

**DESIGN-BUILD PRE-CONSTRUCTION AGREEMENT  
FOR WATER CONSERV I WRF  
REHABILITATION AND EXPANSION PROJECT**

**THIS DESIGN-BUILD PRE-CONSTRUCTION AGREEMENT (“AGREEMENT”)** is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2022, by and between the **City of Orlando, Florida**, a Florida municipal corporation (“**CITY**”) and **Wharton-Smith, Inc.**, a Florida for-profit corporation (“**DESIGN-BUILDER**”).

**WHEREAS**, CITY desires to obtain DESIGN-BUILDER’s professional design-build services (“**Services**”) for the project to be known as the **Water Conserv I WRF Rehabilitation and Expansion Project** (“**Project**”), according to the requirements in the CITY Request for Proposal No.: RFP21-0222, dated as of April 5, 2021 (the “**Solicitation**”), and as further described herein; and

**WHEREAS**, upon completion of the Services, it is contemplated that CITY and the DESIGN-BUILDER will enter into an additional contract pursuant to which the DESIGN-BUILDER will agree to perform the services of a prime contractor in connection with the construction of the Project (such contract, the “**Design-Build Contract**”);

**WHEREAS**, the DESIGN-BUILDER has submitted a proposal or response in connection with the Solicitation, which has been selected by CITY (hereinafter referred to as the “**Proposal**”); and

**WHEREAS**, the DESIGN-BUILDER warrants to CITY that it is qualified and duly licensed to furnish the Services in Florida and meet the obligations set forth in the Solicitation, the Proposal, and the documents detailing the scope of services attached hereto as **Exhibit A** and incorporated herein by this reference (the “**Scope of Services**”), and as hereinafter stated; and

**WHEREAS**, the DESIGN-BUILDER warrants that the representations made by it in its Proposal remain valid, accurate and binding upon it; and

**WHEREAS**, the DESIGN-BUILDER desires to render the Services and meet the obligations set forth in the Solicitation, the Proposal, and the Scope of Services and upon the terms and conditions set forth in the Contract Documents (as defined herein).

**NOW, THEREFORE**, in consideration of the promises and mutual covenants herein contained and given one party to the other, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

**SECTION 1**

**RECITALS; CONTRACT DOCUMENTS AND SCOPE OF SERVICES**

- 1.1 **RECITALS**. The Recitals set forth above are incorporated herein by this reference.
- 1.2 **CONTRACT DOCUMENTS**. For the purposes of this AGREEMENT, the following documents are collectively referred to herein as the “**Contract Documents**”:

- (a) This AGREEMENT together with all Exhibits hereto;
- (b) The Solicitation together with all Exhibits and Attachments thereto; and
- (c) The Proposal together with all Exhibits and Attachments thereto.

The terms of the Contract Documents are incorporated herein by this reference. In the event of conflict between the terms of the Contract Documents, the order of precedence is as set forth above (thus, if there is a conflict between the terms of the Solicitation and the terms of the Proposal, the terms of the Solicitation shall govern). In addition, to the extent any of the terms of the Proposal conflict or in the reasonable opinion of CITY are not relevant to the remaining Contract Documents, then, in that event, the provisions contained in the Proposal will not be applicable nor a part of the Contract Documents. Contract Documents shall further include any later amendments.

### 1.3 **FURNISHING OF SERVICES.**

(a) The DESIGN-BUILDER shall furnish to CITY the Services in compliance with the Contract Documents.

(b) The DESIGN-BUILDER will prepare a design report and thirty percent (30%) construction documents during the pre-construction design phase which will outline all of the parameters of the Project and describe in detail the design features. In its final form the design report will contain a preliminary guaranteed maximum price, a narrative of the main design features and the sequence for design and construction phasing. The DESIGN-BUILDER shall submit the thirty percent (30%) construction documents and design report to CITY for its review. CITY may, reasonably in its sole discretion, elect to approve or reject the design report and/or the thirty percent (30%) construction documents. If CITY rejects the design report and/or the thirty percent (30%) construction documents, the DESIGN-BUILDER shall rework said documents to CITY's satisfaction. Upon receiving CITY's approval of said documents, the DESIGN-BUILDER shall prepare sixty percent (60%), ninety percent (90%), and one hundred percent (100%) construction documents, including drawings, specifications, and progressive GMP estimates. When the plans and specifications are sufficiently complete to establish the Scope of Work for the Project (the services to be performed pursuant to such Scope of Work, the "**Work**") or at such time thereafter designated by CITY, the DESIGN-BUILDER will establish and submit in writing to CITY for its approval a final guaranteed maximum price ("**GMP**") for the construction phase of the Project, guaranteeing the maximum price to CITY for the cost of construction or designated part thereof. The parties understand that there is no guarantee that a Design-Build Contract will be entered into between DESIGN-BUILDER and CITY and the CITY may elect not to enter into such an agreement in its sole discretion.

(c) The Services to be performed by the DESIGN-BUILDER shall be performed in accordance with the Project Timeline attached hereto as **Exhibit B** and incorporated herein by this reference, and the Phase I one hundred percent (100%) construction documents shall be completed by the DESIGN-BUILDER **no later than \_\_\_\_\_**, unless otherwise approved in writing by the CITY (hereof the "**Completion Date**"). CITY may, in its sole and absolute discretion, extend the Completion Date to allow the DESIGN-BUILDER additional

time to complete the Services or to provide additional services which CITY may request as set forth in the Scope of Services.

1.4 **SOLICITATION OF BIDS FOR WORK NOT SELF-PERFORMED BY THE DESIGN-BUILDER.** If the parties enter into a Design-Build Contract, the DESIGN-BUILDER will, except as otherwise set forth below, prepare and issue solicitations (*i.e.*, invitations for bids, requests for proposals, etc.) for all procurements of (i) long lead items, (ii) materials and services, (iii) subcontractor contracts and (iv) site utilities in connection with the construction phase of the Project. The contracts entered into between the DESIGN-BUILDER and the providers of the items identified in (i) – (iv) of the previous sentence are referred to herein as “**Subcontracts**.” The procurement process for such Subcontracts shall be conducted by the DESIGN-BUILDER in accordance with the following guidelines.

(a) **Subcontracts that do not exceed \$50,000.** Unless waived by the CITY, subcontracts not exceeding \$50,000 may be entered into by the DESIGN-BUILDER with any firm that is qualified to provide the work sought and submits the lowest responsive and responsible bid. The DESIGN-BUILDER shall request at least three (3) firms to submit sealed written bids based on written drawings and/or specifications. A tabulation of the results shall be furnished to CITY and to each bidding firm. If approved in advance by CITY, the DESIGN-BUILDER and/or any of the proposed subcontractors included in the DESIGN-BUILDER’s Proposal (“**Proposed Subcontractors**”) may submit sealed written bids as well; provided, that the sealed written bids of the DESIGN-BUILDER and/or its Proposed Subcontractors shall be opened by CITY.

(b) **Subcontracts exceeding \$50,000.** For work other than self-perform work, subcontracts exceeding \$50,000 may be entered into by the DESIGN-BUILDER with the firm that is qualified to provide the work sought and submits the lowest responsive bid. The DESIGN-BUILDER shall advertise these Subcontracts at least once in the Orlando Sentinel with the last advertisement appearing at least fourteen (14) calendar days prior to the established bid opening time and date. If approved in advance by CITY, the DESIGN-BUILDER and/or any of its Proposed Subcontractors may submit sealed written bids as well; provided, that the sealed written bids of the DESIGN-BUILDER and/or its Proposed Subcontractors shall be opened by CITY.

1.5 **WORK SELF PERFORMED BY THE DESIGN-BUILDER.** The DESIGN-BUILDER must self-perform at least twenty-five percent (25%) of the Work for any item listed on the estimate or GMP breakdown where it is economically advantageous to CITY or advantageous to the Project schedule. CITY may require that the DESIGN-BUILDER and/or the Proposed Subcontractors submit sealed bids for such Work and that the bids be opened by CITY.

## SECTION 2

### PRE-CONSTRUCTION DESIGN PHASE FEES AND COSTS AND DESIGN-BUILD CONSTRUCTION FEES AND COSTS

2.1 **PAYMENT OF FEES AND COSTS.** CITY shall be required to pay the DESIGN-BUILDER the amounts set forth in **Section 2.1(a)** for Services performed in connection with the pre-construction design phase of the Project. In the event the Project proceeds to the

construction phase, the Design-Build Contract shall provide that CITY will be required to pay the DESIGN-BUILDER the amounts set forth in **Section 2.1(b)** for Services performed in connection with the construction phase of the Project. For the avoidance of doubt, if the Project does not proceed to the construction phase, CITY shall not be obligated to make any payments to the DESIGN-BUILDER pursuant to **Section 2.1(b)**. Any amounts required to be paid pursuant to this **Section 2.1(a)** shall be paid in accordance with the procedures set forth in **Section 5**.

(a) **Pre-Construction Design Phase Fee and Costs.** In full consideration of the Services performed by the DESIGN-BUILDER in connection with the pre-construction design phase of the Project, including construction administration, CITY hereby agrees to pay the DESIGN-BUILDER a fee as set forth on **Exhibit C** hereto (the “**Fees**”) set as \$ [REDACTED]. The DESIGN-BUILDER shall not be entitled to any other payments or reimbursements in connection with the pre-construction design phase of the Project.

(b) **Construction Phase Fee.** If the parties enter into a Design-Build Contract, the Design-Build Contract will provide that in full consideration of the Services performed by the DESIGN-BUILDER in connection with the construction phase of the Project, CITY will (i) pay the DESIGN-BUILDER a fee to be negotiated by the Parties equal to a percent of the Cost of Work (as defined in **Section 3.1**) (the “**Construction Phase Fee**”) and (ii) reimburse the DESIGN-BUILDER for the DESIGN-BUILDER’s out of pocket costs which are included within the definition of the Cost of Work. If construction is authorized by CITY for only for a part of the Project, the Design-Build Contract will provide that the Construction Phase Fee paid shall be proportionate to the amount of construction authorized by CITY.

(i) Fee (Overhead and Profit for Construction Phase). For profit and overhead, including, but not limited to, home and branch office expenses, and general expenses of any kind, except as may be expressly included in Section 3.1 below, for services provided during and related to the Construction Phase, the fee shall be [REDACTED] % of the Cost of the Work as defined in Section 3.1 below. The balance of the Fee shall be paid upon Final Completion of the Project. If construction is authorized only for a part of the Project, the Fee paid shall be proportionate to the amount of work authorized by the City.

(c) **Unauthorized Services.** The DESIGN-BUILDER acknowledges and agrees that if at any time it performs Services for the Project outside of the Scope of Services and such Services have not been approved in writing in advance by CITY, then the DESIGN-BUILDER shall perform such Service without liability to CITY, and at the DESIGN-BUILDER’s own risk.

### SECTION 3 COST OF THE WORK (Construction Phase)

3.1 **COSTS OF WORK.** The term “**Cost of Work**” shall mean the cost for all building materials plus the necessary labor and equipment to position those materials in their final place within the site. Such costs shall include the items set forth below in this Section 3. The CITY agrees to pay the DESIGN-BUILDER for the Cost of Work plus a construction phase fee as

defined in **Section 2.1(b)**. Such payment shall be in addition to the cost of the DESIGN-BUILDER'S General Conditions in connection with the Construction Phase (i.e. Site related expenses).

3.2 **INCLUDED COSTS**. Only the following costs, which are reasonably incurred by DESIGN-BUILDER in the proper performance of the Work, shall be included in the Cost of Work:

(a) Wages of direct employees of **DESIGN-BUILDER** performing the Work at the Work site (the "**Site**").

(b) Payments properly made by the **DESIGN-BUILDER** to its subcontractors.

(c) Costs, including transportation, inspection, testing, storage and handling of materials, equipment and supplies incorporated in the Work.

3.3 **EXCLUDED COSTS**. The following costs shall be excluded from the Cost of Work:

(a) Compensation for **DESIGN-BUILDER's** personnel stationed at **DESIGN-BUILDER's** principal or branch offices.

(b) Overhead and general expenses (i.e., expenses associated with **DESIGN-BUILDER's** principal office).

(c) The cost of **DESIGN-BUILDER's** capital used in the performance of the Work.

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

(e) The cost of correcting damaged or defective or non-conforming Work (or any resultant delay to the Contract Time) made necessary because of defective workmanship or defective materials, design errors or omissions or other causes attributable to the **DESIGN-BUILDER**, **DESIGNER**, Subcontractors, Suppliers or anyone else for whom they are responsible.

(f) Costs of the **DESIGN-BUILDER's** General Conditions in connection with the construction phase (i.e., Site-related expenses).

(g) The cost of Architect/Engineering Professional Services.

## **SECTION 4 CITY'S RESPONSIBILITIES**

4.1 **REQUIREMENTS FOR THE PROJECT**. CITY agrees that it will provide criteria and information as to CITY's requirements for the pre-construction design phase of the Project in a timely manner, including design objectives and constraints; space; capacity and performance

requirements; flexibility and expandability matters; budgetary limitations; and copies of all design and construction standards which CITY will require to be included in the construction documents.

4.2 **INFORMATION PERTINENT TO THE PROJECT.** CITY shall, upon request, provide the DESIGN-BUILDER with reasonably available information it deems to be pertinent to the Project (including previous reports and any other data relative to design or construction of the Project), and CITY shall advise the DESIGN-BUILDER as to what information, if any, CITY believes to be accurate. The DESIGN-BUILDER is ultimately responsible for satisfying itself as to accuracy of any data provided, and, furthermore, the DESIGN-BUILDER is responsible for bringing to CITY's attention, for CITY's resolution, any material inconsistencies or errors in such data which come to the DESIGN-BUILDER's attention. If CITY requires the DESIGN-BUILDER's assistance in resolving any error or inconsistency, such Services may be provided by mutual agreement of the parties.

4.3 **ACCESS TO PROPERTY.** CITY shall arrange for access to and make provisions for the DESIGN-BUILDER to enter upon public property as reasonably required for the DESIGN-BUILDER to perform the Services. DESIGN-BUILDER shall make its own arrangements for access to private property which DESIGN-BUILDER believes is necessary to perform its Services. If required by the owner of the property, the DESIGN-BUILDER shall agree in writing to:

(a) Indemnify, release, and hold the owner of such property and CITY harmless against any claims, damages and injuries that occur to the extent caused by the DESIGN-BUILDER's use of such property; and

(b) Leave such property in as good condition and order as existed on the commencement of DESIGN-BUILDER's use.

4.4 **CITY PROJECT MANAGER.** The CITY shall appoint a Project Manager ("**Project Manager**") for this Project. The Project Manager shall issue any and all written authorizations to the DESIGN-BUILDER that the Project may require, or that may otherwise be defined or referred to in this AGREEMENT. The Project Manager shall also, 1) act as the CITY's representative with respect to the Services rendered hereunder; 2) transmit instructions to and receive information from the DESIGN-BUILDER; and 3) communicate the CITY's decisions to the DESIGN-BUILDER regarding the Services. The Project Manager shall have the authority to extend the Completion Date as provided in **Section 1.3(c)**.

## SECTION 5 PAYMENTS TO DESIGN-BUILDER

### 5.1 **INVOICING AND PAYMENT**

(a) **Submission of Invoices.** In order to receive payment for its Services performed in connection with the pre-construction design phase of the Project pursuant to **Section 2.1**, the DESIGN-BUILDER must submit an invoice in accordance with the Fees detailing the Services provided and the amount charged (each, an "**Invoice**"). Each Invoice must be accompanied

with an updated CD-ROM of the design files and an updated Project schedule in form and substance acceptable to CITY.

(b) **Payment Period.** Subject to the terms and conditions provided herein, CITY will pay each undisputed Invoice received pursuant to **Section 5.1(a)** within thirty (30) days after receipt and approval by CITY of said Invoice, which shall not be unreasonably withheld. CITY may reasonably request additional documentation from the DESIGN-BUILDER prior to payment of any Invoice. CITY may disallow and deduct any cost for which proper documentation is not provided.

(c) **Reimbursable Expenses.** “**Reimbursable Expenses**” means the actual, necessary and reasonable expenses incurred directly or indirectly in connection with the Project for: transportation and subsistence incidental thereto for Project visitation as approved in advance by the Project Manager and drawings and specifications and similar Project-related items, all in accordance with the CITY’s Policy and Procedures Manual, of which the DESIGN\_BUILDER should make himself familiar.

## 5.2 **SCOPE, COST AND FEE ADJUSTMENT**

(a) **General.** CITY may at any time request reasonable changes to the Scope of Services. CITY shall make such request by delivering to the DESIGN-BUILDER a notification stating the proposed Scope of Services modification and an adjustment of the Fees in **Exhibit C** to reflect such modification. The fee adjustment due to modification in the Scope of Services may be calculated utilizing the same method of compensation applicable to the AGREEMENT prior to the Scope of Services modification.

(b) **Scope Reduction.** CITY shall have the right to reduce (or eliminate, in whole or in part) the Scope of the Services at any time and for any reason, upon providing written notice to the DESIGN-BUILDER specifying the nature and extent of the reduction. In such event the DESIGN-BUILDER shall be fully compensated for the Services performed prior to such reduction or elimination.

(c) **Scope Suspension.** CITY may, at any time and for any reason, direct the DESIGN-BUILDER to suspend Services (in whole or in part) under this AGREEMENT. Such direction shall be in writing, and shall specify the period during which Services shall be stopped. The DESIGN-BUILDER shall resume its Services upon such date as CITY may thereafter specify orally or in writing. The period during which the Services are stopped by CITY shall be added to the term; provided, however, that any work stoppage not approved or caused by the actions or inactions of CITY shall not give rise to any claim against CITY by the DESIGN-BUILDER. CITY agrees to compensate the DESIGN-BUILDER for its reasonable and provable costs, profits (as agreed to by CITY), and losses (including overhead costs, reimbursable, demobilization, remobilization, and subcontractor expenses incurred) attributable to any delay approved or caused by the actions or inaction of CITY.

5.3 **TERMINATION.** Upon the termination of this AGREEMENT, the DESIGN-BUILDER shall prepare a final and complete Invoice for all Services and Reimbursable

Expenses incurred since the posting of the last Invoice, and through the date of termination. The final Invoice shall be subject to all of the provisions described in this **Section 5**.

5.4 **FINAL PAYMENT**. The acceptance by the DESIGN-BUILDER, its successors, or assigns, of any final payment due on account of the pre-construction design phase of the Project shall constitute a full and complete release of CITY from any and all claims or demands regarding further compensation for authorized Services rendered prior to such final payment that the DESIGN-BUILDER, its successors, or assigns have or may have against CITY under the provisions of this AGREEMENT, unless otherwise previously and properly filed pursuant to the provisions of this AGREEMENT, or in a court of competent jurisdiction. This **Section 5.4** does not affect any other portion of this AGREEMENT that extends obligations of the parties beyond final payment.

5.5 **LIVING WAGE**. The DESIGN-BUILDER, as well as its subcontractors at all tiers, shall pay to all of their employees providing Services pursuant to a contract with the CITY, a living wage for the time spent providing Services to the CITY. (This provision does not include general administrative personnel unless they are assigned to a CITY project.) “Living wage” means compensation for employment of not less than \$14.00 per hour for straight time, exclusive of FICA, unemployment taxes, and workers compensation insurance and employee benefits. Necessary payroll documentation shall be provided to confirm compliance with this provision or the DESIGN-BUILDER shall allow the CITY to audit (at DESIGN-BUILDER’s place of business) its payroll records to determine if compliance has been achieved. Failure to comply with the provision may result in termination of the contract and/or preclusion from future CITY contracts at the sole option of the CITY. This provision shall apply to all bid and proposal awards for Services which involve CITY expenditures that exceed \$100,000.00 per year.

## **SECTION 6 TERMINATION**

6.1 **TERMINATION BY CITY FOR CAUSE**. CITY may, in its sole and absolute discretion, by written notice of default to the DESIGN-BUILDER, terminate all or any part of this AGREEMENT if (a) the DESIGN-BUILDER fails to perform the Services described herein, within the time specified herein or any extension hereof; or (b) if the DESIGN-BUILDER fails to satisfy any of the other provisions of the AGREEMENT, or so fails to make progress as to endanger performance of this AGREEMENT in accordance with its terms; and in either of these two circumstances does not cure such failure within a period of ten (10) days (or such longer period as CITY may in its sole discretion authorize in a writing signed by CITY) after receipt of notice from CITY specifying such failure. In the event that CITY elects to waive its remedies for any breach by the DESIGN-BUILDER of any covenant, term or condition of this AGREEMENT, such waiver by CITY shall not limit CITY’s remedies for any succeeding breach of that or of any other term, covenant, or condition of this AGREEMENT.

6.2 **TERMINATION BY CITY FOR CONVENIENCE**. This AGREEMENT may be terminated by CITY in its absolute discretion, in whole or in part, whenever CITY shall determine that such termination is in its best interest. Any such termination shall be effected by delivery of a notice of termination by CITY to the DESIGN-BUILDER, signed by CITY,

specifying the extent to which performance of work under the AGREEMENT is terminated, and the date upon which such termination becomes effective. The DESIGN-BUILDER shall be paid its costs, including contract closeout costs, and profit on Services performed by the DESIGN-BUILDER up to the effective date of AGREEMENT termination. The DESIGN-BUILDER shall promptly submit its claim for final payment to CITY.

6.3 **TERMINATION BY DESIGN-BUILDER FOR CAUSE.** In the event CITY is in default under this AGREEMENT, the DESIGN-BUILDER shall first provide written notice to CITY of said condition alleged by the DESIGN-BUILDER to be a default, and CITY shall have a reasonable period of time, not to exceed sixty (60) days, within which to cure said default. During said period, the DESIGN-BUILDER shall continue to provide the services to CITY. In the event CITY continues to be in default under this AGREEMENT upon the expiration of the time period set forth above for curing its default, this AGREEMENT may be terminated by the DESIGN-BUILDER upon providing a notice of termination to CITY.

6.4 **REMEDIES FOR DEFAULT BY DESIGN-BUILDER.** If this AGREEMENT is terminated by CITY for default by the DESIGN-BUILDER, CITY shall, except as otherwise expressly set forth in the Contract Documents, retain any and all remedies available for it against the DESIGN-BUILDER, all of which remedies shall be cumulative. By way of illustration and not limitation, CITY may proceed to obtain the remaining Services from another third party and thereby recover from the DESIGN-BUILDER any “excess costs” incurred by CITY in so doing.

6.5 **DELIVERY OF MATERIALS UPON TERMINATION.** In the event of termination of this AGREEMENT by CITY, prior to the DESIGN-BUILDER’s satisfactory completion of all the Services described or alluded to herein, the DESIGN-BUILDER shall promptly furnish CITY, at no additional cost or expense, with one (1) copy of the following items (“**Documents**”), any or all of which may have been produced prior to and including the date of termination: data, specifications, calculations, estimates, plans, drawings, construction documents, photographs, summaries, reports, memoranda; CD-ROM design files, and any and all other documents, instruments, information, and materials (whether or not completed) generated or prepared by the DESIGN-BUILDER, or by any subcontractors at all tiers, in rendering the Services described herein, and not previously furnished to CITY by the DESIGN-BUILDER pursuant to this AGREEMENT. The Documents shall be the sole property of CITY, and CITY shall be vested with all rights provided therein of whatever kind and however created. The DESIGN-BUILDER shall also require that all such subcontractors at all tiers agree in writing to be bound by the provisions of this Subsection. Although the Documents will be the sole property of CITY, neither DESIGN-BUILDER nor their design consultants will be responsible for any errors or omissions in the Documents and there will be no guarantee that the Documents will be fit for their intended use.

## **SECTION 7 MATERIALS AND REUSE OF DOCUMENTS**

The DESIGN-BUILDER shall supply CITY with at least one reproducible copy of all data, job files, test reports, cost control and scheduling data, computer printouts, summaries, memoranda, CD-ROM design files, and other written work, documents, instruments, information, and

materials (whether or not completed) generated or prepared by the DESIGN-BUILDER especially for the Services rendered hereunder at CITY's request during the term of the AGREEMENT, upon termination, and with the DESIGN-BUILDER's final payment invoice) by the DESIGN-BUILDER. The final work product of all such materials (e.g., signed and sealed plans and specifications which record design in written and CD-ROM formats; studies; analyses; and so forth), along with all formal DESIGN-BUILDER/CITY correspondence concerning the Project (e.g. letters, tapes, memoranda, etc.) shall be the sole property of CITY. All materials described above shall be retained by the DESIGN-BUILDER for the statutory period (§95.11, Fla. Stat., as it may be from time-to-time amended). Furthermore, CITY may reuse them at no additional cost, and CITY shall be vested with all rights of whatever kind and however created that may be in existence thereto. The design, plans, drawings and specifications shall be a "work made for hire," and the City shall be vested with all rights of ownership therein.

**SECTION 8  
NOTICES**

All notices denominated as such by this AGREEMENT required to be given to the DESIGN-BUILDER hereunder shall be in writing, and shall be given by hand-delivery, facsimile transmission, or United States mail, postage prepaid, addressed to the DESIGN-BUILDER:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Fax: \_\_\_\_\_

All notices required to be given to CITY shall be in writing, and shall be given by hand-delivery, facsimile transmission, or United States mail, postage prepaid, to CITY at:

Chief Procurement Officer  
CITY OF ORLANDO, FLORIDA  
400 South Orange Avenue, 4<sup>th</sup> Floor  
Orlando, Florida 32801  
Fax: 407-246-2869

Either party may change its address, for the purposes of this **Section 8**, by written notice to the other party given in accordance with the provisions hereof.

**SECTION 9  
MBE/WBE PARTICIPATION**

9.1. **City Code Chapter 57.** Chapter 57, Articles II and III, of the Orlando City Code, ("**Chapter 57**") establishes goals of eighteen percent (18%) and six percent (6%), respectively, of the CITY's annual monetary value of contracts for supplies, services and construction to be

awarded to Minority Business Enterprises (“**MBE**”) and Women-Owned Business Enterprises (“**WBE**”).

9.2. **MBE and WBE Participation.** The DESIGN-BUILDER agrees to make a good faith effort to provide that eighteen percent (18%) of the dollar amount of the AGREEMENT is performed by MBEs and six percent (6%) of the dollar amount of the AGREEMENT is performed by WBEs. DESIGN-BUILDER shall utilize the MBEs and WBEs for the Services and in the amounts identified in **Exhibits A** and/or **C** attached hereto. Should the scope of Services herein be increased, the DESIGN-BUILDER agrees to make a good faith effort to include MBE and WBE participation in the increased Services. Such participation shall be in accordance with the MBE and WBE percentages stated above.

9.3. **Substitution.** The DESIGN-BUILDER may, under limited circumstances, substitute an MBE or WBE firm from a firm identified in the Exhibit(s). However, substitution shall only be allowed upon good cause shown as determined by the CITY's MBE official. The DESIGN-BUILDER must receive written approval of the MBE official before substitution will be allowed. Failure to comply shall result in the CITY imposing penalties on the DESIGN-BUILDER; such penalties may include termination of the AGREEMENT or suspension or debarment from obtaining future CITY contracts.

9.4. **Reporting.** The DESIGN-BUILDER shall submit monthly reports in a form acceptable to the CITY to the MBE Office, 400 South Orange Avenue, 5th Floor, Orlando, Florida 32801, documenting compliance with this AGREEMENT. The initial report shall be submitted within ten (10) days after approval of the 100% GMP for Phase I and Phase II and shall include the names of participating MBEs and WBEs and the MBE and WBE Subcontract dollar amounts. The initial report shall also include copies of all MBE and WBE Subcontracts. Subsequent reports shall include documentation on the number of hours worked and the Services performed.

9.5. **No Third-Party Beneficiary.** There shall be no third party beneficiaries of the Minority Business Enterprise or Women-Owned Business Enterprise provisions of this AGREEMENT. The CITY shall have the exclusive means of enforcement of Chapter 57 and the AGREEMENT terms. No right of action for non-signatories of the AGREEMENT is intended or implied. The CITY is the sole judge of compliance and whether a good faith effort has been made under Chapter 57 and the AGREEMENT.

## **SECTION 10 DESIGN-BUILDER'S PROJECT TEAM**

The DESIGN-BUILDER shall designate members of its staff and its subcontractors as the DESIGN-BUILDER's principal-in-charge, project manager and key personnel (collectively, the “**Project Team**”), who shall collectively devote such working time and attention as may be reasonably required to ensure that the Services are properly, economically, and efficiently performed. The DESIGN-BUILDER shall inform CITY as to the authority and powers that the DESIGN-BUILDER's Project Team shall possess during the life of the Project. The DESIGN-BUILDER agrees that CITY shall have the right to approve the DESIGN-BUILDER's Project Team, and that the DESIGN-BUILDER shall not change any member of its Project Team

without obtaining written approval from CITY. If the DESIGN-BUILDER changes or reassigns any key Project Team member without the prior written approval of the City, the DESIGN-BUILDER shall be obligated to pay the City as liquidated and agreed upon damages, and not as a penalty, the sum of Fifty Thousand (\$50,000) Dollars, except in the event a key Project Team member becomes ill or resigns from the Respondent. Key Project Team members for this Project is Design Build Manager (Mike Alexakis), Design Manager (Tim Curran-AECOM), Construction Manager (Drew Gumieny), Construction Superintendent (Robert Lightsey and Shawn Calabrese). Persons responsible for the overall management of the Project and Design-Build Contract; Designer of Record; Person responsible for overall construction (Superintendent). Furthermore, if any member of the DESIGN-BUILDER's Project Team is removed from his or her Project duties, or his or her employment is otherwise terminated or curtailed by the DESIGN-BUILDER, or if the DESIGN-BUILDER's Project Team member terminates his or her employment with the DESIGN-BUILDER, then the DESIGN-BUILDER shall promptly replace such Project Team member with a person of comparable experience and expertise.

## **SECTION 11 INDEMNIFICATION AND INSURANCE**

11.1 **INDEMNIFICATION.** The DESIGN-BUILDER shall indemnify and hold harmless the CITY, its employees and officers, from liabilities, damages, losses, and costs including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the DESIGN-BUILDER and persons employed or utilized by the DESIGN-BUILDER in the performance of the AGREEMENT. This provision shall survive the expiration or termination of the AGREEMENT.

### 11.2 **INSURANCE.**

(a) **Required Insurance.** The DESIGN-BUILDER shall purchase, maintain, and keep in full force, effect, and good standing, such insurance that is further described below, and any other insurance necessary to fully protect DESIGN-BUILDER from claims of the nature that are detailed below, that may arise out of, or result from, the DESIGN-BUILDER's operations, performance, or Services, or all of these things, or any of these things in combination ("**DESIGN-BUILDER's Operations**"), whether the DESIGN-BUILDER's Operations are by the DESIGN-BUILDER, any of its agents or subcontractors, or anyone for whose act or acts it may be liable:

(i) claims under Worker's Compensation, disability benefit, or other (similar) employee benefit acts;

(ii) claims for damages because of bodily injury, sickness or disease, or death of any person other than its employees;

(iii) claims for damages for personal injury; and

(iv) claims for damages because of injury to or destruction of tangible property, including the loss of property use resulting therefrom.

(b) **Insurance Limits.** The insurance required by **Section 11.2(a)** shall be written for not less than the limits of liability specified below, or such limits required by law, whichever is greater:

<u>Type of Insurance</u>	<u>Required Coverages</u>
(i) Worker's Compensation; Employer's Liability	Florida statutory limit \$500,000 per accident
(ii) Comprehensive General Liability:	
Bodily Injury	\$1,000,000 per occurrence
Property Damage	\$1,000,000 per occurrence
Personal Injury	\$1,000,000 per occurrence
Bodily Injury, Personal Injury and Property Damage	\$1,000,000 combined single-limit per occurrence and aggregate
(iii) Business Automobile Liability	\$1,000,000 per accident

(c) **Errors and Omissions Policy.** The DESIGN-BUILDER shall require the architect or engineer of record, as applicable, to purchase, maintain, and keep in full force, effect, and good standing, a professional liability/errors and omissions insurance policy having minimum limits of \$5,000,000 per claim and in the aggregate.

(d) **Insurance Administration.** Insurance certificates, in form and content acceptable to CITY, evidencing all insurance coverages referred to in this Section, shall be delivered to CITY at least ten (10) calendar days before any Services are commenced by the DESIGN-BUILDER under this AGREEMENT. The insurance certificates shall provide and specify that the related insurance coverage shall not be cancelled without at least thirty (30) calendar days prior written notice having been given to CITY. It is also understood and agreed that it is the DESIGN-BUILDER's sole burden and responsibility to coordinate activities between itself, CITY, and the DESIGN-BUILDER's insurer(s) so that the insurance certificates are acceptable to and accepted by CITY within the time limits described in this Section.

(e) **CITY As Additional Insured.** CITY shall be listed as an additional insured on all insurance coverages required by this AGREEMENT, except Worker's Compensation and Professional Liability errors and omissions insurance. Furthermore, all other insurance policies pertaining to the Services to be performed under this AGREEMENT shall memorialize that the

DESIGN-BUILDER or the DESIGN-BUILDER's subcontractors, or all of these entities' ("**Primary Insureds**") insurance, shall apply on a primary basis, and that any other insurance maintained by CITY shall be in excess of and shall not contribute to or be commingled with the Primary Insureds' insurance. Where CITY has been named as an additional insured, the DESIGN-BUILDER shall include the provisions of this Subsection in its subcontractors' at all tiers contracts and the Primary Insureds' insurance shall contain a severability of interest provision stating that, except with respect to total limits of liability, all insurance shall apply separately to each Primary Insured or the additional insured in the same manner as if separate policies had been issued to each.

(f) **CITY's Right to Inspect Policies.** The DESIGN-BUILDER shall, upon thirty (30) days' written request from CITY, deliver copies to CITY, or make copies available for CITY's inspection at Orange County, Florida, of any or all insurance policies that are required in this AGREEMENT. If the DESIGN-BUILDER fails to deliver or make such copies available to CITY; or, if the DESIGN-BUILDER fails to obtain new insurance or have a previous insurance policy reinstated or renewed; or, if the DESIGN-BUILDER fails in any other regard to obtain coverage sufficient to meet the terms and conditions of this AGREEMENT; then CITY may, at its sole option, terminate this AGREEMENT for cause pursuant to the terms and conditions of **Section 6.1.**

(g) **Notifications.** The DESIGN-BUILDER acknowledges, understands, and agrees that it shall give prompt and prior written notice to CITY that any insurance policy defined or contemplated in this **Section 11.2** has lapsed, its limits have been reduced below the amounts required hereunder or such policy has otherwise been terminated.

## **SECTION 12 MISCELLANEOUS PROVISIONS**

12.1 **RECORDS.** The DESIGN-BUILDER shall maintain and require each of its subcontractors at all tiers to maintain complete and accurate books and records ("**Books**") in accordance with sound accounting principles and standards relating to all Services, and the related costs and expenditures to CITY that have been contracted for and paid during the life of this AGREEMENT. The Books shall identify the Services rendered during each month of the AGREEMENT, the date that each Project expense was incurred, and whether the expense was Service or reimbursable-related. These Books shall be maintained for five (5) years following Final Payment.

### 12.2 **LOCAL, STATE AND FEDERAL OBLIGATIONS.**

(a) **Compliance with Law.** The DESIGN-BUILDER and its employees shall promptly observe, comply with, and execute the provisions of any and all present and future federal, state, and local laws, rules, regulations, requirements, ordinances, orders, mandatory guidelines, and mandatory directions, which may pertain or apply to the Services that may be rendered hereto. The DESIGN-BUILDER shall also require, by contract, that all subcontractors at all tiers comply with the terms hereof.

(b) **Licenses.** The DESIGN-BUILDER shall, during the life of this AGREEMENT, procure and keep in full force, effect, and good standing all necessary licenses, registrations, certificates, permits, and other authorizations as are required by local, state, or federal law, in order for the DESIGN-BUILDER to render its Services or Work as described herein. The DESIGN-BUILDER shall also require all of its subcontractors at all tiers to comply by contract with the provisions of this Subsection.

(c) **Compliance With New Regulations.** The DESIGN-BUILDER agrees that at such time as the local, state, or federal agencies modify their grant procedures in order for CITY or the DESIGN-BUILDER to qualify for local, state, or federal funding for the Services to be rendered by the DESIGN-BUILDER, then the DESIGN-BUILDER shall consent to and make such modifications or amendments in a timely manner. If the DESIGN-BUILDER is unable to comply with applicable local, state, or federal laws and regulations governing the grant of such funds for Services to be rendered herein, then CITY shall have the right, by written notice to the DESIGN-BUILDER, to terminate this AGREEMENT without liability. Furthermore, if the DESIGN-BUILDER's compliance with such grant laws, regulations, rules, or procedures causes a material change to a term or condition of this AGREEMENT, then CITY agrees, upon sufficient proof of material changes as may be presented to it by the DESIGN-BUILDER, to amend all related CITY/DESIGN-BUILDER contractual obligations, and to revise such contract budgets accordingly.

12.3 **DESIGN-BUILDER NOT AGENT OF CITY.** The DESIGN-BUILDER is not authorized to act as CITY's agent hereunder and shall have no authority, expressed or implied, to act for or bind CITY hereunder, either in DESIGN-BUILDER's relations with its subcontractors at all tiers or in any other manner whatsoever except as elsewhere provided for in this AGREEMENT.

12.4 **ASSIGNMENT.** CITY has selected the DESIGN-BUILDER to render the Services based in substantial part on the personal qualifications of the DESIGN-BUILDER; as such, the DESIGN-BUILDER may not assign or transfer any right or obligation of this AGREEMENT in whole or in part, without the prior written consent of CITY, which consent may be granted or withheld in the sole discretion of CITY. Any direct or indirect change in the ownership (legal or equitable) of a controlling and/or a majority interest of the DESIGN-BUILDER, whether such change in ownership occurs at one time or as a result of sequential incremental changes, and whether said change is by sale, assignment, hypothecation, bequest, inheritance, operation of law, merger, consolidation, reorganization or otherwise, shall be deemed an assignment of this AGREEMENT subject to the consent of CITY. The DESIGN-BUILDER may utilize subcontractors as otherwise permitted and provided in the Contract Documents. Any assignment or transfer of any obligation under this AGREEMENT without the prior written consent of CITY shall be void, *ab initio*, and shall not release the DESIGN-BUILDER from any liability or obligation under the AGREEMENT, or cause any such liability or obligation to be reduced to a secondary liability or obligation.

## 12.5 AUDITS

(a) **Periodic Auditing of DESIGN-BUILDER's Books.** The Books may (but need not) be kept separate and apart from the DESIGN-BUILDER's other books; but CITY shall have the right, at any reasonable time and through any of its designated agents or representatives, to inspect and audit the Books for the purpose of verifying the accuracy of any Invoice or completion report. In lieu of the above and upon request of CITY, the DESIGN-BUILDER shall prepare an audit (for the most recent fiscal year) for CITY, which shall include the DESIGN-BUILDER's paid salary, fringe benefits, general and administrative overhead costs, and the total amount of money paid by CITY to the DESIGN-BUILDER. The fiscal report shall be certified as true and correct by, and shall bear the signature of, the DESIGN-BUILDER's chief financial officer or its certified public accountant.

(b) **Retention of Books.** The DESIGN-BUILDER shall retain the Books, and make them available to CITY as specified above, until the later of five (5) years after the date of termination or expiration of this AGREEMENT, or such longer time if required by any federal, state, or other governmental law, regulation, policy, or contractual or grant requirement or provision.

(c) **Overcharge.** If it is established by the audit, or by any other means, that the DESIGN-BUILDER has over-billed or overstated its costs, fees, or reimbursable expenses ("**Overcharge**") to the CITY, then the amount of any Overcharge shall be refunded by the DESIGN-BUILDER.

12.6 **SUBCONTRACTOR CONTRACTS.** The DESIGN-BUILDER shall provide a copy of all relevant provisions of this AGREEMENT to all subcontractors hired by it, or for which it may have management responsibilities and shall inform all subcontractors at all tiers that the Services performed hereunder shall strictly comply with the AGREEMENT's terms. The DESIGN-BUILDER shall also furnish the CITY, upon demand, with a copy of all of the subcontractors' at all tiers contracts.

12.7 **ENTIRE AGREEMENT.** This AGREEMENT, including the Exhibits hereto, constitutes the entire AGREEMENT between the parties, and shall supersede and replace all prior agreements or understandings, written or oral, relating to the matters set forth therein, and that specifically related to the execution of this particular document.

12.8 **AMENDMENT.** This AGREEMENT may be amended or modified only by a written instrument duly authorized and executed by the parties.

12.9 **VALIDITY.** The validity, interpretation, construction, and effect of this AGREEMENT shall be in accordance with and governed by the laws of the State of Florida. In the event any provision hereof is determined to be unenforceable or invalid, such unenforceability or invalidity shall not affect the remaining provisions of this AGREEMENT, which shall remain in full force and effect. To that extent, this AGREEMENT is deemed severable.

12.10 **HEADINGS**. The headings of the Sections or Subsections of this AGREEMENT are for the purpose of convenience only, and shall not be deemed to expand, limit, or modify the provisions contained in such Sections or Subsections.

12.11 **TIMELINESS**. CITY and the DESIGN-BUILDER acknowledge and understand that time is of the essence in this AGREEMENT and that the Services shall be performed in as expeditious a manner as may be in accord with the nature of the Project.

12.12 **FORCE MAJEURE**. The parties acknowledge that adverse weather conditions, acts of God, or other unforeseen circumstances of a similar nature, may necessitate modifications to this AGREEMENT, such modifications to include, but not be limited to, the Project's Services, schedule, and Fees. If such conditions and circumstances do in fact occur, then CITY and DESIGN-BUILDER shall mutually agree, in writing, to the modifications to be made to this AGREEMENT.

12.13 **RIGHTS CUMULATIVE; NO WAIVER**. No right or remedy herein conferred upon or reserved to either party hereto is intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given hereunder, or now or hereafter legally existing upon the occurrence of a default hereunder. The failure of either party hereto to insist, at any time, upon the strict observance or performance of any of the provisions of this AGREEMENT, or to exercise any right or remedy as provided in this AGREEMENT, shall not impair any such right or remedy or be construed as a waiver or relinquishment thereof with respect to subsequent defaults. Every right and remedy given by this AGREEMENT to the parties hereof may be exercised from time to time and as often as may be deemed expedient by the parties hereto, as the case may be.

12.14 **DISCRIMINATION**. The DESIGN-BUILDER covenants and agrees that, 1) in the furnishing of Services to the CITY hereunder, no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in regard to this AGREEMENT on the grounds of such person's race, color, creed, national origin, disability, sexual orientation, religion or sex; and 2) the DESIGN-BUILDER shall comply with all existing requirements concerning discrimination imposed by any and all applicable local, state, and federal rules, regulations, or laws, and as such rules, regulations, or laws may be from time to time amended. In the event of a breach of any of the nondiscrimination covenants described in this Subsection, the CITY shall have the right to terminate this AGREEMENT, without liability, as described above.

12.15 **TRUTH-IN-NEGOTIATIONS**. The DESIGN-BUILDER shall execute a Truth-in-Negotiation Certificate in the form attached hereto and made a part hereof, by reference, as **Exhibit D**. It is agreed by the DESIGN-BUILDER that the Fees set forth in **Exhibit C**, and any modifications thereto, shall be adjusted to exclude any sum [plus interest at twelve percent (12%) per annum simple interest on the sums, from the date of payment by the CITY] by which the CITY determines that the price was increased due to inaccurate, incomplete, or non-current wage rates and other factual unit costs.

12.16 **ENTIRE CONTRACT.** This AGREEMENT, including the Contract Documents referenced above, together with any Exhibits or attachments hereto, constitutes the entire agreement between the parties.

12.17 **GOVERNING LAW.** The parties mutually acknowledge and agree that this AGREEMENT shall be construed in accordance with the laws of the State of Florida.

12.18 **PUBLIC ENTITY CRIME.** Any Person or affiliate, as defined in Section 287.133 of the *Florida Statutes*, shall not be allowed to contract with the CITY, nor be allowed to enter into a Subcontract for work on this AGREEMENT, if such a person or affiliate has been convicted of a public entity crime within three (3) years of the date this AGREEMENT was advertised for proposals, or if such person or affiliate was listed on the State's convicted vendor list within three (3) years of the date this AGREEMENT was advertised, whichever time period is greater. A public entity crime means a violation of any state or federal law with respect to and directly related to the transaction of business with any public entity or agency (federal, state or local), involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, forgery, falsification of records, receiving stolen property or material misrepresentation. Any agreement with the CITY obtained in violation of this Section shall be subject to termination for cause. A subcontractor who obtains a Subcontract in violation of this Section shall be removed from the Project and promptly replaced by a subcontractor acceptable to the CITY.

### **SECTION 13 CONFLICTS OF INTEREST**

The DESIGN-BUILDER represents and warrants unto CITY that no officer, employee, or agent of CITY has any interest, either directly or indirectly, in the business of the DESIGN-BUILDER to be conducted hereunder. It is absolutely understood and agreed by the DESIGN-BUILDER that, for the breach or violation of this Section, CITY shall have the right to terminate this AGREEMENT without liability and at its sole discretion.

**IN WITNESS WHEREOF**, the authorized signatories named below have executed this AGREEMENT on behalf of the parties as of the date first set forth above.

#### **CITY OF ORLANDO, FLORIDA**

By: \_\_\_\_\_  
David Billingsley, CPSM, C.P.M.  
Chief Procurement Officer

Date: \_\_\_\_\_

APPROVED AS TO FORM AND LEGALITY  
FOR THE USE AND RELIANCE OF THE  
CITY OF ORLANDO, FLORIDA.

\_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
Assistant City Attorney  
Orlando, Florida

\*\*\*\*\*

**DESIGN-BUILDER  
WHARTON-SMITH, INC.**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT A**  
**SCOPE OF SERVICES**

**EXHIBIT B**  
**PROJECT TIMELINE**

**EXHIBIT C**

**FEES**

**EXHIBIT D**

**TRUTH-IN-NEGOTIATION CERTIFICATE**

DESIGN-BUILDER hereby certifies that all wage rates, and any and all other unit costs supporting the compensation to be paid to the DESIGN-BUILDER pursuant to this AGREEMENT for the Services as set forth herein, are accurate, complete, and current at the date of the AGREEMENT's execution.

\_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_  
(Type or Print Name)

\_\_\_\_\_  
(Title)

Date: \_\_\_\_\_

STATE OF \_\_\_\_\_ }

COUNTY OF \_\_\_\_\_ }

*THE FOREGOING INSTRUMENT* was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_, of \_\_\_\_\_, on behalf of the corporation. He/she [ ] is personally known to me or [ ] has produced \_\_\_\_\_, as identification, and who acknowledged before me that he/she executed the same for the uses and purposes therein expressed.

\_\_\_\_\_  
NOTARY PUBLIC

Print Name: \_\_\_\_\_

My Commission Expires: