***Note to Preparer:***

*(1) This is a sample contract for a “design-build-operate” septage waste treatment facility, hereafter referred to as a “DBO” contract. The contract can be modified to include only design and build without operating the facility. The contract can also include septage waste hauling if a single, municipality-wide operator is desired. The sample DBO contract uses a performance based compensation schedule.*

*(2) All underlined areas in the Contract and in the Annexes are areas that the Owner needs to define and/or decide to include in the Contract.*

*(3) This DBO Contract Example is for a three (3) stage payment according to Annex 6C. For this example the Contractor must verify of the operation costs according to the Schedules provided in their bid (Annex 5)*

**DESIGN-BUILD OPERATE AGREEMENT**

**FOR A WASTE SEPTAGE TREATMENT FACILITY**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

THIS DESIGN/BUILD AGREEMENT with Fixed Price (referred to as the "Agreement” or "Contract" hereafter) is made and entered into by and between: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ hereinafter referred to as the "Municipality" and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ hereinafter referred to as the "Contractor".

**RECITALS**

This Contract is for the design and construction of a septage waste treatment facility, and requires the Contractor to operate the Facility for a minimum of \_\_\_\_\_\_ months ("Initial Term") after the Facility if completed. The Facility will be located at or near \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (which is referred to as the “Project” hereafter).

The amount to be paid by the Municipality to the Contractor for the design and build part of this Contract is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, which sum is payable according to the terms and conditions found in a companion Contract attached as Annex \_6\_, and which is incorporated by reference and made part of this Contract.

The amount to be paid by The Municipality to the Contractor for the operation of the septage treatment Facility for the Initial Term is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ which sum is payable according to the terms and conditions found in this Contract and associated Annexes.

The design and build part of this Contract is not severable from the operation part of this Contract, except at Municipality's sole discretion.

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements stated herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, The Municipality and the Contractor agree to the Recitals as listed above and as follows:

**ARTICLE 1**

**THE AGREEMENT, CONTRACT DOCUMENTS AND DEFINITIONS**

**1.1** **Contract Defined**: “Contract” means and includes this Agreement (and all exhibits) and all Contract Documents.

**1.2 Contract Documents Defined**: “Contract documents” means and includes the illustrative site plan, the project schedule and the other documents specified below, all of which are incorporated by reference into the Contract. Detailed design documents should be organized according to the guidelines in Annex 3: Technical Proposal.

**1.3 Enumerated Documents Form Entire Contract**. Documents not specifically enumerated in Paragraph 1.2 are not Contract Documents, and do not form any part of the Contract.

**1.4** **Complete Agreement**. The Contract, together with the Contractor’s and Surety’s performance and payment bonds for the Project, constitute the entire and exclusive agreement between the Municipality and the Contractor with reference to the Project. The Contract supersedes any and all prior documents, discussions, communications, representations, understandings, negotiations or agreements by and between the parties.

**1.5 Contract Interpreted as a Whole**. The Contract is intended to be an integral whole and shall be interpreted as internally consistent. Work required by any page, part, or portion shall be required.

**1.6 Provision of all Things Required**. Anything that may be required, or reasonably implied or inferred by or from the Agreement or Contract Documents that make up the Contract, or any one or more of them, shall be provided by the Contractor for the Fixed Contract Price.

**1.7 Privity Only with The Contractor**. Nothing contained in the Contract shall create, nor be interpreted to create, privity or any other relationship whatsoever between the Municipality and any person except the Contractor, and similarly, between the Contractor and any person except Municipality.

**1.8 Agreed Interpretation of Contract Terms**. When a word, term, or phrase is used in the Contract, it shall be interpreted or construed first, as defined herein; second, if not defined, according to its generally accepted meaning in the construction industry; and third, if there is no generally accepted meaning in the construction industry, according to its common and customary usage. Headings are used solely for convenience.

**1.9 Terms “Include” and “Days”**. “Include,” “includes,” or “including,” as used in the Contract, shall be deemed in all cases to be followed by the phrase “without limitation.” The term “days,” unless otherwise specified, shall mean calendar days.

**1.10 Use of Singular and Plural**. Words or terms used as nouns in the Contract shall be inclusive of their singular and plural forms, unless the context of their usage clearly requires a contrary meaning.

**1.11 Definition of Material Breaches Not Exhaustive**. The specification of any act, failure, refusal, omission, event, occurrence or condition as constituting a material breach of the Contract shall not imply that any other non-specified act, failure, refusal, omission, event, occurrence or condition shall be deemed not to constitute a material breach of the Contract.

**ARTICLE 2**

**THE CONTRACTOR’S REPRESENTATIONS AND WARRANTIES**

**2.1 Specific Representations**. In order to induce the Municipality to execute this Agreement and recognizing that the Municipality is relying on the Contractor by executing this Agreement, and without superseding, limiting, or restricting any other representation or warranty set forth elsewhere in this Agreement, or the Contract, or implied by operation of law, makes the following express representations to the Municipality:

2.1.1 The Contractor, on its own behalf or through contracts with others, is professionally and fully qualified to act as the design professional and the general the Contractor for the Project and is, and will remain, properly licensed to practice engineering and architecture and general contracting by all public entities having jurisdiction.

2.1.2 Unless otherwise expressly provided in this Agreement, the Contractor will obtain and maintain all necessary licenses, permits or other authorizations necessary to allow the Contractor to perform the Work for the Project until the Contractor’s duties have been fully satisfied.

2.1.3 The Contractor has the expertise, experience, and knowledge as well as the necessary plant, personnel and financial capability to perform the Design Services and the Work in accordance with the terms of the Agreement.

2.1.4 The Contractor represents that all design services for the Project have been or will be performed by the professional consultants of the Design/Build team who are listed in **Annex \_\_3\_**, pursuant to agreements between the Contractor or its agents and said entities. The Contractor further represents that it will employ design professionals, duly licensed by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to perform the Design Services required by this Agreement, and that all Design Services specified or contemplated in this Agreement will be performed by or at the specific direction of such design professionals.

2.1.5 Prior to the execution of this Agreement, the Contractor has visited and inspected the entire Project site and relevant areas adjacent thereto and the local conditions under which the Project is to be designed, constructed and operated and the Contractor has reviewed the site as necessary, to determine the conditions under which the Work will be performed, and the Contractor accepts the conditions of the Project site and areas adjacent thereto which may impact the performance of the Work and has taken those conditions into account in entering into the Agreement, provided, however, that Design Builder’s acceptance herein applies to the extent that the Site conditions are unchanged in any material respect from those which existed at the time the Contractor's bid was made.

2.1.6 In entering into this Agreement, the Contractor represents that it has made such independent inspections as it has determined, based on its extensive experience, to be reasonably necessary and prudent. The Fixed Contract Price includes amounts which Contractor understands and agrees are sufficient to cover any foreseeable conditions (concealed, subsurface, or other). Consequently, should foreseeable concealed conditions encountered in the performance of the Work, whether surface or subsurface, be at variance with the conditions indicated by the Contract Documents or at variance with the Contractor’s expectations, the Contractor agrees that no adjustment in the Fixed Contract Price shall be made, and the Contractor shall complete the Work, absorbing all such unexpected expense; provided, however that the Contractor may seek an adjustment to the Fixed Contract Price if the conditions (including conditions addressed in Paragraph 16.2) encountered in the performance of the Work are covered by and within risks expressly assumed by the Municipality in this Agreement.

2.1.7 The Contractor represents it has developed or fully reviewed the Contract Documents and the Design Performance Guidelines described in Paragraph 1.2 of this Agreement. Based thereon, the Contractor represents that it will prepare the Detailed Design to be fully consistent with the purposes, standards, and provisions set forth in said attachments, and that the Project will be and is constructible in accordance with said documents and the Detailed Design.

2.1.8 The Contractor warrants that the Contract Time is a reasonable period for performing the work, and that the Scheduled Completion Date provides a reasonable period of time for performing the Work.

2.1.9 The Contractor represents it has received, reviewed, compared, studied, and carefully examined all of the documents which make up the Contract, and with regard to any furnished by the Municipality has had any questions about them answered to its satisfaction, and finds such documents in all respects to be complete, accurate, adequate, consistent, coordinated, and sufficient for the Contractor to complete its performance as set forth in the Contract Documents. Such review, comparison, study, and examination is a warranty that the Project can be finally designed and constructed in accordance with the Detailed Design to be completed by the Contractor and to the quality level specified herein for the Fixed Contract Price.

2.1.10 The Contractor assumes full responsibility to the Municipality for improper acts and omissions of its Subcontractors or others employed or retained by the Contractor in connection with the Project.

2.1.11 The Contractor shall prepare all documents required by the Contract, including the Detailed Design and Design Documents, and shall perform all Work in such a manner that they shall be accurate, complete, and for an amount not to exceed the Fixed Contract Price or the fixed prices established, and that all such documents prepared, and all Work performed by the Contractor shall be sufficient to accomplish the Performance Criteria as identified by the Municipality, and shall be in conformity and comply with all applicable law, codes, and regulations.

**ARTICLE 3**

**DESIGN SERVICES PRIOR TO EXECUTION OF AGREEMENT**

**3.1 Completed Tasks**. Prior to the execution of this Agreement, the Contractor has completed the preliminary design documents referenced as attachments in Paragraph 1.2 of this Agreement.

**3.2 Further Design Services**. From the documents referenced in Paragraph 3.1, the Contractor shall prepare Detailed Design documents for the Project pursuant to the provisions of Article 4 of this Agreement.

**ARTICLE 4**

**DETAILED DESIGN**

**4.1 Time for Preparation**. By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, the Contractor shall prepare and submit to the Municipality the complete Detailed Design.

**4.2 Fast Track Acknowledged *(if needed)***. The Project, including the Design Services and the Work to be performed by the Contractor may be conducted by the Contractor using fast track design and construction principles and practices, subject to the provisions in Article 7 regarding the issuance of a Notice to Proceed for Work. The Contractor may prepare the Detailed Design for specified portions of the Work, and upon approval of such parts of the Detailed Design by the Municipality may perform such portions of the Work, even though the entire Detailed Design has not been completed by the Contractor or approved by the Municipality. Notwithstanding the provisions of this Paragraph, the Contractor agrees that all other provisions of this Agreement must be satisfied regarding the performance of the Design Services and the Work, and that the Contractor assumes all responsibility for all increased costs and all delays in the completion of the Project which are caused by the Contractor’s utilization of any fast track procedures or practices, including dividing the Detailed Design into specified portions as set forth in the project schedule, and completing the Work according to those approved portions of the Detailed Design.

**4.3 Detailed Design Defined**. The “Detailed Design” means and includes all Design Documents which shall describe with specificity all elements, details, components, materials, and other information necessary for the complete construction of the Project and the rendering of the Project fully operational for its intended purposes, as identified by the Municipality, including compliance with all testing, permitting, qualifications, certifications, validations, and obtaining regulatory approvals by all applicable regulatory authorities required to render the Project and all its components operational and functionally and legally usable for their intended purpose. Subject to the provisions of Paragraph 12.7 of this Agreement and highlighted in Annex 3: Technical Proposal, the Municipality shall review and approve, where appropriate, the Design Documents, or any portion thereof.

**4.4 Design Documents Defined**. “Design Documents” means all the design documents provided by the Contractor and approved by the Municipality pursuant to the Agreement, including, without limitation, those for use in constructing the Project, performing the Work, and the rendering of the Project fully operational for its intended purposes, as identified by the Municipality, and shall include, without limitation, detailed plans, drawings, specifications, manuals, and related materials prepared by or on behalf of the Contractor.

**4.5 Preparation of Project Site Information**. The Contractor shall prepare, as necessary, surveys and topographic information needed to establish line and grade of sewers serving the Project (if any), location of property lines and easements. Sewer easements, both construction and permanent, shall be referenced to property lines by field surveys, and plans shall include the location of any improvements as it relates to property lines.

**4.6 Design Services Defined**. “Design Services” means any and all architectural, engineering, and design tasks or services required to be performed by the Contractor for the completion of the Project, and all labor, materials, supervision, equipment, computers, documents, and other things necessary for the performance of such task or services.

**4.7 Quality of Design Services**. The Contractor shall be responsible for the professional quality, completeness, accuracy, and coordination of the Design Documents. The Contractor shall provide Design Services that will result in an operationally cost-efficient and economical facility that meets all environmental and regulatory requirements as of the date hereof, and uses the most appropriate available technology.

**4.8 Compliance with Laws and Regulatory Requirements**. In providing Design Services, the Contractor shall comply with the lawful requirements of all government authorities having lawful jurisdiction over the Project. The Contractor shall design the Project to meet all applicable requirements of building control laws and regulations in relation to the design, construction, occupation, and operation of the Project, including, without limitation, environmental standards, fire and safety regulations, and requirements and compliance with all other applicable standards and codes.

**4.9 Duty to Correct Errors**. The Contractor shall, without additional compensation, immediately correct any errors, omissions or deficiencies in its Design Services and Design Documents.

**4.10 Schedule of Design Services**. As a supplement to and consistent with the project schedule attached hereto and referenced in Paragraph 1.2, and to the extent not already a part of said project schedule, the Contractor shall submit for the Municipality’s approval a design schedule for the performance of the Contractor’s Design Services which shall include allowance for reasonable time required for the Municipality’s review of submissions and for approvals of authorities having jurisdiction over the Project, and which shall describe in detail the break-down of the portions of the Detailed Design specified by the Contractor in completing the entire Detailed Design, and the dates by which those specified portions of the Detailed Design will be completed. The design schedule, when approved by the Municipality, shall not, except for good cause, be exceeded by the Contractor. Should the Contractor, at any time during the course of performing the Agreement, have any reason to believe that it will be unable to meet any completion date in accordance with the design schedule, it shall promptly notify the Municipality’s Representative in writing. In such notice, the Contractor shall state the reason for the delay, including the party responsible, if any, and the steps being taken to remedy or minimize the impact of the delay. Failure of Contractor to submit such notice shall constitute a waiver by the Contractor of any claim for an adjustment to the design schedule or the Contract Time. Subject to the provisions of Paragraph 12.7 of this Agreement, the Municipality shall review and approve, where appropriate, the design schedule, or any portion thereof. The design schedule shall be incorporated into and be a part of the project schedule.

**ARTICLE 5**

**PERFORMANCE OF CONSTRUCTION WORK**

**5.1 General Intent**. The Contractor shall perform all Work necessary to construct the Project in accordance with the Contract and to render the Project and all its components operational and functionally and legally usable for its intended purposes, as identified by the Municipality.

**5.2 Work Defined**. “Work” shall mean whatever is done by or required of the Contractor to perform and complete its duties relating to the construction of the Project, including, without limitation, the following:

5.2.1 Construction of the whole and all parts of the Project in full and strict conformity with the Contract;

5.2.2 The provision and furnishing, and prompt payment therefore, of all labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, power, fuel, heat, light, cooling, other utilities and things required for the construction of the Project;

5.2.3 The procurement and furnishing of all necessary building permit[s] and other permits required for the construction of the Project, and the payment of all applicable fees, provided, however, that the Contractor is not responsible for and will not be required to pay impact fees imposed by local taxing authorities;

5.2.4 The creation and submission to the Municipality of detailed as-built drawings depicting all as-built construction;

5.2.5 The furnishing of all equipment and product warranties, manuals, test results and user guides required by the Contract or otherwise reasonably available to the Contractor;

5.2.6 The furnishing of all other services and things required or reasonably inferable from the Contract Documents.

**ARTICLE 6**

**MUNICIPALITIES’S REPRESENTATIVE**

**6.1 Municipality’s Representative**. The Municipality’s Representative for the Project shall be the person designated in Annex\_\_\_\_\_\_. The Municipality’s Representative can act for and on behalf of the Municipality unless otherwise specified herein. Municipality’s Representative has full authority to act on behalf of and to the same extent as the Municipality.

**ARTICLE 7**

**TIME FOR CONSTRUCTION: THE CONTRACT TIME**

**7.1 Commencement of Construction**. After the Municipality has approved the Design Documents for the Detailed Design, or specific portions thereof, the Municipality shall promptly notify the Contractor in writing, by issuance of an applicable Notice to Proceed to Work, which notice shall inform the Contractor it should proceed with the Work or approved portions of the Work.

**7.2 Time for Completion**. The Contractor shall commence the Work when authorized by the Municipality under Paragraph 7.1, and the Work shall be carried out regularly and without interruption. The Contractor shall substantially complete the Work not later than \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ("Scheduled Completion Date"), or such other date as may by Change Order be mutually agreed upon in writing. The number of calendar days between the Effective Date of the Notice to Proceed and the Scheduled Completion Date is the "Contract Time.” The Contractor shall achieve Final Completion of the Work no later than \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, or by such other date as may by Change Order be agreed upon.

**7.3 Liquidated Damages for Delay in Substantial or Final Completion**.

7.3.1 The Contractor shall be assessed (see Annex 6) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ per day as liquidated damages for each day of unexcused delay in achieving Substantial Completion beyond the Scheduled Completion Date.

7.3.2 Any sums due and payable by the Contractor shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Municipality, estimated at the time of executing this Agreement. Such liquidated damages shall apply regardless of whether the Contractor has been terminated by the Municipality prior to Substantial Completion so long as the Contractor’s actions or inactions substantially caused the delay; provided, however, that if the Contractor is in substantial compliance with the project schedule at the time of termination, no liquidated damages will be assessed against the Contractor. All liquidated damages shall be in addition to and not in preclusion of the recovery of actual damages resulting from other defects in the Contractor’s performance hereunder for matters other than delays in Substantial Completion. When the Municipality reasonably believes that Substantial Completion will be inexcusably delayed, the Municipality shall be entitled, but not required, to withhold from any amounts otherwise due to the Contractor an amount then believed by the Municipality to be adequate to recover liquidated damages applicable to such delays. The Municipality shall provide the Contractor a ten (10) day notice of its intent to withhold liquidated damages and the amount of said liquidated damages to be withheld. If and when the Contractor overcomes the delay in achieving Substantial Completion, or any part thereof, for which the Municipality has withheld payment, the Municipality shall promptly release to the Contractor those funds withheld, but no longer applicable as liquidated damages.

**7.4 Performance Guarantee.** The Contractor must comply with the Performance Guarantee provisions highlighted in Annex 9.

**7.5 Municipality’s Approvals/Project Schedule**. The attached project schedule in Annex \_\_\_\_\_ identifies dates and durations for the Municipality’s approvals and actions. Failure of the Municipality to adhere to this schedule shall be cause for time extensions to the Contract Time provided the Contractor complies with the provisions of Article 16 of this Agreement.

**ARTICLE 8**

**ADDITIONAL DUTIES AND RESPONSIBILITIES OF THE CONTRACTOR**

**8.1 The Contractor to Perform All Design Services and Work Required by the Contract**. The intent of the Contract is to require complete, correct and timely execution of the Design Services and the Work. Any and all Design Services and Work that may be required, reasonably implied or reasonably inferred by the Contract, or any part of it, as necessary to fully comply with the Contract and produce the intended result, or as otherwise indicated by the Municipality as of the effective date of this Agreement consistent with the attachments to this Agreement described in Paragraph 1.2, shall be provided by the Contractor without increase to the Fixed Contract Price.

**8.2 Strict Compliance with the Contract Documents**. All Work performed by the Contractor shall be in strict compliance with the Contract Documents, unless deviation from strict compliance has been approved by the Municipality. “Substantial compliance” is not strict compliance. Any Work not in strict compliance with the Contract Documents is defective.

**8.3 Supervision of the Work**. The Work shall be strictly supervised and directed using the Contractor’s best and highest skill and effort, the Contractor bearing full responsibility for any and all acts or omissions of those engaged in the Work on behalf of the Contractor.

**8.4 Warranty of Workmanship and Materials**. The Contractor warrants and guarantees to the Municipality that all labor furnished to do the Work under the Agreement will be competent to perform the tasks undertaken and is the best quality reasonably obtainable, that the product of such labor will yield only high quality results in strict compliance with the Contract, that materials and equipment furnished will be of high quality and new unless otherwise permitted by the Contract, and that the Work will be of high quality, free from faults and defects and in strict conformance with the Contract. Any and all Work not strictly conforming to these requirements shall be considered defective and shall constitute a breach of the Contractor’s warranty.

**8.5 Commencement of Guarantee and Warranty Periods**. Special or specific guarantees and warranties defined in Annex 9, which are required by the Agreement to run for a fixed period of time, shall commence running on the date of Substantial Completion of all the Work.

**8.6 The Contractor’s Schedule of Construction**. The Contractor, within fifteen (15) days after the commencement of any construction activities, shall submit to the Municipality, for its information, and comply with, the Contractor’s schedule of construction for completing the Work by the Scheduled Completion Date. The schedule of construction shall be a detailed critical path (“CPM”) schedule in a form mutually agreeable to the Municipality and the Contractor. The schedule of construction shall be updated at least monthly and shall be revised to reflect conditions encountered from time to time and shall be related to the entire Project. Each such update shall be furnished to the Municipality. Strict compliance with the requirements of this Paragraph shall be a condition precedent for payment to the Contractor, and failure to strictly comply with said requirements shall constitute a material breach of the Agreement. The Contractor must utilize the most current version of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ for Windows or, with prior approval of the Municipality, comparable alternate scheduling software.

**8.7 Record Copy of Contract Documents**. The Contractor shall continuously maintain at the site, accessible by the Municipality, an updated copy of the Agreement, including one record copy of the Contract Documents marked to record on a current basis changes, selections and modifications made during construction. Additionally, the Contractor shall maintain at the site, accessible by the Municipality, a copy of all shop drawings, product data, samples, and other submittals.

**8.8 Review and Approval of Submittals**. The Contractor shall review, study, and approve, or take other necessary action upon all shop drawings, product data, samples, and other submittals to ensure that the Project will be constructed in a timely fashion in strict compliance with the Agreement. All such submittals shall be reviewed and accepted by the appropriate design architect or engineer as applicable.

**8.9 Municipality’s Option to Review Submittals**. The Municipality shall, in its discretion, have the right to review and approve submittals, and if the Municipality so elects, the Contractor shall not perform any portion of the Work as to which the Municipality has required submittal and review until such Submittal has been approved by the Municipality’s Representative. Approval by the Municipality, however, shall not be evidence that Work installed pursuant thereto conforms with the requirements of the Agreement nor shall such approvals relieve the Contractor of any of its responsibilities or warranties under the Agreement.

**8.10 Procurement and Review of Warranties**. The Contractor shall procure from all Subcontractors and Suppliers and shall transmit to the Municipality, all warranties required by the Agreement. The Contractor shall review all such warranties and shall certify to the Municipality that the warranties are in strict compliance with the requirements of the Contract.

**8.11 Procurement of Operations and Maintenance Documentation**. The Contractor shall prepare or procure and shall transmit to the Municipality all documentation required by the Agreement regarding the operating and recommended maintenance programs relating to the various elements of the Work.

**8.12 As-Built Drawings**. The Contractor shall prepare and provide to the Municipality a set of all as-built drawings that shall be complete and, except as specifically noted, shall reflect performance of the Work in strict compliance with the requirements of the Agreement. As-built drawings shall incorporate subsequent information developed by and from any additional surveying performed by the Contractor and shall indicate final as-built elevations of key site conditions including, but not limited to, sewer and water invert/connection, manhole rim, street/gutter high and low points, building first floor finish elevation, etc. For purposes of this Agreement, the Project site shall include the areas defined on the illustrative site plan. As-built drawings shall be in the form of updated Detail Design drawings and submitted in a format compatible with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (recommended: AutoCAD 2000), including one plotted and printed full size set on Mylar film.

**8.13 Compliance with Government Labor Laws**. The Contractor shall assume all labor responsibility for all personnel assigned to or contracted for the performance of the Work and agrees to strictly comply with all its obligations as employer with respect to said personnel.

**8.14 Testing, Inspections, and Approvals**. The Contractor is responsible for testing and inspections The Contractor shall provide, at its cost, whatever additional testing and/or inspections Contractor deems necessary for the completion of the Project and performance of the Work in accordance with this Agreement.

**8.15 Applicable Laws**. The Contractor represents and warrants that it will comply with all public laws, ordinances, rules and regulations applicable to the services to be performed under the Contract, including, without limitation, those relating to the terms and conditions of the employment of any person by the Contractor in connection with the Work to be performed under the Contract.

**8.16 Compliance with Construction Regulations**. The Contractor shall perform the Work in accordance with all construction codes, laws, ordinances or regulations applicable to the design and execution of the Work. Any fine or penalty which may be imposed as consequence of any violation of this provision shall be paid by the Contractor, and the Contractor shall, to the extent of any violation by the Contractor hereunder, indemnify and hold the Municipality harmless from all loss, damages, and expense, including attorney’s fees, resulting from any such violation or alleged violation.

**8.17 Permits, Licenses and Notices**. All plan review fees (except for plan reviews done by the Municipality), construction and building permits, licenses and authorizations necessary for the construction of the Project shall be secured on behalf of the Municipality and paid for by the Contractor, except as specified in this Agreement. The Contractor shall notify the Municipality’s Representative when it has received said permits, licenses and authorizations and upon receipt shall supply the Municipality with copies of same. The originals of said permits, licenses and authorizations shall be delivered to the Municipality upon completion of the Work.

**8.18 Site Safety and Security**. The Contractor shall take all reasonable steps and legally required measures at the site to comply with applicable safety regulations and standards and to adequately protect the Work, stored materials, and temporary structures located on the premises, and to prevent unauthorized persons from entering upon the site. The Contractor shall at all times safeguard the Municipality’s property and employees from injury or loss in connection with the performance of the Agreement. The Contractor shall at all times safeguard and protect its own partially or completely finished Work and that of the adjacent property and all adjacent work from damage. The Contractor shall protect the Municipality’s equipment, apparatus, machinery, and other property and all adjacent work with boarding and other safeguards so as to keep the premises free from dampness, dirt, dust, or other damage and shall remove all such temporary protection upon completion of the Work. The Contractor shall, upon execution of this Agreement, submit to the Municipality its Project Safety Manual, and shall operate in accordance with said Manual.

**8.19 Repair of Collateral Damages**. Unless otherwise instructed by Municipality, the Contractor shall repair and return to original condition all buildings, streets, curbs, sidewalks, utilities or other facilities affected by the Contractor’s performance of the Work, all without additional cost to the Municipality.

**8.20 Cleaning the Site**. The Contractor shall keep the site reasonably clean during performance of the Work. Upon Substantial Completion of the Work, the Contractor shall thoroughly clean the Project site and the Project and remove all waste, debris, trash and excess materials or equipment, together with the Contractor’s property.

**8.21 Municipality’s Access to Work**. At all times relevant to the Agreement, the Contractor shall provide access to the Work to the Municipality and its designees.

**8.22 Decisions Regarding Aesthetic Effect**. The Municipality’s decisions in matters relating to aesthetic effect shall be final and have no effect on the Fixed Contract Price if consistent with the intent of the Detailed Design and the project budget.

**8.23 Contractor to Remain an Independent Contractor**. In the performance of the Agreement, the Contractor’s status as an independent the contractor shall not be modified or diminished by reason of any instructions issued by the Municipality or the Municipality’s Representative to the Contractor or any of the Contractor’s employees, subcontractors, or representatives.

**8.24 Periodic Meetings and Updates**. Periodically, as agreed to by the Municipality and the Contractor, or upon reasonable request of the Municipality, the Contractor will attend meetings to update Municipality on the progress of the Project and to answer any questions of Municipality.

**8.25 Six-Month Periodic Walk Through**. One year from the date of Substantial Completion, on a date mutually agreed upon by the Municipality and the Contractor, the Contractor shall accompany the Municipality on a walk-through of the Project and shall be responsible to correct any items found deficient during such inspection.

**ARTICLE 9**

**FIXED DESIGN AND CONSTRUCTION CONTRACT PRICE**

**9.1 Fixed Contract Price**. The Contractor agrees that the fixed price the Municipality shall pay to the Contractor for the completion of all Design Services and all Construction Work described in the Contract Documents to complete the Project in accordance with the Detailed Design and the Design Documents, and the purposes of the Project, as identified by the Municipality. The Design shall be the sum of: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_and the Construction \_\_\_\_\_\_\_\_\_\_\_ (the “Fixed Contract Price”) according to Annexes 4, 5 and 6. The Fixed Contract Price shall not be modified unless all conditions precedent to a change in the Fixed Contract Price have been satisfied, including the execution of a Change Order in accordance with the requirements of this Agreement.

**9.2 Adjustments to Fixed Contract Price**. In entering into this Agreement, the Contractor understands and agrees that the Fixed Contract Price can only be increased in limited circumstances, and in accordance with the provisions set forth in this Agreement, including but not limited to the Change Order procedures set forth in Article 15 and the Claims procedures set forth in Article 16. Subject to the provisions of this Agreement, the Fixed Contract Price can be increased if:

(a) The Municipality directs or agrees to a change in the Project that increases the cost of the Design Services or the Construction Work;

(b) The Contractor encounters subsurface or concealed conditions at the Project site, which meet the requirements of Paragraph 16.2 and that cause the Contractor to incur increased costs in the Design Services or the Work;

(c) The Contractor encounters Hazardous Materials, complies with the provisions set forth therein, and incurs increased costs to the Design Services or the Work;

(d) The Contractor incurs unavoidable increased costs in performing Design Services or the Work as a direct result of changes, after the execution of this Agreement, in directly applicable laws, codes, ordinances, and/or regulations, such as changes in life-safety building codes or zoning laws, legislatively enacted new categories of taxes (such as a gross receipts tax), and changes in environmental regulations which relate to the Project; or

(e) Emergencies that meet the requirements of Paragraph 15.9, and that cause the Contractor to incur increased costs in the Design Services or the Work.

Except for the foregoing, the Contractor agrees that the Contractor assumes all other risks which may cause increased costs to the Design Services or the Work, and agrees that the Fixed Contract Price will not be increased as a result of any such risks.

**9.3 Taxes**. Unless otherwise provided in this Agreement, the Fixed Contract Price shall include all taxes that are or may be legally assessed or exacted during the construction of the Project.

**ARTICLE 10**

**PAYMENT OF THE FIXED DESIGN BUILD CONTRACT PRICE**

**10.1 Payment Procedure**. The Municipality shall pay the Fixed Contract Price, as it may be adjusted by the operation of this Agreement, to the Contractor in accordance with the procedures set forth in this Article 10 and Annex 6. The Municipality will pay the Contractor a mobilization fee of ten percent (10%) of the Fixed Design Contract Price according to the procedures in Annex 4. Upon certification of Completion of the Work, under the term set forth in this Contract, the Municipality will pay the Contractor ninety percent (90%) of the Fixed Design Contract Price according to the procedure in Annex 4.

**10.2 Schedule of Values**. The Contractor shall prepare and present to the Municipality the Contractor’s schedule of values apportioning the Fixed Contract Price among the different elements of the Project for purposes of periodic and final payment. Pursuant to this Paragraph, the Contractor shall, within thirty (30) calendar days of the Notice to Proceed, submit to the Municipality a detailed schedule of values for Design Services and a preliminary schedule of values for construction services to be rendered in performance of the Work and shall within thirty (30) days of the authorized commencement of some construction activities in performance of the Work submit to the Municipality a detailed schedule of values for all construction activities related to the performance of the Work. The Contractor’s schedules of values shall be presented in a format, with such reasonable detail as the Municipality requests. The Contractor shall not imbalance its schedule of values nor artificially inflates any element thereof. The violation of this provision by the Contractor shall constitute a material breach of this Agreement. The Contractor’s schedule of values will be utilized for the Contractor’s payment requests but shall only be so utilized after it has been acknowledged in writing by the Municipality. The schedule of values submitted by the Contractor pursuant to this Paragraph may from time to time be amended by the Contractor, subject to the approval o the Municipality.

**10.3 Submission of Payment Requests**. On or before the 25th day of each month after commencement of performance, but no more frequently than once monthly, the Contractor may submit to the Municipality’s Representative a payment request for the period ending the last day of the month. Said payment request shall be the in a format acceptable to the Municipality and shall include whatever supporting information as may be required by the Municipality. Therein, the Contractor may request payment as follows:

**10.4 Municipality’s Right to Inspect**. As an additional condition precedent to payment under this Article 10, and including payment for Substantial Completion and on Final Completion, the Municipality may inspect the Contractor’s books and records which support and confirm all of the items set forth in the schedule of values and all other items described in any request for Payment by the Contractor.

**10.5 Warranty of Completed Work; Review of Payment Requests**. Each Payment Request shall be signed by the Contractor and shall constitute the Contractor’s representation that the quantity of Work has reached the level for which payment is requested, that the Work has been properly installed or performed in strict compliance with the Contract, and that the Contractor knows of no reason why payment should not be made as requested.

**10.6 Conditions Precedent to Payment**. In addition to all other conditions precedent contained herein, it shall be a condition precedent to payment of any pay request that the Contractor, if requested by the Municipality, have submitted updated schedules for the performance of its Work and Design Services as required by this Agreement and that the Contractor shall have furnished to the Municipality properly executed waivers of rights to claim against the Municipality, in a form acceptable to the Municipality, from all Subcontractors, Suppliers or others lien or other claim rights, wherein they shall acknowledge receipt of all sums due pursuant to all prior pay requests and waive and relinquish any claim rights relating thereto. The submission by the Contractor of a payment request also constitutes an affirmative representation and warranty that all work for which the Municipality has previously paid is free and clear of any lien, claim, or other encumbrance of any person whatsoever.

**10.7 Time for Payment**. Subject to the Municipality's right of review and objection, the Municipality shall make payment to the Contractor within twenty-one (21) days following receipt of the Contractor’s submittal of a proper payment request.

**10.8 Title Passes Upon Payment**. The Contractor warrants and represents that upon payment of any pay request submitted by the Contractor, title to all Work covered by the pay request shall immediately pass to the Municipality.

**10.9 Payment Not A Waiver of Acceptance**. No payment to the Contractor shall be interpreted or construed to constitute acceptance of any Work not in strict compliance with the Contract, and tne Contractor expressly accepts the risk that defective Work may not be detected (1) during any inspection by the Municipality, (2) prior to making of any payment to the Contractor, or (3) before the Municipality’s occupancy of the Project.

**10.10 Withholding of Payment**. Notwithstanding any withholding of payments hereunder, the Municipality shall timely pay to the Contractor all amounts due the Contractor under this Article that are not in dispute under this Paragraph. The Municipality shall have the right to pursure Liquadated Damages as defined in Annex 6B or refuse to make payment (and, if necessary, may demand the return of a portion or all of the amount previously paid to the Contractor) in an amount then believed by the Municipality to be adequate to cover the penalties, damages, and potential losses resulting or likely to result from:

10.10.1 The quality of a portion, or all, of the Contractor’s Work not being in strict accordance with the requirements of this Contract.

10.10.2 The quantity of the Contractor’s Work not being as represented in the Contractor’s pay request, or otherwise.

10.10.3 The Contractor’s rate of progress being such that, in the Municipality’s opinion, Substantial Completion, Final Completion, or both, may be inexcusably delayed.

10.10.6 Claims made, or likely to be made, against the Municipality or its property because of acts or omissions of the Contractor.

10.10.7 Loss caused by the Contractor.

10.10.8 The Contractor’s failure or refusal to perform any of its obligations to the Municipality.

**10.14 Unexcused Failure to Pay**. If the Municipality, without justifiable cause or basis hereunder, fails to pay the Contractor any amounts due and payable to the Contractor within thirty (30) days after the date established herein for payment of such amounts, then the Contractor may suspend its Design, Build, Operate Services or, as applicable, the Work until payment is made, provided that the Contractor first gives five (5) days’ written notice to the Municipality of its intent. Any payment due hereunder which is not made within thirty (30) days after the date due shall bear interest at the rate of \_\_\_\_\_\_\_ percent.

**ARTICLE 11**

**SUBSTANTIAL AND FINAL COMPLETION**

**11.1 Substantial Completion of Construction**. With respect to the Project, “Substantial Completion” means that stage in the progression of the Work, as approved by the Municipality in writing, when the Project is sufficiently complete in accordance with the Agreement that the Municipality can enjoy beneficial use or occupancy of the entire Project and can utilize it for all of its intended purposes. The Municipality reserves the right to occupy and use any part, portion, or system of the Project when such part, portion, or system is substantially completed.

**11.2 Determination of Substantial Completion**. When the Contractor considers Substantial Completion has been achieved for the Project, the Contractor shall notify the Municipality in writing and shall furnish to the Municipality a listing of those matters yet to be finished. The Municipality or its designee will thereupon conduct an inspection to confirm that the work is in fact substantially complete. Upon its confirmation that the Contractor’s work is substantially complete, the Municipality will so notify the Contractor in writing and will therein set forth the date of Substantial Completion. If the Municipality, through its inspection, fails to find that the Contractor’s work is substantially complete, the Municipality shall notify the Contractor of such findings, indicating items that cause the Work to be incomplete or unsatisfactory for acceptance. By furnishing a list of incomplete or unsatisfactory items, the Municipality does not warrant that the list is a total and complete list of all items necessary to achieve Substantial Completion. Upon completion or correction by the Contractor of all items necessary to achieve Substantial Completion, the Municipality shall repeat all, or any portion, of its Substantial Completion inspection as often as necessary until Substantial Completion is achieved. If the Municipality is required to perform more than three (3) Substantial Completion inspections, the Contractor shall bear the cost of each additional inspection, which cost may be deducted by the Municipality from the Fixed Construction Price payment then or thereafter due to the Contractor. The Municipality shall notify Contractor, in writing, prior to commencing any inspections for which it may deduct payment to the Contractor therefore. Guarantees and equipment warranties required by the Contract shall commence on the date of Substantial Completion.

**11.3 Final Completion Defined**. With respect to the Project, “Final Completion” means the completion of all Design Services and all Work required by, and in strict compliance with, the Agreement, as approved by the Municipality in writing, including the satisfactory completion or resolution of all deficiencies (punch list items) and the Contractor’s provision to the Municipality of all documents and things required by the Agreement. “Final Completion” does not include services under maintenance service agreements and other services intended to continue beyond the Scheduled Construction Completion Date.

**11.4 Determination of Final Completion**. When the Contractor considers the Project finally complete and the Contractor is ready for a final inspection, it shall notify the Municipality’s Representative in writing. Thereupon, the Municipality’s Representative will perform a final inspection of the Project.

**11.5 Final Fixed Construction Price Payment**. If the Municipality’s Representative confirms that the entire Project is complete in full accordance with the Contract and that the Contractor has performed all of its obligations to the Municipality under the Contract, the Municipality’s Representative will furnish a final approval for payment to the Municipality certifying to the Municipality that the Project is complete and the Contractor is entitled to ninety percent (90%) of the Fixed Construction Contract Price as adjusted by operation of this Agreement, less any amounts attributable to liquidated damages, together with the reasonable costs as determined by the Municipality for completing all incomplete work, correcting and bringing into conformance all defective and nonconforming work, and handling any outstanding or threatened claims, which result from the Contractor’s acts or omissions. If the Municipality’s Representative is unable to issue its final approval for payment and is required to repeat its final inspection more than three (3) times, the Contractor shall bear the cost of each additional inspection, which cost may be deducted by the Municipality from the Contractor’s final payment.

**11.6 Conditions Precedent to Final Construction and Commissioning Payment**. Prior to being entitled to receive final payment, and as a condition precedent thereto, the Contractor shall furnish the Municipality, in the form and manner required by the Municipality, the following:

11.6.1 An affidavit that all of the Contractor’s obligations to Subcontractors, laborers, equipment or material Suppliers, or other third parties in connection with the Project, have been paid or otherwise satisfied.

11.6.2 Consent of surety to final payment.

11.6.3 Complete as-built drawings and the record set of Contract Documents.

11.6.4 All product warranties, operating manuals, instruction manuals and other record documents, drawings and things customarily required of a Contractor, or expressly required herein, as a part of or prior to Project closeout.

11.6.5 Verification that the Contractor has paid all taxes as required by the laws of the country in which the project is built.

11.6.6 Verification that the project (i.e., the septage treatment Facility) is in good operating condition at the performance levels listed in Annex \_\_8\_; according to the equipment and materials performance in Annex 5: Schedules; and has been operating during Project Commissioning at those levels for a period of three (3) months.

**11.7 Acceptance of Final Payment a Waiver**. Acceptance by the Contractor of final payment shall constitute a waiver and release of all claims against the Municipality by the Contractor for monies due for the design and building of the project except for those claims previously made in writing against the Municipality by the Contractor, pending at the time of final payment and specifically identified on the Contractor’s pay request for final payment as unsettled at the time it submits its pay request.

**ARTICLE 12**

**MUNICIPALITY’S DUTIES, OBLIGATIONS, AND RESPONSIBILITIES**

**12.1 Provide Project Information**. The Municipality shall provide the Contractor with information regarding the Municipality’s requirements for the Project including any desired or required design or construction schedule. By furnishing such information, the Municipality does not represent, warrant, or guarantee its accuracy or completeness either in whole or in part, and shall have no liability therefore.

**12.2 Review of Documents**. The Municipality shall review any documents submitted by the Contractor requiring the Municipality’s decision, and shall render any required decisions pertaining thereto.

**12.3 Provide Notice of Defects**. In the event the Municipality knows of any material fault or defect in the Work, nonconformance with the Agreement, or of any errors, omissions or inconsistencies in the Design Documents, then the Municipality shall give prompt notice thereof in writing to the Contractor.

**12.4 Access to the Site and the Work; Providing Information**. The Municipality shall provide the Contractor access to the Project site and to the Work, and shall provide the Contractor with such information, existing and reasonably available, necessary to the Contractor’s performance on the Contract as the Contractor may request.

**12.5 Cooperation to Secure Permits, Licenses, Approvals, and Authorizations**. The Municipality shall cooperate with the Contractor in securing any necessary licenses, permits, approvals or other necessary authorizations for the design, construction and certification of the Project.

**12.6 Timely Performance**. The Municipality shall perform the duties set forth in this Article 12 in a reasonably expeditious fashion and in accordance with the project schedule so as to permit the orderly and timely progress of the Contractor’s Design Services and of the Work.

**12.7 Municipality’s Reviews, Inspections, Approvals, and Payments Not a Waiver**. The Municipality’s review, inspection, or approval of any Work, Design Documents, Construction Documents, Operation Documents, submittals, or pay requests by the Contractor shall be solely for the purpose of determining whether such Work and such documents are generally consistent with the Municipality’s construction and operations requirements. No review, inspection, or approval by the Municipality of such Work or documents shall relieve the Contractor of its responsibility for the performance of its obligations under the Agreement or the accuracy, adequacy, fitness, suitability, or coordination of its Design Services and the Construction Work. Approval by any governmental or other regulatory agency or other governing body of any Work, Design Document, or Contract Documents shall not relieve the Contractor of responsibility for the strict performance of its obligations under the Agreement. Payment by the Municipality pursuant to the Agreement shall not constitute a waiver of any of the Municipality’s rights under the Agreement or at law, and the Contractor expressly accepts the risk that defects in its performance, if any, may not be discovered until after payment, including final payment, is made by the Municipality.

**12.8 Delay or Forbearance Not a Waiver**. The Municipality’s agreement not to exercise, or its delay or failure to exercise, any right under the Agreement or to require strict compliance with any obligation of the Contractor under the Agreement shall not be a waiver of the right to exercise such right or to insist on such compliance at any other time or on any other occasion.

**12.9 Subsurface and Other Information Provided by Municipality**. The Municipality shall furnish to Contractor, prior to the execution of this Agreement, any and all written and tangible material knowingly in its possession concerning conditions below ground at the site of the Project, including without limitation a soils report, survey and site demolition bidding documents (if any). By furnishing such material, the Municipality does not represent, warrant, or guarantee its accuracy or completeness either in whole or in part, and shall have no liability therefore.

**12.10 Approvals and Easements**. The Contractor shall obtain all easements required for construction, and shall pay for necessary assessments and charges required for use and occupancy of the Work.

**12.11 Testing and Inspection**. The Contractor shall be responsible for testing and inspections required by sound professional practice and by governmental authorities having jurisdiction over the Project. The Contractor will be responsible only for the cost of failed testing.

**12.12 Right to Stop Work**. In the event the Contractor fails or refuses to perform the Work in strict accordance with the Agreement, or is otherwise in breach of this Contract, the Municipality may, at its option, instruct the Contractor to cease and desist from performing further Work, or any part thereof. Upon receipt of such instruction from the Municipality in writing specifying the reasons therefore, the Contractor shall immediately cease and desist as instructed by the Municipality and shall not proceed further until the cause for the Municipality’s instructions has been corrected, no longer exists, or the Municipality instructs that the Work may resume.

***12.13 Municipality’s Right to Perform Work (Optional)****. In the event the Municipality issues such instructions to stop Work, and in the further event that the Contractor fails and refuses within seven (7) days of receipt of same to provide adequate assurance to the Municipality that the cause of such instructions will be eliminated or corrected, then the Municipality shall have the right to carry out the Work with its own forces, or with the forces of other the contractors, and the Contractor shall be fully responsible for the reasonable costs incurred in performing such Work. The rights set forth in Paragraph 12.12 and this Paragraph 12.13 are in addition to, and without prejudice to, any other rights or remedies the Municipality may have against the Contractor, including the rights to terminate or withhold payment as provided herein.*

**12.14 Municipality Personnel**. The Municipality shall provide to the Contractor a listing of key project personnel of the Municipality working on the Project.

**ARTICLE 13**

**PROJECT DOCUMENTATION**

**13.1 Maintenance of Project-Related Records**. The Contractor shall maintain and protect all records relating in any manner whatsoever to the Project (the “Project Records”) for no less than five (5) years after Final Completion of the Project, and for any longer period of time as may be required by law or good management practice.

**13.2 Availability of Project-Related Records to Municipality**. All Project Records, which are in the possession of the Contractor or the Contractor’s Subcontractors, shall be made available to the Municipality for inspection and copying upon the Municipality’s request at any reasonable time. Additionally, such records shall be made available upon request by the Municipality to any government regulatory authorities, and any such authority may review, inspect and copy such records. The Project Records include, without limitation, all drawings, plans, specifications, submittals, correspondence, logs, minutes, memoranda, photographs, tape or videotape recordings, or other writings or things which document the Project, its design, or its construction. Said records include those documents reflecting the cost of design and construction to the Contractor.

**ARTICLE 14**

**PERSONNEL, SUBCONTRACTORS AND SUPPLIERS**

**14.1 Subcontractor Defined**. “Subcontractor” means an entity or person that has a direct contract with the Contractor to perform a portion of the Work or the Design Services. For purposes of the Agreement, Subcontractors shall also include those furnishing equipment and materials fabricated especially for the Project.

**14.2 Supplier Defined**. “Supplier” means an entity or person providing only equipment or materials for the performance of the Work.

**14.3 Naming of Subcontractors**. At the time of the execution of this Agreement, the Contractor shall provide to the Municipality in writing a list of those subcontractors who the Contractor intends to use in the performance of those portions of the Work under the Contract which involve plumbing, heating, air conditioning or electrical work. Prior to any construction, and on an ongoing basis in order to keep the information current, complete and accurate, the Contractor must provide to the Municipality forms, as required by the applicable taxing authority(ies), showing dates, names, addresses, contracting parties, including all Subcontractors and Suppliers and all other relevant information required.

**14.4 Terms of Subcontracts and Purchase Orders**. All subcontracts and purchase orders with Subcontractors shall afford the Contractor rights against the Subcontractor which correspond to those rights afforded to the Municipality against the Contractor herein, including those rights of Contract suspension, termination, and stop Work orders as set forth herein. It is expressly agreed that no relationship of agency, employment, contract, obligation or otherwise shall be created between the Municipality and any Subcontractor of the Contractor and a provision to this effect shall be inserted into all agreements between the Contractor and its Subcontractors.

**14.5 Contractor Responsible for Acts of its Subcontractors**. Should the Contractor subcontract all or any part of the Work, such subcontracting of the Work shall not relieve the Contractor from any liability or obligation under the Contract or under any applicable policy, law or regulation, and the Contractor shall be responsible for all and any acts, defaults, omissions or negligence of its Subcontractors, Suppliers, and consultants, as related to or affecting the performance of Design Services and the Work.

***14.6 Personnel (Optional)****. The Contractor shall employ and assign only qualified and competent personnel to perform any service or task concerning the Project. The Contractor shall designate one such person as the Project Manager. Absent written instruction from the Contractor to the contrary, the Project Manager shall be deemed to be the Contractor’s authorized representative and shall be authorized to receive and accept any and all communications from the Municipality. Key design and supervisory personnel assigned by the Contractor to this Project are as follows:*

***Name Function Phone No.***

*(1) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(2) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(3) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_*

*The Contractor shall submit the names of other key supervisory personnel, and evidence of their competence, as such key supervisory personnel are appointed by the Contractor. Evidence of the above-named personnel’s competence, such as a resume, shall be provided to Municipality prior to said personnel beginning performance of the function indicated. So long as the individuals named above remain actively employed or retained by the Contractor, or any related entity or affiliate thereof, they shall perform the functions indicated next to their names unless Municipality agrees to the contrary in writing or unless Municipality requests removal of any such individual from the Project. Municipality requests to remove any of the Contractor’s personnel shall be in writing and shall contain substantive reasons therefore. In the event Municipality requests the removal of any of the individuals named above, the Contractor shall immediately comply and shall immediately replace such individual with a qualified substitute to whom Municipality makes no objection, at no cost or penalty to Municipality for delays or inefficiencies the change may cause. In the event one or more individuals not listed above subsequently assumes one or more of those functions listed above, the Contractor shall be bound by the provisions of this Paragraph 14.6 as though such individuals had been listed above.*

**14.7 Removal of Subcontractors**. If, at any time during the course of the Project, the Municipality reasonably determines that the performance of any Subcontractor working on the Project is unsatisfactory, the Municipality’s Representative shall notify the Contractor of the same, and shall set forth the instances of unsatisfactory performance. Promptly on receipt of such notice, the Contractor shall undertake to cure such unsatisfactory performance, or shall remove such Subcontractor from the Project and promptly replace such Subcontractor. Any cure of unsatisfactory performance or any replacement of a Subcontractor pursuant to this Paragraph shall be at no cost or penalty to the Municipality for any increased costs, delays or inefficiencies caused by such unsatisfactory performance, its cure, or by the replacement of a Subcontractor hereunder.

**ARTICLE 15**

**CHANGES IN THE PROJECT**

**15.1 Municipality’s Right to Order Changes**. The Municipality, without invalidating the Agreement, may unilaterally order Changes in the Project within the general scope of the Contract, consisting of additions, deletions or other revisions. All changes in the Project that adjust the Fixed Design and/or Construction Contract Price or the Contract Time shall be authorized only by Change Order and the Contractor specifically recognizes and acknowledges that methods available for adjustments to the Fixed Contract Price set forth in Paragraph 15.3.

**15.2 Change Order Defined**. “Change Order” means and includes a written order to the Contractor signed by the Municipality or Municipality’s Representative and the Contractor and issued after the execution of this Agreement, authorizing a change in the Project and/or an adjustment in the Fixed Contract Price or the Contract Time.

**15.3 Adjustment to Fixed Contract Price**. The increase or decrease in the Fixed Contract Price resulting from a Change Order shall be determined in the following order of precedence:

15.3.1 First, by mutual agreement between the Municipality and the Contractor as evidenced by (1) the change in the Fixed Contract Price being set forth in a Change Order, (2) such change in the Fixed Contract Price together with any conditions or requirements relating thereto, being signed by both parties, and (3) the Contractor’s execution of the Change Order.

15.3.2 Second, if no mutual agreement occurs between the Municipality and the Contractor, under Paragraph 15.3(1), the change in the Fixed Contract Price, if any, shall be derived by determining the reasonable costs incurred or savings achieved, resulting from revisions in the Work, utilizing the current year's cost of living estimate, as adjusted for provided Design Builder shall properly itemize the costs or savings and shall submit sufficient substantiating data to permit evaluation and including a reasonable design fee to perform needed design work to implement the revisions in the Work.

15.3.3 Third, if the parties do not agree on the adjustment to the Fixed Contract Price utilizing the methodology set forth in Paragraph 15.3(1) or 15.3(2), then the amount of the change in the Fixed Contract Price shall be calculated by pricing the labor at the actual wage or hourly rates paid for doing the additional Design Services and the Work; if any, plus the actual cost of materials and equipment, if any; provided, however, that such “actual costs” must be reasonable. In addition the Municipality shall allow a total mark- up of no greater than fifteen percent (15%) for all overhead, all indirect costs, and profit to be added to the actual costs of labor, if any, and materials and equipment, if any, pro- rated between the Contractor and Subcontractors, if any, as the Contractor determines, and in no event shall include any consequential damages of the Contractor.

15.3.4 Any such costs or savings shall be documented in the format and with such content and detail as is acceptable to the Municipality.

**15.4 Extension of Contract Time**. Any extension of the Contract Time requested by the Contractor for performance of any change in the Design Services or the Work ordered by the Municipality may be granted by mutual agreement and then set forth in the Change Order. Otherwise, extensions of the Contract Time must be requested by the Contractor pursuant to the terms and conditions of Article 16 of this Agreement. The failure of the Contractor to provide notice in writing to the Municipality in accordance with Article 16 of this Agreement of any request for extension of the Contract Time shall constitute a waiver by the Contractor of any entitlement to an extension of the Contract Time.

**15.5 Effect of Executed Change Order**. The execution of a Change Order by Contractor shall constitute conclusive evidence of the Contractor’s and the Municipality’s agreement to the ordered changes in the Project, the Agreement as thus amended, the Fixed Contract Price as thus amended and the Contract Time as thus amended. The Contractor, by executing the Change Order, waives and releases any claim against the Municipality for additional time or compensation for matters relating to, arising out of, or resulting from the Design Services or the Work included within or directly affected by the executed Change Order.

**15.6 Consent of Surety**. The Contractor shall notify and obtain the consent and approval of the Contractor’s surety with reference to all Change Orders if such notice, consent or approval is required by the Municipality, the Contractor’s surety or by law. The Contractor’s execution of the Change Order shall constitute the Contractor’s warranty to the Municipality that the surety has been notified of, and consents to, such Change Order and the surety shall be conclusively deemed to have been notified of such Change Order and to have expressly consented thereto.

**15.7 Fiduciary Relationship**. The Contractor recognizes and accepts a fiduciary relationship of trust and confidence established between the Contractor and the Municipality by this Agreement and agrees that it shall at all times in good faith use its best efforts to advance the Municipality’s interests and agrees to perform the Design Services, Construction Work *and Operations* in the best professional manner.

**15.8 Minor Changes in the Project**. The Municipality will have authority to order minor changes in the Work not involving an adjustment in the Fixed Contract Price or an extension of the Contract Time and not inconsistent with the intent of the Detailed Design and Design Documents. Such Changes may be effected by written order and shall be binding on the Municipality and the Contractor.

**15.9 Emergencies**. In any emergency affecting the safety of persons or property, the Contractor shall act, at the Contractor’s discretion, to prevent threatened damage, injury or loss. Any increase in the Fixed Contract Price or extension of the Contract Time claimed by the Contractor on account of emergency work shall be determined as provided in this Article.

**ARTICLE 16**

**CLAIMS FOR ADDITIONAL COST OR TIME**

**16.1 Limitation on and Operation of Contractor Claims**.

16.1.1 The Contractor and the Municipality understand and agree that the Fixed Contract Price cannot increase, unless the Municipality specifically orders a Change to the Project pursuant to Article 15 of this Agreement, or unless the Contractor encounters a condition or situation within the risk assumed by the Municipality under Paragraph 9.2 of this Agreement. In the event the Contractor believes it is entitled to make claims to increase the Fixed Contract Price or to extend the Contract Time, such claims must be made in strict compliance with this Article 16.

16.1.2 The procedures of this Article relating to claims of the Contractor are understood to be a construction management tool of the Municipality. The use of the term “claim” in this Article does not constitute an error, omission, or inappropriate conduct by either party.

**16.2 Claims for Extraordinary Unforeseeable Subsurface or Concealed Conditions**.

16.2.1 Under the provisions of this Agreement, including the representations and warranties of the Contractor contained in Paragraphs 2.1(5) and (6), the Contractor understands and agrees that the risk of increased costs in the Design Services and the Work caused by the conditions of the Project site, whether surface, subsurface, or other conditions which affect the site or the performance of Design Services or the Work have been transferred to and assumed by the Contractor under this Agreement, and that such increased costs will be absorbed by the Contractor, and that there will be no increase in the Fixed Contract Price as a result of the Contractor encountering such conditions and increased costs. Notwithstanding this general transference of the risk of such conditions, the parties agree that there are limited circumstances under which the Contractor may be entitled to an increase in the Fixed Contract Price due to conditions that are unknown, concealed, and unforeseeable conditions, as set forth in this Article.

16.2.2 If subsurface or otherwise concealed conditions are encountered at the Project site which are:

(1) unknown to the Contractor; and

(2) not reasonably foreseeable or anticipated by the Contractor in view of the Contractor’s representations and warranties contained in Article 2.

(3) which are either:

(i) materially different from those indicated in any respective soils reports provided; or

(ii) materially different from those ordinarily found to exist and generally recognized and inherent in construction activities of the character provided for in the Contract, then the Contractor may seek an adjustment to the Fixed Contract Price and/or an extension of the Contract Time, in accordance with the provisions of this Article 16, and provided that the Contractor shall give notice to the Municipality in writing before the conditions are disturbed and in no event later than seven (7) calendar days after the Contractor discovers or observes the conditions.

(iii) Upon receipt of said notice, the Municipality shall investigate such conditions and make a determination as to whether the conditions meet the requirements set forth in this Paragraph 16.2 above. The Municipality shall notify the Contractor in writing within fourteen (14) days of its determination. If the Municipality determines that the conditions do not meet the requirements of Paragraph 16.2, the Municipality shall specify the reasons for that determination.

16.2.3 Examples of conditions that would not be reasonably foreseeable and thus may qualify for an adjustment in the Fixed Contract Price, and/or an extension of the Contract Time include: buried vehicle bodies, which reasonably require the Contractor to utilize equipment to remove said vehicles which was not contemplated by the Contractor as necessary to perform the Work; burial or archeological finds; dump or garbage pits that contain more than fifty (50) cubic yards of refuse to be hauled off of the Project site; drain fields; storage tanks, voids or tunnels; or rock formations which require “jack hammering” or “blasting” to excavate or remove; and groundwater higher than three (3) feet below existing ground level, which cannot be diverted or removed through the use of four-inch (4”) pumps on the Project site.

16.2.4 Examples of conditions that are reasonably foreseeable under the Contract, and do not qualify for an adjustment in either the Fixed Contract Price and/or an extension of the Contract Time include: materials expected to be found in river bottom soil, including but not limited to, cobblestones, clay, sand, silt and gravel (and combinations thereof), boulders up to one ton in size, car bodies or vehicles, which do not require the Contractor to utilize equipment for removal which was not contemplated by the Contractor for use in performing the Work, garbage pits containing less than fifty (50) cubic yards of material.

**16.3 Conditions for Contractor Claims**. Claims by the Contractor against the Municipality are subject to the following terms and conditions:

16.3.1 All the Contractor claims against the Municipality shall be initiated by a written claim submitted to the Municipality’s Representative. Such claim must be received by the Municipality’s Representative no later than seven (7) calendar days after the event or the first appearance of the circumstances causing the claim, and must set forth in detail all known facts and circumstances supporting the claim and such claim must designate whether the claim affects the Design Services and Work;

16.3.2 The Contractor and the Municipality shall continue their performance hereunder regardless of the existence of any claims submitted by the Contractor;

16.3.3 In the event the Contractor seeks to make a claim for an increase in the Fixed Contract Price, as a condition precedent to any liability of the Municipality therefore, the Contractor shall strictly comply with the requirements of Subparagraph 16.3(1) above, and such claim shall be made by the Contractor before proceeding to execute any additional or changed work. Failure of the condition precedent to occur shall constitute a waiver by the Contractor of any claim for additional compensation;

16.3.4 In connection with any claim by the Contractor against the Municipality for an increase in the Fixed Contract Price, any liability of the Municipality shall be strictly limited to the actual costs incurred by the Contractor and a total mark-up of no greater than *twelve percent (12%) overhead.* The Municipality shall not be liable to the Contractor for claims of third parties, including Subcontractors, unless and until liability of the Contractor has been established therefore in a court of competent jurisdiction;

16.3 .5 In the event the Contractor should be delayed in performing any task which at the time of the delay is then critical or which during the delay becomes or may become critical to the extent attributable to any act or omission by the Municipality or someone acting in the Municipality’s behalf, or by Municipality-authorized Change Orders, unusually bad weather not reasonably anticipatable, unavoidable accidents beyond the Contractor’s control, fire, active interference by third parties with the Contractor’s duties on-site, or other acts of God, all relating to the Project site, the date for achieving Substantial Completion, or, as applicable, Final Completion, shall be appropriately adjusted by the Municipality upon the written claim of the Contractor, in accordance with Subparagraph 16.3(1), as the Contractor’s sole remedy. A task is critical within the meaning of this Subparagraph 16.3(5) if, and only if, said task is on the critical path of the project schedule so that a delay in performing such task will delay the Substantial or Final Completion of the Project. Any claim for an extension of time by the Contractor shall strictly comply with the requirements of Subparagraph 16.3(1) above. If the Contractor fails to make such claim as required in this Subparagraph 16.3(5), any claim for an extension of time shall be waived.

16.3.6 An extension of the Contract Time will be the Contractor’s sole remedy for any delays of the Contractor, whether or not delays are caused by the Municipality, Municipality’s Representative and whether or not such delays are foreseeable, unless delays are caused by acts of the Municipality which constitute active interference with the Contractor’s performance of the Work, and only to the extent such acts continue after the Contractor furnishes the Municipality with written notice of such interference. In no other event shall the Contractor be entitled to any compensation or recovery of any damages in connection with any delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration. The Municipality’s exercise of any of its rights or remedies under the Contract Documents, including, without limitation, ordering changes in the Work, direct suspension, or correction of the Work and, regardless of the extent or frequency of the Municipality’s exercise of such remedies, shall not be construed as active interference with the Contractor’s performance of the Work.

16.3.7 If the Contractor submits a schedule or progress report indicating, or otherwise expressing an intention to achieve completion of the work prior to any completion date required by the Contract Documents or expiration of the Contract Time, no liability of the Municipality to the Contractor for any failure of the Contractor to so complete the Work shall be created or implied. However, the Municipality agrees to reasonably cooperate with requests of the Contractor to accelerate the Work.

**ARTICLE 17**

**UNCOVERING AND CORRECTING WORK**

**17.1 Duty to Correct Defective Work Discovered After Completion**. In addition to its warranty obligations set forth elsewhere herein, the Contractor shall be specifically obligated to correct any and all defective or nonconforming Work for a period of twelve (12) months following beneficial occupancy or Final Completion, whichever occurs first, upon written direction from the Municipality. This obligation shall survive final payment by the Municipality and termination of the Agreement.

**17.2 No Period of Limitation Established**. Nothing contained in Paragraph 17.1 shall establish any period of limitation with respect to other obligations, which the Contractor has under the Agreement. Establishment of the one-year time period in Paragraph 17.1 above relates only to the duty to the Contractor to specifically correct the Construction Work.

**17.6 Municipality’s Option to Accept Defective Work**. The Municipality may, but shall in no event be required to, choose to accept defective or nonconforming Construction Work. In such event, and if the Contractor has refused to promptly remove and correct the defective work, the Fixed Contract Price shall be reduced by the reasonable costs of removing and correcting the defective or nonconforming Work. The Municipality shall be entitled to such reduction in the Fixed Contract Price regardless of whether the Municipality has, in fact, removed and corrected such defective Work. If the unpaid balance of the Fixed Contract Price, if any, is insufficient to compensate the Municipality for the acceptance of defective or nonconforming Work, the Contractor shall, upon written demand from the Municipality, pay the Municipality such additional compensation for accepting defective or nonconforming Work.

***(The OPERATIONS Contract can be inserted here)***

**ARTICLE 18**

**SUSPENSION AND TERMINATION**

**18.1 Suspension of Performance**. The Municipality may for any reason whatsoever suspend performance under the Contract. The Municipality shall give written notice of at least five (5) days of such suspension to the Contractor specifying when such suspension is to become effective.

**18.2 Ceasing Performance upon Suspension**. From and upon the effective date of any suspension ordered by the Municipality, the Contractor shall incur no further expense or obligations in connection with the Agreement, and the Contractor shall cease its performance. The Contractor shall also, at the Municipality’s direction, either suspend or assign to the Municipality any of its open or outstanding subcontracts or purchase orders.

**18.3 Claim for Costs of Suspension**. In the event the Municipality directs a suspension of performance under this Article 18, through no fault of the Contractor, and provided the Contractor submits a proper claim as provided in this Agreement, the Municipality shall pay the Contractor as full compensation for such suspension the Contractor’s reasonable costs, actually incurred and paid as follows:

18.3.1 Demobilization and remobilization, including such costs paid to Subcontractors.

18.3.2 Preserving and protecting Work in place.

18.3.3 Storage of material or equipment purchased for the Project, including insurance thereon; and

18.3.4 Performing in a later, different, or during a longer, time frame than that contemplated by this Contract.

**18.4 Resumption of Work after Suspension**. If the Municipality lifts the suspension it shall do so in writing, and the Contractor shall promptly resume performance of the Agreement unless, prior to receiving the notice to resume, the Contractor has exercised its right of termination as provided herein.

18.4.1 The Contractor reserves the right to change its personnel for the performance of the Work, to the extent such personnel are not reasonably available upon the resumption of the Work; provided that the Municipality may direct by Change Order that such personnel be retained on the Project. If the Municipality directs such retention, the Municipality shall pay the Contractor the reasonable costs incurred by the Contractor to keep and/or make such personnel available upon the resumption of the Work, including necessary stand-by costs.

**18.5 Termination by the Contractor for Prolonged Suspension of Performance**. If performance of the Agreement is stopped for a period of ninety (90) consecutive days at the direction of the Municipality pursuant to Paragraph 18.1 or by an order of any court or other public authority, or as a result of any act of government, and provided that such suspension by the Municipality or public authority is through no fault of the Contractor or any person or entity working directly or indirectly for the Contractor, the Contractor may, upon ten (10) days’ written notice to the Municipality, terminate performance under the Agreement and recover from the Municipality on the terms and conditions and in the amounts provided in Paragraph 18.7 below.

**18.6 Termination by the Contractor for Cause**. If the Municipality shall persistently or repeatedly fail to perform any material obligation to the Contractor for a period of thirty (30) days after receiving written notice from the Contractor of its intent to terminate hereunder, the Contractor may terminate performance under the Agreement by written notice to the Municipality. In such event, the Contractor shall be entitled to recover from the Municipality on the terms and conditions and in the amounts as though the Municipality had terminated the Contractor’s performance under the Agreement for convenience pursuant to Paragraph 18.7 below.

**18.7 Termination by Municipality for Convenience**. The Municipality may, for any reason whatsoever, or without reason, terminate performance under the Agreement by the Contractor for convenience. The Municipality shall give at least thirty (30) days prior written notice ofsuch termination to the Contractor specifying when termination becomes effective. The Contractor shall incur no further obligations in connection with the Agreement and the Contractor shall stop Design Services and the Work when such termination becomes effective. The Contractor shall also, at the Municipality’s direction, either terminate or assign to the Municipality outstanding purchase orders and subcontracts. The Contractor shall settle the liabilities and claims arising out of any terminated subcontracts. The Municipality may direct the Contractor to assign the Contractor’s rights, title and interest under terminated orders or subcontracts to the Municipality or its designee. The Contractor shall transfer title and deliver to the Municipality such completed or partially completed Design Documents, Work and materials, equipment, parts, fixtures, information and appropriate contract rights as the Contractor has.

**18.8 Submission of Termination Claim and Compensation for Termination for Convenience**. When terminated for convenience, Contractor shall be compensated as follows:

18.8.1 The Contractor shall submit a termination claim to the Municipality specifying the amounts believed to be due because of the termination for convenience together with costs, pricing or other data required by the Municipality. If the Contractor fails to file a termination claim within three (3) months from the effective date of termination, the Municipality shall pay the Contractor an amount derived in accordance with Subparagraph (3) below;

18.8.2 The Municipality and the Contractor may agree to the compensation, if any, due to the Contractor hereunder;

18.8.3 Absent agreement to the amount due to the Contractor, The Municipality shall pay the Contractor, as full compensation for termination for convenience, the following amounts:

(1) That portion of the Fixed Contract Price representing the value of the Design Services and the Work, as reflected on the schedule of values in Annex 5, performed by the Contractor prior to the date of termination, which is completed and accepted by the Municipality for which the Contractor has not been previously paid;

(2) Reasonable costs incurred in preparing to perform and in performing the terminated portion of the Design Services and the Work, and in terminating the Contractor’s performance, plus a fair and reasonable allowance for direct job site overhead and profit thereon (such profit shall not include anticipated profit or consequential damages); provided however, that if the Municipality can show that the Contractor would have not profited or would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss, if any; and

(3) Reasonable costs of settling and paying costs and claims arising out of the termination of subcontractors or orders pursuant to Paragraph 18.7 above. These costs shall not include amounts paid in accordance with other provisions hereof.

18.8.4 In no event shall the Contractor be entitled to recover anticipated profits or other consequential damages from the Municipality on account of a termination for convenience or an erroneous termination for cause, as described below. The total sum to be paid the Contractor under this Paragraph shall not exceed the Fixed Contract Price, as properly adjusted, reduced by the amount of payments otherwise made, and shall in no event include duplication of payment.

**18.9 Termination by Municipality for Cause**. If the Contractor does not perform the Work, or any part thereof, in a timely manner, supply adequate labor, supervisory personnel or proper equipment or materials, or if it fails to timely discharge its obligations for labor, equipment and materials, or proceeds to disobey applicable laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise commits a violation of a material provision of the Agreement, then the Municipality may by written notice to the Contractor, without prejudice to any other right or remedy against the Contractor or others, terminate the performance of the Contractor and take possession of the Project site and of all materials and equipment at the site and may finish the Work by methods it may deem expedient. In such cases, the Contractor shall not be entitled to receive any further payment until the Work is finished.

**18.10 Erroneous Termination for Cause**. In the event the employment of the Contractor is terminated by the Municipality for cause pursuant to Paragraph 18.9 and it is subsequently determined by a court or other tribunal of competent jurisdiction that such termination was without cause, such termination shall thereupon be deemed a Termination for Convenience under Paragraph 18.7 and the provisions of Paragraph 18.8 regarding compensation shall apply.

**18.11 Payments to Contractor after Termination for Cause**. Upon a termination by the Municipality for cause, if the unpaid balance of the Fixed Contract Price exceeds the cost of finishing the Work, including compensation for the Municipality’s additional costs and expenses of every nature whatsoever made necessary thereby, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the Municipality. This obligation for payment shall survive the termination of the Agreement.

**ARTICLE 19**

**OWNERSHIP OF DOCUMENTS**

**19.1 Documents Municipality’s Property**. The Design Documents and the Contract Documents, including but not limited to, the drawings, specifications and other documents or things prepared by the Contractor for the Project, shall become and be the sole property of the Municipality. Any documents furnished by the Municipality shall remain the property of the Municipality. The Contractor may be permitted to retain copies of the Design Documents and Contract Documents and any documents furnished by the Municipality for its records; provided, however, that in no event shall the Contractor use, or permit to be used, any portion of all of such documents on other projects without the Municipality’s prior written authorization.

**ARTICLE 20**

**INDEMNIFICATION**

**20.1 Contractor Indemnification of Municipality for Personal Injury or Damage to Tangible Property**. The Contractor shall indemnify and hold the Municipality and the Municipality’s Representative harmless from any and all claims, liability, damages, loss, cost and expense of every type whatsoever including, without limitation, attorneys’ fees and expenses, in connection with the Contractor’s performance of this Contract, provided that such claims, liability, damage, loss, cost or expense is due to sickness, personal injury, disease or death, or to loss or destruction of tangible property (other than the Work itself), including loss of use resulting therefrom, to the extent caused by the Contractor or anyone for whose acts the Contractor may be liable.

**20.2 Contractor Indemnification of Municipality for Violations of Laws, Environmental Requirements and Licensing Requirements**. Contractor shall indemnify and hold harmless the Municipality and its affiliates, officers, directors, and employees from and against all claims, liabilities, damages, losses, costs, expenses (including reasonable attorney’s fees and expenses, and fees and expenses of experts) for bodily injury, including death, or damage to or loss of property, or any other type or form of loss occurring or sustained or resulting from and of the following:

20.2.1 Any violation by the Contractor, its Subcontractors, representatives, employees, and agents of laws, rules, or regulations applicable to the performance of its obligations under the Agreement.

20.2.2 Environmental violations or contamination from hazardous substances, hazardous wastes and emissions or other substances or chemicals regulated by any applicable environmental laws or regulations and to the extent caused by any willful misconduct, negligent act or omission, or legal violation by the Contractor, its Subcontractors, Suppliers, representatives, employees, or agents.

20.2.3 The failure of any of the Contractor’s employees, agents, representatives, Suppliers, or Subcontractors to obtain and maintain the required skills, licenses, certificates and permits mandated by applicable federal, state or local governing authorities with jurisdiction over construction, fabrication, environmental, health and safety matters of the Project.

**ARTICLE 21**

**INSURANCE**

**21.1 Required Coverage and Limits**. The Contractor shall have and maintain the insurance described in Annex 11 and incorporated herein by reference during the entire performance of this Contract, and for a period of two (2) years after Final Construction Completion of the Project. Such insurance shall cover the claims and provide the limits of coverage set forth in Annex 11.

**21.2 Proof of Insurance**. The Contractor shall provide the Municipality with certificates of insurance naming the Municipality as an additional insured (except for professional liability insurance) or certified copies of the policies required by the Municipality, certifying that all insurance is in force, within ten (10) days after the Agreement becomes effective or on the date construction is commenced, whichever occurs first. Certificates of insurance evidencing the coverages required by the Agreement shall contain an endorsement requiring sixty (60) days’ written notice to Municipality prior to any cancellation or alteration of said coverage. Said coverage shall be written by an insurer properly licensed in the country where the project is located and who is reasonably acceptable to the Municipality. Insurance required by this Agreement must apply separately to each insured against whom a claim is made or suit is brought, except with respects to the limits of the company’s liability.

**21.3 Increases in Coverage**. At the request of the Municipality, the Contractor shall increase the above insurance limits or obtain additional coverage at the Municipality’s expense.

**21.4 Subrogation**. The Municipality and the Contractor waive all rights against each other and against the respective consultants, subcontractors, agents and employees of the other for damages covered by the insurances listed on Exhibit 2, which the Contractor is required to carry except that neither waives any right to seek to recover from the other deductibles or other amounts required to be paid in self insurance before such property coverage becomes effective and neither waives any right as they have to proceeds of such insurance held by the Contractor. Further, the Municipality does not waive its subrogation rights to the extent of its property insurance on structures or portions of structures that do not comprise the Work. The g and the Contractor each shall require appropriate similar waivers from their consultants, subcontractors and agents.

**ARTICLE 22**

**SURETY BONDS**

**22.1 Performance Bond and Payment Bond**. Within fifteen (15) days of execution of this Agreement, the Contractor must furnish separate performance and payment bonds to the Municipality. Each bond shall set forth a penal sum in an amount not less than the Fixed Contract Price. Each bond furnished by the Contractor shall incorporate by reference the terms of this Agreement as fully as though they were set forth verbatim in such bonds. In the event the Fixed Contract Price is adjusted by Change Order executed by the Contractor, the penal sum of both the performance bond and the payment bond shall be deemed increased by like amount. The performance and payment bonds furnished by the Contractor shall be in form suitable to the Municipality and shall be executed by a surety, or sureties, properly licensed in the country where this project is located and who are acceptable to the Municipality. The Contractor recognizes and acknowledges that the performance bond must cover all services (design and construction) to be provided by the Contractor under this Agreement.

**ARTICLE 23**

**MISCELLANEOUS PROVISIONS**

**23.1 Governing Law**. The Agreement shall be governed by the laws of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. The parties agree that venue for any filed legal proceeding will be in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and hereby consent to the jurisdiction of such courts.

**23.2 Successors and Assigns**. The Municipality and the Contractor bind themselves, their successors, assigns, executors, administrators and other legal representatives to the other party hereto and to successors, assigns, executors, administrators and other legal representatives of such other party in respect to all terms and conditions of this Contract.

**23.3 Assignment**. The Contractor shall not assign the Agreement, or any part of the Agreement, without prior written consent of the Municipality.

**23.4 Notices**. Any notice required to be given herein shall be deemed to have been given to the other party if (1) given by first class mail, registered or express mail, courier service, or hand delivery; or (2) by fax, provided that such notice is also confirmed by first class mail, registered or express mail, courier service, or hand delivery to the following addresses:

**TO MUNICIPALITY:**

**TO CONTRACTOR:**

All notices shall be effective upon receipt.

**23.5 Publicity**. No information relative to the existence or the details of the Design Services or the Work shall be released by the Contractor, either before or after completion of the Project, for publication, advertising or any commercial purposes without The Municipality’s prior written consent.

**23.6 Severability**. In the event that any portion or any portions of this Contract are held to be unenforceable by a court of competent jurisdiction, then the remainder of this Contract shall be enforced as though such portions had not been included, unless to do so would cause this Contract to fail of its essential purposes.

**23.7 Effective Date**. The effective date of this Contract is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

**ARTICLE 24**

**DISPUTE RESOLUTION**

**24.1 Initial Dispute Resolution**. If a dispute arises out of or relates to this Agreement or its breach, the parties shall endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the parties shall endeavor to settle the dispute by mediation before resorting to litigation.

**24.2 Work Continuance and Payment**. Unless otherwise agreed in writing, the Contractor shall continue the Work and maintain the approved schedules during any mediation proceedings. If the Contractor continues to perform, the Municipality shall continue to make payments in accordance with this Agreement.

**24.3 Multiparty Proceeding**. The parties agree that all parties necessary to resolve a dispute shall be parties to the same mediation proceeding.

**24.4 If Mediation Fails**. If mediation fails to resolve the dispute, either party may file an action in the courts of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

In Witness that the parties have read and agree to be bound by and perform according to the terms and conditions of this Agreement, their duly authorized representatives have signed below.

**i Contractor**

Signature\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Signature:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(Printed Name):\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Printed Name):\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Title\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Address\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Address\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Phone No.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Phone No.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Fax No.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Fax No.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

email\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ email\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Annexes

|  |
| --- |
| Annex 3  Technical Proposal |

1. Company Experience
2. Personnel and Organization Chart
3. Proposed Plant Design Summary
4. Design Proposal Drawing Set to include:
   1. Cover Sheet
   2. Architectural
   3. Mechanical
   4. Structural
   5. Plumbing
   6. Electrical
5. Site Preparation Summary
6. Mobilization Schedule
7. Construction Schedule
8. Contractor’s Equipment for Construction
9. Proposed Subcontractors
10. The Contractors Bid, Any Attached Documents and Acceptance of the Compensation Terms
11. Operations and Maintenance Bid with Attachments; and Acceptance of the Compensation Terms
12. Operations Summary and Spare Parts List
13. Recommended Changes to the Design/Build/Operate Terms

Annex 4

Design Build and Operate Performance Based Price

*(can be broken in to design, build and or operate – examples are provided)*

**4a. Total Price - Single Stage Bid**

|  |  |  |  |
| --- | --- | --- | --- |
| **Item** | **Descrption** | **Quantity** | **Total Price** |
| **1.** | Design, Build, Operate (5 years) Septage Treatment Plant that will meet the required performance and effluent quality | **1** |  |
|  |  |  |  |
|  |  |  |  |

**4b. Total Price – Two (2) Stage Bid**

|  |  |  |  |
| --- | --- | --- | --- |
| **Item** | **Descrption** | **Quantity** | **Total Price** |
| **1.** | Design, Build Septage Treatment Plant that will meet the required performance and effluent quality | **1** |  |
| **2.** | Operate Septage Treatment Plant that will meet the required performance specific and effluent quality (5 years) | **1** |  |
|  |  |  |  |

**4c. Total Price – Multiple Pricing Requirments**

*(may require bid schedule for each – see Annex 5)*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Item** | **Descrption** | **Schedule**  **Reference** | **Quantity** | **Total Price** |
| **1.** | Design and Services |  | **1** |  |
| **2.** | Site Preparation and Construct (civil works, installation and spare parts) Septage Treatment Plant that will meet the required performance and effluent quality |  | **1** |  |
| **3.** | Operate Septage Treatment Plant that will meet the required performance specific and effluent quality (5 years) |  | **1** |  |
| **3a.** | Power Cost |  |  |  |
| **3b.** | Maintenance and Repair Cost |  |  |  |
| **3c.** | Manpower Cost |  |  |  |
| **3d.** | Chemical, Biosolids Mgt and Other Cost |  |  |  |
| **3e.** | Spare Parts |  |  |  |

**Annex 5**

**Tables for Determining DBO Price**

(*these may or may not be included in the Bid/Contract)*

**A. Mobilzation and Treatment Plant Site Development Price**

|  |  |  |  |
| --- | --- | --- | --- |
| **Description** | **Price** | **Quantity** | **Total Price** |
| A. Mobilization |  |  |  |
| Mobilzation |  |  |  |
| Engineering Support |  |  |  |
| Permits/Licenses |  |  |  |
| Demobization |  |  |  |
| B. Site Development |  |  |  |
| Demolition |  |  |  |
| Excavation, Backfilling, Compaction |  |  |  |
| Fencing and/or Security |  |  |  |
| Buildings and Structures |  |  |  |
| Road, Access, Drainage |  |  |  |
| Lanscaping |  |  |  |
| Other (pipes…..) |  |  |  |
|  |  |  |  |

**B. Design Build Price**

(*this can be broken in to a design and then a build price)*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Description** | **Unit**  **Cost** | **Quantity** | **Total Price** | |
| **Weighing Station** (building, scales…..)  **Inlet Works** |  |  |  |  |
| (inlet pipes, lift station, screens, transfer pumps, tanks, blowers, diffusers.. ) |  |  |  |  |
|  |  |  |  |  |
| **Biological Treatment Plant** |  |  |  |  |
| (tanks, blowers, pumps….) |  |  |  |  |
| **Disinfection and Filter System** |  |  |  |  |
| (tank, chlorine dosing pump, filter, chemicals…) |  |  |  |  |
|  |  |  |  |  |
| **Mechanical Works** |  |  |  |  |
| (valves, pipes, fittings…) |  |  |  |  |
|  |  |  |  |  |
| **Electrical and Instrumentation Works** |  |  |  |  |
| (PLC, spare generator …) |  |  |  |  |
|  |  |  |  |  |
| **Odor Control (*if needed)*** |  |  |  |  |
| (structure, blowers…….)  **Biosolids Management**  (sludge dewatering, dryer, composting or transport…)  **Laboratory**  (back-up equipment, consumables) |  |  |  |  |
|  |  |  |  |  |
|  | | | | |

**C. Power Price**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Equipment** | **No.** | **KwH** | **Hr/day** | **Cost**  **(day)** | **Cost**  **(year)** |
| Weigh Station (vacuum truck) |  |  |  |  |  |
| Pumps and Screening |  |  |  |  |  |
| Equalization Tank |  |  |  |  |  |
| Aeration/Digester |  |  |  |  |  |
| Pumps |  |  |  |  |  |
| Final Clarifier |  |  |  |  |  |
| Disinfection (chlorination) |  |  |  |  |  |
| Biosolids Handling (dewatering, compost) |  |  |  |  |  |
|  |  |  |  |  |  |
|  |  |  |  |  |  |

**D. Labor Cost**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Category** | **No.** | **Hours Per Day** | **Rate** | **Total Cost Per Day** | **Total Cost Per Year** |
| Operator 1 |  |  |  |  |  |
| Operator 2 |  |  |  |  |  |
| Lab Technician |  |  |  |  |  |
| Technician |  |  |  |  |  |
|  |  |  |  |  |  |
|  |  |  |  |  |  |

**E. Chemical Cost**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Process** | **Chemical** | **Quantity** | **Cost Per**  **Kg** | **Cost Per**  **Day** |
| Aeration |  |  |  |  |
| Disinfection |  |  |  |  |
| Biosolids |  |  |  |  |
|  |  |  |  |  |

**F. Miscellaneous Cost**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Process** | **Frequency** | **Cost** | **Total Cost**  **(monthly)** | **Total Cost**  **(per year)** |
| Biosolids Hanling | 1/day |  |  |  |
| Independent Lab Testing  (influent, effluent and sludge) | 1/month |  |  |  |
| Independent Scale Testing |  |  |  |  |
| Site Maintenance |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |

**G. Equipment Maintenance and Repair Cost**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Area** | **Period**  **(year)** | **Labor**  **(hour)** | **Labor Cost**  **(year)** | **Parts Cost**  **(year)** | **Total** |
| Preventative Maintenance |  |  |  |  |  |
| Drives |  |  |  |  |  |
| Mechanisms |  |  |  |  |  |
| Mixers |  |  |  |  |  |
|  |  |  |  |  |  |
| Replacement Parts |  |  |  |  |  |
| Drives |  |  |  |  |  |
| Pumps |  |  |  |  |  |
| Mixers |  |  |  |  |  |
| Motors |  |  |  |  |  |
| Bearings |  |  |  |  |  |
|  |  |  |  |  |  |
|  |  |  |  |  |  |
|  |  |  |  |  |  |

**H. Spare Parts**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Description** | **Unit**  **Cost** | **Quantity** | **Total Price** | |
| **Weighing Station**  (building, scales…..)  **Inlet Works** |  |  |  |  |
| (inlet pipes, lift station, screens, transfer pumps, tanks, blowers, diffusers.. ) |  |  |  |  |
|  |  |  |  |  |
| **Biological Treatment Plant** |  |  |  |  |
| (tanks, blowers, pumps….) |  |  |  |  |
| **Disinfection and Filter System** |  |  |  |  |
| (tank, chlorine dosing pump, filter, chemicals…) |  |  |  |  |
|  |  |  |  |  |
| **Mechanical Works** |  |  |  |  |
| (valves, pipes, fittings…) |  |  |  |  |
|  |  |  |  |  |
| **Electrical and Instrumentation Works** |  |  |  |  |
| (PLC, spare generator …) |  |  |  |  |
|  |  |  |  |  |
| **Odor Control (*if needed)*** |  |  |  |  |
| (structure, blowers…….)  **Biosolids Management**  (sludge dewatering, dryer, composting or transport…)  **Laboratory**  (back-up equipment, consumables) |  |  |  |  |
|  |  |  |  |  |
|  | | | | |

I. Recommended Spare Parts

|  |  |  |  |
| --- | --- | --- | --- |
| **Description** | **Price** | **Quantity** | **Total Price** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |

Annex 6

Performance Payments

In accordance with the contract provisions Municipality shall pay the Contractor in the following manner and at the following times, on the basis of design, build and operate price (Annex 4).

TERMS OF PAYMENT

*(these are guidelines and can be adjusted according to the preferred performance based compensation model)*

**A. Design and Services**

**Ten percent (10%)** of the total design services amount as an advance payment against receipt of invoice, and an irrevocable advance payment security for the equivalent amount.

**Ninety percent (90%)** of the total design services amount upon acceptance of design in accordance with the Contract and within forty-five (45) days after receipt of invoice.

**B. Construction of Septage Treatment Plant (site preparation, installation and commissioning)**

**Ten percent (10%)** of the total amount as an advance payment against receipt of invoice and an irrevocable advance payment security for the equivalent amount.

**Ninety percent (90%)** of the amount upon Final Completion and 90 day Commissioning. Payment shall be made within forty-five (45) days after receipt of invoice.

**Penalty for Equipment Not Meeting the Bid Perfromance Standards Set Forth in Annex 5**. (*May include a penalty for exceeding the bid amount of energy, chemicals and other items in the bid. Energy is the major cost and one example is for the penalty to be the cost of the energy in excess of the amount bid times ten (10). This is to encourage bidders to be accurate in their bids regarding energy consumption,.)*

**Liquidated Damages.** The Contractor will be assessed \_\_\_\_\_\_\_\_\_\_ per day as liquidated damages for each day of unexcused delay in achieving the Final Completion beyond the schedule Completion Date.

**C. Operation and Maintenance of Septage Treatment Plant**

**95 percent (95%)** of the total monthly operation and maintenance price, based on pro rata of the 5 year Operations Bid, upon receipt of the third party confirmation samples for the influent, effluent and sludge quality. This price is based on an influent quality and volume as defined in the Design Performance Guidelines (Annex 8). This fee shall serve as the minimum payment per month regardless of influent concentrations or volume of septage. Effluent quality must satisfy the Permit requirements and there are no payments for exceeding the Permit requirements. Sludge volume, quality and disposal is also subject to the Permit requirements and is included in the Contractor’s Operations Price. *(If the Municipality desires a certain sludge quality, such as percent solids; or desires a specific disposal method, such as composting, then this should be included in the Contract and here in the Operations Payment since this requirement would be in addition to the Permit requirements)*

**Payment for Volume and/or Organic Loading in Excess the Design Performance Guidelines**. For quanitities exceeding the design volume, the Municipality will pay the Contract \_\_\_\_\_\_\_\_\_\_\_\_\_ per cubic meter for the volume each month beyond the design volume. If the average organic loading, per month, exceeds the performance design by 30%, than the Municipaly will pay the Contractor and additional \_\_\_\_\_\_\_\_\_\_\_ per cubic meter of total volume treated at the Facility.

**Excess Costs in Energy, Chemicals or Equipment Repair.** All such costs are the responsibility of the Contractor. *(Some Contracts include a penalty for exceeding the bid energy price for each piece of equipment if the Operations Contract is tied to the Design Build Contract.*

**Five percent (5%)** of the total yearly operation and maintenance price, based on pro rata of the 5 year Operations Bid, upon successful completion of 12 months of meeting the facliity permit requirements.

PAYMENT PROCEDURES

The procedures for certification and making payments shall be as follows:

**Annex 8**

**Septage Treatment Facility Design Performance Guidelines**

(*guidelines are based on the dry and wet water flows, water quality of the influent, discharge requirments in the permit and sludge disposal requirements)*

**A. Septage Physical Characteristics**

|  |  |
| --- | --- |
| **Paramenter** | **Amount** |
| Average Flow (m3/d) |  |
| Wet Weather Flow (m3/d) |  |
| Design Septage Flow |  |
|  |  |

**B. Septage Characteristics**

| **Parameter** | **Units** | **Average Value** |
| --- | --- | --- |
| TSS | mg/L |  |
| BOD5 at 20°C | mg/L |  |
| COD | mg/L |  |
| Oil and Grease | mg/L |  |
| TKN | mg/L |  |
| Phosphorus | mg/L |  |
| Ammonium | mgN/L |  |
| PH |  |  |
| Total Coliform | MPN per 100 mL |  |

**C. Effluent Characteristics (as defined in the Discharge Permit)**

| **Parameter** | **Units** | **Average Value** |
| --- | --- | --- |
| TSS | mg/L |  |
| BOD5 at 20°C | mg/L |  |
| COD | mg/L |  |
| Oil and Grease | mg/L |  |
| TKN | mg/L |  |
| Phosphorus | mg/L |  |
| Ammonium | mgN/L |  |
| PH |  |  |
| Total Coliform | MPN per 100 mL |  |

Annex 9

Performance Guarantee

1. Functional Guarantees

Subject to compliance with the foregoing preconditions, the Contractor guarantees as follows:

1.1 TreatmentCapacity

As defined in the Contract

1.2 Labor, Raw Materials and Utilities Consumption

(i) Power Cost for Plant and Equipment (excludes the lighting cost)

(ii) Chemical Cost

(iii) Manpower Cost

(iv) Maintenance and Repair Cost

1.3 Treatment Performance

Effluent quality conforming to effluent standards as specified

1.4 Maintaining the Facilities

The Contractor shall be responsible for the care and custody of the facilities, together with the risk of damages or loss thereof, during the five (5) year operations period.

2. Failure in Guarantees and Liquidated Damages

2.1 **Capacity**. Failure to meet the Plant design capacity as specified then the Contractor shall pay liquidated damages at the rate of one (1) percent of the contract amount for every one percent (1%) of the deficiency in the Plant capacity (for every cubic meter per day) of the facilities, or at a proportionately reduced rate for any deficiency, or part thereof, of less than a complete one percent (1%).

2.2 **Consumables in Excess of Guaranteed Level**. If the actual measured figure of specified raw materials and utilities consumed per unit (or their average total cost of consumption) exceeds the guaranteed figure specified then the Contractor shall pay liquidated damages at the rate of onepercent of the contract amount for every one percent (1%) of the excess consumption of the Facilities, or part thereof, of less than a complete one percent (1%).

2.3 **Minimum Levels**. If the following minimum levels of performance guarantees (and consumption guarantees) are not attained by the Contractor, the Contractor shall at its own cost make good any deficiencies until the Facilities reach any of such minimum performance levels:

(a) At a minimum the capacity of the facilities shall be a minimum ofninety percent (90%) of the guaranteed capacity

**and/or**

(b) The average total cost of consumption of all the raw materials and utilities of the facilities shall be no greater than one hundred and ten percent (110%) of the guaranteed figures

4.4 Limitation of Liability

The Contractor’s aggregate liability to pay liquidated damages for failure to attain the functional guarantees shall not exceed one hundred percent (100 %) of the Contract price.

**ANNEX 11**

**INSURANCE**

**1.1 CONTRACTOR’S LIABILITY INSURANCE**. The Contractor shall purchase and maintain in full force and effect such insurance as well protect the Contractor from claims set forth below which may arise out of or result from the Contractor’s operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly controlled by any of them or by anyone whose acts any of them may be liable:

1.1.1 Claims under worker’s or workmen’s compensation, disability benefits and other similar employee benefit acts which are applicable to the Work to be performed;

1.1.2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor’s employees;

1.1.3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor’s employees;

1.1.4 Claims for damages insured by usual personal injury liability coverage, which are sustained (i) by a person as a result of an offense directly or indirectly related to employment of such person by the Contractor or (ii) by another person;

1.1.5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

1.1.6 Claims for damages because of bodily injury, death of a person, or property damage arising out of ownership, maintenance, or use of a motor vehicle;

1.1.7 Claims for bodily injury or property damage arising out of completed operations; and

1.1.8 Claims involving contractual liability insurance applicable to the Contractor’s obligations under the Agreement.

1.2 The insurance required by Paragraph 1.1 above shall be written for not less than limits of liability specified in this Contract or as required by law, whichever is greater. Coverage, whether written on an occurrence of claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment. In addition, for any insurance required that is obtained on a claims-made basis, “tail coverage” is required at the completion of the Work for twenty-four (24) months. Continuous claims-made coverage will be acceptable in lieu of “tail coverage” provided the retroactive date is on or before the effective date of this Contract or twenty-four (24) months “prior acts” coverage is provided.

1.2.1 The insurance required by Paragraph 21.1 above shall be written for not less than the following limits:

1. Worker’s Compensation Liability:
2. Employer’s Liability: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ per accident

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ policy limit

1.2.2 Comprehensive Commercial General Liability (“CGL”) and Umbrella Liability Insurance. Contractor shall maintain commercial General Liability (“CGL”) and, if necessary, commercial umbrella insurance with a limit of not less than \_\_\_\_\_\_\_\_\_\_ each occurrence. If such CGL insurance contains a general aggregate limit, it shall apply separately to this project location. Additional insured coverage as required by this subparagraph shall apply as primary insurance with respect to any other insurance or self-insurance programs afforded to the Municipality;

a. For the hazards of explosion, collapse, and damage to underground property, coverage shall be required if the exposure exist. This coverage may be provided by the subcontractor if the Municipality and prime Contractor are named as additional insured;

1.2.3 Business Liability Insurance: Contractor shall maintain business, auto liability and, if necessary, commercial umbrella liability insurance with a limit of not less than \_\_\_\_\_\_ each accident.

1.2.4 If the General Liability coverages are provided by Commercial Liability policies the:

1. General Aggregate shall not be less than \_\_\_\_\_\_\_\_\_\_\_; and
2. Fire legal liability shall be provided in an amount not less than \_\_\_\_\_\_\_\_\_\_\_ per occurrence; and

*1.2.5 Umbrella Excess Liability. An umbrella policy may be used in combination with other policies to provide the required coverage.*

1.2.6 Professional Liability coverage with limits of not less than \_\_\_\_\_\_\_\_\_\_.

1. If the Professional Liability coverage required by this Paragraph is provided through a claims made policy, the Contractor must maintain such insurance for the entire five (5) years of this Agreement. The Contractor shall be responsible for all premiums, deductibles and all costs not covered by such insurance.

1.3 Certificates of Insurance for Comprehensive General Liability must be acceptable to the Municipality and shall be filed with the Municipality prior to commencement of the Work. The Municipality may require proof of coverage by an endorsement. The certificates, or endorsements, if required, and the insurance policies required by this Article shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least thirty (30) days’ prior written notice has been given to the Municipality. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Contractor’s Request for Payment as required by Article 7. Information concerning reduction of coverage shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor’s information and belief.

**2.1 MUNICIPALITY’S LIABILITY INSURANCE**. The Municipality at its option may purchase and maintain other insurance for self-protection against claims, which may arise from operations under the Contract.

**3.1 PROPERTY INSURANCE**. Contractor shall purchase and maintain property insurance written on a builder’s risk “all risk”, including earthquake and flood or equivalent policy form in the amount of the Fixed Contract Price plus the value of any upward adjustments to the Fixed Contract Price permitted by the Contract, on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract or as otherwise agreed in writing by the Municipality and Contractor, until final payment has been made as provided in the Contract or until no person other than Municipality has an insurable interest in the Project, whichever is later. This insurance shall include interests of Municipality, Contractor, Subcontractors and sub-subcontractors in the Work, and Municipality shall be named as an additional insured.

3.1.1 If the property insurance required deductibles, the Contractor shall pay costs of such deductibles.

3.1.2 A loss insured under Contractor’s all-risk policy shall be adjusted by Contractor as fiduciary and made payable to Contractor as fiduciary for the insureds. Upon, occurrence of an insured loss, Municipality may require Contractor to give bond for proper performance of Contractor’s duties. Contractor shall deposit in a separate account proceeds received, which Contractor shall distribute in accordance with such agreement as the parties in interest reach. If, after such insured loss, no other special agreement is made, and unless Municipality terminates the Contract for convenience, replacement or damaged property shall be performed by Contractor.