design-Builder's Work Product, Owner should pay an additional sum for the use of Design-Builder's Work Product pursuant to Section 4.3.</p>

Article 9	Representatives of the Parties	<p>Enter the name, title, address and telephone number of Owner's Senior Representative and Owner's Representative at Sections 9.1.1 and 9.1.2, respectively.</p> <p>Enter the name, title, address and telephone number of Design-Builder's Senior Representative and Design-Builder's Representative at Sections 9.2.1 and 9.2.2, respectively.</p> <p>The parties can elect to establish these Representatives during the performance of the Project rather than at the time of execution of this Agreement. If Representatives are identified after execution of the Agreement, an appropriate amendment should be made to the Agreement at the time these individuals are designated.</p>
10.1	Insurance	Attach an Insurance Exhibit setting forth in detail the insurance coverages required for the Project. Parties are advised to familiarize themselves with the terms of Article 5 of the General Conditions of Contract, Insurance and Bonds, and to consult their insurance advisor.
10.2	Bonds	Enter the type and amount of bonds or other performance security required for the Project. Where bonding is not required by statute, Owner may want to evaluate the project risks versus the bonding costs in deciding what type of performance security to require.
11.1	Other Provisions	Insert any other provisions. For example, the parties may elect to have disputes resolved through litigation rather than arbitration, in which case the following optional language in this Section should be included.
11.2	Listing of Exhibits	Include a listing of exhibits and documents incorporated or referenced in the Agreement. This listing includes the exhibits and documents referenced in the Agreement. Additional documents or exhibits referenced in the Agreement should be listed here.
12	Limitation of Liability	This provision establishes a limit of liability of Design-Builder's liability for the Project.



Progressive Design-Build Agreement

This document has important legal consequences. Consultation with an attorney is recommended with respect to its completion or modification.

This **AGREEMENT** is made as of the _____ day of _____ in the year of 2024, by and between the following parties, for services in connection with the Project identified below:

OWNER/CITY:
(Name and address)

City of Visalia
707 W. Acequia Avenue
Visalia, CA 93291

DESIGN-BUILDER:
(Name and address)

4CGlobal, Inc. dba 4Creeks Build
324 S. Santa Fe Street
Visalia, CA 93292

PROJECT:
(Include Project name and location as it will appear in the Contract Documents)

Valley Strong Stadium (Recreation Park)
Expansion & Remodel of Clubhouse & Batting Cage

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder agree as set forth herein.

Article 1

Design-Builder's Services and Responsibilities

1.1 General Services.

1.1.1 Owner shall provide Design-Builder with Owner's Project Criteria describing Owner's program requirements and objectives for the Project. Owner's Project Criteria shall include Owner's use, space, price, time, site, performance, and expandability requirements. Owner's Project Criteria may include conceptual documents, design specifications, design performance specifications, and other technical materials and requirements prepared by or for Owner.

1.1.2 If Owner's Project Criteria have not been developed prior to the execution of this Agreement, Design-Builder will assist Owner in developing Owner's Project Criteria, with such service deemed to be an additional service for which additional compensation shall be paid by Owner to Design-Builder. If Owner has developed Owner's Project Criteria prior to executing this Agreement, Design-Builder shall review and prepare a written evaluation of such criteria, including recommendations to Owner for different and innovative approaches to the design and construction of the Project. The parties shall meet to discuss Design-Builder's written evaluation of Owner's Project Criteria and agree upon what revisions, if any, should be made to such criteria.

1.2 Phased Services.

1.2.1 Phase 1 Services. Design-Builder shall perform the services related to Task 1 – Batting Cage & Related Site Work and Task 2 – Clubhouse & Related Site Work. Services to include:

- a) The previously authorized design agreement with 4Creeks, Inc dba 4Creeks Design dated November 6, 2024, hereby incorporated as Exhibit A.
- b) Procurement of long-lead items that could be purchased prior to final Task 1 and Task 2 authorization in order to try and keep the project within the tight construction window, as previously authorized by the City Council, and described in Exhibit B. These lead time items would be purchased via competitive bidding, reviewed/approved by the Owner; in addition, any items purchased shall be provided to the City if either applicable Phase 2 Task is not completed by Design-Builder or credited against the Phase 2 Service contract amount paid by City upon completion of the relevant Phase 2 Task.
- c) Pricing, sourcing, bidding, negotiating, vetting, and other services needed for the Project, as may be revised in accordance with Section 1.1 hereof,.

Design-Builder shall perform such services to the level of completion required for Design-Builder and Owner to establish the Contract Price for Phase 2, as set forth in Section 1.3 below. The Contract Price for Phase 2 shall be developed during Phase 1. Design-Builder's Compensation for Phase 1 Services is set forth in Section 6.1.1 herein. The level of completion required for Phase 1 Services is defined in Exhibit A, Agreement dated November 6, 2024.

1.2.2 Phase 2 Services. Design-Builder shall perform the services related to Task 1 – Batting Cage & Related Site Work and Task 2 – Clubhouse & Related Site Work. Design-Builder's Phase 2 services shall consist of the completion of any remaining design services for the Project, the procurement of materials and equipment for the Project, the performance of construction services for the Project, the start-up, testing, and commissioning of the Project, and the provision of warranty services, all as further described in the Contract Price Amendment. Upon receipt of Design-Builder's proposed Contract Price for Phase 2, Owner may proceed as set forth in Section 1.3.

1.3 Proposal. Upon/near the completion of design for each Task from the Phase 1 Services, Design-Builder shall submit to the Owner a separate proposal ("Proposal") for construction of each Task, based on a Lump Sum Fee per each:

Task 1 – Batting Cage & Related Site Work: TBD Lump Sum Fee (Proposal – Task 1)

Task 2 – Clubhouse & Related Site Work: TBD Lump Sum Fee (Proposal – Task 2)

1.3.1 The Proposal shall include the following unless the parties mutually agree otherwise:

1.3.1.1 The Contract Price shall be based on a Lump Sum for each Task in each Phase of the Project, which shall all be added together to calculate the Total Contract Price for the Project.

1.3.1.2 The Basis of Design Documents, which may include, by way of example, Owner's Project Criteria, which are set forth in detail and are attached to the Proposal;

1.3.1.3 A list of the assumptions and clarifications made by Design-Builder in the preparation of the Proposal, which list is intended to supplement the information contained in the drawings and specifications and is specifically included as part of the Basis of Design Documents;

1.3.1.4 The Scheduled Substantial Completion Date upon which the Proposal is based, to the extent said date has not already been established under Section 5.2.1 hereof, and a schedule upon which the Scheduled Substantial Completion Date is based and a Project Schedule for the Work;

1.3.1.5 If applicable, a list of Allowance Items, Allowance Values, and a statement of their basis; **NOT USED**

1.3.1.6 If applicable, a schedule of alternate prices;

1.3.1.7 If applicable, a schedule of unit prices;

1.3.1.8 If applicable, a statement of Additional Services which may be performed but which are not included in the Proposal, and which, if performed, shall be the basis for an increase in the Contract Price and/or Contract Time(s);

1.3.1.9 If applicable, a Savings provision;

1.3.1.10 If applicable, Performance Incentives; **NOT USED**

1.3.1.11 The time limit for acceptance of the Proposal; and

1.3.1.12 A project permit list, a list detailing the permits and governmental approvals that Design-Builder will bear responsibility to obtain, in accordance with General Conditions Section 3.5, Government Approvals and Permits.

1.3.2 Review and Adjustment to Proposal.

1.3.2.1 After submission of the Proposals, Design-Builder and Owner shall meet to discuss and review each Proposal. If Owner has any comments regarding the Proposals, or finds any inconsistencies or inaccuracies in the information presented, it shall promptly give written notice to Design-Builder of such comments or findings. If appropriate, Design-

Builder shall, upon receipt of Owner's notice, make appropriate adjustments to the Proposals.

1.3.2.2 Acceptance of Proposals. If Owner accepts the Proposals, as may be amended by Design-Builder, the Contract Price and its basis shall be set forth in an amendment to this Agreement, when mutually agreed between the parties (Contract Price Amendment). Once the parties have agreed upon the Contract Price and Owner has issued a Notice to Proceed with Phase 2, Design-Builder shall perform the Phase 2 Services, all as further described in the Contract Price Amendment, as it may be revised. The Owner will issue a Notice to Proceed for each of Task 1 and Task 2 if the related Proposal is accepted separately.

1.3.2.3 Failure to Accept a Proposal. If Owner rejects a Proposal, or fails to notify Design-Builder in writing on or before the date specified in each Proposal that it accepts the Proposal, the Proposal shall be deemed withdrawn and of no effect. In such event, Owner and Design-Builder shall meet and confer as to how the Project will proceed, with Owner having the following options:

- i Owner may suggest modifications to a Proposal, whereupon, if such modifications are accepted in writing by Design-Builder, the Proposal shall be deemed accepted and the parties shall proceed in accordance with Section 1.3.2.2 above;
- ii Owner may authorize Design-Builder to continue to proceed with the Work on the basis of reimbursement as provided in Section 6.1.2 hereof without a Contract Price, in which case all references in this Agreement to the Contract Price shall not be applicable; or
- iii Owner may terminate this Agreement for convenience in accordance with Article 8 hereof

If Owner fails to exercise any of the above options, Design-Builder shall have the right to request a change to the agreement and/or proposal to address any impacts to the scheduling or construction costs. Any proposed changes will be incorporated as an amendment, and shall be reviewed and approved by the Owner prior to implementation.

1.3.3 **Skilled and Trained Workforce Requirement:** By signing this Agreement, the Design-Builder is certifying to City that Design-Builder and its subcontractors at every tier shall use a skilled and trained workforce to perform all work on the Project that falls within an apprenticeable occupation in the building and construction trades as required by the Public Contract Code section 22164(c). Design-Builder is further certifying that they understand the terms "apprenticeable occupation" and "skilled and trained workforce" have the meanings defined in California Public Contract Code section 2601 in this Agreement.

Article 2

Contract Documents

2.1 The Contract Documents are comprised of the following:

2.1.1 All written modifications, amendments, minor changes, and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Agreement Between Owner and Design-Builder* (2022 Edition) ("General Conditions of Contract");

2.1.2 The Contract Price Amendment or the Proposal accepted by Owner in accordance with Section 1.3 above.

2.1.3 This Agreement, including all exhibits (list for example, performance standard requirements, performance incentive arrangements, markup exhibits, allowances, unit prices, or exhibit detailing offsite reimbursable personnel) but excluding, if applicable, the Contract Price Amendment;

2.1.4 The General Conditions of Contract;

2.1.5 Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract;

2.1.6 Exhibit A, previously authorized design agreement dated November 6, 2024, and Contract Amendment No. 1, dated January 8, 2025;

2.1.7 Exhibit B, long-lead items;

2.1.8 Exhibit C, Contract Price Amendment; and

2.1.9 The following other documents:

2.1.9.1 Special Conditions

2.1.9.2 Disclosure Statements

2.1.9.3 Insurance Requirements

2.1.9.4 City of Visalia Labor Compliance Manual

2.1.9.5 City of Visalia Engineering Standard Specifications dated August 5, 2013

2.1.9.6 Labor Prevailing Wage Rates

2.1.9.7 Subcontractor List with DIR registration numbers

2.1.9.8 Payment Bond

2.1.9.9 Performance Bond

2.1.9.10 Maintenance Bond

2.1.9.11 Workers Compensation Insurance

2.1.9.12 Contractor's Affidavit

Article 3

Interpretation and Intent

3.1 Design-Builder and Owner, at the time of acceptance of the Proposal by Owner in accordance with Section 1.3 hereof, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents for any conflicts or ambiguities. Design-Builder and Owner will

discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement, or if applicable, prior to Owner's acceptance of the Proposal.

3.2 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after Owner's acceptance of the Proposal, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict, or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof. *(Note, the parties are strongly encouraged to establish in the Contract Price Amendment or Proposal (as applicable) the priority of the various documents comprising such exhibit or proposal.)*

3.3 Terms, words, and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.

3.4 If Owner's Project Criteria contain design specifications: (a) Design-Builder is entitled to reasonably rely on the accuracy of the information represented in the design specifications and their compatibility with other information set forth in Owner's Project Criteria, including any design performance specifications; and (b) Design-Builder shall be entitled to an adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate design specification.

3.5 The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

Article 4

Ownership of Work Product

4.1 Ownership of Documents: All original papers and documents, produced as a result of this Agreement, shall become the property of the Owner. In addition, Ownershall be provided with access and use of any other papers and documents consistent with the purpose and scope of services covered by this Agreement. Any additional copies, not otherwise provided for herein, shall be the responsibility of the Owner.

Documents, including drawings and specifications, prepared by Design-Builder pursuant to this Agreement, are not intended or represented to be suitable for reuse by Owner or others on extensions of the PROJECT or on any other project. Any use of the completed documents for other projects and any use of incomplete documents without the specific written authorization from Design-Builder will be at Owner's sole risk and without liability to Design-Builder. Further, any and all liability arising out of changes made to Design-Builder's deliverables under this Agreement by Owner or persons other than Design-Builder is waived as against Design-Builder, and the Owner assumes full responsibility for such changes unless the Owner has given \checkmark prior notice and has received from \checkmark written consent for such changes.

4.2 The Design-Builder shall secure in writing from all patentees, copyright holders, and assignees of all Project-related documents, all copyrights, assignments, and licenses related to such expression (e.g., designs, drawings, Contract Documents, specifications, documents in computer form, etc.) as necessary to allow the Owner the full, unlimited, and unencumbered use of that expression for the execution, operation, maintenance, modernization or expansion of this sole Project. The Design-Builder shall immediately convey all such copyrights, assignments, and licenses to the Owner without reservation except that which is expressly allowed in this Article. In the case of products, materials, systems, etc., protected by patent, the Design-Builder and its consultants shall not specify or cause to be specified any infringing use of a patent." Design Builder shall retain underlying intellectual property rights of design elements not specific to this sole Project as the work is an instrument of service.

4.3 Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate. If Owner terminates this Agreement for its convenience as set forth in Article 8 hereof, or if Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on the following:

4.3.1 Use of the Work Product is at Owner's sole risk without liability or legal exposure to any Indemnified Party, and on the Owner's obligation to provide the indemnity set forth in Section 4.5 herein, and

4.3.2 Owner agrees to pay Design-Builder the additional sum of _____ Dollars (\$) _____) as compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with Section 4.2 if Owner resumes the Project through its employees, agents, or third parties. **NOT USED**

4.4 Owner's Limited License upon Design-Builder's Default. If this Agreement is terminated due to Design-Builder's default pursuant to Section 11.2 of the General Conditions of Contract, then Design-Builder grants Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights and obligations as set forth in Section 4.2 above. Notwithstanding the preceding sentence, if it is ultimately determined that Design-Builder was not in default, Owner shall be deemed to have terminated the Agreement for convenience, and Design-Builder shall be entitled to the rights and remedies set forth in Section 4.3 above.

4.5 Owner's Indemnification for Use of Work Product. Owner recognizes that in the event of an early termination of the Work, whether for convenience or for cause, Design-Builder will not have the opportunity to finish or to finalize its Work Product. Therefore, if Owner uses the Work Product, in whole or in part, or if Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article 4, Owner shall defend, indemnify, and hold harmless the Indemnified Parties from and against any and all claims, damages, liabilities, losses, and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product, to the fullest extent permitted by applicable law.

4.6 Publication: No report, information, or other data given or prepared or assembled by the Design-Builder pursuant to this Agreement, shall be made available to any individual or organization by the Design-Builder without the prior written approval of the Owner. Notwithstanding the foregoing, however, the Design-Builder shall not be required to protect or hold in confidence and confidential information which (1) is or becomes available to the public with the prior written consent of the Owner; (2) must be disclosed to comply with law; or (3) must be disclosed in connection with any legal proceedings.

4.7 Copyrights: The Design-Builder shall be free to copyright material developed under this Agreement with the provision that the Owner be given a nonexclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use the material for government or public purposes. Should Design-Builder place a copyright notice on documents it must state, "City of Visalia holds a nonexclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use the material for government or public purposes.

Article 5

Contract Time

5.1 Date of Commencement. The Phase 1 Services shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed unless the parties mutually agree otherwise in writing. The Work shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed for

Phase 2 Services (“Date of Commencement”) if the Proposal is accepted and the Contract Price Amendment is amended to this Agreement unless the parties mutually agree otherwise in writing.

5.2 Substantial Completion and Final Completion.

Substantial Completion of the entire Work shall be achieved no later than: March 23, 2026. (Scheduled Substantial Completion Date”).

[At the parties’ option, the following supplemental language may be inserted at the end of Section 5.2.1.]

The parties agree that the definition for Substantial Completion set forth in Section 1.2.19 of the General Conditions of Contract is hereby modified to read as follows:

“*Substantial Completion* is the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete so that First Pitch Entertainment, LLC, the tenant utilizing the facility can occupy and use at a minimum to provide for locker and restroom facilities for the Visalia Rawhide baseball team thereof for its intended purposes, provided. Design-Builder shall provide at it’s costs alternative solutions that could also work for the First Pitch Entertainment, LLC, such as temporary facilities or alternative means to supply First Pitch Entertainment, LLC with functional facilities.

5.2.1 Interim milestones and/or Substantial Completion of identified portions of the Work shall be achieved as follows:

Interim Milestone	Date
Task 1: Batting Cage Construction Substantially Complete	October 21, 2025
Task 2: Clubhouse Construction Substantially Complete	March 23, 2026

5.2.2 Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2.8 of the General Conditions of Contract.

5.2.3 All of the dates set forth in this Article 5 (“Contract Time(s)”) shall be subject to adjustment in accordance with the General Conditions of Contract.

5.3 Time is of the Essence. Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

5.4 Liquidated Damages. Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees to the following liquidated damages on Phase 2 task only if Substantial Completion is not attained as follows:

Substantial Completion Milestone	Date	Liquidated Damages
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Task 1 - Batting Cage Construction Substantially Complete	October 21, 2025	500.00
Task 2 - Clubhouse Construction Substantially Complete	March 23, 2026	\$1,500.00

Design-Builder shall pay liquidated damages for each day that Substantial Completion extends beyond the LD Date shown above.

[The parties may want to consider the following supplemental language within Section 5.4 if they want to assess liquidated damages for failing to meet Final Completion. In this case, the first sentence in Section 5.2.3 should be deleted and the language below should be checked and completed.]

Design-Builder and Owner have agreed not to provide for liquidated damages in this Agreement for failure of Design-Builder to achieve the Contract Time(s) set forth in this Article 5. Design-Builder understands, however, that Owner may suffer actual damages in the event the Contract Time(s) set forth herein are not achieved. Owner shall be able to recover damages from Design-Builder to the extent it can demonstrate that said actual damages have been incurred, are directly related and caused by Design-Builder's failure to meet the Contract Time(s) set forth herein, and are not waived by Section 10.5.1 of the General Conditions of Contract. Notwithstanding the foregoing in no event shall Design-Builder's liability for actual damages for delays exceed _____ Dollars (\$_____). **NOT USED**

5.5 Any liquidated damages assessed pursuant to this Agreement shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties, and any other damages, whether special or consequential, and of whatsoever nature, incurred by Owner which are occasioned by any delay in achieving Substantial Completion, Interim Milestone Dates (if any), or Final Completion.

[The Parties may also desire to cap the liquidated damages payable under this Agreement, in which case the following language should be included at the end of Section 5.5.]

Owner and Design-Builder agree that the maximum aggregate liability Design-Builder has for any liquidated damages that may be assessed under this Agreement shall be _____ Dollars (\$_____). **NOT USED**

5.6 Early Completion Bonus. If Substantial Completion for Task 2 is attained on or before Five(5) days, March 18, 2026 before the Scheduled Substantial Completion Date for Task 2 (the "Bonus Date"), Owner shall pay Design-Builder at the time of Final Payment under Section 7.4 hereof an early completion bonus of One-thousand Five Hundred Dollars (\$1,500) for each day that Substantial Completion is attained earlier than the Bonus Date. *(If a GMP is not established upon execution of this Agreement, the parties should consider setting the early completion bonus after GMP negotiations. If an early completion bonus is applicable to any dates set forth in Section 5.2.2 or 5.2.3 hereof, this Section 5.6 will need to be modified accordingly.)*

[The Parties may also desire to cap the early completion bonus payable under Section 5.6 in which case the following language should be included.]

Owner and Design-Builder agree that the maximum aggregate amount that Design-Builder shall receive as the early Completion Bonus is _____ Dollars (\$_____). **NOT USED**

[The Parties may also desire to modify Section 8.2.2 of the General Conditions of Contract relative to compensability of delays that would cause the Contract Time(s) to be extended. In such case, the following option can be used.]

In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 of the General Conditions of Contract, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price for those events set forth in Section 8.2.1 of the General Conditions of Contract, provided, however, for Force Majeure Events, Design-Builder shall be entitled to an increase in the Contract Price providing that: (i) said events must exceed _____ cumulative days before Design-Builder is entitled to additional compensation; and (ii) said additional compensation shall be limited to: **NOT USED**

[Check one box only.]

\$ _____ dollars a day for each day work is delayed beyond the Scheduled Substantial Completion Date. **NOT USED**

or

the direct costs and expenses Design-Builder can demonstrate it has reasonably actually incurred as a result of such event. **NOT USED**

5.7 Owner's Review Time. The parties have established the following maximum and minimum amount of time for Owner to review Design Submissions and the Project Schedule or any updates thereto unless the parties agree in writing otherwise.

5.7.1 Owner shall have the following timeframes to review the 60% submittal:

60% Submittal	City Review Time
Task 1 - Batting Cage	Two weeks
Task 2 - Clubhouse	Three weeks

5.7.2 Owner shall have the following timeframes to review the 90% submittal:

90% Submittal	City Review Time
Task 1 - Batting Cage	Two Weeks
Task 2 - Clubhouse	Three Weeks

Article 6

Contract Price

6.1 Contract Price.

6.1.1 For Phase 1 Services, Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions and as follows:

- a) Design Services per the previously authorized design agreement dated November 6, 2024, and Contract Amendment No. 1, dated January 8, 2025, for the Contract Lump Sum of Four-Hundred-Fifty-Five-Thousand-Dollars and no cents (\$455,000.00);
- b) Procurement of long-lead items for the Not-To-Exceed sum of One-Million-Sixty-Five-Thousand-Dollars and no cents (\$1,065,000.00); Any long-lead items are to be approved by the Owner prior to ordering them. Any amounts expended for long lead items shall be subtracted from the Proposal amounts to be submitted per Section 6.2, below.
- c) For a total of One-Million-Five-Hundred-Twenty-Thousand-Dollars and no cents (\$1,520,000.00).
- d) Total Payment will be subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Phase 1 Services compensation is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

6.1.2 For Phase 2 Services, Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price (“Contract Price”) equal to the Lump Sum amount set forth in Section 6.2 hereof or in the Contract Price Amendment, or as set forth in the Contract Price Amendment and any adjustments made in accordance with the General Conditions of Contract.

6.1.3 For the specific Work set forth below, Owner agrees to pay Design-Builder, as part of the Contract Price, on the following basis: *(This is an optional section intended to provide the parties with flexibility to identify and price limited services.)* **NOT USED**

6.2 Lump Sum. Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a Construction Lump Sum for Phase 2 Services, per each Task as follows:

Task 1 – Batting Cage & Site Work: Lump Sum Fee of **TBD** Dollars (**\$TBD**) (“Contract Price”)

Task 2 – Clubhouse & Site Work: : Lump Sum Fee of **TBD** Dollars (**\$TBD**) (“Contract Price”)

6.2.1 As stated in Section 1.3 of this Contract the Design-Builder shall prepare a Proposal for Task 1 and Task 2 of Phase 2 after near completion of the corresponding Phase 1 design. Each Proposal will be reviewed by Owner, and if approved, this Contract will be amended to list the approved price for each Task. Once approved the Contract Price for each Task will only be adjusted in accordance with the General Conditions of the Contract. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

6.3 Payment for Extra Work/Markups for Changes. If Owner requests changes after the Proposal for each Task by the Design Builder has been accepted, then the Contract Price may require an adjustment due to changes in the Work, and the cost of such changes is determined under Section 9.4.1. of the General Conditions of Contract, payment shall be made as follows:

6.3.1 Payment for Extra Work

This section supersedes and replaces the extra work and force account markups specified in Section 9-5 “Payment for Extra Work” and related sections from the City of Visalia Engineering Standard Specifications. The markups listed in this section shall be used for all lump sum, fixed fee, force account, or similar type change orders for items of work in the Phase 2 services that are requested by the Owner as modifications or extra items that were not included in the design accepted by the Owner after completion of Phase 1, but are not considered necessary for the completion of the approved design.

The Owner may order extra work or make changes by altering, adding to, or deducting from the Work for Phase 2 Services, via Change Order. Additionally, new and unforeseen work will be classified as extra work when such work cannot be covered by any of the various items or combination of items that would be necessary to complete the design accepted by the Owner after completion of Phase 1. Foreseeable work required to complete the items in each approved Task shall not be considered Extra Work.

All Change Order work shall be performed under the same terms and conditions of the original description of the Work, except for any extension of completion times necessitated by said Change Order(s). Certified payrolls shall be submitted with each billing for extra work.

The Contract Price, or amount due to the Design-Builder will only be reduced/increased after the Change Order has been reviewed and authorized by the City of Visalia Change Order Committee. Design-Builder shall provide all supporting documentation needed for a complete change order request package.

The value of any additional work ordered by the Owner shall be determined as follows:

- A. By unit prices in the Construction Services Agreement or the Contract; or
- B. By estimate and acceptance in a lump sum; or
- C. By a fixed fee; or
- D. By force account.

The Design-Builder shall do no extra work for Phase 2 Services except upon written order from the Owner. For such extra work for Phase 2 services the Design-Builder shall receive payment as previously agreed upon in writing, or Design-Builder shall be paid on force account. In any emergency affecting the safety of persons or property, the Design-Builder shall act, at his discretion, to prevent threatened damage, injury or loss to life and/or property. The Design-Builder shall immediately notify the Owner of any work performed under this provision. Any additional compensation or extension of time claimed by the Design-Builder on account of emergency work shall be reviewed and determined as provided in this section.

- A. Materials: Material payment is full compensation for materials the Design-Builder furnishes and uses in the work for Phase 2 services. Owner reserves the right to furnish such materials required as it deems expedient and the Design-Builder shall have no claim for profit or other overhead on the cost of such materials. The Owner determines the cost based on the material purchase price, including delivery charges, except:
 - a. **Fifteen percent (15%) markup is added**
 - b. Supplier discounts are subtracted whether the Design-Builder took them or not
 - c. If the Owner believes the material purchase prices are excessive, the City pays the lowest current wholesale price for a similar material quantity
 - d. If the Design-Builder procured the materials from a source the Design-Builder wholly or partially owns, the determined cost is based on the lower of the:
 - i. Price paid by the purchaser for similar materials from that source on Contract items
 - ii. Current wholesale price for those materials
 - e. If the Design-Builder does not submit a material cost record within 30 days of billing, the determined cost is based on the lowest wholesale price:
 - i. During that period
 - ii. In the quantities used
- B. Equipment: For all equipment that is necessary, the Design-Builder shall receive the current prices in the locality which shall have been previously determined and agreed to in writing by the Owner

and by the Design-Builder, plus **fifteen percent (15%)**. The current State Labor Surcharge and Equipment Rental rates book shall be used to resolve any equipment rental rate disagreements.

- a. Equipment rental rates includes the cost of:
 - i. Fuel, Oil, Lubrication, Supplies, Small tools, necessary attachments, repairs and maintenance, depreciation, storage, insurance, and other incidentals.
 - ii. The City does not pay for small tools consumed by use. This is considered included in the markup rate.
 - b. If the work is being done by Force Account, the Owner will only pay for the hours the equipment is operating on the Extra Work item.
 - c. The Owner shall direct the Design-Builder to use the equipment factors listed in the current State Labor Surcharge and Equipment Rental Rates book to determine the compensation amount as the Owner deems appropriate.
- C. Labor: For all labor that is necessary, the Design-Builder shall receive the actual amount paid for labor including benefits (health and welfare, pension, vacation, training, other state and federally recognized fringe benefit payments) as shown on certified payrolls or the current prices in the locality which shall have been previously determined and agreed to in writing by the Owner and the Design-Builder, whichever is less, plus **thirty-five percent (35%)**. The 35% markup consists of payment for all costs of bonds, insurance, overhead and profit for the work, described further as follows:
- a. Owner does not allow a labor surcharge markup so this 35% markup includes compensation for the following: worker's compensation insurance, social security, Medicare, Federal unemployment insurance, State unemployment insurance, State training taxes, and other similar items.
 - b. The 35% markup also consists of payment for all overhead costs related to labor but not designated as costs of the labor used in the direct performance of the work, including:
 - i. Home office overhead
 - ii. Field office overhead
 - iii. Bond costs
 - iv. Profit
 - v. Labor liability insurance
 - vi. Other fixed or administrative costs that are not costs of the labor used in the direct performance of the work.
 - c. Owner does not pay for labor travelling to or from the jobsite.
- D. For all extra work performed by a first-tier subcontractor Design-Builder shall receive actual cost of the work plus **ten percent (10%)**. For all extra work performed by second-tier subcontractor, the first-tier subcontractor shall receive the actual cost of the second-tier subcontractor work plus **five percent (5%)**. The total maximum markup between the Design-Builder and all lower tier subcontractors shall not exceed **twenty percent (20%)** regardless of how many lower tier subcontractors are included in the change order. These markups consist of payment for the cost of bonds, insurance, overhead and profit for the work. Likewise, for subcontracted work deleted from the contract, the Design-Builder shall provide an additional ten percent (10%) percent or five percent (5%) percent credit respectively for all materials, labor, and equipment. This shall not apply to the reduction of unit priced bid item quantities specifically identified in the contract Bid Schedule.
- E. For work deleted from the contract, the Design-Builder shall provide an additional **fifteen percent (15%)** credit on all materials, labor, and equipment. This shall not apply to the reduction of unit priced bid item quantities specifically identified in the contract Bid Schedule.

Markups on any subcontractor change order or extra work shall not exceed the markups in this section.

All extra work and/or force account work shall be documented daily upon report sheets prepared and furnished by the Design-Builder, and signed by the Design-Builder and the Owner, which daily reports shall thereafter be considered the true record of extra work or force account work done. The Design-Builder shall be responsible for providing full labor, equipment, and materials breakdowns for approval on all change orders and extra work.

Daily reports shall be submitted no later than the second working day following the work for labor and equipment involved and no later than the fifth working day for material invoices and specialized forces. Unless otherwise permitted by the Owner, no payment will be made for extra work if it has not been reported within the time and in the manner specified.

6.4 Design-Builder's Fee. **NOT USED**

6.4.1 Design-Builder's Fee shall be:

[Choose one of the following.]

_____ Dollars (\$ _____), as adjusted in accordance with Section 6.4.2 below.

or

_____ percent (_____ %) of the Cost of the Work, as adjusted in accordance with Section 6.4.2 below.

6.4.2 Design-Builder's Fee will be adjusted as follows for any changes in the Work:

6.4.2.1 For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive a Fee of _____ percent (_____ %) of the additional Costs of the Work incurred for that Change Order, plus any other markups set forth at Exhibit _____ hereto.

6.4.2.2 For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, the deductive amounts shall include:

[Check one box only.]

No additional reduction to account for Design-Builder's Fee or any other markup.

or

An amount equal to the sum of: (a) _____ percent (_____ %) applied to the direct costs of the net reduction (which amount will account for a reduction associated with Design-Builder's Fee); plus (b) any other markups set forth at Exhibit _____ hereto applied to the direct costs of the net reduction.

6.5 Cost of the Work.

6.5.1 The term Cost of the Work shall mean costs reasonably incurred by Design-Builder in the proper performance of the Work. The Cost of the Work shall include only the following:

6.5.1.1 Wages of direct employees of Design-Builder performing the Work at the Site or, with Owner's agreement, at locations off the Site, provided, however, that the costs for those employees of Design-Builder performing design services shall be calculated on the basis of prevailing market rates for design professionals performing such services or, if applicable, those rates set forth in an exhibit to this Agreement.

6.5.1.2 Wages or salaries of Design-Builder's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work.

6.5.1.3 Wages or salaries of Design-Builder's personnel stationed at Design-Builder's principal or branch offices, but only to the extent said personnel are identified in Exhibit ____ and performing the function set forth in said Exhibit. The reimbursable costs of personnel stationed at Design-Builder's principal or branch offices shall include a _____ percent (____%) markup to compensate Design-Builder for the Project-related overhead associated with such personnel.

6.5.1.4 Costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under Sections 6.5.1.1 through 6.5.1.3 hereof.

[In lieu of the language in Section 6.5.1.4 above, Design-Builder and Owner may want to include the following language.]

A multiplier of _____ percent (____%) shall be applied to the wages and salaries of the employees of Design-Builder covered under Sections 6.5.1.1 through 6.5.3.3 hereof. **NOT USED**

6.5.1.5 The reasonable portion of the cost of travel, accommodations and meals for Design-Builder's personnel necessarily and directly incurred in connection with the performance of the Work.

6.5.1.6 Payments properly made by Design-Builder to Subcontractors and Design Consultants for performance of portions of the Work, including any insurance and bond premiums incurred by Subcontractors and Design Consultants.

6.5.1.7 Costs incurred by Design-Builder in repairing or correcting defective, damaged or nonconforming Work (including any warranty or corrective Work performed after Substantial Completion), provided that such Work was beyond the reasonable control of Design-Builder, or caused by the ordinary mistakes or inadvertence, and not the negligence, of Design-Builder or those working by or through Design-Builder. If the costs associated with such Work are recoverable from insurance, Subcontractors or Design Consultants, Design-Builder shall exercise best efforts to obtain recovery from the appropriate source and provide a credit to Owner if recovery is obtained.

6.5.1.8 Costs, including transportation, inspection, testing, storage, and handling of materials, equipment, and supplies incorporated or reasonably used in completing the Work.

6.5.1.9 Costs less salvage value of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Design-Builder, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling, and removing such items.

6.5.1.10 Costs of removal of debris and waste from the Site.

6.5.1.11 The reasonable costs and expenses incurred in establishing, operating and demobilizing the Site office, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying, and reasonable petty cash expenses.

6.5.1.12 Rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Design-Builder at the Site, whether rented from Design-Builder or others, and incurred in the performance of the Work.

6.5.1.13 Premiums for insurance and bonds required by this Agreement or the performance of the Work.

6.5.1.14 All fuel and utility costs incurred in the performance of the Work.

6.5.1.15 Sales, use, or similar taxes, tariffs, or duties incurred in the performance of the Work.

6.5.1.16 Legal costs, court costs, and costs of mediation and arbitration reasonably arising from Design-Builder's performance of the Work, provided such costs do not arise from disputes between Owner and Design-Builder.

6.5.1.17 Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents.

6.5.1.18 The cost of defending suits or claims for infringement of patent rights arising from the use of a particular design, process, or product required by Owner, paying legal judgments against Design-Builder resulting from such suits or claims, and paying settlements made with Owner's consent.

6.5.1.19 Deposits which are lost, except to the extent caused by Design-Builder's negligence.

6.5.1.20 Costs incurred in preventing damage, injury, or loss in case of an emergency affecting the safety of persons and property.

6.5.1.21 Accounting and data processing costs related to the Work.

6.5.1.22 Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner.

[Design-Builder and Owner may want to consider adding the following Section 6.5.1.23 to address the payment of warranty work.]

6.5.1.23 Owner and Design-Builder agree that an escrow account in the amount of _____ Dollars (\$_____) shall be established prior to Final Completion, which escrow shall be used to reimburse Design-Builder for the Costs of the Work incurred after Final Completion to perform warranty Work. The escrow agreement will provide that any sums not used at the expiration of the warranty period shall be returned to Owner, subject to any savings Design-Builder may be entitled to under this Agreement. In the event the warranty escrow account is exhausted, but funds remain under the GMP, Owner shall be obligated to pay Design-Builder the Costs of the Work incurred after Final Completion to perform warranty Work up to the GMP. **NOT USED**

6.5.2 Non-Reimbursable Costs. The following shall be excluded from the Cost of the Work:

6.5.2.1 Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 6.5.1.1, 6.5.1.2, and 6.5.1.3 hereof.

6.5.2.2 Overhead and general expenses, except as provided for in Section 6.5.1 hereof, or which may be recoverable for changes to the Work.

6.5.2.3 The cost of Design-Builder's capital used in the performance of the Work.

6.5.2.4 If the parties have agreed on a GMP, costs that would cause the GMP, as adjusted in accordance with the Contract Documents, to be exceeded.

[The parties shall comply with the following Section 6.6 based upon whether the GMP is agreed upon before the execution of this Agreement or will be developed and agreed upon after execution of this Agreement. If the parties do not use a GMP, this Section 6.5 shall be deemed inapplicable and compensation to Design-Builder shall be based on those fees and costs identified in the balance of this Article 6.]

6.6 The Guaranteed Maximum Price. **NOT USED**

6.6.1 Design-Builder guarantees that it shall not exceed the GMP of _____ Dollars (\$_____). Documents used as a basis for the GMP shall be identified in the Contract Price Amendment to this Agreement. Design-Builder does not guarantee any specific line item provided as part of the GMP and has the sole discretion to apply payment due to overruns in one line item to savings due to underruns in any other line item. Design-Builder agrees, however, that it will be responsible for paying all costs of completing the Work which exceed the GMP, as adjusted in accordance with the Contract Documents. *(While the Contract Price Amendment will be developed in advance or concurrently with the execution of this Agreement, it is recommended that such exhibit include the items set forth in Section 1.3 above, to ensure that the basis for the GMP is well understood).*

[In lieu of 6.6.1, Owner and Design-Builder may want to include the following language.]

Design-Builder guarantees that it shall not exceed the GMP of _____ Dollars (\$_____). Documents used as basis for the GMP shall be identified as the Contract Price Amendment to this Agreement. Design-Builder does not guarantee any specific line item provided as part of the GMP, provided, however, that it does guarantee the line item for its general project management and general conditions costs, in the amount of _____ Dollars (\$_____), and as set forth in the Contract Price Amendment ("General Conditions Cap"). Design-Builder agrees that it will be responsible for paying the applicable general conditions costs in excess of the General Conditions Cap, as well as be responsible for all costs of completing the Work which exceed the GMP, as said general conditions line item and the GMP may be adjusted in accordance with the Contract Documents, including but not limited to the markups for Change Orders set forth in Section 6.3 herein.

6.6.2 The GMP includes a Contingency in the amount of _____ Dollars (\$_____) which is available for Design-Builder's exclusive use for unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration; (c) escalation of materials; (d) correction of defective, damaged or nonconforming Work, design errors or omissions, however caused; (e) Subcontractor defaults; or (f) those events under Section 8.2.2 of the General Conditions of Contract that result in an extension of the Contract Time but do not result in an increase in the Contract Price. The Contingency is not available to Owner for any reason, including changes in scope or any other item which would enable

Design-Builder to increase the GMP under the Contract Documents. Design-Builder shall provide Owner notice of all anticipated charges against the Contingency, and shall provide Owner as part of the monthly status report required by Section 2.1.2 of the General Conditions of Contract an accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months. Design-Builder agrees that with respect to any expenditure from the Contingency relating to a Subcontractor default or an event for which insurance or bond may provide reimbursement, Design-Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design-Builder agrees that if Design-Builder is subsequently reimbursed for said costs, then said recovery will be credited back to the Contingency.

6.6.3 Savings.

6.6.3.1 If the sum of the actual Cost of the Work and Design-Builder's Fee (and, if applicable, any prices established under Section 6.1.3 hereof) is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference ("Savings") shall be shared as follows:

[Choose one of the following.]

_____ percent (____%) to Design-Builder and
_____ percent (____%) to Owner.

or

The first _____ Dollars (\$ _____) of Savings shall be provided to (choose either Design-Builder or Owner) _____, with the balance of Savings, if any, shared _____ percent (____%) to Design-Builder and _____ percent (____%) to Owner.

6.6.3.2 Savings shall be calculated and paid as part of Final Payment under Section 7.4 hereof, with the understanding that to the extent Design-Builder incurs costs after Final Completion which would have been payable to Design-Builder as a Cost of the Work, the parties shall recalculate the Savings in light of the costs so incurred, and Design-Builder shall be paid by Owner accordingly.

6.7 Allowance Items and Allowance Values. **NOT USED**

6.7.1 Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in the Contract Price Amendment or the Proposal.

6.7.2 Design-Builder and Owner have worked together to review the Allowance Items and Allowance Values based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Items. Design-Builder and Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values. Nothing herein is intended in any way to constitute a guarantee by Design-Builder that the Allowance Item in question can be performed for the Allowance Value.

6.7.3 No work shall be performed on any Allowance Item without Design-Builder first obtaining in writing advanced authorization to proceed from Owner. Owner agrees that if Design-Builder is not provided written authorization to proceed by the date set forth in the Project schedule, due to no fault of Design-Builder, Design-Builder may be entitled to an adjustment of the Contract Time(s) and Contract Price.

6.7.4 The Allowance Value includes the direct cost of labor, materials, equipment, transportation, taxes, and insurance associated with the applicable Allowance Item. All other costs, including

design fees, Design-Builder's overall project management and general conditions costs, overhead and Fee, are deemed to be included in the original Contract Price, and are not subject to adjustment notwithstanding the actual amount of the Allowance Item.

[Alternatively, the parties may want to delete Section 6.7.4 and add the following provision.]

In the event the actual direct cost of labor, materials, equipment, transportation, taxes, and insurance associated with the applicable Allowance Item is _____ percent (_____ %) greater than or less than the Allowance Value, Design-Builder and Owner agree that Design-Builder's right to Fee and markup shall be determined in accordance with Section 6.4.

6.7.5 Whenever the actual costs for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.7.4. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

6.8 Performance Incentives. **NOT USED**

6.8.1 Owner and Design-Builder have agreed to the performance incentive arrangements set forth in Exhibit _____.

(The parties are encouraged to discuss and agree upon performance incentives that will influence project success. These incentives may consist of Award Fees, incentives for safety, personnel retention, client satisfaction, and similar items.)

Article 7

Procedure for Payment

7.1 Payment for Preliminary Services. Design-Builder and Owner agree upon the following method for partial and final payment to Design-Builder for the services hereunder: (Insert terms.)

7.2 Contract Price Progress Payments.

PAYMENT SHALL BE MADE IN ACCORDANCE WITH SECTION 9, MEASUREMENT & PAYMENT OF THE CITY OF VISALIA ENGINEERING STANDARD SPECIFICATIONS.

7.2.1 Design-Builder shall submit to Owner on the twentieth (20th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

7.2.2 Owner shall make payment within thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract.

7.2.3 If Design-Builder's Fee under Section 6.4 hereof is a fixed amount, the amount of Design-Builder's Fee to be included in Design-Builder's monthly Application for Payment and paid by Owner shall be proportional to the percentage of the Work completed, less payments previously made on account of Design-Builder's Fee.

7.3 Retainage on Progress Payments.

[For public projects, Design-Builder and Owner may want to consider substituting the following retainage provision.]

Owner will retain five percent (5%) from Design-Builder's Applications for Payment pursuant to applicable state law.

Final Acceptance of the entire Work will require an Action by the Visalia City Council. The city will file a Notice of Completion for recording by the Tulare County Recorder's Office after Final Acceptance by the City Council.

[If Owner and Design-Builder have established a warranty reserve pursuant to Section 6.5.1.23 above, the following provision should be included.]

If a warranty reserve has been established pursuant to Section 6.5.1.23 above, Owner shall at the time of Substantial Completion retain the agreed-upon amounts and establish an escrow account as contemplated by Section 6.5.1.23 above. **NOT USED**

7.4 Final Payment. Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract. Final Payment will be subject to the City Council authorizing the recording of the Notice of Completion for the project. **Design-Builder may submit the Final Application for Payment upon the passing of thirty-five days after the filing of the Notice of Completion without claims.** Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment as per the following section of the City of Visalia Engineering Standard Specifications:

Section 9-12 Final Progress Payment:

Provided no notices of potential claim, proposed change orders, or claims are pending under Section 4-12, "Notices, Change Orders, and Claims," the Engineer shall, after the completion of the Contract, make a final estimate of the amount of work done thereunder and the value of such work; and the City shall pay the entire sum so found to be due after deducting the retention amount from the final estimate, or other amounts as provided in Section 9-6, "Partial (Progress) Payments and Retentions" and Section 9-9, "Stop Notices; City's Right To Withhold Payments," to be retained following completion of the work.

If a notice of potential claim, proposed change order, or claim is pending under Section 4-12, "Notices, Change Orders, and Claims," and is not resolved in time necessary for the processing of the final monthly progress payment as provided in the above paragraph, the Engineer shall cause a semi-final estimate to be prepared, and the Contractor shall be paid any amounts due less any retentions as provided in Section 9-6, "Partial ('Progress') Payments and Retentions," and Section 9-9, "Stop Notices; City's Right to Withhold Payments." Upon resolution of the procedures under said Section 4-12, a final estimate will be prepared as above provided, and a final progress payment shall be made.

Section 9-13. Final Payment to Release Owner

The acceptance, without notice of potential claim, by the Contractor of the final payment shall be and shall operate as a release to the Owner (City) of all claims and all liability to the Contractor for all things done or performed for or relating to the work and for every act and neglect of the City and others relating to or arising out of the work, excepting only the Contractor's claims, if any, for amounts withheld by the City, upon final payment. However, no payment, final or otherwise, shall operate to release the Contractor or his sureties from any obligation upon or under this Contract or the Contractor's bond.

Section 9-14 Payment of Retention

Retention shall be released at the latest sixty (60) days after the occurrence of any of the definitions of "Completion" for purposes of Public Contract Code Section 7107 (see definitions of "Completion" in Section 1-3.17B). Any final payment and release of retentions will exclude any amounts withheld in conformance with Section 9-9, "Stop Notices; Rights of the City to Withhold Payments," and Public Contract Code section 7107. When specified in the Contract Specifications, certain portions of the amount retained pursuant to Section 9-6, "Partial ('Progress') Payments and Retentions," may be withheld until the satisfactory completion of the maintenance period specified in the City of Visalia Landscape Standards and Specifications for work pertaining to the installation of landscaping and irrigation facilities.

7.5 Interest. Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing five (5) days after payment is due at the rate of ____ percent (____ %) per month until paid. **NOT USED**

7.6 Record Keeping and Finance Controls. Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement relative to Costs of the Work. Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner's accountants shall be afforded access to, and the right to audit from time to time, upon reasonable notice, Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda, and other data relating to the Work, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by Owner and Design-Builder as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, but the composition of such multiplier or markup is not subject to audit. Any lump sum agreed to by Owner and Design-Builder as part of this Agreement is not subject to audit.

Article 8

Termination for Convenience

8.1 If Design-Builder is terminated for convenience pursuant to Section 11.6 of the General Conditions of Contract, and the parties have agreed to a payment to Design-Builder in the case of such termination of convenience, Owner shall pay Design-Builder for the following in addition to the amount set forth in Section 11.6.1 of the General Conditions of Contract: **NOT USED**

[Choose one of the following.]

The fair and reasonable sums for overhead and profit on the sum of items as set forth in Section 11.6.1 of the General Conditions of Contract.

or

Overhead and profit in the amount of _____ percent (_____%) on the sum of items set forth in Section 11.6.1 of the General Conditions of Contract.

8.2 In addition to the amounts set forth in Section 8.1 above and Section 11.6.1 of the General Conditions of Contract, Design-Builder shall be entitled to receive one of the following if the parties agree to an additional payment: **NOT USED**

8.2.1 If Owner terminates this Agreement prior to commencement of construction, Design-Builder shall be paid _____ percent (_____%) of the remaining balance of

the Contract Price or, if a GMP has not been established, the remaining balance of the most recent estimated Contract Price.

8.2.2 If Owner terminates this Agreement after commencement of construction, Design-Builder shall be paid _____ percent (_____ %) of the remaining balance of the Contract Price or, if a GMP has not been established, the remaining balance of the most recent estimated Contract Price.

[The following Article 9 should only be used if Owner and Design-Builder agree to establish their respective representatives at the time the Agreement is executed rather than during the performance of the Project.]

Article 9

Representatives of the Parties

9.1 Owner's Representatives.

9.1.1 Owner designates the individual listed below as its Senior Representative ("Owner's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: (Identify individual's name, title, address, and telephone numbers.)

Christopher Crawford, City Engineer
City of Visalia
315 E. Acequia Ave., Visalia CA 93291
(559) 713-4331

9.1.2 Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract: (Identify individual's name, title, address, and telephone numbers.)

Rebecca Keenan, Sr. Civil Engineer
City of Visalia
315 E. Acequia Ave., Visalia, CA 93291
(559) 713-4541

9.2 Design-Builder's Representatives.

9.2.1 Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: (Identify individual's name, title, address, and telephone numbers.)

Matt Ainley, P.E., CEO, RMO, Principal Civil Engineer
4CGlobal, Inc, dba 4Creeks Build.
324 S. Santa Fe St., Visalia, CA 93292
(559) 802-3052

9.2.2 Design-Builder designates the individual(s) listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract: (Identify individual's name, title, address, and telephone numbers.)

Will Ruoff, Architect

4Creeks, Inc dba 4Creeks Design.
324 S. Santa Fe St., Visalia CA 93292
(559) 802-3052

Alec Grassel
4CGlobal, Inc dba 4Creeks Build.
324 S. Santa Fe St., Visalia CA 93292
(559) 802-3052

Article 10

Bonds and Insurance

10.1 Insurance. Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Exhibit attached hereto and in accordance with Article 5 of the General Conditions of Contract.

10.2 Bonds and Other Performance Security. Design-Builder shall provide the following performance bond and labor and material payment bond or other performance security:

Performance Bond.

(Check one box only. If no box is checked, then no bond is required.)

Required Not Required

Design-Builder is required to furnish a Performance Bond for 100% of the contract price of Phase 2 of the Work, guaranteeing the faithful performance thereof.

Payment Bond.

[Check one box only. If no box is checked, then no bond is required.]

Required Not Required

Design-Builder is required to furnish a Payment Bond for 100% of the Contract Price (Civil Code 9554) of Phase 2 of the Work, to secure the payment of claims of laborers, mechanics, materialmen and other persons named in Civil Code Section 9100, or amounts due under the California Unemployment Insurance Code with respect to work or labor performed by such claimant, or any amounts required to be deducted, withheld, and paid pursuant to the California Revenue and Taxation Code for the wages of employees of the Design-Builder and his subcontractors, if the Contract Price is increased then a revised Performance Bond to match the revised Contract Price is required unless Owner agrees not to require a revision to the Performance Bond.

Other Performance Security: **Maintenance Bond**

[Check one box only. If no box is checked, then no other performance security is required. If the "Required" box is checked, identify below the specific performance security that is being required and all salient commercial terms associated with that security.]

Required Not Required

Design-Builder is required to furnish a Maintenance Bond for 10% of the contract price of Phase 2, guaranteeing the correction of deficiencies during the specified maintenance period of one (1) year from the date the Notice of Completion for work performed under said contract has been recorded. If the Contract Price is increased then a revised Maintenance Bond to match the revised Contract Price is required unless Owner agrees not to require a revision to the Maintenance Bond.

Article 11

Other Provisions

11.1 Other provisions, if any, are as follows:

11.1.1 **Third Party Beneficiaries:** DESIGN-BUILDER and OWNER acknowledge that this agreement is part of the Recreation Park Project involving improvements agreed upon between the OWNER and current stadium tenant, First Pitch Entertainment, LLC, (hereinafter referred to as "FPE"). FPE shall be considered to be a third-party beneficiary to this Agreement. Except as stated herein, this Agreement is for the sole benefit of the Parties hereto and is not intended to confer rights upon any other third party.

11.1.2 **Subcontractors:**

Design Builder acknowledges that all identified subcontractors listed in the Design Builder's proposal will be afforded all protections of Public Contract Code sections 4100-4114. Following award and under this Agreement, the Design Builder shall proceed as follows in awarding construction subcontracts with a value exceeding one half of 1 percent of the Contract Price allocable to construction work:

- a) Provide public notice of availability of work to be subcontracted in accordance with the City publication requirements for competitive bidding, including a fixed date and time that qualifications statements, bids, or proposals will be due; and
- b) Establish reasonable qualification criteria and standards; and
- c) Award the subcontract either on a best value basis or to the lowest responsible bidder. The process may include prequalification or short-listing. This process does not apply to construction subcontractors in the original proposal. Subcontractors awarded construction subcontracts under this process shall be afforded all the protections of Public Contract Code sections 4100-4114.

Design builder acknowledges that it shall be solely responsible for providing City with a complete and updated list of subcontractors as they become known on the Project.

11.1.3 **Independent Contractor:**

Design Builder is, and shall be at all times, in the performance of this Agreement acting as an independent contractor. This Agreement is not intended, and shall not be construed, to create the relationship of agent, servant employee, partnership, joint venture or association as between Design Builder and City. Design Builder shall secure at its expense and be responsible for any and all payment of all taxes, social security, state disability insurance compensation, unemployment compensation and other payroll deductions for Design Builder and its officers, agents and employees and all business licenses, if any, in connection with the services to be performed hereunder.

11.1.4 **City Employees and Officials:**

Design Builder shall employ no City official nor any regular City employee in the Work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement in violation of applicable provisions of law.

11.1.5 **Department of Industrial Relations Registration:**

Strict compliance with all Department of Industrial Relations ("DIR") registration requirements in accordance with Labor Code §§ 1725.5 and 1771.1 is a material obligation of Design Builder and all of its Subcontractors (of any tier) under the Contract Documents. The foregoing includes, without limitation, compliance with DIR registration requirements at all times during performance of the Work by Design Builder and all of its Subcontractors of any tier. Design Builder shall provide

certification of registration and registration number to City before a Subcontractor will be allowed to work on the Project. The failure of Design Builder and its Subcontractors of any tier to be properly registered with DIR at all times during performance of the Work is a material breach of the Contract and grounds for termination for cause. An affirmative and ongoing obligation of Design Builder under the Contract Documents is the verification that all Subcontractors of any tier are at all times during performance of the Work in full and strict compliance with the DIR registration requirements. Design Builder shall not permit or allow any Subcontractor of any tier to perform any Work without Design Builder's verification that all Subcontractors are in full and strict compliance with the DIR registration requirements. Any Subcontractor not properly registered with DIR shall be substituted in accordance with Labor Code § 1771.1. Design Builder or its Subcontractors shall not be entitled to any additional costs or time arising from or in any way related to compliance with the DIR registration requirements.

11.1.6 Equal Employment Opportunity:

During performance of the Contract, Design Builder will not discriminate against any person or group of persons on account of race, color, religion, creed, national origin, ancestry, physical handicap, medical condition, age, marital status, sex or sexual orientation. Design Builder confirms that it has an equal opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that it maintains no employee facilities segregated on the basis of race, color, religion or national origin.

11.1.7 Warranties by Design Builder:

Design Builder has and throughout the term of the Contract shall maintain all required authority, license status, professional ability, skills and capacity to perform Design Builder's obligations hereunder and shall perform them in accordance with the requirements contained in the Contract Documents. Design Builder has visited the Site and has reasonably examined the nature and extent of the Work, Site, locality, impact(s) to adjoining private property, actual conditions, as-built conditions, and all local and federal, state and local laws and regulations that in any manner may affect cost, progress, performance or furnishing of Work or which relate to any aspect of the design and/or the means, methods, techniques, sequences or procedures of construction to be employed by Design Builder and safety precautions and programs incident thereto. Design Builder has reasonably examined all reports of exploration and tests of subsurface conditions, as-built drawings, other drawings or reports, available for design and construction purposes, of physical conditions, or which may be apparent at the Site and accepts the criteria set forth in these documents and the General Conditions to the extent of the information contained in these documents upon which Design Builder is entitled to rely. Design Builder agrees that except for the information so identified, Design Builder does not and shall not rely on any other information contained in these documents. After contract award, Design Builder, will conduct or obtain any additional examinations, investigations, explorations, tests, reports and studies, including but not limited to geotechnical investigations, upon which the design will be based, that pertain to the surface and subsurface conditions, as-built conditions, underground facilities and all other physical conditions at or contiguous to the Site as Design Builder considers necessary for the performance or furnishing of Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents.

11.1.8 Services Provided:

All design and engineering services furnished by Design Builder shall be performed by or under the supervision of persons licensed to practice architecture, engineering or surveying (as applicable) in the State of California, by personnel who are skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall have professional responsibility for the accuracy and completeness of the design documents and construction documents prepared or checked by them.

11.1.9 Warranty:

Design-Builder warrants to City that: (i) materials and equipment furnished will be of good quality and new unless otherwise required or permitted by the Contract Documents; (ii) the Work will be of

good quality and free from defects; (iii) the Work will conform to the requirements of the Contract Documents; and (iv) Design-Builder will deliver a Project free of stop payment notice claims. Work not conforming to these requirements shall be deemed defective. Design-Builder's warranty excludes improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by City, Design-Builder shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

11.2 Listing of Exhibits and documents incorporated herein:

- A. Previously authorized design agreement dated November 6, 2024, and Contract Amendment No. 1, dated January 8, 2025.
- B. Long-lead items
- C. Contract Price Amendment (incorporated as part of Phase 2)
- D. General Conditions (incorporated as part of Phase 2)
- E. Special Conditions (incorporated as part of Phase 2)
- F. Disclosure Statements
- G. Insurance Requirements
- H. City of Visalia Labor Compliance Manual
- I. City of Visalia Engineering Standard Specifications dated August 5, 2013
- J. Labor Prevailing Wage Rates (incorporated as part of Phase 2)
- K. Subcontractor List with DIR registration numbers
- L. Payment Bond
- M. Performance Bond
- N. Maintenance Bond
- O. Workers Compensation Insurance
- P. Contractor's Affidavit
- Q.

[In lieu of Sections 10.3.1 through 10.3.3 of the General Conditions of Contract, the Parties may want to delete such sections and include the following alternative disputes proceeding clause.]

Any claims, disputes, or controversies between the parties arising out of or related to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 10.2 of the General Conditions of Contract shall be resolved in a court of competent jurisdiction in the state in which the Project is located. **NOT USED**

[Section 2.9.1 of the General Conditions of Contract contains an option for the parties to establish a limited time frame for the Design-Builder's warranty. If the parties agree to such a limited time frame, the parties may insert it below.]

The parties have agreed to limit the time frame that Owner can make a claim pursuant to Section 2.9.1 of the General Conditions of Contract. Owner must make all claims pursuant to Section 2.9.1 of the General Conditions of Contract within _____ years of the date of Final Completion of the Project. **NOT USED**

Article 12- Not Used

Limitation of Liability

12.1 Limitation. To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Design-Builder, its Design Consultants, and Subcontractors, surety (if any) and their respective officers, directors, employees, and agents, and any of them, to Owner and anyone claiming by, through, or under Owner, for any and all claims, losses, liabilities, costs, or damages whatsoever arising out of, resulting from, or in any way related to, the Project or this Agreement from any cause, including but not limited to the negligence, indemnity, professional errors or omissions, strict liability, breach of contract, or warranty (express or implied) shall not exceed Ten percent (10%) of the Contract Price. The parties agree that specific consideration has been given by Design-Builder for this limitation and that it is deemed adequate.

DRAFT

In executing this Agreement, Owner and Design-Builder each individually represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary corporate approvals to execute this Agreement, and perform the services described herein.

CITY OF VISALIA

DESIGN-BUILDER

City Manager

Date

By: Authorized Agent

Date

Print Name, Title

APPROVED AS TO FORM:

City Attorney

Date

Risk Manager

Date

Project Manager

Date

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