



# Progressive Design-Build Agreement for Water and Wastewater Projects

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

---

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

**OWNER:**

Durham County  
200 E. Main Street  
Durham, North Carolina 27701

**DESIGN-BUILDER:**

Crowder Construction Company  
1111 Burma Drive  
Apex, NC 27539

**PROJECT:**

Slater Road Lift Station, Force Main, and Gravity Main

## Article 1

### **Design-Builder's Services and Responsibilities**

#### 1.1 General Services.

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

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

#### 1.2 Phased Services.

1.2.1 Phase 1 Services. Design-Builder shall perform the services of design, pricing and other services for the Project based on Owner's Project Criteria, as may be revised in accordance with Section 1.1 hereof, as set forth in Exhibit B, Scope of Services. Design-Builder shall perform such services to the level of completion required for Design-Builder and Owner to establish the Contract Price for Phase 2, as set forth in Section 1.3 below. The Contract Price for Phase 2 shall be developed during Phase 1 on an "open book" basis. Design-Builder's Compensation for Phase 1 Services is set forth in Section 6.0 herein. The level of completion required for Phase 1 Services is defined in Exhibit B, Scope of Services (either as a percentage of design completion or by defined deliverables).

1.2.2 Phase 2 Services. Design-Builder's Phase 2 services shall consist of the completion of design services for the Project, the procurement of all materials and equipment for the Project, the performance of construction services for the Project, the start-up, testing, and commissioning of the Project, and the provision of warranty services, all as further described in the Contract Price Amendment. Upon receipt of Design-Builder's proposed Contract Price for Phase 2, Owner may proceed as set forth in Article 1.3.

1.3 Proposal. Upon completion of the Phase 1 Services and any other Basis of Design Documents upon which the parties may agree, Design-Builder shall submit a proposal to Owner (the "Proposal") for the completion of the design and construction for the Project for the Contract Price, which may be based on Design-Builder's Fee and Cost of the Work for a Guaranteed Maximum Price (GMP). For any Early Work Package, the Design-Builder shall submit to Owner a Proposal in accordance with this section 1.3.

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

1.3.1.1 The Contract Price that may be based on Design-Builder's Fee and Cost of the Work, which shall be the sum of:

- i Design-Builder's Fee as defined in Section 6.4.1 hereof;
- ii The estimated Cost of the Work as defined in Section 6.5 hereof, inclusive of any Design-Builder's Contingency as defined in Section 6.6.2 hereof; and

iii If applicable, any prices established under Section 6.1.3 hereof;

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

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

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

1.3.1.5 If applicable, a list of Allowance Items, Allowance Values, and a statement of their basis;

1.3.1.6 If applicable, a schedule of alternate prices;

1.3.1.7 If applicable, a schedule of unit prices;

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

1.3.1.9 If applicable, a Savings provision;

1.3.1.10 If applicable, Performance Incentives;

1.3.1.11 The time limit for acceptance of the Proposal; and

1.3.1.12 An Owner's permit list detailing the permits and governmental approvals that Owner will bear responsibility to obtain.

### 1.3.2 Review and Adjustment to Proposal.

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

1.3.2.2 Acceptance of Proposal. If Owner accepts the Proposal, as may be amended by Design-Builder subsequent to negotiations, the Contract Price and its basis shall be set forth in an amendment to this Agreement, when mutually agreed between the parties (Contract Price Amendment). Once the parties have agreed upon the Contract Price and Owner has issued a Notice to Proceed with Phase 2, Design-Builder shall perform the Phase 2 Services, all as further described in the Contract Price Amendment, as it may be revised.

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

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

If Owner fails to exercise any of the above options, Design-Builder shall have the right to (a) continue with the Work as if Owner had elected to proceed in accordance with Section 1.3.2.3(ii) above, and be paid by Owner accordingly, unless and until Owner notifies it in writing to stop the Work; (b) suspend performance of Work in accordance with Section 11.3.1 of the General Conditions of Contract; or (c) may give written notice to Owner that it considers this Agreement completed. If Owner fails to exercise any of the options under Section 1.3.2.3 within ten (10) days of receipt of Design-Builder's notice, then this Agreement shall be deemed completed. If Owner terminates the relationship with Design-Builder under Section 1.3.2.3(iii), or if this Agreement is deemed completed under this paragraph, then Design-Builder shall have no further liability or obligations to Owner under this Agreement.

## **Article 2**

### **Contract Documents**

2.1 The Contract Documents are comprised of the following:

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

2.1.2 The Contract Price Amendment referenced in Section 1.3.2.2 herein or the Proposal accepted by Owner in accordance with Section 1.3 herein;

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

2.1.4 The General Conditions of Contract;

2.1.5 Construction Documents prepared and approved in accordance with Section 1.4 of the General Conditions of Contract; and

2.1.6 Exhibit B, Phase 1 Scope of Services.

2.1.7 The following other documents, if any:

2.1.7.A Owner's RFQ Dated 12/28/23 which contains Owner's Design Criteria

2.1.7.B Crowder proposal for Phase 1 Services

2.1.7.C Crowder proposal for Phase 2 services (if accepted)

## **Article 3**

### **Interpretation and Intent**

3.1 Design-Builder and Owner, at the time of acceptance of the Proposal by Owner in accordance with Section 1.3 hereof, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement, or if applicable, prior to Owner's acceptance of the Proposal.

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

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

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

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

## **Article 4**

### **Ownership of Work Product**

4.1 Work Product. All drawings, specifications and other documents and electronic data, including such documents identified in the General Conditions of Contract, furnished by Design-Builder to Owner under this Agreement ("Work Product") are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including but not limited to any intellectual property rights, copyrights and/or patents, subject to the provisions set forth in Sections 4.2 through 4.5 below.

4.2 Owner's Limited License upon Project Completion and Payment in Full to Design-Builder. Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder shall grant Owner a limited license to use the Work Product in connection with Owner's occupancy of the Project, conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on Owner's obligation to provide the indemnity set forth in Section 4.5 herein.

4.3 Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate. If Owner terminates this Agreement for its convenience as set forth in Article 8 hereof, or if

Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on the following:

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

4.3.2 Owner agrees to pay Design-Builder the additional sum of one thousand dollars (\$1,000) as compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with Section 4.2 if Owner resumes the Project through its employees, agents or third parties.

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

4.5 Owner's Indemnification for Use of Work Product. Owner recognizes that in the event of an early termination of the Work, whether for convenience or for cause, Design-Builder will not have the opportunity to finish or to finalize its Work Product. However, Design-Builder shall not be liable for any claims, damages, liabilities, losses, and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product to the fullest extent permitted by G.S. § 22B-1. If Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article 4, Owner shall defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product, to the fullest extent permitted by G.S. § 22B-1. Nothing in this Section or Agreement shall be deemed to constitute a waiver of the governmental immunity of Owner, which immunity is hereby reserved to Owner.

## **Article 5**

### **Contract Time**

5.1 Date of Commencement. The Phase 1 Services shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed unless the parties mutually agree otherwise in writing. The Work shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed for Phase 2 Services ("Date of Commencement") if the Proposal is accepted and the Contract Price Amendment is amended to this Agreement unless the parties mutually agree otherwise in writing.

5.2 Substantial Completion and Final Completion.

5.2.1 The time in which Substantial Completion of the entire Work shall be achieved ("Scheduled Substantial Completion Date") will be mutually agreed upon and incorporated into this Agreement at a later date after the parties finalize the Scope of Work and the Project Schedule. Substantial Completion is the date when the Work is complete pursuant to the definition of Substantial Completion set forth in Section 1.2.19 of the General Conditions of Contract.

5.2.2 Interim milestones and/or Substantial Completion of identified portions of the Work shall be achieved as follows: interim milestones may be agreed upon at the completion of the Preliminary Engineering Phase.

5.2.3 Final Completion of the Work or identified portions of the Work shall be achieved within sixty (60) days after achievement of Substantial Completion. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2.8 of the General Conditions of Contract.

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

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

5.4 Liquidated Damages. Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not attained by ten (10) days after the Scheduled Substantial Completion Date (the "LD Date"), as adjusted in accordance with this Agreement and the Contract Documents, Design-Builder shall pay Owner one thousand Dollars (\$1,000) as liquidated damages for each day that Substantial Completion extends beyond the LD Date.

5.4.1 If Final Completion is not attained by the Scheduled Final Completion Date, as adjusted in accordance with this Agreement and the Contract Documents, the Design-Builder shall pay the Owner five hundred dollars (\$500) as liquidated damages for each day that Final Completion extends beyond the Final Completion Date.

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

Owner and Design-Builder agree that the maximum aggregate liability Design-Builder has for any liquidated damages that may be assessed under this Agreement shall be twenty-five percent (25%) of the Contract Price. This section applies only to delays and schedule-related damages, and does not otherwise limit Owner's remedies regarding claims or damages other than those caused by delays and schedule-related causes.

5.6 This section has been intentionally removed.

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

5.7.1 Owner shall have a minimum of ten (10) business days of receipt by Owner to review all Design Submissions, the Project Schedule, and any updates thereto.

5.7.2 Owner shall review and (if applicable) provide a response to Design-Builder on all Design Submissions, the Project Schedule and any updates thereto within ten (10) business days of receipt by Owner.

## **Article 6**

### **Contract Price**

6.1 Contract Price.

6.1.1 Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of One million, six hundred fifteen thousand and eight hundred seventy-nine dollars (\$1,615,879) for the Phase 1 Services on a lump sum basis, subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Phase 1 Services compensation is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

6.1.2 For Phase 2 Services, Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") equal to the Lump Sum amount set forth in Section 6.2 hereof or in the Contract Price Amendment, or equal to Design-Builder's Fee (as defined in Section 6.4 hereof) plus the Cost of the Work (as defined in Section 6.5 hereof), subject to any GMP established in Section 6.6 hereof or as set forth in the Contract Price Amendment and any adjustments made in accordance with the General Conditions of Contract.

6.1.3 For the specific Work set forth below, Owner agrees to pay Design-Builder, as part of the Contract Price, on the following basis:

For easement acquisition services, Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of Three hundred twenty-three thousand, four hundred seventy five dollars (\$323,475) on a unit price basis of twenty one thousand, five hundred and sixty five dollars (\$21,565) per easement. This amount is not included in the lump sum amount in 6.1.1 above.

6.2 This section has been intentionally removed.

6.3 Markups for Changes. If the Contract Price requires an adjustment due to changes in the Work, and the cost of such changes is determined under Sections 9.4.1.3 or 9.4.1.4 of the General Conditions of Contract, the following markups shall be allowed on such changes:

6.3.1 For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive a Fee of thirteen- and one-half percent (13.5%) of the additional costs incurred for that Change Order.

6.3.2 For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, the deductive amounts shall include thirteen- and one-half percent (13.5%) applied to the direct costs of the net reduction (which amount will account for a reduction associated with Design-Builder's Fee).

6.4 Design-Builder's Fee.

6.4.1 Design-Builder's Fee shall be:

thirteen and one-half percent (13.5%) of the Cost of the Work, as adjusted in accordance with Section 6.4.2 below.

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

6.4.2.1 For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive a Fee of thirteen and one-half percent (13.5%) of the additional Costs of the Work incurred for that Change Order.

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



An amount equal to the sum of: (a) thirteen- and one-half percent (13.5%) applied to the direct costs of the net reduction (which amount will account for a reduction associated with Design-Builder's Fee); plus (b) any other markups set forth applied to the direct costs of the net reduction.

## 6.5 Cost of the Work.

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

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

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

6.5.1.3 Wages or salaries of Design-Builder's personnel stationed at Design-Builder's principal or branch offices, but only to the extent said personnel are identified in Exhibit E\_\_ and performing the function set forth in said Exhibit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.5.1.21 Accounting and data processing costs related to the Work.

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

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

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

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

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

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

## 6.6 The Guaranteed Maximum Price.

6.6.1 Reserved. The development of the GMP will be determined and incorporated into this Agreement at a later date.

6.6.2 Reserved. The development of the Contingency included in the GMP will be determined and incorporated into this Agreement at a later date.

### 6.6.3 Savings.

6.6.3.1 If the sum of the actual Cost of the Work and Design-Builder's Fee (and, if applicable, any prices established under Section 7.1.3 hereof) is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference ("Savings") shall be shared as follows:

- Twenty-five percent (30%) to Design-Builder and  
Seventy-five percent (70%) to Owner.

### 6.6.4 Owner's Unforeseen Contingency

6.6.4.1 The GMP shall include a line item for an Owner's Unforeseen Contingency in an amount to be determined and incorporated into this Agreement during the development of the GMP, which will be available for Owner's exclusive use. The Owner shall provide the Design-Builder the amount of this contingency during Phase I Services. By way of example, and not as a limitation, such costs may include: (a) changes in scope of the Project (b) Force Majeure events (c) Differing Site Conditions and (d) Hazardous Conditions. Owner shall provide prior written approval in accordance with the Agreement for any use of the Owner's/Unforeseen Contingency. Any remaining Owner's/Unforeseen Contingency shall be the Owner's and not included in any shared Savings.

## 6.7 Allowance Items and Allowance Values.

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

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

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

6.7.4 The Allowance Value includes the direct cost of labor, materials, equipment, transportation, taxes, and insurance associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and general conditions costs, overhead and Fee, are deemed to be included in the original Contract Price, and are not subject to adjustment notwithstanding the actual amount of the Allowance Item unless agreed to by the Owner for any particular Allowance Item and the Allowance Value will be adjusted accordingly to include additional costs. By way of example and not as a limitation, Allowance Items could include materials testing, surveying (as-builts), building permits, landfill flipping fees and asphalt repair.

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

## **Article 7**

### **Procedure for Payment**

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

7.2 Contract Price Progress Payments.

7.2.1 Design-Builder shall submit to Owner on the twenty fifth (25th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

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

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

7.3 Retainage on Progress Payments.

7.3.1 Owner will retain five percent (5%) of the cost of Work, exclusive of General Conditions costs, and any amounts paid to Design-Builder's Design Consultant, from each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Work completed early in the Project.

7.3.2 Within fifteen (15) days after Substantial Completion of the entire Work or, if applicable, any portion of the Work, pursuant to Section 6.6 of the General Conditions of Contract, Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to: (a) the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion; and (b) all other amounts Owner is entitled to withhold pursuant to Section 6.3 of the General Conditions of Contract.

7.4 Final Payment. Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract. Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment (less any amount the parties may have agreed to set aside for warranty work) within thirty (30) days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.7.2 of the General Conditions of Contract. Interest shall accrue on payments improperly withheld by Owner at the prevailing interest rate until paid.

7.5 Interest. Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing sixty (60) days after payment is due at the rate of One and one half percent (1.5 %) per month until paid.

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

## **Article 8**

### **Termination for Convenience**

8.1 If Design-Builder is terminated for convenience pursuant to Section 11.6 of the General Conditions, and the parties have agreed to a payment to Design-Builder in the case of such termination of convenience, Owner shall pay Design-Builder for the following in addition to the amount set forth in Section 11.6.1 of the General Conditions:

The fair and reasonable sums for overhead and profit on the sum of items set forth in Section 11.6.1 of the General Conditions. Design-Builder shall not be paid on account of loss of anticipated overhead, profits, or revenue, or other economic loss arising out of or resulting from such termination.

8.2 This section has been intentionally removed.

## **Article 9**

### **Representatives of the Parties**

9.1 Owner's Representatives.

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

*County Manager and/or his/her designee.*

9.1.2 Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract:

**Jerry Morrone, P.E.**  
**Durham County Engineering and Environmental Services**  
**Project Manager**  
**5926 NC Highway 55 East**  
**Durham, North Carolina 27713**  
**Office: 919-560-9039**  
**Cell: 919-451-4319**  
**Email: gmorrone@dconc.gov**

9.2 Design-Builder's Representatives.

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

B.J Christman  
President  
1111 Burma Drive, Apex, NC 27539  
919-367-2002

9.2.1 Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract:

Chris Robards  
Regional Manager  
1111 Burma Drive, Apex, NC 27539  
919-367-2000

**Article 10**

**Bonds and Insurance**

10.1 Insurance. Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Exhibit C attached hereto and in accordance with Article 5 of the General Conditions of Contract 535.

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

Performance Bond.

Required                       Not Required

Payment Bond.

Required                       Not Required

Other Performance Security.

Required

Not Required

## **Article 11**

### **Other Provisions**

11.1 Other provisions, if any, are as follows:

11.1.1 **Duty to Cooperate.** Owner and Design-Builder commit at all times to cooperate fully with each other and proceed on the basis of trust and good faith to permit each party to realize the benefits afforded under this Agreement; provided, however, that under no circumstances shall this Agreement and the Parties' contractual relationship hereto be deemed to create any fiduciary relationship, or otherwise impose any fiduciary obligation or duty upon either Party.

11.1.2 **Definitions.** Terms, words and phrases used in this Agreement shall have the meanings given them in DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition) ("General Conditions of Contract").

11.1.3 **Design Services.** Design-Builder shall, consistent with applicable state licensing laws, provide design services, including architectural, engineering, and other design professional services required by this Agreement. Such design services shall be provided through qualified, licensed design professionals who are either (i) employed by Design-Builder, or (ii) procured by Design-Builder from independent sources. Nothing in this Agreement is intended to create any legal or contractual relationship between Owner and any independent design professional.

11.1.4 **Design-Builder acknowledges that:** it has reviewed Exhibit A and has informed Owner of any conflict, ambiguity or discrepancy that Design-Builder has discovered in Exhibit A; it has informed Owner of the specific requirement(s) of the Exhibit A that may be in need of modification with the justification or rationale for such modification and the suggested modification language and that Owner has addressed those Exhibit A modifications to the satisfaction of the Design-Builder.

11.1.5 **Design-Builder represents that Exhibit A is sufficient for Design-Builder to develop the design for the Project and notwithstanding Exhibit A provided and modified by Owner, the Design-Builder shall be fully responsible for the design and construction of the Project and meeting the performance requirements of the Acceptance Testing Plan for the Project.**

11.2 Listing of Exhibits and documents incorporated herein:

DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2022 Edition) ("General Conditions of Contract")

Exhibit A – Owner's Project Criteria

Exhibit B – Scope of Phase 1 Services

Exhibit C – Insurance Requirements for Owner and Design-Builder

Contract Price Amendment, if any.

11.3 Notwithstanding Section 2.3.1 of the General Conditions of Contract, if the parties agree upon specific performance requirements that are contained in the Acceptance Testing Plan, the design professional services shall be performed to achieve such standards. Design-Builder shall prepare Acceptance Testing Plan for approval by Owner.

11.4 Indemnification. To the fullest extent permitted by law, Owner hereby reserves the right to recover reasonable legal expenses including attorney fees, litigation expenses and court cost as well as damages or losses suffered by Owner, if Design-Builder is found to be a proximate cause of damages or losses suffered by Owner, from claims for non-party bodily injury, sickness or death or non-party tangible property damage (other than to the Work itself), but only to the extent caused by the Design-Builder's negligent acts or omissions or willful misconduct perpetrated during the execution of this Contract.

To the fullest extent permitted by law, Design-Builder hereby reserves the right to recover reasonable legal expenses including attorney fees, litigation expenses and court cost as well as damages or losses suffered by Design-Builder, if Owner is found to be a proximate cause of damages or losses suffered by Design-Builder, resulting from Owner's negligent performance or willful misconduct perpetrated during the execution of this Contract. Nothing in this Agreement shall be deemed to constitute a waiver of the governmental immunity of Owner, which immunity is hereby reserved to Owner.

## **Article 12**

### **Limitation of Liability**

12.1 To the fullest extent permitted by law, the total liability, in the aggregate, of the Design-Builder, its Design Consultants, and Subcontractors, surety (if any) and each of their respective officers, directors, employees and agents, and any of them, to Owner and anyone claiming by, through or under Owner, for any and all claims, losses, liabilities, costs or damages whatsoever arising out of, resulting from or in any way related to the Project or this Agreement from any cause, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, or warranty (express or implied), shall not exceed the limits of Design-Builder's insurance as required under this Agreement. Uninsured events shall be limited to 20% of the Contract Price. The parties agree that specific consideration has been given by Design-Builder for this limitation and that it is deemed adequate.

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

12.2 Mutual Waiver of Consequential Damages. Design-Builder and Owner waive all Claims, losses, damages, or liabilities against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes, but is not limited to:

1. Damages incurred by Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. Damages incurred by Design-Builder for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit.

This mutual waiver is applicable, without limitation, to all consequential damages due to either Party's termination in accordance with Article 8 of this Agreement and / or Article 11 of the General Conditions of Contract. Nothing contained in this Section 12.2 shall be deemed to reduce or preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents. Notwithstanding the foregoing, the waiver of consequential damages in this Section does not apply to recovery for the following: (1) amounts that Design-Builder or Owner are required to pay pursuant to their respective indemnity obligations under the Contract Documents; (2) amounts covered by the insurance policy relied upon by Design-Builder to comply with the insurance requirements of the Contract; and (3) actual damages incurred by Design-Builder or Owner as a result of the Parties' negligent acts or omissions or willful misconduct; provided that, in no event shall the aggregate amount of any consequential damages assessed against Design-Builder exceed the amount of \$1,000,000 or 20% of the final Contract Sum, whichever is greater.



**OWNER:**

**DESIGN-BUILDER:**

\_\_\_\_\_  
*(Name of Owner)*

\_\_\_\_\_  
*(Name of Design-Builder)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Printed Name)*

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

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

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

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

**Caution: An original DBIA document has this caution printed in blue. This is a printable copy and an original assures that changes will not be obscured as may occur when documents are reproduced.**

DRAFT