

7999

DESIGN-BUILD CONTRACT

Department of Transportation  
Office Copy

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

SR 99 BORED TUNNEL ALTERNATIVE  
DESIGN-BUILD PROJECT

CONFORMED DOCUMENT

12/10/2010

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2 **Appendices**

- 3 Appendix 1 Price Proposal Form
- 4 Appendix 2 Acronyms and Definitions
- 5 Appendix 3 Design-Builder's Proposal Commitments and Clarifications
- 6 Appendix 4 Property Acquisition Schedule
- 7 Appendix 5 Prevailing Wage Requirements and Additional Federal Requirements
- 8           5-A Prevailing Wage Requirements
- 9           5-B Federal Provisions
- 10          5-C FHWA Form 1273
- 11          5-D Federal Prevailing Wage Rates
- 12          5-E State Prevailing Wage Rates
- 13 Appendix 6 Requirements for Nondiscrimination
- 14 Appendix 7 Key Personnel
- 15 Appendix 8 Invoice Certificates
- 16 Appendix 9 Not Used
- 17 Appendix 10 Contract Bonds
- 18           10-A Payment Bond
- 19           10-B Performance Bond
- 20 Appendix 11 Dispute Review Board
- 21 Appendix 12 Designation of Initial Representatives



1 Notice to Proceed ("NTP 1"), while the environmental analysis is underway. If a Record of  
2 Decision is issued that selects the Bored Tunnel Alternative, the remaining work will be authorized  
3 by a second Notice to Proceed ("NTP 2"), with completion deadlines tied to NTP 2.

4 **NOW, THEREFORE**, WSDOT and Design-Builder, for the consideration hereinafter named,  
5 agree as follows:

6 **1. CONTRACT COMPONENTS; INTERPRETATION OF CONTRACT DOCUMENTS**

7 **1.1 Certain Definitions**

8 Appendix 2 hereto contains the meaning of various terms used in the Contract Documents.

9 **1.2 Order of Precedence**

10 The Contract Documents are intended to be complementary and to describe and provide for a  
11 complete contract. Each of the Contract Documents is an essential part of the contract, and a  
12 requirement occurring in one is as binding as though occurring in all. In the event of any conflict  
13 among the Contract Documents, the order of precedence shall be as set forth below:

- 14 (a) Change Orders and Contract amendments;
- 15 (b) The Contract, including Appendices 1 through 13, except that Appendix 3 has a  
16 lower order of precedence;
- 17 (c) Appendix 3 to the Contract, constituting Design-Builder's Proposal Commitments  
18 and Clarifications;
- 19 (d) Technical Requirements;
- 20 (e) All other RFP Documents listed as Contract Documents in Appendix A1 to the  
21 Technical Requirements; and
- 22 (f) The Proposal.

23 In addition, if the Proposal includes statements or incorporates Alternative Technical Concepts  
24 ("ATCs") that can reasonably be interpreted as offers to provide higher quality items than otherwise  
25 required by the Contract Documents or to perform services in addition to those otherwise required,  
26 or otherwise contains terms that are more advantageous to WSDOT than the requirements of the  
27 Contract Documents, Design-Builder's obligations hereunder shall include compliance with all such  
28 statements, offers and terms.

29 **1.3 Mandatory Standards**

30 Mandatory Standards shall be deemed incorporated into the Contract Documents to the extent that  
31 they are referenced therein, with the same order of precedence as the Contract Document(s) in  
32 which the reference occurs.

33 **1.4 Omission of Details; Clarification by WSDOT**

34 Design-Builder shall not take advantage of any apparent error, omission, ambiguity, deficiency or  
35 defect in the Contract Documents. Should it appear that the Work to be done or any matter  
36 relative thereto is not sufficiently detailed or explained in the Contract Documents, Design-Builder  
37 shall apply to WSDOT in writing for such further written explanations as may be necessary and  
38 shall conform to the explanation provided. Design-Builder shall promptly notify WSDOT of all  
39 errors, omissions, ambiguity, deficiencies or defects which it may discover in the Contract

1 Documents, and shall obtain specific instructions in writing regarding any such error, omission,  
2 ambiguity, deficiency or defect before proceeding with the Work affected thereby. The fact that the  
3 Contract Documents omit or misdescribe any details of any Work which are necessary to carry out  
4 the intent of the Contract Documents, or which are customarily performed under similar  
5 circumstances, shall not relieve Design-Builder from performing such omitted Work or  
6 misdescribed details of the Work, and they shall be performed as if fully and correctly set forth and  
7 described in the Contract Documents, without entitlement to a Change Order hereunder except as  
8 specifically allowed under Article 11.

9 **1.5 Computation of Periods**

10 References to "days" contained in the Contract Documents shall mean calendar days unless  
11 otherwise specified, provided that if the date to perform any act or give any notice specified in the  
12 Contract Documents (including the last date for performance or provision of notice "within" a  
13 specified time period) falls on a non-Business Day, such act or notice may be timely performed on  
14 the next succeeding day which is a Business Day. Notwithstanding the foregoing, requirements  
15 contained in the Contract Documents relating to actions to be taken in the event of an emergency,  
16 requirements contained in Sections 5.7 and 5.8 and any other requirements for which it is clear  
17 that performance is intended to occur on a non-Business Day, shall be required to be performed as  
18 specified, even though the date in question may fall on a non-Business Day.

19 **1.6 Standard for Approvals**

20 In all cases where approvals, acceptances or consents are required to be provided by WSDOT or  
21 Design-Builder hereunder, such approvals, acceptances or consents shall not be withheld  
22 unreasonably except in cases where a different standard (such as sole discretion) is specified, and  
23 shall not be unreasonably delayed if no response time is specified. In cases where sole discretion  
24 is specified, the decision shall not be subject to dispute resolution or other legal challenge;  
25 provided, however, the issue of whether the decision was arbitrary or capricious shall be subject to  
26 dispute resolution hereunder.

27

28

1 **2. OBLIGATIONS OF DESIGN-BUILDER; REPRESENTATIONS AND COVENANTS**

2 **2.1 Performance Requirements**

3 **2.1.1 Performance Standards**

4 Design-Builder shall design the Project and shall construct the Project as designed, in accordance  
5 with all professional engineering principles and construction practices generally accepted as  
6 standards of the industry in the State, in a good and workmanlike manner, free from defects  
7 (except to the extent that such defects are inherent in prescriptive specifications included in the  
8 Technical Requirements), and in accordance with the terms and conditions set forth in the Contract  
9 Documents.

10 **2.1.2 Performance as Directed**

11 At all times during the term hereof, including during the course of, and notwithstanding the  
12 existence of, any dispute, Design-Builder shall perform as directed by WSDOT in a diligent manner  
13 and without delay. If a dispute arises regarding such performance or direction, the dispute shall be  
14 resolved in accordance with Article 24.

15 **2.2 General Obligations of Design-Builder**

16 Design-Builder, in addition to performing all other requirements of the Contract Documents, shall:

- 17 (a) furnish all design and other services, provide all materials and labor and undertake  
18 all efforts necessary or appropriate (excluding only those services, materials and  
19 efforts which the Contract Documents specify will be undertaken by other Persons)  
20 to construct the Project and maintain it during construction in accordance with the  
21 requirements of the Contract Documents, so as to achieve Substantial Completion,  
22 Physical Completion and Final Completion by the applicable Completion Deadlines.
- 23 (b) at all times provide Design-Builder's Project Manager, approved by WSDOT, who  
24 (i) will have full responsibility for the prosecution of the Work, (ii) will act as agent  
25 and be a single point of contact in all matters on behalf of Design-Builder, (iii) will be  
26 present (or have an approved designee present) at the Site at all times that Work is  
27 performed, and (iv) will have authority to bind Design-Builder on all matters relating  
28 to the Project;
- 29 (c) obtain all Governmental Approvals (other than the Environmental Approvals)  
30 specifically including any Governmental Approvals required to implement any  
31 approved ATCs incorporated into the Contract Documents;
- 32 (d) comply with all conditions imposed by and undertake all actions required by and all  
33 actions necessary to maintain in full force and effect, all Governmental Approvals,  
34 including implementation of all environmental mitigation measures required by the  
35 Contract Documents, except to the extent that such responsibility is expressly  
36 assigned in the Contract Documents to WSDOT or to another Person;
- 37 (e) provide such assistance as is reasonably requested by WSDOT in dealing with any  
38 Person and/or in prosecuting and defending lawsuits in any and all matters relating  
39 to the Project, which may include providing information and reports regarding the  
40 Project, executing declarations and attending meetings and hearings, but which  
41 shall in no event be deemed to require Design-Builder to provide legal services;



- 1 (f) comply with all requirements of all Laws, including Environmental Laws, including  
2 environmental mitigation and monitoring measures required for the Project,  
3 including those set forth in TR Section 2.8, and requirements regarding the  
4 handling, generation, treatment, storage, transportation and disposal of Hazardous  
5 Materials;
- 6 (g) cooperate with WSDOT and Governmental Bodies with jurisdiction over the Project  
7 in the review and oversight of the Project and other matters relating to the Work;
- 8 (h) supervise and be responsible to WSDOT for acts and omissions of all DB-Related  
9 Entities, as though all such Persons were directly employed by Design-Builder; and
- 10 (i) mitigate delay to the Project and mitigate damages due to delay in all  
11 circumstances, to the extent possible, including by resequencing, reallocating or  
12 redeploying Design-Builder's forces to other work, as appropriate.

### 13 **2.3 Representations and Covenants**

14 Design-Builder represents and covenants for the benefit of WSDOT as follows:

#### 15 **2.3.1 Maintenance of Professional Qualifications**

16 Design-Builder and its design and construction Subcontractor(s) have maintained, and throughout  
17 the term of the Contract shall continue to maintain, all required authority, license status,  
18 professional ability, skills and capacity to perform the Work.

#### 19 **2.3.2 Evaluation of Constraints**

20 Design-Builder has evaluated the constraints affecting delivery of the Project, including the  
21 Property Acquisition Schedule and Basic Configuration as well as the assumed conditions of the  
22 Environmental Approvals, and has reasonable grounds for believing and does believe that the  
23 Project can be delivered within such constraints.

#### 24 **2.3.3 Feasibility of Performance**

25 Design-Builder has evaluated the feasibility of performing the Work within the time specified herein  
26 and for the compensation specified herein, and has reasonable grounds for believing and does  
27 believe that such performance (including achievement of Substantial Completion, Physical  
28 Completion and Final Completion by the applicable Completion Deadlines) for such compensation  
29 is feasible and practicable.

#### 30 **2.3.4 Review of Site Information**

31 Prior to submitting its Proposal, in accordance with prudent and generally accepted engineering  
32 and construction practices, Design-Builder reviewed the boring logs provided by WSDOT in TR  
33 Appendix G2, inspected and examined the Site and surrounding locations, and has undertaken  
34 other appropriate activities sufficient to familiarize itself with surface conditions and subsurface  
35 conditions discernible from the surface affecting the Project. As a result of such review, inspection,  
36 examination and other activities, Design-Builder is familiar with and accepts the physical  
37 requirements of the Work. Before commencing any Work on a particular aspect of the Project,  
38 Design-Builder shall verify all governing dimensions and conditions at the Site and shall examine  
39 all adjoining work which may have an impact on such Work. Design-Builder shall be responsible  
40 for ensuring, including through field verification, that the Design Documents and Working Drawings  
41 accurately depict all governing and adjoining dimensions and conditions.

1 **2.3.5 Governmental Approvals**

2 Design-Builder has no reason to believe that any Governmental Approval required to be obtained  
3 by Design-Builder will not be granted in due course and thereafter remain in effect so as to enable  
4 the Work to proceed in accordance with the Contract Documents. For Governmental Approvals  
5 required to be obtained by Design-Builder that must formally be issued in the name of WSDOT,  
6 Design-Builder shall undertake all efforts to obtain such approvals, subject to WSDOT's  
7 reasonable cooperation with Design-Builder, including execution and delivery of appropriate  
8 applications and other documentation in a form approved by WSDOT. Design-Builder shall assist  
9 WSDOT in obtaining any Governmental Approvals which WSDOT may be obligated to obtain,  
10 including providing information requested by WSDOT and participating in meetings regarding such  
11 approvals. Delay in obtaining Governmental Approvals may be considered a Third Party Delay for  
12 which additional compensation and/or a time extension is allowed in accordance with Article 11.

13 **2.3.6 Progression of Work**

14 Design-Builder shall at all times schedule and direct its Work to provide an orderly progression of  
15 the Work to achieve Substantial Completion, Physical Completion and Final Completion by the  
16 applicable Completion Deadlines and in accordance with the Contract Schedule, including  
17 furnishing such employees, materials, facilities and equipment and working such hours (including  
18 extra shifts, overtime operations, and on Sundays and public holidays) as may be necessary to  
19 achieve such goals, all at Design-Builder's own expense, except as otherwise specifically provided  
20 in Article 11.

21 **2.3.7 Organization**

22 Design-Builder is a Joint Venture, duly organized and validly existing under the laws of the State of  
23 Washington, with all requisite power to own its properties and assets and carry on its business as  
24 now conducted or proposed to be conducted. Design-Builder is duly qualified to do business, and  
25 is in good standing, in the State, and will remain in good standing throughout the term of the  
26 Contract and for as long thereafter as any obligations remain outstanding under the Contract  
27 Documents.

28 **2.3.8 Labor Harmony**

29 Design-Builder shall ensure labor harmony on Site during all stages of the Project, including taking  
30 appropriate steps to prevent strikes, walkouts, Work stoppages, Work slowdowns, Work  
31 curtailments, cessations or interruptions of production due to labor disputes. If failure to maintain  
32 labor harmony results in delay in completion of the Project, Design-Builder shall not be entitled to a  
33 time extension or increase in compensation under Sections 11.3 and 11.4, respectively.

1 **3. DESIGN REQUIREMENTS**

2 **3.1 Responsibility for Design**

3 **3.1.1 Design Work To Be Performed By Licensed Personnel**

4 All design and engineering services furnished by Design-Builder shall be performed by or under  
5 the supervision of personnel licensed to perform such services in accordance with Washington law,  
6 by personnel who are careful, skilled, experienced and competent in their respective trades or  
7 professions, who are professionally qualified to perform the Work in accordance with the Contract  
8 Documents and who shall assume professional responsibility for the accuracy and completeness  
9 of the documents prepared or checked by them.

10 **3.1.2 Obligation to Correct Errors**

11 Design-Builder agrees that it has full responsibility for the design of the Project, regardless of the  
12 fact that certain conceptual design work occurred and was provided to Design-Builder prior to the  
13 date of execution of the Contract. Design-Builder specifically acknowledges and agrees that:

- 14 (a) Design-Builder is not entitled to rely on and has not relied on (i) the Reference  
15 Documents or (ii) any other documents or information provided by WSDOT, except  
16 to the extent specifically permitted in the Contract Documents.
- 17 (b) The Conceptual Design, including the Basic Configuration, is preliminary and  
18 conceptual in nature, may contain errors, and may not be suitable as the basis for  
19 the final design.
- 20 (c) Design-Builder is responsible for providing Released for Construction Documents  
21 that comply with the requirements of the Contract Documents, regardless of any  
22 errors, omissions, deficiencies or other defects in the Conceptual Design, without  
23 any increase in compensation or extension of a Completion Deadline, subject only  
24 to the right to a Change Order for Necessary Basic Configuration Changes.

25 The foregoing shall in no way affect WSDOT's agreement herein to issue Change Orders in  
26 accordance with Article 11 with respect to Necessary Basic Configuration Changes.

27 **3.2 Design Requirements**

28 **3.2.1 Design Review Process**

29 Design-Builder shall furnish the Released for Construction Documents and other Design  
30 Documents (including Final Design documents) to WSDOT in accordance with TR Sections 2.12  
31 and 2.28. Design-Builder shall obtain WSDOT's acceptance or approval of the Design Documents  
32 (as applicable) in accordance with the Technical Requirements.

33 WSDOT shall have the right to review and comment on the Design Documents for compliance with  
34 the requirements of the Contract Documents in accordance with TR Section 2.28. Design-Builder  
35 shall review comments upon receipt and shall promptly notify WSDOT if Design-Builder anticipates  
36 that incorporation of the comments would adversely affect the design or construction of the Project  
37 or the Contract Schedule, in which event WSDOT shall have the right to modify its comments. If  
38 Design-Builder fails to notify WSDOT regarding concerns associated with any WSDOT comments  
39 in a timely manner after receipt of such comments, Design-Builder shall be deemed to have fully  
40 accepted all responsibility for changes made to the documents in response to such comments.

1 Within 14 days of receipt of comments from WSDOT (including modifications to previous  
2 comments) or such longer period as may be allowed by WSDOT, Design-Builder shall revise and  
3 modify all such documents so as to fully reflect all such comments.

#### 4 **3.2.2 Third Party Approvals**

5 (a) Design-Builder shall be responsible for coordinating all design reviews required by  
6 local agencies, Utility Owners and other third parties. WSDOT will assist in  
7 obtaining approvals from Utility Owners as specified in Section 7.2, and agrees to  
8 assist Design-Builder in its efforts to obtain other third party approvals as may be  
9 reasonably requested by Design-Builder. Delay in obtaining Third Party Approvals  
10 may be considered a Third Party Delay for which additional compensation and/or  
11 a time extension is allowed in accordance with Article 11. For delays relating to  
12 Utility Owners see Section 7.2.

13 (b) Design-Builder acknowledges that it has sole responsibility for obtaining any  
14 approvals from third parties required to implement approved ATCs incorporated in  
15 the Contract Documents. Design-Builder agrees that if Design-Builder fails to  
16 obtain any such approval, Design-Builder shall comply with the corresponding  
17 baseline requirements (unmodified by the ATC) without any increase in  
18 compensation or extension of the Completion Deadlines. WSDOT agrees to  
19 assist Design-Builder in its efforts to obtain such approvals as may be reasonably  
20 requested by Design-Builder.

#### 21 **3.2.3 Compliance with Contract Requirements; Changes in Basic Configuration**

22 Design-Builder shall not perform any Work that is inconsistent with the requirements of the  
23 Contract Documents or that modifies the Basic Configuration unless such Work has been  
24 specifically authorized by Change Order or Directive Letter specifically authorizing the change.  
25 This requirement applies regardless of whether the Work in question is required by a  
26 Governmental Approval, is desired by Design-Builder for its benefit, or for any other reason.  
27 Design-Builder acknowledges and agrees that constraints set forth in the Contract Documents, as  
28 well as Site conditions, the Property Acquisition Schedule and the requirement to obtain approval,  
29 will impact Design-Builder's ability to revise the Basic Configuration.

#### 30 **3.2.4 Ownership of Design**

31 Except for proprietary TBM-related design information, all Work product, including Working  
32 Drawings, Released for Construction Documents, Design Documents, studies, manuals, As-Built  
33 Plans, and technical reports, resulting from Design-Builder's performance of its obligations under  
34 the Contract Documents shall be considered works for hire and shall become the property of  
35 WSDOT without restriction of limitation on their use.

#### 36 **3.3 Reference Documents**

37 WSDOT has provided the Reference Documents to Design-Builder for information only, and such  
38 documents are not mandatory or binding on Design-Builder. Design-Builder understands and  
39 agrees that WSDOT shall not be responsible or liable in any respect for any loss, damage, injury,  
40 liability, cost or cause of action whatsoever suffered by any DB-Related Entity by reason of any  
41 use of any information contained in the Reference Documents or any action or forbearance in  
42 reliance thereon, except to the extent that WSDOT has specifically agreed herein that Design-  
43 Builder shall be entitled to an increase in its compensation and/or extension of a Completion  
44 Deadline with respect to such matter. Design-Builder further acknowledges and agrees that (a) if

1 and to the extent Design-Builder or anyone on Design-Builder's behalf uses any of said information  
2 in any way, such use is made on the basis that Design-Builder, not WSDOT, has approved and is  
3 responsible for said information, and (b) Design-Builder is capable of conducting and obligated  
4 hereunder to conduct any and all studies, analyses and investigations as it deems advisable to  
5 verify or supplement said information, and that any use of said information is entirely at Design-  
6 Builder's own risk and at its own discretion.

7 **3.4 Design Professional Licensing Laws**

8 WSDOT does not intend to contract for, pay for, or receive any design services which are in  
9 violation of any professional licensing laws, and by execution of this Contract, Design-Builder  
10 acknowledges that WSDOT has no such intent. It is the intent of the parties that Design-Builder  
11 will furnish the design of the Project through subcontracts with licensed design and engineering  
12 firm(s) as provided herein. Any references in the Contract Documents to Design-Builder's  
13 responsibilities or obligations to "perform" the design portions of the Work shall be deemed to  
14 mean that Design-Builder shall "furnish" the design for the Project.

15

**4. TIME WITHIN WHICH PROJECT SHALL BE COMPLETED; SCHEDULING**

**4.1 Time of Essence**

Time is of the essence of the Contract.

**4.2 Time for Completion**

Design-Builder shall achieve Substantial Completion within 1,589 days after the effective date of NTP 2, shall achieve Physical Completion within 120 days after Substantial Completion, and shall achieve Final Completion within 120 days after Physical Completion. Except as otherwise specifically provided in this Article 4 and Article 11, WSDOT shall have no obligation to extend any of the foregoing Completion Deadlines, and Design-Builder shall not be relieved of its obligation to comply with the Contract Schedule and achieve Substantial Completion, Physical Completion and Final Completion by the applicable Completion Deadlines for any reason.

**4.3 Notice to Proceed**

The NEPA documentation and environmental permits for the Project will not be completed prior to Contract execution. Consequently, WSDOT will issue two notices to proceed for the Project (NTP 1 and NTP 2). WSDOT anticipates that NTP 1 will be issued shortly after Contract execution, but WSDOT may defer issuance of NTP 1 for up to 30 days after Contract execution. NTP1 will authorize Design-Builder to proceed with the NTP 1 Work consistent with FHWA's design-build rule and NEPA. Work that is authorized in NTP 1 will focus on preliminary design, including investigations, and analysis necessary to support the Final EIS, the Section 106 process, Endangered Species Act consultation, and environmental permitting. Details regarding the types of work to be authorized under NTP 1 can be found in TR Section 2.8.

The NTP 1 Work does not include preparation of the NEPA document or any decision-making responsibility with respect to the NEPA process, though NTP 1 Work will support the NEPA documents prepared by WSDOT. WSDOT will be responsible for completing the NEPA documentation and obtaining FHWA's approval thereof. Under no circumstances shall Design-Builder commence Final Design or construction until such time FHWA has issued the Record of Decision and WSDOT issues NTP 2, nor shall Design-Builder take any other action during the NTP 1 period that would materially affect WSDOT's or FHWA's objective consideration of alternatives under NEPA.

NTP 2 will be issued only if the final NEPA documents, including the Record of Decision, choose the Bored Tunnel Alternative as the Selected Alternative. Upon the issuance of NTP 2, Design-Builder shall commence NTP 2 Work, which will generally consist of Final Design and construction.

In the event that the final NEPA documents select the "no-build" alternative or select an alternative other than the Bored Tunnel Alternative, WSDOT will terminate the Contract for convenience and Design-Builder will be paid for the NTP 1 Work as provided herein.

**4.3.1 Conditions to Issuance of NTP 2 and Start of NTP 2 Work**

NTP 2 will be issued only after final NEPA documents have been approved, and only if the Bored Tunnel Alternative is chosen as the Selected Alternative in the final approved documents. In addition, if the final approved documents, including the Record of Decision, include any modifications to the Project requirements requiring a modification to the Contract Documents, NTP 2 will be issued only after the parties have reached agreement regarding such modifications.

1 Following issuance of NTP 2, Design-Builder may continue performance of Work authorized by  
2 NTP 1 and may also proceed with Final Design and construction.

3 23 CFR 636.302 (a) (1) (iv) and (vi) requires that subsequent approval of final design and  
4 construction activities will be contingent upon a finding of price reasonableness by WSDOT, and  
5 concurred in by FHWA. Any major changes or scope changes to the contract that result between  
6 the issuing of NTP 1 and NTP 2 will be subject to price reasonableness analysis and, in  
7 conformance with 23 CFR 636.302 (a) (1) (vi), WSDOT's finding of price reasonableness is subject  
8 to FHWA concurrence.

#### 9 **4.3.2 Schedule for Issuance of NTPs**

10 WSDOT anticipates that it will issue NTP 1 concurrently with or shortly after execution and delivery  
11 of the Contract and that NTP 2 will be issued approximately 180 days after issuance of NTP 1. If  
12 WSDOT fails to issue NTP 2 on or before August 31, 2011, Design-Builder shall have the right to  
13 an increase in the Lump Sum Amount as specified in Section 10.1.1. If WSDOT fails to issue NTP  
14 2 on or before March 1, 2012, Design-Builder shall have the right to terminate the Agreement for  
15 convenience as specified in Section 15.6, by written notice of termination delivered to WSDOT at  
16 any time prior to issuance of NTP 2 by WSDOT.

17 If the effective date of NTP 2 is less than 180 days after the effective date of NTP 1, Design-Builder  
18 will have the right to receive an extension of the Completion Deadlines, if and to the extent that  
19 Design-Builder establishes that Work that would otherwise have performed during NTP 1 is on the  
20 Critical Path as the result of acceleration of NTP 2. However, no extension will be allowed to the  
21 extent that the reduced timeframe for NTP 1 resulted from a delay in NTP 1 due to Design-  
22 Builder's action or inaction, or to the extent that the impact to the Critical Path could reasonably  
23 have been avoided by Design-Builder.

#### 24 **4.4 Contract Schedule**

25 Design-Builder shall deliver the Project, including planning, design, construction, management,  
26 development and completion, in accordance with the Contract Schedule, as described in TR  
27 Section 2.1.6. Such schedule shall also be the basis for determining the amount of monthly  
28 progress payments and payments from the Escalation Fund to be made to Design-Builder, subject  
29 to the cap on payment set forth in Section 10.4.

#### 30 **4.5 Prerequisites for Start of Construction**

31 The following must occur prior to commencement of any physical construction work in the field that  
32 disturbs existing soils or man-made objects in any way:

- 33 (a) Issuance of the Record of Decision by FHWA identifying the Project as the Selected  
34 Alternative;
- 35 (b) Issuance of NTP 2;
- 36 (c) Those portions of the following plans to the extent they relate to the design package  
37 being proposed for construction: the Quality Management Plan in accordance with  
38 TR Section 2.28; the Public Information Plan in accordance with TR Section 2.9; the  
39 Environmental Compliance Plan in accordance with TR Section 2.8; the Utility Work  
40 Plan in accordance with TR Section 2.10; the Traffic Management Plan in  
41 accordance with TR Section 2.22;

- 1 (d) Design-Builder shall have met all requirements of the Quality Management Plan that  
2 are a condition to construction;
- 3 (e) All Governmental Approvals necessary for such Work to proceed obtained (whether  
4 by Design-Builder or WSDOT), and all pre-requisites to the commencement of  
5 construction set forth therein satisfied;
- 6 (f) All necessary rights of access for such Work in place; and
- 7 (g) WSDOT's acceptance of the Released for Construction Documents and Traffic  
8 Control Plans for such portion of the Project in accordance with TR Sections 2.22  
9 and 2.28.

10 The Contract Schedule shall reflect the anticipated dates set forth in TR Section 2.8 for WSDOT to  
11 obtain Governmental Approvals. An equitable adjustment shall be made to the Lump Sum Amount  
12 and Completion Deadlines in the event that the approvals are delayed beyond such anticipated  
13 dates, upon Design-Builder's compliance with all applicable requirements of Article 11, and subject  
14 to the limitations contained therein.

15 **4.6 Limitation of Operations**

16 Design-Builder may perform Work at all times except as limited by Project permits, City of Seattle  
17 Street Use Permits and TR Sections 2.8 and 2.22.



1 **5. CONTROL OF WORK; ALLOCATION OF CERTAIN RISKS**

2 **5.1 Control and Coordination of Work**

3 Design-Builder shall be solely responsible for and have control over the construction means,  
4 methods, techniques, sequences, procedures and Site safety, and shall be solely responsible for  
5 coordinating all portions of the Work under the Contract Documents, subject, however, to all  
6 requirements contained in the Contract Documents.

7 **5.2 Safety**

8 Design-Builder shall take all reasonable precautions and be solely responsible for safety on the  
9 Project in compliance with TR Section 2.1.3.

10 **5.3 Obligation to Minimize Impacts**

11 Design-Builder shall ensure that all of its activities and the activities of all DB-Related Entities are  
12 undertaken in a manner that will minimize the effect on surrounding property and the public to the  
13 maximum extent reasonably practicable.

14 **5.4 Quality Management**

15 **5.4.1 Design-Builder Quality Management**

16 Design-Builder shall strictly comply with the Quality Management Plan in the performance of the  
17 Work in compliance with TR Section 2.28 and the Contract Documents.

18 **5.4.2 Oversight, Inspection, and Testing by WSDOT and Others**

19 All materials and each part or detail of the Work shall also be subject to oversight, inspection and  
20 testing by WSDOT and other Persons designated by WSDOT. Such oversight, inspection and/or  
21 testing does not make such Person a party to the Contract nor will it change the rights of the  
22 parties hereto. Design-Builder hereby consents to such oversight, inspection and testing. Upon  
23 request from WSDOT, Design-Builder shall furnish information to such Persons as are designated  
24 in such request and shall permit such Persons access to the Site and all parts of the Work.

25 **5.4.3 Obligation to Uncover Finished Work**

26 At all times before Final Completion, Design-Builder shall remove or uncover such portions of the  
27 finished construction Work as directed by WSDOT. After examination by WSDOT and any other  
28 Persons designated by WSDOT, Design-Builder shall restore the Work to the standard required by  
29 the Contract Documents. If the Work exposed or examined is not in conformance with the  
30 requirements of the Contract Documents, then uncovering, removing and restoring the Work and  
31 recovery of any delay to the Critical Path occasioned thereby shall be at Design-Builder's expense  
32 and Design-Builder shall not be entitled to a time extension. Furthermore, any Work done or  
33 materials used without notice to and opportunity for prior inspection by WSDOT may be ordered  
34 uncovered, removed or restored at Design-Builder's expense and without a time extension, even if  
35 the Work proves acceptable after uncovering. Except with respect to Work done or materials used  
36 as described in the foregoing sentence, if Work exposed or examined under this Section 5.4.3 is in  
37 conformance with the requirements of the Contract Documents, then any delay in the Critical Path  
38 from uncovering, removing and restoring Work shall be considered a WSDOT-Caused Delay, and  
39 Design-Builder shall be entitled to a Change Order for the cost of such efforts and recovery of any

1 delay to the Critical Path occasioned thereby, upon Design-Builder's compliance with all applicable  
2 requirements of Article 11, and subject to the limitations contained therein.

### 3 **5.5 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances, and Approvals**

4 Design-Builder shall not be relieved of its obligation to perform the Work in accordance with the  
5 Contract Documents, or any of its other obligations under the Contract Documents, by reason of  
6 oversight, spot checks, audits, reviews, tests, inspections, acceptances or approvals by any  
7 Persons, or by any failure of any Person to take such action. The oversight, spot checks, audits,  
8 reviews, tests, inspections, acceptances and approvals by any Person do not constitute final  
9 acceptance of the particular material or Work, or waiver of any legal or equitable right with respect  
10 thereto. WSDOT may reject or require Design-Builder to remedy any Nonconforming Work and/or  
11 identify additional Work which must be done to bring the Project into compliance with the  
12 requirements of the Contract Documents at any time prior to Final Acceptance, whether or not  
13 previous oversight, spot checks, audits, reviews, tests, inspections, acceptances or approvals were  
14 conducted by any Person.

15 WSDOT shall not be precluded, by any measurement, estimate or certificate made either before or  
16 after Final Acceptance and payment therefor, from showing that any such measurement, estimate  
17 or certificate was incorrectly made or untrue, or from showing the true amount and character of the  
18 work performed and materials furnished by Design-Builder, or from showing that the work or  
19 materials do not in fact conform to the requirements of the Contract Documents. Notwithstanding  
20 any such measurement, estimate or certificate, or payment made in accordance therewith,  
21 WSDOT shall not be precluded from recovering from Design-Builder and its Surety(ies) such  
22 damages as WSDOT may sustain by reason of Design-Builder's failure to comply with the terms of  
23 the Contract Documents.

### 24 **5.6 Nonconforming Work**

#### 25 **5.6.1 Rejection, Removal and Replacement of Work**

26 Subject to WSDOT's right, in its sole discretion, to accept or reject Nonconforming Work, Design-  
27 Builder shall remove and replace rejected Nonconforming Work so as to conform to the  
28 requirements of the Contract Documents, at Design-Builder's expense and without any time  
29 extension; and Design-Builder shall promptly take all action necessary to prevent similar  
30 deficiencies from occurring in the future. The fact that WSDOT may not have discovered the  
31 Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. If Design-  
32 Builder fails to correct any Nonconforming Work within five days of receipt of notice from WSDOT  
33 requesting correction (or, for Nonconforming Work which can not be corrected within five days, if  
34 Design-Builder fails to (i) provide within such five-day period a schedule for WSDOT's approval to  
35 promptly correct any such Nonconforming Work; (ii) begin correction of the Nonconforming Work  
36 within such five-day period and thereafter diligently prosecute and complete such correction in  
37 accordance with the WSDOT-approved schedule), then WSDOT may cause the Nonconforming  
38 Work to be remedied or removed and replaced, and may deduct the cost of doing so from any  
39 moneys due or to become due Design-Builder and/or obtain reimbursement from Design-Builder  
40 for such cost.

#### 41 **5.6.2 Acceptance of Nonconforming Work**

42 WSDOT may, in its sole discretion, accept any Nonconforming Work without requiring it to be fully  
43 corrected, and shall be entitled to reduce the Design-Builder's compensation in the manner  
44 described below (and seek reimbursement of previous payments, if applicable). In certain

1 instances, it may not be possible or practical to remedy the Nonconforming Work so that it meets  
2 the requirements of the Contract Documents. Unless expressly provided otherwise elsewhere in  
3 the Contract Documents for specific events, the reduction in compensation shall equal, at  
4 WSDOT's election, (a) Design-Builder's cost savings associated with its failure to perform the Work  
5 in accordance with the requirements of the Contract Documents or (b) the amount deemed  
6 appropriate by WSDOT to provide compensation for impacts arising out of the failure to comply  
7 with the Contract Documents, including additional lifecycle and future maintenance costs and/or  
8 other costs arising out of or affected by the Nonconforming Work.

## 9 **5.7 Subsurface Work**

### 10 **5.7.1 Tunnel Boring Machine Intervention Work**

11 To reasonably allocate risk of tunneling on the Project, WSDOT shall share in the cost and  
12 schedule risk of Intervention Work in accordance with this Section 5.7.1. Intervention Work is work  
13 of any nature performed in or around the TBM for a continuous period of time by workers operating  
14 under hyperbaric pressure. TBM maintenance work performed under hyperbaric pressure qualifies  
15 as Intervention Work. WSDOT will not consider work performed in conditions other than under  
16 hyperbaric pressure as Intervention Work. The time for Intervention Work will be measured on an  
17 hour by hour basis rounded to the nearest hour beginning when the first worker(s) enters the  
18 hyperbaric chamber for compression and ending when the last worker(s) has completed  
19 decompression including down time between shifts (if any), or when the TBM resumes excavation,  
20 whichever occurs first. For example, if Intervention Work is completed in 7.25 hours, the  
21 Intervention Work will be calculated as having taken seven hours. If the Intervention Work is  
22 completed in 7.5 hours, the Intervention Work will be calculated as having taken eight hours. The  
23 total of the two instances of Intervention Work would count as a cumulative 15 hours of  
24 Intervention Work.

#### 25 **5.7.1.1 Intervention Work Included in Original Scope**

26 The Lump Sum Amount and Contract Schedule include the cost and schedule impact of 1440  
27 cumulative hours of Intervention Work. Work performed under hyperbaric pressure that is  
28 necessitated by the breach of contract or fault or negligence, or act or failure to act of any DB-  
29 Related Entity, is not Intervention Work and will not count towards the cumulative total hours of  
30 Intervention Work.

#### 31 **5.7.1.2 Routine Maintenance Included in Original Scope**

32 Routine Maintenance is not considered Intervention Work, and all costs associated with Routine  
33 Maintenance are included in the Lump Sum Amount. Design-Builder is not entitled to a time  
34 extension or additional compensation for any Routine Maintenance.

#### 35 **5.7.1.3 Extraordinary Intervention Work**

36 Upon Design-Builder's compliance with all applicable requirements of this Section 5.7 and  
37 Article 11, and subject to the limitations contained therein, WSDOT shall issue one or more  
38 Change Orders, (a) to compensate Design-Builder for additional direct costs of performing work  
39 directly related to Extraordinary Intervention Work, and (b) to extend the Completion Deadlines and  
40 compensate Design-Builder for delay damages with respect to any delay in the Critical Path  
41 caused by Extraordinary Intervention Work. Compensation will be allowed for extended Site  
42 overhead, but not for profit or home office overhead directly or indirectly associated with  
43 Extraordinary Intervention Work.

1 WSDOT will use the Shared Contingency Allowance to pay amounts owing to Design-Builder  
2 under this Section 5.7.1.3, but if the Shared Contingency Allowance is fully consumed, WSDOT  
3 shall remain responsible for the costs of Extraordinary Intervention Work described in this Section  
4 5.7.1.3.

5 In the event that funds remain in the Shared Contingency Allowance after Physical Completion of  
6 the Work, unused amounts in the Shared Contingency Allowance shall be paid to the Design-  
7 Builder in accordance with the provisions of Article 13.

#### 8 **5.7.1.4 Intervention Work Due To Differing Site Conditions**

9 In the event that either Intervention Work or Extraordinary Intervention Work is required as the  
10 direct result of a Differing Site Condition, Design-Builder's entitlement to a Change Order shall be  
11 governed by Section 5.7.6 instead of this Section 5.7.1.

#### 12 **5.7.2 Geotechnical and Environmental Reports**

13 The Geotechnical Baseline Report, TR Appendix G1, and the Environmental Baseline Report, TR  
14 Appendix E6 contain the narrative description of geotechnical and environmental conditions that  
15 Design-Builder should expect to encounter during subsurface construction Work. In the event the  
16 Geotechnical Baseline Report or Environmental Baseline Report, as applicable, is silent with  
17 respect to a particular geotechnical or environmental condition, Design-Builder may rely upon the  
18 Geotechnical & Environmental Data Report, TR Appendix G2, as describing such condition.  
19 Whenever there is an inconsistency between conditions described in the Geotechnical Baseline  
20 Report or Environmental Baseline Report and the conditions described in the Geotechnical &  
21 Environmental Data Report, then the conditions described in the Geotechnical Baseline Report or  
22 Environmental Baseline Report, as applicable, shall take precedence, and shall be the conditions  
23 against which actual conditions encountered are compared for the purpose of determining if a  
24 Differing Site Condition exists. Design-Builder acknowledges that, in developing its Proposal,  
25 Design-Builder gave full consideration to the contents of the Geotechnical Baseline Report,  
26 Environmental Baseline Report and the Geotechnical & Environmental Data Report, and further  
27 acknowledges that it shall not be entitled to a time extension or increase in its compensation as the  
28 result of encountering conditions consistent with those described in the Geotechnical Baseline  
29 Report or Environmental Baseline Report, except as otherwise provided in Section 5.7.

#### 30 **5.7.3 Notice of and Report Regarding Differing Site Conditions**

##### 31 **5.7.3.1 Notice**

32 Design-Builder shall exercise due diligence and the standard of care of an experienced global  
33 tunneling contractor in continually evaluating site conditions as they are encountered, including  
34 subsurface geological conditions, so to ensure prompt identification of potential Differing Site  
35 Conditions. If, in the exercise of such due diligence and standard of care Design-Builder  
36 determines or reasonably should have determined that it has encountered Differing Site  
37 Conditions, Design-Builder shall provide written notice to WSDOT. Such notice shall be provided  
38 within seven days (for the tunnel) or promptly (for all other areas) after the date of such  
39 determination or date that Design-Builder should have known of the conditions (such time frame  
40 being subject to any event beyond the reasonable control of Design-Builder which materially  
41 impairs Design-Builder's ability to prepare and deliver such notice, in which case the time frame  
42 shall be extended by the period of time in which Design-Builder is so materially impaired).

1 **5.7.3.2 Continuation of Work**

2 Pending a determination by WSDOT whether a condition constitutes a Differing Site Condition,  
3 Design-Builder shall continue to progress the Work unless the Parties mutually agree that doing so  
4 would be commercially unreasonable under the circumstances. Design-Builder shall, to the extent  
5 practicable, mitigate the impact of the claimed Differing Site Conditions.

6 **5.7.3.3 Report**

7 Within 30 days of the initial notice, or such other period of time that the parties may agree to as  
8 being reasonable under the circumstances, Design-Builder shall provide WSDOT a written report  
9 that shall include a narrative and supporting documentation regarding the nature of the Differing  
10 Site Conditions, the anticipated schedule impact and financial impact of the claimed Differing Site  
11 Conditions, and information regarding insurance that may be available to cover such impacts.  
12 Such report shall provide sufficient detail to allow WSDOT to thoroughly analyze and determine  
13 whether the referenced conditions are in fact Differing Site Conditions. If the parties mutually  
14 agree that it is appropriate under the circumstances, Design-Builder may submit a preliminary  
15 written report within the time frame required by this Section 5.7.3.3, followed by periodic updates to  
16 the report at interim stages agreed to by the parties.

17 **5.7.3.4 Waiver**

18 Failure of Design-Builder to provide notice to WSDOT strictly in accordance with the provisions of  
19 this Section 5.7.3 shall result in the waiver of Design-Builder's rights, if any, to the relief described  
20 in this Section 5.7.

21 **5.7.4 WSDOT Investigation**

22 **5.7.4.1 Commencement of Investigation**

23 Upon receipt of the report described in Section 5.7.3.3, WSDOT shall commence an investigation  
24 of the identified conditions to determine whether the conditions are Differing Site Conditions.

25 **5.7.4.2 WSDOT Determination**

26 If WSDOT decides in accordance with the investigation described above that the claimed changed  
27 conditions in fact constitute Differing Site Conditions, WSDOT shall then investigate: (a) whether  
28 the existence of the conditions are expected to have an adverse financial impact on Design-Builder  
29 or result in a Critical Path delay and (b) whether any Project insurance policies are available to  
30 cover some or all of the damages suffered as a result of the conditions. WSDOT shall within 30  
31 days of its receipt of Design-Builder's written report as described in Section 5.7.3.3, issue its  
32 determination as to whether the described conditions constitute Differing Site Conditions for which  
33 Design-Builder is entitled to relief pursuant to the terms of this Contract. If Design-Builder  
34 disagrees with WSDOT's determination, it may submit the matter for dispute resolution in  
35 accordance with Article 24.

36 **5.7.5 Insurance**

37 Prior to filing any request for a Change Order relating to a Differing Site Condition, Design-Builder  
38 shall inquire whether insurance proceeds may be available to cover any of its costs. If Design-  
39 Builder finds that reasonable grounds for filing an insurance claim exist, then Design-Builder shall  
40 so notify WSDOT and shall take appropriate steps to file and pursue the claim in accordance with

1 Section 20.5.2. Upon receipt of a Change Order request and evidence that the claim has been  
2 properly filed, WSDOT will process the Change Order request.

### 3 **5.7.6 Change Orders for Differing Site Conditions**

4 Upon Design-Builder's compliance with all applicable requirements of this Section 5.7 and  
5 Article 11, and subject to the limitations contained therein, WSDOT shall issue one or more  
6 Change Orders, (a) to compensate Design-Builder for additional costs directly attributable to the  
7 Differing Site Conditions, and (b) to extend the Completion Deadlines and compensate Design-  
8 Builder for delay damages with respect to any delay in the Critical Path caused by any such  
9 conditions. Compensation will be allowed for extended Site overhead and profit, but not for home  
10 office overhead directly or indirectly associated with Differing Site Conditions. The Change Order  
11 may designate as provisional some or all of the costs described therein, subject to adjustment  
12 based on actual costs incurred as the result of the Differing Site Conditions.

13 WSDOT will use the Shared Contingency Allowance to pay amounts owing to Design-Builder for  
14 Differing Site Conditions under this Section 5.7.6, but if the Shared Contingency Allowance is fully  
15 consumed, WSDOT shall remain responsible for the costs of Differing Site Conditions as described  
16 in this Section 5.7.6. Unused amounts in the Shared Contingency Allowance shall be shared by  
17 Design-Builder and WSDOT in accordance with the provisions of Article 13.

### 18 **5.7.7 Burden of Proof**

19 Design-Builder shall bear the burden of proving that a Differing Site Condition exists and that it has  
20 taken reasonable steps to mitigate the impact of the Differing Site Condition.

## 21 **5.8 Action To Be Taken Upon Discovery of Specified Site Conditions**

### 22 **5.8.1 Archaeological and Historical Objects**

23 Archaeological or historical objects, such as ruins, sites, buildings, artifacts, human skeletal  
24 remains or other objects of antiquity that may have significance from a historical, cultural, or  
25 scientific standpoint, which may be encountered by Design-Builder, shall not be further disturbed.  
26 Except for those archaeological or historical objects described in the Technical Requirements,  
27 Design-Builder shall immediately notify the WSDOT Engineer by telephone or in person of any  
28 archaeological or historical objects it encounters in performing the Work. Any telephone or in-  
29 person notification shall be followed by written notification within three days of discovery thereof.  
30 Design-Builder shall cease all Work adjacent to the discovery, in a manner adequate to provide for  
31 the security, protection and integrity of the affected area until and unless directed to proceed by the  
32 WSDOT Engineer.

33 Upon notification by Design-Builder under this Section 5.8.1, the WSDOT Engineer will determine if  
34 the objects need further documentation or treatment. Design-Builder will be required to stop Work  
35 in the vicinity of the discovery until such determination is made. The WSDOT Engineer will require  
36 Design-Builder to suspend Work in the vicinity of the discovery until said documentation or  
37 treatment is accomplished.

38 If the WSDOT Engineer finds that the suspension of Work in the vicinity of the discovery increases  
39 or decreases the cost to perform the Work or will result in a Critical Path delay, WSDOT shall issue  
40 one or more Change Orders (a) to compensate Design-Builder for additional costs directly  
41 attributable to changes in the scope of the Work arising from the site conditions, and (b) to extend

1 the Completion Deadlines and compensate Design-Builder for delay damages with respect to any  
2 Critical Path delay caused by such conditions.

### 3 **5.8.2 Hazardous Materials**

#### 4 **5.8.2.1 Notification by Design-Builder**

5 If Design-Builder becomes aware of any Hazardous Materials on the Site not described in the  
6 Technical Requirements (including in the Environmental Baseline Report) that Design-Builder  
7 believes may require removal or treatment, Design-Builder shall immediately notify the WSDOT  
8 Engineer of any such finds in writing within three days of discovery thereof, before the Hazardous  
9 Materials are disturbed and before the affected Work is performed. Such notification shall identify  
10 the conditions represented in the Contract, the conditions encountered at the Site, an explanation  
11 of the difference between the materials encountered and what is described in the Environmental  
12 Baseline Report, and shall describe the type of Remediation Work, if any, which Design-Builder  
13 proposes to undertake with respect thereto. Upon receipt of the written notification, WSDOT will  
14 investigate the affected area. WSDOT will notify Design-Builder of its determination whether or not  
15 a Change Order is warranted under Section 5.8.2.2. If Design-Builder disagrees with WSDOT's  
16 determination, it may submit the matter for dispute resolution in accordance with Article 24.

#### 17 **5.8.2.2 Cost and Schedule Relief**

18 Upon Design-Builder's compliance with all applicable requirements of this Section 5.8 and  
19 Article 11, and subject to the limitations contained therein, Design-Builder shall be entitled to a  
20 Change Order priced in accordance with Section 11.8 for cost impacts and Critical Path delays  
21 associated with the performance of Remediation Work for Hazardous Materials not described in  
22 the Contaminated Materials Baseline Report or in the Technical Requirements generally.

23 Allowable costs shall be limited to the incremental costs of performance of Remediation Work,  
24 deducting any avoided costs such disposal of materials had they not been contaminated) after  
25 completion of the testing process to determine whether Hazardous Materials are present. Design-  
26 Builder shall take all reasonable steps to minimize any such costs. In addition, compensation for  
27 Remediation Work will be allowed only if Design-Builder demonstrates to WSDOT's satisfaction  
28 that (a) the Remediation Work could not have been avoided by reasonable design modifications or  
29 construction techniques and (b) Design-Builder's plan for the Remediation Work represents the  
30 approach which is most beneficial to the Project and the public. Design-Builder shall provide  
31 WSDOT with such information, analyses and certificates as may be requested by WSDOT in order  
32 to enable a determination regarding eligibility for payment.

33 Except as expressly provided in this Section 5.8, the Lump Sum Amount and unit prices include  
34 the cost of all activities to be performed by Design-Builder pursuant to Section 2.2(f) and TR  
35 Section 2.8.

### 36 **5.8.3 Action To Be Taken For Conditions Indicated in the Contract Documents**

37 Except as otherwise specified in TR Section 2.8.4.3, Design-Builder shall not be obligated to stop  
38 Work upon discovery of archaeological or historical objects or Hazardous Materials which the  
39 Contract Documents indicate are present in the location in question. Design-Builder shall provide  
40 prompt notice to the WSDOT Engineer of any such discovery and shall proceed with Work in  
41 accordance with the requirements of the Contract Documents. In the event that any Environmental  
42 Approvals specify a procedure to be followed which differs from the procedure set forth above,  
43 Design-Builder shall follow the procedure set forth in the Environmental Approvals.

1 **5.8.4 Burden of Proof**

2 Design-Builder shall bear the burden of proving that a condition under this Section 5.8 exists and  
3 that it has taken reasonable steps to mitigate the impact of the condition.

4 **5.9 Deformation Mitigation and Repair**

5 The provisions of this Section 5.9 concern Structures and Utilities identified in TR Section 2.52 or  
6 otherwise determined to be within the Zone of Influence in accordance with TR Section 2.52. With  
7 respect to Utilities, the provisions of this Section 5.9 are subject to Section 7.2.1.2.

8 **5.9.1 Design-Builder's Responsibility**

9 Design-Builder shall perform all Deformation Mitigation Measures required by the Contract  
10 Documents and such other Deformation Mitigation Measures that it deems necessary or prudent  
11 under the circumstances, without entitlement to any additional compensation except as specified in  
12 Sections 5.9.2, 5.9.3 and 5.9.4.

13 **5.9.2 Grouting Operations**

14 Labor and material cost for Grouting Operations shall be paid by WSDOT pursuant to  
15 Section 10.1.2 at the applicable unit priced rate determined as specified in Section 10.1.2.

16 **5.9.3 Use of Deformation Mitigation and Repair Fund for Certain Advance Mitigation and**  
17 **Impacts of Deformation Within Tolerances**

18 WSDOT has established a Deformation Mitigation and Repair Fund to pay for up to \$20,000,000 of  
19 direct costs of advance Deformation Mitigation Measures for Group B Structures and certain costs  
20 resulting from the occurrence of Deformation. This fund will be available to make payments, as  
21 described in Sections 5.9.3 and 5.9.4, to Design-Builder, other contractors and/or owners of  
22 Structures or Utilities. Unused amounts in the Deformation Mitigation and Repair Fund shall be  
23 shared by Design-Builder and WSDOT in accordance with the provisions of Article 13.

24 **5.9.3.1 Advance Deformation Mitigation Measures, Group B Structures**

25 Design-Builder will be entitled to reimbursement from the Deformation Mitigation and Repair Fund  
26 for its direct costs of advance Deformation Mitigation Measures for Group B Structures that are not  
27 identified in the Contract Documents but that Design-Builder deems necessary or prudent to  
28 perform prior to start of or concurrently with tunnel construction in the area, excluding costs of  
29 design work. Upon Design-Builder's compliance with all applicable requirements of this  
30 Section 5.9 and Article 11, and subject to the limitations contained therein, Design-Builder shall  
31 have the right to receive one or more Change Orders for such costs, up to the amount available in  
32 the Deformation Mitigation and Repair Fund. Costs of Grouting Operations will be paid directly by  
33 WSDOT as specified in Section 5.9.2 and are not payable from the Deformation Mitigation and  
34 Repair Fund. Once the Deformation Mitigation and Repair Fund has been fully expended, Design-  
35 Builder shall be responsible for all remaining costs of such work (excluding costs of Grouting  
36 Operations to be paid by WSDOT under Section 5.9.2).



1 **5.9.3.2 Mitigation and Repairs Due to Deformation of Structures and Utilities Within**  
2 **Tolerances**

3 This Section 5.9.3.2 concerns Deformation within the allowable Deformation tolerance specified for  
4 a Structure or Utility as set forth in TR Section 2.52 that occurs at any time prior to Physical  
5 Completion with resultant property damage to such Structure or a Utility, despite Design-Builder's  
6 performance of Deformation Mitigation Measures as described in Section 5.9.1 if applicable. If  
7 such Deformation occurs, Design-Builder shall perform Additional Deformation Work as directed by  
8 WSDOT. In such event WSDOT shall prepare a scope of work and issue a Change Order for the  
9 Additional Deformation Work pursuant to Section 11.2 to cover the cost of the Additional  
10 Deformation Work, excluding costs of Grouting Operations. WSDOT shall also grant a time  
11 extension under Section 11.3 for any Critical Path delay associated with the performance of the  
12 Additional Deformation Work. In lieu of directing Design-Builder to perform the Additional  
13 Deformation Work, WSDOT may, in its sole discretion, (a) retain other contractors to perform such  
14 work, or (b) elect not to perform such work and instead make payments to owners of Structures or  
15 Utilities damaged as a result of Deformation.

16 Once the Deformation Mitigation and Repair Fund is fully expended, WSDOT shall remain  
17 responsible for the costs of Additional Deformation Work as described in this Section 5.9.3. Each  
18 Change Order for Additional Deformation Work shall state whether it will be paid from the  
19 Deformation Mitigation and Repair Fund. Costs of Grouting Operations will be paid directly by  
20 WSDOT as specified in Section 5.9.2 and are not payable from the Deformation Mitigation and  
21 Repair Fund.

22 Any Additional Deformation Work necessary with respect to Group B Category #1 Utilities will be  
23 performed by the affected Utility Owners and will not be considered included in the Work. The  
24 costs of such Additional Deformation Work will not be payable from the Deformation Mitigation and  
25 Repair Fund.

26 **5.9.4 Mitigation and Repairs Due to Deformation of Structures and Utilities Outside of**  
27 **Tolerances**

28 **5.9.4.1 Design-Builder Responsibility**

29 This Section 5.9.4 concerns Deformation that exceeds the allowable Deformation tolerance  
30 specified for a Structure or Utility as set forth in TR Section 2.52 that occurs at any time prior to  
31 Physical Completion with resultant property damage to such Structure or Utility. Subject to  
32 Section 5.9.4.3, if such Deformation occurs, Design-Builder shall, as directed or approved by  
33 WSDOT, perform all Deformation Mitigation Measures and repair any damage to affected  
34 Structures and Utilities (including Group B Category #1 Utilities) arising out of or related to the  
35 Deformation, at Design-Builder's sole expense except as otherwise provided in Section 5.9.4.2.  
36 Design-Builder shall confer with WSDOT in developing the scope and extent of the necessary  
37 Deformation Mitigation Measures and property damage repairs. Design-Builder and WSDOT shall  
38 work cooperatively with the owner of the Structure or Utility in defining and scheduling performance  
39 of such work. In lieu of directing Design-Builder to perform said work, WSDOT may, in its sole  
40 discretion, (a) retain other contractors to perform such work, or (b) elect not to perform such work  
41 and instead make payments to owners of Structures or Utilities affected by the Deformation.

42 If funds remain available in the Deformation Mitigation and Repair Fund as of the date that  
43 WSDOT directs or approves performance of work by Design-Builder under this Section 5.9.4,  
44 Design-Builder shall have the right to receive a Change Order, subject to the limitations specified in

1 Article 11, allowing compensation for such work up to the amount remaining available in such fund  
2 as determined by WSDOT.

3 In determining whether funds are available in the Deformation Mitigation and Repair Fund to pay  
4 for a Change Order under this Section 5.9.4, WSDOT will deduct all amounts previously allocated  
5 by WSDOT to make payments, as described in Sections 5.9.3 and 5.9.4, to Design-Builder, other  
6 contractors and/or owners of Structures or Utilities.

7 Upon depletion of the Deformation Mitigation and Repair Fund, or where work or damages  
8 addressed in this Section 5.9.4 are caused by the breach of contract or fault or negligence, or act  
9 or failure to act of any DB-Related Entity, the Design-Builder shall be responsible for all costs for  
10 such work or damages including paying compensation in lieu of mitigation and repair work as  
11 agreed to by owners of Structures or Utilities affected by the Deformation. Such work to be  
12 performed by Design-Builder will be identified in a no-cost Change Order.

13 Design-Builder shall not be entitled to a time extension for any Critical Path delay resulting from  
14 performance of work required under this Section 5.9.4.

15 Costs of Grouting Operations will be paid directly by WSDOT as specified in Section 5.9.2 and are  
16 not payable from the Deformation Mitigation and Repair Fund.

#### 17 **5.9.4.2 Additional Deformation After Authorization of Repair Work**

18 Subject to Section 5.9.4.3, if, after WSDOT has directed or approved performance of Additional  
19 Deformation Work under Section 5.9.3, the Structure or Utility in question is affected by  
20 Deformation outside of the allowable Deformation tolerance for such Structure or Utility as set forth  
21 in TR Section 2.52, the respective responsibilities and obligations of the parties shall be governed  
22 by Section 5.9.4.1, except that WSDOT shall remain responsible for the cost of any Additional  
23 Deformation Work performed by Design-Builder and previously authorized under Section 5.9.3,  
24 and any time extensions previously granted under Section 5.9.3 shall remain valid.

#### 25 **5.9.4.3 Limitation on Responsibility**

26 Subject to the limitations in Section 11.7 (other than Section 11.7.1(d)), Design-Builder's  
27 unreimbursed expenditures under Sections 5.9.4.1 and 5.9.4.2 (i.e. expenditures not reimbursed  
28 by WSDOT, insurance proceeds or otherwise) shall be taken into account in determining whether  
29 the cap on liability set forth in Section 15.16 has been reached. In the event that said cap on  
30 liability is reached prior to completion of all work under Sections 5.9.4.1 and 5.9.4.2, Design-  
31 Builder shall have no further obligation hereunder to perform such work at its own expense or to  
32 make reimbursements to third parties. In such event, WSDOT shall have the right to require  
33 Design-Builder to continue to perform such work at WSDOT's expense, or may elect to have such  
34 work performed by others at WSDOT's expense.

35 At regular progress meetings, Design-Builder shall advise WSDOT regarding work performed  
36 under Sections 5.9.4.1 and 5.9.4.2. If at any point the total unreimbursed expenditures under such  
37 sections exceeds \$50,000,000, Design-Builder shall thereafter provide periodic written statements  
38 to WSDOT regarding total expenditures. Such statements shall be provided concurrently with  
39 invoices submitted under Section 10.2, and shall be provided on a quarterly basis unless WSDOT  
40 requests Design-Builder to provide statements more frequently. Promptly following receipt of a  
41 written request from WSDOT, Design-Builder shall provide WSDOT with detailed backup for the  
42 stated amount.

1 **5.10 Changes in Basic Configuration**

2 **5.10.1 Change Order for Necessary Basic Configuration Change**

3 Upon Design-Builder's fulfillment of all applicable requirements of Article 11, and subject to the  
4 limitations contained therein, if the cost and/or time required to perform the Work is adversely  
5 affected by a Necessary Basic Configuration Change, Design-Builder shall be entitled to an  
6 increase in the Lump Sum Amount and/or an extension of the Completion Deadlines  
7 commensurate with the cost impact and Critical Path delay associated therewith, excluding any  
8 costs and/or time that could have been reasonably avoided by Design-Builder; provided, however,  
9 Design-Builder shall not be entitled to an increase in its compensation or an extension of the  
10 Completion Deadlines in connection with errors resulting from approved ATCs incorporated in the  
11 Contract Documents.

12 If the cost and/or time required to perform the Work is reduced by a Necessary Basic Configuration  
13 Change, the Lump Sum Amount shall be decreased and/or Completion Deadlines shall be  
14 shortened accordingly.

15 Any change in the highway vertical and horizontal alignment within the parameters addressed in  
16 Section 5.10.2 shall not be considered a Necessary Basic Configuration Change.

17 **5.10.2 Change in Basic Configuration Resulting From Design-Builder Initiated Change**  
18 **Proposal**

19 If a Design-Builder Initiated Change Proposal results in a change in Basic Configuration, any cost  
20 savings from such change shall be shared in accordance with Article 12.

21 The highway vertical alignment shown in TR Appendix M1 may be changed by up to plus or minus  
22 0.5 feet; the highway horizontal alignment may be changed by up to two feet left or right; without a  
23 change being deemed to have occurred in the Basic Configuration, provided such changes do not  
24 require changes to any other element of the Basic Configuration and do not require additional  
25 Utility Adjustments, and provided that the revised design complies with all contract requirements  
26 and does not result in additional costs to WSDOT unless approved by WSDOT.

1 **6. COOPERATION AND COORDINATION**

2 **6.1 Cooperation with Other Contractors**

3 Design-Builder acknowledges that WSDOT has awarded and/or plans to award contracts for  
4 construction and other work at or near the Site, and that other projects at or near the Site may be  
5 in various stages of design and construction. Design-Builder and any DB-Related Entity shall fully  
6 cooperate and coordinate with such other contractors and projects, and shall schedule and  
7 sequence the Work as reasonably necessary to accommodate the work of such other contractors  
8 and projects, as more particularly described in TR Section 2.58. Further, Design-Builder shall  
9 conduct its Work and perform its obligations under the Contract Documents without unreasonably  
10 interfering with or hindering the progress or completion of the work being performed by other  
11 contractors or of the work relating to such other projects.

12 The coordination of the Work shall be taken into account by Design-Builder as part of the Site  
13 investigation in accordance with Section 2.3.4, and any resulting costs shall be incidental and  
14 included within the Lump Sum Amount.

15 **6.2 Coordination with Adjacent Property Owners**

16 Design-Builder shall coordinate with owners of property adjoining the Project, as necessary to  
17 implement the Work, as more particularly described in TR Sections 2.9 and 2.58.

1    **7.       ACCESS TO PROPERTY; UTILITY ADJUSTMENTS; ENVIRONMENTAL MITIGATION**

2    **7.1      Acquisition of Property Rights**

3    WSDOT shall undertake and complete the acquisition of property rights for the Project in  
4    accordance with the acquisition schedule ("Property Acquisition Schedule") set forth in Appendix 4.  
5    Refer to TR Section 2.24 for specific information regarding the property interests to be acquired.

6    Design-Builder may request that WSDOT obtain access to property rights not identified in the  
7    Property Acquisition Schedule, and in such case WSDOT shall cooperate with Design-Builder.  
8    Design-Builder acknowledges that all acquisitions of property rights by WSDOT will be subject to  
9    requirements of the Uniform Relocation and Real Property Acquisition Act of 1970, including the  
10   requirement for WSDOT to make a determination that the acquisition is necessary. Design-Builder  
11   agrees that it shall be fully responsible for and shall bear all risk of increased costs and delays  
12   resulting from or arising in connection with the acquisition of such additional property rights.

13   **7.2      Utility Adjustments**

14   This Section 7.2 describes the scope of Design-Builder's responsibilities with respect to Utility  
15   Adjustments, and how the risks associated with Adjustments will be allocated between WSDOT  
16   and Design-Builder. TR Section 2.10 further describes the scope of the Work with respect to Utility  
17   Adjustments. Utilities impacted by the Project include both Public Utilities and Private Utilities.

18   The majority of Utilities impacted by the Project are Public Utilities, owned by departments or  
19   divisions of either the City or King County. WSDOT and the Public Utility Owners have entered  
20   into Intergovernmental Agreements that govern the Adjustment of their respective Public Utilities.  
21   The Intergovernmental Agreements are Reference Documents; requirements of the  
22   Intergovernmental Agreements that apply to the Design-Builder and/or the Project are incorporated  
23   into the appropriate sections of the Contract Documents.

24   Except as provided otherwise in this Section 7.2 or in TR Section 2.10, Design-Builder is  
25   responsible for performing all work related to Public Utilities that is necessary to accommodate the  
26   Project, and the Lump Sum Amount includes all Adjustment Costs incurred by Design-Builder for  
27   such Work. In addition, except as otherwise provided in this Section 7.2 or in TR Section 2.10, any  
28   reimbursement owed by or to a Public Utility Owner for Utility Adjustments will be addressed  
29   directly between WSDOT and the respective Utility Owner pursuant to the applicable  
30   Intergovernmental Agreement.

31   Private Utilities fall into two categories, as determined pursuant to Section 7.2.3.2. A Category #1  
32   Utility is owned by a Private Utility Owner that has Cost Responsibility for the costs of Adjusting  
33   that Utility. A Category #2 Utility is owned by a Private Utility Owner that does not have Cost  
34   Responsibility for the costs of Adjusting that Utility. Except as otherwise specified in this Section  
35   7.2, Design-Builder shall negotiate and enter into Adjustment Agreements with the Private Utility  
36   Owners covering each Private Utility Adjustment, whether Category #1 or Category #2.

37   For each Category #1 Utility that requires Adjustment, WSDOT and the City will direct the Utility  
38   Owner to Adjust the Utility as necessary to accommodate the Project. Design-Builder shall seek  
39   reimbursement of any Adjustment Costs it incurs for Category #1 Utilities directly from the Utility  
40   Owners pursuant to the Adjustment Agreement. By its execution of the Contract, Design-Builder  
41   shall be deemed to have certified that the Lump Sum Amount does not include any amounts  
42   covering Adjustment Costs to be incurred or paid for by Design-Builder for any Category #1 Utility

1 except for those costs attributable to Group B Category #1 Utility Work addressed in Section  
2 7.2.1.2.1 which shall be included in the Lump Sum Amount.

3 Except as otherwise specified in this Section 7.2 or in TR Section 2.10, all Adjustment Costs for  
4 Category #2 Utilities impacted by the Project (if any) shall be Design-Builder's responsibility. As a  
5 result, Design-Builder shall reimburse such Utility Owners for their Adjustment Costs. The Lump  
6 Sum Amount includes this reimbursement obligation as well as any Adjustment Costs incurred by  
7 Design-Builder with respect to Category #2 Utilities.

8 Design-Builder will be entitled to a Change Order relating to Utility Adjustments only as specified in  
9 this Section 7.2, subject to Article 11. Section 5.9 addresses damage to Utilities caused by  
10 Deformation. In all other respects, as between WSDOT and Design-Builder, Design-Builder  
11 assumes all risk and responsibility for any additional or unanticipated costs and/or time resulting  
12 from Utilities affecting, or affected by, the Project.

### 13 **7.2.1 Design-Builder's Responsibility For Utility Work**

#### 14 **7.2.1.1 General Scope**

15 Design-Builder is responsible for performing, and the scope of the Utility Work includes, all  
16 Adjustment Work except for (a) any efforts and costs which are identified as the responsibility of  
17 the Utility Owners or of WSDOT or are otherwise specifically excluded from the Utility Work in this  
18 Section 7.2 or in TR Section 2.10, and (b) those efforts and costs which are allocated to the Utility  
19 Owners in the Utility Standards or in the Utility MOUs (if any).

20 Without limiting the generality of the preceding paragraph, Design-Builder is responsible for  
21 performing, and the scope of the Utility Work includes:

- 22 (a) All investigative work necessary to confirm the exact location, size and type of each  
23 Utility (including Prescheduled Adjustments) located within the Project Right of Way  
24 or otherwise potentially impacted by the Project;
- 25 (b) The Incidental Utility Work;
- 26 (c) Reimbursement of Utility Owners for their Adjustment Costs for any Category #2  
27 Utilities;
- 28 (d) The Deformation Mitigation Measures to be undertaken by Design-Builder in  
29 advance of or concurrently with the tunneling and excavation work for the Project,  
30 pursuant to Section 7.2.1.2;
- 31 (e) All tasks, obligations and duties, and all costs, if any, that are the responsibility of  
32 Design-Builder pursuant to any Utility Agreements (unless otherwise specified in the  
33 Contract Documents);
- 34 (f) Any Betterments added to the Utility Work pursuant to Section 7.2.6; and
- 35 (g) Any other efforts and costs by Design-Builder that are necessary in order to  
36 accomplish the Work described in this Section 7.2 and/or in TR Section 2.10.

37 The Utility Work does not include acquisition of Utility easements; but it does include the obligation  
38 to reimburse Utility Owners for costs of acquiring Utility easements, if necessary for the Adjustment  
39 of any Category #2 Utilities.

1 Utility Adjustments may be necessitated by: (a) the possibility that a Utility will be damaged by  
2 Deformation caused by work on the Project, (b) a physical conflict between the Utility and the  
3 Project (including their respective construction, operation, maintenance or use), and/or (c) an  
4 incompatibility between the Project as designed and the Utility based on the applicable Utility  
5 Standards and/or applicable Laws (even though there is no physical conflict). The limits of  
6 Adjustment of existing Utilities extend as far as is necessary to accommodate or permit  
7 construction of the Project in accordance with the foregoing, whether inside or outside the Project  
8 Right of Way. Design-Builder shall ensure that all Utility Adjustments are compatible with and  
9 interface properly with the Project.

10 Design-Builder shall coordinate and cooperate with WSDOT and Utility Owners to ensure that all  
11 Adjustment Work, whether performed or furnished by Utility Owners or by Design-Builder, is  
12 completed in a timely fashion in accordance with the Contract Schedule.

13 For all Utilities at the Site (whether or not they are being Adjusted pursuant to this Section 7.2),  
14 Design-Builder shall minimize disruption in services provided by Utility Owners by (a) coordinating  
15 planned outages, (b) incorporating and implementing a contingency plan for unplanned outages,  
16 (c) developing a framework for coordination among Utility Owners, Design-Builder and any affected  
17 property owners, as well as a framework for handling of questions and claims, and (d) coordinating  
18 with Utility Owners to develop a plan so that the Utility Owners can access their facilities during  
19 Project construction.

20 Damage to a Utility that is caused by Deformation will be addressed pursuant to Section 5.9 and  
21 TR Section 2.52, and shall be subject to this Section 7.2 and TR Section 2.10 only to the extent  
22 specified in Section 7.2.1.2. If a Utility suffers damage due to Design-Builder's activities for any  
23 reason other than Deformation, the Utility Work includes the obligation to contact the Utility Owner  
24 and implement a plan to expeditiously repair the damage and to restore any disrupted services at  
25 Design-Builder's expense.

## 26 **7.2.1.2 Deformation Mitigation Measures, and Repairs for Utilities**

### 27 **7.2.1.2.1 Deformation Mitigation Measures Included in the Adjustment Work**

28 Certain Deformation Mitigation Measures with respect to Utilities described in Section 5.9 and  
29 TR Section 2.52 shall be considered Adjustment Work, as follows:

30 *Group A Utilities.* As more particularly described in Section 5.9 and in TR Section 2.52, certain  
31 Utilities are known to be at risk of damage from construction-induced Deformation, and Design-  
32 Builder is required to perform Deformation Mitigation Measures for those Utilities prior to or  
33 concurrently with the tunneling and excavation Work for the Project. Those Utilities, referred to as  
34 Group A Utilities, are identified in TR Section 2.10. All of the Group A Utilities are Public Utilities.  
35 All Utilities not included in Group A are part of Group B (including all other Public Utilities and all  
36 Private Utilities).

37 *Group B Utilities – Public and Category #2 Utilities.* With respect to Public Utilities and any  
38 Category # 2 Utilities included in Group B, Design-Builder shall, as more particularly provided in  
39 Section 5.9 and TR Section 2.52, perform such Deformation Mitigation Measures prior to or  
40 concurrently with tunneling and excavation as it deems necessary or prudent.

41 *Group B Utilities –Category #1.* All Category #1 Utilities shall be considered Group B Utilities. As  
42 provided in TR Section 2.52, Category #1 Utility Owners are responsible at their discretion and  
43 expense to perform their own Deformation Mitigation Measures. Accordingly, Design-Builder's  
44 Utility Work with respect to such Deformation Mitigation Measures includes only (a) the notification,

1 planning and scheduling tasks that are assigned to Design-Builder in TR Section 2.52.8.5, and (b)  
2 any other coordination activities necessary or appropriate in order for the Utility Owners'  
3 Deformation Mitigation Measures to be completed in accordance with the Contract Schedule and  
4 requirements of the Project. The Utility Work does not include any other Deformation Mitigation  
5 Measures with respect to Category #1 Utilities.

6 All of the work described in this Section 7.2.1.2.1 (with respect to both Group A and Group B  
7 Utilities, and whether performed by Design-Builder or the Utility Owner) shall be performed in  
8 accordance with this Section 7.2 and TR Section 2.10 and shall be considered Adjustment Work.  
9 Adjustment for Mitigation purposes may include relocation where appropriate.

#### 10 **7.2.1.2.2 Deformation Mitigation Measures and Repairs not Included in the Adjustment** 11 **Work**

12 In certain circumstances described in Section 5.9 and/or in TR Section 2.52, Deformation  
13 Mitigation Measures in addition to those described in Section 7.2.1.2.1 may become necessary  
14 with respect to both Public and Private Utilities, as well as repair of damage to Utilities resulting  
15 from Deformation. Any such Deformation Mitigation Measures and any repair of damage due to  
16 Deformation shall not be treated as an Adjustment or considered Adjustment Work, and this  
17 Section 7.2 and TR Section 2.10 shall apply to such Work only to the extent specified in said  
18 Section 5.9 and/or TR Section 2.52.

#### 19 **7.2.1.3 Prescheduled Adjustments**

20 The Utility Work includes such coordination between Design-Builder and others performing work on  
21 each Prescheduled Adjustment as may be necessary for orderly and timely progress on the  
22 Prescheduled Adjustment and the Project, including assisting in the determination of an  
23 appropriate location for installation of the Adjusted Utility (if not yet determined) in conjunction with  
24 the development of the Final Design. Refer to TR Section 2.10 for any additional Work that  
25 Design-Builder is required to perform with respect to Prescheduled Adjustments.

#### 26 **7.2.1.4 Incidental Utility Work**

27 Notwithstanding any contrary provision of the Contract Documents, Design-Builder shall be  
28 responsible for all Incidental Utility Work, without regard to the allocation of responsibility for  
29 Adjustment Work otherwise established pursuant to Section 7.2.3.1, except for possible  
30 abandonment and removal to be performed by the Utility Owner as designated in TR Appendix U5.  
31 Design-Builder shall make all arrangements and perform all work necessary to accomplish the  
32 Incidental Utility Work, including locating Utilities, identifying conflicts, performing any necessary  
33 coordination with Utility Owners and property owners, furnishing design, performing construction,  
34 and obtaining and complying with all required Governmental Approvals and WSDOT  
35 franchises/permits.

36 If a Utility Owner accepts the responsibility to perform any Incidental Utility Work that is otherwise  
37 Design-Builder's responsibility hereunder, Design-Builder shall confirm that the Utility Owner in fact  
38 timely performs such Incidental Utility Work, or Design-Builder shall perform such Incidental Utility  
39 Work itself in accordance with the Contract Schedule.

#### 40 **7.2.1.5 Design-Builder's Responsibility to Perform**

41 Design-Builder shall perform all Utility Work without regard to any of the following: (a) whether an  
42 impacted Utility was indicated in the Utility Information, or if indicated, whether the Utility was



1 accurately indicated therein; (b) the feasibility, estimated duration of work time, cost or any other  
2 characteristic of any proposed disposition (e.g., relocation, Protection in Place) stated for the Utility  
3 in the Utility Information; (c) whether Design-Builder is entitled to additional compensation or an  
4 extension of the Contract Time with respect to such Work; and (d) whether the Utility Work is the  
5 Utility Owner's Cost Responsibility.

## 6 **7.2.2 Utility Agreements**

7 The Utility Agreements for the Project are: (a) the Utility MOUs (if any), and (b) the Adjustment  
8 Agreements that will be entered into between Design-Builder and the Private Utility Owners.

### 9 **7.2.2.1 Memoranda of Understanding**

10 Design-Builder acknowledges that the purpose of the Utility MOU's (if any) is to promote  
11 cooperation by the Utility Owners with the Project, but that the Utility MOU's are not binding on the  
12 Utility Owners. Nevertheless, Design-Builder is required to comply with any Utility MOUs included  
13 in TR Appendix U, unless otherwise directed by WSDOT. In the event of any conflict between the  
14 terms of any Utility MOU and the terms of the Contract Documents, the Contract Documents shall  
15 prevail as between WSDOT and Design-Builder. WSDOT shall have no obligation to enter into a  
16 Utility MOU with any Utility Owner.

### 17 **7.2.2.2 Adjustment Agreements**

18 An Adjustment Agreement between Design-Builder and the Utility Owner shall be required for each  
19 Adjustment of a Private Utility, other than Prescheduled Adjustments, temporary Protections in  
20 Place, and Adjustments undertaken by a Group B Category #1 Utility Owner for Deformation  
21 Mitigation Measures pursuant to Section 7.2.1.2.1. A single Adjustment Agreement may address  
22 more than one Utility Adjustment for the same Utility Owner, unless otherwise directed by WSDOT.  
23 Design-Builder shall prepare and negotiate the Adjustment Agreements in accordance with TR  
24 Section 2.10. Design-Builder shall comply with the terms and conditions of all Adjustment  
25 Agreements.

26 Design-Builder shall have no right to enter into any agreement with a Utility Owner that purports to  
27 bind WSDOT to its terms. Adjustment Agreements entered into by Design-Builder shall not be  
28 considered Contract Documents. In no event shall any Adjustment Agreement be deemed to  
29 amend the terms of any other agreement to which WSDOT is a party, provided that an Adjustment  
30 Agreement may deviate from the requirements of a Utility MOU if WSDOT has agreed to such  
31 deviation in writing. In the event of any conflict between the terms of any Adjustment Agreement  
32 and the terms of the Contract Documents, the Contract Documents shall prevail as between  
33 WSDOT and Design-Builder.

### 34 **7.2.2.3 Intentionally Omitted**

## 35 **7.2.3 Work Responsibility and Cost Responsibility**

### 36 **7.2.3.1 Work Responsibility**

37 The responsibility (as between Design-Builder and the Utility Owners) for performing particular  
38 Adjustment Work shall be initially determined in accordance with the following:

- 39 (a) For Prescheduled Adjustments (whether for Public or Private Utilities), Design-  
40 Builder is responsible for coordinating its Work on the Project (and the Adjustment  
41 Work by any Utility Owners in the vicinity) with any such Adjustments. See Section

1           7.2.1.3. Except for possible abandonment and removal work as specified in TR  
2           Section 2.10, Design-Builder shall have no other responsibility for performing  
3           Adjustment Work on the Prescheduled Adjustments.

4           (b) For other Public Utilities, Design-Builder is responsible for performing all Adjustment  
5           Work, except as provided otherwise in the applicable Utility Standards or in TR  
6           Section 2.10. In case of a conflict as to this issue, TR Section 2.10 shall prevail  
7           over the Utility Standards, and between or among applicable Utility Standards, the  
8           standard that assigns the greatest responsibility to Design-Builder shall prevail.

9           (c) For other Private Utilities (except with respect to Deformation Mitigation Measures  
10           for Group B Category #1 Utilities), Design-Builder and the affected Utility Owner  
11           shall determine the allocation of responsibility between them for performing  
12           particular Adjustment Work, and (except for the Deformation Mitigation Measures for  
13           Group B Category #1 Utilities) shall incorporate said determination into the  
14           applicable Adjustment Agreement, as more particularly described in TR Section  
15           2.10.

16 Any subsequent modification of work responsibility for a Prescheduled Adjustment or for  
17 Adjustment of any other Public Utility shall be decided by WSDOT (together with the Utility Owner),  
18 and implemented in accordance with Article 11. For any other Private Utility, Design-Builder and  
19 the affected Utility Owner may modify the initial allocation of responsibility for performing  
20 Adjustment Work by amending the Adjustment Agreement (or by entering into an Adjustment  
21 Agreement where one was not previously required), in accordance with TR Section 2.10. Any  
22 such changes in work allocation shall be addressed in accordance with Section 7.2.13.

23 Regardless of the arrangements made with the Utility Owners, and except as may be otherwise  
24 provided in this Section 7.2, Design-Builder shall continue to be the responsible party to WSDOT  
25 for timely performance of all Adjustment Work in accordance with the requirements of the Contract  
26 Documents.

### 27 **7.2.3.2 Cost Responsibility**

28 For each Private Utility identified in the Utility Information, the initial determination of whether the  
29 Utility is a Category #1 Utility or a Category #2 Utility shall be in accordance with TR Section 2.10  
30 or if not specified therein, then in accordance with the applicable Utility MOU included in the RFP, if  
31 any. Except for Incidental Utility Work, if the Cost Responsibility for a particular Private Utility is not  
32 indicated in either location, then the Utility shall initially be in Category #1. Any changes from the  
33 initial determination of Cost Responsibility for a Private Utility shall be addressed in accordance  
34 with Section 7.2.10.1.

35 The determination of Cost Responsibility with respect to Public Utilities will be addressed directly  
36 between WSDOT and the respective Utility Owner. Consequently, any changes in Cost  
37 Responsibility which may occur in regards to Public Utilities will not affect either the scope of the  
38 Utility Work or Design-Builder's compensation hereunder.

### 39 **7.2.4 Payment To and Collection From Utility Owners**

#### 40 **7.2.4.1 Collection from Private Utility Owners**

41 Design-Builder shall collect the appropriate reimbursement directly from the Utility Owner for any  
42 Utility Work Design-Builder performs for a Category #1 Utility, as addressed in the applicable  
43 Adjustment Agreement. Design-Builder also shall collect the appropriate reimbursement directly

1 from the Utility Owner for any increased costs Design-Builder may incur as a result of actions or  
2 inactions on the part of any Private Utility Owner. If Design-Builder asserts that any Private Utility  
3 Owner has failed to comply with its obligation under an Adjustment Agreement or has otherwise  
4 hindered or interfered with the progress or completion of the Work, then except as otherwise set  
5 forth in Sections 7.2.11 and 7.2.12, Design-Builder's sole remedy shall be to seek recourse against  
6 the Utility Owner.

#### 7 **7.2.4.2 Failure to Pay**

8 If for any reason Design-Builder is unable to collect amounts due from a Utility Owner pursuant to  
9 Section 7.2.4.1, Design-Builder shall notify WSDOT within 30 Calendar Days after the payment  
10 due date and shall resolve such dispute directly with the Utility Owner, subject to the requirements  
11 of Section 7.2.7.

#### 12 **7.2.4.3 Reimbursements to Utility Owners**

13 Design-Builder shall reimburse Utility Owners for all Adjustment Costs for any Category #2 Utilities.

14 Design-Builder also shall make any other reimbursements to Utility Owners required under any  
15 Utility Agreement in connection with the Adjustment Work or shall reimburse WSDOT for making  
16 such payments, as applicable (for example, for damage to a Utility caused by Design-Builder's  
17 work). Design-Builder shall make all payments required by this Section 7.2.4 in accordance with  
18 the time and other requirements of the applicable Utility Agreement(s). The provisions of this  
19 Section 7.2.4 shall not apply to damage to Utilities caused by Deformation (which shall be  
20 addressed under Section 5.9), nor shall they limit any other obligations of Design-Builder to  
21 WSDOT pursuant to the Contract Documents, for damage caused to Utility Owner facilities or  
22 otherwise.

#### 23 **7.2.5 Reliance on Utility Information**

24 WSDOT has performed preliminary investigations of existing Utilities located within the area  
25 expected to be impacted by the Project, as described in TR Section 2.10. Design-Builder  
26 acknowledges that (a) the Utility Information does not identify Service Lines impacted by the  
27 Project, and (b) information contained in the Utility Information, including the descriptions of the  
28 affected Utilities, their locations, and any concepts regarding the nature and extent of Adjustments  
29 (if any) required for a Utility, is preliminary, may not be accurate and shall not be relied upon.  
30 Design-Builder shall verify all Utility Information included in the RFP, and shall perform its own  
31 investigations in accordance with the Contract Documents. Design-Builder shall not proceed with  
32 any construction Work at any location until such investigations have been completed for that  
33 location. If Design-Builder's investigations identify Utilities (excluding Service Lines) not described  
34 in the Utility Information, or if Design-Builder determines that any Major Underground Utility was  
35 not described in the Utility Information with Reasonable Accuracy (as defined in Section 7.2.9.3),  
36 Design-Builder shall notify WSDOT immediately upon such discovery.

#### 37 **7.2.6 Betterments and Utility Owner Projects**

##### 38 **7.2.6.1 Betterments**

##### 39 **7.2.6.1.1 Betterments for Private Utilities**

40 Design-Builder may agree in an Adjustment Agreement to design and/or construct a Betterment for  
41 a Private Utility at the Utility Owner's expense, subject to compliance with Section 7.2.6.3. Such

1 Betterment shall be treated as an addition to the scope of the Utility Work upon WSDOT's  
2 approval and the parties' execution of such Adjustment Agreement; however, such addition shall  
3 not be treated as a change in the Work directed by WSDOT, and Design-Builder shall not be  
4 entitled to any time extension or increase in compensation on account thereof. Instead, Design-  
5 Builder shall arrange to collect payment for such Utility Work directly from the Utility Owner.

6 Design-Builder shall promptly notify WSDOT of any request or requirement by a Private Utility  
7 Owner that Design-Builder considers to give rise to a Betterment, and shall keep WSDOT informed  
8 as to the status of negotiations with the Private Utility Owners concerning such requests. If  
9 Design-Builder and a Private Utility Owner disagree as to whether a particular Utility Owner request  
10 or requirement constitutes a Betterment, Design-Builder shall notify WSDOT and shall resolve such  
11 dispute directly with the Utility Owner, subject to the requirements of Section 7.2.7.

#### 12 **7.2.6.1.2 Betterments for Public Utilities**

13 Any Utility Owner requests or requirements for a Public Utility Betterment shall be addressed  
14 pursuant to Article 11.

#### 15 **7.2.6.2 Utility Owner Projects**

16 Utility Owner Projects are subject to normal WSDOT permitting requirements.

##### 17 **7.2.6.2.1 Utility Owner Projects for Private Utilities**

18 Design-Builder may enter into an agreement with a Private Utility Owner to design and/or construct  
19 a Utility Owner Project at the Utility Owner's expense, subject to compliance with Section 7.2.6.3.  
20 Any such Utility Owner Project shall be considered to be work outside of the Contract and the  
21 Work.

22 Design-Builder's compensation for such a Utility Owner Project shall not involve WSDOT.

##### 23 **7.2.6.2.2 Utility Owner Projects for Public Utilities**

24 Any proposal for Design-Builder to design and/or construct a Utility Owner Project for a Public  
25 Utility Owner shall be addressed pursuant to Article 11.

#### 26 **7.2.6.3 Restrictions on Betterments and Utility Owner Projects**

27 Work identified in the Contract Documents as part of Design-Builder's original scope shall not be  
28 considered a Betterment unless expressly identified as such in the Contract Documents. Except  
29 as may be otherwise set forth in this Section 7.2.6 or in TR Section 2.10, all the terms and  
30 conditions of the Contract Documents that apply to the Utility Work shall apply to any Betterment  
31 added to the Work.

32 Design-Builder shall not proceed with any Private Utility Betterment or with any Utility Owner  
33 Project that is incompatible with the Project or cannot be performed within the constraints of  
34 applicable Law, the Governmental Approvals, any applicable franchises/permits and the Contract  
35 Documents, including the contractual deadline for Substantial Completion. Design-Builder shall  
36 not be entitled to any additional compensation from WSDOT or any extension of the Contract Time  
37 on account of any Private Utility Betterment or on account of any Utility Owner Project.

38 Design-Builder shall provide WSDOT with such information, analyses and certificates as WSDOT

1 may request in order to determine compliance with this Section 7.2.6.

## 2 **7.2.7 Failure of Utility Owners to Cooperate**

### 3 **7.2.7.1 Disputes**

4 Design-Builder shall make diligent efforts to obtain the cooperation of each Utility Owner as  
5 necessary for the Project. Design-Builder shall notify WSDOT immediately if (a) Design-Builder is  
6 unable (or anticipates that it will be unable), after diligent efforts, to reach agreement with a Private  
7 Utility Owner on a necessary Adjustment Agreement within a reasonable time, (b) Design-Builder  
8 believes for any other reason that any Utility Owner would not undertake or permit an Adjustment  
9 in a manner consistent with the timely completion of the Project, (c) Design-Builder becomes aware  
10 that a Utility Owner is not cooperating in providing needed work or approvals, (d) a Utility Owner  
11 fails to timely pay amounts due to Design-Builder as described in Section 7.2.4, or (e) any other  
12 dispute arises between Design-Builder and any Utility Owner with respect to the Project, including  
13 any dispute as to whether or not a particular Utility Owner request or requirement constitutes a  
14 Betterment. After giving such notice, Design-Builder shall remain responsible for coordination with  
15 the Utility Owner, and shall continue to diligently pursue the Utility Owner's cooperation. Subject to  
16 Section 7.2.12, any notice provided to WSDOT or assistance requested from and/or provided by  
17 WSDOT shall neither relieve Design-Builder of its responsibility hereunder for the satisfaction of its  
18 obligations and timely completion of all Adjustments, nor otherwise modify the allocation of risks  
19 and responsibilities between WSDOT and Design-Builder established in this Section 7.2.

### 20 **7.2.7.2 Private Utilities With Adjustment Agreement**

21 Where an Adjustment Agreement has been executed between Design-Builder and a Private Utility  
22 Owner covering the subject of the dispute, Design-Builder shall take the lead in resolving the  
23 dispute and WSDOT shall provide assistance as reasonably requested by Design-Builder. In such  
24 case, such assistance shall be at no cost to WSDOT other than the time of its staff, and WSDOT  
25 shall have no obligation to pursue any legal proceedings against the Utility Owner or to exercise  
26 any other remedy available to it under applicable Law.

27 Notwithstanding the foregoing, and whether or not requested to do so by Design-Builder, WSDOT  
28 may elect, in its sole discretion: (a) to participate in the resolution of any such dispute, (b) to take  
29 the lead in resolving any such dispute involving a Category #2 Utility, and/or (c) to pursue legal  
30 proceedings against the Utility Owner or to exercise other available remedies. WSDOT shall remit  
31 to Design-Builder any amounts collected on Design-Builder's behalf as a result of any such action  
32 or proceeding, after first deducting therefrom all costs (including attorneys', courts' and expert  
33 witness fees and costs) incurred by WSDOT in pursuing such action or proceeding.

### 34 **7.2.7.3 Other Utilities**

35 For Public Utilities and any other Utilities not covered by Section 7.2.7.2, WSDOT shall take the  
36 lead in resolving the dispute (whether or not Design-Builder has requested assistance). WSDOT  
37 may elect in its sole discretion whether or not to pursue legal proceedings or to exercise any other  
38 remedies that may be available to it under applicable Law. Once an Adjustment Agreement has  
39 been executed between Design-Builder and the owner of a Private Utility, any further disputes  
40 regarding that Utility shall be addressed under Section 7.2.7.2.

### 41 **7.2.7.4 Design-Builder's Cooperation**

42 As requested by WSDOT, Design-Builder shall cooperate in any efforts undertaken by WSDOT to

1 resolve disputes in accordance with this Section 7.2.7, including in connection with any lawsuit or  
2 alternate proceedings undertaken by WSDOT for such purpose. Such cooperation shall include  
3 Design-Builder's staff and consultants acting as witnesses in such lawsuits and proceedings and  
4 providing testimony, information, reports, graphs, photos, plans, renderings and similar materials to  
5 WSDOT's counsel, at Design-Builder's expense except as otherwise provided in Section 7.2.12.

#### 6 **7.2.7.5 Conditions to WSDOT's Assistance**

7 WSDOT shall not be obligated to take action pursuant to this Section 7.2.7 unless all of the  
8 following conditions are satisfied:

- 9 1. Design-Builder has provided to WSDOT a written report explaining the nature and  
10 history of the dispute, the names and contact information for the representatives of  
11 each disputant, a description of the assistance requested by Design-Builder, and  
12 such other information as WSDOT may reasonably request; and
- 13 2. Design-Builder has provided evidence reasonably satisfactory to WSDOT that:
  - 14 (a) Design-Builder has made diligent efforts to obtain the Utility Owner's  
15 cooperation or to otherwise resolve the dispute, but that such efforts have  
16 not succeeded,
  - 17 (b) any assistance requested by Design-Builder from WSDOT is reasonable,
  - 18 (c) if applicable, Design-Builder has provided a reasonable Adjustment plan to  
19 the Utility Owner that has been approved by WSDOT,
  - 20 (d) Design-Builder or the Utility Owner has obtained, or is in a position to timely  
21 obtain, any Governmental Approvals and WSDOT franchises/permits  
22 required in order to implement the Adjustment plan proposed by Design-  
23 Builder,
  - 24 (e) the time for completion of the Adjustment established in the Contract  
25 Schedule is reasonable, and
  - 26 (f) Design-Builder's position in the dispute is otherwise reasonable.

#### 27 **7.2.8 Avoiding Adjustments and Minimizing WSDOT Costs**

28 Design-Builder shall consider the location of Utilities and the potential impact of Utility Adjustments  
29 in finalizing the design of the Project, with the goals of minimizing Adjustment Costs, related  
30 construction and disruption to the public, and avoiding schedule delay, to the extent practical and  
31 at all times conforming to requirements of the Contract Documents. Notwithstanding the foregoing,  
32 Design-Builder shall take all reasonable steps, including revising the Design Documents to work  
33 around a newly identified Utility, to minimize costs for which WSDOT is required to reimburse a  
34 Utility Owner or for which Design-Builder is entitled to additional compensation pursuant to this  
35 Section 7.2.

36 Design-Builder shall design the Project so that after a Prescheduled Adjustment, relocation (either  
37 temporary or permanent) of the affected Utility shall not be required.

38 With respect to all other Utilities, Design-Builder shall endeavor to avoid multiple relocations of the  
39 same Utility, whether by the Utility Owner or by Design-Builder. Accordingly, after a Utility has  
40 been relocated once in order to accommodate the Project, Design-Builder shall be responsible for  
41 all Adjustment Costs incurred by either Design-Builder or the Utility Owner in order to subsequently

1 relocate such Utility to accommodate the Project. Design-Builder shall reimburse such costs  
2 incurred by Utility Owners either directly (for Private Utilities) or by reimbursing WSDOT for  
3 amounts paid by WSDOT to the Utility Owners (for Public Utilities). Notwithstanding any contrary  
4 provision of the Contract Documents, Design-Builder shall not receive any extension of the  
5 Contract Time or increase in compensation on account of or in connection with such subsequent  
6 relocation. This paragraph shall not apply to Temporary Relocations that are necessary for  
7 construction of the Project.

## 8 **7.2.9 Price Adjustments and Time Extensions for Inaccurate Utility Information**

9 Any time extension and/or increase in compensation claimed by Design-Builder pursuant to this  
10 Section 7.2.9 shall be issued only upon Design-Builder's compliance with all applicable  
11 requirements of this Section 7.2.9, Section 7.2.14 and Article 11, and subject to the limitations  
12 contained therein.

### 13 **7.2.9.1 Eligibility for Change Orders – Public Utilities and Prescheduled Adjustments**

14 If any Major Underground Utility that is a Public Utility and/or a Prescheduled Adjustment is not  
15 identified in the Utility Information with Reasonable Accuracy, then Design-Builder shall be entitled  
16 to:

- 17 (a) an extension of the Contract Time to the extent that any delay in a Critical Path is  
18 directly attributable to the correction of such inaccurate information,
- 19 (b) delay and disruption damages that are directly attributable to the inaccuracy, and
- 20 (c) an increase in compensation on account of any other increased costs of the Work  
21 which are directly attributable to the correction of such inaccurate information.

22 WSDOT shall be entitled to a credit if any such Major Underground Utility is not described in the  
23 Utility Information with Reasonable Accuracy and correction of the inaccuracy has the effect of  
24 reducing Design-Builder's costs.

### 25 **7.2.9.2 Eligibility for Change Orders – Other Utilities**

26 If any Major Underground Utility not addressed in Section 7.2.9.1 is not identified in the Utility  
27 Information with Reasonable Accuracy, then Design-Builder shall be entitled to:

- 28 (a) an extension of the Contract Time to the extent that any delay in a Critical Path is  
29 directly attributable to the correction of such inaccurate information,
- 30 (b) delay and disruption damages that are directly attributable to the inaccuracy,
- 31 (c) for Category #1 Utilities only, an increase in the Lump Sum Amount on account of  
32 any other increased costs of the Work (excluding Adjustment Costs) which are  
33 directly attributable to the correction of such inaccurate information, and
- 34 (d) for Category #2 Utilities only, an increase in the Lump Sum Amount on account of  
35 any other increased costs of the Work (including Adjustment Costs) which are  
36 directly attributable to the correction of such inaccurate information.

1 WSDOT shall be entitled to a credit if a Category #2 Major Underground Utility is not described in  
2 the Utility Information with Reasonable Accuracy and correction of the inaccuracy has the effect of  
3 reducing Design-Builder's costs.

4 **7.2.9.3 Reasonable Accuracy Defined**

5 "Reasonable Accuracy" shall mean that a Major Underground Utility is referenced in the Utility  
6 Information, and

- 7 1. the Utility's actual centerline location is within 10 feet of the horizontal centerline  
8 location indicated in the Utility Information (with no limitation on vertical location),  
9 and
- 10 2. one of the following applies, with regard to any difference (whether larger or smaller)  
11 between the Utility's actual inside diameter (as applicable to pipe style Utilities) or  
12 actual cross sectional area (as applicable to duct bank style Utilities), excluding  
13 casings and any other appurtenances (the "actual size"), and the inside diameter or  
14 cross sectional area (as applicable) indicated for such Utility in the Utility Information  
15 (the "stated size"):

Stated size (pipe style)	Actual size
12" or less	not more than 24"
greater than 12" but less than or equal to 36"	stated size $\pm$ 50%
greater than 36" but less than or equal to 72"	stated size $\pm$ 25%
greater than 72"	stated size $\pm$ 15%

16 For example, if the stated size of an underground pipeline listed in the Utility Information is 36", but  
17 the pipeline's actual size is 48" and its centerline is actually located eight feet away from the  
18 horizontal centerline location shown in the Utility Information, such pipeline shall be deemed  
19 indicated with Reasonable Accuracy and Design-Builder shall not be entitled to a Change Order for  
20 any increased costs or delays resulting from the increased size or differing location of the pipeline.  
21 As a further example, if the stated size of a Category #2 underground pipeline listed in the Utility  
22 Information is 36", but the pipeline's actual size is 60" and its centerline is actually located eight  
23 feet away from the horizontal centerline location shown (without regard to vertical location), then  
24 such pipeline shall be deemed not indicated with Reasonable Accuracy, and Design-Builder shall  
25 be entitled to a Change Order for any increased costs or delays resulting from the increased size  
26 (but not from the differing location) of the pipeline.

Stated size (duct bank style)	Actual size
4 to 16 conduits	Nominal cross section $\pm$ 50%
16 to 36 conduits	Nominal cross section $\pm$ 25%
More than 36 conduits	Nominal cross section $\pm$ 15%



1 Duct bank size calculations are performed as follows: nominal duct bank cross section is calculated  
2 based on number, size, and orientation of conduit with 2" edge to edge spacing between conduit,  
3 3" outside cover; and 6" over pour to sides and top. Example calculation:

4 For a 2X3 duct bank with 5 inch conduit nominal cross section is calculated as follows:

5 width = 3"+5"+2"+5"+3"+6" = 24"

6 depth = 3"+5"+2"+5"+2"+5"+3"+6" = 31"

7 Nominal cross section area = 24"X31" = 744 in<sup>2</sup>

8 Actual cross section may be (744 in<sup>2</sup> x 0.5) = 372 in<sup>2</sup> to (744 in<sup>2</sup> x 1.5) = 1116 in<sup>2</sup>

9 Location accuracy standards for duct bank style Utilities are determined in the same manner as for  
10 pipe style Utilities noted above.

11 In case of any discrepancy between the information provided by one component of the Utility  
12 Information and information provided by another component of the Utility Information, only the  
13 more accurate information shall be relevant in determining Reasonable Accuracy.

#### 14 **7.2.9.4 Limitations and Exclusions**

15 Design-Builder shall not be entitled to a Change Order pursuant to this Section 7.2.9 for any of the  
16 following:

- 17 1. Any inaccuracies in the Utility Information to the extent that the correct information:
  - 18 (a) was known to Design-Builder as of the Proposal Date,
  - 19 (b) would have been apparent during a surface inspection of the area conducted  
20 prior to the Proposal Date, or
  - 21 (c) could have been inferred from the presence of other facilities or surface  
22 features, such as buildings, meters, junction boxes, manholes, vaults, or  
23 identifying markers.
- 24 2. Increased costs or time attributable to inaccuracies in the Utility Information, to the  
25 extent that such costs could have been avoided by timely identifying the correct  
26 information and addressing the actual field conditions in the "Released for  
27 Construction" Design Documents for the Work in question.
- 28 3. Any inaccuracies in the Utility Information regarding Utilities other than Major  
29 Underground Utilities.

#### 30 **7.2.10 Certain Other Price Adjustments**

31 The provisions of this Section 7.2.10 are subject to the conditions and applicable limitations stated  
32 in Section 7.2.14, in addition to those established in Article 11.

##### 33 **7.2.10.1 Change in Category Assignment of Private Utility**

34 WSDOT may, at any time, notify Design-Builder of a change in the Cost Responsibility category  
35 assignment for a particular Private Utility. Such a change between Categories #1 and #2 directed

1 by WSDOT shall be treated in accordance with Article 11, resulting in either an increase or a  
2 decrease in Design-Builder's compensation hereunder, as applicable.

### 3 **7.2.10.2 Early Adjustment Work**

4 If, prior to issuance of NTP 2, WSDOT advances funding to, or reimburses a Utility Owner for,  
5 Adjustment Work for a Category #2 Utility, or a Utility Owner performs Adjustment Work for a  
6 Public Utility that is Design-Builder's responsibility pursuant to Section 7.2.3.1 (in either case (i) to  
7 the extent such work may be performed prior to NTP 2 under applicable Law, and (ii) other than  
8 with regard to a Prescheduled Adjustment), the resulting reduction in the scope of the Work shall  
9 be treated as a change in the Work directed by WSDOT in accordance with Article 11, entitling  
10 WSDOT to a reduction in Design-Builder's compensation hereunder.

### 11 **7.2.11 Delayed Prescheduled Adjustments**

12 Upon Design-Builder's compliance with all applicable requirements of Section 7.2.14 and Article  
13 11, and subject to the limitations contained therein, if the Utility Owner fails to complete a  
14 Prescheduled Adjustment on or before the time reasonably scheduled by Design-Builder for  
15 completion of such work (as stated in the Contract Schedule approved by WSDOT), then Design-  
16 Builder shall be entitled to:

- 17 (a) an increase in compensation on account of any increased costs of the Work directly  
18 resulting from such failure, and
- 19 (b) an extension of the Contract Time to the extent that any delay in a Critical Path is  
20 directly attributable to such failure.

### 21 **7.2.12 Utility Delays**

22 Except as specified in this Section 7.2.12, any time frames for completion of the Adjustment Work  
23 or components thereof included in the RFP are estimates only and shall not be relied upon by  
24 Design-Builder.

25 The provisions of this Section 7.2.12 shall not apply to any Prescheduled Adjustments. Any time  
26 extension and/or increase in compensation claimed by Design-Builder pursuant to this Section  
27 7.2.12 shall be issued only upon Design-Builder's compliance with all applicable requirements of  
28 this Section 7.2.12, Section 7.2.14 and Article 11, and subject to the limitations contained therein.

#### 29 **7.2.12.1 Category #1 Private Utilities With Adjustment Agreement**

30 Design-Builder shall not be entitled to any time extension nor to any increase in compensation for  
31 Project delays or increased costs incurred by Design-Builder resulting from a Utility Owner's failure  
32 to timely complete any task for Adjustment of a Category # 1 Utility, where there is an executed  
33 Adjustment Agreement between Design-Builder and the Utility Owner covering such Adjustment.

#### 34 **7.2.12.2 Category #2 Private Utilities With Adjustment Agreement**

35 For purposes of this Section 7.2.12.2, the term "Utility Delay" means an unavoidable delay to a  
36 Critical Path that is directly attributable to a Utility Owner's failure to complete any task necessary  
37 for Adjustment of a Category #2 Utility that is the subject of an executed Adjustment Agreement  
38 between Design-Builder and the Utility Owner, before the later to occur of: (i) the deadline for  
39 performance of such task under the applicable Utility MOU (or, if there is no applicable Utility MOU

1 or it does not specify a deadline, the time reasonably scheduled by Design-Builder for such task as  
2 stated in the Contract Schedule approved by WSDOT), and (ii) the deadline in the applicable  
3 Adjustment Agreement.

4 Design-Builder shall be entitled to an extension of the Contract Time based on the number of days  
5 of Critical Path delay that are directly attributable to a Utility Delay, but any such delay shall not be  
6 grounds for any increase in compensation.

### 7 **7.2.12.3 Private Utilities Without Adjustment Agreement**

8 For purposes of this Section 7.2.12.3, the term "Utility Delay" means an unavoidable delay to a  
9 Critical Path that is directly attributable to a Utility Owner's failure to complete any task necessary  
10 for Adjustment of its Private Utility (either Category #1 or Category #2, but excluding Prescheduled  
11 Adjustments) before the deadline for performance of such task under the applicable Utility MOU  
12 (or, if there is no applicable Utility MOU or it does not specify a deadline, the time reasonably  
13 scheduled by Design-Builder for such task as stated in the Contract Schedule approved by  
14 WSDOT), where either (a) Design-Builder is not required to enter into an Adjustment Agreement  
15 with the Utility Owner covering such Adjustment, or (b) an Adjustment Agreement is required, but  
16 Design-Builder has been unable to enter into an Adjustment Agreement with the Utility Owner  
17 covering such Adjustment.

18 Design-Builder shall be entitled to:

- 19 (a) an increase in compensation on account of any increased costs of the Work that are  
20 directly attributable to a Utility Delay as defined in this Section 7.2.12.3, and
- 21 (b) an extension of the Contract Time based on the number of days of Critical Path  
22 delay that are directly attributable to such Utility Delay.

### 23 **7.2.12.4 Public Utilities**

24 For purposes of this Section 7.2.12.4, the term "Utility Delay" shall mean an unavoidable delay to a  
25 Critical Path that is directly attributable to a Utility Owner's failure to complete any task necessary  
26 for Adjustment of a Public Utility (other than a Prescheduled Adjustment) before the time  
27 reasonably scheduled by Design-Builder for such task as stated in the Contract Schedule  
28 approved by WSDOT.

29 Design-Builder shall be entitled to:

- 30 (a) an increase in compensation on account of any increased costs of the Work which  
31 are directly attributable to a Utility Delay as defined in this Section 7.2.12.4, and
- 32 (b) a time extension based on the number of days of Critical Path delay that are directly  
33 attributable to such Utility Delay.

### 34 **7.2.12.5 Conditions to Time Extension for Utility Delays**

35 Design-Builder shall not be entitled to any time extension for a Utility Delay unless all of the  
36 following conditions are satisfied:

- 37 1. Design-Builder has provided evidence reasonably satisfactory to WSDOT that:
  - 38 (a) Design-Builder took advantage of Float available early in the Contract

- 1 Schedule for coordination activities with respect to the Utility(ies) to which  
2 such Utility Delay relates,
- 3 (b) Design-Builder has fulfilled its obligation to coordinate with the Utility Owner  
4 to prevent or reduce such Utility Delay, and
- 5 (c) Design-Builder has otherwise made diligent efforts to obtain timely  
6 cooperation of the Utility Owner but has been unable to obtain such timely  
7 cooperation;
- 8 2. If applicable, Design-Builder has provided a reasonable Adjustment plan to the  
9 Utility Owner that has been submitted to WSDOT for review and comment;
- 10 3. Design-Builder or the Utility Owner has obtained, or is in a position to timely obtain,  
11 all Governmental Approvals and any WSDOT franchises/permits required in order to  
12 design and construct such Adjustment;
- 13 4. There exist no circumstances which have delayed or are delaying the affected  
14 Adjustment, other than those that fit within the definition of a Utility Delay; and
- 15 5. The time extension is otherwise allowable under Article 11.

### 16 **7.2.13 Changes in Work Allocation**

17 The Work includes responsibility for causing all Adjustment Work to occur in a timely fashion,  
18 including reimbursing the Utility Owners for their Adjustment Costs for Category #2 Utilities (except  
19 as may be otherwise provided in this Section 7.2), and scheduling all Adjustment Work (whether  
20 performed by Design-Builder or by the affected Utility Owner) so as to meet the Substantial  
21 Completion Deadline. Accordingly, if a Utility Owner performs or furnishes Adjustment Work that  
22 was initially determined to be Design-Builder's responsibility, or if Design-Builder performs or  
23 furnishes Adjustment Work that was initially determined (in either case pursuant to Section 7.2.3.1)  
24 to be the Utility Owner's responsibility, the following shall apply:

- 25 (a) there shall be no resulting extension of the Contract Time for either Public Utilities or  
26 Private Utilities,
- 27 (b) for Public Utilities, any resulting increase or decrease in the costs of the Work shall  
28 be reflected in an increase or decrease, as applicable, in Design-Builder's  
29 compensation hereunder, in accordance with Article 11 and subject to the  
30 requirements and limitations stated in Section 7.2.14, and
- 31 (c) for Private Utilities, there shall be no resulting change in Design-Builder's  
32 compensation hereunder (either up or down).

33 This Section 7.2.13 shall not apply to any delayed Prescheduled Adjustments or to any Adjustment  
34 Work that is the subject of Section 7.2.10.2.

### 35 **7.2.14 Additional Provisions Concerning Utility Change Orders**

36 Design-Builder's entitlement to any additional compensation or time extension relating to Utility  
37 Adjustments shall be subject to the restrictions and limitations set forth in this Section 7.2.14, in  
38 addition to the other specified requirements and limitations.

1 **7.2.14.1 Changes in Utility Standards**

2 There shall be no increase or decrease in Design-Builder's compensation pursuant to this Section  
3 7.2 on account of any change in Utility Standards, whether or not such change qualifies as a  
4 Betterment. However, any change in Utility Standards that constitutes or results from a change in  
5 Laws may be grounds for a Change Order under other Contract provisions.

6 **7.2.14.2 Unavoidable Costs and Delays Only**

7 Design-Builder shall not be entitled to a Change Order for any cost or delay that could have been  
8 avoided by timely request for information under the Underground Utilities One Number Locating  
9 Service Statute (RCW19.122), or for any amount that Design-Builder has the right to obtain from a  
10 Utility Owner under said statute.

11 Design-Builder shall provide documentation satisfactory to WSDOT evidencing compliance with  
12 Section 7.2.8. Design-Builder shall be responsible for any increased costs of the Work and any  
13 time that could have been avoided by such compliance.

14 **7.2.14.3 Incremental Costs Only**

15 Any increase in compensation pursuant to this Section 7.2 shall include only the incremental costs  
16 arising from the circumstances giving rise thereto; i.e. the amount payable shall take into account  
17 the costs that would have been incurred absent such circumstance and a credit shall be allowed  
18 for any avoided costs.

19 **7.2.14.4 No Adjustment for Incidental and Coordination Work**

20 All Incidental Utility Work and all costs of coordinating with Utility Owners as necessary for the  
21 Project are included in the Lump Sum Amount, regardless of the classification of the associated  
22 Utility as a Category #1, Category #2 or Public Utility, and regardless of (a) whether or not the  
23 Utility Information reveals the circumstances requiring such Incidental Utility Work and/or  
24 coordination, or (b) the Utility is the subject of a Prescheduled Adjustment. Accordingly, no  
25 adjustment in Design-Builder's compensation hereunder or extension of the Contract Time will be  
26 allowed on account of costs incurred, cost savings or delays associated with the performance of  
27 Incidental Utility Work by Design-Builder or by any Utility Owner, regardless of whether or not the  
28 Utility Information reveals the circumstances requiring such Incidental Utility Work. Furthermore,  
29 Design-Builder shall not be entitled to any increase in compensation for any costs of coordinating  
30 with Utility Owners.

31 **7.2.14.5 No Adjustment for Voluntary Action by Design-Builder**

32 If Design-Builder elects to make payments to Utility Owners or to undertake any other efforts with  
33 respect to Adjustment of Utilities that are not required by the terms of the Contract Documents,  
34 then unless Design-Builder has received direction from WSDOT in accordance with Article 11, to  
35 do so, Design-Builder shall not be entitled to any time extension or additional compensation in  
36 connection therewith. Design-Builder shall promptly notify WSDOT of the terms of any such  
37 arrangements.

38 **7.2.15 FHWA Utility Requirements**

39 The provisions of this Section 7.2.15 apply to the Project unless WSDOT advises Design-Builder  
40 otherwise. The Project is subject to 23 CFR Part 645 Subpart A (including its requirements as to

1 plans, specifications, estimates, charges, tracking of costs, credits, billings, records retention, and  
2 audit) and FHWA's associated policies, and accordingly all Adjustment Agreements shall  
3 incorporate by reference 23 CFR Part 645 Subpart A. Design-Builder shall be responsible for  
4 preparing and processing any submittals to FHWA that may be required with respect to the Utility  
5 Adjustments. Design-Builder shall comply (and shall require the Utility Owners to comply) with 23  
6 CFR Part 645 Subpart A as necessary for any Utility Adjustment costs to be eligible for  
7 reimbursement from any federal financing or funding.

### 8 **7.3 Environmental Compliance**

#### 9 **7.3.1 Performance by Design-Builder**

10 In performance of the Work, Design-Builder shall comply with all requirements of all applicable  
11 Environmental Laws and Governmental Approvals issued thereunder, whether obtained by  
12 WSDOT or Design-Builder. Design-Builder acknowledges and agrees that it will be responsible for  
13 all fines and penalties that may be assessed in connection with any failure to comply with such  
14 requirements.

#### 15 **7.3.2 Environmental Mitigation**

16 Design-Builder shall comply with all environmental performance requirements and perform all  
17 environmental mitigation measures required by the Contract Documents and the Governmental  
18 Approvals, including those contained in the Environmental Approvals. The Total Compensation  
19 includes Design-Builder's compliance with and performance of the environmental performance  
20 requirements and environmental mitigation measures identified by the Environmental Approvals  
21 (whether draft or final) as of the Proposal Date. In the event the environmental performance  
22 requirements and environmental mitigation measures in the final Environmental Approvals differ  
23 from those included in Design-Builder's original scope of work, WSDOT will issue a Change Order  
24 modifying the Work as appropriate to ensure that the Project will comply with the final  
25 Environmental Approvals, as a WSDOT-Directed Change.

### 26 **7.4 Port of Seattle Work**

27 The Port of Seattle Work shall be procured by Design-Builder using a competitive process  
28 approved by WSDOT. WSDOT has established a fund in the amount of \$20,000,000 (the "Port of  
29 Seattle Fund") to pay for (a) the Port of Seattle Work pursuant one or more Change Orders and  
30 (b) rent owing to the Port of Seattle for the property identified in TR Section 2.58. Design-Builder  
31 shall submit a Change Order request to WSDOT once Design-Builder has determined the cost of  
32 performance of any Port of Seattle Work. The Change Order request shall meet the requirements  
33 of and be subject to the limitations set forth in Article 11. The amount of each such Change Order  
34 will be further limited to the amount available in the Port of Seattle Fund as of the date that  
35 WSDOT approves the Change Order. In determining availability of funds in the Port of Seattle  
36 Fund to pay for a Change Order under this Section 7.4, WSDOT will deduct all amounts previously  
37 allocated by WSDOT to pay for Port of Seattle Work and to make rent payments to the Port of  
38 Seattle.

39 The Lump Sum Amount shall be deemed to include Design-Builder's design costs for the Port of  
40 Seattle Work as well as any costs that Design-Builder may incur in connection with performance of  
41 the Port of Seattle Work in excess of the amount payable from the Port of Seattle Fund.

42 Design-Builder shall not be entitled to a time extension for any Critical Path delay resulting from  
43 performance of work required under this Section 7.4.

1 **8. CONTRACTING AND LABOR PRACTICES**

2 **8.1 Equal Employment Opportunity**

3 **8.1.1 Policy**

4 Design-Builder shall comply with the Equal Employment Opportunity (EEO) requirements set forth  
5 in Appendix 6.

6 **8.1.2 Inclusion in Subcontracts**

7 Design-Builder shall include Section 8.1.1 and Section 1 of Appendix 6 in every Subcontract and  
8 agreement with a supplier over \$10,000, and shall require that they be included in all Subcontracts  
9 and agreements with suppliers over \$10,000 at lower tiers, so that such provisions will be binding  
10 upon each such Person.

11 **8.2 Disadvantaged Business Enterprises**

12 **8.2.1 Policy**

13 Design-Builder shall comply with the requirements set forth in Appendix 6. WSDOT has  
14 established a DBE goal for the Contract in the amount of eight percent of the compensation  
15 payable to Design-Builder.

16 **8.2.2 Inclusion in Subcontracts**

17 Design-Builder shall include provisions to effectuate the requirements of Appendix 6, including the  
18 assurance required by Section 1.1(g) thereof, in every Subcontract and agreement with supplier,  
19 and shall require that they be included in all Subcontracts and agreements with suppliers at lower  
20 tiers, so that such provisions will be binding upon each such Person.

21 **8.3 Subcontracting Requirements**

22 Design-Builder shall comply with all applicable requirements of the Contract Documents relating to  
23 Subcontracts and agreements with suppliers (including Appendices 5 and 6), and shall ensure that  
24 its Subcontractors (at all tiers) comply with all applicable requirements of the Contract Documents  
25 relating to subcontracting and purchasing (including Appendices 5 and 6).

26 **8.3.1 Major Participants**

27 Design-Builder shall not add, delete, or change the role of, any Major Participant as set forth in its  
28 Proposal without the prior written approval of WSDOT.

29 **8.3.2 Assignment of Subcontract Rights**

30 Each Subcontract and agreement with a supplier shall provide that, pursuant to terms in form and  
31 substance satisfactory to WSDOT, (a) WSDOT is a third party beneficiary of the Subcontract and  
32 shall have the right to enforce all terms of the Subcontract for its own benefit, (b) all guarantees  
33 and warranties, express and implied, shall inure to the benefit of WSDOT, its successors and  
34 assigns, as well as Design-Builder, and (c) the rights of Design-Builder under such instrument are  
35 assigned to WSDOT contingent upon delivery of written request from WSDOT following default by  
36 Design-Builder or termination or expiration of the Contract, allowing WSDOT to assume the benefit

1 of Design-Builder's rights with liability only for those remaining obligations of Design-Builder  
2 accruing after the date of assumption by WSDOT. The assignment shall not release or relieve  
3 Design-Builder from its obligations or liabilities incurred under the assigned Subcontract prior to the  
4 effective date of the assignment.

### 5 **8.3.3 Subcontract Terms**

6 Each Subcontract and agreement with a supplier shall include terms and conditions sufficient to  
7 ensure compliance by the Subcontractor, supplier with all applicable requirements of the Contract  
8 Documents, and shall include provisions addressing the following requirements as well as any  
9 other terms that are specifically required by the Contract Documents to be included therein:

- 10 (a) Each such agreement shall include terms that are substantially similar to those  
11 terms required by Sections 5.1, 5.2, 5.3, 5.4.3, 5.7, 8.1 (as appropriate), 8.2, 8.3,  
12 8.4.3, 9.1, 11.9, 14, 15, 19, 21.4 and 25.13 and Appendices 5 (as appropriate) and 6  
13 (as appropriate), specifically including an agreement by the Subcontractor to be  
14 joined in any dispute resolution proceeding pursuant to Article 24 if such joinder is  
15 reasonably necessary to resolve the dispute; and
- 16 (b) Each such agreement (other than agreements with suppliers) shall include terms  
17 that are substantially similar to those contained in Sections 2.2(e), 2.2(f), 2.2(g),  
18 2.3.1, 22.2 (as appropriate) and 22.3.

### 19 **8.3.4 Subcontract Data**

20 Design-Builder shall provide WSDOT with a list of the name and address of, licenses held by, and  
21 any insurance documents required pursuant to Article 20 for, each Subcontractor (excluding  
22 suppliers), as soon as the potential Subcontractor has been identified by Design-Builder, but in no  
23 event less than 14 days prior to the scheduled initiation of Work by such proposed Subcontractor.  
24 Design-Builder shall provide WSDOT with an updated list of its Subcontractors and suppliers from  
25 time to time upon request by WSDOT; shall allow WSDOT access to all agreements with  
26 Subcontractors and suppliers and records regarding such agreements; and shall deliver to  
27 WSDOT, within 10 days after receipt of a request from WSDOT, copies of all such agreements as  
28 may be requested. All such agreements shall be in writing.

### 29 **8.3.5 Responsibility for Work by Subcontractors**

30 Notwithstanding any Subcontract or agreement with any Subcontractor, Design-Builder shall be  
31 fully responsible for all of the Work. WSDOT shall not be bound by any Subcontract, and no  
32 Subcontract shall include a provision purporting to bind WSDOT. Each Subcontract shall include  
33 the following provision:

34 Nothing contained herein shall be deemed to create any privity of contract between  
35 the State of Washington through its Secretary of Transportation (WSDOT) and  
36 Subcontractor, nor does it create any duties, obligations or liabilities on the part of  
37 WSDOT to Subcontractor except those allowed under Washington law. In the event  
38 of any claim or dispute arising under this Subcontract and/or Design-Builder's  
39 contract with WSDOT, Subcontractor shall look only to Design-Builder for any  
40 payment, redress, relief or other satisfaction. Subcontractor hereby waives any  
41 claim or cause of action against WSDOT arising out of this Subcontract or otherwise  
42 arising in connection with Subcontractor's work.



1 **8.3.6 Subcontract Work**

2 Design-Builder shall coordinate the Work performed by Subcontractors.

3 **8.3.7 Debarred Subcontractors**

4 Design-Builder shall not enter into any Subcontracts with any Person then debarred or suspended  
5 from submitting bids by any agency of the State.

6 **8.3.8 Subcontract Completion and Return of Retainage Withheld**

7 The following procedure shall apply to all Subcontracts entered into hereunder.

8 **8.3.8.1 Requirements**

9 The requirements and procedure for release and return of retainage withheld from Subcontractors  
10 are as follows:

- 11 (a) The Subcontractor shall make a written request to Design-Builder for the release of  
12 the Subcontractor's retainage or bond;
- 13 (b) Within 14 calendar days of the request, Design-Builder shall determine if the  
14 subcontract has been satisfactorily completed and shall inform the Subcontractor, in  
15 writing, of Design-Builder's determination;
- 16 (c) If Design-Builder determines that the subcontract has been satisfactorily completed,  
17 the Subcontractor's retainage or retainage bond shall be released by Design-Builder  
18 within 10 calendar days from the date of the written notice;
- 19 (d) If Design-Builder determines that the Subcontractor has not achieved satisfactory  
20 completion of the Subcontract, Design-Builder must provide the Subcontractor with  
21 written notice, stating specifically why the Subcontract Work is not satisfactorily  
22 completed and what has to be done to achieve completion. Design-Builder shall  
23 release the Subcontractor's retainage or retainage bond within eight calendar days  
24 after the Subcontractor has satisfactorily completed the Work identified in the notice;
- 25 (e) In determining whether satisfactory completion has been achieved, Design-Builder  
26 may require the Subcontractor to provide documentation such as certifications and  
27 releases, showing that all laborers, lower-tiered subcontractors, suppliers of material  
28 and equipment, and others involved in the Subcontractor's Work have been paid in  
29 full. Design-Builder may also require any documentation from the Subcontractor  
30 that is required by the Subcontract or by this Contract or by Law, such as affidavits  
31 of wages paid, material acceptance certifications and releases from applicable  
32 Governmental Bodies to the extent that they relate to the Subcontractor's Work; and
- 33 (f) If Design-Builder fails to comply with the requirements of this Section 8.3.8 and the  
34 Subcontractor's retainage or retainage bond is wrongfully withheld, the  
35 Subcontractor may seek recovery against Design-Builder under applicable prompt  
36 pay statutes in addition to any other remedies provided for by the Subcontract or by  
37 Law.

1 **8.3.8.2 Conditions**

2 The following conditions shall apply:

- 3 (a) This clause does not create a contractual relationship between WSDOT and any  
4 Subcontractor. Also, it is not intended to bestow upon any Subcontractor, the status  
5 of a third-party beneficiary to the Contract between WSDOT and Design-Builder;  
6 and
- 7 (b) This Section 8.3.8 does not apply to retainage withheld by WSDOT from monies  
8 earned by Design-Builder. WSDOT shall continue to process the release of that  
9 retainage in accordance with the requirements and procedures set forth in Chapter  
10 60.28 RCW.

11 **8.3.8.3 Payment**

12 Design-Builder will be solely responsible for any additional costs involved in paying retainage to the  
13 Subcontractors prior to Completion. Those costs shall be deemed included in the Total  
14 Compensation.

15 **8.4 Key Personnel; Character of Workers**

16 **8.4.1 Key Personnel**

17 Appendix 7 hereto identifies certain key positions required of Design-Builder for the Project.  
18 WSDOT shall have the right to review the qualifications and character of each individual to be  
19 assigned to a key position (including personnel employed by Subcontractors) and to approve or  
20 disapprove use of the person proposed for such key position prior to the commencement of any  
21 Work by such individual. Design-Builder shall notify WSDOT in writing of any proposed changes in  
22 any Key Personnel, and shall not change any Key Personnel without the prior written approval of  
23 WSDOT.

24 **8.4.2 Representations, Warranties and Covenants**

25 Design-Builder acknowledges and agrees that the award of the Contract by WSDOT to Design-  
26 Builder was based, in large part, on the qualifications and experience of the personnel listed in the  
27 Proposal and Design-Builder's commitment that such individuals would be available to undertake  
28 and perform the Work. Design-Builder represents, warrants and covenants that such individuals  
29 are available for and will fulfill the roles identified for them in the Proposal in connection with the  
30 Work. Unless otherwise agreed to by WSDOT in writing, individuals filling key personnel roles  
31 shall devote a sufficient amount of their time for the applicable role with respect to the prosecution  
32 and performance of the Work and Design-Builder shall document such commitment to WSDOT's  
33 satisfaction upon WSDOT's request.

34 **8.4.3 Employee Performance Requirements**

35 All individuals performing the Work shall have the skill and experience and any licenses or  
36 certifications required to perform the Work assigned to them. If WSDOT determines that any  
37 Person employed by Design-Builder or by any Subcontractor is not performing the Work properly  
38 and skillfully, or who is intemperate or disorderly, then, at the written request of WSDOT, Design-  
39 Builder or such Subcontractor shall remove such Person and such Person shall not be re-  
40 employed on the Project without the prior approval of WSDOT in its sole discretion. If Design-  
41 Builder or the Subcontractor fails to remove such Person(s) or fails to furnish skilled and

1 experienced personnel for the proper performance of the Work, then WSDOT may, in its sole  
2 discretion, suspend the affected portion of the Work by delivery of written notice of such  
3 suspension to Design-Builder. Such suspension shall in no way relieve Design-Builder of any  
4 obligation contained in the Contract Documents or entitle Design-Builder to a Change Order. Once  
5 compliance is achieved, Design-Builder shall be entitled to and shall promptly resume the Work.

## 6 **8.5 Apprentice Utilization**

7 Design-Builder shall comply with an Apprentice Utilization Requirement. No less than 15.0% of  
8 project Labor Hours shall be performed by Apprentices.

### 9 **8.5.1 Plan**

10 Design-Builder shall submit an "Apprentice Utilization Plan" (DOT form 422-115 EF) within 30 days  
11 of Contract execution, demonstrating how and when they intend to achieve the Apprentice  
12 Utilization Requirement. The plan shall be updated and resubmitted as appropriate as the Work  
13 progresses. The intent is to provide WSDOT with enough information to track progress in meeting  
14 the utilization requirements.

### 15 **8.5.2 Reporting**

16 Design-Builder shall submit a "Statement of Apprentice /Journeyman Participation" (DOT form 422-  
17 110 EF) on a monthly basis. The report shall be submitted to WSDOT by the last Business Day of  
18 the subsequent month, until the date that Substantial Completion is achieved. The data reported  
19 shall be cumulative to date and consolidated to include Design-Builder and all Subcontractors. At  
20 Design-Builder's request, WSDOT may suspend this reporting requirement during periods of  
21 minimal or no applicable work activities on the project. Design-Builder shall submit documentation  
22 of its Good Faith Effort if (1) Design-Builder is unable to provide a plan demonstrating how it  
23 intends to meet the Apprentice Utilization Requirement or (2) the Project has been completed  
24 without meeting the Apprentice Utilization Requirement.

### 25 **8.5.3 Contacts**

26 Design-Builder may obtain information on State-approved Apprenticeship Training Programs by  
27 contacting the Department of Labor and Industries at:

28 Specialty Compliance Services Division, Apprenticeship Section, P.O. Box 44530, Olympia, WA  
29 98504-4530 or by phone at (360) 902-5320.

### 30 **8.5.4 Good Faith Efforts**

31 In fulfilling the Good Faith Effort, Design-Builder shall perform and, when appropriate, require its  
32 Subcontractors to perform the following steps:

- 33 1. Solicit Apprentice(s) from State-approved Apprenticeship Training Program(s)
- 34 2. Document the solicitation and, in the event Apprentice(s) are not available, obtain  
35 supporting documentation from the solicited program(s).
- 36 3. Demonstrate that the plan was updated as required elsewhere in this specification.
- 37 4. Provide documentation demonstrating what efforts Design-Builder has taken to  
38 require Subcontractors to solicit and employ Apprentice(s).

1 In the event that the preceding steps have been followed, Design-Builder may also supplement the  
2 Good Faith Efforts documentation with the following documentation:

- 3 1. Submit documentation demonstrating successful Apprentice utilization on previous  
4 contracts.
- 5 2. Submit documentation indicating company wide Apprentice utilization efforts and  
6 percentages of attainment.

7

1     **9.     SITE SECURITY; MAINTENANCE; TITLE**

2     **9.1    Site Security**

3     Design-Builder shall provide appropriate security for the Work Area and shall take all reasonable  
4     precautions and provide protection to prevent damage, injury or loss to the Work and materials and  
5     equipment to be incorporated therein, as well as all other property in the Work Area, whether  
6     owned by Design-Builder, WSDOT, or any other Person. Design-Builder shall at all times keep the  
7     Work Area in a neat and clean condition, including performing litter removal, removal of graffiti and  
8     weed control.

9     **9.2    Maintenance and Repair of Work and On-Site Property**

10    **9.2.1   Responsibility of Design-Builder**

11    Except as otherwise provided in Section 9.2.2, Design-Builder shall maintain, rebuild, repair,  
12    restore, or replace all Work, whether temporary or permanent, that is damaged or destroyed prior  
13    to Final Completion. All such work shall be at no additional cost to WSDOT except to the extent  
14    that WSDOT is responsible for such costs as provided in Article 11. WSDOT retains the right to  
15    beneficially occupy all or any portion of the Work prior to Final Completion. Should WSDOT  
16    exercise its right to beneficial occupancy, Design-Builder shall coordinate access to the Site to  
17    complete Work or to correct Nonconforming Work to minimize disruption of WSDOT's activities.  
18    WSDOT shall use its best efforts to prevent its beneficial occupancy from interfering with the  
19    conduct of Design-Builder's Work.

20    **9.2.2   Relief from Liability for Maintenance**

21    Effective as of Final Completion, WSDOT shall be considered to have accepted maintenance  
22    liability for all elements of the Project. Notwithstanding the foregoing, all elements of the Work  
23    which will be owned by Persons other than WSDOT (such as Utility facilities) will be considered  
24    accepted for purposes of maintenance responsibility only as of the date of acceptance of  
25    maintenance responsibilities by such Persons. Effective as of the date on which the Project or any  
26    portion thereof is opened to traffic, Design-Builder shall be relieved of maintenance liability and  
27    responsibility for repair of damage caused by the traveling public to the opened portions of the  
28    Project .

29    **9.3    Protection and Restoration of Off-Site Private/Public Property**

30    Design-Builder shall protect private or public property on or in the vicinity of the Site or likely to be  
31    affected by the Work. Design-Builder shall ensure that such property is not removed, damaged,  
32    destroyed, or prevented from being used unless the Contract so specifies. Damages to Structures  
33    and Utilities identified in TR Section 2.52 or otherwise determined to be within the zone of influence  
34    in accordance with TR Section 2.52 shall be addressed pursuant to Section 5.9.

35    Property includes land, utilities, trees, landscaping, improvements legally on the Project Right of  
36    Way, markers, monuments, buildings, structures, pipe, conduit, signs, and other property of all  
37    description whether shown in the Contract Documents or not.

38    If WSDOT requests in writing, or if otherwise necessary, Design-Builder shall install protection,  
39    acceptable to WSDOT, for property such as that listed in the previous paragraph. Design-Builder  
40    is responsible for protecting all property that is subject to damage by the construction operation.

1 If any DB-Related Entity damages, destroys, or interferes with the use of such property, Design-  
2 Builder shall restore it to original condition. Design-Builder shall also halt any interference with the  
3 property's use. If Design-Builder refuses or does not respond immediately, WSDOT may have  
4 such property restored by other means and subtract the cost from money that will be or is due  
5 Design-Builder.

6 Design-Builder may access the worksite from adjacent properties. Design-Builder shall not use or  
7 allow others to use this access to merge with public traffic. During non-working hours, Design-  
8 Builder shall provide a physical barrier that is either locked or physically unable to be moved  
9 without equipment. The access shall not go through any existing structures. The access may go  
10 through fencing. Design-Builder shall effectively control airborne particulates that are generated by  
11 use of the access. The location and use of the access shall not adversely affect wetlands or  
12 sensitive areas in any manner. Design-Builder shall be responsible for obtaining all haul road  
13 agreements, permits and/or easements associated with the access. Design-Builder shall replace  
14 any fence, repair any damage and restore the site to its original state when the access is no longer  
15 needed. Design-Builder shall bear all costs associated with this worksite access.

#### 16 **9.4 Title**

17 Design-Builder warrants that it owns, or will own, and has, or will have, good and marketable title to  
18 all materials, equipment, tools and supplies furnished, or to be furnished, by it and its  
19 Subcontractors that become part of the Project or are purchased for WSDOT for the operation,  
20 maintenance, or repair thereof, free and clear of all Liens. Title to all of such materials, equipment,  
21 tools and supplies which shall have been delivered to the Site shall pass to WSDOT, free and clear  
22 of all Liens, upon payment by WSDOT to Design-Builder of invoiced amounts pertaining thereto.  
23 Notwithstanding any such passage of title, and subject to Section 9.1, Design-Builder shall retain  
24 sole care, custody and control of such materials, equipment, tools and supplies, and shall exercise  
25 due care with respect thereto as part of the Work until Final Completion or until Design-Builder is  
26 removed from the Project.

1 **10. PAYMENT**

2 **10.1 Compensation**

3 As full compensation for the Work and all other obligations to be performed by Design-Builder  
4 under the Contract Documents, WSDOT shall pay to Design-Builder Total Compensation equal to  
5 the sum of (1) the Lump Sum Amount as described in Section 10.1.1, (2) an amount for unit priced  
6 Work as described in Section 10.1.2, (3) amounts payable from the Escalation Fund as described  
7 in Section 10.1.3, (4) amounts payable from the Bond and Insurance Fund as described in  
8 Section 10.1.4; (5) amounts payable from the South U-Section Fund described in Section 10.1.5;  
9 and (6) amounts payable under Change Orders issued under Article 11. Design-Builder  
10 acknowledges and agrees that the Total Compensation covers:

- 11 (a) performance of each and every portion of the Work in accordance with the Contract  
12 Documents and all applicable Laws;
- 13 (b) all designs, equipment, materials, labor, insurance and bond premiums, home  
14 office, jobsite and other overhead, profit and services relating to Design-Builder's  
15 performance of its obligations under the Contract Documents (including all Work,  
16 Warranties, equipment, materials, labor and services provided by Subcontractors  
17 and intellectual property rights necessary to perform the Work);
- 18 (c) the cost of obtaining, complying with and maintaining all Governmental Approvals  
19 (except for approvals which are the responsibility of WSDOT, as specifically  
20 provided elsewhere in the Contract Documents); and
- 21 (d) payment of any taxes, duties, and permit and other fees and/or royalties imposed  
22 with respect to the Work and any equipment, materials, labor, or services included  
23 therein.

24 **10.1.1 Adjustments to Lump Sum Amount**

25 The Lump Sum Amount shall initially be the "Lump Sum Amount" set forth in Appendix 1. The  
26 Lump Sum Amount may be increased or decreased only by a Change Order issued in accordance  
27 with Article 11 (including a Change Order issued with respect to a delay in issuance of NTP 2 as  
28 described in this Section 10.1.1) or by an amendment to the Contract.

29 If WSDOT issues NTP 2 after August 31, 2011 and on or before March 1, 2012, Design-Builder  
30 shall be entitled to an increase in the Lump Sum Amount, in the amount of \$56,000 per day for  
31 each day after August 31, 2011 until the NTP 2 issuance date, which price increase shall be  
32 Design-Builder's sole and exclusive remedy for such delay. The unit prices are not subject to  
33 adjustment under this Section 10.1.1.

34 Design-Builder shall not be entitled to the additional compensation described above to the extent  
35 the delay in issuance of NTP 2 was due to incorporation of ATCs into the Project scope or a  
36 breach of this Contract by Design-Builder, or if a concurrent delay occurred that was attributable to  
37 Design-Builder. If WSDOT issues NTP 2 on or before August 31, 2011, the Lump Sum Amount  
38 shall not be subject to adjustment under this Section 10.1.1.

39 Any price increase under this Section 10.1.1 shall be amortized proportionally over all Work  
40 covered by the Lump Sum Amount remaining to be performed as of the date of issuance of NTP 2,  
41 and shall be evidenced by a Change Order.

1 **10.1.2 Unit Priced Work**

2 **10.1.2.1 General Requirements for Unit Priced Work**

3 Certain Work will be unit priced, as identified in Appendix 1. Payment to Design-Builder for such  
4 Work will be made on the basis of the unit prices shown in said Appendix (as such prices may be  
5 adjusted under Section 10.1.2.2) and the actual quantities of each item of unit priced Work  
6 completed in accordance with the Contract Requirements. Payment to Design-Builder will be  
7 made only for the actual quantities of Work performed and accepted in conformance with the  
8 Contract Documents, and shall be subject to the limitations set forth in Section 11.7.1. Design-  
9 Builder shall keep detailed records of the quantities for unit priced Work, and shall submit  
10 supporting documentation of such quantities with its invoices.

11 **10.1.2.2 Variation in Estimated Quantities for Unit Priced Work**

12 When the accepted quantity of Work performed under a unit item varies from the original quantity  
13 as identified in Appendix 1, payment for all such Work will be at the unit price specified in  
14 Appendix 1 unless the total accepted quantity of any such unit item, adjusted to exclude added or  
15 deleted amounts included in Change Orders accepted by both parties, has increased or decreased  
16 by more than 25 percent from the original quantity specified in Appendix 1. In that case, the unit  
17 price may be adjusted as described herein.

18 The adjusted final quantity shall be determined by starting with the final accepted quantity  
19 measured after all Work under an item has been completed. Any unit priced quantities included in  
20 additive Change Orders accepted by both parties shall be subtracted from this amount, and any  
21 quantities included in deductive Change Orders accepted by both parties shall be added. The final  
22 result of this calculation shall become the adjusted final quantity and the basis for comparison to  
23 the original quantity as identified in Appendix 1.

24 If the adjusted final quantity of any item does not vary from the quantity shown in Appendix 1 by  
25 more than 25 percent, then Design-Builder and WSDOT agree that all Work under that item will be  
26 performed at the original unit price specified in Appendix 1.

27 **10.1.2.2.1 Increased Quantities**

28 Either party will be entitled to renegotiate the price for that portion of the adjusted final quantity in  
29 excess of 1.25 times the original quantity as identified in Appendix 1. The price for excessive  
30 increased quantities will be determined by agreement of the parties, or, where the parties cannot  
31 agree, the price will be determined by WSDOT based upon the actual costs to perform the Work,  
32 including reasonable markup for overhead and profit.

33 **10.1.2.2.2 Decreased Quantities**

34 Either party will be entitled to an adjustment in compensation if the adjusted final quantity of Work  
35 performed is less than 75 percent of the original quantity as identified in Appendix 1. The  
36 adjustment shall be based upon and limited to three factors:

- 37 (a) Any increase or decrease in unit costs of labor, materials or equipment, utilized for  
38 Work actually performed, resulting solely from the reduction in quantity;
- 39 (b) Changes in production rates or methods of performing Work actually done to the  
40 extent that the nature of the Work actually performed differs from the nature of the  
41 Work included in the original plan; and



- 1 (c) An adjustment for the anticipated contribution to unavoidable fixed cost and  
2 overhead from the units representing the difference between the adjusted final  
3 quantity and 75 percent of the original quantity as identified in Appendix 1.

#### 4 **10.1.2.2.3 Limitations on Adjustments to Payments for Unit Priced Work**

5 The following limitations shall apply to renegotiated prices for increases and/or adjustments for  
6 decreases:

- 7 (a) Equipment rates shall be at actual cost, not to exceed the rates set forth in the  
8 AGC/WSDOT Equipment Rental Agreement (referred to in Section 11.9) that is in  
9 effect at the time the Work is performed.
- 10 (b) No payment will be made for extended or unabsorbed home office overhead and  
11 field overhead expenses to the extent that there is an unbalanced allocation of such  
12 expenses among the price items identified in Appendix 1.
- 13 (c) No payment for consequential damages or loss of anticipated profits will be allowed  
14 because of any variance in quantities from those originally identified in Appendix 1  
15 or elsewhere in the Contract Documents, if any.
- 16 (d) The total payment (including the adjustment amount and unit prices for Work  
17 performed) for any item that experiences an adjustment for decreased quantity shall  
18 not exceed 75 percent of the amount originally identified for the item in Appendix 1.

19 Unless otherwise ordered by WSDOT, Design-Builder shall proceed with the Work pending  
20 determination of the cost or time adjustment for the variation in quantities.

21 Design-Builder and WSDOT agree that there will be no cost adjustment for decreases in quantities  
22 for any line item amount that was included by WSDOT in the Appendix 1 for the purpose of  
23 assuring that all Proposals would include the same amount for the line item in question.

#### 24 **10.1.3 Escalation Fund**

25 WSDOT has established an Escalation Fund in the amount of \$110,000,000 for the purpose of  
26 reducing the level of contingency contained in the Total Proposal Price for projected inflation in  
27 construction costs over the course of the Project. Amounts in this fund shall be deemed earned on  
28 a pro rata basis as NTP 2 Work is performed, based on progress of the NTP 2 Work. The amount  
29 payable each month shall be determined by multiplying the total value of the Escalation Fund value  
30 by the percent completion value of the NTP 2 Work as determined at the Progress Meetings  
31 described in Section 10.2.2. The Escalation Fund is not subject to increase for any reason, and  
32 Design-Builder shall absorb any inflation costs in excess of the amount payable from the  
33 Escalation Fund.

34 For purposes of representations in the Contract regarding costs of Work that are covered by the  
35 Lump Sum Amount and/or unit prices, the term "Lump Sum Amount" and the term "unit prices"  
36 shall also be deemed to include amounts in the Escalation Fund allocable to the Work in question.

#### 37 **10.1.4 Bond and Insurance Fund**

38 WSDOT has established a Bond and Insurance Fund in the amount of \$100,000,000 to cover the  
39 premiums for bonds required under Article 19 and costs of insurance required under Article 20,  
40 including worker's compensation, and to incentivize Design-Builder to reduce the costs of such

1 premiums and costs. This fund shall be available to reimburse such costs on a dollar-for-dollar  
2 basis, with any excess amount available in the Bond and Insurance Fund to be paid upon  
3 achievement of Substantial Completion.

#### 4 **10.1.5 South U-Section Fund**

5 WSDOT has established a South U-Section Fund in the amount of \$50,000,000 for the purpose of  
6 compensating the Design-Builder for the Work to design and construct the open-cut section south  
7 of the South Portal, referred to as the South U-Section. Amounts in this fund shall be deemed  
8 earned based on progress of Work on the South U-Section. The amount payable each month shall  
9 be determined by multiplying the total value of the South U-Section Fund by the percent  
10 completion value of the applicable Contract Schedule activities as determined at the Progress  
11 Meetings described in Section 10.2.2. The South U-Section Fund will be payable under the item  
12 "Design-Build Work – South U-Section" as set forth in Appendix 1. Payments made under this  
13 Section 10.1.5 shall constitute full compensation for all South U-Section Work including applicable  
14 taxes.

#### 15 **10.2 Invoices and Payment**

16 Payment for completed Work shall be made through periodic progress payments ("Progress  
17 Payments") as provided herein, subject to the retainage requirements set forth in Section 10.3 and  
18 to the caps on payment set forth in Section 10.4.1.

#### 19 **10.2.1 Invoicing Requirements**

20 Design-Builder shall submit monthly invoices to WSDOT on a mutually agreed date consistent with  
21 the cutoff date for Progress Payments set by WSDOT. No payment item shall be included on any  
22 invoice for Work that has been documented as deficient by Design-Builder's Quality Assurance  
23 Manager, or Work that has not been performed in accordance with the Contract.

24 Design-Builder acknowledges that WSDOT will obtain funding for portions of the Work from various  
25 sources, and also that the financing for various elements of the Work may be subject to certain  
26 special requirements. If requested by WSDOT, Design-Builder shall provide separate invoices for  
27 Work that is subject to reimbursement by the Federal government or third parties. Such invoices  
28 shall (1) be organized to meet all applicable reimbursement requirements and facilitate the  
29 reimbursement process, and (2) be submitted in a format reasonably requested by WSDOT.

30 Each monthly invoice shall include the following:

- 31 (a) An invoice cover sheet that shall indicate each of the following items:
- 32 (1) Project number and title;
  - 33 (2) invoice number (numbered consecutively, starting with "1")
  - 34 (3) period covered by the invoice (specific beginning and ending calendar days);
  - 35 (4) amount of invoice payable from the funds and allowances identified herein  
36 and total amount for each fund and allowance to date;
  - 37 (5) total amount earned to date for the Project as a whole;
  - 38 (6) authorized signature, title of signer, and date of signature; and
  - 39 (7) signature of Design-Builder's Quality Assurance Manager.

1 (b) A progress report including: (1) a narrative report addressing progress of the Work  
2 and performance of the parties; and (2) a technical report concerning the Contract  
3 Schedule as described in TR Section 2.1.6.

4 The narrative report shall include:

5 (1) an executive summary of the Project achievements and difficulties for the  
6 period just ended, and an overview of the goals for the period just beginning;

7 (2) an analysis of the Project's condition with respect to on time and on budget  
8 performance, which shall include: (1) a discussion of Contract milestones  
9 and Critical Path items; and (2) a description of plans to complete the Work  
10 by the Completion Deadlines, including any special measures that may be  
11 necessary;

12 (3) a more detailed review for design and for construction of each discipline's  
13 past performance and future Project goals;

14 (4) a discussion of areas of special concern, such as quality management,  
15 environmental protection, Utility coordination, public relations, and  
16 cooperation with adjacent contractors;

17 (5) a status report of required submittals, RFIs, design approvals, and other  
18 administrative issues that may impact timely performance;

19 (6) a review of past period safety performance and safety issues for the period  
20 just beginning;

21 (7) a self-assessment of Design-Builder's performance against any incentive  
22 performance issues;

23 (8) a review of pending and potential Change Orders to determine actions  
24 required for early resolution; and

25 (9) the Monthly Contract Schedule Update Submittal Package, as required in TR  
26 Section 2.1.6.2.3.

27 (c) Certification signed by Design-Builder's Quality Assurance Manager, certifying that:

28 (1) all Work (including that of designers, Subcontractors, suppliers, fabricators,  
29 and builders) has been tested and/or inspected by the Quality Assurance  
30 Team;

31 (2) all Work, except as specifically noted in the certification, conforms to the  
32 requirements of the Contract; and

33 (3) the elements of the Quality Management Plan and all of the measures and  
34 procedures provided for therein are functioning properly and are being  
35 followed.

36 (d) Written releases, in a form reasonably acceptable to WSDOT, signed by each  
37 Subcontractor or supplier that provided services, materials or equipment included in  
38 any preceding invoice and for which Design-Builder received payment.

39 Said release(s) shall certify that each Subcontractor or supplier (1) received  
40 payment in full for its services, materials or equipment, except only for retainage and  
41 amounts in dispute, and (2) waives and releases any liens, claims or security  
42 interests, known or unknown, suspected or unsuspected, arising out of such  
43 services, materials or equipment against any person or property whatsoever, except

1 potential liens and claims against retention funds or bonds for retainage and  
2 amounts in dispute. The release shall state any amounts in dispute.

3 (e) Invoice data sheet(s) and supporting documents allowing WSDOT to determine the  
4 amount payable, as follows:

5 (1) General. With the exception of unit priced, force account or other "exception  
6 items", WSDOT will base payments on an estimate of the percentage of  
7 Work completed, as mutually agreed with Design-Builder, and not on  
8 measured quantities. Design-Builder shall design a Primavera report, to  
9 WSDOT's reasonable satisfaction, that can be submitted in letter size  
10 hardcopy, text-searchable PDF electronic file format, and comma-delimited  
11 ASCII electronic format. The Primavera report shall contain an individual  
12 line entry for each price-loaded activity in the Contract Schedule. For each  
13 such activity, the Primavera report will show the total percent complete, the  
14 percent completed in the period covered by the invoice, and the total dollar  
15 billing for the activity. The Primavera report will be grouped and subtotaled  
16 by cost account with activities sorted in start sequence within groups.

17 (2) Exception Items. WSDOT will pay Design-Builder for items not included in  
18 the price-loaded schedule. Such exception items include unit priced work,  
19 force account work, incentives, disincentives and price adjustments, if  
20 contemplated in the Contract. Design-Builder shall assemble the required  
21 supporting documents for each exception item and submit them with its  
22 monthly invoice. Design-Builder shall tally the value of each exception item  
23 for each invoice, and provide a separate exception items subtotal line on  
24 each monthly invoice.

25 (3) Format. Design-Builder shall submit the format of the invoice data sheets to  
26 WSDOT for approval at least 14 calendar days before the submittal of the  
27 first invoice. Once WSDOT has approved the invoice format, the format  
28 shall not be changed unless the change is approved in writing by WSDOT.

29 (f) Report identifying design exceptions requested or approved during the prior month.

30 (g) Copies of invoices and evidence of payment of bond and insurance premiums, if the  
31 invoice includes a request for payment from the Bond and Insurance Fund on  
32 account of such premiums.

### 33 10.2.2 Draft Invoice and Progress Meeting

34 Prior to submission of the first draft invoice, Design-Builder shall prepare and submit to WSDOT for  
35 approval a standard invoice form, including the certificates set forth in Appendix 8 and addressing  
36 the requirements set forth in Section 10.2.1, which will correlate with and reflect the activities  
37 shown on the current Contract Schedule as set forth in TR Section 2.1.6.

38 Design-Builder shall deliver a draft invoice to WSDOT on or about the first business day of each  
39 month. Progress payment meetings ("Progress Meetings") will be held within seven days of  
40 submission of each draft invoice. At each Progress Meeting, Design-Builder and WSDOT's  
41 designated representative shall ascertain the progress of the Work and verify the quantities for any  
42 unit priced Work. Design-Builder and WSDOT's designated representative shall review the draft  
43 invoice reflecting the value of Work completed as of the last day of the previous month (based on  
44 quantities and unit prices for unit priced Work, based on force account records for force account  
45 Work, and based on progress for all other Work) and showing the maximum amount payable under

1 Section 10.4. Design-Builder acknowledges that prior determinations regarding progress are  
2 subject to adjustment at each Progress Meeting.

3 Design-Builder and WSDOT's designated representative shall sign the draft invoice, indicating that  
4 it has been approved and setting forth the proposed total payment amount, which shall be the  
5 difference between the value of the Work then completed, calculated based on progress, plus the  
6 value of unit priced and force account Work, less retainage and Progress Payments previously  
7 made. The amounts set forth in the draft invoice shall be used by Design-Builder in preparation of  
8 its monthly invoice described in Section 10.2.

### 9 **10.2.3 Delivery of Invoices**

10 Within seven days after each Progress Meeting, Design-Builder shall submit to WSDOT one hard  
11 copy and one electronic copy of its final invoice, which shall be based upon the approved draft  
12 invoice and otherwise comply with the invoicing requirements set forth above.

### 13 **10.2.4 WSDOT Review of Invoices**

14 Within seven business days after WSDOT's receipt of the invoice, WSDOT will review the invoice  
15 and all attachments thereto and shall notify Design-Builder of the amount approved for payment  
16 and specify the reason for disapproval of any remaining invoiced amounts. Design-Builder may  
17 include such disapproved amounts in the next month's invoice after correction of the deficiencies  
18 noted by WSDOT (all such disapproved amounts shall be deemed in dispute unless otherwise  
19 agreed). If WSDOT determines at any time that Design-Builder has been over-credited under a  
20 previous progress report or progress payment, that over-credit will be credited against current  
21 progress reports or payments.

### 22 **10.2.5 Payment by WSDOT**

23 Subject to retention as provided in Section 10.3, and provided that Design-Builder and each  
24 Subcontractor covered under RCW 39.12 have submitted to the State Department of Labor and  
25 Industries and it has approved a Statement of Intent to Pay Prevailing Wages in the form required  
26 under the Standard Specifications, WSDOT shall pay or cause to be paid Design-Builder for all  
27 undisputed amounts set forth in an invoice that complies with Section 10.2.

### 28 **10.2.6 Timing of Payment**

29 Provided the invoice is received by WSDOT no later than the tenth day of the month, WSDOT shall  
30 make payment to Design-Builder no later than the tenth day of the following month. If an invoice is  
31 received by WSDOT after the tenth day of the month, WSDOT shall make payment no later than  
32 30 days after WSDOT receives the invoice.

### 33 **10.3 Retainage**

34 Pursuant to RCW 60.28, a sum of 5 percent of the monies earned by Design-Builder will be  
35 retained from progress payments. Such retainage shall be used as a trust fund for the protection  
36 and payment (1) to the State with respect to taxes imposed pursuant to Titles, 50, 51, and 82  
37 RCW, and (2) the claims of any person arising under the Contract Documents.

38 Monies retained under the provisions of RCW 60.28 shall, at the option of Design-Builder, be:

39 (a) Retained in a fund by WSDOT; or

1 (b) Deposited by WSDOT in an escrow (interest-bearing) account in a bank, mutual  
2 saving bank, or savings and loan association (interest on monies so retained shall  
3 be paid to Design-Builder). Deposits are to be in the name of WSDOT and are not  
4 to be allowed to be withdrawn without WSDOT's written authorization. WSDOT will  
5 issue a check representing the sum of the monies reserved, payable to the bank or  
6 trust company. Such check shall be converted into bonds and securities chosen by  
7 Design-Builder as the interest accrues.

8 At the time the Contract is executed, Design-Builder shall designate the option desired. In  
9 choosing option (b), Design-Builder agrees to assume full responsibility to pay all costs which may  
10 accrue from escrow services, brokerage charges or both, and further agrees to assume all risks in  
11 connection with the investment of the retained percentages in securities.

12 Design-Builder may also submit a bond ("retainage bond") for all or any portion of the retainage  
13 addressed herein. The bond shall be in a form acceptable to WSDOT and issued by a Surety  
14 meeting the requirements of Section 19.

15 Release of the retainage will be made 60 days following the date of Final Completion (pursuant to  
16 RCW 39.12, and RCW 60.28) provided the following conditions are met:

- 17 (a) A release has been obtained from the Washington State Department of Revenue;  
18 (b) Affidavits of Prevailing Wages Paid for Design-Builder and all Subcontractors are on  
19 file with WSDOT (RCW 39.12.040);  
20 (c) A certificate of *Payment of Contributions Penalties and Interest on Public Work*  
21 *Contract* is received from the Washington State Employment Security Department;  
22 (d) Subject to Section 8 of Appendix 5-A, Washington State Department of Labor &  
23 Industries shows Design-Builder is current with payments of industrial insurance and  
24 medical aid premiums; and  
25 (e) All claims, as provided by Law, filed against the retainage have been resolved. In  
26 the event claims are filed and provided the conditions of subsection (a)-(d) above  
27 are met, Design-Builder will be paid such retained percentage less an amount  
28 sufficient to pay any such claims together with a sum determined by WSDOT  
29 sufficient to pay the cost of foreclosing on claims and to cover attorney's fees.

#### 30 10.4 Limitations on Payment

##### 31 10.4.1 Cap on Payments

32 Due to the rate at which funding will become available for this Project, payments to Design-Builder  
33 on account of the Total Compensation shall not exceed the following cumulative limits for the  
34 periods identified below:

- |    |     |   |                 |
|----|-----|---|-----------------|
| 35 | (a) | For periods up to and including June 30, 2011 | \$ 100,000,000  |
| 36 | (b) | For periods up to and including June 30, 2012 | \$ 400,000,000  |
| 37 | (c) | For periods up to and including June 30, 2013 | \$ 700,000,000  |
| 38 | (d) | For periods up to and including June 30, 2014 | \$1,000,000,000 |
| 39 | (e) | For periods up to and including June 30, 2015 | \$1,275,000,000 |
| 40 | (f) | For periods up to and including June 30, 2016 | \$1,350,000,000 |

1 The Payment Schedule shall not provide for payments to be made during any period exceeding the  
2 cumulative limits set forth in this Section 10.4.1. At no time shall Design-Builder invoice WSDOT  
3 for amounts exceeding the aforementioned funding restrictions. The Department's inability to pay  
4 more than these amounts shall not absolve Design-Builder of responsibility to make timely  
5 payment to Subcontractors and suppliers.

## 6 **10.4.2 Payment for Materials**

### 7 **10.4.2.1 Delivery of Materials**

8 Materials shall be delivered to the Site, or delivered to Design-Builder and promptly stored by  
9 Design-Builder in storage approved by WSDOT. Materials that have not been delivered to or  
10 adjacent to the Site will be eligible for payment only if they were specifically manufactured or  
11 produced for the Project, and then only after being irrevocably assigned to WSDOT. As a  
12 condition to inclusion of such materials in any invoice, Design-Builder shall submit certified bills for  
13 such materials with its invoice. Payment will not be made when the invoice value of such  
14 materials, as determined by WSDOT, amounts to less than \$2,000 or if materials are to be stored  
15 less than 30 days.

### 16 **10.4.2.2 Title to Materials**

17 All such materials so delivered shall become the property of WSDOT. Payment for stockpiled  
18 materials will not constitute final acceptance of such materials. At WSDOT's request, Design-  
19 Builder at its own expense shall promptly execute, acknowledge and deliver to WSDOT actual bills  
20 of sale or other instruments in a form acceptable to WSDOT, conveying and assuring to WSDOT  
21 title to such materials included in any invoice, free and clear of all Liens. Design-Builder at its own  
22 expense shall conspicuously mark such materials as the property of WSDOT, shall not permit such  
23 materials to become commingled with non-WSDOT-owned property and shall take such other  
24 steps, if any, as WSDOT may require or regard as necessary to vest title to such materials in  
25 WSDOT free and clear of Liens. The required invoice, billing, title, or assignment documents,  
26 furnished by Design-Builder, shall contain complete material description and identification data.

### 27 **10.4.2.3 Deductions for Lost or Damaged Materials**

28 The amount shown in an invoice for material which is subsequently lost, damaged or unsatisfactory  
29 will be deducted from succeeding invoices until the material is repaired or replaced (at Design-  
30 Builder's expense). In case any supplier claims against Design-Builder remain (for materials so  
31 paid for) unsatisfied for more than 30 days following issuance of payment to Design-Builder, the  
32 applicable payment may be canceled on the next invoice.

### 33 **10.4.2.4 Not to Exceed Amount**

34 Payment for material furnished and delivered as indicated in this Section 10.4.2 will not exceed the  
35 amount paid by Design-Builder as evidenced by a bill of sale supported by paid invoice, or 75  
36 percent of the in-place price, whichever is less.

## 37 **10.4.3 No Payment for Nonconforming Work**

38 WSDOT will make no payment for Nonconforming Work, except as provided under Section 5.6.

1 **10.4.4 Withholding of Progress Payments**

2 If WSDOT deems that any schedule fails to provide the information required in TR Section 2.1.6,  
3 WSDOT may withhold progress payments until the schedule containing the required information  
4 has been submitted by Design-Builder and accepted by WSDOT.

5 If the Baseline Contract Schedule is not accepted within four months of issuance of NTP 1, the  
6 monthly Progress Payment may be withheld until said schedule has been accepted by WSDOT.

7 **10.5 Final Payment Process**

8 Upon Final Completion and after Final Inspection under Section 21.3, and following satisfaction of  
9 the conditions precedent in Section 10.5.1.1 and presentation of a Final Contract Voucher  
10 Certification prepared by WSDOT and signed by Design-Builder, the amount due Design-Builder  
11 will be paid. Said certification may identify one or more outstanding claims that were properly filed  
12 and prosecuted under Article 24 but which remain pending thereunder. Said certification shall be  
13 deemed a release of all claims of Design-Builder unless a claim is filed in accordance with the  
14 requirements of Article 24 and is expressly excepted from Design-Builder's certification on the Final  
15 Contract Voucher Certification. The date of Final Acceptance is the date the Secretary signs the  
16 Final Contract Voucher Certification.

17 **10.5.1 Final Payment**

18 **10.5.1.1 Conditions Precedent to Final Payment**

19 As a condition to its obligation to make payment to Design-Builder based on the Final Contract  
20 Voucher Certification, WSDOT shall have received the following:

- 21 (a) an affidavit that payrolls, bills for materials and equipment, and other indebtedness  
22 connected with the Work have been paid or otherwise satisfied;
- 23 (b) a certificate evidencing that insurance required by the Contract Documents to  
24 remain in force after Final Payment is currently in effect and shall not be canceled or  
25 allowed to expire until at least 30 days' prior written notice has been given to  
26 WSDOT;
- 27 (c) releases and waivers, from Design-Builder in favor of WSDOT, of liens, claims  
28 (except those previously identified in writing on the Final Contract Voucher  
29 Certification or claims which Design-Builder may be entitled to assert against  
30 WSDOT with respect to indemnities under this Contract or with respect to WSDOT's  
31 breach of obligations under this Contract to be performed after Final Payment),  
32 security interests and encumbrances arising out of the Contract Documents,  
33 whether known or unknown, suspected or unsuspected;
- 34 (d) releases and waivers from Subcontractors and suppliers in favor of WSDOT of liens,  
35 claims, security interests or encumbrances, known or unknown, suspected or  
36 unsuspected, arising out of Subcontracts, the Work or the Project;
- 37 (e) materials acceptance certification documents, on WSDOT forms or other forms  
38 WSDOT approves;
- 39 (f) final maps of the Project Right of Way and as-built drawings for the Project;
- 40 (g) an assignment of warranties from suppliers of equipment and software to be  
41 assigned pursuant to TR Section 2.12;



- 1 (h) consent of the Surety to Final Payment;
- 2 (i) bills of sale and instruments of title transfer to Work product, free and clear of liens  
3 and encumbrances;
- 4 (j) "Affidavits of Wages Paid" signed and submitted by Design-Builder and each  
5 Subcontractor required to submit such an affidavit under RCW 39.12 in accordance  
6 with TR Section 2.12.3.2.3;
- 7 (k) Affidavits of amounts paid DBE participants, on WSDOT forms or forms WSDOT  
8 approves; and
- 9 (l) a certificate that all guarantees and warranties required by the Contract Documents  
10 to remain in force after Final Payment are in effect.

### 11 **10.5.1.2 Prior Payments Subject to Correction**

12 All prior payments shall be subject to correction in the Final Payment.

### 13 **10.5.1.3 Deductions to Final Payment**

14 The Final Payment amount will be reduced by any amounts deductible under Section 10.4.2.3.

### 15 **10.5.2 WSDOT Right to Establish Final Completion Date**

16 If Design-Builder fails, refuses, or is unable to sign and return any documentation required for Final  
17 Completion, WSDOT reserves the right to establish the date of Final Completion (for the purpose  
18 of meeting the requirements of RCW 60.28) and unilaterally accept the Work. Such unilateral  
19 acceptance will occur only after Design-Builder has been provided the opportunity, by written  
20 request from WSDOT, to voluntarily submit the required documents. If voluntary compliance is not  
21 achieved, formal notification of the impending establishment of the date of Final Completion will be  
22 provided by certified letter from the Secretary to Design-Builder, which will provide 30 days for  
23 Design-Builder to submit the necessary documents. The 30-day period will begin on the date the  
24 certified letter is received by Design-Builder. The date the Secretary unilaterally signs the Final  
25 Contract Voucher Certification shall be considered both the date of Final Completion and the date  
26 of Final Acceptance. WSDOT's right to unilaterally accept the Work will apply whether the Work  
27 has been completed in accordance with Section 21.4 or terminated in accordance with Article 15.  
28 Unilateral Final Acceptance of the Contract by WSDOT does not in any way relieve Design-Builder  
29 of its responsibility to perform work required by the Contract Documents or applicable Laws.

### 30 **10.6 Payments to Subcontractors**

31 Within 30 days after receipt of payment from WSDOT, Design-Builder shall pay each  
32 Subcontractor, out of the amount paid to Design-Builder on account of such Subcontractor, all  
33 undisputed amounts (less any retainage and any other offsets and deductions provided in the  
34 Subcontract or by Law) due and owing in accordance with the Subcontract. Within 30 days after  
35 satisfactory completion of all Work to be performed by a Subcontractor, including provision of  
36 appropriate releases, certificates and other evidence of the Subcontractor's compliance with all  
37 applicable requirements of the Contract Documents, Design-Builder shall return any moneys  
38 withheld in retention from the Subcontractor. Design-Builder shall, by appropriate agreement with  
39 each Subcontractor, require each Subcontractor to make payments to its lower tier Subcontractors  
40 in a similar manner. WSDOT shall have no obligation to pay or to see to the payment of money to  
41 a Subcontractor, except as may otherwise be required by Law.

1 **10.7 Disputes**

2 Subject to WSDOT's right to withhold from progress payments any amounts in dispute, and except  
3 as expressly stated otherwise in this Article 10, any disagreement between WSDOT and Design-  
4 Builder relating to this Article 10 shall be subject to Article 24. Failure by WSDOT to pay any  
5 amount in dispute shall not alleviate, diminish or modify in any respect Design-Builder's obligation  
6 to perform under the Contract Documents, including Design-Builder's obligation to achieve Final  
7 Completion in accordance with the Contract Documents, and Design-Builder shall not cease or  
8 slow down its performance under the Contract Documents on account of any such amount in  
9 dispute. Design-Builder shall proceed as directed by WSDOT pending resolution of the dispute.  
10 Upon resolution of any such dispute each party shall promptly pay to the other any amount owing.

11 **10.8 State Taxes**

12 Design-Builder shall pay all applicable federal, State and local sales, consumer, use and similar  
13 taxes, property taxes and any other taxes, fees, charges or levies imposed by a Governmental  
14 Body, whether direct or indirect, relating to, or incurred in connection with, the Project or  
15 performance of the Work, including that portion of the compensation payable hereunder relating to  
16 design services. Except as provided in Section 10.8.2, the Total Compensation includes all such  
17 taxes.

18 The Washington State Department of Revenue has issued special rules on the state sales tax.  
19 Sections 10.8.1 and 10.8.2 are meant to clarify those rules. Design-Builder should contact the  
20 Financial System Manager, Department of Transportation, Olympia, for answers to questions in  
21 this area.

22 The compensation payable hereunder is not subject to adjustment if Design-Builder based its  
23 Proposal on a misunderstood tax liability.

24 As a condition to release of retainage under Section 10.3, Design-Builder shall provide a certificate  
25 from the State Department of Revenue showing that all Contract-related taxes have been paid  
26 (RCW 60.28.050). WSDOT may deduct from its payments to Design-Builder any amount Design-  
27 Builder may owe the State Department of Revenue, whether the amount owed relates to this  
28 Contract or not. Any amount so deducted will be paid into the proper State fund.

29 **10.8.1 State Sales Tax: Work Performed on City, County, or Federally-Owned Land**

30 State Department of Revenue Rule 171 and its related rules apply to this Section. TR Appendix R-  
31 1 identifies those parts of the Project that require Work on land owned by:

- 32 (a) a municipal corporations such as the City of Seattle;  
33 (b) a political subdivision of the State; or  
34 (c) the United States of America.

35 For Work performed on such land, Design-Builder shall include Washington State retail sales taxes  
36 in the portion of its compensation allocable to such Work. These retail sales taxes shall include  
37 those Design-Builder pays on purchases of materials, equipment, and supplies used or consumed  
38 in performing such Work.

1 **10.8.2 State Sales Tax: Work on State-Owned or Private Land**

2 State Department of Revenue Rule 170 and its related rules apply to this Section. TR  
3 Appendix R-1 identifies those parts of the Project that require Work on State-owned or private land.

4 For Work performed on State-owned or private land, Design-Builder shall collect from WSDOT,  
5 retail sales tax on the portion of its compensation allocable to such Work. WSDOT will  
6 automatically add this sales tax to each payment to Design-Builder. For this reason, Design-  
7 Builder represents that it has not included and shall not include such retail sales tax on Work  
8 performed on State-owned or private land in the Total Proposal Price, Change Order requests, or  
9 any other amounts included in the Total Compensation.

10 However, WSDOT will not add in sales tax Design-Builder or Subcontractor pays on the purchase  
11 or rental of tools, machinery, equipment, or consumable supplies not integrated into the Project.  
12 Regardless of whether the Work is performed on State-owned or private land, such sales taxes  
13 shall be deemed included in the Total Compensation, and shall be accounted for in Change Order  
14 pricing.

1 **11. CHANGES IN THE WORK**

2 This Article 11 sets forth the requirements for obtaining all Change Orders under the Contract.  
3 Design-Builder waives the right to make any claim for a time extension or for any monetary  
4 compensation in addition to that specified in the Contract Documents, except as specifically  
5 permitted hereunder. Design-Builder shall bear the burden of proving entitlement to a time  
6 extension or additional compensation.

7 **11.1 Circumstances Under Which Change Orders May Be Issued**

8 **11.1.1 Change Orders**

9 The term "Change Order" shall mean a written amendment to the terms and conditions of the  
10 Contract Documents issued in accordance with this Article 11, for the following purposes (or  
11 combination thereof):

- 12 (a) to modify the scope of the Work;
- 13 (b) to revise a Completion Deadline;
- 14 (c) to revise the compensation payable hereunder, including the Lump Sum Amount  
15 and unit prices; and
- 16 (d) to revise other terms and conditions of the Contract Documents.

17 A Change Order shall not be effective for any purpose unless executed by WSDOT, as specified  
18 herein. WSDOT may issue unilateral Change Orders as specified in Section 11.2.

19 **11.1.2 Directive Letters**

20 WSDOT may at any time issue a Directive Letter to Design-Builder in the event of any desired  
21 change in the Work or of any dispute regarding the scope of the Work. The Directive Letter will  
22 state that it is issued under this Section 11.1.2, will describe the Work in question and will state the  
23 basis for determining compensation, if any. Design-Builder shall proceed immediately with the  
24 Work as directed in the letter, pending the execution of a formal Change Order (or, if the letter  
25 states that the Work is within the original scope of the Work, Design-Builder shall proceed with the  
26 Work as directed but shall have the right pursuant to Section 11.3 to request that WSDOT issue a  
27 Change Order). The fact that a Directive Letter was issued by WSDOT does not constitute  
28 evidence that in fact a WSDOT-Directed Change occurred. Such determination shall be based on  
29 an analysis of the original requirements of the Contract Documents and the effect of the Directive  
30 Letter on those requirements.

31 **11.1.3 Changed or Extra Work Performed Without Change Order or Directive Letter**

32 To the extent that Design-Builder undertakes performance of any changed or extra work without  
33 receiving a Directive Letter or Change Order executed by WSDOT, Design-Builder shall be  
34 deemed to have performed such work voluntarily and shall not be entitled to a Change Order in  
35 connection therewith. In addition, Design-Builder may be required to remove or otherwise undo  
36 any such work, at its sole cost.

1 **11.2 WSDOT-Directed Changes**

2 **11.2.1 Issuance of Request for Change Proposal and Initial Consultation**

3 If WSDOT desires to issue a WSDOT-Directed Change or to evaluate whether to initiate such a  
4 change, then WSDOT may, at its discretion, issue a Request for Change Proposal. Within seven  
5 days after Design-Builder's receipt of a Request for Change Proposal, WSDOT and Design-Builder  
6 shall consult to define the proposed scope of the change. Within seven days after the initial  
7 consultation, WSDOT and Design-Builder shall consult concerning the estimated cost and time  
8 impacts. Design-Builder shall provide data regarding such matters as requested by WSDOT.

9 **11.2.2 WSDOT Determination**

10 Within seven days after the second consultation and provision of any data as described in  
11 Section 11.2.1, WSDOT shall notify Design-Builder whether WSDOT:

- 12 (a) wishes to issue a Change Order;
- 13 (b) wishes to request Design-Builder to prepare a Change Order form as discussed at  
14 the meeting; or
- 15 (c) no longer wishes to issue a Change Order.

16 WSDOT may at any time, in its sole discretion, require Design-Builder to provide two alternative  
17 Change Order forms, one of which shall provide for a time extension and any additional costs  
18 permitted hereunder, and the other of which shall show all Acceleration Costs associated with  
19 meeting the original Completion Deadlines, as well as any additional costs permitted hereunder.

20 **11.2.3 Submittal of Change Order Form**

21 If so requested, Design-Builder shall, within 10 days after receipt of the notification described in  
22 Section 11.2.2, prepare and submit to WSDOT for review and approval a Change Order form for  
23 the requested change, complying with all applicable requirements of Section 11.5. If the Change  
24 Order is approved, any design and engineering costs incurred in developing the Change Order  
25 form will be included within the Change Order, otherwise, a separate Change Order will be issued  
26 allowing reimbursement for such costs.

27 **11.2.4 Order To Proceed Notwithstanding Disagreement**

28 If WSDOT and Design-Builder agree that a change in the requirements relating to the Work has  
29 occurred but disagree as to whether the change justifies additional compensation or time or  
30 disagree as to the amount of any change to be made to the compensation or a Completion  
31 Deadline, WSDOT may, in its sole discretion, order Design-Builder to proceed with the  
32 performance of the Work in question notwithstanding such disagreement. Such order may, at  
33 WSDOT's option, be in the form of:

- 34 (a) a force account Change Order as provided in Section 11.9; or
- 35 (b) a Directive Letter as described in Section 11.1.2.

36 **11.2.5 Unilateral Change Orders**

37 WSDOT may issue a unilateral Change Order at any time, regardless of whether it has issued a  
38 Request for Change Proposal. Such Change Order shall provide for compensation to be paid in  
39 accordance with Section 11.9. If the Change Order results in a reduction in the Work, the Change

1 Order may contain a price deduction deemed appropriate by WSDOT, and Design-Builder shall  
2 have the right to submit the amount of such price deduction to dispute resolution in accordance  
3 with Article 24.

#### 4 **11.3 Time Extensions for Excusable Delays**

5 The Completion Deadlines may only be changed by a Change Order. Any claim by Design-Builder  
6 for an extension of a Completion Deadline shall be subject to Design-Builder's fulfillment of all  
7 applicable requirements of this Article 11, and subject to the limitations contained herein.

##### 8 **11.3.1 Excusable Delays**

9 The term "Excusable Delay" shall mean delays to the Critical Path caused by (a) acts, omissions,  
10 conditions, events, or circumstances that are beyond the reasonable control of Design-Builder  
11 including seismic events, acts of war, public insurrection, riot and WSDOT-Caused Delays; and (b)  
12 events for which the Contract Documents provide that Design-Builder is entitled to claim a  
13 schedule adjustment by reference to this Article 11, provided that in either case the event was not  
14 caused by or contributed to the negligent acts or omissions, fault, recklessness, willful misconduct,  
15 breach of contract, or violation of law of any DB-Related Entity, and could not reasonably have  
16 been prevented or avoided by Design-Builder.

17 Upon Design-Builder's fulfillment of all applicable requirements of this Article 11, and subject to the  
18 limitations specified herein, where Design-Builder is prevented from completing any part of the  
19 Work by the applicable Completion Deadline due to an Excusable Delay, the Completion Deadline  
20 will be extended in an amount equal to the delay to the Critical Path.

21 Design-Builder shall be required to demonstrate to WSDOT's satisfaction that the change in the  
22 Work or other event or situation which is the subject of the request for Change Order seeking a  
23 change in a Completion Deadline has caused or will result in an identifiable and measurable  
24 disruption of the Work which has impacted the Critical Path activity.

25 Notwithstanding the preceding, the risks arising from the following events or circumstances shall be  
26 borne exclusively by Design-Builder, shall not be deemed Excusable Delays, and shall not be the  
27 basis for any relief, monetary or otherwise, to Design-Builder:

- 28 1. general market and economic conditions affecting the availability, supply or cost of  
29 labor, equipment and materials, construction equipment and supplies, or  
30 commodities;
- 31 2. weather conditions of any type, including heat, rain, wind, snow, and flooding  
32 caused by weather conditions, except that adverse weather conditions may be  
33 considered an Excusable Delay if they were abnormal for the period of time in  
34 question, could not have been reasonably anticipated and had an adverse effect on  
35 the scheduled construction;
- 36 3. strikes, labor disputes, work slowdowns, work stoppages, boycotts or other similar  
37 labor disruptions, unless such strikes, disputes, slowdowns, stoppages, boycotts or  
38 disruption affect a specific trade on a national or regional level and were not caused  
39 by the improper acts or omissions of any DB-Related Entity;
- 40 4. delays in obtaining or delivery of goods or services from any Subcontractor or  
41 supplier, unless Subcontractor's reason for delay arises from an event that would  
42 otherwise be excusable to Design-Builder hereunder;

- 1 5. delays of common carriers unless the common carrier's reason for the delay arises  
2 from an event that would otherwise be excusable to Design-Builder hereunder; and  
3 6. bankruptcy or insolvency of a DB-Related Entity, or inability of a DB-Related Entity  
4 to perform, unless such inability would otherwise be excusable to Design-Builder  
5 hereunder.

6 The adjustment to the Completion Deadlines allowed for Excusable Delays constitutes Design-  
7 Builder's sole and exclusive remedy for such delays, except for the compensation allowed for  
8 certain types of delays as provided in Section 11.4.

### 9 **11.3.2 No Change Order for Non-Excusable Delay**

10 Design-Builder shall not be entitled to any additional compensation or extension of a Completion  
11 Deadline for any delays which are not Excusable Delays. Delays attributable to and within the  
12 control of a DB-Related Entity shall be deemed to be delays within the control of Design-Builder.

### 13 **11.4 Increase in Compensation**

14 Any claim by Design-Builder for an increase in compensation shall be subject to Design-Builder's  
15 fulfillment of all applicable requirements of this Article 11, and subject to the limitations contained  
16 herein.

17 Design-Builder may request a Change Order to increase its compensation only as allowed by  
18 Section 10.1 or Article 13 and for the following:

- 19 (a) additional costs of performance of the Work directly attributable to WSDOT-Directed  
20 Changes for which a Change Order or a Request for Change Proposal has not been  
21 issued;
- 22 (b) delay and disruption damages directly attributable to (i) WSDOT-Caused Delays, (ii)  
23 Third Party Delays and (iii) Excusable Delays under Section 5.8.1 (Archaeological  
24 and Historical Objects), Section 5.8.2 (Hazardous Materials) or Section 5.10.1  
25 (Change Order for Necessary Basic Configuration Change);
- 26 (c) additional costs of performance of the Work directly attributable to WSDOT direction  
27 to uncover Work, certain Site conditions, Necessary Basic Configuration Changes  
28 and Hazardous Materials, to the extent provided in Sections 5.4.3, 5.8, and 5.10;
- 29 (d) costs of (i) Additional Deformation Work for which WSDOT is responsible under  
30 Section 5.9.3 and (ii) Deformation Mitigation Measures and repairs reimbursable  
31 from the Deformation Mitigation and Repair Fund under Section 5.9.3 or Section  
32 5.9.4;
- 33 (e) certain costs of performance of Extraordinary Intervention Work and costs directly  
34 attributable to Differing Site Conditions, as provided in Section 5.7;
- 35 (f) costs of performance of the Port of Seattle Work payable from the Port of Seattle  
36 Fund as provided in Section 7.4;
- 37 (g) certain costs of performance of Utility Work, as provided in Section 7.2;
- 38 (h) additional costs directly attributable to any of the following events which materially  
39 and adversely affects performance of the Work:
- 40 (1) an earthquake that results in damage to the Work or to materials or  
41 equipment on the Site;

- 1 (2) a rebellion, war, riot, sabotage, terrorism or civil commotion;
- 2 (3) the discovery at, near, or on the Site of any paleontological, cultural or  
3 biological resources or any species presently or in the future listed as  
4 threatened or endangered under the federal or state endangered species  
5 act, provided that the existence of such resources was not disclosed in the  
6 RFP documents;
- 7 (4) the suspension, termination, interruption, denial, failure to obtain,  
8 nonrenewal or amendment of any such Environmental Approval, except to  
9 the extent caused by a failure of Design-Builder to comply with the Contract  
10 Documents; and
- 11 (5) any change in a Law, change in the judicial interpretation of a Law, or  
12 adoption of any new Law, which is materially inconsistent with Laws in effect  
13 on the Proposal Date (excluding any such change or new Law which was  
14 passed or adopted but not yet effective as of such date), and which  
15 (A) requires a material modification in the Project design, (B) requires a  
16 major State or federal environmental approval not previously required for the  
17 Project, (C) changes to the sales or use tax rate, or (D) specifically targets  
18 the Project or Design-Builder.
- 19 (i) changes in unit prices in accordance with Section 10.1.2.

## 20 11.5 Conditions Precedent to Change Orders

21 The requirements set forth in this Section 11.5 constitute conditions precedent to Design-Builder's  
22 entitlement to request and receive a Change Order pursuant to Sections 11.3 and/or 11.4 (a)  
23 through (i).

### 24 11.5.1 Delivery of Change Notice

25 Design-Builder shall deliver to WSDOT written notice (a "Change Notice") stating that an event or  
26 situation has occurred within the scope of Section 11.3 and/or 11.4 (a) through (i) and shall state  
27 which subsection thereof is applicable. The first Change Notice shall be labeled "Change Notice  
28 No. 1" and subsequent notices shall be numbered sequentially.

29 Each Change Notice shall be delivered as promptly as possible after such event or situation  
30 becomes apparent. If any Change Notice is delivered later than 14 days after Design-Builder first  
31 discovered (or should have discovered in the exercise of reasonable prudence) the occurrence  
32 which is described therein, Design-Builder shall be deemed to have waived its right to a Change  
33 Order. Furthermore, in the event any Change Notice concerns any condition or material described  
34 in Article 5 and is delivered after the 14-day period specified herein, Design-Builder shall be  
35 deemed to have waived the right to collect any and all costs incurred in connection therewith to the  
36 extent that WSDOT is not afforded the opportunity to inspect such material or condition before it is  
37 disturbed.

### 38 11.5.2 Contents of Change Notice

39 The Change Notice shall: (a) state in detail the facts underlying the potential Change Order, the  
40 reasons why Design-Builder believes additional compensation or time will or may be due and the  
41 date of occurrence; (b) state in detail the basis that the work is not required by the Contract



1 Documents, if applicable; (c) identify particular elements of performance for which additional  
2 compensation may be sought under this Article 11; (d) identify any potential Critical Path impacts;  
3 and (e) provide an estimate of the time within which a response to the notice is required to  
4 minimize cost, delay, or disruption of performance.

5 Any adjustments made to the Contract Documents shall not include increased costs or time  
6 extensions for delay resulting from Design-Builder's failure to provide requested additional  
7 information under this Section 11.5.

### 8 **11.5.3 Delivery of Requests for Change Orders**

9 Design-Builder shall deliver a detailed request for Change Order to WSDOT within 30 days after  
10 delivery of the Change Notice indicating the relief being sought with particularity and detailed  
11 written support. If Design-Builder requests a time extension, then WSDOT, in its sole discretion,  
12 may require Design-Builder to provide two alternative Change Order requests, one of which shall  
13 provide for a time extension and any additional costs permitted hereunder, and the other of which  
14 shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as  
15 well as any additional costs permitted hereunder.

### 16 **11.5.4 Incomplete Change Orders**

17 Each request for Change Order provided under Section 11.5.3 shall meet all requirements set forth  
18 in Section 11.6; provided that if any such requirements cannot be met due to the nature of the  
19 occurrence, Design-Builder shall provide an incomplete request for Change Order which shall:

- 20 (a) comply with all requirements capable of being met;
- 21 (b) include a list of requirements which are not fulfilled together with an explanation  
22 reasonably satisfactory to WSDOT stating why such requirements cannot be met;
- 23 (c) provide such information regarding projected impact on the Critical Path as is  
24 requested by WSDOT; and
- 25 (d) in all events include sufficient detail to ascertain the basis for the proposed Change  
26 Order and for any price increase associated therewith, to the extent such amount is  
27 then ascertainable.

28 Design-Builder shall furnish, when requested by WSDOT, such further information and details as  
29 may be required to determine the facts or contentions involved. Design-Builder agrees that it shall  
30 give WSDOT access to all of Design-Builder's books, records and other materials relating to the  
31 Work in question, and shall cause its Subcontractors to do the same, so that WSDOT can  
32 investigate the basis for such proposed Change Order. Design-Builder shall provide WSDOT with  
33 a monthly update to all outstanding incomplete requests for Change Order, describing the status of  
34 all previously unfulfilled requirements and stating any changes in projections previously delivered  
35 to WSDOT, time expenditures to date and time anticipated for completion of the activities for which  
36 the time extension is claimed.

### 37 **11.5.5 Importance of Timely Delivery**

38 Design-Builder acknowledges and agrees that timely delivery of notification of such events and  
39 situations and requests for Change Orders and updates thereto are of vital importance to WSDOT.  
40 WSDOT is relying on Design-Builder to evaluate, promptly upon the occurrence of any event or  
41 situation, whether the event or situation will affect schedule or costs and, if so, whether Design-  
42 Builder believes a time extension and/or price increase is required hereunder. If an event or

1 situation occurs which may affect the compensation payable to Design-Builder or a Completion  
2 Deadline, WSDOT will evaluate the situation and determine whether it wishes to make any  
3 changes to the definition of the Project so as to bring it within WSDOT's funding and time  
4 restraints.

5 The following matters (among others) shall be considered in determining whether WSDOT has  
6 been prejudiced by Design-Builder's failure to provide timely notice:

- 7 (a) the effect of the delay on alternatives available to WSDOT (that is, a comparison of  
8 alternatives which are available at the time notice was actually given and  
9 alternatives which would have been available had notice been given when required  
10 under the Contract Documents); and
- 11 (b) the impact of the delay on WSDOT's ability to obtain and review objective  
12 information contemporaneously with the event.

### 13 **11.5.6 Subcontractor Claims**

14 Prior to submission by Design-Builder of any request for a Change Order to WSDOT which is  
15 based in whole or in part on a request by a Subcontractor to Design-Builder for a price increase or  
16 time extension under its Subcontract, Design-Builder shall have reviewed all claims by the  
17 Subcontractor which constitute the basis for the request for Change Order and determined in good  
18 faith that each such claim is justified hereunder and that Design-Builder is justified in requesting an  
19 increase in compensation and/or change in Completion Deadlines in the amounts specified in the  
20 request for Change Order. Each request for Change Order involving Subcontractor Work, and  
21 each update to an incomplete request for Change Order involving such Work, shall include a  
22 summary of Design-Builder's analysis of all components of the Subcontractor claims and a sworn  
23 certification in form acceptable to WSDOT signed by Design-Builder's Project Manager stating that  
24 Design-Builder has investigated the basis for the Subcontractor's claims and has determined that  
25 all such claims are justified as to entitlement and amount of money and/or time requested, has  
26 reviewed and verified the adequacy of all back-up documentation and has no reason to believe  
27 and does not believe that the factual basis for the Subcontractor's claim is falsely represented.  
28 Any request for Change Order involving Subcontractor Work shall be considered incomplete if it is  
29 not accompanied by such analysis and certification.

### 30 **11.6 Contents of Change Orders**

#### 31 **11.6.1 Form of Change Order**

32 Each Change Order form and request for Change Order shall be prepared in form acceptable to  
33 WSDOT, and shall meet all applicable requirements of this Article 11. Design-Builder shall prepare  
34 a scope of work, cost estimate, delay analysis and other information as required by this  
35 Section 11.6.1 for each Change Order form and request for Change Order.

#### 36 **11.6.1.1 Scope of Work**

37 The scope of work shall describe in detail satisfactory to WSDOT all activities associated with the  
38 Change Order, including a description of additions, deletions and modifications to the existing  
39 requirements of the Contract Documents.

1 **11.6.1.2 Cost Estimate**

2 The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be  
3 made. It shall include a breakdown for labor, materials, equipment, overhead (which includes all  
4 indirect costs) and profit, unless WSDOT agrees otherwise. The estimate shall include costs  
5 allowable under Section 11.7.2, if any. If the work is to be performed by Subcontractors and if the  
6 work is sufficiently defined to obtain Subcontractor quotes, Design-Builder shall obtain quotes (with  
7 breakdowns showing cost of labor, materials, equipment, overhead and profit) on the  
8 Subcontractor's stationery and shall include such quotes as back-up for Design-Builder's estimate.  
9 No markup shall be allowed in excess of the amounts allowed under Sections 11.7.2 and 11.9.  
10 Design-Builder shall identify all conditions with respect to prices or other aspects of the cost  
11 estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence  
12 or non-occurrence of an event.

13 **11.6.1.3 Time Impact Analysis**

14 If Design-Builder claims that such event, situation or change affects the Critical Path, it shall  
15 provide a time impact analysis indicating all activities represented or affected by the change, with  
16 activity numbers, durations, predecessor and successor activities, resources and cost. Design-  
17 Builder shall be responsible for preparing a Contract Schedule update, in form satisfactory to  
18 WSDOT, which compares the proposed new schedule to the Baseline Contract Schedule or  
19 Monthly Contract Schedule Update, as appropriate. The Contract Schedule update shall  
20 demonstrate to WSDOT's reasonable satisfaction that the event or circumstance: (1) had a  
21 specific impact on the Critical Path, and except in cases of concurrent delay, was the sole cause of  
22 such impact, and (2) could not have been avoided by re-sequencing of the Work or other  
23 reasonable alternatives. If a request for time extension, combined with previous extension  
24 requests, equals 20 percent or more of the Baseline Contract Schedule, Design-Builder shall  
25 provide with the request a written consent of the Surety or Sureties if WSDOT requests such  
26 consent.

27 **11.6.1.4 Other Supporting Documentation**

28 Design-Builder shall provide such other supporting documentation as may reasonably be required  
29 by WSDOT.

30 **11.6.2 Justification**

31 All requests for Change Orders shall include a narrative justification therefor, detailing all causes of  
32 the proposed change, making specific reference to the applicable provisions of this Article 11  
33 which permit a Change Order to be issued, and describing the data and documents which  
34 establish the necessity and amount of such proposed change.

35 **11.6.3 Design-Builder Representation**

36 Each Change Order (other than Change Orders issued unilaterally by WSDOT) shall contain a  
37 sworn certification in form acceptable to WSDOT by Design-Builder that the amount of time and/or  
38 compensation requested includes all known and anticipated impacts or amounts, direct, indirect  
39 and consequential, which may be incurred as a result of the event or matter giving rise to such  
40 proposed change and that Design-Builder has no reason to believe and does not believe that the  
41 factual basis for the Change Order is falsely represented.

1 **11.7 Certain Limitations**

2 **11.7.1 Limitation on Increases in Compensation**

3 Any increase in Design-Builder's compensation allowed hereunder shall exclude:

- 4 (a) costs caused by the breach of contract or fault or negligence, or act or failure to act  
5 of any DB-Related Entity;
- 6 (b) costs which could reasonably have been avoided by Design-Builder, for example by  
7 resequencing, reallocating or redeploying its forces to other portions of the Work or  
8 to other activities unrelated to the Work (with the understanding that any additional  
9 costs reasonably incurred in connection with such reallocation or redeployment are  
10 allowable);
- 11 (c) costs for any rejected Work which failed to meet the requirements of the Contract  
12 Documents and any necessary remedial Work;
- 13 (d) Costs payable by Design-Builder under Sections 5.9.3 and 5.9.4; and
- 14 (e) any standby or rental costs for the TBM (although additional costs of operation and  
15 maintenance of the TBM are allowable).

16 **11.7.2 Limitation on Delay and Disruption Damages**

17 **11.7.2.1 Acceleration Costs; Delay and Disruption Damages**

18 Acceleration Costs shall be compensable hereunder only with respect to Change Orders issued by  
19 WSDOT as an alternative to allowing an extension of a Completion Deadline as contemplated by  
20 Section 11.3. Other delay and disruption damages shall be compensable hereunder only with  
21 respect to delays described in Section 11.4(b).

22 **11.7.2.2 Other Limitations**

23 Delay and disruption damages shall be limited to direct costs directly attributable to the delays  
24 described in Section 11.7.2.1 and markups thereon as determined by the parties. In addition,  
25 before Design-Builder may obtain any increase in compensation for extended overhead,  
26 Acceleration Costs or other damages relating to delay, Design-Builder shall have demonstrated to  
27 WSDOT's satisfaction that:

- 28 (a) its schedule which defines the affected Critical Path in fact set forth a reasonable  
29 method for completion of the Work;
- 30 (b) the change in the Work or other event or situation which is the subject of the  
31 requested Change Order has caused or will result in an identifiable and measurable  
32 disruption of the Work which impacted the Critical Path activity;
- 33 (c) the delay or damage was not due to any breach of contract or fault or negligence, or  
34 act or failure to act of any DB-Related Entity, and could not reasonably have been  
35 prevented or avoided by Design-Builder, for example by resequencing, reallocating  
36 or redeploying its forces to other portions of the Work or other activities unrelated to  
37 the Work (subject to reimbursement for additional costs reasonably incurred in  
38 connection with such reallocation or redeployment);
- 39 (d) the delay for which compensation is sought is not concurrent with any other delay  
40 other than a WSDOT-Caused Delay; and

1 (e) Design-Builder has suffered or will suffer actual costs due to such delay, each of  
2 which costs shall be documented in a manner satisfactory to WSDOT.

### 3 **11.8 Pricing of Change Orders**

4 Except as otherwise provided herein, WSDOT and Design-Builder (on its own behalf and on behalf  
5 of its Subcontractors) shall endeavor to negotiate, in good faith, a reasonable cost for each  
6 Change Order.

#### 7 **11.8.1 Negotiated Change Orders**

8 A negotiated Change Order shall specify, as applicable, scheduling requirements, time extensions  
9 and all costs of any nature arising out of the Work covered by the Change Order. Notwithstanding  
10 the foregoing, the parties may mutually agree to use a multiple-step process involving issuance of  
11 a Change Order which includes an estimated construction cost and which provides for a revised  
12 Change Order to be issued after a certain design level has been reached, thus allowing a  
13 refinement and further definition of the estimated construction cost.

#### 14 **11.8.2 Unit Priced Change Orders**

15 WSDOT and Design-Builder may agree to negotiate unit prices for changed Work. Measurement  
16 of unit-priced quantities will be as specified in the Change Order. Unit prices shall be deemed to  
17 include all costs for labor, material, overhead and profit, and shall not be subject to change  
18 regardless of any change in the estimated quantities.

#### 19 **11.8.3 Added Work**

20 When the Change Order adds Work to Design-Builder's scope that is not covered by existing unit  
21 prices, the increase in Design-Builder's compensation shall be (a) negotiated based on estimated  
22 costs of labor, material and equipment, or (b) based on actual costs and markups in accordance  
23 with Section 11.9.

#### 24 **11.8.4 Deleted Work**

25 When the Change Order deletes Work from the scope of the Work covered by the Lump Sum  
26 Amount (including deletion of any Work contained in the Contract Documents that is found to be  
27 unnecessary), the amount of the reduction in the Lump Sum Amount shall be based upon a current  
28 estimate including a bill of material, a breakdown of labor and equipment costs and overhead and  
29 profit associated with the deleted work. The current estimated amount of risk associated with such  
30 Work shall be a factor in determining the markup for the deduction. When a deduction is involved,  
31 documented cancellation and restocking charges may be included in costs and subtracted from the  
32 price deduction.

#### 33 **11.8.5 Work Both Added and Deleted**

34 When the Change Order involves lump sum pricing and includes both added and deleted Work,  
35 Design-Builder shall prepare a statement of the cost of labor, material and equipment for both  
36 added and deleted work.

37 (a) If the change results in a net increase in cost, the change shall be treated as Work  
38 added. Markups for overhead and profit will be allowed only for the net increase in  
39 cost in order to establish the amount to be added to the Lump Sum Amount.

1 (b) If the change results in a net decrease in cost, the change shall be treated as Work  
2 deleted and the provisions of Section 11.8.4 shall be used on the net decrease in  
3 cost in order to establish the amount to be deducted from the Lump Sum Amount.

4 (c) If the change results in a net change of zero, there will be no change in the Lump  
5 Sum Amount.

## 6 **11.9 Force Account**

7 The Contract Documents or Change Orders may call for Work or material to be paid for by force  
8 account. WSDOT shall reimburse Design-Builder for all costs associated with force account Work,  
9 including costs of design, engineering, labor, small tools, supplies, equipment, specialized  
10 services, materials, applicable taxes, overhead and profits commensurate with those costs. The  
11 amount to be paid shall be determined in accordance with this Section 11.9.

### 12 **11.9.1 Construction Labor Costs**

13 Labor reimbursement calculations shall be based on a "Project Labor List" prepared and submitted  
14 by Design-Builder and by any Subcontractor before commencing force account Work. Once a  
15 Project Labor List is approved by WSDOT, it shall be used to calculate force account Work labor  
16 payment until a new Project Labor List is submitted and approved. WSDOT may compare the  
17 Project Labor List to payrolls and other documents and may, at any time, require Design-Builder to  
18 submit a new Project Labor List. Design-Builder may submit a new Project Labor List at any time.  
19 Prior payment calculations shall not be adjusted as a result of a new Project Labor List.

#### 20 **11.9.1.1 Preparation of Project Labor List**

21 The Project Labor List shall be accurate and satisfy the requirements of this Section 11.9.1.1. The  
22 Project Labor List shall include regular time and overtime rates for all employees (or work  
23 classifications) expected to participate in force account Work. The rates shall include the basic  
24 wage and fringe benefits, the current rates for Federal Insurance Compensation Act (FICA),  
25 Federal Unemployment Tax Act (FUTA), State Unemployment Tax Act (SUTA), the company's  
26 present rates for Medical Aid and Industrial Insurance premiums and the planned payments for  
27 travel and per diem compensation.

#### 28 **11.9.1.2 WSDOT Acceptance of Project Labor List**

29 In the event that an acceptance initial Project Labor List or requested revised Project Labor List is  
30 not received and approved by WSDOT by the time the force account Work calculations have  
31 begun, WSDOT will develop a Project Labor List unilaterally, utilizing the best data available, that  
32 will be used until Design-Builder's Project Labor List is received and approved. Prior calculations,  
33 prepared using the WSDOT list, will not be revised as a result of differences between it and  
34 Design-Builder's Project Labor List.

#### 35 **11.9.1.3 Labor Markup**

36 In addition to the compensation for direct labor costs described in Sections 11.9.1.1 and 11.9.1.2,  
37 WSDOT will pay Design-Builder 29 percent of the sum of the costs calculated for labor  
38 reimbursement to cover Project overhead, general company overhead, profit, bonding, insurance  
39 required by Article 20, Business and Occupation tax, and any other costs incurred. This amount  
40 will include any costs of safety training and health tests, but will not include such costs for unique  
41 force account Work that is different from typical Work and which could not have been anticipated  
42 during preparation of the Proposal.

1 **11.9.1.4 Monthly Contract Schedule Update for Force Account Work**

2 Force account Work activities will not be initially price loaded, but said "as-built" activities will be  
3 added to the Monthly Contract Schedule Updates described in Section 10.2 to show their  
4 relationship (if any) to other scheduled Work activities and the price paid for completed work will be  
5 added to these activities at the end of each payment period..

6 **11.9.2 Non-Construction Labor**

7 The cost of labor for non-construction-related force account Work (including design, surveying,  
8 utility coordination, permits, professional environmental services and similar aspects of the Work),  
9 whether provided by Design-Builder or a Subcontractor, will equal the sum of (1) actual wages (i.e.  
10 the base wage paid to the employee exclusive of fringe benefits), plus (2) a labor surcharge of 150  
11 percent on such amount, which shall constitute full compensation for all state and federal payroll,  
12 unemployment and other taxes, workers' compensation, fringe benefits (including health insurance,  
13 retirement plans, vacation, sick leave and bonuses) and all other payments made to, or on behalf  
14 of, the workers, in excess of actual wages, as well as for overhead. This amount shall be  
15 considered full compensation and no further markups will be allowed.

16 **11.9.3 Material Costs**

17 WSDOT will reimburse invoice costs for Design-Builder supplied Materials. The costs shall include  
18 freight handling charges and applicable taxes. Before force account Work is started, WSDOT may  
19 require Design-Builder to obtain multiple quotations for the materials to be utilized and select the  
20 supplier with prices and terms most advantageous to WSDOT.

21 **11.9.3.1 Calculation of Cost of Materials**

22 WSDOT will provide a list of the types and quantities of Design-Builder-supplied materials  
23 witnessed by WSDOT as being utilized in force account Work. The list will be furnished promptly  
24 after the material is incorporated, on a daily basis unless agreed otherwise. Design-Builder may  
25 propose corrections to the list and will supply prices for the materials and other costs and return  
26 the list to WSDOT. To support the prices, Design-Builder shall attach valid copies of supplier  
27 invoices. If invoices are not available for materials from Design-Builder's stocks, Design-Builder  
28 shall certify actual costs (at a reasonable level) by affidavit. WSDOT will review the prices and any  
29 Design-Builder-proposed corrections and, if reasonable, approve the completed list. Once  
30 approved, the prices will be utilized in the calculation of force account reimbursement for materials.

31 If, in the case of non-invoiced materials supported by Design-Builder's affidavit, prices appear  
32 unreasonable, WSDOT will determine the costs for all or part of materials, utilizing the best data  
33 available.

34 **11.9.3.2 WSDOT-Supplied Material**

35 WSDOT reserves the right to provide materials (including materials that WSDOT arranges for third  
36 parties to provide). In this case, Design-Builder will receive no payment for any costs, overhead or  
37 profit arising from the value of the materials themselves. Additional costs to handle and place the  
38 WSDOT-supplied materials shall be compensated as described in this Section 11.9.

1 **11.9.3.3 Materials Markup**

2 In addition to compensation for direct materials costs, WSDOT will pay Design-Builder 21 percent  
3 of the sum of the costs calculated for materials reimbursement to cover Project overhead, general  
4 company overhead, profit, bonding, insurance required by Article 20, Business and Occupation tax,  
5 and any other costs incurred.

6 **11.9.3.4 Affiliated Source of Supply**

7 If the materials are obtained from a supply or source owned in whole or in part by Design-Builder  
8 or a Subcontractor, the cost of such materials shall not exceed the lesser of the lowest price  
9 charged by Design-Builder or such Subcontractor (as applicable) for similar materials furnished to  
10 other jobs or the current wholesale price for such materials delivered to the Site.

11 **11.9.4 Equipment**

12 WSDOT will reimburse Design-Builder for the cost of equipment utilized in force account Work that  
13 is owned (either through outright ownership or through a long-term lease) and operated by Design-  
14 Builder or a Subcontractor or equipment rented and operated by Design-Builder or Subcontractor  
15 as specified in this Section 11.9.4. Equipment that is rented with operator is considered a service  
16 and addressed in accordance with Section 11.9.5.

17 **11.9.4.1 Payment for Equipment**

- 18 (a) Payment for use of the TBM for force account Work shall be limited to actual  
19 additional costs incurred in operation and maintenance of the TBM directly  
20 attributable to such Work, including the cost of additional parts for the TBM required  
21 as a result of such Work. Labor costs for such operation and maintenance, and  
22 markups thereon, shall be determined in accordance with Section 11.9.1.
- 23 (b) The amount of payment for any other Design-Builder-owned equipment used in  
24 force account Work shall be determined according to the version of the  
25 AGC/WSDOT Equipment Rental Agreement which is in effect at the time force  
26 account Work is performed. The rates listed in the Rental Rate Blue Book (as  
27 modified by the current AGC/WSDOT Equipment Rental Agreement) shall be full  
28 compensation for all fuel, oil, lubrication, ordinary repairs, maintenance, and all  
29 other costs incidental to furnishing and operating the equipment except labor for  
30 operation. Current copies of the Rental Rate Blue Book and the AGC/WSDOT  
31 Equipment Rental Agreement are maintained at [www.wsdot.wa.gov](http://www.wsdot.wa.gov).
- 32 (c) Payment for rented equipment will be made on the basis of a valid invoice, covering  
33 the time period of the force account Work. Before force account Work is started,  
34 WSDOT may require Design-Builder to obtain multiple quotations for the rental of  
35 equipment to be utilized and select the supplier with prices and terms most  
36 advantageous to WSDOT. In the event that prior quotations are not obtained and  
37 the supplier is not a firm independent from Design-Builder or a Subcontractor, then  
38 after-the-fact quotations may be obtained by WSDOT from the open market in the  
39 vicinity and the lowest such quotation may be used in place of the submitted invoice.

40 **11.9.4.2 Small Tools**

41 In addition to the payments for Design-Builder-owned and rented equipment pursuant to  
42 Section 11.9.4.1, one or more lump-sum payments may be made for small tools. The amount to  
43 be paid shall be determined as outlined in the AGC/WSDOT Equipment Rental Agreement.



1 **11.9.4.3 Equipment Markup**

2 WSDOT will add 21 percent to equipment costs to cover Project overhead, general company  
3 overhead, profit, bonding, insurance required by Article 20, Business and Occupation tax, and any  
4 other costs incurred. This markup will be over and above those equipment costs and will not be  
5 adjusted for any equipment overhead amounts included in the Blue Book rates.

6 **11.9.5 Specialized Services**

7 Compensation for force account Work for specialized services shall be made on the basis of an  
8 invoice from the providing entity. A "specialized service" shall be one which is typically billed  
9 through invoice in standard industry practice. Before force account Work is started, WSDOT may  
10 require Design-Builder to obtain multiple quotations for the service to be utilized and select the  
11 provider with prices and terms most advantageous to WSDOT. In the event that prior quotations  
12 are not obtained and the service invoice is submitted by a Subcontractor, then after-the-fact  
13 quotations may be obtained by WSDOT from the open market in the vicinity and the lowest such  
14 quotation may be used in place of the submitted invoice.

15 Except as provided in this Section 11.9.5, WSDOT will pay Design-Builder an additional 21 percent  
16 of the sum of the costs included on invoices for specialized services to cover Project overhead,  
17 general company overhead, profit, bonding, insurance required by Article 20, Business &  
18 Occupation tax, and any other costs incurred.

19 When a supplier of services is compensated through invoice, but acts in the manner of a  
20 Subcontractor, as described in Section 11.9.7, then markup for that invoice shall be according to  
21 Section 11.9.7.

22 **11.9.6 Mobilization**

23 Force account Work involving mobilization is the preparatory Work performed by Design-Builder,  
24 including procurement, loading and transportation of tools and equipment, and personal travel time  
25 (when such travel time is a contractual obligation of Design-Builder or a customary payment from  
26 Design-Builder to all employees). Mobilization also includes the costs incurred during  
27 demobilization. Pro-rata adjustments may be made when the mobilization applies to both force  
28 account Work and other Contract Work. WSDOT will pay for mobilization for off-Site preparatory  
29 Work for force account Work items, provided that notice has been provided sufficiently in advance  
30 to allow WSDOT to witness the activity, if desired.

31 Any costs experienced during mobilization activities for labor, equipment, materials or services  
32 shall be included with the other types of force account Work and paid accordingly. Note that no  
33 additional mobilization expense will be paid for any equipment presently on Site.

34 **11.9.7 Markups on Subcontracted Works**

35 The foregoing markups will be paid to Design-Builder only for Work it performs; in the case of Work  
36 that is subcontracted, said markups will be allowed to the Subcontractor that actually performs the  
37 work. When force account Work is performed by one or more approved Subcontractors or  
38 suppliers, or through invoice by firm(s) acting in the manner of a subcontractor, Design-Builder will  
39 be allowed an additional markup, determined in accordance with Section 11.9.7.2, applied to the  
40 costs computed for Work done by each Subcontractor or supplier through Sections 11.1 through  
41 11.6, to compensate for all administrative costs, including Project overhead, general company  
42 overhead, profit, bonding, insurance required by Article 20, Business & Occupation tax, and any

1 other costs incurred. Only one such markup shall be allowed, notwithstanding the actual number  
2 of intervening Subcontractors. This markup shall fully compensate Design-Builder for overhead  
3 and profit with respect to subcontracted Work.

#### 4 **11.9.7.1 Characterization of Subcontracted Work**

5 A firm may be considered to be acting as a Subcontractor when WSDOT observes one or more of  
6 the following characteristics:

- 7 (a) The person in charge of the firm's activities takes an active role in managing the  
8 overall Project, including extensive coordination, interpretation of plans, interaction  
9 with WSDOT or management of a complex and interrelated operation;
- 10 (b) Rented equipment is provided fueled, operated and maintained by the firm.  
11 Operators of rented equipment are supervised directly by the firm's representative.  
12 There is little interaction between Design-Builder and the employees of the firm;
- 13 (c) The firm appears to be holding the risk of performance and quality of the Work;  
14 and/or
- 15 (d) The firm appears to be responsible for liability arising from the Work.

#### 16 **11.9.7.2 Calculation of Markup**

17 Markups shall be based on the amount paid for force account Work performed by each  
18 Subcontractor on each force account and calculated to include Sections 11.9.1 through 11.9.6.  
19 The markup for this amount is as follows:

20	(a)	On amounts up to \$25,000	12 percent
21	(b)	On amounts greater than \$25,000 up to \$100,000	10 percent
22	(c)	On amounts greater than \$100,000	7 percent

23 The amounts and markup rates shall be calculated separately for each Subcontractor on each  
24 force account item established.

25 The payments described in this Section 11.9.7 shall be full payment for force account Work. The  
26 calculated payment shall cover all expenses of every nature, kind, and description, including those  
27 listed above and any others incurred in performance of the force account Work.

28 An item which was included in the original scope of the Work will not be paid as force account  
29 Work unless pursuant to a Change Order that requires a payment adjustment. Force account  
30 Work may, at any time and by agreement of the Parties, be converted to agreed unit prices or lump  
31 sums applicable to the remaining Work.

#### 32 **11.9.8 Force Account Records**

##### 33 **11.9.8.1 Daily Reports**

34 Design-Builder shall furnish daily, on forms approved by WSDOT, reports of force account Work.  
35 The reports shall itemize all costs for labor, materials, and equipment rental and give total of costs  
36 to date for the force account Work. For workers, the reports shall include hours worked, rates of  
37 pay, names and classifications. For equipment, the reports shall include size, type; identification  
38 number, rental rate, and hours of operation. All such records and reports shall be made

1 immediately available to WSDOT upon its request. The cost of furnishing such reports shall be  
2 included in Design-Builder's overhead and fee percentages.

### 3 **11.9.8.2 Reports As Basis for Payment**

4 All force account Work reports shall be signed by Design-Builder or its authorized representative.  
5 WSDOT will compare its records with Design-Builder's reports, make the necessary adjustments  
6 and compile the costs of force account Work. When such reports are agreed upon and signed by  
7 both parties, they will become the basis of payment, but shall not preclude subsequent adjustment  
8 based on a later audit. Design-Builder's (and each Subcontractor's) cost records pertaining to  
9 force account Work shall be open, during all regular business hours, to inspection or audit by  
10 representatives of WSDOT during the life of the Contract and for a period of not less than seven  
11 years after Final Acceptance, and Design-Builder (and each Subcontractor) shall retain such  
12 records for that period. If an audit is to be commenced more than 60 days after Final Acceptance,  
13 Design-Builder will be given a 20 day notice of the time when such audit is to begin.

### 14 **11.9.9 Compliance with the Federal Acquisition Regulation**

15 Reimbursable expenses shall be limited to and comply with the FAR. Expenses excluded by the  
16 FAR shall not be reimbursed. If FHWA asserts that any claimed reimbursable expenses are not  
17 reimbursable under FAR, WSDOT will allow Design-Builder the opportunity to respond to FHWA  
18 and defend the allowability of the expenses.

### 19 **11.10 Disputes**

20 If WSDOT refuses to issue a Change Order based on Design-Builder's request, Design-Builder  
21 shall nevertheless perform all work as specified in an appropriate Directive Letter, with the right to  
22 submit the issue of entitlement to a Change Order to dispute resolution in accordance with  
23 Article 24. Design-Builder shall maintain and deliver to WSDOT, upon request, contemporaneous  
24 records, meeting the requirements of Section 11.9.8, for all work performed which Design-Builder  
25 believes constitutes extra work (including non-construction work), until all disputes regarding  
26 entitlement or cost of such work are resolved.

27 If WSDOT and Design-Builder agree that a request by Design-Builder to increase its compensation  
28 and/or extend any Completion Deadline has merit, but are unable to agree as to the amount of  
29 such increase and/or time extension, WSDOT agrees to mark up the Change Order request or  
30 Change Order form provided by Design-Builder to reduce the amount of the increase and/or time  
31 extension as deemed appropriate by WSDOT. In such event, WSDOT will execute and deliver the  
32 marked-up Change Order to Design-Builder within a reasonable period after receipt of a request by  
33 Design-Builder to do so, and thereafter will make payment and/or grant a time extension based on  
34 such marked-up Change Order.

35 Except as otherwise specified in the Change Order, execution of a Change Order by both parties  
36 shall be deemed accord and satisfaction of all claims by Design-Builder of any nature arising from  
37 or relating to the Work covered by the Change Order. Design-Builder's claim and any award by  
38 the dispute resolver shall be limited to the incremental costs incurred by Design-Builder with  
39 respect to the disputed matter (crediting WSDOT for any corresponding reduction in Design-  
40 Builder's other costs) and shall in no event exceed the amounts allowed by Section 11.9 with  
41 respect thereto.

1 **11.11 No Release or Waiver**

2 **11.11.1 Extension of Time for Performance**

3 No extension of time granted hereunder shall release Design-Builder's Surety from its obligations.  
4 WSDOT shall not be deemed to have waived any rights under the Contract Documents (including  
5 its right to abrogate the Contract for abandonment or for failure to complete within the time  
6 specified, or to impose and deduct damages as may be provided herein) as the result of any grant  
7 of an extension of time beyond the date fixed for the completion of any part of the Work, any  
8 acceptance of performance of any part of the Work after a Completion Deadline, or the making of  
9 any payments to Design-Builder after such date.

10 **11.11.2 No Change Order Based on Course of Conduct or Order by Unauthorized Person**

11 No course of conduct or dealings between the Parties nor express or implied acceptance of  
12 alterations or additions to the Work, and no claim that WSDOT has been unjustly enriched shall be  
13 the basis for any claim, request for additional compensation or extension of a Completion  
14 Deadline. Further, Design-Builder shall undertake, at its risk, work included in any request, order  
15 or other authorization issued by a person in excess of that person's authority as provided herein, or  
16 included in any oral request. Design-Builder shall be deemed to have performed such work as a  
17 volunteer and at its sole cost. In addition, WSDOT may require Design-Builder to remove or  
18 otherwise undo any such work, at Design-Builder's sole cost.

19

## 12. DESIGN-BUILDER INITIATED CHANGE PROPOSALS

### 12.1 Eligible Proposals

A Design-Builder Initiated Change Proposal is a proposal developed and documented by Design-Builder which meets any of the following criteria:

- (a) Any change that requires a Design Deviation. If approved by WSDOT, the cost savings realized by these types of changes shall be shared in accordance with Section 12.1.4.
- (b) Changes proposed by Design-Builder which borrow ideas from non-successful Proposals. If approved by WSDOT, the cost savings realized by these types of changes shall be shared in accordance with Section 12.1.4.
- (c) Changes deemed by WSDOT in its sole discretion to be equal or better than the requirement proposed to be changed. If approved by WSDOT, all cost savings for these changes shall be retained by Design-Builder. These changes shall be implemented in accordance with Section 12.1.5.
- (d) Changes that do not fit into subsections (a), (b) or (c) above. If approved by WSDOT, the cost savings on these changes shall be shared as the parties mutually agree. If the parties are unable to agree on how the savings will be shared, the proposed change shall be considered denied.

WSDOT shall have sole discretion to approve or disapprove any Design-Builder Initiated Change Proposal.

#### 12.1.1 Required Information

At a minimum, the following information shall be submitted by Design-Builder with each Design-Builder Initiated Change Proposal:

- (a) A statement that the submission is a Design-Builder Initiated Change Proposal, and a narrative description of the proposed change.
- (b) Description of the existing requirements of the Contract Documents that are involved in the proposed change and an itemization of the requirements that must be revised if the Design-Builder Initiated Change Proposal is approved.
- (c) Discussion of the differences between the existing requirements of the Contract Documents and the proposed change, together with advantages and disadvantages of each difference.
- (d) A description of any previous use of, or tests related to, the proposed change. If the proposed change was previously submitted on another WSDOT project, indicate the date, contract number and the action taken by WSDOT.
- (e) Impact on the proposed on life cycle costs.
- (f) Date or time by which a Change Order adopting the Design-Builder Initiated Change Proposal must be issued in order to obtain the maximum cost reduction, noting any effect on the Contract Schedule.
- (g) A complete cost analysis including (i) a cost estimate for the existing requirements of the Contract Documents compared to Design-Builder's cost estimate of the proposed changes, (ii) an estimate of any additional costs that will be incurred by

1 WSDOT if the change is approved; and (iii) the costs of development and  
2 implementation of the change by Design-Builder.

3 Design-Builder shall provide any additional information requested by WSDOT in a timely manner.  
4 Additional information could include results of field investigations and surveys, design  
5 computations and field change sheets.

## 6 **12.2 WSDOT Review and Approval or Rejection**

### 7 **12.2.1.1 Review of Design-Builder Initiated Change Proposals**

8 Upon receipt of a Design-Builder Initiated Change Proposal, WSDOT will process it expeditiously,  
9 but shall not be liable for any delay in acting upon any proposal submitted pursuant to this Section  
10 12.1. Design-Builder may withdraw all or part of any Design-Builder Initiated Change Proposal at  
11 any time prior to approval by WSDOT. Each party shall bear its own costs in connection with  
12 preparation and review of Design-Builder Initiated Change Proposals.

### 13 **12.2.1.2 Approval of Design-Builder Initiated Change Proposals**

14 WSDOT may approve, in its sole discretion, in whole or in part, by Change Order, any Design-  
15 Builder Initiated Change Proposal submitted. Until a Change Order is issued on a Design-Builder  
16 Initiated Change Proposal, Design-Builder shall remain obligated to perform the Work in  
17 accordance with the Contract Documents. WSDOT's rejection or approval of any Design-Builder  
18 Initiated Change Proposal shall be final and not subject to collaborative partnering, dispute  
19 resolution or appeal.

## 20 **12.2.2 Compensation Adjustment**

21 Except for as specified in Section 12.1.1(c), if WSDOT accepts a Design-Builder Initiated Change  
22 Proposal submitted by Design-Builder pursuant to this Article 12, the compensation payable to  
23 Design-Builder shall be adjusted in accordance with this Section 12.1.4.

### 24 **12.2.2.1 Estimated Net Savings**

25 The term "estimated net savings" as used in this Section 12.1 shall mean (a) the difference  
26 between the estimated cost of performing the Work according to the Contract Documents and the  
27 estimated cost to perform it according to the proposed change, less (b) the costs of studying and  
28 preparing the Design-Builder Initiated Change Proposal as proven by Design-Builder and approved  
29 by WSDOT in accordance with the Change Order procedures set forth herein. Design-Builder's  
30 profit shall not be considered part of the cost.

### 31 **12.2.2.2 Collateral and Future Savings**

32 Except as specified in Section 12.1.4.4, Design-Builder is not entitled to share in either collateral or  
33 future contract savings. The term "collateral savings" means those measurable net reductions in  
34 WSDOT's costs resulting from the Design-Builder Initiated Change Proposal, including costs of  
35 maintenance by WSDOT, logistics and WSDOT-furnished property. The term "future contract  
36 savings" shall mean reductions in the cost of performance of future construction contracts for  
37 essentially the same item resulting from a Design-Builder Initiated Change Proposal submitted by  
38 Design-Builder.

1 **12.2.2.3 Price Adjustment Factor**

2 The Lump Sum Amount shall be reduced by an amount equal to the sum of (a) 100 percent of any  
3 additional costs incurred by WSDOT resulting from the Design-Builder Initiated Change Proposal  
4 plus (b) 50 percent of estimated net savings, provided that Design-Builder's profit shall not be  
5 reduced as part of this calculation. If the Design-Builder Initiated Change Proposal affects the cost  
6 of unit priced Work, a comparable reduction shall be made to the Unit Prices.

7 **12.2.2.4 Payment Due Date**

8 Design-Builder's share of any Design-Builder Initiated Change Proposal cost savings shall be  
9 payable at such time as payments would have been made for the Work which is the subject of the  
10 Design-Builder Initiated Change Proposal had the Design-Builder Initiated Change Proposal not  
11 been implemented.

12 **12.3 "Or Equal" Changes**

13 Changes proposed by Design-Builder pursuant to Section 12.1.1(c) and, in WSDOT's sole  
14 discretion, deemed equal or better than the requirement proposed to be changed, shall be priced  
15 as "no cost," and shall be documented as Change Orders. In making the determination of equal or  
16 better, WSDOT may consider, among other criteria, the following:

- 17 (a) Does the proposed change meet or exceed the functional intent or intended  
18 purpose?
- 19 (b) Does the proposed change meet or exceed structural requirements?
- 20 (c) Does the proposed change meet or exceed safety requirements?
- 21 (d) Does the proposed change meet or exceed life-cycle cost or maintenance  
22 requirements?
- 23 (e) Does the proposed change meet or exceed aesthetic expectations?

24 In no case shall a Design-Builder Initiated Change Proposal that requires a Design Deviation be  
25 considered equal or better.

26 **12.3.1 Changes Which Are Not Design-Builder Initiated Change Proposals or "Or Equal"**  
27 **Changes**

28 Changes proposed by Design-Builder pursuant to Section 12.1.1(d) and, in WSDOT's sole  
29 discretion, not deemed equal or better than the requirement proposed to be changed but which  
30 WSDOT is otherwise willing to consider may be executed with a sharing of costs or savings as the  
31 parties may agree.

32 **12.3.2 Use of Design-Builder Initiated Change Proposals by WSDOT**

33 Design-Builder Initiated Change Proposals shall contain no restrictions imposed by Design-Builder  
34 on use or disclosure thereof. WSDOT retains the right to use, duplicate and disclose in whole or in  
35 part any data necessary for the utilization of Design-Builder Initiated Change Proposal on any other  
36 or subsequent Projects without any obligation to Design-Builder. This provision is not intended to  
37 deny rights provided by Law with respect to patented materials or processes.

38

1 **13. CONTRACT INCENTIVES**

2 **13.1 Shared Contingency Allowance**

3 WSDOT has established a Shared Contingency Allowance in the amount of \$40,000,000. Design-  
4 Builder will be entitled to receive 75 percent of any amount remaining in the Shared Contingency  
5 Allowance following Physical Completion of the Work and WSDOT's determination of all amounts  
6 owing to Design-Builder under Change Orders payable from the Shared Contingency Allowance.  
7 WSDOT will retain the remaining 25 percent. Design-Builder's share of the unused funds in the  
8 Shared Contingency Allowance shall be added to the Total Compensation by a Change Order and  
9 shall be due and payable at the same time as the Final Payment.

10 **13.2 Deformation Mitigation and Repair Fund**

11 Design-Builder will be entitled to receive 75 percent of any amount remaining in the Deformation  
12 Mitigation and Repair Fund following Physical Completion of the Work and WSDOT's  
13 determination of all amounts owing to Design-Builder under Change Orders payable from the fund.  
14 WSDOT will retain the remaining 25 percent. Design-Builder's share of the unused funds in the  
15 Deformation Mitigation and Repair Fund shall be added to the Total Compensation by Change  
16 Order and shall be due and payable at the same time as the Final Payment.

17 **13.3 Completion Incentive**

18 **13.3.1 Incentive for Completion Prior to Substantial Completion Deadline**

19 If Design-Builder achieves Substantial Completion of the Project prior to the Substantial  
20 Completion Deadline, Design-Builder shall be entitled to an incentive of \$25,000,000.

21 **13.3.2 Incentive for On-Time Completion or Late Completion Within Specified Period**  
22 *[include the provision only if Section 4.2 specifies less than 1,905 days]*

23 If Design-Builder achieves Substantial Completion before the date that is 316 days *[the difference*  
24 *between 1,905 and the number of days specified in Section 4.2]* after the Substantial Completion  
25 Deadline, Design-Builder shall be entitled to an incentive of \$100,000 per day, up to a maximum of  
26 \$25,000,000, for each day that the actual date of Substantial Completion precedes said date. If an  
27 incentive is payable under Section 13.3.1, no incentive would be payable under this Section 13.3.2.  
28 *[For example, if Section 4.2 sets the completion deadline at 1,850 days, the blank would be filled in*  
29 *with 55. Under this scenario, if completion occurs 20 days after the Substantial Completion*  
30 *Deadline (including any extensions of that deadline allowed under Article 11), the incentive would*  
31 *be \$3,500,000 (\$100,000 times 35 days which is 55 minus 20).]*

32 **13.3.3 Payment of Incentive**

33 Incentive payments owing under this Section 13.3 shall be added to the Total Compensation by a  
34 Change Order and shall be due and payable at the same time as the Final Payment.

35 **13.3.4 No Effect on Liquidated Damages**

36 Design-Builder's right to receive incentive payments owing under this Section 13.3 shall not affect  
37 its obligation to pay Liquidated Damages under Article 17.



1 **14. SUSPENSION OF WORK**

2 **14.1 Suspension for Convenience**

3 WSDOT may, at any time and for any reason, by written notice, order Design-Builder to suspend  
4 all or any part of the Work required under the Contract Documents for the period of time that  
5 WSDOT deems appropriate for the convenience of WSDOT. Design-Builder shall promptly comply  
6 with any such written suspension order. Design-Builder shall promptly recommence the Work  
7 upon receipt of written notice from WSDOT directing Design-Builder to resume Work.

8 **14.2 Suspension for Cause**

9 WSDOT has the authority by written order to suspend the Work without liability to WSDOT wholly  
10 or in part for Design-Builder's failure to:

- 11 (a) correct conditions unsafe for the Project personnel or general public;  
12 (b) comply with any Governmental Approval, Law or otherwise carry out the  
13 requirements of the Contract Documents;  
14 (c) carry out reasonable orders of WSDOT; or  
15 (d) comply with environmental requirements or requirements for developing and  
16 implementing the Quality Management Plan.

17 Design-Builder shall promptly comply with any such written suspension order. Design-Builder shall  
18 promptly recommence the Work upon receipt of written notice from WSDOT directing Design-  
19 Builder to resume Work.

20 **14.3 Design-Builder Responsibilities During Suspension**

21 During periods that Work is suspended, Design-Builder shall continue to be responsible for the  
22 Work and shall prevent damage or injury to the Project and other facilities in the Project vicinity,  
23 provide for drainage, obtain and maintain compliance with all Governmental Approvals, maintain all  
24 Design-Builder-provided insurance and bonds and erect necessary temporary structures, signs or  
25 other facilities required to maintain the Project and other facilities in the Project vicinity. During any  
26 suspension period, unless otherwise directed by WSDOT, Design-Builder shall continue to be  
27 responsible for maintenance of traffic in accordance with the Traffic Management Plan and TR  
28 Section 2.22, and for maintenance during construction in accordance with TR Section 2.29. If the  
29 suspension is for WSDOT's convenience, the additional work performed by Design-Builder during  
30 the suspension period shall be considered WSDOT-Directed Changes.

31

1 **15. TERMINATION FOR CONVENIENCE**

2 **15.1 Notice of Termination**

3 WSDOT may terminate the Contract and the performance of the Work by Design-Builder in whole  
4 or, from time to time, in part, if WSDOT determines, in its sole discretion, that a termination is in the  
5 best public, State or national interest to do so. In addition, in the event that the Record of Decision  
6 (ROD) results in selection of either the no-build alternative or a build alternative different from the  
7 Bored Tunnel Alternative, the Contract will be terminated for convenience, Design-Builder will be  
8 paid for the NTP 1 Work pursuant to the Contract, and Design-Builder will not be entitled to any  
9 further compensation.

10 WSDOT shall notify Design-Builder of its decision to terminate by delivering to Design-Builder a  
11 written Notice of Termination specifying the extent of termination and its effective date.  
12 Termination (or partial termination) of the Contract shall not relieve any Surety of its obligation for  
13 any claims arising out of the Work performed.

14 **15.2 Design-Builder's Responsibilities Upon Termination**

15 After receipt of a Notice of Termination, and except as otherwise directed by WSDOT, Design-  
16 Builder shall immediately proceed as follows, regardless of any delay in determining or adjusting  
17 any amounts due under this Article 15.

- 18 (a) Stop Work as specified in the notice;
- 19 (b) Communicate such notice to all affected Subcontractors and suppliers and that their  
20 Subcontracts and supply agreements are not to be further performed unless  
21 otherwise authorized in writing by WSDOT;
- 22 (c) Place no further Subcontracts or orders for materials, services or facilities, except as  
23 necessary to complete the continued portion of the Work, if any, or for mitigation of  
24 damages;
- 25 (d) Terminate all Subcontracts to the extent that they relate to the Work terminated  
26 unless directed by WSDOT to assign all of the right, title and interest of Design-  
27 Builder under one or more Subcontracts so terminated, in which case Design-  
28 Builder shall assign the Subcontracts identified by WSDOT and terminate all  
29 remaining Subcontracts;
- 30 (e) Subject to the prior approval of WSDOT, settle all outstanding liabilities and claims  
31 arising out of such termination of Subcontracts;
- 32 (f) Provide WSDOT with an inventory list of all materials previously produced,  
33 purchased or ordered from suppliers for use in the Work and not yet used in the  
34 Work, including its storage location, as well as any documentation or other property  
35 required to be delivered hereunder which is either in the process of development or  
36 previously completed but not yet delivered to WSDOT, and such other information  
37 as WSDOT may request; and transfer title and deliver to WSDOT, in the manner, at  
38 the times, and as and to the extent, if any, directed by WSDOT (i) fabricated or  
39 unfabricated parts, the Work in process, completed Work, supplies and other  
40 material produced or acquired for the Work terminated; and (ii) the Design  
41 Documents, Working Drawings and all other completed or partially completed  
42 drawings (including plans, elevations, sections, details and diagrams),

1 specifications, records, samples, information and other property that would have  
2 been required to be furnished to WSDOT if the Work had been completed;

- 3 (g) Complete performance in accordance with the Contract Documents of all Work not  
4 terminated;
- 5 (h) Take all action that may be necessary, or that WSDOT may direct, for the safety,  
6 protection and preservation of (a) the public, including public and private vehicular  
7 movement, (b) the Work and (c) the equipment, machinery, materials and property  
8 related to the Contract Documents that is in the possession of Design-Builder and in  
9 which WSDOT has or may acquire an interest;
- 10 (i) As authorized by WSDOT in writing, use its best efforts to sell, in a manner, at the  
11 times, to the extent, and at the price or prices directed or authorized by WSDOT,  
12 any property of the types referred to in Section 15.2(f); provided, however, that  
13 Design-Builder (i) is not required to extend credit to any purchaser, and (ii) may  
14 acquire the property under the conditions prescribed and at prices approved by  
15 WSDOT. The proceeds of any transfer or disposition will be applied to reduce any  
16 payments to be made by WSDOT under the Contract Documents or paid in any  
17 other manner directed by WSDOT;
- 18 (j) If requested by WSDOT, withdraw from the portions of the Site designated by  
19 WSDOT and remove such materials, equipment, tools and instruments used by, and  
20 any debris or waste materials generated by, Design-Builder and any Subcontractor  
21 in the performance of the Work as WSDOT may direct; and
- 22 (k) Take other actions directed by WSDOT.

### 23 **15.3 Responsibility After Notice of Termination**

24 Design-Builder shall continue to be responsible for damage to materials after issuance of the  
25 Notice of Termination, except as follows:

- 26 (a) Design-Builder's responsibility for damage to materials for which partial payment  
27 has been made as provided herein shall terminate when WSDOT certifies that those  
28 materials have been stored in the manner and at the locations directed by WSDOT.
- 29 (b) Design-Builder's responsibility for damage to materials purchased by WSDOT  
30 subsequent to the issuance of the notice that the Contract is to be terminated shall  
31 terminate when title and delivery of those materials has been taken by WSDOT.

32 Immediately after WSDOT determines that Design-Builder has completed the Work directed to be  
33 completed prior to termination and such other work as may have been ordered to secure the  
34 Project for termination, Design-Builder will not be required to provide for continuing safety, security  
35 and maintenance at the Site.

### 36 **15.4 Negotiated Termination Settlement**

#### 37 **15.4.1 Settlement Proposal**

38 After receipt of a Notice of Termination, Design-Builder shall submit a final termination settlement  
39 proposal to WSDOT in the form and with the certification prescribed by WSDOT. Design-Builder  
40 shall submit the proposal promptly, but no later than 60 days from the effective date of termination,  
41 unless Design-Builder has requested a time extension in writing within such 60-day period and  
42 WSDOT has agreed in writing to allow such an extension. WSDOT will then review Design-  
43 Builder's termination settlement proposal and will act upon it, return it with comments or reject it. If

1 Design-Builder fails to submit the proposal within the time allowed, WSDOT may determine, on the  
2 basis of information available to it, the amount, if any, due Design-Builder because of the  
3 termination and shall pay Design-Builder the amount so determined. Design-Builder agrees to  
4 make all records available to the extent deemed necessary by WSDOT to verify the costs in  
5 Design-Builder's settlement proposal.

#### 6 **15.4.2 Negotiated Settlement Amount**

7 Design-Builder and WSDOT may agree, as provided in Section 15.4.1, upon the whole or any part  
8 of the amount or amounts to be paid to Design-Builder by reason of the total or partial termination  
9 of Work pursuant to this Article 15. Such negotiated settlement may include a reasonable  
10 allowance for profit solely on Work which has been completed as of the termination date and  
11 subsequently accepted by WSDOT. Upon determination of the settlement amount, the Contract  
12 will be amended accordingly, and Design-Builder will be paid the agreed amount. Nothing in  
13 Section 15.5, prescribing the amount to be paid to Design-Builder in the event that Design-Builder  
14 and WSDOT fail to agree upon the whole amount to be paid to Design-Builder by reason of the  
15 termination of Work pursuant to this Article 15, shall be deemed to limit, restrict or otherwise  
16 determine or affect the amount(s) which may be agreed upon to be paid to Design-Builder  
17 pursuant to this Section 15.4. WSDOT's execution and delivery of any settlement agreement shall  
18 not affect any of its rights under the Contract Documents with respect to completed Work, relieve  
19 Design-Builder from its obligations with respect thereto, including Warranties, or affect Design-  
20 Builder's rights under the Contract Bonds as to such completed or non-terminated Work.

#### 21 **15.5 Determination of Settlement Amount If Negotiations Fail**

22 If Design-Builder and WSDOT fail to agree, as provided in Section 15.4.2, upon the whole amount  
23 to be paid to Design-Builder by reason of the termination of Work pursuant to this Article 15, the  
24 amount payable (exclusive of interest charges) shall be determined by WSDOT in accordance with  
25 the following, but without duplication of any amounts agreed upon in accordance with Section 15.4:

##### 26 **15.5.1 Payment Amount**

27 Subject to the limit on WSDOT expenditures set forth in Section 10.4.1, WSDOT will pay Design-  
28 Builder the sum of the following amounts for Work performed prior to the effective date of the  
29 Notice of Termination, as such amounts are determined by WSDOT:

- 30 (a) Design-Builder's actual reasonable out-of-pocket cost (without profit, and including  
31 equipment costs only to the extent permitted by Article 11) for all Work performed  
32 other than unit priced Work. Costs to be reimbursed include mobilization,  
33 demobilization and work done to secure the Project for termination, including  
34 reasonable overhead and accounting for any refunds payable with respect to  
35 insurance premiums, deposits or similar items, as established to WSDOT's  
36 satisfaction. In determining the reasonable cost, deductions will be made for the  
37 cost of materials to be retained by Design-Builder, amounts realized by the sale of  
38 materials and for other appropriate credits. Deductions will also be made for the  
39 cost of damaged materials. When, in the opinion of WSDOT, the cost of an item of  
40 Work is excessively high due to costs incurred to remedy or replace defective or  
41 rejected Work, the reasonable cost to be allowed will be the estimated reasonable  
42 cost of performing that Work in compliance with the requirements of the Contract  
43 Documents and the excessive actual cost will be disallowed.
- 44 (b) As profit on clause (a) above, a sum determined by WSDOT to be fair and  
45 reasonable; provided, however, that if it appears that Design-Builder would have

1 sustained a loss, no profit shall be included or allowed under this Section 15.5.1 and  
2 an appropriate adjustment shall be made in the settlement amount.

3 (c) The cost of settling and paying claims arising out of the termination of Work under  
4 Subcontracts and supply agreements as provided in Section 15.2(e), exclusive of  
5 the amounts paid or payable on account of supplies or materials delivered or  
6 services furnished by the Subcontractor or supplier prior to the effective date of the  
7 Notice of Termination under the Contract, which amounts shall be included in the  
8 cost on account of which payment is made under clause (a) above.

9 (d) The reasonable out-of-pocket cost (including reasonable overhead) of the  
10 preservation and protection of property incurred pursuant to Section 15.2(h) and any  
11 other reasonable out-of-pocket cost (including overhead) incidental to termination of  
12 Work under the Contract, including the reasonable cost to Design-Builder of  
13 handling material returned to the supplier, delivered to WSDOT or otherwise  
14 disposed of as directed by WSDOT, and including a reasonable allowance for  
15 Design-Builder's administrative costs in determining the amount due to Design-  
16 Builder as the result of the termination of Work under the Contract.

17 (e) For unit priced Work, payment will be made for the actual number of units of Work  
18 completed at the Contract unit prices.

#### 19 **15.5.2 Maximum Compensation**

20 Design-Builder acknowledges and agrees that it shall not be entitled to any compensation in  
21 excess of the value of the Work performed (determined as provided in Section 15.5.1) plus its  
22 settlement costs, and that items such as lost or anticipated profits, unabsorbed overhead and  
23 opportunity costs shall not be recoverable by it upon termination of the Contract. However, the  
24 total amount to be paid to Design-Builder for Lump Sum Work performed prior to the termination  
25 may not exceed the total Lump Sum Amount plus applicable amounts payable from the Escalation  
26 Fund for such Work, less the amount of payments previously made and less the portion of the  
27 Lump Sum Amount allocable to Work not terminated. In addition, the costs identified in  
28 Sections 15.5.1(b), (c), (d) and (e) will be allowed as described therein. Furthermore, if any refund  
29 is payable with respect to insurance or bond premiums, deposits or similar items which were  
30 previously passed through to WSDOT by Design-Builder, such refund shall be paid directly to  
31 WSDOT or otherwise credited to WSDOT.

#### 32 **15.5.3 Excluded Items**

33 Except for normal spoilage, and except to the extent that WSDOT will have otherwise expressly  
34 assumed the risk of loss, there will be excluded from the amounts payable to Design-Builder under  
35 Section 15.5.1, the fair value, as determined by WSDOT, of equipment, machinery, materials and  
36 property which is destroyed, lost, stolen or damaged so as to become undeliverable to WSDOT, or  
37 to a buyer pursuant to Section 15.2(i). The amount set forth in the Proposal by Design-Builder for  
38 the Work terminated shall be a factor to be analyzed in determining the value of the Work  
39 terminated.

#### 40 **15.5.4 Payment of Termination Amount**

41 Upon determination of the amount of the termination payment, the Contract shall be amended to  
42 reflect the agreed termination payment, and Design-Builder shall be paid the agreed amount.

1 **15.6 Termination for Failure to Issue NTP 2**

2 If NTP 2 has not been issued by March 1, 2012, Design-Builder's sole and exclusive remedy for  
3 such failure shall be as follows:

4 **15.6.1** Design-Builder may seek to negotiate a Change Order including an extension in time for  
5 issuance of NTP 2 and an increase in the Lump Sum Amount mutually acceptable to Design-  
6 Builder and WSDOT.

7 **15.6.2** If Design-Builder does not wish to seek a Change Order as provided above or WSDOT fails  
8 to agree to a Change Order acceptable to Design-Builder, then Design-Builder shall have the right  
9 to notify WSDOT that this Contract is terminated for convenience under this Article 15. Upon  
10 delivery by Design-Builder to WSDOT of such a notice of termination at any time after March 1,  
11 2012 and before NTP 2 is issued, the provisions of this Article 15 shall apply. If NTP 2 is issued  
12 before Design-Builder has delivered notice of termination, Design-Builder shall be entitled to an  
13 increase in the Lump Sum Amount in the amount of \$56,000 per day, for each day after August 31,  
14 2011 until the NTP 2 issuance date.

15 **15.7 Partial Termination**

16 If a termination hereunder is partial, the portion of the Lump Sum Amount allocable to the  
17 remainder of the Work shall be adjusted as appropriate to account for the change in the overall  
18 scope of the Project, and the Escalation Fund shall be reduced pro rata based on the reduction in  
19 the total cost of the Work. Unit prices will not be adjusted.

20 **15.8 Reduction in Amount of Claim**

21 The amount otherwise due Design-Builder under this Article 15 shall be reduced by (a) all  
22 unliquidated advance or other payments made to or on behalf of Design-Builder applicable to the  
23 terminated portion of the Contract, (b) the amount of any claim which WSDOT may have against  
24 any DB-Related Entity in connection with the Contract Documents, (c) the agreed price for, or the  
25 proceeds of the sale of, any property, materials, supplies or other things acquired by Design-  
26 Builder or sold, pursuant to the provisions of this Article 15, and not otherwise recovered by or  
27 credited to WSDOT, (d) amounts that WSDOT deems advisable to retain to cover any existing or  
28 threatened claims, Liens and stop notices relating to the Project, including claims by Utility Owners,  
29 (e) the cost of repairing any Nonconforming Work and (f) any amounts due or payable by Design-  
30 Builder to WSDOT.

31 **15.9 Partial Payments**

32 WSDOT may, from time to time, under such terms and conditions as it may prescribe and in its  
33 sole discretion, make partial payments on account against costs incurred by Design-Builder in  
34 connection with the terminated portion of the Contract, whenever in the opinion of WSDOT the  
35 aggregate of such payments shall be within the amount to which Design-Builder will be entitled  
36 under this Article 15. If the total of such payments is in excess of the amount finally agreed or  
37 determined to be due under this Article 15, such excess shall be payable by Design-Builder to  
38 WSDOT upon demand together with interest thereon as set forth in Section 10.7.

39 **15.10 Subcontracts**

40 Design-Builder shall insert in all Subcontracts and supply agreements a requirement that the  
41 Subcontractor or supplier shall stop Work on the date and to the extent specified in a Notice of

1 Termination from WSDOT in accordance with this Article 15, and shall require Subcontractors to  
2 insert the same provision in each Subcontract and supply agreement at all tiers.

3 For the purposes of Sections 15.4.2 and 15.5, upon termination under Section 15.2(d) of Work  
4 under any Subcontract or supply agreement, Design-Builder will not be entitled to reimbursement  
5 for that portion of the termination settlement with any such Subcontractor of supplier which  
6 constitutes anticipatory or unearned profit on Work not performed, or which constitutes  
7 consequential damages on account of the termination or partial termination.

#### 8 **15.11 No Unearned Profits or Consequential Damages**

9 Under no circumstances shall Design-Builder be entitled to anticipatory or unearned profits or  
10 consequential or other damages as a result of a termination or partial termination under this  
11 Article 15. The payment to Design-Builder determined in accordance with this Article 15  
12 constitutes Design-Builder's sole and exclusive remedy for a termination under this Article 15.

#### 13 **15.12 No Waiver**

14 Termination for convenience shall not result in a forfeiture by WSDOT of damages it may be  
15 entitled to in connection with any Event of Default, except to the extent that settlement of such  
16 damages was included in the calculation of the compensation owing Design-Builder upon the  
17 termination for convenience.

#### 18 **15.13 Dispute Resolution**

19 The failure of the parties to agree on amounts due under this Article 15 shall be a dispute to be  
20 resolved in accordance with Article 24.

#### 21 **15.14 Allowability of Costs**

22 All costs claimed by Design-Builder under this Article 15 shall, at a minimum, be allowable,  
23 allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

#### 24 **15.15 Suspension of Work**

25 In the event of any suspension of Work by WSDOT for more than 180 consecutive days, Design-  
26 Builder shall have the right to notify WSDOT that this Contract is terminated for convenience under  
27 this Article 15. Design-Builder shall notify WSDOT of such election by delivering to WSDOT a  
28 written notice of termination due to such suspension specifying its effective date. Upon delivery by  
29 Design-Builder to WSDOT of a notice of termination, delivered at any time after 180 days of  
30 suspension and before the suspension is lifted, the provisions of this Article 15 shall apply.

#### 31 **15.16 Aggregate Cap On Liability**

##### 32 **15.16.1 General**

33 Subject to the exclusions set forth in Section 15.16.2, the entire liability of Design-Builder for any  
34 damages arising from Design-Builder's performance or non-performance of any Work under the  
35 Contract Documents, regardless of the form of action (whether in contract, tort including  
36 negligence, indemnification, strict liability or otherwise, and including all Liquidated Damages  
37 assessable under the Contract Documents), shall not exceed the caps specified below and  
38 WSDOT releases Design-Builder from all liability in excess of the specified caps:

- 1 (a) \$500,000,000 with respect to breach of Design-Builder's obligation to complete the  
2 Project and perform warranty work for the Total Compensation in accordance with  
3 the Contract;
- 4 (b) \$500,000,000 with respect to breach of Design-Builder's obligation to make  
5 payments to all laborers, mechanics, and subcontractors and material suppliers, and  
6 all persons who supply such person or persons, or subcontractors, with provisions  
7 and supplies for the carrying on the Work that are permitted to seek payment under  
8 RCW 39.08; and
- 9 (c) \$100,000,000 with respect to any and all other causes (including unreimbursed  
10 expenditures relating to Deformation as described in Section 5.9.4.3).

11 **15.16.2 Exclusions**

12 The caps on liability specified in Section 15.16.1 exclude:

- 13 (a) any type of damage or loss to the extent it is covered by insurance (i) required to be  
14 carried pursuant to Article 20, or (ii) which Design-Builder is deemed to have self-  
15 insured pursuant to Article 20;
- 16 (b) any liability for damages and losses to the extent arising from fraud or willful  
17 misconduct by a DB-Related Entity, and/or criminal acts (other than violation of a  
18 criminal law based upon strict liability or negligence) by Design-Builder; and
- 19 (c) any liability for damages and losses to the extent arising from criminal acts (other  
20 than violation of criminal law based upon strict liability or negligence) by a DB-  
21 Related Entity other than the Design-Builder to the extent said liability for damages  
22 and losses are covered by (i) insurance of any nature carried by a DB-Related Entity  
23 regardless of whether said insurance is required to be carried pursuant to Article 20  
24 and (ii) bonds provided by any DB-Related Entity other than the Design-Builder.

25



1 **16. DEFAULT; REMEDIES**

2 **16.1 Default By Design-Builder**

3 **16.1.1 Events of Default**

4 Design-Builder shall be in breach under the Contract upon the occurrence of any one or more of  
5 the following events or conditions:

- 6 (a) Design-Builder fails to promptly begin the Work under the Contract Documents  
7 following the effective date of NTP 1 or NTP 2, as the case may be;
- 8 (b) Design-Builder fails to diligently prosecute the Work to completion or otherwise fails  
9 to perform the Work with sufficient resources to ensure the prompt completion  
10 thereof;
- 11 (c) Design-Builder fails to perform Quality Control and/or Quality Assurance activities  
12 and/or fails to execute remedial action in accordance with the Quality Management  
13 Plan;
- 14 (d) Design-Builder fails to perform the Work in accordance with the Contract  
15 Documents, refuses to remove and replace rejected materials or Nonconforming or  
16 unacceptable Work, or fails to remove and replace workers as directed by WSDOT  
17 under Section 8.4.3;
- 18 (e) Design-Builder discontinues or suspends the prosecution of the Work (exclusive of  
19 Work stoppage due to (i) termination by WSDOT, (ii) suspension by WSDOT, or  
20 (iii) nonpayment by WSDOT not related to a breach by Design-Builder);
- 21 (f) Design-Builder fails to resume performance of Work which has been suspended or  
22 stopped, within a reasonable time after receipt of notice from WSDOT to do so or (if  
23 applicable) after cessation of the event preventing performance;
- 24 (g) Design-Builder breaches any other agreement contained in the Contract  
25 Documents, or Design-Builder fails to perform any other obligation under the  
26 Contract Documents, including EEO and DBE requirements;
- 27 (h) Design-Builder fails to provide and maintain the required insurance and payment  
28 and performance bond;
- 29 (i) Design-Builder assigns or transfers the Contract Documents or any right or interest  
30 therein, except as expressly permitted under Section 26.4;
- 31 (j) Design-Builder fails, absent a valid dispute, to make payment when due for labor,  
32 equipment or materials in accordance with applicable Law and its agreements with  
33 Subcontractors and suppliers, fails to comply with any Law or Governmental  
34 Approval; or fails reasonably to comply with the instructions of WSDOT consistent  
35 with the Contract Documents;
- 36 (k) Design-Builder fails to discharge or obtain a stay within 10 days of any final  
37 judgment(s) or order for the payment of money against it in excess of \$100,000 in  
38 the aggregate arising out of the prosecution of the Work (provided that, for purposes  
39 hereof, posting of a bond in the amount of 125 percent of such judgment or order  
40 shall be deemed an effective stay);
- 41 (l) Design-Builder shall have become insolvent, generally does not pay its debts as  
42 they become due, admits in writing its inability to pay its debts, or makes an

- 1 assignment for the benefit of creditors, or insolvency, receivership, reorganization or  
2 bankruptcy proceedings shall have been commenced by or against Design-Builder;
- 3 (m) Any joint venture member or general partner of Design-Builder shall have become  
4 insolvent, generally does not pay its debts as they become due, admits in writing its  
5 inability to pay its debts, or makes an assignment for the benefit of creditors, or any  
6 insolvency, receivership, reorganization or bankruptcy proceedings shall have been  
7 commenced by or against any joint venture member or general partner of Design-  
8 Builder;
- 9 (n) Any representation or warranty made by Design-Builder in the Contract Documents  
10 or in any certificate, schedule, instrument or other document delivered pursuant to  
11 the Contract Documents shall have been false or materially misleading when made;
- 12 (o) Design-Builder is a party to fraud;
- 13 (p) Design-Builder fails to take commercially reasonable action to maintain labor  
14 harmony in accordance with the requirements of the Contract Documents.

### 15 **16.1.2 Right to Cure**

16 WSDOT agrees to allow Design-Builder and Surety 15 days notice and opportunity to cure any  
17 breach before declaring an Event of Default, provided that no such notice and opportunity to cure  
18 is required for any breach which by its nature cannot be cured. If a breach is curable but by its  
19 nature cannot be cured within 15 days, as determined by WSDOT, WSDOT agrees not to declare  
20 an Event of Default provided that Design-Builder commences such cure within such 15-day period  
21 and thereafter diligently prosecutes such cure to completion; provided, however, that in no event  
22 will such cure period exceed 60 days in total. Design-Builder hereby acknowledges and agrees  
23 that the events described in subsections 16.1.1(n) and (o) are not curable. With regard to the  
24 events described in subsection 16.1.1(m), WSDOT will not declare an Event of Default if, within the  
25 15-day cure period, Design-Builder provides satisfactory assurance to WSDOT that such event will  
26 not adversely impact Design-Builder's performance of all of its obligations under the Contract  
27 Documents. Notwithstanding the foregoing, if WSDOT believes a condition affecting the Project  
28 poses an immediate and imminent danger to public health or safety, WSDOT may, without notice  
29 and without awaiting lapse of any cure period, rectify the condition at Design-Builder's cost, and so  
30 long as WSDOT undertakes such action in good faith, such action shall not expose WSDOT to  
31 liability to Design-Builder and shall not entitle Design-Builder to any other remedy, it being  
32 acknowledged that WSDOT has a paramount public interest in providing and maintaining safe  
33 public use of and access to the Project. WSDOT shall be deemed to have acted in good faith  
34 regarding the existence of such danger in the absence of clear and convincing evidence that the  
35 danger did not exist.

## 36 **16.2 Remedies**

### 37 **16.2.1 Rights of WSDOT**

38 If an Event of Default occurs, then, in addition to all other rights and remedies provided by Law or  
39 equity or available under the Contract or otherwise, including the rights to recover Liquidated  
40 Damages and to seek recourse against the Contract Bonds required hereby and/or other  
41 performance security, WSDOT shall have the following rights and remedies, without further notice,  
42 and without prejudice to any of its other rights or remedies and without waiving or releasing  
43 Design-Builder from any obligations, and Design-Builder shall have the following obligations (as  
44 applicable):

- 1 (a) WSDOT may order Design-Builder to suspend or discontinue the Work or any  
2 portion of the Work;
- 3 (b) WSDOT may terminate the Contract or a portion thereof, in which case, the  
4 provisions of Sections 15.3 and 15.4 shall apply;
- 5 (c) If and as directed by WSDOT, Design-Builder shall withdraw from the Site; and shall  
6 remove such materials, equipment, tools and instruments used by, and any debris  
7 or waste materials generated by, any DB-Related Entity in the performance of the  
8 Work;
- 9 (d) Design-Builder shall deliver to WSDOT possession of any or all facilities of Design-  
10 Builder located on the Site as well as any or all Design Documents, Working  
11 Drawings and all other completed or partially completed drawings (including plans,  
12 elevations, sections, details and diagrams), specifications, records, information,  
13 schedules, samples, shop drawings and other documents, that WSDOT deems  
14 necessary for completion of the Work;
- 15 (e) Design-Builder shall confirm the assignment to WSDOT of the Subcontracts  
16 requested by WSDOT, and Design-Builder shall terminate, at its cost, all other  
17 Subcontracts;
- 18 (f) WSDOT may deduct from any amounts payable by WSDOT to Design-Builder such  
19 amounts payable by Design-Builder to WSDOT, including Liquidated Damages or  
20 other damages payable to WSDOT under the Contract Documents;
- 21 (g) WSDOT shall have the right, but not the obligation, to pay such amount and/or  
22 perform such act as may then be required;
- 23 (h) WSDOT, without incurring any liability to Design-Builder, shall have the rights (i) to  
24 take the performance of all or a portion of the Work from Design-Builder (either with  
25 or without the use of Design-Builder's materials, equipment, tools and instruments)  
26 and enter into an agreement with another Person for the completion of such Work;  
27 or (ii) to use such other methods, as in the opinion of WSDOT, will be required for  
28 the completion of the Project; and/or
- 29 (i) WSDOT shall have the right, but is not obligated to, perform any obligations of  
30 Design-Builder, including: (i) perform or attempt to perform, or cause to be  
31 performed, such work; (ii) spend such sums as WSDOT deems necessary and  
32 reasonable to employ and pay such architects, engineers, consultants and  
33 contractors and obtain materials and equipment as may be required for the purpose  
34 of completing such work; (iii) execute all applications, certificates and other  
35 documents as may be required for completing the work; (iv) modify or terminate any  
36 contractual arrangements; (v) take any and all other actions which it may in its sole  
37 discretion consider necessary to complete the Work; and (vi) prosecute and defend  
38 any action or proceeding incident to the Work.

1 **16.2.2 Liability of Design-Builder**

2 **16.2.2.1 Occurrence of an Event of Default**

3 Subject to Section 16.2.2.8, if an Event of Default has occurred, Design-Builder shall be liable to  
4 WSDOT (in addition to any other damages under the Contract Documents other than those costs  
5 intended to be covered by Liquidated Damages payable hereunder) for all costs reasonably  
6 incurred by WSDOT or any party acting on WSDOT's behalf in completing the Work or having the  
7 Work completed by another Person (including any re-procurement costs, throwaway costs for  
8 unused portions of the completed Work and increased financing costs). Upon the occurrence of an  
9 Event of Default, WSDOT shall be entitled to withhold all or any portion of further payments to  
10 Design-Builder until such time as WSDOT is able to determine how much (if any) remains owing to  
11 Design-Builder. Promptly upon such determination, WSDOT shall notify Design-Builder in writing  
12 of the amount, if any, that Design-Builder shall pay WSDOT or that WSDOT shall pay Design-  
13 Builder with respect thereto. All costs and charges incurred by WSDOT, including attorneys',  
14 accountants' and expert witness fees and costs, together with the cost of completing the Work  
15 under the Contract Documents, will be deducted from any moneys due or which may become due  
16 to Design-Builder. If such expense exceeds the sum which would have been payable under the  
17 Contract, then Design-Builder shall pay to WSDOT the amount of such excess.

18 **16.2.2.2 Assurance of Future Performance**

19 It is recognized that if a default under Section 16.1.1(k) or (l) occurs, such event could impair or  
20 frustrate Design-Builder's performance of the Work. Accordingly, it is agreed that upon the  
21 occurrence of any such event, WSDOT shall be entitled to request of Design-Builder, or its  
22 successor in interest, adequate assurance of future performance in accordance with the terms and  
23 conditions hereof. Failure to comply with such request within 10 days of delivery of the request  
24 shall entitle WSDOT to terminate the Contract and to the accompanying rights set forth above.  
25 Pending receipt of adequate assurance of performance and actual performance in accordance  
26 therewith, WSDOT shall be entitled to proceed with the Work with its own forces or with other  
27 contractors on a time and material or other appropriate basis, the cost of which will be credited  
28 against and deducted from WSDOT's payment obligations hereunder. The foregoing shall be in  
29 addition to all other rights and remedies provided by Law or equity and such rights and remedies  
30 as are otherwise available under the Contract Documents and Contract Bonds.

31 **16.2.2.3 Alternative to Terminating the Contract and Completing the Work**

32 In lieu of the provisions of this Section 16.2 for terminating the Contract and completing the Work,  
33 WSDOT may pay Design-Builder for the parts already done according to the provisions of the  
34 Contract Documents and may treat the parts remaining undone as if they had never been included  
35 or contemplated by the Contract Documents. No claim under this provision will be allowed Design-  
36 Builder for prospective profits on, or any other compensation relating to, Work that Design-Builder  
37 has not performed.

38 **16.2.2.4 Termination Deemed to Constitute a Termination for Convenience**

39 If the Contract is terminated for grounds which are later determined not to justify a termination for  
40 default, such termination shall be deemed to constitute a termination for convenience pursuant to  
41 Article 15.

1 **16.2.2.5 Damages Resulting From Design-Builder's Breach or Failure to Perform**

2 If WSDOT suffers damages as a result of Design-Builder's breach or failure to perform an  
3 obligation under the Contract Documents, then WSDOT shall be entitled to recovery of such  
4 damages from Design-Builder regardless of whether the breach or failure that gives rise to the  
5 damages ripens into an Event of Default.

6 **16.2.2.6 Cumulative Remedies**

7 The exercise or beginning of the exercise by WSDOT of any one or more rights or remedies under  
8 this Section 16.2 shall not preclude the simultaneous or later exercise by WSDOT of any or all  
9 other rights or remedies, each of which shall be cumulative.

10 **16.2.2.7 Continued Liability of Design-Builder and Surety**

11 Design-Builder and Surety shall not be relieved of liability for continuing Liquidated Damages on  
12 account of a default by Design-Builder hereunder or by WSDOT's declaration of an Event of  
13 Default, or by actions taken by WSDOT under this Section 16.2.

14 **16.2.2.8 Consequential Damages**

15 Under no circumstances will either party be entitled to consequential damages arising out of the  
16 other's performance of (or failure to perform) under the Contract Documents, and each party  
17 hereby releases the other from such liability, provided that this limitation shall not excuse liability for  
18 fraud, gross negligence, intentional misconduct, or criminal acts and shall not limit the parties'  
19 ability to obtain recovery for liabilities, costs and losses covered by the insurance required  
20 hereunder. The term "consequential damages" shall mean those special, indirect or incidental  
21 damages that do not flow directly and immediately from an injurious act but that result indirectly  
22 from an action or failure to act, such as revenue losses, loss of use, cost of capital, debt service,  
23 loss of profit on related contracts, administrative costs, loss of bonding capacity, lost opportunity,  
24 claims of taxpayers and other indirect damage. Liabilities, costs and losses incurred by either  
25 party due to failure by the other to procure and maintain insurance policies required hereunder, as  
26 well as any amounts that this Contract expressly states are to be reimbursed from one party to the  
27 other (including interest, late charges, fees, penalties, and similar charges), shall be considered  
28 direct damages. This provision shall apply to limit liability under actions brought under any theory  
29 of law, including actions in tort (including negligence) as well as in contract.

30 **16.3 Right to Stop Work if Undisputed Payment Is Not Made**

31 Design-Builder shall have the right to stop Work if WSDOT fails to make an undisputed payment  
32 when due under Section 10.2 within seven days after receipt of notice of nonpayment. Any such  
33 Work stoppage shall be considered a suspension under Section 14.1. Design-Builder shall not  
34 have the right to terminate the Contract for default as the result of any failure by WSDOT to make  
35 an undisputed payment due hereunder, but Design-Builder shall have the right to declare a  
36 termination for convenience under Article 15 upon meeting the requirements of Section 15.15.

1 **17. LIQUIDATED DAMAGES**

2 Delays in completion of the Work and lane closures at times and in locations not consistent with  
3 the requirements of the Contract Documents result in inconvenience to the traveling public,  
4 obstruct traffic, interfere with and delay commerce, and increase risk to highway users. In addition,  
5 delays in meeting Contract milestones cause additional delays to other WSDOT contractors whose  
6 work interfaces with the Project. Delays and lane closures cost taxpayers and the City of Seattle  
7 undue sums of money, adding time needed for administration, engineering, inspection, and  
8 supervision. Accordingly, the parties agree to liquidate damages for delays in completion of the  
9 Work, delays in opening lanes, ramps or streets, and failure to meet certain Contract milestones,  
10 as specified herein. WSDOT acknowledges and agrees that the sole damages owing by Design-  
11 Builder to WSDOT for such delays shall be the liquidated amounts specified herein.

12 **17.1 Damages for Late Completion**

13 In the event that Design-Builder fails to meet the Completion Deadlines specified herein, Design-  
14 Builder agrees to pay WSDOT Liquidated Damages in the following amounts:

- 15 (a) For Design-Builder's failure to achieve Substantial Completion by the applicable  
16 deadline: \$50,000 per day until 1,905 days after the effective date of NTP 2 until the  
17 earlier to occur of the date Substantial Completion is achieved or two years after the  
18 deadline for Substantial Completion;
- 19 (b) For Design-Builder's failure to achieve Substantial Completion by 1,905 days after  
20 the effective date of NTP 2, an additional \$50,000 per day until the earlier to occur  
21 of the date Substantial Completion is achieved or two years after the deadline for  
22 Substantial Completion;
- 23 (c) For failure to achieve Physical Completion by the applicable deadline: \$7,600.00  
24 per day until the date Physical Completion is achieved; and
- 25 (d) For failure to achieve Final Completion by the applicable deadline: \$3,800.00 per  
26 day until the date Final Completion is achieved.

27 WSDOT is authorized to deduct these Liquidated Damages from any money due or coming to  
28 Design-Builder.

29 Liquidated Damages will not be assessed for any days for which an extension of time is granted.  
30 No deduction or payment of Liquidated Damages will, in any degree, release Design-Builder from  
31 its obligations and liabilities pursuant to the Contract Documents, other than the obligation to pay  
32 damages for delay.

33 **17.2 Liquidated Damages for Failure to Open Lanes**

34 In addition to any Liquidated Damages that may be payable by Design-Builder under Section 17.1,  
35 Design-Builder agrees to pay WSDOT Liquidated Damages in the following amounts in the event  
36 of any failure of Design-Builder to open any lane, ramp or street by the scheduled opening times  
37 specified in TR Section 2.22:

- 38 (a) For lanes on SR 99: \$2,700.00 for each lane for each 15 minutes (prorated to the  
39 nearest five minutes) that a lane is closed on SR 99 beyond the scheduled opening  
40 times;

- 1 (b) For all lanes on SR 99 northbound or all lanes on SR 99 southbound: \$4,000.00 for  
 2 each direction for each hour (prorated to the nearest 15 minutes) that all lanes are  
 3 closed on northbound or southbound SR 99 beyond the scheduled opening times;
- 4 (c) For SR 99 on- and off-ramps: \$350.00 for each ramp for each 15 minutes (prorated  
 5 to the nearest five minutes) that a ramp is closed beyond the scheduled opening  
 6 times; and
- 7 (d) For local principal arterial streets (1st Avenue, 3rd Avenue, 5th Avenue, or Virginia  
 8 Street): \$350.00 for each street for each 15 minutes (prorated to the nearest five  
 9 minutes) that a local principal arterial is closed beyond the scheduled opening times.

10 Design-Builder authorizes WSDOT to deduct these liquidated damages from any money due or  
 11 coming due to Design-Builder.

12 **17.3 Liquidated Damages for Failure to Meet Contract Milestones**

13 In addition to any Liquidated Damages that may be payable by Design-Builder under Sections 17.1  
 14 and 17.2, Design-Builder agrees to pay WSDOT Liquidated Damages in the event that Design-  
 15 Builder fails to meet certain Contract milestones, as follows:  
 16

Milestone Description	Amount
<b>North Construction Area</b>	
Failure to coordinate and finalize design concept with North Access Contractor by 413 days from NTP 2	\$1,300.00 per day from 413 days from NTP 2 until the date design concept is finalized
For failure to achieve Site Handback – Stage II (completion of support of excavation walls) and relinquish the Seattle maintenance yard staging area to the North Access Contractor by 1,204 days from NTP 2	\$1,000.00 per day from 888 days from NTP 2 until the date handback is achieved and staging area is relinquished
For failure to allow others access to tunnel operations buildings and/or cut-and-cover structures (to pull wire and install equipment upon completion of North Access Contractor's work) by 1,600 days from NTP 2	\$1,000.00 per day for each tunnel operation building and cut-and-cover structure for which access is not provided, from 1,284 days from NTP 2 until the date access is provided
<b>South Construction Area</b>	
For failure to coordinate and finalize design concept for interface with the South Access Contractor by 505 days from NTP 2	\$1,600.00 per day from 505 days from NTP 2 until the date design concept is finalized
For failure to achieve Site Handback – Stage I and relinquish the south end of the WOSCA site staging area to others by 717 days from NTP 2	\$1,300.00 per day from 717 days from NTP 2 until the date handback is achieved and staging area is relinquished

Milestone Description	Amount
For failure to achieve Site Handback – Stage II and relinquish the WOSCA site staging area (south of Dearborn Street) to the South Access Contractor by 1,600 days from NTP 2	\$1,200.00 per day from 1,284 days from NTP 2 until the date handback is achieved and staging area is relinquished
For failure to allow others access to tunnel operations buildings and/or cut-and-cover structures (to pull wire and install equipment) by 1,600 days from NTP 2	\$1,200.00 per day for each tunnel operation building and/or cut-and-cover structure for which access is not provided, from 1,600 days from NTP 2 until the date access is provided
For failure to achieve Site Handback – Stage III and relinquish the remainder of the WOSCA site staging area to the South Access Contractor by 1,721 days from NTP 2	\$1,200.00 per day from 1,405 days from NTP 2 until the date handback is achieved and staging area is relinquished

1 **17.4 Cap On Liability for Liquidated Damages**

2 In no event will WSDOT assess Liquidated Damages in excess of \$75,000,000.

3



1 **18. INDEMNIFICATION**

2 **18.1 Indemnifications by Design-Builder**

3 **18.1.1 General Indemnities**

4 Subject to Section 18.1.3, Design-Builder shall release, indemnify, defend and hold harmless the  
5 State, WSDOT, the City, Governor, Commission, Secretary, and all officers and employees of the  
6 State and the City, the State's and the City's agents, consultants, and their respective successors  
7 and assigns and their respective shareholders, officers, directors, agents and employees  
8 (collectively referred to as the "Indemnified Parties") from and against any and all claims, causes of  
9 action, suits, judgments, investigations, legal or administrative proceedings, penalties, fines,  
10 damages, losses, liabilities, costs and expenses, including any injury to or death of persons or  
11 damage to or loss of property (including damage to utility facilities), and including attorneys',  
12 accountants' and expert witness fees and costs, arising out of, relating to or resulting from:

- 13 (a) The breach or alleged breach of the Contract Documents by any DB-Related Entity  
14 (the requirement to provide an indemnity for breach of contract is intended to  
15 provide protection to WSDOT with respect to third party claims associated with such  
16 breach, and is not intended to provide WSDOT with an alternative cause of action  
17 for damages incurred directly by WSDOT with respect to such breach);
- 18 (b) The failure or alleged failure by any DB-Related Entity to comply with any applicable  
19 Environmental Laws or other Laws (including Laws regarding handling, generation,  
20 treatment, storage, transportation and disposal of Hazardous Materials) or  
21 Governmental Approvals in performing the Work;
- 22 (c) Any alleged patent or copyright infringement or other allegedly improper  
23 appropriation or use of trade secrets, patents, proprietary information, know-how,  
24 copyright rights or inventions in performance of the Work, or arising out of any use  
25 in connection with the Project of methods, processes, designs, information or other  
26 items furnished or communicated to WSDOT or another Indemnified Party pursuant  
27 to the Contract Documents; provided that this indemnity shall not apply to any  
28 infringement resulting from WSDOT's failure to comply with specific written  
29 instructions regarding use provided to WSDOT by Design-Builder;
- 30 (d) The alleged or actual negligent act or omission or willful misconduct of any DB-  
31 Related Entity;
- 32 (e) Any and all claims by any governmental or taxing authority claiming taxes based on  
33 gross receipts, purchases or sales, or the use of any property or income of Design-  
34 Builder or any of its Subcontractors or suppliers or any of their respective agents,  
35 officers or employees with respect to any payment for the Work made to or earned  
36 by any DB-Related Entity;
- 37 (f) Any and all stop notices and/or Liens filed in connection with the Work, including all  
38 expenses and attorneys', accountants' and expert witness fees and costs incurred in  
39 discharging any stop notice or Lien, provided that WSDOT is not in default in  
40 payments owing to Design-Builder with respect to such Work;
- 41 (g) Any spill or release or threatened spill or release of a Hazardous Material  
42 (i) attributable to the negligence, willful misconduct or breach of contract by any DB-  
43 Related Entity, or (ii) which was brought onto the Site by any DB-Related Entity;  
44 and/or

1 (h) The claim or assertion by any contractor of inconvenience, disruption, delay or loss  
2 caused by interference by any DB-Related Entity with or hindering the progress or  
3 completion of work being performed by other contractors as described in Article 6,  
4 or failure of any DB-Related Entity to cooperate reasonably with other contractors in  
5 accordance therewith.

#### 6 **18.1.2 Design Defects**

7 Subject to Section 18.1.3, Design-Builder shall release, indemnify, defend and hold harmless the  
8 Indemnified Parties from and against any and all claims, causes of action, suits, judgments,  
9 investigations, legal or administrative proceedings, penalties, fines, damages, losses, liabilities,  
10 costs and expenses, including any injury to or death of persons or damage to or loss of property  
11 (including damage to utility facilities), and including attorneys', accountants' and expert witness  
12 fees and costs, arising out of, relating to or resulting from errors, omissions, deficiencies or defects  
13 in the Design Documents, regardless of whether such errors, omissions, deficiencies or defects  
14 were also included in the Basic Configuration, Conceptual Design or Reference Documents.  
15 Design-Builder agrees that, because the Basic Configuration, Conceptual Design and Reference  
16 Documents are necessarily subject to validation, review and modification by Design-Builder, it is  
17 appropriate for Design-Builder to assume liability for errors, omissions, deficiencies or defects in  
18 the completed Project even though they may be related to errors, omissions, deficiencies or  
19 defects in the Basic Configuration, Conceptual Design or Reference Documents.

#### 20 **18.1.3 Losses Due to Negligence of Indemnified Parties**

21 Design-Builder's obligation to indemnify, defend, or save harmless an Indemnified Party under  
22 Sections 18.1.1 and 18.1.2 shall not extend to any loss, damage or cost to the extent that such  
23 loss, damage or cost was caused by the sole negligence or willful misconduct of such Indemnified  
24 Party or its agents, servants or independent contractors who are directly responsible to such  
25 Indemnified Party.

#### 26 **18.1.4 Claims by Employees**

27 In claims by an employee of Design-Builder, a Subcontractor, a supplier, anyone directly or  
28 indirectly employed by them or anyone for whose acts they may be liable, the indemnification  
29 obligation under this Section 18.1 shall not be limited by any limitation on the amount or type of  
30 damages, compensation or benefits payable by or for Design-Builder or a Subcontractor or  
31 supplier under the Washington State Industrial Insurance Act, Title 51 RCW, workers'  
32 compensation, disability benefit or any other employee benefits laws. In addition, for purposes of  
33 indemnification only, Design-Builder specifically and expressly waives any immunity that may be  
34 granted it under the Washington State Industrial Insurance Act, Title 51 RCW. Design-Builder's  
35 waiver of immunity by the provisions of this Section 18 does not extend to claims by Design-  
36 Builder's employees directly against Design-Builder.

### 37 **18.2 Responsibility of WSDOT for Certain Hazardous Materials**

#### 38 **18.2.1 Pre-Existing Site Contamination**

39 Except with respect to Design-Builder's responsibilities regarding Hazardous Materials pursuant to  
40 Section 18.1.1(g), WSDOT shall indemnify, protect, defend and hold harmless DB-Related Entities  
41 from all third party claims (including claims for response and remediation costs, administrative  
42 costs, fines, charges, penalties, attorney fees and cost recovery or similar actions brought by a  
43 governmental or private party, including third party tort liability) arising, directly or indirectly, from

1 any presence or release of any Hazardous Materials within the Project Right of Way. Except for  
2 Hazardous Materials for which Design-Builder is responsible as described in Section 18.1.1(g),  
3 without contradiction of any assertion by WSDOT of third party liability, and for purposes of this  
4 Contract only, (a) Design-Builder shall not be required to execute any hazardous waste manifests  
5 as a “generator”, and (b) Hazardous Materials encountered in the performance of the Work shall  
6 be disposed of, if at all, utilizing an EPA identification number or other appropriate legal device  
7 obtained by, and carried in the name of, WSDOT or another Person designated by WSDOT.

#### 8 **18.2.2 Temporary Water Pollution / Erosion Control**

9 In an effort to prevent, control, and stop water pollution and erosion within the Project, thereby  
10 protecting the Work, nearby land, streams, and other bodies of water, Design-Builder shall perform  
11 all Work in strict accordance with all applicable Laws governing waters of the State, as well as  
12 permits acquired for the Project.

13 Design-Builder shall perform all temporary water pollution/erosion control measures shown in the  
14 Contract Documents, Released For Construction Documents, or as ordered by WSDOT as Work  
15 proceeds.

#### 16 **18.3 No Effect on Other Rights**

17 The obligations described in this Article 18 shall not be construed to limit rights and obligations  
18 provided by law or equity which would otherwise exist in favor of a party indemnified hereunder.

#### 19 **18.4 CERCLA Agreement**

20 Without limiting their generality, the indemnities set forth in Section 18.1.1(g) are intended to  
21 operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental  
22 Response, Compensation and Liability Act, 42 U. S. C. Section 9607(e), to insure, protect, hold  
23 harmless and indemnify the Indemnified Parties.

1    **19.    SURETY BONDS**

2    Design-Builder shall provide a Performance Bond and a Payment Bond, each in the amount of  
3    \$500,000,000. Said bonds shall be in the forms attached hereto as Appendices 10-A and 10-B.  
4    Each bond required hereunder shall be provided by a Surety:

- 5           (a)    registered with the Washington State Insurance Commissioner,
- 6           (b)    appearing on the current Authorized Insurance List in the State of Washington  
7                   published by the Office of the Insurance Commissioner, and
- 8           (c)    with an A.M. Best and Company rating level of A- or better and Class IX or better, or  
9                   as otherwise approved by WSDOT in its sole discretion.

10   WSDOT may require any Sureties to appear and qualify themselves at any time. If WSDOT  
11   determines that a Surety is not qualified, WSDOT may, upon written demand, require Design-  
12   Builder to furnish a replacement bond or bonds from a qualified Surety. Until the replacement  
13   bond or bonds are furnished, payments on the Contract will stop.

1 **20. INSURANCE**

2 **20.1 Public Liability and Property Damage Insurance**

3 Design-Builder shall procure and maintain insurance as specified in this Article 20. The insurance  
4 provided hereunder shall be available for the benefit of the Indemnified Parties and Design-Builder  
5 with respect to covered claims, but shall not be interpreted to relieve Design-Builder of any  
6 obligations hereunder. Unless otherwise specified in the Contract, all insurance required  
7 hereunder shall be procured from insurance or indemnity companies with an A.M. Best and  
8 Company rating level of A- or better, Class VIII or better, or as otherwise approved by WSDOT and  
9 with companies or through sources approved by the State Insurance Commissioner pursuant to  
10 Chapter 48.05 RCW. If an insurer is not an admitted carrier (unauthorized insurer), the insurance  
11 policies and procedures for issuing the insurance policies must comply with Chapter 48.15 RCW  
12 and 284-15 WAC. Unless otherwise indicated below, the policies shall be kept in force from the  
13 Effective Date until the date of Physical Completion, as determined pursuant to Section 21.2.

14 **20.2 Minimum Insurance Requirements**

15 **20.2.1 Workers' Compensation**

16 Each Design Build Related-Entity shall provide industrial insurance and medical aid as required  
17 under Title 51 RCW. Design-Builder shall also provide coverage for claims asserted under the  
18 Longshore and Harbor Workers Compensation Act (LHWCA) and the Jones Act, as required.  
19 Design-Builder shall maintain such insurance through the expiration of the Warranty periods  
20 described in Article 22. Design-Builder shall be the named insured on these policies. If Design-  
21 Builder is self-insured under Title 51 RCW, it shall also provide an endorsement extending  
22 coverage to all State operations on an "if any" basis.

23 To the extent not provided under the Design-Builder's multi-state worker's compensation policy,  
24 Design-Builder shall also provide "stop-gap" liability insurance under its commercial general liability  
25 policy (for bodily injury or disease) with minimum limits of \$1,000,000 per accident for bodily injury  
26 by accident, \$1,000,000 per employee for bodily injury by disease, and \$1,000,000 aggregate limit  
27 for bodily injury by disease.

28 **20.2.2 Commercial General Liability**

29 Design-Builder shall provide commercial general liability coverage, on a primary basis, for bodily  
30 injury, property damage, personal injury and advertising injury liability written on an occurrence  
31 form that shall be no less comprehensive and no more restrictive than the coverage provided by  
32 Insurance Services Office (ISO) form CG 00 01 12 04. Design-Builder shall maintain such  
33 insurance through the expiration of the Warranty periods described in Article 22, unless otherwise  
34 specified herein.

35 The commercial general liability insurance shall include, but not be limited to, coverage for liability  
36 arising out of: (i) fire legal liability in an amount not less than \$50,000; (ii) blanket contractual; (iii)  
37 independent contractors; (iv) premises operations; and (v) products and completed operations for a  
38 minimum of six years following Final Completion. This coverage shall have an annual minimum  
39 limit of \$2,000,000 per occurrence, \$4,000,000 general annual aggregate and \$4,000,000  
40 products/completed operations aggregate. If commercial general liability insurance with a general  
41 aggregate limit and products and completed operations aggregate limit is used, then both the  
42 general liability and products/completed operations aggregate limits shall apply separately and

1 exclusively to the Project, or Design-Builder may obtain separate insurance to provide the required  
2 limit which shall not be subject to depletion because of claims arising out of any other project or  
3 activity of Design-Builder.

4 Design-Builder shall be the named insured. Each of the Indemnified Parties shall also be added to  
5 the commercial general liability policy as either (a) named insured, or (b) additional insureds with  
6 respect to liability arising out of the Project or any acts, errors or omissions of any DB-Related  
7 Entity, whether occurring on or off of the Site. If the State is added to said policy as a named  
8 insured, the Design-Builder is not required to obtain owners and contractors protective (OCP)  
9 coverage pursuant to Section 20.2.11.

### 10 **20.2.3 Automobile Liability**

11 Design-Builder shall provide commercial automobile liability insurance covering the ownership,  
12 maintenance or use of all owned/leased, non-owned and hired vehicles used in the performance of  
13 the Work, both on and off the Site, including loading and unloading, with limits of not less than  
14 \$1,000,000 per accident, combined single limit for bodily injury and property damage liability.  
15 Design-Builder shall maintain such insurance through Final Completion; provided, however, that  
16 such coverage shall be maintained for vehicles used in the performance of Warranty Work until the  
17 expiration of the Warranty periods described in Article 22. Coverage shall be provided on  
18 Insurance Services Office form number CA 0001 or an equivalent and shall include endorsement  
19 CA9948 (in transit pollution risks coverage). Design-Builder shall be the named insured and the  
20 Indemnified Parties shall be additional insureds with respect to liability arising out of the Project or  
21 any acts, errors, or omissions of any DB-Related Entity. The required limits can be satisfied by a  
22 combination of a primary policy and an excess policy.

### 23 **20.2.4 Environmental Liability**

24 Design-Builder shall provide environmental liability coverage on an occurrence or claims made  
25 basis with limits of not less than \$100,000,000 per claim and aggregate, including liability arising  
26 out of transportation and non-owned disposal sites. The policy shall include as insureds WSDOT,  
27 Design-Builder and any of its Subcontractors at any tier performing Work for which such coverage  
28 is appropriate. The remaining Indemnified Parties shall be additional insureds with respect to  
29 liability arising out of the Project or any acts of any DB-Related Entity, whether occurring on or off  
30 of the Site. The policy shall have a five year extended reporting period and cover claims made on  
31 and prior to Final Completion and claims made after Final Completion but within the extended  
32 reporting period. The required limits shall be satisfied by a combination of a primary policy and an  
33 excess policy.

### 34 **20.2.5 Excess Liability**

35 Design-Builder shall provide excess liability insurance with limits not less than \$200,000,000 which  
36 will provide coverage at least as broad as the primary coverages set forth herein, including  
37 Workers' Compensation, Commercial General Liability, and Automobile Liability in excess of the  
38 amounts set forth in Sections 20.2.1 (for Jones Act and LHWCA liability), 20.2.2, 20.2.3 and 20.2.9,  
39 respectively. The Indemnified Parties shall be added as additional insureds with respect to liability  
40 arising out of the Project or any acts, errors or omissions of any DB-Related Entity, whether  
41 occurring on or off the Site to the extent they are not named on any of the foregoing policies as  
42 named insureds.

1 **20.2.6 Professional Liability**

2 Design-Builder shall provide professional liability coverage with limits not less than \$25,000,000  
3 per claim and aggregate. The professional liability coverage shall protect against any negligent  
4 act, error or omission arising out of design or engineering activities with respect to the Project. The  
5 policy shall be a Project-specific policy, shall have a retroactive date no later than May 26, 2010,  
6 and shall remain in place through the date of Final Acceptance, as determined pursuant to Section  
7 21.5. The policy shall have an extended reporting period of not less than ten years from the  
8 effective date of coverage. The coverage shall include design subconsultants at any tier. This  
9 policy may be in excess of the coverage provided for claims which may also be covered pursuant  
10 to the commercial general liability policy required in Section 20.2.2 above. The coverage shall also  
11 include an indemnity endorsement to provide coverage for the Indemnified Parties for liability  
12 arising out of the activities or any act, error, or omission of any DB-Related Entity providing  
13 professional services hereunder.

14 **20.2.7 Builder's Risk**

15 Design-Builder shall procure and maintain builder's risk insurance to include the interests of  
16 Design-Builder, all Subcontractors (excluding those solely responsible for design Work) at any tier,  
17 WSDOT and the Indemnified Parties, as their interests may appear. The insurance shall be  
18 maintained until the date of Final Completion; provided that Design-Builder shall not be required to  
19 maintain property insurance for any portion of the Project following transfer of control thereof to  
20 WSDOT.

21 (a) Minimum Scope

22 The policy shall be written by insurers authorized to conduct business in the State of Washington  
23 with a minimum A.M. Best's Rating of A-, Class X and be written on a builder's risk "all risk" form  
24 for the entire Project including: (i) coverage for any ensuing loss from faulty workmanship,  
25 Nonconforming Work, materials, omission or deficiency in design or specifications; (ii) coverage  
26 against damage or loss caused by earth movement, flood, fire, accidental breakdown of  
27 machinery, theft, and vandalism and malicious mischief; (iii) coverage during operational testing;  
28 (iv) coverage for removal of debris;(v) coverage for buildings, structures, machinery, equipment,  
29 facilities, fixtures and all other properties constituting a part of the Project; (vi) transit coverage,  
30 including ocean marine coverage (unless insured by the supplier); and (vii) sub-limits sufficient to  
31 insure the full replacement value of any key equipment item, including the TBM.

32 (b) Minimum Policy Limits

33 The policy shall have a minimum policy limit of \$500,000,000, except for earth movement and flood  
34 coverage shall be insured to the probable maximum loss of the Project and the components  
35 thereof, provided that the limit applicable to earth movement shall not be less than \$100,000,000 in  
36 aggregate limit for the project term.

37 Such insurance shall be in a form acceptable to WSDOT.

38 In satisfaction of the requirements of subsection (vi) above concerning "ocean marine coverage,"  
39 Design-Builder may obtain separate ocean marine insurance on an "all risk" basis known as  
40 "Institute Cargo Clauses (A)," including war, riots and strikes, covering all materials and equipment  
41 associated with the Work at full replacement value while in transit, shipment and/or moorage until  
42 the date of Final Completion.

1 In any policies procured pursuant to this subsection, deductibles or self-insured retentions shall be  
2 no greater than (i) \$1,000,000 for earth movement and flood perils and (ii) 2 percent of the total  
3 value of each insured unit at the time of loss for all other perils.

4 (c) Contractor's Equipment

5 Contractor shall maintain All Risk Equipment Insurance covering all risk of physical damage to  
6 equipment provided for use at the Project site by Design-Builder and/or Subcontractors of any tier,  
7 whether owned, leased, rented, borrowed or used at the Project site. Design-Builder agrees to  
8 waive and does hereby waive its rights of recovery against the Indemnified Parties and each of  
9 their officers, employees, consultants, agencies and agents, as to any damage or loss which may  
10 occur to its equipment. Design-Builder will have the insurance company along with any DB-  
11 Related Entity specifically agree to this waiver. Design-Builder shall have the insurance company  
12 specifically agree to this waiver. If uninsured, Design-Builder shall defend and hold harmless the  
13 Indemnified Parties and each of its officers, employees, consultants, agencies and agents for loss  
14 or damage to its tools and equipment.

15 **20.2.8 Railroad Protective Liability**

16 Design-Builder shall provide any coverage as may be required by any railroad as a condition of the  
17 railroad's consent for entry onto railroad facilities or property. Said policy shall be effective during  
18 the period any Work is being performed across, under or adjacent to any railroad tracks or right of  
19 way.

20 **20.2.9 Aircraft Liability**

21 Design-Builder shall provide insurance, with a limit of not less than \$25,000,000 per occurrence, in  
22 all cases where any aircraft is used on the Project that is owned, leased or chartered by any DB-  
23 Related Entity, protecting against claims for damages resulting from such use. Any aircraft  
24 intended for use in performance of the Work, the aircraft crew, flight path and altitude, including  
25 landing of any aircraft on the Site or on any property owned by WSDOT shall be subject to review  
26 and written acceptance by WSDOT prior to occurrence of any such usage. If any aircraft are  
27 leased or chartered with crew and/or pilot, evidence of non-owned aircraft liability insurance will be  
28 acceptable but must be provided prior to use of the aircraft. The Indemnified Parties shall be  
29 additional insureds with respect to liability arising out of the Project or any acts, errors or omissions  
30 of any DB-Related Entity, whether occurring on or off the Site.

31 **20.2.10 Marine Liability**

32 Design-Builder shall provide marine protection and indemnity (P&I) insurance for all liabilities  
33 arising out of the operation of a watercraft or vessel used on the Project that is owned, leased or  
34 chartered by any DB-Related Entity. In the event that marine related activities are to be performed  
35 exclusively by Subcontractors, Design-Builder shall require such Subcontractors to satisfy the  
36 requirements of this Section 20.2.10. The policy shall include, among other things, coverage for  
37 bodily injury, illness and/or loss of life to any person or crew member (including any and all claims  
38 arising pursuant to the Jones Act and claims for maintenance and cure), damage to cargo while  
39 loading, carrying or unloading cargo, damage to piers and docks, pollution liability, and removal of  
40 wreckage as required by law. Such coverage shall have primary limits of not less than \$5,000,000  
41 per occurrence, and excess limits of not less than \$10,000,000 and shall be required in all cases  
42 where any watercraft or vessel is used on the Project that is owned, leased or chartered by any  
43 DB-Related Entity. If any watercraft or vessels are leased or chartered with crew, evidence of non-  
44 owned watercraft liability ("Charterer's Liability") insurance complying with the requirements of this



1 Section 20.2.10 will be acceptable but must be provided to WSDOT prior to use of the watercraft or  
2 vessel. The Indemnified Parties shall be additional insureds with respect to liability arising out of  
3 the Project or any acts, errors or omissions of any DB-Related Entity, whether occurring on or off  
4 the Site.

#### 5 **20.2.11 Owners and Contractors Protective (OCP) Liability**

6 Design-Builder shall either include the State as a named insured on the commercial general liability  
7 policy or provide owners and contractors protective (OCP) liability insurance, with an annual  
8 minimum limit of \$2,000,000 per occurrence, \$4,000,000 general annual aggregate, providing  
9 bodily injury and property damage liability coverage until the Final Acceptance date, as determined  
10 pursuant to Section 21.5, under Insurance Services Office form CG 0009, together with WSDOT  
11 Amendatory Endorsement No. CG 29 08, specifying the State of Washington as named insured.

### 12 **20.3 General Insurance Requirements**

#### 13 **20.3.1 Premiums, Deductibles and Self-Insured Retentions**

14 Design-Builder shall be responsible for payment of premiums for all insurance required under this  
15 Article 20. Design-Builder further agrees that for each claim, suit or action made against insurance  
16 provided hereunder, with respect to all matters for which Design-Builder is responsible hereunder,  
17 Design-Builder shall be solely responsible for all deductibles, self-insured retentions and amounts  
18 in excess of the coverage provided. Any deductibles or self-insured retentions shall not exceed  
19 \$1,000,000 unless otherwise provided in this Article 20. Any deductibles or self insured retentions  
20 shall not apply to WSDOT or the Indemnified Parties. With respect to any such self-insured  
21 retentions in excess of \$100,000, at the time the policies are delivered to WSDOT, Design-Builder  
22 shall also provide a bond or letter of credit acceptable to WSDOT guaranteeing payment of the  
23 self-insured retention.

#### 24 **20.3.2 Verification of Coverage**

25 Design-Builder shall file with WSDOT, Contract Payment Section, P.O. Box 47420, Olympia, WA  
26 98504-7420, certified copies of all policies required hereunder evidencing the minimum insurance  
27 coverages required to be provided, at least 30 days prior to the date such insurance is required to  
28 be provided hereunder. WSDOT shall have no duty to pay or perform under the Contract  
29 Documents until such policies, in compliance with all requirements of this Article 20, have been  
30 provided. By accepting the policies as required hereunder, WSDOT does not acknowledge or  
31 represent that the insurance requirements of Article 20 have been satisfied. WSDOT expressly  
32 reserves all rights against the Design-Builder to assert claims for breach of the terms and  
33 conditions of this Article 20 at any time in the future. Design-Builder shall promptly deliver to  
34 WSDOT a certificate of insurance with respect to each renewal policy, as necessary to  
35 demonstrate the maintenance of the required insurance coverages for the terms specified herein.  
36 Such certificates shall be delivered to WSDOT not less than 45 days prior to the expiration date of  
37 any policy and bear a notation evidencing payment of the premium therefore. If requested by  
38 WSDOT from time to time, certified duplicate copies of any renewal policy shall also be provided.

#### 39 **20.3.3 Subcontractor Insurance Requirements**

40 Design-Builder shall cause each Subcontractor to provide and maintain insurance that complies  
41 with the requirements for Design-Builder-provided insurance set forth in this Article 20 in  
42 circumstances where the Subcontractor is not covered by Design-Builder-provided insurance;  
43 provided that Design-Builder shall have sole responsibility for determining the limits of coverage

1 required to be obtained by Subcontractors (if any), which determination shall be made in  
2 accordance with reasonable and prudent business practices. Design-Builder shall cause each  
3 such Subcontractor to include each of the Indemnified Parties as additional insureds under such  
4 Subcontractors' insurance policies obtained pursuant to Sections 20.2.2, 20.2.3, 20.2.4, 20.2.5,  
5 20.2.8, 20.2.9 and 20.2.10 above. Design-Builder shall require each such Subcontractor to require  
6 that its insurer agree to waive any subrogation rights the insurers may have against the  
7 Indemnified Parties. If requested by WSDOT, Design-Builder shall promptly provide certificates of  
8 insurance evidencing coverage for each Subcontractor. WSDOT shall have the right to contact the  
9 Subcontractors directly in order to verify the above coverage.

#### 10 **20.3.4 Endorsements and Waivers**

11 All insurance policies required to be provided by Design-Builder hereunder shall contain or be  
12 endorsed to comply with the following provisions, provided that, for the workers' compensation  
13 policy, only subsections (d) and (h) shall be applicable:

- 14 (a) For claims covered by the insurance specified herein, all insurance coverage shall  
15 be primary insurance and non-contributory with respect to the named insureds,  
16 additional insureds, and their respective members, directors, officers, employees,  
17 agents and consultants, and shall specify that coverage continues notwithstanding  
18 the fact that Design-Builder has left the Site. Any insurance or self-insurance  
19 beyond that specified in this Contract that is maintained by an insured, Indemnified  
20 Party, or their members, directors, officers, employees, agents and consultants shall  
21 be in excess of, and shall not contribute with, the insurance required herein.
- 22 (b) Any liability failure on the part of a named insured to comply with reporting  
23 provisions or other conditions of the policies, any breach of warranty, any action or  
24 inaction of a named insured or others, any foreclosure relating to the Project or any  
25 change in ownership of all or any portion of the Project shall not affect coverage  
26 provided to the other insureds or additional insureds (and their respective members,  
27 directors, officers, employees, agents and consultants).
- 28 (c) All insurance to be provided herein shall include a "separation of insureds" clause  
29 and shall apply separately to each insured and additional insured against whom a  
30 claim is made or suit is brought, except with respect to the limits of the insurer's  
31 liability. No policy shall contain any provision or exclusion (including a "cross-  
32 liability" or similar exclusion) that in effect would prevent, bar, or otherwise preclude  
33 any insured or additional insured under the policy from making a claim that would  
34 otherwise be covered by such policy on the grounds that the claim is brought by an  
35 insured or additional insured against an insured or additional insured under the  
36 policy. The requirements of this subsection do not apply to claims by Design-  
37 Builder against any of its Subcontractors or suppliers or to claims between  
38 Subcontractors and/or suppliers.
- 39 (d) Each policy shall be endorsed to state that coverage shall not be suspended,  
40 voided, canceled, modified or reduced in coverage or in limits except after 45 days  
41 (ten days for non-payment of premium) prior written notice by certified mail, return  
42 receipt requested, has been given to WSDOT. Such endorsement shall not include  
43 any limitation of liability of the insurer for failure to provide such notice.
- 44 (e) All endorsements adding additional insureds to required policies shall be on form  
45 CG-20-10 (1985 edition) or an equivalent form and shall contain no limitations or  
46 exclusions with respect to "products/completed operations" coverage. The  
47 coverage shall be primary and non contributory with respect to any other insurance

1 maintained by the additional insured. Any insurance or self-insurance that is  
2 maintained by an additional insured, or their members, directors, officers,  
3 employees, agents and consultants shall be in excess of, and shall not contribute  
4 with, the insurance required herein.

5 (f) The automobile liability insurance policy shall be endorsed to include Motor Carrier  
6 Act Endorsement-Hazardous materials clean up (MCS-90) or its equivalent.

7 (g) Each policy shall provide coverage on an "occurrence" basis and not a "claims  
8 made" basis (with the exception of professional liability and earth movement  
9 policies).

### 10 **20.3.5 Waivers of Subrogation**

11 The Design-Builder waives all rights against the Indemnified Parties, against each of their agents  
12 and employees and against Subcontractors and suppliers and their respective members, directors,  
13 officers, employees, agents and consultants for any claims arising out of the performance of work  
14 under this Contract. Design-Builder shall require all Subcontractors and any DB-Related Entity to  
15 provide similar waivers in writing each in favor of the Indemnified Parties. The waivers required in  
16 this subsection do not apply to claims between Subcontractors and/or subconsultants of Design-  
17 Builder or those claims asserted by Design-Builder against any Subcontractors and/or suppliers.  
18 Each policy, including, workers' compensation coverage, but excluding owners and contractors  
19 protective liability insurance, shall include a waiver of any right of subrogation against the  
20 Indemnified Parties and any other additional insureds (and their respective members, directors,  
21 officers, employees, agents and consultants).

### 22 **20.3.6 Changes in Requirements**

23 WSDOT shall notify Design-Builder in writing of any changes in the requirements applicable to  
24 insurance required to be provided by Design-Builder. Except as set forth in this Section 20.3, any  
25 additional cost from such change shall be paid by WSDOT and any reduction in cost shall reduce  
26 the Total Compensation pursuant to a Change Order.

### 27 **20.3.7 No Recourse**

28 All costs for insurance shall be considered incidental to and included in compensation allowed  
29 hereunder and no additional payment will be made by WSDOT unless expressly specified in this  
30 Section 20.3.

### 31 **20.3.8 Support of Indemnifications**

32 The insurance coverage provided hereunder by Design-Builder shall support but is not intended to  
33 limit Design-Builder's indemnification obligations under the Contract Documents.

### 34 **20.3.9 Commercial Unavailability of Required Coverages**

35 If, through no fault of Design-Builder, any of the coverages required in this Article 20 (or any of the  
36 required terms of such coverages, including policy limits) become unavailable or are available only  
37 with commercially unreasonable premiums, WSDOT will consider in good faith alternative  
38 insurance packages and programs proposed by Design-Builder, with the goal of reaching  
39 agreement on a package providing coverage equivalent to that specified herein. Design-Builder  
40 must demonstrate to WSDOT's reasonable satisfaction that it has used diligent efforts in the global  
41 insurance markets to obtain the required insurance coverages, and shall advise WSDOT of the

1 specific results of those efforts. Design-Builder shall not be entitled to any increase in its  
2 compensation for increased costs resulting from the unavailability of coverage and the requirement  
3 to provide acceptable alternatives. WSDOT shall be entitled to a reduction in the Total  
4 Compensation if WSDOT agrees to accept alternative policies providing less than equivalent  
5 coverage, with the amount to be determined by extrapolation using the insurance quotes included  
6 in the Escrowed Proposal Documents escrowed pursuant to Section 25.1 (or based on other  
7 evidence of insurance premiums as of the Proposal Date if the Escrowed Proposal Documents do  
8 not provide adequate information).

#### 9 **20.4 WSDOT's Right to Remedy Breach by Design-Builder**

10 Failure on the part of Design-Builder to maintain the insurance as required hereunder shall  
11 constitute a material breach of the Contract, upon which WSDOT may, after giving five business  
12 days notice to Design-Builder to correct the breach, immediately terminate the Contract or, at its  
13 discretion, procure or renew such insurance and pay any and all premiums in connection therewith,  
14 with any sums so expended to be repaid to WSDOT on demand, or at the sole discretion of  
15 WSDOT, offset against funds due Design-Builder from WSDOT.

#### 16 **20.5 Insurance Proceeds and Prosecution of Claims**

##### 17 **20.5.1 Design-Builder Claims Against WSDOT-Provided Policies**

18 Under certain circumstances, insurance policies required to be provided by WSDOT hereunder are  
19 intended to provide compensation to Design-Builder for costs incurred by Design-Builder. Design-  
20 Builder shall be responsible for processing all such claims and shall not be entitled to receive a  
21 Change Order for any costs, which it could have recovered from the insurer. Design-Builder  
22 agrees to report timely to the insurer(s) any and all matters, which may give rise to an insurance  
23 claim and to promptly and diligently pursue any and all insurance claims on behalf of WSDOT,  
24 whether for defense or indemnity or both. WSDOT agrees to promptly notify Design-Builder of  
25 WSDOT's incidents, potential claims, and matters which may give rise to an insurance claim by  
26 WSDOT, to tender its defense or the claim to Design-Builder, and to cooperate with Design-Builder  
27 as necessary for Design-Builder to fulfill its duties hereunder.

##### 28 **20.5.2 Claims Relating to Differing Site Conditions**

29 Design-Builder shall be responsible for reporting and processing all potential insurance claims  
30 relating to Differing Site Conditions. The proceeds of all such claims shall be paid directly to  
31 WSDOT to be added to the Shared Contingency Allowance. Design-Builder agrees to report  
32 timely to the insurer(s) any such matters which may give rise to an insurance claim and to promptly  
33 and diligently pursue such claims on behalf of WSDOT. Design-Builder shall maintain  
34 contemporaneous records of all costs incurred by it with respect to the Differing Site Condition  
35 pending a determination by the insurance company regarding the claim. WSDOT agrees to  
36 cooperate with Design-Builder as necessary for Design-Builder to fulfill its duties hereunder.

1   **20.6 Commencement of Work**

2   Design-Builder shall not commence Work under this Contract until it has obtained the insurance  
3   required under this Article 20 and has furnished original policies of insurance evidencing the  
4   required coverage as required hereunder, nor shall Design-Builder allow any Subcontractor to  
5   commence Work under any Subcontract until the insurance required of the Subcontractor has  
6   been obtained and approved by Design-Builder.

7   The insurance coverage required pursuant to Sections 20.2.1, 20.2.2, 20.2.3, and 20.2.6 shall be  
8   provided prior to the start of the NTP 1 Work. All remaining coverages required pursuant to  
9   Section 20.2 shall be provided prior to the start of the NTP 2 Work.

10   **20.7 Disclaimer**

11   Design-Builder and each Subcontractor shall have the responsibility to make sure that their  
12   insurance programs fit their particular needs, and it is their responsibility to arrange for and secure  
13   any insurance coverage which they deem advisable, whether or not specified herein. Nothing in  
14   this Contract shall be construed as limiting in any way the extent to which Design-Builder may be  
15   held responsible for any claims resulting from its performance of the work hereunder. Design-  
16   Builder's obligations to procure insurance are separate and independent of its contractual defense  
17   and indemnity obligations. The coverage limits set forth in Article 20 are minimum requirements  
18   and WSDOT does not represent that the minimum coverages and limits required hereunder will  
19   necessarily be adequate to protect Design-Builder.

20

1 **21. ACCEPTANCE OF PROJECT**

2 **21.1 Substantial Completion**

3 **21.1.1 Notice by Design-Builder**

4 As a pre-requisite to Substantial Completion, Design-Builder shall provide written notice to WSDOT  
5 when all of the following have occurred with respect to the Project:

- 6 (a) Design-Builder has completed all Site Work such that WSDOT and the traveling  
7 public have full and unrestricted use and benefit of the facilities from both the  
8 operational and safety standpoint, and only minor incidental Work, replacement of  
9 temporary substitute facilities, or correction or repair remains for the Physical  
10 Completion;
- 11 (b) Design-Builder has ensured that all Work completed to achieve Substantial  
12 Completion has been performed in accordance with the requirements of the  
13 Contract Documents;
- 14 (c) Design-Builder has ensured that the facilities may be operated without damage to  
15 the Project or any other property on or off the Project Site, and without injury to any  
16 Person;
- 17 (d) Design-Builder has ensured that the Project is ready to be opened for traffic and that  
18 remaining Work can be completed within single lane or shoulder closures in  
19 accordance with the TR Section 2.22.

20 **21.1.2 Response by WSDOT**

21 Promptly after receipt of the notice required by Section 21.1.1, and in no event later than 30 days  
22 thereafter, WSDOT shall advise Design-Builder in writing of any of the following of which WSDOT  
23 has knowledge:

- 24 (a) Defects in the Work, and/or
- 25 (b) Deficiencies in the Project relating to the items described in clauses (a) through (d)  
26 of Section 21.1.1, and/or
- 27 (c) Deviations of any installed equipment, materials and workmanship from the  
28 requirements of the Contract Documents.

29 Design-Builder shall, at its own cost and expense, promptly correct such defects, deficiencies and  
30 deviations.

31 **21.1.3 Notice of Substantial Completion**

32 Upon full compliance with items (a) through (d) listed above in this Section 21.1, WSDOT will issue  
33 a Notice of Substantial Completion at such time as:

- 34 (a) Design-Builder has corrected, pursuant to the provisions of Section 21.1.2 all  
35 defects, deficiencies and deviations with respect to the Project and WSDOT has  
36 notified Design-Builder in writing of its acceptance (or waiver pending Final  
37 Completion) of such corrections; provided that the items described in Section 21.1  
38 shall not be required to be performed as a condition to Substantial Completion;

- 1 (b) Design-Builder has received all applicable Governmental Approvals required to be  
2 obtained by Design-Builder pursuant to the Contract Documents; and
- 3 (c) A Punch List for the Project to be performed after Substantial Completion, has been  
4 mutually agreed to by WSDOT and Design-Builder.

## 5 **21.2 Physical Completion**

6 Design-Builder shall achieve Physical Completion by the Physical Completion Deadline. Physical  
7 Completion shall be deemed to have occurred when:

- 8 (a) Design-Builder has completed all Work required by the Contract Documents,  
9 including all Punch List items, initial planting, and correction of any defects,  
10 deficiencies and deviations with respect to the Project which were waived pending  
11 Physical Completion;
- 12 (b) Design-Builder has satisfied all conditions to acceptance and has obtained all  
13 design and construction approvals by Utility Owners; and
- 14 (c) Design-Builder has satisfied all requirements regarding Final Cleanup.

15 Design-Builder shall provide notice to WSDOT when all of the above referenced conditions have  
16 been met. Upon receipt of the notice, WSDOT will perform Final Inspection pursuant to  
17 Section 21.3. Should WSDOT identify any defects or deficiencies in the Work, Design-Builder shall  
18 immediately remedy such defects or deficiencies at no additional cost. Upon full compliance with  
19 items (a) through (d) listed above in this Section 21.2, WSDOT will give Design-Builder written  
20 notice of the date of Physical Completion.

## 21 **21.3 Final Inspection**

22 WSDOT will not make the final inspection until the physical Work required by the Contract,  
23 including Final Cleanup and all extra Work ordered by WSDOT, has been completed. The date of  
24 Physical Completion will be determined as provided in Section 21.2.

## 25 **21.4 Final Completion**

26 WSDOT will give Design-Builder written notice of the date of Final Completion after all of Design-  
27 Builder's obligations under the Contract (with the exception of Warranty work, if applicable) have  
28 been performed by Design-Builder. The following events must occur before the date of Final  
29 Completion can be established:

- 30 (a) The Work on the Project has been completed pursuant to the Contract Documents;  
31 and
- 32 (b) Design-Builder has furnished all documentation required by the Contract Documents  
33 and required by Law.

## 34 **21.5 Final Acceptance**

35 Design-Builder must perform all the obligations under the Contract before Final Acceptance can  
36 occur. Failure of Design-Builder to achieve Final Acceptance shall not bar WSDOT from  
37 unilaterally accepting the Contract as provided in Section 10.5.2. The Secretary accepts the  
38 Project as complete and acknowledges the final amount due to Design-Builder by signature on the  
39 Final Contract Voucher Certification. The date of that signature is the date of Final Acceptance.

1 Design-Builder agrees that neither Final Completion nor Final Acceptance shall relieve Design-  
2 Builder of the responsibility to indemnify, defend, and protect WSDOT, its agents, their respective  
3 successors and assigns and their respective shareholders, officers, directors, agents and  
4 employees against any claim or loss resulting from the failure of Design-Builder (or any  
5 Subcontractors) to pay all laborers, mechanics, suppliers, or any other Person who provides labor,  
6 supplies, or provisions for carrying out the Work or for any payments required for unemployment  
7 compensation under Title 50 RCW or for industrial insurance and medical aid required under Title  
8 51 RCW.

9 Final Acceptance shall not constitute acceptance of any unauthorized or non-compliant Work or  
10 material. WSDOT shall not be barred from requiring Design-Builder to remove, replace, repair, or  
11 dispose of any Work or material that is defective, unauthorized or that otherwise fails to comply  
12 with the Contract Documents or from recovering damages for any such Work or material. Neither  
13 Final Completion nor Final Acceptance shall relieve Design-Builder of any obligations and/or  
14 responsibilities relating to warranty requirements, if any, designated in the Contract Documents.

### 15 **21.6 Overpayments; No Relief from Continuing Obligations**

16 Final Acceptance will not prevent WSDOT from correcting any measurement, estimate or  
17 certificate made before or after completion of the Work, or from recovering from Design-Builder  
18 and/or the Surety(ies) the amount of any overpayment sustained due to failure of Design-Builder to  
19 fulfill the obligations under the Contract Documents. A waiver on the part of WSDOT of any breach  
20 by Design-Builder shall not be held to be a waiver of any other or subsequent breach. Final  
21 Acceptance shall not relieve Design-Builder from any of its continuing obligations hereunder, or  
22 constitute any assumption of liability by WSDOT.

### 23 **21.7 Assignment of Causes of Action**

24 Design-Builder hereby offers and agrees to assign to WSDOT all rights, title and interest in and to  
25 all causes of action it may have under Section 4 of the Clayton Act (15 U. S. C. Section 15), arising  
26 from purchases of goods, services or materials pursuant to the Contract or any Subcontract. This  
27 assignment shall be made and become effective at the time WSDOT tenders Final Payment to  
28 Design-Builder, without further acknowledgment by the parties.

29



1    **22.    WARRANTIES**

2    **22.1   Warranties by Design-Builder**

3    **22.1.1   Project Warranties**

4    The following general warranty is in addition to any express warranties provided for elsewhere in  
5    the Contract Documents. Design-Builder warrants that:

- 6           (a)    all design Work performed pursuant to the Contract Documents shall conform to all  
7                    professional engineering principles generally accepted as standards of the industry  
8                    in the State;
- 9           (b)    the Project shall be free of defects, including design defects, deficiencies, errors and  
10                   omissions, except to the extent that such defects are inherent in prescriptive  
11                   specifications included in the Technical Requirements;
- 12           (c)    materials and equipment incorporated into the Work shall be of good quality and,  
13                   when installed, shall be new;
- 14           (d)    Equipment provided by Design-Builder shall be of modern design and in good  
15                   working condition;
- 16           (e)    the Work shall meet all of the requirements of the Contract Documents;
- 17           (f)    the specifications and/or drawings selected or prepared for use during construction  
18                   are appropriate for their intended use; and
- 19           (g)    the Project shall be constructed so that it can be used for the intended function.

20   **22.1.2   Project Warranty Term**

21   Warranties shall commence on the date that Physical Completion occurs. Subject to extension  
22   under Section 22.2, the Warranties for the tunnel structure, the tunnel approach structure and all  
23   systems, equipment, fixtures and other appurtenances of the tunnel structure and tunnel approach  
24   structure shall remain in effect for a two-year period. Subject to Section 22.2, the Warranties for all  
25   other Work shall remain in effect until the later of (a) one year from the date of Physical Completion  
26   or (b) the Final Completion date. If any of the Work fails to meet the standards set forth in this  
27   Section 22.1 at any time within the applicable warranty period, then Design-Builder shall correct  
28   such Work in accordance with Section 22.1.3 below, even if the performance of such corrective  
29   work extends beyond the stated warranty period.

30   **22.1.3   Corrective Work**

31   WSDOT, as the owner of the Project, shall have full authority to undertake enforcement of the  
32   Warranties. Within seven days of receipt by Design-Builder of notice from WSDOT specifying a  
33   failure of any of the Work to satisfy Design-Builder's Warranties, or of any Subcontractor warranty,  
34   guarantee or obligation which Design-Builder is responsible to enforce, Design-Builder and  
35   WSDOT shall mutually agree when and how Design-Builder shall remedy such violation; provided,  
36   however, that in case of an emergency requiring immediate curative action, Design-Builder shall  
37   implement such action as it deems necessary and shall notify WSDOT on an expedited decision.  
38   Design-Builder and WSDOT shall agree on such remedy (or an alternative remedy, if necessary)  
39   as soon as reasonably practicable. If Design-Builder does not use its best efforts to proceed to  
40   effectuate such remedy within the agreed time, or if Design-Builder and WSDOT fail to reach such  
41   an agreement within such seven-day period (or immediately, in the case of emergency conditions),

1 then WSDOT, after notice to Design-Builder, shall have the right to perform or have performed by  
2 third parties the necessary remedy, and the costs thereof shall be borne by Design-Builder.  
3 WSDOT may agree to accept Nonconforming Work in accordance with Section 5.6.2.

#### 4 **22.1.4 Costs of Correction of Work**

5 Design-Builder shall be responsible for obtaining any required approvals from WSDOT in  
6 connection with any such corrective Work. Design-Builder shall bear all costs of correcting any  
7 rejected Work, including additional testing and inspections, and shall reimburse WSDOT and pay  
8 WSDOT's expenses made necessary thereby within 10 days after Design-Builder's receipt of  
9 invoices therefor. If WSDOT agrees to accept any Nonconforming Work without requiring it to be  
10 fully corrected, Design-Builder shall be responsible for obtaining any required Governmental  
11 Approvals or other consents from any other Person in connection with the Warranty Work.

#### 12 **22.2 Warranty of Corrected Work**

13 The Warranties shall apply to all Work redone, repaired, corrected or replaced pursuant to the  
14 terms of the Contract. The Warranties as to each redone, repaired, corrected or replaced element  
15 of the Work shall extend beyond the original warranty period if necessary to provide at least one-  
16 year warranty period for any re-done Work.

#### 17 **22.3 Subcontractor Warranties**

##### 18 **22.3.1 Assignment**

19 Design-Builder shall obtain from all Subcontractors and suppliers and cause to be extended to  
20 WSDOT, appropriate representations, warranties (for period at least co-extensive in duration with  
21 Design-Builder's Warranties for such Work), guarantees and obligations with respect to the design,  
22 materials, workmanship, equipment, tools and supplies furnished by such Subcontractors and  
23 suppliers, including all such representations, warranties, guarantees and obligations required to be  
24 furnished by Subcontractors and suppliers under their Subcontracts or supply agreements. These  
25 representations and warranties shall supplement the representations and warranties of Design-  
26 Builder hereunder. All representations, warranties, guarantees and obligations of Subcontractors  
27 and suppliers (a) shall be written so as to survive all WSDOT and Design-Builder inspections, tests  
28 and approvals hereunder, and (b) shall run directly to and be jointly and severally enforceable by  
29 Design-Builder and/or WSDOT and their respective successors and assigns. Design-Builder  
30 hereby assigns to WSDOT all of Design-Builder's rights and interest in all extended warranties for  
31 periods exceeding the applicable Warranty period which are received by Design-Builder from any  
32 Subcontractors or suppliers.

##### 33 **22.3.2 Enforcement**

34 Upon receipt from WSDOT of notice of a failure of any of the Work to satisfy any Subcontractor or  
35 supplier warranty, representation, guarantee, or obligation, Design-Builder shall enforce or perform  
36 any such representation, warranty, guarantee or obligation, in addition to Design-Builder's other  
37 obligations hereunder. WSDOT's rights under this Section 22.3.2 shall commence at the time such  
38 representation, warranty, guarantee or obligation is furnished, and shall continue until the  
39 expiration of Design-Builder's relevant Warranty (including extensions thereof under Section 22.2).  
40 Until such expiration, Design-Builder shall be responsible for the cost of any equipment, material,  
41 labor (including re-engineering) or shipping, and Design-Builder shall be required to replace or  
42 repair defective equipment, material or workmanship furnished by any Subcontractor or supplier.

1   **22.4   No Limitation of Liability**

2   The foregoing warranties are in addition to all rights and remedies available under the Contract  
3   Documents or applicable Law, and shall not limit Design-Builder's liability or responsibility imposed  
4   by the Contract Documents or applicable Law with respect to the Work, including liability for design  
5   defects, latent construction defects, strict liability, negligence or fraud.

6   **22.5   Assignment of Warranties**

7   Design-Builder's Warranties (including extensions thereof under Section 22.2) and all  
8   Subcontractor and supplier warranties shall be assignable by WSDOT without approval by Design-  
9   Builder or any Subcontractor or supplier, which assignment shall be effective upon delivery of  
10   notice to Design-Builder of the assignment.

11   **22.6   Disputes**

12   Any disagreement between WSDOT and Design-Builder relating to this Article 22 shall be subject  
13   to the dispute resolution provisions contained in Article 24, provided that Design-Builder shall  
14   proceed as directed by WSDOT pending resolution of the dispute.

15

1 **23. COLLABORATIVE PARTNERING PRINCIPLES**

2 WSDOT expects a collaborative partnering work relationship among WSDOT, Design-Builder, its  
3 Subcontractors and the City's representatives. The collaborative partnering process (hereinafter  
4 referred to as "collaborative") is intended to draw on the strengths of each organization to help  
5 identify and achieve mutual and reciprocal goals, including achieving completion of the Work on  
6 time, within budget and in accordance with its intended purpose. A primary consideration in the  
7 collaborative process is the prompt and equitable resolution of issues affecting the conduct of the  
8 Work, consistent with the rights and responsibilities of the respective Parties under the Contract.  
9 WSDOT believes that Project objectives can be best achieved through a collaboration that  
10 promotes and facilitates strategic planning, design, construction and commissioning of the Project.  
11 The goal of the collaborative process is to better manage overall risk to the Project and to each  
12 Party to the Contract.

13 This collaborative process recognizes that each Party's success is tied directly to the success of all  
14 other members of the Project team and requires the Parties to: (1) organize and integrate their  
15 respective roles, responsibilities and expertise; (2) identify and align their respective expectations  
16 and objectives; (3) commit to open communications, transparent decision making, proactive and  
17 non-adversarial interaction, problem-solving, and the sharing of ideas; (4) continuously seek to  
18 improve the project planning, design, and construction processes; and (5) reasonably share both  
19 the risks and rewards associated with achieving the Project objectives.

20 To assist the teams in developing and maintaining a collaborative work relationship, the Parties  
21 agree that within 30 calendar days of NTP 1, WSDOT and Design-Builder will mutually select a  
22 third-party facilitator to conduct a team building workshop, consistent with these collaborative  
23 principles. Unless agreed otherwise by the Parties, the initial workshop should be held within 60  
24 calendar days of the NTP 1. The Parties agree to jointly develop an agenda that will help the  
25 members of the team agree to adhere to the principles of collaboration based on mutual trust,  
26 confidence, good faith and fair dealing. Design-Builder's and the major Subcontractor's key staff  
27 as well as WSDOT's key staff responsible for the management and administration of the Contract  
28 must attend the workshop.

29 During this initial workshop, a program for the continuation and maintenance of the collaborative  
30 process will be developed for use throughout the duration of the Project. Follow-up sessions may  
31 be held periodically as agreed to by WSDOT and Design-Builder. These sessions may be used to  
32 address specific subjects or concerns. Any cost associated with this collaborative process will be  
33 agreed to by both Parties and will be shared equally between WSDOT and Design-Builder, except  
34 for travel expenses, which will be borne by each Party.

35 While the establishment of the collaborative process and any charter document that is developed  
36 as a result of the process will not change the legal relationship of the Parties, nor relieve either  
37 Party from any terms of the Contract, it is WSDOT's expectation that the Parties will cooperate and  
38 exercise their skill and judgment in furthering the interests of the Project and will promote an  
39 environment of mutual trust, confidence, good faith, and fair dealing with each other. Within the  
40 scope of their respective expertise, the Parties shall together actively and continually pursue  
41 collaboration in the best interest of the Project. The Parties shall endeavor to promote harmony  
42 and collaboration among all Project participants.

43 The Parties agree that the language of this Article 23, and any statements made or documents  
44 prepared by the facilitator, shall not be admissible or discoverable in any judicial or other dispute  
45 resolution proceeding.

1 **24. PROTEST AND DISPUTE RESOLUTION**

2 **24.1 Procedure and Protest by Design-Builder**

3 If Design-Builder disagrees with anything required in a Change Order or any written order,  
4 direction, instruction, interpretation or any other determination by the WSDOT Engineer either  
5 written or oral, Design-Builder shall:

- 6 (a) Immediately give a signed written notice of protest to WSDOT before doing the  
7 Work. Said notice shall be delivered to WSDOT within seven days of the  
8 occurrence of the event giving rise to the protest. For purposes of this Article 24,  
9 "occurrence" means when Design-Builder knows, or in its diligent prosecution of the  
10 Work should have known, of the event giving rise to the protest. Design-Builder  
11 shall not be entitled to any adjustment in its compensation or any Completion  
12 Deadline for any occurrence of events or costs that occurred more than seven days  
13 before Design-Builder's written notice to WSDOT.
- 14 (b) The written notice of protest shall contain the following information:
- 15 (1) The date of the protested action; and  
16 (2) The general nature and circumstances which caused the protest.
- 17 (c) Design-Builder shall supplement the written notice of protest within 30 days with a  
18 written statement providing the following:
- 19 (1) A full discussion of the circumstances which caused the protest, including,  
20 names of persons involved, time, duration and nature of the work involved,  
21 and a review of the Contract Documents referenced to support the protest;
- 22 (2) The estimated dollar cost broken down by the cost components allowed  
23 under Article 11, including such costs for Subcontractors, if any, of the  
24 protested work and how that estimate was determined; and
- 25 (3) An analysis of the progress schedule showing the schedule change or  
26 disruption if Design-Builder is asserting a schedule change or disruption.

27 Throughout any protested Work, Design-Builder shall keep complete, detailed and  
28 contemporaneous records of costs incurred and schedule impacts in the performance of the  
29 protested Work. Design-Builder shall permit WSDOT access to these and any other records  
30 needed for evaluating the protest, at any time.

31 WSDOT will evaluate all protests submitted in accordance with this Section 24.1. If WSDOT  
32 determines that a protest is valid, WSDOT will make an equitable adjustment in the Design-  
33 Builder's compensation or the Completion Deadlines in accordance with Article 11. No adjustment  
34 will be made for an invalid protest.

35 If WSDOT determines that the protest is invalid, that determination, with an explanation, shall be  
36 provided in writing to Design-Builder. If Design-Builder does not accept WSDOT's determination,  
37 either Party may refer the dispute to the Disputes Review Board pursuant to Section 24.2 below. If  
38 the Parties mutually agree, the protest may be defaulted to Section 24.3, bypassing the Disputes  
39 Review Board process. Otherwise, submittal of the dispute to the Disputes Review Board is a  
40 **CONDITION PRECEDENT** to any further right to pursue the protest.

41 Notwithstanding any protest and appeal, Design-Builder shall proceed promptly with the Work as  
42 directed by WSDOT.

1 The failure of Design-Builder to initiate, pursue, and evidence its protest in accordance with the  
2 terms of this Section 24.1 (including Design-Builder's duty to maintain records and disclose all  
3 relevant information to WSDOT) shall be deemed a waiver of its right to any equitable adjustment  
4 in the Design-Builder's compensation or Completion Deadlines.

## 5 **24.2 Disputes Review Board**

6 The Disputes Review Board ("DRB") is hereby created as part of the dispute resolution process to  
7 be utilized when WSDOT and Design-Builder are unable to resolve the dispute through  
8 negotiations and prior to the filing of a claim pursuant to Section 24.3. The DRB will consider  
9 disputes referred to it and furnish recommendations to WSDOT and Design-Builder to assist in the  
10 resolution of the differences between them. The purpose of the DRB response to such issues is to  
11 provide nonbinding findings and recommendations designed to expose the disputing parties to an  
12 independent view of the merits of the dispute.

13 The DRB members shall have extensive experience (technical or managerial) in a senior capacity  
14 in the construction industry, with substantial experience in tunneling projects, the interpretation of  
15 construction contract documents and the analysis and resolution of construction issues. It is  
16 desirable that each DRB member have demonstrated experience in design-build contracting on  
17 major public infrastructure projects, and in particular on tunneling projects. The DRB chairperson  
18 shall have administrative and disputes resolution experience and the ability to facilitate the DRB's  
19 proceedings. It is also desirable for the DRB chairperson to have substantial experience in  
20 construction disputes resolution, adjudication or arbitration, the interpretation of construction  
21 contract documents, and the analysis and resolution of construction claims. The DRB members  
22 shall discharge their responsibilities impartially and independently considering the facts and  
23 conditions related to the matters under consideration and the provisions of the Contract  
24 Documents.

25 No DRB member shall have a financial interest in the Project of any nature, except for payments  
26 for services on the DRB. No member shall have been employed by either Party or an affiliate of  
27 either Party within a period of two years prior to award of this Contract or during the term of this  
28 Contract; except that, service as a member of other disputes review boards on other contracts will  
29 not preclude a member from serving on the DRB.

30 Design-Builder will compensate directly the fees and travel expense for all three members, plus  
31 pay all of the operating and administrative expenses of the DRB. Design-Builder shall then invoice  
32 all of these costs to WSDOT, which shall reimburse Design-Builder for 50 percent of these costs on  
33 the next progress payment.

### 34 **24.2.1 Selection of DRB Members**

35 WSDOT and Design-Builder shall each nominate four candidates to the DRB member pool. After  
36 reviewing the candidates, WSDOT and Design-Builder shall (1) agree on three members to serve  
37 on the DRB and (2) determine who is best capable of serving as the DRB chairperson. All DRB  
38 members shall be neutrals and shall not be advocates for either WSDOT or Design-Builder. In the  
39 event that all three members were not selected from the initial pool of nominees, the process shall  
40 be repeated.

41 In case a member of the DRB needs to be replaced, the replacement member will be appointed in  
42 the same manner as the replaced member was appointed. The appointment of a replacement  
43 DRB member will begin promptly upon determination of the need for replacement and shall be  
44 completed within 30 days.

1 **24.2.2 Termination of DRB Members**

2 Service of a DRB member may be terminated at any time with not less than 30 days' notice by  
3 (a) mutual agreement between WSDOT and Design-Builder or (b) resignation of the member.

4 Termination of a member will be followed by appointment of a substitute as specified in  
5 Section 24.2.1.

6 **24.2.3 Disputes Review Board Procedures**

7 Promptly upon approval of the DRB members and within the first 60 days after the issuance of  
8 NTP 1, WSDOT, Design-Builder and the individual DRB members shall enter into an agreement  
9 ("DRB Agreement") that sets forth the DRB's rules of operation and procedures to be followed for  
10 the Project. The agreement shall include the frequency of the DRB's visits to the Project and its  
11 interactions with WSDOT and Design-Builder to keep abreast of the construction development and  
12 potential disputes.

13 In developing the DRB Agreement, the parties shall take into consideration their respective duties  
14 and responsibilities set forth in the "Scope of Work" included in Appendix 11.

15 The parties may also consider the "Suggested Administrative Procedures" for the DRB's rules of  
16 operation included in the Appendix 11. These procedures express, in general terms, the policy for  
17 the creation and operation of the DRB.

18 Disputes, as used in this Section 24.2, will refer only to protests properly submitted in accordance  
19 with Section 24.1. If WSDOT has determined the protest to be invalid and either Design-Builder or  
20 WSDOT has elected to refer the matter to the DRB, then the DRB shall consider the issue and  
21 provide recommendations concerning:

- 22 (a) The interpretation of the Contract;
- 23 (b) Entitlement to additional compensation or time for performance;
- 24 (c) The amount of additional compensation or time for performance following a  
25 recommendation of entitlement by the DRB provided that: (1) the parties were not  
26 able to reach a resolution as to the amount of the equitable adjustment or time; (2)  
27 the WSDOT Engineer has made a unilateral determination of the amount of  
28 compensation for time; and (3) Design-Builder has protested WSDOT's unilateral  
29 determination; and
- 30 (d) Other subjects mutually agreed by WSDOT and Design-Builder to be a DRB issue.

31 **24.2.4 Procedures for Consideration of Disputes**

32 The procedure for consideration of disputes shall be as follows:

- 33 (a) Once a determination has been made to submit a dispute to the DRB, the DRB  
34 members will be contacted and advised of the existence of the dispute. A hearing  
35 will be scheduled to be conducted at the next regular Project visit or at such other  
36 time, as agreed to by the Parties;
- 37 (b) Design-Builder and WSDOT shall each be afforded an opportunity to be heard by  
38 the DRB and to offer evidence. Either Party furnishing any written evidence or  
39 documentation to the DRB must furnish copies of such information to the other Party  
40 a minimum of 15 days prior to the date the DRB sets to convene the hearing for the

1 dispute. Either Party shall produce such additional evidence as the DRB may deem  
2 necessary to an understanding and determination of the dispute and furnish copies  
3 to the other Party;

4 (c) After the hearing is concluded, the DRB shall meet in private and reach a conclusion  
5 supported by two or more members. Its findings and recommendations, together  
6 with its reasons shall then be submitted as a written report to both Parties. The  
7 recommendations shall be based on the pertinent provisions of the Contract  
8 Documents and facts and circumstances involved in the dispute. The Contract  
9 Documents shall be interpreted and construed in accordance with the laws of the  
10 State of Washington. The DRB shall make every effort to reach a unanimous  
11 decision. If this proves impossible, the dissenting member may prepare a minority  
12 report; and

13 (d) Within 30 days of receiving the DRB's recommendations, both WSDOT and Design-  
14 Builder shall respond to the other in writing signifying that the dispute is either  
15 resolved or remains unresolved. Although both Parties should place weight upon  
16 the DRB recommendations, the recommendations are not binding.

17 In the event the DRB's recommendations do not lead to resolution of the dispute, all DRB records  
18 and written recommendations, including any minority reports, will be admissible as evidence in any  
19 subsequent arbitration or litigation.

#### 20 **24.2.5 Advisory Recommendation**

21 Upon mutual agreement by the Parties, the DRB may be called upon to act in an advisory capacity  
22 to assist in resolution of issues or disputes prior to a formal DRB presentation. In the case of an  
23 advisory recommendation, an informal submission no longer than two written pages shall be  
24 submitted to the DRB by each Party. To the extent possible, the Parties will submit agreed-to  
25 questions for the DRB to answer as part of the informal process.

26 Once written submissions have been made, either Party may request an opportunity to give an oral  
27 presentation to the DRB, and the DRB may also request an oral presentation by the Parties. Oral  
28 presentations shall take place during a regularly scheduled meeting of the DRB. Unless a time  
29 limit is specifically agreed to by the Parties, the DRB will establish a time limit for oral  
30 presentations. To the extent possible, the DRB should attempt to facilitate a resolution without  
31 making a formal determination at the conclusion of the DRB meeting. Neither of the Parties nor  
32 the DRB is bound in any way by an advisory recommendation. Any issue or dispute addressed in  
33 an advisory recommendation, to the extent it is not resolved, may be addressed through a formal  
34 DRB submission. Advisory recommendations shall not be admissible in any subsequent disputes  
35 procedures, including any other administrative or judicial proceedings.

#### 36 **24.2.6 DRB Process as Condition Precedent to Arbitration or Litigation**

37 Submittal of a dispute to the DRB will be a **CONDITION PRECEDENT** to the filing for arbitration or  
38 litigation in a court of law unless WSDOT and Design-Builder have agreed to default the dispute to  
39 Section 24.3. Furthermore, if the DRB's assistance does not lead to resolution of the dispute,  
40 causing Design-Builder to file a claim pursuant to Section 24.3, or if the Parties default the dispute  
41 to Section 24.3, full compliance by Design-Builder with the provisions of Section 24.3 is a  
42 contractual **CONDITION PRECEDENT** to Design-Builder's right to commence arbitration or  
43 litigation.



1 Unless otherwise noted, disputes, claims, counterclaims and other matters in question between  
2 WSDOT and Design-Builder that are not resolved will be decided in the Superior Court of Thurston  
3 County, Washington, which shall have exclusive jurisdiction and venue over all matters in question  
4 between WSDOT and Design-Builder.

5 The Contract shall be interpreted and construed in accordance with the laws of the State of  
6 Washington.

#### 7 **24.2.7 Matters Ineligible for Disputes Review Board Procedures**

8 The dispute resolution procedures set forth in Section 24.2 shall not apply to the following  
9 (collectively, "Ineligible Matters"):

- 10 (a) Any matters that the Contract Documents expressly state are final, binding or not  
11 subject to dispute resolution;
- 12 (b) Any matters relating to the scope or applicability of indemnities provided under the  
13 Contract Documents;
- 14 (c) Any claim for injunctive relief;
- 15 (d) Any claim against an insurance company, including any Subcontractor dispute that  
16 is covered by insurance;
- 17 (e) Any claim arising solely in tort;
- 18 (f) Any claim between Design-Builder or WSDOT and a third party in which the third  
19 party is a necessary or appropriate party to such dispute, including any related  
20 claims between the Parties arising therefrom;
- 21 (g) Any claim or dispute that is the subject of litigation in a lawsuit filed in court to which  
22 the procedures established in this Section 24.2 do not apply, including any effort to  
23 interplead a Party into such a lawsuit in order to make the procedures established in  
24 this Section 24.2 applicable;
- 25 (h) Any claim for, or dispute based on, remedies expressly created by statute; and  
26 (i) Any dispute that is actionable only against a Surety.

#### 27 **24.3 Claims**

##### 28 **24.3.1 General**

29 When disputes occur during the Project, Design-Builder shall follow the procedures outlined in  
30 Sections 24.1 and 24.2. If the procedures outlined therein fail to provide satisfactory resolution,  
31 Design-Builder shall pursue the more formalized method outlined in this Section 24.3 for submitting  
32 a claim.

33 If Design-Builder claims that it is entitled to an adjustment in its compensation and/or Completion  
34 Deadlines, and provided that Design-Builder has pursued and exhausted all the means provided in  
35 Sections 24.1 and 24.2 to resolve a dispute, Design-Builder may file a claim as provided in this  
36 Section 24.3.

37 Design-Builder shall be deemed to have waived, released, and relinquished any claim for  
38 additional compensation or performance time, or adjustment to its compensation and/or  
39 Completion Deadlines, if Design-Builder fails: (1) to provide WSDOT timely written notifications or  
40 other submissions required by Section 24.1; (2) to maintain complete records of actual cost and

1 additional time incurred, as required by Section 24.1, or provide for WSDOT access to same; (3) to  
2 properly and timely submit a claim as required by this Section 24.3; or (4) to take such actions or  
3 provide such notices as required by other provisions of the Contract Documents as a condition to  
4 Design-Builder's right to seek any extension of the Completion Deadlines.

5 The fact that Design-Builder has provided a proper notification, provided a properly filed claim, or  
6 provided WSDOT access to records of actual cost, shall not in any way be construed as proving or  
7 substantiating the validity of the claim. If the claim, after consideration by WSDOT, is found to  
8 have merit, WSDOT will make an equitable adjustment either in the amount of costs to be paid or  
9 in the time required for the Work, or both. If WSDOT finds the claim to be without merit, no  
10 adjustment will be made.

11 Failure to submit with the Final Contract Voucher Certification such information and details as  
12 described in this Section 24.3 for any claim shall operate as a waiver of the claim by Design-  
13 Builder as provided in Section 10.5. Claims submitted with the Final Contract Voucher Certification  
14 shall be resolved pursuant to this Article 24.

#### 15 **24.3.2 Claims Content**

16 All claims filed by Design-Builder shall be in writing, submitted to the WSDOT as soon as possible,  
17 and in no event later than the date WSDOT executes the Final Contract Voucher Certification as  
18 addressed in Section 10.5. All claims shall be in sufficient detail to enable WSDOT to ascertain the  
19 basis and amount of the claim. As a minimum, the following information must accompany each  
20 claim submitted:

- 21 (a) A detailed factual statement of the claim providing all necessary dates, locations,  
22 and items of Work affected by the claim;
- 23 (b) The date on which facts arose that gave rise to the claim;
- 24 (c) The name of each WSDOT individual, official, or employee and each Design-Builder  
25 or Subcontractor employee or agent involved in, or knowledgeable about the claim;
- 26 (d) The specific provision of the Contract Documents which support the claim and a  
27 statement of the reasons why such provisions support the claim;
- 28 (e) If the claim relates to a decision of WSDOT which the Contract leaves to WSDOT's  
29 discretion or as to which the Contract provides that WSDOT's decision is final,  
30 Design-Builder shall set out in detail all facts supporting its position relating to the  
31 decision of WSDOT;
- 32 (f) The identification of any documents and the substance of any oral communications  
33 that support the claim;
- 34 (g) Copies of any identified documents, other than WSDOT documents and documents  
35 previously furnished to WSDOT by Design-Builder, that support the claim (manuals  
36 which are standard to the industry, used by Design-Builder, may be included by  
37 reference);
- 38 (h) If an adjustment in the Completion Deadlines is sought:
  - 39 (1) The specific days and dates for which it is sought;
  - 40 (2) The specific reasons Design-Builder believes a time adjustment should be  
41 granted;
  - 42 (3) The specific provisions of the Contract under which it is sought; and

1 (4) Design-Builder's analysis of the impact of the event(s) upon Design-Builder's  
2 schedule to demonstrate the reason and entitlement for such adjustment.

- 3 (i) If additional compensation is sought, the exact amount of the claims and a  
4 breakdown of that amount into the specific cost components allowed under  
5 Article 11. Subcontractor's claims shall be set forth in the same detail; and  
6 (j) A notarized statement shall be submitted to WSDOT containing the following  
7 language:  
8

9 Under the penalty of law for perjury or falsification, the undersigned,

10 \_\_\_\_\_  
11 (Name)

12 \_\_\_\_\_ of  
13 (Title)

14 \_\_\_\_\_  
15 (Design-Builder)

16 Hereby certifies that the claim for extra compensation and time, if any  
17 made herein for Work on this Contract is a true statement of the  
18 actual costs incurred and time sought, and is fully documented and  
19 supported under the Contract between the parties, and reflects an  
20 adjustment to which Design-Builder in good faith believes it is entitled  
21 under the Contract.  
22

### 23 24.3.3 Claims Documentation

24 It shall be the responsibility of Design-Builder to keep full and complete records of the costs and  
25 additional time incurred for any alleged claim. Design-Builder shall permit WSDOT to have access  
26 at all reasonable times to those records and any other records as may be required by WSDOT to  
27 determine the facts or contentions involved in the claim. Design-Builder shall retain those records  
28 in accordance with the provisions of Section 25.5. All claims filed against WSDOT shall be subject  
29 to audit in accordance with the provisions of Section 24.4. Failure of Design-Builder,  
30 Subcontractors, or lower tier Subcontractors to maintain and retain sufficient records to allow  
31 WSDOT to verify all or a portion of the claim or to permit WSDOT access to the books and records  
32 of Design-Builder, Subcontractors, or lower tier Subcontractors shall constitute a waiver of the  
33 claim(s) and shall bar any recovery for that claim(s).

### 34 24.3.4 WSDOT Response

35 Design-Builder shall pursue administrative resolution of any claim with WSDOT or the designee of  
36 WSDOT. Provided that Design-Builder is in full compliance with all the provisions of this  
37 Section 24.3, and after the formal claim document has been submitted, WSDOT will respond in  
38 writing to Design-Builder as follows:

- 39 (a) Within 60 days from the date the claim is received by WSDOT, subject to the  
40 provisions of Section 24.3.4(b) below.

- 1 (b) If, in the opinion of WSDOT, the above time period is unreasonable due to the  
2 complexity of the claim under consideration, WSDOT will notify Design-Builder  
3 within 30 days from the date the claim is received by WSDOT as to the amount of  
4 time which will be necessary for WSDOT to prepare its response.

#### 5 **24.3.5 Claims Condition Precedent to Arbitration or Litigation**

6 The failure of Design-Builder to initiate, pursue and evidence its claim in accordance with the terms  
7 of this Section 24.3 (including Design-Builder's duty to disclose all relevant information to WSDOT)  
8 shall be deemed a waiver of its right to any adjustment in its compensation and/or the Completion  
9 Deadlines. Full compliance by Design-Builder with the provisions of this Section 24.3 is a  
10 contractual CONDITION PRECEDENT to Design-Builder's right to seek judicial relief or demand  
11 arbitration.

#### 12 **24.4 Audit**

13 Audits may be conducted by WSDOT pursuant to Sections 25.4.3 and 25.4.4 for purposes of  
14 validating Design-Builder claims, including to verify Design-Builder labor rates, overhead costs,  
15 berth vessel costs, temporary services costs, and any other costs pertaining to Design-Builder  
16 pricing.

#### 17 **24.5 Claims Resolution**

##### 18 **24.5.1 General**

19 Prior to seeking claims resolution through nonbinding alternative dispute resolution processes,  
20 binding arbitration, or litigation, pursuant to this Section 24.5, Design-Builder shall proceed under  
21 the administrative procedures in Sections 24.1, 24.2, 24.3 and any other provisions provided in the  
22 Contract for resolution of disputes. The provisions of these Sections must be complied with in full,  
23 as a CONDITION PRECEDENT, to Design-Builder's right to seek claims resolution through any  
24 nonbinding alternative dispute resolution process, binding arbitration or litigation, as provided in  
25 this Section 24.5.

##### 26 **24.5.2 Nonbinding Alternative Disputes Resolution(ADR)**

27 Nonbinding ADR processes are encouraged and available upon mutual agreement of Design-  
28 Builder and WSDOT for all claims submitted in accordance with Section 24.3, provided that:

- 29 (a) All the administrative remedies provided for in the Contract have been exhausted;  
30 (b) WSDOT has been given the time and opportunity to respond to Design-Builder as  
31 provided in Section 24.3; and  
32 (c) WSDOT has determined that it has sufficient information concerning Design-  
33 Builder's claims to participate in a nonbinding ADR process.

34 WSDOT and Design-Builder mutually agree that the cost of the nonbinding ADR process shall be  
35 shared equally by both Parties with each Party bearing its own preparation costs.

36 The type of nonbinding ADR process shall be agreed upon by the Parties and shall be conducted  
37 within the State of Washington at a location mutually acceptable to the Parties.

1 Design-Builder agrees that the participation in a nonbinding ADR process does not in any way  
2 waive the requirement that binding arbitration or litigation proceedings must commence within 180  
3 calendar days of the date of Final Acceptance, the same as any other claim or causes of action as  
4 provided in the Contract.

### 5 **24.5.3 Claims of \$1,000,000 or Less**

6 Design-Builder and WSDOT mutually agree that those claims which total \$1,000,000 or less,  
7 submitted in accordance with Section 24.3 and not resolved by nonbinding ADR processes, shall  
8 be resolved through mandatory and binding arbitration as described herein.

### 9 **24.5.4 Administration of Arbitration**

10 Arbitration shall be as agreed by the Parties or, if the Parties cannot agree, arbitration shall be  
11 administered through the American Arbitration Association (AAA) using the following arbitration  
12 methods:

- 13 (a) The current version of the Northwest Region Expedited Commercial Arbitration  
14 Rules shall be used for claims with an amount less than \$25,000;
- 15 (b) The current version of the Expedited Procedures of the Construction Industry  
16 Arbitration Rules shall be used for claims with an amount equal to or greater than  
17 \$25,000 and less than \$50,000; or
- 18 (c) The current version of the standard procedures of the Construction Industry  
19 Arbitration Rules shall be used for claims with an amount equal to or greater than  
20 \$50,000 and not greater than \$1,000,000.

21 WSDOT and Design-Builder mutually agree the venue of any arbitration hearing shall be within the  
22 State of Washington and any such hearing shall be conducted within the State of Washington.

23 WSDOT and Design-Builder mutually agree to be bound by the decision of the arbitrator, and  
24 judgment upon the award rendered by the arbitrator may be entered in the Superior Court of  
25 Thurston County. The decision of the arbitrator and the specific basis for the decision shall be in  
26 writing. The arbitrator shall use the Contract as a basis for decisions.

### 27 **24.5.5 Arbitration Procedures**

28 If the dispute cannot be resolved through administrative procedures provided in Sections 24.1,  
29 24.2, 24.3 and any other provision provided in the Contract for resolution of disputes or through a  
30 mutually agreed upon nonbinding ADR process, Design-Builder shall advise WSDOT, in writing,  
31 that mandatory and binding arbitration is desired. The Parties may agree on an arbitration  
32 process, or, if the Parties cannot agree a demand for arbitration shall be filed by Design-Builder, in  
33 accordance with the AAA rules, with WSDOT, and with the AAA. Selection of the arbitrator and the  
34 administration of the arbitration shall proceed in accordance with AAA rules using arbitrators from  
35 the list developed by the AAA, except that, for claims under \$25,000 using the Northwest Region  
36 Expedited Commercial Arbitration Rules, arbitration selection shall proceed pursuant to Section 55  
37 of the Expedited Procedure of the Construction Industry Arbitration Rules. Arbitration shall  
38 proceed utilizing the appropriate rule of the AAA as determined by the dollar amount of the claim  
39 as provided in Section 24.5.4.

40 Unresolved disputes which do not involve delays or impacts to unchanged Work may be brought to  
41 binding arbitration prior to the Physical Completion Deadline, provided that:

- 1 (a) All the administrative remedies provided for in the Contract have been exhausted;  
2 (b) The dispute has been pursued to the claim status as provided in Section 24.3; and  
3 (c) Design-Builder certifies in writing that claims for delays or impacts to the Work will  
4 not result from the dispute.

5 Unless WSDOT and Design-Builder agree otherwise, all other unresolved claims (disputes which  
6 have been pursued to the claim status) which arise from the Contract must be brought in a single  
7 arbitration hearing and only after the Physical Completion Deadline has occurred. The total of  
8 those unresolved claims cannot be greater than \$1,000,000 to be eligible for arbitration.

9 In addition, Design-Builder agrees arbitration proceedings must commence, by filing of the  
10 aforementioned demand for arbitration, within 180 calendar days of the date of Final Acceptance,  
11 the same as any other claim or causes of action as provided in Section 24.5.7.

12 The scope and extent of discovery shall be determined by the arbitrator in accordance with AAA  
13 rules. In addition, each Party for claims greater than \$25,000 shall serve upon the other Party a  
14 "statement of proof." The statement of proof shall be served, with a copy to the AAA, no less than  
15 20 calendar days prior to the arbitration hearing and shall include:

- 16 (a) The identity, current business address, and residential address of each witness who  
17 will testify at the hearing;
- 18 (b) The identity of any expert witness to be called, a statement as to the subject matter  
19 and the substance of the facts and opinions on which the expert is expected to  
20 testify, a summary of the grounds for each opinion, and a resume of the expert's  
21 qualifications; and
- 22 (c) A list of each document that the Party intends to offer in evidence at the arbitration  
23 hearing. Either Party may request from the other Party a copy of any document  
24 listed. If such a request is made, a copy of the document shall be provided within  
25 five calendar days from the date the request is received.

26 The arbitrator may permit a Party to call a witness or offer a document not shown or included in the  
27 statement of proof only upon a showing of good cause.

#### 28 **24.5.6 Claims in Excess of \$1,000,000**

29 Design-Builder and WSDOT mutually agree that those claims in excess of \$1,000,000, submitted  
30 in accordance with Section 24.3 and not resolved by nonbinding ADR processes, shall be resolved  
31 through litigation unless the Parties mutually agree to resolve the claim through binding arbitration.

#### 32 **24.5.7 Time Limitation and Jurisdiction**

33 Any claim or cause of action of Design-Builder against WSDOT shall be forever barred, released  
34 and waived unless, in addition to complying with Section 10.5, Design-Builder shall have first  
35 satisfied the conditions precedent to commencing arbitration or litigation set forth in this Article 24,  
36 as applicable, and either shall have commenced arbitration or shall have filed a complaint in the  
37 Superior Court of Washington for Thurston County no later than 180 calendar days from the date  
38 of Final Acceptance. The Parties understand and agree that Design-Builder's failure to bring an  
39 action in the proper forum within the time period provided, shall be a complete bar to any such  
40 claims or causes of action.

1 If after Final Payment is made, it is determined through the dispute resolution process set forth in  
2 Article 24 that either Party is entitled to payment from the other (1) with respect to claims that were  
3 identified in the Final Contract Voucher Certification pursuant to Section 10.5; (2) which Design-  
4 Builder may be entitled to assert against WSDOT with respect to indemnities under the Contract or  
5 with respect to WSDOT's breach of obligations under the Contract which may occur after Final  
6 Payment, or (3) which WSDOT may be entitled to assert against Design-Builder with respect to  
7 Design-Builder's continuing obligations under the Contract Documents, such Party shall pay the  
8 amounts determined to be owing to the other Party within ten Business Days after determination  
9 thereof or entry of judgment if required, whichever is later.

#### 10 **24.5.8 Continuation of Work**

11 At all times during this dispute resolution process or any subsequent administrative or court  
12 proceeding, and at all times during the pendency of any dispute with any other project contractor,  
13 Design-Builder and all Subcontractors shall proceed with the Project Work diligently, without delay,  
14 in accordance with all provisions of the Contract Documents.

1 **25. DOCUMENTS AND RECORDS**

2 **25.1 Escrowed Proposal Documents (EPDs)**

3 Documents used by Design-Builder in developing its Proposal shall be preserved for use by  
4 WSDOT in connection with this Contract, as provided below.

5 **25.1.1 Data to be Escrowed**

6 The EPDs shall include any writings, working papers, computer printouts, charts, and any other  
7 data compilations of any nature which contain or reflect all information, data, and calculations used  
8 by Design-Builder to develop the Proposal for the Project. Design-Builder shall submit its EPD in  
9 hard copy and whenever possible shall also provide electronic copies. The EPD shall include  
10 equipment rates, overhead rates, labor rates, efficiency and/or productivity factors, and arithmetic  
11 extensions. The EPD shall also include detailed information provided to Design-Builder by  
12 Subcontractors identified in the Proposal and any other potential Subcontractors that provided data  
13 upon which the Proposal was based. The EPD shall identify any standard industry manuals used  
14 by Design-Builder in developing its Proposal. The EPD shall not include documents provided by  
15 WSDOT for use by Design-Builder in developing the Proposal. The EPD shall also include Design-  
16 Builder's estimates of bond and insurance costs and supporting information.

17 **25.1.2 Submittal of EPD**

18 The EPD documentation shall be submitted to the designated escrow company within seven  
19 calendar days after the Contract has been executed by WSDOT. The EPD documents shall be  
20 submitted in a sealed container. The container shall be clearly marked "EPD Documents" and shall  
21 also show on the face of the container the Design-Builder's name, the date of submittal, the Project  
22 title, and the Contract number.

23 Concurrently with submission of quotations or revisions to quotations provided in connection with  
24 formally proposed amendments to the Contract and concurrently with approval of each Change  
25 Order, if appropriate, one copy of all documentary information used in preparation of the quotation  
26 or Change Order shall be added to the EPD.

27 **25.1.3 Affidavit**

28 The sealed container shall contain, in addition to the Proposal documentation, an affidavit signed  
29 under oath by an individual authorized by Design-Builder to execute the Proposal. The affidavit  
30 shall list each document included in the EPD with sufficient specificity so a comparison can be  
31 made between the list and the documents supplied, to ensure that all the EPD documents listed in  
32 the affidavit have been enclosed in the sealed container. The affidavit shall show that the affiant  
33 has personally examined the EPD Documents and that the affidavit lists all of the documents used  
34 by Design-Builder to determine its Proposal for the Project and that all such documentation has  
35 been enclosed in the sealed container. This duty shall flow down to all Subcontractors and  
36 suppliers.

37 **25.1.4 Verification**

38 The escrow company, upon receipt of the sealed container, shall place the container in a safety  
39 deposit box, vault, or other secure place, and immediately notify WSDOT in writing that the  
40 container has been received. Upon receipt of such notice, WSDOT will promptly notify Design-  
41 Builder in writing that WSDOT will open the sealed container to verify that the affidavit has been



1 enclosed and to compare the EPD documents listed in the affidavit with the actual documentation  
2 enclosed in the container to ensure that all of the EPD documents have been submitted and that  
3 the copies are legible. The notification will advise Design-Builder of the date and time the  
4 container will be opened and the name of the WSDOT employee who will verify the contents of the  
5 container. The WSDOT employee verifying the contents of the escrow container will not be  
6 involved or connected with the review, evaluation, or resolution of any claim or dispute by Design-  
7 Builder made to WSDOT in connection with the Contract for which the verification was made.  
8 Design-Builder may have representatives present at the opening.

9 The EPD documents listed in the affidavit but not enclosed in the sealed container through error or  
10 oversight shall be submitted in a sealed container within five days after the opening of the original  
11 container. Any EPD document that is illegible shall be replaced with legible copies and furnished  
12 within five days after the opening of the original container. The face of the container shall be  
13 marked "Supplemental." The same procedure used in verifying the contents of the original  
14 container shall be used in verifying the contents of the supplemental submittal.

#### 15 **25.1.5 Subcontractor / Supplier Information**

16 Design-Builder shall require each Subcontractor / Supplier performing Work or supplying materials  
17 with a projected value greater than \$5,000,000 to submit to escrow a copy of all documentary  
18 information used in determining its price (or the price included in any Contract Modification),  
19 immediately prior to executing the Subcontract or purchase agreement and each Contract  
20 Modification and Subcontract or purchase agreement amendment, to be held in the same manner  
21 as Design-Builder's EPD and which shall be accessible by WSDOT in accordance with this  
22 Section 25.1. Each such Subcontract or purchase agreement shall include a representation and  
23 warranty from the Subcontractor / Supplier, for the benefit of Design-Builder and WSDOT, stating  
24 that its EPD constitutes all the documentary information used in establishing its price, and agreeing  
25 to provide a sworn certification in favor of Design-Builder and WSDOT together with each  
26 supplemental EPD, stating that the information contained therein is complete, accurate and  
27 current. Each Subcontract or purchase agreement that is not subject to the foregoing requirement  
28 shall include a provision requiring the Subcontractor / Supplier to preserve all documentary  
29 information used in establishing its Subcontract or purchase agreement price and to provide such  
30 documentation to WSDOT in connection with any claim made by such Subcontractor / Supplier.

#### 31 **25.1.6 Review of EPD**

32 The EPD shall be available for review by WSDOT (a) in connection with (i) negotiation of any  
33 Change Orders, (ii) resolution of disputes and claims, and (iii) audit under Section 24.4 (if the EPD  
34 are relevant to the subject of the audit), and (b) as described in Section 25.1.4. Subject to  
35 Section 25.1.9, WSDOT shall be entitled to review all or any part of the EPD in order to satisfy itself  
36 regarding the applicability of the individual documents to the matter at issue and shall be entitled to  
37 make and retain copies of such documents as it deems appropriate in connection with any such  
38 matters. The foregoing shall in no way be deemed a limitation on WSDOT's discovery rights with  
39 respect to such documents. Design-Builder may have representatives physically present at all  
40 times during WSDOT's review of EPD.

#### 41 **25.1.7 Duration of Escrow and Release of EPD**

42 The EPD shall remain in escrow during the life of the Contract and will be returned to Design-  
43 Builder by the escrow company once all of the following have occurred: (a) 180 days have elapsed  
44 after expiration or earlier termination of the Warranties, (b) all disputes regarding the Contract have  
45 been settled, and (c) Design-Builder has signed the Final Contract Voucher Certification and has

1 not reserved any claims on the Final Contract Voucher Certification against WSDOT arising out of  
2 the Contract. In the event that claims against WSDOT are reserved on the Final Contract Voucher  
3 Certification, the EPD shall remain in escrow. If efforts to resolve claims are unsuccessful,  
4 WSDOT may serve a request upon Design-Builder to authorize the escrow company, in writing, to  
5 release the EPD to WSDOT. Design-Builder shall respond to the request within 20 days after  
6 service of the request. If Design-Builder objects or does not respond to the request within 20 days  
7 after service of the request, WSDOT may file a motion requesting the court to enter an order  
8 directing the escrow company to deliver the EPD to WSDOT. The escrow company shall release  
9 the EPD for review as follows:

- 10 (a) To WSDOT upon receipt of a letter from Design-Builder authorizing the release;  
11 (b) To WSDOT upon receipt of a certified copy of a court order directing the release of  
12 the documents;  
13 (c) To the court for an in camera examination pursuant to a certified copy of a court  
14 order; and  
15 (d) The EPD and affidavit shall be returned to Design-Builder if litigation is not  
16 commenced within the time period prescribed by Law.

#### 17 **25.1.8 Representation and Warranty**

18 Design-Builder represents and warrants that the EPD and any supplement thereto constitute all of  
19 the information used in the preparation of its Proposal and agrees that no other Proposal  
20 preparation information will be considered in resolving disputes or claims. Design-Builder also  
21 agrees that the EPD are not part of the Contract Documents and that nothing in the EPD shall  
22 change or modify the Contract Documents.

#### 23 **25.1.9 Confidentiality of EPD**

24 The EPD are and will remain the property of Design-Builder. WSDOT has no interest in or right to  
25 the EPD other than the rights specified herein. In the event litigation ensues between WSDOT and  
26 Design-Builder with respect to the Contract, the EPD may become the property of WSDOT for use  
27 in the litigation as may be appropriate subject to the provisions of any court order limiting or  
28 restricting the use or dissemination of the EPD as provided in Section 25.1.7(c).

#### 29 **25.2 Remedies for Refusal or Failure to Provide EPD**

30 Failure or refusal to provide the EPD shall be deemed a material breach of the Contract. WSDOT  
31 may at its option refuse to make payments otherwise owing under Article 10 until Design-Builder  
32 has submitted the EPD in accordance with the Contract. This remedy is not exclusive and WSDOT  
33 may take such other action as is available to it under the Contract or by Law.

#### 34 **25.3 Cost and Escrow Instructions**

35 The cost of the escrow will be borne by WSDOT. WSDOT will provide escrow instructions to the  
36 escrow company consistent with this Article 25.

#### 37 **25.4 Project Records**

##### 38 **25.4.1 Maintenance of Records**

39 Design-Builder shall maintain a complete set of all books, records and documents prepared or  
40 employed by Design-Builder with respect to the Project.

1 **25.4.2 Audit and Inspection Rights**

2 WSDOT shall have such rights to audit and inspect Design-Builder, its Subcontractors and their  
3 respective books and records (including all tax returns and supporting documentation filed with any  
4 Governmental Bodies) in connection with the issuance of Change Orders, the resolution of  
5 disputes, and such other matters WSDOT deems necessary for purposes of complying or verifying  
6 compliance with the Contract and Laws. WSDOT's audit rights include the right to observe  
7 business operations of Design-Builder and its Subcontractors to confirm the accuracy of books and  
8 records. Refer to Appendix 5 for a description of federal government audit rights.

9 Design-Builder represents and warrants the completeness and accuracy of all information it or its  
10 agents provides in connection with audits by WSDOT or the federal government, and shall cause  
11 all Subcontractors to warrant the completeness and accuracy of all information such  
12 Subcontractors provide in connection with such audits.

13 **25.4.3 Claims Audits**

14 All claims filed against WSDOT shall be subject to audit at any time following the filing of the claim.  
15 The audit may be performed by employees of WSDOT or by an auditor under contract with  
16 WSDOT. No notice is required before commencing any audit before 60 days after Final  
17 Acceptance. If an audit is to be commenced more than 60 days after the date of Final Acceptance,  
18 Design-Builder will be given 20 calendar days notice of the time when the audit is to begin.  
19 Design-Builder, Subcontractors or their agents shall provide adequate facilities, acceptable to  
20 WSDOT, for the audit during normal business hours. Design-Builder, Subcontractors and their  
21 agents shall cooperate with the auditors. Failure of Design-Builder, Subcontractors or their agents  
22 to maintain and retain sufficient records to allow the auditors to verify all or a portion of the claim or  
23 to permit the auditors access to the books and records of Design-Builder, Subcontractors or their  
24 agents shall constitute a waiver of the claim and shall bar any recovery thereunder.

25 **25.4.4 Required Documents for Audits**

26 At a minimum, the auditors shall have available to them the following documents, including both  
27 hard and electronic copies as applicable:

- 28 (a) Daily time sheets and supervisor's daily reports;
- 29 (b) Collective bargaining agreements and/or union agreements;
- 30 (c) Insurance, welfare and benefits records;
- 31 (d) Payroll registers;
- 32 (e) Earnings records;
- 33 (f) Payroll tax forms;
- 34 (g) Material invoices and requisitions;
- 35 (h) Material cost distribution worksheet;
- 36 (i) Equipment records (list of company equipment, rates, etc.);
- 37 (j) Subcontractors' and suppliers' and agents' invoices and payment certificates;
- 38 (k) Canceled checks (payroll and suppliers);
- 39 (l) Job cost report;
- 40 (m) Job payroll ledger;

- 1 (n) General ledger;
- 2 (o) Cash disbursements journal;
- 3 (p) E-mail, letters and correspondence;
- 4 (q) Network servers, data storage devices, backup media;
- 5 (r) All documents that relate to each and every claim together with all documents that  
6 support the amount of damages as to each claim; and
- 7 (s) Work sheets used to prepare the claim establishing (a) the cost components for  
8 items of the claim including labor, benefits and insurance, materials, equipment,  
9 Subcontractors, all documents that establish the time periods, individuals involved,  
10 the hours for the individuals and the rates for the individuals, and (b) the lost  
11 revenue components of the claim.

12 Full compliance by Design-Builder with the provisions of this Section 25.4.4 is a contractual  
13 condition precedent to Design-Builder's right to seek relief under Article 24. Design-Builder  
14 represents and warrants the completeness and accuracy of all information it or its agents provides  
15 in connection with this Section 25.4.

## 16 **25.5 Retention of Records**

17 Design-Builder shall maintain all records and documents relating to the Project, the Contract or  
18 Work (including copies of all original documents delivered to WSDOT) at Design-Builder's office in  
19 the State until three years after the earlier to occur of (a) the date of Final Acceptance or (b) the  
20 termination date. If approved by WSDOT, photographs, microphotographs or other authentic  
21 reproductions may be maintained instead of original records and documents. Design-Builder shall  
22 notify WSDOT where such records and documents are kept.

23 Notwithstanding the foregoing, all records which relate to claims being processed or actions  
24 brought under the dispute resolution provisions hereof shall be retained and made available until  
25 such actions and claims have been finally resolved. Records to be retained include all books and  
26 other evidence bearing on Design-Builder's costs and expenses under the Contract Documents.  
27 Design-Builder shall make these records and documents available for audit and inspection to  
28 WSDOT, at Design-Builder's office, at all reasonable times, without charge, and shall allow such  
29 Persons to make copies of such documents (at no expense to Design-Builder).

## 30 **25.6 Washington Public Records Act**

### 31 **25.6.1 Applicability of Act**

32 Design-Builder acknowledges and agrees that all records, documents, drawings, plans,  
33 specifications and other materials in WSDOT's possession or those to which WSDOT is entitled to  
34 access, including materials submitted by Design-Builder, may be determined to be public records  
35 under the Washington Public Records Act, Chapter 42.56 RCW, and as such may be subject to  
36 public disclosure.

### 37 **25.6.2 Proprietary, Trade Secret or Confidential Information**

38 WSDOT recognizes that certain Work product provided by Design-Builder to WSDOT or that  
39 WSDOT owns pursuant to the Contract, or documents containing financial and marketing  
40 information or intellectual property, or Pricing Documents of which WSDOT obtains a copy  
41 pursuant to the Contract Documents may be exempt from disclosure under Chapter 42.56 RCW,

1 may constitute trade secrets as defined in RCW 19.108.010(4) and may include confidential  
2 information which is otherwise subject to protection from misappropriation or disclosure. Should  
3 such records become the subject of a request for public disclosure, the following provisions shall  
4 apply:

- 5 (a) WSDOT shall immediately notify Design-Builder upon receipt of notice from WSDOT  
6 of such a request and the date by which it anticipates producing the requested  
7 records;
- 8 (b) Design-Builder must then assert in writing to WSDOT any claim that such records  
9 contain proprietary or confidential information that it believes is exempt from  
10 disclosure under Chapter 42.56 RCW or is subject to protection pursuant to Chapter  
11 19.108 RCW or other state law so that WSDOT may consider such assertion in  
12 responding to the requester;
- 13 (c) If Design-Builder fails to make such assertion within eight days after the date  
14 WSDOT notifies Design-Builder of its intended response, WSDOT may make such  
15 disclosure;
- 16 (d) If Design-Builder timely asserts that the requested records contain proprietary or  
17 confidential information or trade secrets, Design-Builder will be permitted an  
18 additional eight days to seek judicial protection of the records pursuant to RCW  
19 42.56.540. Such an action shall be at Design-Builder's expense. If Design-Builder  
20 does not seek judicial protection of the records within such eight-day period, such  
21 records will be released;
- 22 (e) If Design-Builder's assertion that records contain proprietary or confidential  
23 information or trade secrets is challenged in court by the requester, Design-Builder  
24 shall assist WSDOT in its defense and shall indemnify WSDOT for any and all fines  
25 assessed and costs (including the fees and costs of WSDOT's attorneys) WSDOT  
26 incurs in such defense, including any attorneys' fees assessed against WSDOT  
27 under RCW 42.56.550(4); and
- 28 (f) If prior to judicial consideration of a challenge by a requester WSDOT in its sole  
29 discretion believes Design-Builder does not have a valid claim, WSDOT shall notify  
30 Design-Builder no less than three days prior to the date WSDOT intends to make  
31 the disclosure to allow Design-Builder to take such action as it deems appropriate  
32 prior to disclosure. WSDOT shall not make such a disclosure while an action to  
33 enjoin disclosure is pending under RCW 42.56.540; and
- 34 (g) If WSDOT denies a request for public records solely for reasons other than Design-  
35 Builder's assertion of proprietary or confidential information contained in records,  
36 Design-Builder has no responsibility for payment of any attorneys' fees or fines that  
37 may be imposed on WSDOT, nor for payment of WSDOT's attorneys' fees.

### 38 **25.6.3 Design-Builder Designation of Documents.**

39 In the event Design-Builder believes that any work product subject to transmittal to or review by  
40 WSDOT under the terms of this Contract, and any work product WSDOT owns pursuant to  
41 Section 3.2.4, contains proprietary or confidential information or trade secrets that are exempt or  
42 protectable from disclosure pursuant to State law, Design-Builder shall use its diligent efforts to  
43 identify such information prior to such transmittal or review, and WSDOT shall confer with Design-  
44 Builder on appropriate means of ensuring compliance with applicable Law prior to transmittal or  
45 review. Design-Builder's failure to so identify any such information shall not relieve WSDOT of its  
46 obligation to notify Design-Builder of any request for disclosure of records described in this

1 Section 25.6 or otherwise affect Design-Builder's right to protect proprietary and confidential  
2 information under applicable Law or as set forth in Section 25.6.2. All copies and abstracts of  
3 Design-Builder's books and records that WSDOT obtains or prepares from an audit pursuant to  
4 Section 25.4 shall be presumed to contain proprietary or confidential information or trade secrets  
5 except to the extent (i) Design-Builder otherwise indicates in writing to WSDOT or (ii) WSDOT  
6 duplicates materials WSDOT previously obtained by other means. Upon the written request of  
7 either Party, Design-Builder and WSDOT shall mutually develop a protocol for the transmittal,  
8 review and disclosure of Work Product or other information secured by Design-Builder so as to  
9 avoid violations of Chapters 42.56, 19.108 and 42.52 RCW.

10

1    **26.    MISCELLANEOUS PROVISIONS**

2    **26.1    Amendments**

3    The Contract may be amended only by a written instrument duly executed by the Parties or their  
4    respective successors or assigns.

5    **26.2    Waiver**

6    Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or  
7    other provisions of the Contract Documents at any time (including any agreement by WSDOT to  
8    accept Nonconforming Work under Section 5.6.2) shall not in any way limit or waive that Party's  
9    right thereafter to enforce or compel strict compliance with every term, covenant, condition or other  
10   provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the Parties  
11   make and implement any interpretation of the Contract Documents without documenting such  
12   interpretation by an instrument in writing signed by both Parties, such interpretation and  
13   implementation thereof will not be binding in the event of any future disputes. The consent by one  
14   Party to any act by the other Party requiring such consent shall not be deemed to render  
15   unnecessary the obtaining of consent to any subsequent act for which consent is required,  
16   regardless of whether similar to the act for which consent is given.

17   No act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed  
18   to waive, exhaust or impair any right, remedy or power of such Party under any Contract  
19   Document, or to relieve the other Party from the full performance of its obligations under the  
20   Contract Documents. No custom or practice between the Parties in the administration of the terms  
21   of the Contract Documents shall be construed to waive or lessen the right of a Party to insist upon  
22   performance by the other Party in strict compliance with the terms of the Contract Documents.

23   No waiver of any term, covenant or condition of the Contract Documents shall be valid unless in  
24   writing and signed by the Party providing the waiver.

25   **26.3    Independent Contractor**

26   Design-Builder is an independent contractor, and nothing contained in the Contract Documents  
27   shall be construed as constituting any relationship with WSDOT other than that of Project owner  
28   and independent contractor. In no event shall the relationship between WSDOT and Design-  
29   Builder be construed as creating any relationship whatsoever between WSDOT and any of Design-  
30   Builder's employees. Neither Design-Builder nor any of its employees is or shall be deemed to be  
31   an employee of WSDOT. Except as otherwise specified in the Contract Documents, Design-  
32   Builder has sole authority and responsibility to employ, discharge and otherwise control its  
33   employees and has complete and sole responsibility as a principal for its agents, for all  
34   Subcontractors and for all other Persons that Design-Builder or any Subcontractor hires or  
35   engages to perform or assist in performing the Work.

36   **26.4    Successors and Assigns**

37   The Contract Documents shall be binding upon and inure to the benefit of WSDOT and Design-  
38   Builder and their permitted successors, assigns and legal representatives.

39   Design-Builder may collaterally assign its rights to receive payment under the Contract Documents  
40   and may subcontract Work in compliance with the requirements of the Contract Documents.  
41   Design-Builder shall not otherwise sublet, transfer, assign or dispose of any portion of the Contract



1 Documents, or delegate any of its duties hereunder, except with WSDOT's prior approval. Design-  
2 Builder's assignment or delegation of any of its Work under the Contract Documents shall be  
3 ineffective to relieve Design-Builder of its responsibility for the Work assigned or delegated, unless  
4 WSDOT, in its sole discretion, has approved such relief from responsibility. Any assignment of  
5 money shall be subject to all proper set-offs and withholdings in favor of WSDOT and to all  
6 deductions provided for in the Contract Documents. No partner, joint venturer, member or  
7 shareholder of Design-Builder may assign, convey, transfer, pledge, mortgage or otherwise  
8 encumber its ownership interest in Design-Builder without the prior approval of WSDOT, in  
9 WSDOT's sole discretion.

10 **26.5 Designation of and Cooperation with Representatives**

11 WSDOT and Design-Builder shall each designate an individual or individuals who shall be  
12 authorized to make decisions and bind the Parties on matters relating to the Contract Documents.  
13 Appendix 12 provides the initial designations. Such designations may be changed by a  
14 subsequent writing delivered to the other Party in accordance with Section 26.6. The Parties may  
15 also designate technical representatives who shall be authorized to investigate and report on  
16 matters relating to the construction of the Project and negotiate on behalf of each of the Parties but  
17 who do not have authority to bind WSDOT or Design-Builder.

18 Design-Builder shall cooperate with WSDOT and all representatives of WSDOT designated as  
19 described above.

20 **26.6 Notices and Communications**

21 **26.6.1 Delivery of Notices**

22 Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by  
23 certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service,  
24 with delivery receipt requested, or (d) sent by facsimile communication followed by a hardcopy or  
25 with receipt confirmed by telephone, to the following addresses (or to such other address as may  
26 from time to time be specified in writing by such Person):

27 All correspondence with Design-Builder shall be sent to Design-Builder's Project Manager or as  
28 otherwise directed by such Project Manager. The address for such communications shall be [to be  
29 added in the execution documents]:

30 \_\_\_\_\_  
31 \_\_\_\_\_  
32 \_\_\_\_\_  
33 Attn.: \_\_\_\_\_  
34 Telephone: \_\_\_\_\_  
35 FAX: \_\_\_\_\_

36 In addition, copies of all notices to proceed and suspension, termination and default notices shall  
37 be delivered to the following persons:

38 \_\_\_\_\_  
39 \_\_\_\_\_  
40 Attn.: \_\_\_\_\_  
41 Telephone: \_\_\_\_\_  
42 FAX: \_\_\_\_\_

A complete page 140  
is attached to back of  
contract. BDN



1 All communications to WSDOT shall be marked with WSDOT's project identification number and  
2 shall be delivered to WSDOT's Project Manager, with copies to such additional Persons as may be  
3 designated by WSDOT's Project Manager, at the address set forth below [*to be added in the*  
4 *execution documents*]:

5 Washington State Department of Transportation  
6 Alaskan Way Viaduct  
7 999 Third Avenue, Ste 2424  
8 Seattle, WA 98104  
9 Attn.: Linea Laird  
10  
11 Telephone: 206-805-2843  
12 FAX: 206-805-2899

13 In addition, copies of all notices regarding disputes, termination and default notices shall be  
14 delivered to the following persons:

15 Same as above.  
16 \_\_\_\_\_  
17 Attn.: \_\_\_\_\_  
18 Telephone: \_\_\_\_\_  
19 FAX: \_\_\_\_\_

## 20 **26.6.2 Receipt of Notices**

21 Notices shall be deemed received when actually received in the office of the addressee (or by the  
22 addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S.  
23 Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing,  
24 notices sent by facsimile after 4:00 p.m. Pacific Time and all other notices received after 5:00 p.m.  
25 Pacific Time shall be deemed received on the first Business Day following delivery (that is, in order  
26 for a fax to be deemed received on the same day, at least the first page of the fax must have been  
27 received before 4:00 p.m.).

## 28 **26.6.3 Copies of Correspondence to WSDOT**

29 Design-Builder shall copy WSDOT on all written correspondence pertaining to the Contract  
30 between Design-Builder and any Person other than Design-Builder's Subcontractors, consultants  
31 and attorneys.

## 32 **26.7 Interpretation of Contract Documents**

33 In the Contract Documents, where appropriate: the singular includes the plural and vice versa;  
34 references to statutes or regulations include all statutory or regulatory provisions consolidating,  
35 amending, or replacing the statute or regulation referred to; the words "including," "included,"  
36 "includes," and "include" are deemed to be followed by the words "without limitation," unless the  
37 context requires otherwise, in phrases involving performance by a Person, the word "shall"  
38 indicates a requirement imposed on the Person; unless otherwise indicated, references to  
39 sections, appendices and exhibits are to the document which contains such references; words  
40 such as "herein," "hereof," and "hereunder" refer to the entire document in which they are  
41 contained and not to any particular provision or section; words not otherwise defined that have  
42 well-known technical or construction industry meanings are used in accordance with such  
43 recognized meanings; references to Persons include their respective permitted successors and

1 assigns and, in the case of Governmental Bodies, Persons succeeding to their respective functions  
2 and capacities; and words of any gender used herein include each other gender where  
3 appropriate. Unless otherwise specified, lists contained in the Contract Documents defining the  
4 Project or the Work shall not be deemed all-inclusive.

5 References to "plan(s)" in the Mandatory Standards shall be deemed to refer to the Design  
6 Documents. References to the project owner shall mean WSDOT, or, where Work is being  
7 performed on facilities owned by a Governmental Body other than WSDOT, such Governmental  
8 Body. References to "bid," "proposal" or "bid proposal" shall be deemed to refer to the Proposal.  
9 References to the "Contractor" shall be deemed to refer to Design-Builder. References to the  
10 Engineer in the context of provider of compliance judgment may mean Design Manager, Quality  
11 Assurance Manager or other appropriate representative of Design-Builder, or it may mean a  
12 WSDOT representative, depending on the context, as determined by WSDOT in its sole discretion.

13 Design-Builder acknowledges and agrees that it had the opportunity and obligation, prior to the  
14 Proposal Date, to review the Contract Documents and to bring to WSDOT's attention any conflicts  
15 or ambiguities contained therein. Design-Builder further acknowledges and agrees that it has  
16 independently reviewed the Contract Documents with legal counsel, and that it has the requisite  
17 experience and sophistication to understand, interpret and agree to the particular language of the  
18 Contract Documents. Accordingly, in the event of an ambiguity in or dispute regarding the  
19 interpretation of the Contract Documents, the Contract Documents shall not be construed against  
20 the Person that prepared them, and instead other rules of interpretation shall be used. WSDOT's  
21 answers to any questions posed during the proposal process for the Project shall in no event be  
22 deemed part of the Contract Documents and shall not be relevant in interpreting the Contract  
23 Documents except as they may clarify provisions otherwise considered ambiguous.

#### 24 **26.8 Officials Not to Benefit**

25 Without prior written consent of State, Design-Builder must not employ any professional or  
26 technical personnel to provide services under the Contract Documents who are or have been at  
27 any time during the time period of the Contract in the employ of State, except retired State  
28 employees, without written consent from State.

29 Design-Builder warrants that it has not employed or retained any company or person, other than a  
30 bona fide employee working solely for Design-Builder, to solicit or secure the Contract, and that  
31 Design-Builder has not paid or agreed to pay any company or person, other than a bona fide  
32 employee working for Design-Builder, any fee, commissions, percentage, brokerage fee, gifts, or  
33 any other consideration, contingent upon or resulting from the award of making of the Contract.

34 The rights and remedies of WSDOT specified in this Section 26.8 are not exclusive and are in  
35 addition to any other rights and remedies allowed by Law.

#### 36 **26.9 Limitation on Third Party Beneficiaries**

37 The City is an intended third-party beneficiary of the Contract documents with respect to the City's  
38 interests thereunder. It is not intended by any of the provisions of the Contract Documents to  
39 create any third party beneficiary hereunder, other than the City, or to authorize anyone not a party  
40 hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions  
41 hereof, except to the extent that specific provisions (such as the warranty and indemnity  
42 provisions) identify third parties (such as Utility Owners) and state that they are entitled to benefits  
43 hereunder. Except as otherwise provided in this Section 26.9, the duties, obligations and  
44 responsibilities of the Parties to the Contract Documents with respect to third parties shall remain

1 as imposed by Law. The Contract Documents shall not be construed to create a contractual  
2 relationship of any kind between WSDOT and a Subcontractor or any other Person except Design-  
3 Builder. Any indemnified Party shall have the right to enforce the indemnification and insurance  
4 obligations set forth in Articles 18 and 20.

#### 5 **26.10 No Personal Liability**

6 WSDOT's authorized representatives are acting solely as agents and representatives of WSDOT  
7 when carrying out the provisions of or exercising the power or authority granted to them under the  
8 Contract Documents. They shall not be liable either personally or as employees of WSDOT for  
9 actions in their ordinary course of employment. No agent, consultant, officer or employee of  
10 WSDOT shall be personally responsible for any liability arising under the Contract.

#### 11 **26.11 Authorization**

12 The execution, delivery and performance of the Contract have been duly authorized by all  
13 necessary actions of Design-Builder, and, if applicable, Design-Builder's members, and will not  
14 result in a breach or a default under the organizational documents of any such Person or any  
15 indenture, loan, credit agreement, or other material agreement or instrument to which any such  
16 Person is a party or by which their properties and assets may be bound or affected.

#### 17 **26.12 Further Assurances**

18 Design-Builder shall promptly execute and deliver to WSDOT all such instruments and other  
19 documents and assurances as are reasonably requested by WSDOT to further evidence the  
20 obligations of Design-Builder hereunder, including assurances regarding assignments of  
21 Subcontract and supply agreements contained herein.

#### 22 **26.13 Survival**

23 Design-Builder's representations and warranties, the dispute resolution provisions contained in  
24 Article 24, and all other provisions which by their inherent character should survive termination of  
25 the Contract, shall survive the termination of the Contract.

#### 26 **26.14 Severability**

27 If any clause, provision, section or part of the Contract is ruled invalid under Article 24 or otherwise  
28 by a court of competent jurisdiction, then the Parties shall: (a) promptly meet and negotiate a  
29 substitute for such clause, provision, section or part, which shall, to the greatest extent legally  
30 permissible, effect the original intent of the Parties, including an equitable adjustment to the  
31 Design-Builder's compensation to account for any change in the Work resulting from such  
32 invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as  
33 applicable) which declared such invalidity for an interpretation of the invalidated portion to guide  
34 the negotiations. The invalidity or unenforceability of any such clause, provision, section or part  
35 shall not affect the validity or enforceability of the balance of the Contract, which shall be construed  
36 and enforced as if the Contract did not contain such invalid or unenforceable clause, provision,  
37 section or part.

#### 38 **26.15 Headings**

39 The captions of the sections of the Contract Documents are for convenience only and shall not be  
40 deemed part of the Contract Documents or considered in construing the Contract Documents.

1   **26.16 Governing Law**

2   The Contract Documents shall be governed by and construed in accordance with the law of the  
3   State, without regard to conflict of law principles.

4   **26.17 Entire Contract**

5   The Contract Documents contain the entire understanding of the Parties with respect to the subject  
6   matter hereof and supersede all prior agreements, understandings, statements, representations  
7   and negotiations between the Parties with respect to its subject matter.

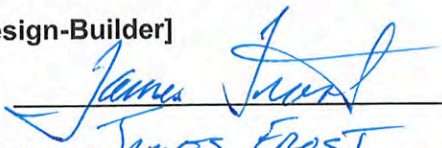
8   **26.18 Counterparts**

9   This instrument may be executed in two or more counterparts, each of which shall be deemed an  
10  original, but all of which together shall constitute one and the same instrument.  
11

1 **IN WITNESS WHEREOF**, the Parties have executed the Contract as of the last date set forth next  
2 to signatures of the Parties, below.

3

[Design-Builder]

By: 

Name: JAMES FROST

Title: CEO CIVIL GROUP/STP

Date: 12/28, 2010

Washington Department of Transportation

By: 

Name: Paula J. Hammond

Title: Secretary of Transportation

Date: 1/6, 2011

[Design-Builder]

DRAGADOS USA INC  
a Delaware corporation.

By: 

Name: Fernando Gonzalez Alcaraz

Title: CFO

Contractor's License No.: SEATTTP908PO

4

ADDENDUM

1

2 [Joint Venture Members] agree that they shall be jointly and severally liable for the obligations of  
3 Design-Builder under the Contract Documents. [Joint Venture Members] agree that WSDOT and  
4 its successors and assignees shall be entitled to enforce any claim or judgment against Design-  
5 Builder arising out of the Contract Documents directly against Design-Builder, [Joint Venture  
6 Members] in any order.

7 Date: December 28<sup>th</sup>, 2010

8 [Joint Venture Members]

9 By: 

10 Name: JAMES FROST

11 Title: CEO Civil Group/STP

~~Date: 12/30/10~~

~~By: ~~

~~Name: Fernando Gonzalez Alcantara~~

~~Title: CFO - DRAGADOS USA INC~~

1 Documents, or delegate any of its duties hereunder, except with WSDOT's prior approval. Design-  
2 Builder's assignment or delegation of any of its Work under the Contract Documents shall be  
3 ineffective to relieve Design-Builder of its responsibility for the Work assigned or delegated, unless  
4 WSDOT, in its sole discretion, has approved such relief from responsibility. Any assignment of  
5 money shall be subject to all proper set-offs and withholdings in favor of WSDOT and to all  
6 deductions provided for in the Contract Documents. No partner, joint venturer, member or  
7 shareholder of Design-Builder may assign, convey, transfer, pledge, mortgage or otherwise  
8 encumber its ownership interest in Design-Builder without the prior approval of WSDOT, in  
9 WSDOT's sole discretion.

## 10 **26.5 Designation of and Cooperation with Representatives**

11 WSDOT and Design-Builder shall each designate an individual or individuals who shall be  
12 authorized to make decisions and bind the Parties on matters relating to the Contract Documents.  
13 Appendix 12 provides the initial designations. Such designations may be changed by a  
14 subsequent writing delivered to the other Party in accordance with Section 26.6. The Parties may  
15 also designate technical representatives who shall be authorized to investigate and report on  
16 matters relating to the construction of the Project and negotiate on behalf of each of the Parties but  
17 who do not have authority to bind WSDOT or Design-Builder.

18 Design-Builder shall cooperate with WSDOT and all representatives of WSDOT designated as  
19 described above.

## 20 **26.6 Notices and Communications**

### 21 **26.6.1 Delivery of Notices**

22 Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by  
23 certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service,  
24 with delivery receipt requested, or (d) sent by facsimile communication followed by a hardcopy or  
25 with receipt confirmed by telephone, to the following addresses (or to such other address as may  
26 from time to time be specified in writing by such Person):

27 All correspondence with Design-Builder shall be sent to Design-Builder's Project Manager or as  
28 otherwise directed by such Project Manager. The address for such communications shall be *[to be*  
29 *added in the execution documents]*:

30 801 2<sup>nd</sup> Ave., Suite 302  
31 Seattle, WA 98104

32  
33 Attn.: Manuel Pardo  
34 Telephone: 206-802-1799  
35 FAX: 206-802-1801

36 In addition, copies of all notices to proceed and suspension, termination and default notices shall  
37 be delivered to the following persons:

38 500 5<sup>th</sup> Avenue, 38<sup>th</sup> Floor  
39 New York, NY 10110  
40 Attn.: Ricardo Franco  
41 Telephone: 212-779-0900  
42 FAX: 212-764-6032

15901 Olden Street  
Slymar, CA 98142  
Attn.: Jack Frost  
Telephone: 818-362-8391  
FAX: 818-364-8030