

# Johns Creek Environmental Campus

Design/Build  
Request for Proposals  
RFP #03RFP376K

Design/Build Services

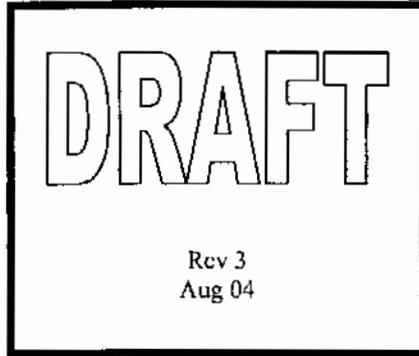
Issued by:

**FULTON COUNTY**  
**DEPARTMENT OF PUBLIC WORKS**



Fulton County Purchasing Department  
130 Peachtree Street, S.W.  
Atlanta, Georgia 30303

VOLUME 2 – D/B Contract



**CONTRACT  
FOR  
DESIGN/BUILD SERVICES FOR  
JOHNS CREEK ENVIRONMENTAL CAMPUS**

between

**THE COUNTY OF FULTON, GEORGIA**

and

COMPANY

Dated

**DRAFT CONTRACT  
FOR THE  
DESIGN/BUILD SERVICES FOR  
JOHNS CREEK ENVIRONMENTAL CAMPUS**

THIS CONTRACT FOR DESIGN/BUILD SERVICES FOR JOHNS CREEK ENVIRONMENTAL CAMPUS is made and entered into as of this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_ between Fulton County, a political subdivision of the State of Georgia (the "County") and \_\_\_\_\_ a corporation organized and existing under the laws of the State of \_\_\_\_\_ and authorized to do business in the State of Georgia (the "D/B Company").

**RECITALS**

[A] The County owns and operates the existing 7 mgd Johns Creek Water Pollution Control Plant (WPCP) (the "Existing Plant")

[B] To provide for increased environmentally sound wastewater treatment and reclamation capacity which will facilitate and Design/Build development in the northern portion of the County, the County has determined to undertake significant capital improvements to construct a new 15 mgd Johns Creek Environmental Campus on a new site located on Holcomb Bridge Road (New Site").

[C] The County has determined that it is in the County's best interests to contract with a single private company to design, obtain permits for, construct, start-up and acceptance test (the "Design/Build Work") the new Johns Creek Environmental Campus ("JCEC").

[D] The County has selected a desired technology, Membrane Bioreactor System (MBR), as the treatment process for the JCEC. The Membrane System Supplier (MSS) was selected using a Request For Proposal ("Technology RFP") process which resulted in a recommendation from an evaluation committee, utilizing the evaluation factors and selection criteria and following the review and selection process identified in the Technology RFP.

[E] Based on the evaluations and determination of the evaluation committee, the Board of Commissioners on April 7, 2004 authorized the use of Zenon Environmental Inc. as the selected MSS to furnish at the stated price and schedule the MBR Technology for the JCEC.

[F] Pursuant to Title 36, Chapter 91 of the OCGA the County issued a request for proposals on \_\_\_\_\_, 2004 (the "D/B RFP") for a private entity to provide the Design/Build Services. The County provided the D/B Company with reasonable access to the Existing Plant and the JCEC to allow them the opportunity to review documentation and to conduct such inspections and reviews as they deemed necessary prior to submission of the proposals.

[G] Proposals submitted in response to the D/B RFP were received on \_\_\_\_\_, 2004 from \_\_\_\_\_ ( ) firms.

[H] The County requested and received written clarifications of the proposals received in accordance with Section 3.8 of the RFP.

[I] The County reviewed each proposal including their responses to proposal clarification questions to determine compliance with the minimum evaluation criteria set forth in the D/B RFP, and to identify the responsiveness and responsible offerors who were determined to be reasonably susceptible of being selected for award.

[J] (Optional) In accordance with Section 5.4 of the RFP, the County commenced discussions and negotiations with the \_\_\_\_\_ ( ) proposers that were deemed to be reasonably susceptible of being selected for award.

[K] Based on an evaluation by the selection committee utilizing the evaluation factors and selection criteria and following the review and selection process identified in the RFP, the selection committee made a determination that the proposal submitted by or on behalf of the D/B Company was the most advantageous proposal to the County and forwarded its recommendation to the County's Board of Commissioners.

[L] Based on the evaluations and determination of the evaluation committee, the Board of Commissioners on \_\_\_\_\_, made a determination that the proposal submitted by the D/B Company was the most advantageous proposal received in response to the County's RFP and awarded the contract to the D/B Company, authorized finalization of the D/B Contract with the D/B Company, and authorized \_\_\_\_\_ to execute and deliver the final Agreement.

[M] \_\_\_\_\_, an affiliate of the D/B Company, will guarantee the payment and performance of the obligations of the D/B Company under the Design/Build Contract pursuant to a guaranty agreement executed concurrently herewith.

[N] The County desires to receive, and the D/B Company desires to provide, the Design/Build Services under the terms of this D/B Contract.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto, intending to be legally bound, agree as follows:

**ARTICLE 1  
DEFINITIONS/INTEPRETATIONS**

**SECTION 1.1 DEFINITIONS**

The following words and terms as used in the Design/Build (D/B) Request for Proposal (RFP), the Technology RFP, and the Design/Build Contract shall have the respective meanings set forth below. The words "include" or "including" are always without limitations.

Acceptance	Demonstration by the D/B Company, subject to confirmation by the County, that the Acceptance Testing Requirements have been conducted, the Acceptance Standards have been achieved, and all other contractually specified conditions for acceptance by the County of the Design/Build Project have been satisfied.
Acceptance Date	The date, which is the number of days, proposed on Price Proposal Form 4, from the Design/Build Date that the D/B Company guarantees to have achieved Acceptance.
Acceptance Date Conditions	Has the meaning specified in Section 7.5 of the Design/Build Contract.
Acceptance Test Procedures and Standards	Those test procedures and standards set forth in Appendix 15 of the D/B RFP that the D/B Company must undertake and meet in order to achieve the County's Acceptance of the Design/Build Work, including, but not limited to, demonstrating that the Plant is capable of satisfying the Performance Criteria described in Appendix 2 of the D/B RFP.
Acceptance Testing Plan	The plan prepared by the D/B Company to address the details of required acceptance testing as defined in Appendix 15.
Acceptance Testing Report	The certified written report that the D/B Company shall furnish describing and certifying the Acceptance Testing Plan has been executed and the results of the Acceptance Tests.
Addenda	Written or graphic revisions to the RFP document, which clarifies, corrects or changes the requirements of the RFP or Contract Documents issued by the County prior to opening of the proposals.
Appendix	Any of the documents attached to and thereby incorporated into the Design/Build Contract, as applicable and so designated as an "Appendix", including any and all exhibits and appendices, all of which may be amended or modified from time to time in accordance with the Design/Build Contract as applicable, and Applicable Laws.
Applicable Law	Applicable Law means: (1) any federal, State of Georgia, Fulton County or local law, code, regulation, consent order or agreement; (2) any formally adopted and generally applicable rule, requirement, determination, standard, policy, implementation schedule, consent order or agreement or other order of any Governmental Body having appropriate jurisdiction; (3) any established interpretation of law or regulation utilized by an appropriate regulatory Governmental Body if such interpretation is documented by such regulatory body; and (4) any Governmental Approval, in each case having the force of law from time to time: (a) to the sitting, design, acquisition, construction, equipping, financing,

	<p>ownership, possession, start-up, testing, operation, maintenance, repair, replacement, or management of municipal wastewater treatment systems;</p> <p>(b) to the conveyance, treatment, storage, or discharge of the Influent or the Effluent;</p> <p>(c) to the air and odor emissions from municipal wastewater treatment systems; and</p> <p>(d) to the transfer, handling, processing, transportation or disposal of Sludge and Residuals.</p>
Application for Payment	The form accepted by the County which is to be used by the D/B Company in requesting progress payments or final payment and which is to include supporting documentation as required by the Contract Documents.
Approved	Where used in conjunction with the County's response to submittals, requests, applications, inquiries, reports and claims by the D/B Company, the meaning of the term "approved" shall be held to limitations of the County's responsibilities and duties as described herein. In no case shall "approval" be interpreted as a release of the D/B Company from responsibilities to fulfill the requirements of the Design/Build Contract.
Award Date	The date listed in the Notice of Award to the apparent successful D/B Company.
Bankruptcy Code	Means the United States Bankruptcy Code (11 U.S.C. §101, et seq.), as amended from time to time and any successor statute thereto. "Bankruptcy Code" shall also include any similar state law relating to bankruptcy, insolvency, the rights and remedies of creditors, the appointment of receivers or the liquidation of companies and estates that are unable to pay their debts when due.
Billing Period	Means each calendar month, except that (1) the first Billing Period shall begin on the Design/Build Date and shall continue to the last day of the month in which the Design/Build Date occurs and (2) the last Billing Period shall end on the last day of the Term of the Design/Build Contract.
CERCLA	Means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 et seq., and the applicable regulations promulgated thereunder, each as amended or superseded from time to time.
Change in Law	<p>Means any of the following acts, events or circumstances to the extent that compliance therewith materially increases the cost of performing, or materially increases the scope, of a party's obligations hereunder:</p> <p>(a) the adoption, amendment, promulgation, issuance, modification, repeal or written change in administrative or judicial interpretation of any Applicable Law on or after the Contract Date, unless such Applicable Law was on or prior to the Contract Date duly proposed and published in the Federal Register or was adopted, promulgated, issued or otherwise officially modified or changed in interpretation, in each case in final form, to become effective without any further action by any Governmental Body;</p> <p>(b) the order or judgment of any Governmental Body issued on or after the Contract Date (unless such order or judgment is issued to enforce compliance with Applicable Law which was effective as of the Contract Date) to the extent such order or judgment is not the result of willful or negligent action, breach of the Design/Build Contract, violation of law, illegal act, error or omission or lack of reasonable diligence of the D/B Company or of the County, whichever is asserting the occurrence of a Change in Law; provided, however, that the contesting in good faith or the failure in good faith to contest any such order or</p>

	<p>judgment shall not constitute or be construed as such a willful or negligent action, error or omission or lack of reasonable diligence;</p> <p>(c) except with respect to any Governmental Approval required for the construction of the Design/Build Project as provided in item (ii) below pertaining to exclusions from "Change in Law", the denial of an application for, a delay in the review, issuance or renewal of, or the suspension, termination, or interruption of any Governmental Approval, or the imposition of a term, condition or requirement which is more stringent or burdensome than the Contract Standards in connection with the issuance, renewal or failure of issuance or renewal of any Governmental Approval, to the extent that such occurrence is not the result of willful or negligent action, breach of this Design/Build Contract, violation of law, illegal act, error or omission or a lack of reasonable diligence of the D/B Company or of the County, whichever is asserting the occurrence of a Change in Law; provided, however, that the contesting in good faith or the failure in good faith to contest any such occurrence shall not be construed as such a willful or negligent action or lack of reasonable diligence. It is specifically understood, however, that none of the following shall constitute a "Change in Law":</p> <ul style="list-style-type: none"> <li>(i) a change in the nature or severity of the actions typically taken by a Governmental Body to enforce compliance with Applicable Law which was effective as of the Contract Date;</li> <li>(ii) all matters directly relating to obtaining and maintaining EPA, EPD or local Governmental Approvals of the design, construction and operation of the Design/Build Project, including any delay, non-issuance or imposition of terms and conditions upon the issuance or renewal of any Governmental Approval necessary in connection therewith, or the entry of an amended or replacement administrative order relating thereto;</li> <li>(iii) any action by a Governmental Body or any other event that affects generally applicable working conditions or standards that is not specific to the wastewater treatment industry or to the New Plant, and that does not require a Capital Modification in order to effectuate compliance therewith; and</li> <li>(iv) any action by a Governmental Body relating to sales or use taxes including the imposition or increase in any such taxes.</li> </ul>
Change Order	<p>A written order approved by the County and signed by the County's Contract Representative authorizing and approving a change to the scope of services. The change order must be processed pursuant to Fulton County policy and procedure 800-6, which is incorporated herein as if fully set forth herein, and shall be valid and binding on the County only where the change is approved by the County as set forth in policy 800-6. should there be a conflict between any provisions in the D/B Contract and policy 800-6, Fulton County Policy and Procedures 800-6 shall take precedence and govern.</p>
Claim	<p>A demand or assertion by the County or D/B Company seeking an adjustment of the Contract Price, Contract Times or both, or other relief with respect to the terms of the contract. A demand for money or services of a third party is not a claim.</p>
Complete or Final Completion	<p>That the Design/Build Work is 100% done, including punch list.</p>
Construction Cost Index or CCI	<p>Construction Cost Index as published by the Engineering News Record.</p>
Construction Equipment	<p>Equipment used in the performance of the work but not incorporated therein.</p>
Construction Period	<p>Means the period from and including the Notice to Proceed Construction to and including the day preceding the Acceptance Date.</p>

Construction Manager	The Construction Manager is the person or entity identified as such in writing by the County. The term "Construction Manager" means the Construction Manager or the Construction Manager's authorized representative. The Construction Manager is the County's agent for purposes of administering this contract.
Contract Date	The date that the Design/Build Contract has been executed by the County and the D/B Company.
Contract Operator or Contract Operations	An operator of the JCEC who is under contract with the County to provide operational services
Contract Representative	In the case of the D/B Company, the individual specified in writing by the D/B Company as the representative of the D/B Company for all purposes of the Design/Build Contract and, in the case of the County, the Director of Public Works or such other representative as shall be designated in writing by the County from time to time.
Contract Standards	The most stringent of the standards, terms, conditions, methods, techniques and practices imposed and required by: (1) Applicable Law; (2) the Minimum Technical Requirements; (3) the Effluent Requirements; (4) Good Engineering and Construction Practice; (5) Good Industry Practice; (6) applicable equipment manufacturers specifications; (7) applicable Insurance Requirements; and (8) any other standard, term, condition or requirement specifically provided in the Design/Build Contract to be observed by the D/B Company.
Core Project Team	The Project Guarantor, Design Engineer, Construction Contractor, Start-up and Training Contractor and others as identified in the Design/Build Proposal.
County	Fulton County, Georgia.
County Assumes Operational Responsibility	The date, after acceptance and other requirements are met, when the County assumes operational control of the JCEC.
County Fault	Means any breach (including the untruth or breach of any County representation or warranty herein set forth), failure, nonperformance or noncompliance by the County with respect to its obligations under this Design/Build Contract to the extent not directly attributable to any Uncontrollable Circumstance or D/B Company Fault, and which materially and adversely affects the D/B Company's rights, obligations or ability or costs to perform under this Design/Build Contract.
County Property	Means any structures, improvements, equipment, fire alarm systems, wastewater and water mains, valves, pumping systems, hydrants, hydrant connections, duct lines, streets, lamps, lampposts, monuments, sidewalks, curbs, trees or any other systems, fixtures, or real or personal property owned, leased, operated, maintained, or occupied by the County.
CPI	Consumer Price Index for All Urban Consumers (CPI-U), Atlanta, GA, Metropolitan Area (as published monthly by the Department of Commerce, Bureau of Labor Statistics, Chicago, IL).
Data CD-ROM	The CD-ROM included with the RFP that was developed by the County to provide Proposers with the data relating to the Design/Build Project.
Definitions	The list defining terms applicable to the RFPs and upon which the Design/Build Contract is based.

Design/Build or D/B	A method of contracting under which one entity provides the design, architectural and construction services under one contract. Design/Build and D/B are used interchangeably.
Design/ Build Schedule	A plan for completion of the Design/Build Project in compliance with the Design/Build Contract and specified activities and interim milestones as specified in Appendix 12.
Design Progress Meetings	Meetings held during the design of the JCEC in accordance with Appendix 10.
D/B Bid Bond	Surety in penal sum of 5% of Fixed Design/Build Price submitted in each proposal to the County, that the D/B Company will forfeit to County should it fail to enter into a contract with the Membrane System Supplier within one year of D/B Contract Date under the same fixed price, delineated schedule, warranties and other terms and conditions contain in its proposal as accepted by the County, along with the other conditions for forfeiting contained in the D/B RFP.
D/B Company	The Selected Proposer with whom the County executes the Design/Build Contract.
D/B Company Construction Supervisor	Has the meaning specified in Article 6 of the Design/Build Contract.
D/B Company Fault	Means any breach (including the untruth or breach of any D/B Company representation or warranty herein set forth), failure, nonperformance or noncompliance by the D/B Company with respect to its obligations under this Design/Build Contract to the extent not directly attributable to any Uncontrollable Circumstance or County Fault, and which materially and adversely affects the County's rights or obligations under this Design/Build Contract.
Design/Build Contract or D/B Contract	The entire and integrated agreement (including Appendices and other specifications) between the County and the D/B Company concerning the Design/Build Project.
Design/Build Date	The date on which the Design/Build Date Requirements are met and the Notice to Proceed with the Design/Build Work is issued by the County.
D/B Escalation Date	The date that is the one-year anniversary from the Design/Build RFP Proposal Submission Date.
Design/Build Guarantees	The performance guarantees that the D/B Company must design and construct the JCEC to perform as provided in Appendix 19.
Design/Build Project	The Design/Build Work necessary for the D/B Company to meet the obligations of the Design/Build Contract, including the construction of the JCEC and the expansion and/or upgrade of the Existing Facilities for the Plant to meet the needs of the Johns Creek Service Area described in the D/B RFP.
Design/Build Request for Proposal (D/B RFP)	Design/Build RFP is the request for proposals to select an entity to deliver the John's Creek Environmental Campus (JCEC) project using Design/Build delivery method specified above.
Design/Build Work or D/B Work	The employment and furnishing of all labor, materials, equipment, supplies, tools, scaffolding, transportation, insurance, temporary facilities, and other things and services of every kind whatsoever necessary for the full performance and completion of the D/B Company's permitting, design, engineering, construction, management, start-up, training, equipment testing, acceptance testing, and related obligations with respect to the Design/Build Project. A reference to Design/Build Work shall mean any part and all

	of the Design/Build Work unless the context otherwise requires, and shall include all extra Design/Build Work authorized by Change Order.
Design Flow	The average daily flow during the maximum month.
Draft NPDES Permit	Draft NPDES Permit No. GA0030686 as issued by EPD for the operation of the Johns Creek Environmental Campus after approval of completion of the 15 MGD facility.
Draw Down Schedule	The schedule of and amount of draw down payments against the Fixed Design/Build Price prepared and submitted by the D/B Company as specified in Appendix 12.
Diversion Pump Station	The existing pump station located at the Existing Plant that can divert influent wastewater to the Big Creek Water Reclamation Facility for treatment.
Effluent	Wastewater discharged from the Existing Plant or the new JCEC.
Effluent Requirements	The most stringent of the requirements pertaining to the discharge of Effluent established by the Contract Standards.
Effluent Quality Performance Guarantee	The quality of the effluent discharge from the JCEC that is a design and construction performance guarantee for the D/B Company in accordance with Appendix 18.
Emergency Response Plan	The plan prepared by the D/B Company to serve as a guide in responding to emergency situations as defined in Appendix 13.
Encumbrance	Means any Lien, lease, mortgage, security interest, charge, judgment, judicial award, attachment or encumbrance of any kind with respect to the Design/Build Project or the New Plant.
EPA or USEPA	United States Environmental Protection Agency or any successor agency.
EPD or GAEPD	Georgia Environmental Protection Department or any successor department.
Equipment	Equipment incorporated or to be incorporated into the D/B Work.
Evaluation Committee	The committee of individuals assigned by the County to evaluate the Proposals in order to determine the most advantageous Proposal.
Event of Default	Means, with respect to the D/B Company, those items specified in Section 12.2 of the Design/Build Contract, and with respect to the County, those items specified in Section 1.32 of the Design/Build Contract.
Existing Influent Pump Station	The Johns Creek Influent Pump Station located with the Existing Plant at 8100 Riverbirch Drive, Roswell, Georgia, and all related equipment including, but not limited to, pumps, influent meters, and generators, together with all improvements thereto acquired, installed, constructed or reconstructed from time to time by the County and its delegate.
Existing Plant	Collectively, all process systems, structures, tanks, pipes, pumps, and equipment, together with all appurtenant and ancillary systems, used to handle and treat the Influent into the Johns Creek WPCP located at 8100 Riverbirch Drive, Roswell, Georgia, and as generally described in Appendix 1.
Extension Period	Has the meaning specified in Section 7.8 of the Design/Build Contract.
Field Order	A written order issued by the Construction Manager which requires minor changes in the

	D/B Work, but does not involve a change in project scope, fixed D/B Price or the Term of the D/B Contract.
Final NPDES Permit	The final, effective permit to be issued by the EPD regulating discharges from the New Plant.
Fixed Design/Build Price	The guaranteed price set forth on Price Proposal Form A to perform the Design/Build Work.
Fixed Design/Build Price Adjustment Factor	The factor, which is defined in Appendix 8, to be used to escalate the Fixed Design/Build Price to the month of the Design/Build Date in the event the Design/Build Date does not occur within 12 months of the Proposal Submission Date.
Fixed Membrane System Price	The guaranteed price set forth on Price Proposal Form A to provide the Membrane System Scope of Supply in accordance with the specified schedule and specified terms and conditions.
Fixed Membrane System Price Adjustment Factor	The factor, which is defined in Appendix 8, to be used to escalate the Fixed Membrane System Price to the month of the Design/Build Date in the event the Design/Build Date does not occur within 12 months of the Proposal Submission Date.
Good Engineering and Construction Practice	The methods, techniques, standards and practices which, at the time they are to be employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good design, engineering, equipping, installation, construction, and commissioning practices in the municipal wastewater treatment industry as followed in the Southeast region of the United States.
Good Industry Practice	Those methods, techniques, standards and practices which, at the time they are to be employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good operation, maintenance, repair, replacement, and management practices in the municipal wastewater treatment industry as observed in the Southeast region of the United States.
Governmental Approvals	All approvals, permits, licenses, authorizations, consents, certifications, exemptions, registrations, rulings, and entitlements of whatever kind and however described which are required under Applicable Law to be obtained or maintained by any person with respect to the Design/Build Project.
Governmental Body	Any federal, state, regional or local legislative, executive, judicial or other governmental board, agency, authority, commission, administration, court or other body, or any official thereof having jurisdiction over the Existing Facilities and the JCEC or any aspect thereof including, without limitation, the design, operation, repair, maintenance, construction and upgrade thereof.
Guarantor	The entity committing to financially guarantee the performance by the D/B Company of its obligations under the Design/Build Contract.
Guaranty Agreement	The Guaranty Agreement entered into concurrently with the Design/Build Contract from the Guarantor to the County in substantially the form provided in Appendix 7.
Hazardous Material	Any waste, substance, object or material deemed hazardous under Applicable Law including, without limitation "hazardous material" as defined in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. and "hazardous waste" as defined in the Resource Conservation Recovery Act, 42 U.S.C. § 6901 et seq.

Influent	All wastewater, infiltration, and inflows entering the Existing Plant or New Plant.
Insurance Requirements	Any rule, regulation, code, or requirement issued by any fire insurance rating bureau or any body having similar functions or by any insurance company that has issued a policy of insurance as specified in the Design/Build Contract.
Johns Creek Environmental Campus (JCEC) or New Plant	The new County-owned water reclamation facilities to be designed and constructed as part of the Design/Build Project to serve the Johns Creek Service Area of North Fulton County, Georgia and that will discharge effluent into Chattahoochee River.
Legal Proceeding	Every action, suit, litigation, arbitration, administrative proceeding, and other legal or equitable proceeding having a bearing upon this Design/Build Contract or the New Plant, and all appeals therefrom.
Letter of Credit	Has the meaning specified in Section 13.3 of the Design/Build Contract.
Loss-and-Expense	Means any and all actual loss, liability, forfeiture, obligation, damage, delay, fine, penalty, judgment, deposit, cost, expense, claim, Tax, or expense, including all Fees and Costs, except as explicitly excluded or limited under any provision of this Design/Build Contract.
Membrane System	The part of the membrane bioreactor process at the new Johns Creek Environmental Campus that will achieve the solids separation objectives of the process. The Membrane System includes membranes and equipment related to their operation.
Membrane Bioreactor or "MBR"	The technology selected for the New Plant that will provide a portion of the wastewater treatment process. The MBR includes the Membrane System, the basin design and arrangement, the screening requirements and other related equipment.
Membrane System Supplier	The entity, which the County selects based on the Proposal evaluation process that provides the Membrane System Scope of Supply. The Membrane System Supplier will provide its scope of supply through an allowance to the Design/Build Project.
Membrane System Supplier Bid Bond	Surety in penal sum of 5% of Membrane System Proposer's Fixed Membrane System Price submitted in its proposal to the County, that proposer will forfeit to County should it fail to enter into a contract with D/B Company within one year of D/B Contract Date under the same fixed price, delineated schedule, warranties and other terms and conditions contain in its proposal as accepted by the County along with other conditions for forfeiture contained in the Technology RFP.
Membrane System Supplier Escalation Date	The date that is the 15 month anniversary date from the Technology RFP Proposal Submission Date.
Membrane System Scope of Supply	The portion of the MBR process, defined in Section 2, which is supplied by the Membrane System Supplier. This includes membranes and related equipment, as well as services related to design, installation oversight, start-up, operation and training.
Milestone	Milestone identified in the Detailed Design and Construction Schedule to be prepared and submitted by the D/B Company in accordance with Appendix 12.
Minimum Evaluation Criteria	Minimum financial and technical qualification that will be required. Non-qualified proposals not meeting the Minimum Evaluation Criteria will be disqualified.
Minimum Financial Criteria	Financial criteria used to determine if the proposal meets the Minimum Evaluation Criteria listed above.

Minimum Technical Requirements	Minimum technical requirements used to determine if the proposal meets the Minimum Evaluation Criteria listed above.
Mixed Liquor Suspended Solids (MLSS)	The total suspended solids (TSS) concentration of mixed liquor in the MBR process, as analyzed according to "Standard Methods for the Analysis of Water and Wastewater".
Monthly Project Progress Report	The D/B Company shall provide to the Construction Manager a monthly report on the progress of the D/B Work in accordance with Appendix 10.
Noise Guarantee	The guarantee that requires the D/B Company to design and construct the JCEC to not increase the amount of ambient noise in the vicinity of the JCEC in accordance with Appendices 2 and 19.
Non-Binding Mediation	The voluntary system of dispute resolution established by Section 12.10 of the Design/Build Contract for the resolution of disputes arising under the Design/Build Contract.
Non-Compliant Effluent	Effluent discharges from the JCEC that does not comply with the NPDES permit requirements or other regulatory requirement.
Notice of Award	Is applicable to D/B Company. Is provided by the County to the apparent successful D/B Proposer, and indicates that it is the County's intent to award the Design/Build Contract to that D/B Proposer, contingent upon the D/B Proposer's execution of the Design/Build Contract and submission of the other necessary documents as specified in the D/B RFP, and contingent upon the County's subsequent acceptance of same and formal approval of the Contract by the Fulton County Board of Commissioners.
Notice to Proceed	The written notification after the Design/Build Date Requirements are satisfied given to the D/B Company by the County to begin work.
Notice to Proceed - Construction	The written notification after all requirements for such authorization are satisfied, given to the D/B Company by the County to begin construction work.
Notice of Selection	Is applicable to Membrane System Supplier. Is provided by the County to apparent successful Membrane System Supplier Proposer, that the BOC has accepted and incorporated its proposal and that its proposal will be included exclusively in the D/B RFP and will be accepted by the successful D/B Company as part of the D/B Company's proposal.
NPDES	National Pollution Discharge Elimination System.
NPDES Permit	The National Pollution Discharge Elimination System Permits as issued by the EPD to control quantity and quality of effluent discharges.
Odor Control	The odor control requirements as set forth in Appendices 5A and 5B to meet the Performance Criteria for odor set forth in Appendices 2 and 18.
Odor Control Guarantee	The D/B Guarantee that the D/B Company will design and construct the JCEC such that there is not odor emitted from the facility in accordance with Appendices 2 and 19.
Operational Cost Guarantee	The D/B Guarantee that the D/B Company will design and construct the JCEC such that the cost of operating the facility in the specific areas of electrical consumption, chemical consumption, sludge disposal and odor control chemical consumption is not exceeded in accordance with Appendices 2 and 19.
Operations and Maintenance Manual Or O&M Manual	Means the manual prepared and submitted by the D/B Company in accordance to the requirements outlined in Appendix 13 and the Design/Build Contract, regarding the Good Industry Practice of the Plant, including, but not limited to, detailed standard

	operating and maintenance procedures and other specific instructions, policies, directives, routines, and schedules.
Overdue Rate	The maximum rate of interest permitted by the laws of the State, if applicable, or the Prime Rate, whichever is lower.
Payment Bond	The surety bond which guarantees the timely payment by the D/B Company for all labor, materials, supplies, implements, and machinery and equipment furnished with respect to the Design/Build Project, and which shall be provided in accordance with Section 13.2 of the Design/Build Contract.
Performance Bond	The surety bond which guarantees the timely performance by the D/B Company of its obligations to construct the Design/Build Project, and which shall be provided in accordance with Section 13.2 of the Design/Build Contract.
Performance Criteria	Those performance criteria specified in Appendix 2 of this RFP and the Design/Build Contract that the D/B Company warrants the New Plant will continuously meet through Good Industry Practice by the County and its operations contractor.
Plans	That portion of the D/B Contract documents describing in drawings, the shape, dimensions, and other similar requirements governing the completion of the various portions of the D/B Work, prepared by the D/B Company and including revisions thereto. The term is used interchangeable with the word, "Drawings"
Plant	The Existing Johns Creek WPCP and/or the New Johns Creek Environmental Campus (JCEC) , as applicable and the real property on which they are located, consisting of buildings, structures, fixtures and equipment, and the roads, grounds, fences and landscaping appurtenant thereto, utilized for preliminary treatment, primary treatment, secondary treatment and advanced biological treatment (nitrification) of Influent, Effluent disinfection and dechlorination, Plant Sludge treatment, laboratory functions and administration and management of the New Plant.
Plant Realty	The parcels of real property upon which the Plant, or any portions thereof, are located.
Pre-Existing Environmental Condition	Limited to, (1) the presence anywhere in, on or under the New Plant on the Proposal Submission Date, if not disclosed to the D/B Company as of the Proposal Submission Date, of underground storage tanks (for the storage of chemicals, fuel oil or diesel fuel) that are not then in use in connection with operation of the New Site; and (2) the presence anywhere in, on or under the New Site, as of the Contract Date, of Hazardous Materials, Contaminated Soil or other Contaminated Materials (but expressly excluding for purposes of this definition (i) any matters disclosed to the D/B Company by the County as of the Proposal Submission Date; and (ii) any matters of which the D/B Company has actual knowledge as of the Proposal Submission Date, and any such excluded matters shall not constitute a Pre-Existing Environmental Condition for which the D/B Company could be afforded relief from its obligations hereunder or additional compensation).
Price Proposal	The section of the Proposal that includes all Proposal cost information in accordance with the RFP and which is to be submitted separately from the Technical Proposal.
Prime Rate	The prime rate as published in The Wall Street Journal (Eastern Edition) or a mutually agreeable alternative source of the prime rate if it is no longer published in The Wall Street Journal (Eastern Edition) or the method of computation thereof is substantially modified.

Process and Instrumentation Diagram (P&ID)	A drawing showing treatment processes, related systems, related equipment, and their connectivity. Specifically, a P&ID includes tankage, equipment, piping, valves, control panels, instrumentation, and the function of instrumentation in control systems.
Project Manager	Has the meaning specified in Articles 5 and 6 of the Design/Build Contract.
Progress Meetings	Meetings held monthly, at a minimum, during which the D/B Company provides information on the progress of the JCEC construction in accordance with Appendix 10.
Proposal	The document submitted for evaluation in response to the RFP, detailing the Proposer's plan to perform the work generally described in the RFP, in accordance with the Design/Build Contract and is comprised of the Technical Proposal and the Price Proposal together.
Price Proposal Form or PPF	Any of the Price Proposal Forms provided in Section 6 that must be completed by Proposer and appended to the Technical and Price Proposals, respectively.
Proposal Submission Date	The date and time by which the Proposal is required to be submitted to the County by the Proposer, in accordance with Section 4 of the RFP.
Proposer	The sole entity (including any corporation, joint venture, partnership, or other business entity) submitting a Proposal in response to the RFP.
Public Education and Community Outreach Plan	The plan to be developed by the D/B Company based upon the outline contained in Appendix 19.
Punchlist	After Substantially Complete, a list of Design/Build Work that is not complete. This list will be compiled based upon walk-through inspections by the County and deficiencies determined during Acceptance testing. Failure of an acceptance test as delineated in the specifications is not a valid item for the punch list.
QA/QC Manager	Has the meaning as specified in Article 6 of the D/B Contract.
QA/QC Program	The D/B Company's program as specified in the QA/QC plan, submitted in accordance with Appendix 13 for the control of the quality of work in the performance of the D/B Work.
Rating Services	Moody's Investors Services, Inc. or Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc., or any of their respective successors and assigns and, if such corporations shall be dissolved or liquidated or shall no longer perform the functions of a securities rating agency, "Rating Services" shall be deemed to refer to any other nationally recognized securities rating agency designated by the County.
RCRA	The Resource Conservation and Recovery Act, 42 U.S.C.A. § 6901 et seq., and applicable regulations promulgated thereunder, each as amended from time to time.
Reimbursable Expense	Expenses that the D/B Company incurs which are directly related to the D/B Company's obligations under the Agreement during the period from Contract Date till Design/Build Date that the County would reimburse if the D/B Contract was terminated prior to the Design/Build Date.
Relative Evaluation Criteria	The factors related to the Technical Proposal and Price Proposal to be considered in evaluating proposals as defined in Section 5.3 of the RFP.
Residuals	Any liquid, semi-solid or solid material generated by or as a result of the operations, maintenance, repair, and management of the Plant, excluding Sludge that is land filled or otherwise disposed of and not further processed.

Retainage	Each milestone payment will be subject to a 10% holdback until 50% of the value of the Design/Build Fixed Price, including change orders and other additions to the D/B Contract, is due and the manner and progress of the Design/Build Work performed is satisfactory to the County, at which time further payments will not be subject to additional retainage holdbacks unless the County determines that the Design/Build Work is unsatisfactory or has fallen behind schedule in which case the amount of retainage will be resumed at the previous level. Upon Substantial Completion the amounts retained minus 200% of the estimated value of the outstanding Design/Build Work will be released to the D/B Company.
RFP or Request for Proposal	The document entitled "Fulton County, Georgia, Johns Creek Environmental Campus Design/Build Request for Proposals", or Fulton County, Georgia, Johns Creek Environmental Campus Technology Request for Proposals", as amended by addenda.
Safety and Security Plan	The plan prepared by the D/B Company to describe the responsibilities for maintaining security and safety of all equipment and structures contained within the facility as defined in Appendix 13.
SCADA	In the context of data gathering and telemetry systems, means "Supervisory Control and Data Acquisition".
Schedule of Values	A breakdown of the cost of the Design/Build Work, which totals the Fixed Design/Build Price. The content and level of breakdown of prices is specified in Appendix 12.
SEC	Securities Exchange Commission
Security Instruments	The Guaranty Agreement, the Letter of Credit, the Payment Bond, the Construction Performance Bond, the Bid Bond and the Membrane System Supplier Bid Bond.
Senior Supervisors	Has the meaning specified in Article 5 of the Design/Build Contract.
Site	The real property designated as the D/B Company's envelope for the location of the Design/Build Project.
Site Safety Representative	Has the meaning defined in Section 6.12.
Sludge	The biosolids generated by the treatment of Influent at the New Plant.
Small, Minority and Female Owned Business Opportunity Plan	The D/B Company's plan to utilize small minority and female owned businesses in the design and construction of the Design/Build Work as set forth in Technology and D/B RFP Section 3.
Solids Retention Time (SRT)	The average amount of time that a solid particle remains in the MBR process. SRT is calculated by dividing the mass of solids within the process by the rate at which solids are removed from the process.
Specifications	That portion of the D/B Contract documents describing in words the technical requirements governing the completion of various portions of the D/B Work, deliverable or general conditions for execution of the D/B work. "Appendices" and "Specifications" are used interchangeably.
Specified Subsurface Conditions	Is limited to, (1) the presence at the New Site of subsurface structures, materials or conditions having historical, archaeological, religious or similar significance, and (2) subsurface geological conditions (i) in areas of the Site at which the D/B Company was prohibited by the County from performing geotechnical inspections prior to the issuance

	of its Proposal or (ii) which the D/B Company was unable to reasonably discern from the geotechnical reports, Site Related Documents and information prepared by or on behalf of the County, prior to the Contract Date, but only to the extent that a subsurface geological condition causes structural damage to or the collapse of the New Plant.
Start-Up & Equipment Testing Plan	The plan prepared by the D/B Company to facilitate equipment start-up and testing as defined in Appendix 14 of the RFP.
State	The State of Georgia.
Subcontract	An agreement or purchase order by the D/B Company or a Subcontractor to the D/B Company, as applicable.
Subcontractor	Every person (other than employees of the D/B Company) employed or engaged by the D/B Company or any person directly or indirectly in privity with the D/B Company (including all Subcontractors and every sub-subcontractor of whatever tier) for any portion of the Design/Build effort, whether for the furnishing of labor, materials, equipment, supplies, Design/Build services, or otherwise.
Substantial Completion	Has the meaning specified in Section 7.3 of the Design/Build Contract.
Supplier	Any individual, firm or corporation who supplies material or equipment for the D/B Work but who does not perform labor at the site. A supplier may provide start-up assistance, training and software installation on site without being reclassified as a subcontractor.
Tax	Any tax, fee, levy, duty, impost, charge, surcharge, assessment or withholding, or any payment-in-lieu thereof, and any related interest, penalty or addition to tax.
Technology RFP	RFP issued to solicit proposal to supply the Membrane System Scope of Supply based on specified requirements.
Technical Proposal	The section of the Proposal that contains the technical and business aspects of the Proposer's plan to perform the Design/Build Work generally described and in accordance with the RFP, and which is to be submitted separately from the Price Proposal.
Technical Proposal Form or TPF	Any of the forms provided in Section 6 of the D/B RFP that must be completed by Proposer and appended to the Technical Proposals
Term	Has the meaning set forth in Article 2 of the Design/Build Contract.
Transaction Agreement Form	Any of the Transaction Agreement Forms appended to the Design/Build Contract.
Transition Plan	The plan that defines the period of time from Substantial Completion until County Assumption of Operational Responsibility as outlined in Appendix 13 and the Design/Build Contract.
Transition Period	The Period of time from Substantial Completion until County Assumption of Operational Responsibility.
Training Plan	The plan that defines the training programs for all personnel designated by the County to operate the Plant to be prepared and executed by the D/B Company, in accordance to the requirements outlined in Appendix 13 and the Design/Build Contract.

<p>Uncontrollable Circumstance</p>	<p>Any act, event or condition that is beyond the reasonable control of, and is not also the result of the willful or negligent act, error or omission, failure to exercise reasonable diligence, or breach of the Design/Build Contract on the part of, the party relying thereon as justification for not performing an obligation or complying with any condition required of such party under the Design/Build Contract, and that materially interferes with or materially increases the cost of performing its obligations hereunder (other than payment obligations).</p> <p>(1) Inclusions. Subject to the foregoing, Uncontrollable Circumstances may include, but shall not be limited to, the following:</p> <ul style="list-style-type: none"> <li>(a) a Change in Law;</li> <li>(b) the existence of a Pre-Existing Environmental Condition;</li> <li>(c) the existence of Specified Subsurface Conditions;</li> <li>(d) naturally occurring events (except weather conditions normal for the service area) such as landslides, underground movement, earthquakes, lightning, fires, tornadoes, hurricanes, floods (but only to the extent the hydraulic capacity of the New Plant is exceeded), epidemics, and other acts of God;</li> <li>(e) explosion, sabotage or similar occurrence, acts of a declared public enemy, extortion, war, blockade or insurrection, riot or civil disturbance;</li> <li>(f) labor disputes, except labor disputes involving the employees of the D/B Company, its Affiliates, or Subcontractors which affect the performance of the Design/Build Work;</li> <li>(g) the failure of any appropriate Governmental Body, public utility or private utility having operational jurisdiction in the area in which the New Plant are located to provide and maintain Utilities to the New Plant which is required for the performance of the Design/Build Contract;</li> <li>(h) any failure of title to the New Plant or any enforcement of any Encumbrance on the New Plant not consented to in writing by, or arising out of any action or agreement entered into by, the party adversely affected thereby; and</li> <li>(i) the preemption of materials or Design/Build effort by a Governmental Body in connection with a public emergency or any condemnation or other taking by eminent domain of any material portion of the New Plant.</li> </ul> <p>(2) Exclusions. It is specifically understood that, without limitation, none of the following acts, events or circumstances shall constitute Uncontrollable Circumstances:</p> <ul style="list-style-type: none"> <li>(a) any act, event or circumstance with respect to which the D/B Company has assumed the "as-is" risk under Section 6.3, except as specifically provided in subsection 6.3.4 of the Design/Build Contract;</li> <li>(b) terms, conditions and prices prevailing in the market for the transportation and disposal of Residuals;</li> <li>(c) changes in interest rates, inflation rates, wage rates, insurance costs, commodity prices, currency values, exchange rates or other general economic conditions;</li> <li>(d) changes in the financial condition of the County, the D/B Company, the Guarantor, or their Affiliates or Subcontractors affecting the ability to perform their respective obligations;</li> <li>(e) the consequences of error, neglect or omissions by the D/B Company, the Guarantors, any Subcontractor, any supplier, any of their Affiliates or any other person in the performance of the Design/Build Work;</li> <li>(f) union or labor work rules, requirements or demands which have the effect of increasing the number of employees employed at the New Plant or otherwise increasing the cost to the D/B Company of performing the</li> </ul>
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	<p>Contract Design/Builds;</p> <ul style="list-style-type: none"> <li>(g) any impact of prevailing wage or similar laws, customs or practices on the D/B Company's costs;</li> <li>(h) weather conditions normal for the service area;</li> <li>(i) any act, event, circumstance or Change in Law occurring outside of the United States;</li> <li>(j) any surface, subsurface geotechnical or hydrological conditions and other Site conditions including without limitation the existence of compressible soil layers, masses, unstable soil, manmade deposits and water table fluctuations, utility lines, pipes and structures (other than Pre-Existing Environmental Conditions and Specified Subsurface Conditions);</li> <li>(k) mechanical failure of equipment to the extent not resulting from a condition that is listed in the "Inclusions" section of this definition;</li> <li>(l) power outages not caused by third party Utilities;</li> <li>(m) a Change in Law pertaining to Taxes;</li> <li>(n) any failure in obtaining EPD approval for any of the Design/Build Project;</li> <li>(o) failure of the D/B Company to secure patents which it deems necessary for the performance of the Design/Build Work;</li> <li>(p) any Change in Law (including the issuance of any Governmental Approval, the enactment of any statute, or the promulgation of any regulation) the terms and conditions of which do not impose more stringent or burdensome requirements on the D/B Company than are imposed by the Contract Standards; and</li> </ul>
Upset	The meaning given such term in the Clean Water Act.
Utilities	Any and all utility work and installations whatsoever (including gas, water, electricity, telephone, and telecommunications), and all piping, wiring, conduits, and other fixtures of every kind whatsoever related thereto or used in connection therewith.
WLA	Waste load allocation.
Whole Plant Acceptance Testing	That portion of the Acceptance Testing that test the entire plant. The D/B Company is in operational control of the plant and is responsible for its proper and correct operation. During this period some of the D/B Performance Guarantees will be verified.
WPCP	Water pollution control plant.

**SECTION 1.2 INTERPRETATIONS** In this Design/Build Contract notwithstanding any other provision hereof:

1.2.1 Applicability and Stringency of Contract Standards--The D/B Company shall be obligated to comply only with those Contract Standards which are applicable in any particular case. Where more than one Contract Standard applies to any particular performance obligation of the D/B Company hereunder, each such applicable Contract Standard shall be complied with. In the event there are different levels of stringency among such applicable Contract Standards, the most stringent of the applicable Contract Standards shall govern.

1.2.2 As Shown, As Indicated, As Detailed--These words, and words of like implication, refer to information contained by drawings and/or specifications describing the Design/Build Work, unless explicitly stated otherwise in other contract documents.

1.2.3 Causing Performance--A party shall itself perform, or shall cause to be performed, the obligations affirmatively undertaken by such party under this Design/Build Contract, subject to any limitations specifically imposed hereby with respect to Subcontractors or otherwise.

1.2.4 Cost and Expense of Performance--All obligations undertaken by each party hereto shall be performed at the cost and expense of the party undertaking the obligation, unless the other party has explicitly agreed herein to bear all or a portion of the expense either directly or by reimbursement to the other party.

1.2.5 Counterparts--This Design/Build Contract may be executed in any number of original counterparts. All such counterparts shall constitute but one and the same Design/Build Contract.

1.2.6 Defined Terms--The definitions set forth in Section 1.1 shall control in the event of any conflict with the definitions used in the recitals hereto.

1.2.7 Delivery of Documents in Digital --In this Design/Build Contract, the D/B Company is obligated to deliver reports, records, designs, plans, drawings, specifications, proposals and other documentary submittals in connection with the performance of its duties hereunder. The D/B Company agrees that all such documents shall be submitted to the County both in printed form (in the number of copies indicated) and, at the County's request, in digital form. Electronic copies shall consist of computer readable data submitted in any standard interchange format which the County may reasonably request to facilitate the administration and enforcement of this Design/Build Contract.

1.2.8 Directed, Required, Acceptable--When these words refer to work or its performance, "directed", "required", "requested", "authorized", "selected", "permitted", "ordered", "designated", "prescribed", and words of like implication, mean "by direction of", the County. Likewise, "acceptable", "satisfactory", "in the judgment of", and words of like import, mean "recommended by", "acceptable to", "satisfactory to", or "in the judgment of" the County.

1.2.9 Entire Design/Build Contract--The Design/Build Contract represents the entire and integrated agreement between the parties hereto and takes precedence over all prior negotiations, representations or agreements either written or oral, including those contained in the County's D/B RFP for

the JCEC, the proposal of the D/B Company submitted in response thereto, and any amendments or supplements to the D/B RFP or the proposal. Where there is a conflict between the Design/Build Contract and any other documents supplied by the County Section 1.3.4 shall apply. The Design/Build Contract may be amended or modified only by a modification as defined in Article 8. The Design/Build Contract shall not be construed to create any contractual relationship of any kind between any persons or entities other than the County, including the Program Manger and/or Construction Managers, and the D/B Company. Nothing contained in the Contract Documents shall create any contractual relationship between the County, Program Manager, Construction Manager, or any other consultant employed by the County, and any of the D/B Company's, engineers, consultants, subcontractors or supplier. Nothing contained in the Contract Documents or other documents shall create any contractual relationship between the County and the Membrane System Supplier. The County will look solely to the D/B Company to fulfill all terms and conditions of the Design/Build Contract.

1.2.10 Gender and Plurality--Words of the masculine gender mean and include correlative words of the feminine and neuter genders, and words importing the singular number mean and include the plural number and vice versa.

1.2.11 Good Industry Practice and Good Engineering and Construction Practice--Good Industry Practice and Good Engineering and Construction Practice shall be utilized hereunder, among other things, to implement and in no event displace or lessen the stringency of, the Contract Standards. In the event that, over the course of the Term of this Design/Build Contract, Good Industry Practice or Good Engineering and Construction Practice evolves in a manner which in the aggregate materially and adversely affects the cost of compliance therewith by the D/B Company, the D/B Company shall be relieved of its obligation to comply with such evolved Good Industry Practice and Good Engineering and Construction Practice. In the above event the D/B Company shall comply with the Good Industry Practice and Good Engineering and Construction Practice as of the Contract Date unless the County agrees to adjust the Fixed Design/Build Price subject to Cost Substantiation, to account for such additional costs of the evolved standards. However, in no event shall any evolution of Good Industry Practice or Good Engineering and Construction Practice affects the County's election to pay or not pay for any increased cost.

1.2.12 Governing Law--This Design/Build Contract shall be governed by and construed in accordance with the applicable laws of the State of Georgia.

1.2.13 Headings--The table of contents and any headings preceding the text of the Articles, Sections and subsections of this Design/Build Contract shall be solely for convenience of reference and shall not affect its meaning, construction or effect.

1.2.14 Internal Conflict or Discrepancy--In the event of a conflict or discrepancy between any of the terms or conditions of this Design/Build Contract, including any conflict or discrepancy between the main body of this Design/Build Contract and any Appendix or Transaction Agreement Form, the interpretation which imposes the terms or conditions of greatest stringency on the D/B Company or results in the lowest Fixed Design/Build Price payable by the County shall govern.

1.2.15 Interpolation--If any calculation hereunder is to be made by reference to a chart or table of values, and the reference calculation falls between two stated values, the calculation shall be made on the basis of linear interpolation.

1.2.16 Liquidated Damages and Fixed Design/Build Price Reductions--This Design/Build Contract provides for the payment of liquidated damages and Fixed Design/Build Price reductions in certain circumstances of nonperformance, breach and default. Each party agrees that the damaged party's actual damages in each such circumstance would be difficult or impossible to ascertain (particularly with respect to the public harm that would occur as a result of such nonperformance, breach or default of the D/B Company) and that the liquidated damages and Fixed Design/Build Price reductions provided for herein with respect to each such circumstance are intended to place the damaged party in the same economic position as it would have been in had the circumstance not occurred. In those cases where additional remedies are provided for, the parties acknowledge and agree that such remedies are intended to address harms and damages which are separate and distinct from those which the liquidated damages or Fixed Design/Build Price reductions are meant to remedy. The amounts of the liquidated damages and Fixed Design/Build Price reductions have been determined, taking into account, among other things, cost savings which a party might realize as a result of the circumstance resulting in the requirement to pay liquidated damages or Fixed Design/Build Price reductions, and any such savings shall not mitigate or offset the requirement of a party to pay the full amount of such liquidated damage or Fixed Design/Build Price reduction.

1.2.17 Minimum Technical Requirements--The Minimum Technical Requirements are intended to include the basic design principles, concepts and requirements for the Design/Build Work but do not include the final, detailed design, plans, drawings or specifications or indicate or describe each and every item required for full performance of the physical Design/Build Work and for achieving Acceptance. The D/B Company agrees to prepare all necessary complete and detailed designs, plans, drawings and specifications and to furnish and perform, without additional compensation of any kind, all Design/Build Work in conformity with the Minimum Technical Requirements and the final designs, plans, drawings and specifications based thereon. Furthermore, the D/B Company agrees that it shall not have the right to bring any claim whatsoever against the County or any of its consultants or subcontractors, arising out of any design drawings, specifications or design requirements included in the D/B RFP or made available during the procurement process.

1.2.18 No Third Party Rights--This Design/Build Contract is exclusively for the benefit of the County and the D/B Company and shall not provide any third parties with any remedy, claim, liability, reimbursement, cause of action, or other rights.

1.2.19 Persons--Words importing persons include firms, companies, associations, joint ventures, general partnerships, limited partnerships, limited liability corporations, trusts, business trusts, corporations and other legal entities, including public bodies, as well as individuals.

1.2.20 References to Days--All references to days herein are references to calendar days.

1.2.21 References Hereto--The terms "hereby," "hereof," "hereto," "herein," "hereunder" and any similar terms refer to this Design/Build Contract; and the term "hereafter" means after, and the term "heretofore" means before, the Contract Date.

1.2.22 Reference to Including--All references to "including" herein shall be interpreted as meaning "including without limitation."

1.2.23 Reference to Knowledge--All references to "knowledge", "knowing", "know" or "knew" shall be interpreted as references to a party having actual knowledge.

1.2.24 Severability--If any clause, provision, subsection, section or article of this Design/Build Contract shall be ruled invalid by any court of competent jurisdiction, then the parties shall: (1) promptly negotiate a substitute for such clause, provision, subsection, section or article which shall, to the greatest extent legally permissible, effectuate the intent of the parties in the invalid clause, provision, subsection, section or article; (2) if necessary or desirable to accomplish item (1) above, apply to the court having declared such invalidity for a judicial construction of the invalidated portion of this Design/Build Contract; and (3) negotiate such changes, in substitution for or addition to the remaining provisions of this Design/Build Contract as may be necessary in addition to and in conjunction with items (1) and (2) above to effect the intent of the parties in the invalid provision. The invalidity of such clause, provision, subsection, section or article shall not affect any of the remaining provisions hereof, and this Design/Build Contract shall be construed and enforced as if such invalid portion did not exist.

1.2.25 Standards of Workmanship and Materials--Any reference in this Design/Build Contract to materials, equipment, systems or supplies (whether such references are in lists, notes, specifications, schedules, or otherwise) shall be construed to require the D/B Company to furnish the same in accordance with the grades and standards indicated in this Design/Build Contract. Where this Design/Build Contract does not specify any explicit quality or standard for construction materials or workmanship, the D/B Company shall use only workmanship and new materials of a quality consistent with that of construction workmanship and materials specified elsewhere in the Minimum Technical Requirements, and the Minimum Technical Requirements are to be interpreted accordingly.

1.2.26 Technical Standards and Codes--References in this Design/Build Contract to all professional and technical standards, codes and specifications are to the most recently published professional and technical standards, codes and specifications of the institute, organization, association, authority or society specified, in effect as of the Contract Date. Unless otherwise specified to the contrary, (1) all such professional and technical standards, codes and specifications shall apply as if incorporated in the Minimum Technical Requirements and (2) if any material revision occurs, to the D/B Company's knowledge, after the Contract Date, and prior to completion of the applicable Design/Build Work, the D/B Company shall notify the County. If so directed by the County, the D/B Company shall perform the applicable Design/Build Work in accordance with the revised professional and technical standard, code or specification as long as the D/B Company is compensated, subject to Cost Substantiation, for any additional cost or expense attributable to any such revision.

1.2.27 Treatment of Influent--The terms "treat", "treated", "treatment", "treating" and any similar terms, when used with respect to Influent, shall mean and refer to the operation of the JCEC to receive, and process Influent and discharge Effluent, all in accordance with this Design/Build Contract.

**SECTION 1.3 EXECUTION, CORRELATION AND INTENT**

1.3.1 Correlated Personnel Observations Execution of this Design/Build Contract is a representation that the D/B Company and its architects, engineers, consultants and subcontractors have visited the site, have become familiar with the local conditions under which the Design/Build Work is to be performed, and have correlated personal observations with the requirements of the Design/Build Contract.

1.3.2 County Documents The intent of the Design/Build Contract is to include all items necessary for the proper execution and completion of the Design/Build Work. The Design/Build Contract, the Design/Build RFP, the Technology RFP and any other County furnished documents are complementary and what is required by any one shall be as binding as if required by all. Work not covered in the Design/Build Contract shall not be required unless it is consistent therewith and is reasonably inferable therefrom as being necessary to produce the intended results. Words and abbreviations which have well-known technical or trade meanings are used in the Design/Build Contract in accordance with such recognized meanings.

1.3.3 D/B Work Division The organization of the Design/Build Contract, the Design/Build RFP, the Technology RFP and any related Specifications provided to the D/B Company in any manner, shall not control the D/B Company in dividing the Design/Build Work among architects, engineers, consultants, subcontractors and trades or in establishing the extent of work to be performed by any such entity; nor shall any responsibility be assumed by the County, Program Manager or Construction Manager for the manner in which the D/B Company utilizes such documentation provided to divide the Design/Build Work among such entities.

1.3.4 Order of Document Precedence If any portion of the Design/Build Contract, the Design/Build RFP, the Technology RFP or any other document supplied by the County or its representative shall be in conflict with another portion of such documentation the following shall be the order of precedence: The Design/Build Contract, the General Requirements of the Design/Build RFP, the General Requirements of the Technology RFP, any outline or technical Specifications provided; any drawings provided; any other Design/Build Project data provided. All such discrepancies and/or conflicts shall be submitted in writing to the Construction Manager for clarification.

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**ARTICLE 2**

**TERM**

**SECTION 2.1 EFFECTIVE DATE AND TERM** This Design/Build Contract shall become effective on the Contract Date, and shall continue in effect until all provisions of the Design/Build Work are complete in accordance with the provisions of the contract or until the D/B Company fulfills its responsibilities under the contract and the D/B Project has been accepted by the County, unless earlier terminated pursuant to the termination provisions of Article 12 hereof, in which event the Term shall be deemed to have ended as of the date of such termination. All rights, obligations and liabilities of the parties hereto shall commence on the Contract Date, subject to the terms and conditions hereof. The County shall not be obligated to pay any applicable Fixed Design/Build Price until the Design/Build Date. At the end of the Term of this Design/Build Contract, all other obligations of the parties hereunder shall terminate, except as provided in Article 12.

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**ARTICLE 3  
ADMINISTRATION**

**SECTION 3.1 PROGRAM MANAGER / CONSTRUCTION MANAGER**

3.1.1 Management Approach The County has established a process for the design and construction of infrastructure and facilities projects in its Capital Improvements Program which utilizes a team concept involving the use of a Program Manager and a Construction Manager. The Program Manager/Construction Manager provide a wide range of services to assist and support the County in comprehensive program planning, organization, coordination, control, budgeting, and implementation of the design and construction of each project in the program. It is the County's intent that the Program Manager/Construction Manager, and D/B Company work as a unified team with the County in the delivery of this project.

3.1.2 The Program Manager

[1] The Program Manager is the person or entity identified as such herein. The term "Program Manager" means the Program Manager or the Program Manager's authorized representative.

[2] The County has contracted with the Parsons PM Team to provide program planning that establishes direction and performance goals for the implementation of numerous projects contained in the County's Capital Improvements Program. The Program Manager is also responsible for monitoring the implementation of projects to assure that program priorities and goals are met, and for reporting overall program status to the County. Specific areas of Program Manager responsibility include 1) program and strategic planning, 2) projects definition, 3) funding coordination, 4) program priority management, 5) master scheduling, 6) project scoping and performance parameters, 7) program status reporting, and 8) project oversight monitoring and quality assurance.

3.1.3 The Construction Manager

[1] The Construction Manager is the person or entity identified as such herein. The term "Construction Manager" means the Construction Manager or the Construction Manager's authorized representative.

[2] The County has contracted with the Parsons PM Team to be responsible for the implementation and delivery of projects within the County Capital Improvements Program. The Construction Manager's services include project-specific planning and management of design, construction, and support services required to complete projects in accordance with performance goals. The Construction Manager also is responsible for all status reporting of implementation activities, and provides technical and planning support to the Program Manager as requested. Specific areas of Construction Manager responsibility include 1) program management support, 2) project implementation planning, 3) design services management, 4)

equipment and materials procurement, 5) permitting and regulatory compliance, 6) field construction management and safety, 7) construction contract administration, 8) design and construction status reporting, 9) project records management, and 10) management information systems (MIS) for the program.

**SECTION 3.2 ADMINISTRATION OF THE CONTRACT**      The Program

Manager/Construction Manager shall provide administration services as hereinafter described.

3.2.1 County's Primary Representative      For the administration of this D/B Contract, the Construction Manager shall serve as the County's primary representative during design and construction and until final payment to the D/B Company is due. The Program Manager will not interface directly with the D/B Company or exercise direct administration authority over the D/B Work. The Construction Manager shall advise and consult with the County and the Program Manager. The primary point of contact for the D/B Company shall be the Construction Manager. All correspondence from the D/B Company to the County shall be forwarded through the Construction Manager. Likewise, all correspondence and instructions to the D/B Company shall be forwarded through the Construction Manager.

3.2.2 Monitor Performance      The Construction Manager will determine in general that the construction is being performed in accordance with design and engineering requirements, and will endeavor to guard the County against defects and deficiencies in the D/B Work.

3.2.3 Responsibilities Not Required of Construction Manager      The Construction Manager will not be responsible for or have control or charge of construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the D/B Work, nor will it be responsible for the D/B Company's failure to carry out the D/B Work in accordance with the Contract Documents. The Construction Manager will not be responsible for or have control or charge over the acts or omissions of the D/B Company, its architects, engineers, consultants, subcontractors, or any of their agents or employees, or any other persons performing the D/B Work.

3.2.4 Access to D/B Work      The County, the Program Manager, the Construction Manager and any other consultants employed by the County shall at all times have access to the D/B Work. The D/B Company shall provide safe facilities for such access so that they may perform their functions.

3.2.5 Application for Payment Observations      Based on the Construction Manager's observations regarding the D/B Company's Applications for Payment, the Construction Manager shall determine the amounts owing to the D/B Company, in accordance with the payment terms of the Contract, and shall issue Certificates for Payment in such amount to the County.

3.2.6 Interpretations      The Construction Manager shall render interpretations necessary for the proper execution or progress of the D/B Work. Either party to the Contract may make written requests to the Construction Manager for such interpretations. Shall be consistent with the intent of and reasonably inferable from the Contract Documents and shall be in writing or in graphic form

3.2.7 Claims, Disputes and Other Matters In questions between the D/B Company and the County relating to the progress of the D/B Work or the interpretation of the Contract Documents shall be referred to the Construction Manager for interpretation by the County Attorney. The Construction Manager shall provide a written recommendation.

3.2.8 Artistic Effect In matters relating to artistic effect, the interpretation of the D/B Company's architect shall be final, if the County determines that it is consistent with the intent of the Contract Documents.

3.2.9 Decision On Disagreements Except as otherwise provided in this Contract, the Construction Manager shall issue a decision on any disagreement concerning a question of fact arising under this Contract. The Construction Manager shall reduce the decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Construction Manager shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Contractor files a written appeal with the County Manager and furnishes the Construction Manager a copy of such appeal. The decision of the County Manager shall be final and conclusive. Such final decision of the County Manager shall not be pleaded in any suit involving a question of fact arising under this Contract, provided such is not fraudulent, capricious, arbitrary, so grossly erroneous as necessarily implying bad faith, or is not supported by substantial evidence. In connection with any appeal proceeding under this Article, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of Contractor's appeal. Pending any final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the Contract and in accordance with the Construction Manager's decision.

3.2.10 Authority to Reject Work The Construction Manager shall have authority to reject D/B Work which does not conform to the Contract Documents. Whenever, in the Construction Manager's opinion, it is considered necessary or advisable for the implementation of the intent of the Contract Documents, the County shall have authority to require special inspection or testing of the D/B Work in accordance with Section 6.9, whether or not such D/B Work be then fabricated, installed or completed. Neither the Construction Manager's authority to act under this Subparagraph, nor any decision made by the Construction Manager in good faith either to exercise or not to exercise such authority, shall give rise to any duty or responsibility of the Construction Manager to the D/B Company, any subcontractor, any of their agents or employees, or any other person performing any of the D/B Work.

3.2.11 Submittals The Construction Manager will determine from the D/B Company's approved submittal register those shop drawings, product data, and samples requiring review by the County, Program Manager, or Construction Manager, and shall communicate that information to the D/B Company. The D/B Company shall submit and the Construction Manager shall receive submittals in accordance with the provisions in Appendices 10, 12, 13 and other sections of the D/B Contract. All submittals received by the Construction Manager shall include the D/B Company's architect's or engineers' review comments or approval. The Construction Manager, the Program Manager and/or the County shall review submittals only for compliance with County program and standards and the information given in the

D/B Contract Documents, with promptness and in accord with schedule. The Construction Manager shall indicate requirements for resubmittal (if any), or approval of submittal, and return submittals to Contractor for distribution, or for resubmission.

3.2.12 Change Orders The Construction Manager shall take appropriate action on Change Orders in accordance with Article 8 of this Agreement, and shall have authority to order minor changes in the D/B Work as provided in of this Agreement.

3.2.13 Substantial Completion and Final Completion The Construction Manager shall conduct inspections to determine the dates of Substantial Completion and Final Completion, and shall receive and forward to the County for review written warranties and related documents required by the Contract Documents and assembled by the D/B Company. The Construction Manager shall approve and issue Certificates for Payment upon compliance with Substantial and Final Completion requirements indicated in of this Agreement.

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**ARTICLE 4  
COUNTY**

**SECTION 4.1 DEFINITIONS**

4.1.1 The County (Owner) The person or entity identified as such herein. The term "County" means the County or the County's authorized representative. The term "County" also means any agent of the county, including the Program Manager and the Construction Manager. The terms "County" and "Owner" may be used interchangeably in the Design/Build Contract and other related Documents.

**SECTION 4.2 REPRESENTATIONS AND WARRANTIES OF THE COUNTY** The County represents and warrants that:

4.2.1 Existence and Powers The County is a political subdivision of the State, validly existing under the Constitution and the laws of the State, with full legal right, power and authority to enter into and to perform its obligations under this Design/Build Contract;

4.2.2 Due Authorization and Binding Obligation This Design/Build Contract has been duly authorized, executed and delivered by all necessary action of the County and constitutes a legal, valid and binding obligation of the County, enforceable against the County in accordance with its terms, except to the extent that its enforceability may be limited by constitutional, bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and by equitable principles of general application;

4.2.3 No Conflict To its knowledge, neither the execution nor delivery by the County of this Design/Build Contract nor the performance by the County of its obligations in connection with the transactions contemplated hereby or the fulfillment by the County of the terms or conditions hereof: (a) conflicts with, violates or results in a material breach of any law or governmental regulation applicable to the County; or (b) conflicts with, violates or results in a material breach of any term or condition of any order, judgment or decree, or any contract, agreement or instrument, to which the County is a party or by which the County or any of its properties or assets are bound, or constitutes a material default under any of the foregoing;

4.2.4 No Litigation Except as disclosed in writing to the D/B Company, to its knowledge, there is no Legal Proceeding before or by any Governmental Body, or proceeding for referendum or other voter initiative, pending or, to the County's knowledge, overtly threatened or publicly announced against the County, in which an unfavorable decision, ruling or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Design/Build Contract by the County or the validity, legality or enforceability of this Design/Build Contract against the County, or any other agreement or instrument entered into by the County in connection with the transactions

contemplated hereby, or on the ability of the County to perform its obligations hereunder or under any such other agreement or instrument.

4.2.5 Governmental Approvals The County has and shall continue to have throughout the Term of this Design/Build Contract, all Governmental Approvals necessary to effectuate its responsibilities under this Design/Build Contract or required of the County as owner of the Existing Plant and New Plant, and the County has enacted all municipal laws, ordinances or regulations which are necessary for the performance by the County of this Design/Build Contract; and

4.2.6 Applicable Law Compliance Except as disclosed in writing to the D/B Company, to its knowledge (1) the County is not in material violation of any Applicable Law pertaining to the New Plant, or (2) the County has not received notice of a violation or an alleged violation of any such Applicable Law.

**SECTION 4.3 INFORMATION AND SERVICES REQUIRED OF THE COUNTY**

4.3.1 The County shall furnish all reasonably available site information describing the physical characteristics, legal limitations and utility locations for the site of the Design/Build Project, and a legal description of the site.

4.3.2 Except as indicated otherwise, the County shall secure and pay for necessary easements required for the construction of permanent structures.

4.3.3 Information or services under the County's control shall be furnished by the County with reasonable promptness

4.3.4 The County shall forward all instructions to the D/B Company through the Construction Manager.

4.3.5 The County assure the D/B Company access to the New Plant and New Plant Site for the performance of its obligations hereunder;

4.3.6 The County obtain and maintain any Governmental Approvals that are the responsibility of the County, specifically the NPDES Permit. County's assistance of the D/B Company in the submission of all information for Government Approvals does not relieve the D/B Company of the responsibility to obtain all required Government Approvals as required for the D/B Work.

4.3.7 The County comply with Applicable Law pertaining to the County as owner of the New Plant (except to the extent the D/B Company has agreed to perform and assume any such obligations in this Design/Build Contract;

4.3.8 The County pay the Design/Build Price and any other amounts due the D/B Company in accordance with the terms and conditions of this Design/Build Contract

**SECTION 4.4 COUNTY'S RIGHT TO STOP THE DESIGN/BUILD WORK** If the D/B

Company fails to correct defective Design/Build Work as required by Section 6.10 or persistently fails to carry out the Design/Build Work in accordance with the Design/Build Contract, the County , by written

order signed personally or by an agent specifically so empowered by the County in writing, may order the D/B Company to stop the Design/Build Work, or any portion thereof, until the cause for such order has been eliminated.

**SECTION 4.5 COUNTY'S RIGHT TO CARRY OUT THE DESIGN/BUILD WORK** If the D/B Company defaults or neglects to carry out the Design/Build Work in accordance with the Design/Build Contract, and fails within seven (7) days after receipt of written notice from the County to commence and continue correction of such default or neglect with diligence and promptness, the County may, after four (4) days following receipt by the D/B Company of an additional written notice and without prejudice to any other remedy the County may have, make good such deficiencies. In such case an appropriate Change Order shall be issued deducting from the payments then or thereafter due the D/B Company for the cost of correcting such deficiencies, including compensation for the County's Agents or Professional consultants for additional services made necessary by such default, neglect or failure. If the payments then or thereafter due the county are not sufficient to cover such amount, the D/B Company shall pay the difference to the County.

**SECTION 4.6 OTHER CONTRACT** Other Work at Existing or New Sites The County may award other contracts for additional work, other than the D/B Work at the existing site or the new site, and the D/B Company shall fully cooperate with such other entity in order to avoid any interference with each others work. The award of other contracts or the performance of additional work at the existing site and/or new site does not in and of itself constitute interference with the D/B Work. The D/B Company will have to provide detailed documentation to support any claim of interference with D/B Work prior to the start of other work at the existing site and/or new site.

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**ARTICLE 5**  
**D/B COMPANY**

**SECTION 5.1 DEFINITIONS**

5.1.1 The D/B Company The person or entity identified as such herein. The Term "D/B Company" means the D/B Company or the D/B Company's designated representative. The D/B Company is the prime entity that provides program verification, professional design and engineering services, space planning, construction services including labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, furnishings, equipment and other facilities and services for execution and completion of the Design/Build D/B Work, whether temporary or permanent and whether or not incorporated or to be incorporated into the Design/Build D/B Work. The term "D/B Company" shall be taken to include the D/B Company's sub-contractors, and other entities providing design, engineering, materials, labor and construction services for execution of the Design/Build D/B Work.

**SECTION 5.2 REPRESENTATIONS AND WARRANTIES OF THE D/B COMPANY** The D/B Company represents and warrants that:

5.2.1 Existence and Powers The D/B Company is a corporation duly organized, validly existing and in good standing under the laws of the State of [REDACTED] and fully authorized to do business in the State of Georgia, with the full legal right, power and authority to enter into and perform its obligations under this Design/Build Contract;

5.2.2 Due Authorization and Binding Obligation This Design/Build Contract has been duly authorized, executed and delivered by all necessary corporate action of the D/B Company and constitutes a legal, valid and binding obligation of the D/B Company, enforceable against the D/B Company in accordance with its terms, except to the extent that its enforceability may be limited by constitutional, bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and by equitable principles of general application;

5.2.3 No Conflict To its knowledge, neither the execution nor delivery by the D/B Company of this Design/Build Contract nor the performance by the D/B Company of its obligations in connection with the transactions contemplated hereby or the fulfillment by the D/B Company of the terms or conditions hereof: (a) conflicts with, violates or results in a breach of any law or governmental regulation applicable to the D/B Company; or (b) conflicts with, violates or results in a breach of any order, judgment or decree, or any contract, agreement or instrument to which the D/B Company is a party or by which the D/B Company or any of its properties or assets are bound, or constitutes a default under any of the foregoing;

5.2.4 No Approvals Required No approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Body is required for the valid execution and

delivery of this Design/Build Contract by the D/B Company or the performance of its payment or other obligations hereunder except such as have been duly obtained or made;

5.2.5 No Litigation Except as disclosed in writing to the County in a certification of an officer of the D/B Company addressed to the County simultaneously with the execution and delivery of this Design/Build Contract, there is no Legal Proceeding before or by any Governmental Body pending or, to the D/B Company's knowledge, overtly threatened or publicly announced against the D/B Company or the Guarantor, in which an unfavorable decision, ruling or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Design/Build Contract by the D/B Company, or the validity, legality or enforceability of this Design/Build Contract against the D/B Company or any other agreement or instrument entered into by the D/B Company in connection with the transactions contemplated hereby, or on the ability of the D/B Company to perform its obligations hereunder or under any such other agreement or instrument.

5.2.6 Claims and Demands Except as disclosed in writing to the County in a certification of an officer of the D/B Company addressed to the County simultaneously with the execution and delivery of this Design/Build Contract, there are no material and adverse claims and demands based in environmental, contract or tort law pending or to its knowledge, threatened against the D/B Company or any Affiliate of the D/B Company, or the Guarantor or any Affiliate of the Guarantor with respect to any water or wastewater plant designed, constructed, operated, maintained or managed by any of the foregoing.

5.2.7 Governmental Approvals The D/B Company has or will obtain in the course of its performance hereunder, either directly or through qualified Subcontractors, the Governmental Approvals which the D/B Company must obtain in its own name or that of its Subcontractors to provide the contract services.

5.2.8 Applicable Law Compliance Except as disclosed in writing to the County in a certification of an officer of the D/B Company addressed to the County simultaneously with the execution and delivery of this Design/Build Contract, to its knowledge, the D/B Company is not in material violation of any law, order, rule or regulation applicable to any water or wastewater plant designed, constructed, operated, maintained or managed by the D/B Company or any Affiliate of the D/B Company.

5.2.9 Practicability of Performance The Minimum Technical Requirements, the technology and the construction practices to be employed in the construction of the JCEC are furnished exclusively by the D/B Company pursuant to the terms of this Design/Build Contract, and the D/B Company assumes and shall have exclusive responsibility for their efficacy, notwithstanding the inclusion of design drawings, specifications, design principles or other terms and conditions in the RFP or the negotiation of the terms of the Minimum Technical Requirements, Acceptance Test Procedures and Standards, and Performance Guarantees between the D/B Company and the County. The D/B Company assumes the risk of the practicability and possibility of performance of the Design/Build Project on the scale, within the time for completion and in the manner required hereunder, and of treating Influent through the acceptance period operation of the JCEC in a manner which meets all of the requirements hereof, even

though such performance and operation may involve technological or market breakthroughs or overcoming facts, events or circumstances which may be different from those assumed by the D/B Company in entering into this Design/Build Contract, and agrees that sufficient consideration for the assumption of such risks and duties is included in the Fixed Design/Build. No impracticability or impossibility of any of the foregoing shall be deemed to constitute an Uncontrollable Circumstance.

5.2.10 Patents and Licenses The D/B Company owns, or is expressly authorized to use under patent rights, licenses, franchises, trademarks or copyrights, the technology necessary for the Design/Build Work without any material conflict with the rights of others, and the D/B Company is authorized to assign the right to use such technology to the County upon termination of this Design/Build Contract or expiration of the Term without any further approvals, and shall bear all cost incurred by the County in obtaining same should this not be the case.

5.2.11 Information Supplied by the D/B Company The information supplied and representations and warranties made by the D/B Company and the Guarantor in all submittals made in response to the RFP and in all post-proposal submittals with respect to the D/B Company and the Guarantor (and, to its knowledge, all information supplied in such submittals with respect to any such Subcontractor) are true, correct and complete in all material respects.

### **SECTION 5.3 D/B COMPANY'S ARCHITECTS AND ENGINEERS**

5.3.1 Architect and Engineer of Record Architects and engineers utilized in the performance of the D/B Work in the capacity of Architect and Engineer(s) of Record, and those who review and approve the design of architectural, structural, civil, mechanical, electrical, and other engineering features of the D/B Work, shall be legally licensed in the State of Georgia. Design and engineering services shall be performed by qualified architects, engineers and other professionals selected and paid for by the D/B Company.

5.3.2 Responsibilities Generally The D/B Company's architects and engineers shall fully develop the complete interior space planning, architectural design, building systems engineering and design, and site development engineering and design, including the preparation of construction drawings and specifications as necessary, to produce the constructed facility in a complete, finished, and operable condition.

5.3.3 Reviews and Approvals The D/B Company's architects and engineers shall be responsible, as the Architects and Engineers of Record, for review and approval of shop drawings, product data, and samples produced by the D/B Company and its subcontractors.

5.3.4 Site Visits The D/B Company's architects and engineers shall visit the site at intervals appropriate to the stage of construction to become familiar with the progress and quality of the D/B Work and to determine in general if the D/B Work is proceeding in accordance with the D/B Contract Documents. Field observation reports shall be produced and distributed for each site visit.

**SECTION 5.4 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY THE D/B COMPANY** Starting upon the D/B Company's receipt of the Notice to Proceed, the D/B Company shall again carefully study and compare the Contract Documents and field conditions of the jobsite and shall immediately report to the Construction Manager any error, inconsistency, ambiguity or omission that may be discovered; or, if no such errors, inconsistencies, ambiguities or omissions are found, the D/B Company shall so state in writing to the Construction Manager.

**SECTION 5.5 LABOR AND MATERIALS**

5.5.1 Timely Payment The D/B Company shall provide and timely pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the D/B Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the D/B Work.

**SECTION 5.6 WARRANTY OF MATERIALS AND EQUIPMENT FURNISHED** The D/B Company warrants to the County that all materials and equipment furnished under this Contract shall be new unless otherwise specified, and that all D/B Work shall be of good, first quality, free from faults and defects and in conformance with the Contract Documents. All D/B Work not conforming to these requirements, including substitutions not properly approved and authorized by the County, may be considered defective. If required by the County, the D/B Company shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty is not limited by the provisions under Paragraph 12.2 of this Agreement.

**SECTION 5.7 TAXES** The D/B Company shall pay all sales, consumer, use and other similar taxes for the D/B Work or portions thereof provided by the D/B Company which are legally enacted at the time proposals or bids are received, whether or not yet effective at time of bid.

**SECTION 5.8 PERMITS, FEES AND NOTICES**

5.8.1 Permits and Fees The D/B Company shall apply for, pay for and secure all permits required for the proper execution of the D/B Work. There will be no charge for demolition and building permits issued by Fulton County. The D/B Company shall secure and pay for all other permits and governmental fees required to execute the D/B Work, including but not limited to licenses and inspections necessary for the proper execution and completion of the D/B Work, and for the occupancy of the D/B Work upon Substantial Completion and which are legally required at the time bids are received. Other permits required by any department of Fulton County Government or any other jurisdiction must be obtained by the D/B Company. D/B Company shall be responsible for obtaining interim and/or final Certificates of Occupancy from the authority having jurisdiction. The D/B Company shall be responsible

for all costs which may be necessary in order to obtain these certificates, with the exception of those defined below. D/B Company shall be responsible for acquiring and installing water and sewer taps for the project including all fees. Cost of meters and other materials and labor shall be the responsibility of the D/B Company.

5.8.2 Notices The D/B Company shall give all notices and comply with all laws, codes, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction which bear on the performance of the D/B Work. The Construction Manager shall be notified within two (2) days in writing of any jurisdiction observations or inspections that require changes to the design and engineering requirements in the Contract Documents.

5.8.3 Construction Documents It is the responsibility of the D/B Company to make certain that the Construction Documents are in accordance with applicable laws, statutes, building codes and regulations. If the D/B Company observes that any of the Construction Documents are at variance therewith in any respect, the D/B Company shall promptly rectify such variance at no cost to the County. Should such variance be due to any inaccuracy or inconsistency in the Contract Documents made part of this Agreement, the D/B Company shall notify the Construction Manager in writing, and any necessary changes shall be accomplished by appropriate modification. All necessary modifications which result from such conflicts shall be issued to the D/B Company in writing by the Construction Manager.

5.8.4 Responsibility for Inaccurate or Inconsistent Work If the D/B Company performs any D/B Work knowing it to be contrary to applicable laws, statutes, building codes, and regulations, and the source of the conflict is an inaccuracy or inconsistency in the Contract Documents made part of this Agreement, and such D/B Work is performed without notice of such having been made to the Construction Manager, the D/B Company shall assume full responsibility therefor and shall bear all direct and indirect costs and liabilities attributable thereto. None the less, as to designer and builder, the D/B Company shall be solely responsible for any work contrary to law or applicable codes.

## **SECTION 5.9 ALLOWANCES**

5.9.1 Included in the Fixed D/B Price The D/B Company shall include in the contract sum all allowances stated in the Contract Documents. Descriptions of allowances, if any, are found in the Appendix 20 with definitions.

5.9.2 Monetary amounts allowances have been stipulated in Appendix 20 Allowances. The performance or non-performance of D/B Work under an allowance is solely at the discretion of the County. Allowances are provided for D/B Work that may or may not be required and may or may not have been defined at the time of the solicitation. D/B Company shall be entitled to receive payment for only those portions of the allowance authorized.

## **SECTION 5.10 PROJECT MANAGEMENT**

5.10.1 Qualified Personnel The D/B Company shall provide qualified personnel to supervise and direct the D/B Work. The D/B Company shall be solely responsible for all design, engineering, space planning, construction, fabrication, delivery, erection, installation, means, methods, techniques, sequences and procedures, and shall coordinate all portions of the D/B Work.

5.10.2 Acts and Omissions The D/B Company shall be responsible to the County for the acts and omissions of the D/B Company's officers, directors, consultants, employees, architects, suppliers, engineers, contractors, subcontractors and their agents and employees, and any other persons performing any of the D/B Work.

5.10.3 Program/Construction Managers The D/B Company shall not be relieved from obligations to perform the D/B Work in accordance with the County requirements, either by the activities or duties of the Program Manager or the Construction Manager in the administration of the Contract, or by inspections, tests or reviews required or performed by persons other than the D/B Company.

5.10.4 Documents Distribution The D/B Company shall be responsible for printing and distribution of documents including reports, schedules, Plans, drawings and Project Manuals, submittals and other documents associated with the D/B Work in accordance with Appendices 10, 12 and 13.

5.10.5 Personnel Performance The D/B Company shall enforce discipline and good order at all times among the D/B Company's employees and all Subcontractors. All persons engaged by the D/B Company for Design/Build Work shall have all required applicable licenses and requisite skills, for the tasks assigned. The D/B Company shall employ or engage and compensate engineers and other consultants to perform all engineering and other services required for the Design/Build Work. Each such engineer and consultant shall have a current professional registration or certification to practice in the State if required by Applicable Law.

5.10.6 Senior Supervisors The D/B Company shall appoint and inform the County of the identity of the corporate officials of the D/B Company and the Guarantor with senior supervisory responsibility from time to time for the D/B Work and the performance of this Design/Build Contract (the "Senior Supervisors"). The D/B Company shall promptly notify in writing to the County of the appointment of any successor Senior Supervisors. The Senior Supervisors shall cooperate with the County in any reviews of the performance of the Project Manager which the County may undertake from time to time, and shall give full consideration to any issues raised by the County in conducting such performance reviews.

5.10.7 Project Manager The D/B Company shall appoint a full-time manager for the D/B Work (the "Project Manager") who shall be trained, experienced and proficient in the management of design/build projects and the design and construction of wastewater treatment system projects comparable to the JCLC project, and whose sole employment responsibility shall be managing the D/B Company's performance of the Design/Build D/B Work.

5.10.8 Construction Superintendent The D/B Company shall designate a D/B Company Construction Superintendent, subordinate to the Project Manager, who shall be present on the Site with any necessary assistants on a full time basis when the D/B Company or any Subcontractor is performing Design/Build Work.

5.10.9 Other Management Personal The D/B Company shall appoint in accordance with Section 6.12 other management personal as required to effectively manage the D/B Work.

5.10.10 Good Order The D/B Company shall at all times enforce strict discipline and good order among the D/B Company's employees and shall not employ on the D/B Work any unfit person or anyone not skilled in the task assigned them.

#### **SECTION 5.11 D/B COMPANY'S DESIGN/BUILD SCHEDULE**

5.11.1 Submission of Schedule The D/B Company shall prepare and submit for the Construction Manager's review a detailed D/B Company's Design/Build Schedule for the D/B Work in accordance with Appendix 12. The schedule shall not exceed time limits as indicated in the D/B Company's proposal or under this. Schedules shall be kept current and updated and submitted monthly in accordance with Appendix 12.

5.11.2 All Submittals Reflected on Schedule The D/B Company shall prepare and keep current, for the Construction Manager's review, a schedule of submittals which is coordinated with the D/B Company's design and construction schedule. Schedule shall show submittal date, date sent to D/B Company's architects and engineers, date sent to Construction Manager, date received from D/B Company's architects and engineers and Construction Manager, dates of receipt from and return to subcontractors and suppliers, and action taken.

**SECTION 5.12 DOCUMENTS AND SAMPLES AT THE SITE** The D/B Company shall maintain at the Project site, on a current basis, one record copy of all Drawings, Specifications, Submittals, Samples, Product Data, Addenda, Change Orders, Modifications and other documents related to the D/B Work in good order and marked currently to record all changes made during construction. These shall be available to the Construction Manager and shall be delivered to the Construction Manager for submittal to the County upon completion of the D/B Work. The D/B Company shall advise the Construction Manager on a current basis of all changes in the D/B Work made during construction.

#### **SECTION 5.13 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES**

5.13.1 Submittal Register The D/B Company shall prepare and submit to the Construction Manager, per the procedures contained in Appendices 10, 12, and 13, a comprehensive Submittal Register for review and approval by the Construction Manager.

5.13.2 Submittal Promptness The D/B Company shall prepare, review, approve and submit to its architects and engineers, and to the Construction Manager if required, with reasonable

promptness and in such sequence as to cause no delay in the D/B Work or to any separate contractor, all Shop Drawings, Product Data and Samples required by the Contract Documents. The D/B Company shall coordinate its Shop Drawings, Product Data and Samples with those of other separate contractors, if any.

5.13.3 D/B Company Representations In approving and submitting Shop Drawings, Product Data, and Samples, the D/B Company represents that he has determined and verified all materials, field measurements and field construction criteria related thereto, or shall do so with reasonable promptness, and has checked and coordinated the information contained within such submittals between all trades and with the requirements of the D/B Work, the Project and the Contract Documents.

#### **SECTION 5.14 SAFETY AND SECURITY**

5.14.1 Safety The D/B Company shall maintain the safety of the services at a level consistent with the Contract Standards and Appendices 9B and 10. Without limiting the foregoing, the D/B Company shall: (1) take all reasonable precautions for the safety of, and provide all reasonable protection to prevent damage, injury or loss by reason of or related to the construction of the D/B Work to, (a) all employees working at the Site and all other persons who may be involved with the operation, construction, maintenance, repair and replacement of the D/B Work, (b) all visitors to the Site, (c) all materials and equipment under the care, custody or control of the D/B Company on the Site, (d) other property constituting part of the Existing Site or New Site, and (e) County Property; (2) establish and enforce all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards and promulgating safety regulations; (3) give all notices and comply with all Applicable Law relating to the safety of persons or property or their protection from damage, injury or loss; (4) designate a qualified and responsible employee at the Site, The Site Safety Representative, whose duty shall be the supervision of plant safety, the prevention of fires and accidents and the coordination of such activities as shall be necessary with federal, State and County officials; (5) during Equipment and Start-up Testing and Acceptance Testing operate all equipment in a manner consistent with the manufacturer's safety recommendations; (6) provide for safe and orderly vehicular movements; and (7) develop and carry out a Site-specific Project Safety and Health Program, including employee training and periodic inspections, designed to implement the requirements of this Section.

5.14.2 OSHA The D/B Company shall construct all D/B Work and take all other actions which may be required in order to bring the JCEC in compliance with the Occupational Safety and Health Act as in effect on the Contract Date at the cost and expense of the Company. Compensation for any such actions or other actions shall be solely through the Fixed Design/Build Price. Any amendments to the Occupational Safety and Health Act or the regulations thereunder which take effect after the Contract Date shall constitute a Change in Law.

5.14.3 Security The D/B Company shall be responsible for the security of the Site, the D/B Work, the D/B Project and the JCEC from the Notice to Proceed until County Assumes Operational Responsibility, and shall maintain suitable fences, gates and locks at the Site. The Company shall guard

against and be responsible for all damage or injury to such properties caused by trespass, negligence, vandalism or malicious mischief of third parties, and shall provide for safe and orderly vehicular movement.

**SECTION 5.15 USE OF SITE** The D/B Company shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents, and shall not unreasonably encumber the site with any materials or equipment. The D/B Company shall control accessibility to the site and not unreasonably impede the normal flow of traffic in the vicinity, including truck and equipment entrances, allowable use of contiguous sidewalks and streets, and parking facilities.

**SECTION 5.16 UTILITIES** The D/B Company shall coordinate and be responsible for all connections to the existing and/or new utilities.

**SECTION 5.17 CLEANING UP**

5.17.1 D/B Company In accordance with Appendix 10 the D/B Company shall at all times keep the premises free from accumulation of waste materials or rubbish caused by the D/B Company's operations, and shall adhere to all of the terms of the General Requirements. At the completion of the D/B Work, the D/B Company shall remove all the waste materials and rubbish from and about the Project as well as all the tools, construction equipment, machinery and surplus materials.

5.17.2 County Rights If the D/B Company fails to clean up adequately, the County may do so as provided in Section 4.4 of this Agreement, and the cost thereof shall be charged directly as a deduct to the Contract Sum.

**SECTION 5.18 COMMUNICATIONS AND MEETINGS** On or before the Design/Build Date, the D/B Company shall inform the County of the telephone, fax and beeper numbers, e-mail address and other means by which the Project Manager and Senior Supervisors may be contacted. The County shall furnish to the D/B Company comparable communications information with respect to the Construction Manager. The D/B Company shall meet with the Construction Manager each month in accordance with Appendix 10 to review the content of the Project Managers reports required to be prepared pursuant to Appendix 10. The Project Manager and, if requested by the County, the Senior Supervisors each shall personally attend the monthly meetings with the County, and all special meetings which may be reasonably requested from time to time, to review management, operational, performance and planning matters arising with respect to the D/B Work and this Design/Build Contract. Any issue in dispute which the parties are unable to resolve at such monthly and special meetings may be referred for Non-Binding Mediation pursuant to Section 12.10 and resolution of any issue resolved at such meetings or through Non-Binding Mediation shall be reflected in a Contract Administration Memorandum.

**SECTION 5.19 CUSTOMER SERVICE**

5.19.1 Public Education and Community Outreach Plan The D/B Company shall prepare and deliver to the County in accordance with Appendix 19, a Public Education and Community Outreach Plan, which plan shall be based upon the outline contained in Appendix 19

5.19.2 Single Point of Contact The D/B Company shall create and support a single point of contact for all complaints, and communications received by the D/B Company and/or the County regarding the Design/Build Project, the D/B Work, or related issues. The D/B Company shall respond in a timely and effective manner to all such complaints and communications received by the D/B Company and/or the County regarding the design, construction, any environmental issues regarding wastewater, stormwater, odor and air emissions, noise, or any other matter related to the Contract services. The D/B Company shall investigate each such complaint and communication and, the D/B Company shall promptly rectify any physical discrepancy and respond back to the source of the inquiry within 24 hours. All customer communications shall be immediately logged and promptly responded to in writing, faxed to the County on a daily basis, and reported to the County as part of the routine project reports delivered pursuant to Article 6. The D/B Company shall establish, maintain and make freely known a telephone number, e-mail address and mailing address to which customer complaints and communications may be directed.

5.19.3 Relations with Participating Communities The D/B Company shall cooperate with and assist the County in performing its obligations under its agreements with the Participating Communities relating to the JCEC, including providing all information, data and reports required under such agreements. The D/B Company shall indemnify and hold harmless the County, in the manner provided in Section 11.4, from any Loss-and-Expense resulting under such agreements from any failure to perform obligations owed to a Participating Community thereunder to the extent the Loss-and-Expense is attributable to an unexcused failure by the D/B Company to perform the Contract Services.

**SECTION 5.20 COPYRIGHT, ROYALTIES AND PATENTS**

5.20.1 The documents, including but not limited to all plans, designs, drawings, specifications, shop drawings and other documentation resulting from the design, engineering and construction services, shall become the sole property, custody and control of Fulton County. The D/B Company or any other entity associated with the documents shall not receive any additional compensation in the future if Fulton County uses the documents for use in planning, design, engineering and construction of any future project.

5.20.2 The D/B Company shall pay all royalties and license fees, shall defend all suits or claims for infringement of any patent rights, and shall hold the County, the Program Manager, the Construction Manager, and other consultants of the County for the Project, and their agents and employees, harmless from loss on account thereof. If the D/B Company has reason to believe that the design, process or product selected is an infringement of a patent, it shall be responsible for such loss unless such information is promptly given to the County.

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**ARTICLE 6**  
**DESIGN/BUILD OF THE DESIGN/BUILD PROJECT**

**SECTION 6.1. DESIGN/BUILD GENERALLY.**

6.1.1 Elements of the Design/Build Work In performing the Design/Build Work generally, the Company shall, in accordance with the Contract Standards and without limitation, as and to the extent applicable hereunder: (1) prepare and excavate the New Plant Realty; (2) provide for all Utility infrastructure; (3) remove from the New Plant Realty and dispose of any demolition or construction debris resulting from the Design/Build Work and any excess soil excavated therefrom; (6) design and construct the Design/Build Project; (6) conduct start up operations; and (6) conduct the Acceptance Tests, all so that the Design/Build Work is suitable and adequate for the purposes thereof. Laydown and staging areas for construction materials shall be located on the New Plant Realty, or at other locations approved by the County and arranged and paid for by the D/B Company.

6.1.2 Commencement of Design/Build Work On the Design/Build Date, the County shall issue a written Notice to Proceed to the D/B Company to begin the Design/Build Work and thereupon the Design/Build Period shall commence. Immediately following the receipt of the County's written Notice to Proceed, the D/B Company shall commence and proceed to undertake, perform and complete the Design/Build Work in accordance with the D/B Contract Standards. Following receipt of the Notice to Proceed the D/B Company may commence design work, procurement of equipment, investigation of the site and other non-construction activities of the Design/Build Work. Construction activities are not authorized to commence until a Notice to Proceed-Construction is issued in accordance with section 6.5. The time to Acceptance of the Design/Build Project shall be computed from the Design/Build Date as proposed in the D/B Company's Design/Build Schedule. This period can not exceed the term of the D/B Contract as provided in Article 2. The D/B Company's failure to achieve Acceptance on or before the Scheduled Acceptance Date shall result in the assessment of delay liquidated damages under Section 7.9.

6.1.3 Conditions to Commencement of Design/Build Work Promptly following the Contract Date, the D/B Company shall proceed at its own cost and expense to exercise good faith and due diligence in order to satisfy all of the following D/B Company responsibilities, continuously, expeditiously and as soon as practicable:

[1] Governmental Approvals The D/B Company has obtained, on its own behalf or behalf of the County as applicant, all Governmental Approvals necessary to commence or proceed with the design of the Design/Build Work in form and substance satisfactory to the County with respect to the JCEC.

[2] Environmental Notification Forms and Impact Reports The D/B Company has prepared and properly submitted any environmental notification forms and impact reports with respect to the Design/Build Work which is required under Applicable Law to undertake and complete the Design/Build Project.

[3] Utilities The D/B Company has made all arrangements necessary to secure the availability of all Utilities required to construct the Design/Build Project in the capacities required hereunder, and has evidenced such availability by letters or other appropriate assurances from the providers of such Utilities;

[4] Design Drawings The D/B Company has submitted to the Construction Manager the Conceptual Design Submittal as detailed in Appendix 10.

[5] Required Design/Build Period Insurance The D/B Company has obtained and submitted to the County certificates of insurance for all Required Construction Period Insurance for the Design/Build Period specified in Appendix 9A;

[6] Site Plan The D/B Company shall prepare or have prepared a site plan showing (a) the exact dimensions and locations of the proposed New Plant; (b) the exact location of all means of access thereto and all easements relating thereto; (c) that the proposed location of the Design/Build Work is in compliance with all applicable building and set-back lines and does not encroach on or interfere with existing easements (whether on, above or below ground) nor any wetland or wetland buffers; and (d) no encroachments from the Design/Build Work extending to adjacent property or from adjacent property onto the Site, nor any gaps, gores, projections, protrusions or other survey defects;

[7] Guarantor and D/B Company Law Compliance The Guarantor and the D/B Company certify that they are in substantial compliance with all laws, regulations, rules and orders applicable to their businesses, non-compliance with which would have a material effect upon their businesses or their ability to perform their respective obligations under this Agreement, or the Guaranty.

[8] Confirmation of Guaranty The Guarantor shall execute and deliver confirmations to the County that the Guaranty as executed on the Contract Date remains in full force and effect;

[9] Representations The D/B Company and the Guarantor shall certify that, respectively, the representations of the D/B Company set forth in Section 5.2 hereof and of the Guarantor set forth in the Guaranty shall be true and correct in all material respects as of the Design/Build Date, and the D/B Company and the Guarantor shall deliver to the County a certificate of an authorized officer to that effect;

[10] Documents Evidencing Required Activities The D/B Company shall have provided to the County copies of all filing and reports conducted, prepared or obtained with respect to or evidencing the D/B Company's activities pursuant to this Section;

[11] Financial Condition The D/B Company shall provide audited consolidated financial statements of the Guarantor and unaudited financial statements of the D/B Company for the most recently completed fiscal year and a certificate certified by an authorized officer of the Guarantor stating that as of the quarter immediately preceding the Design/Build Date

the Guarantor meets or exceeds the Minimum Financial Criteria. Since the Contract Date, there shall not have occurred any change, financial or otherwise, in the condition of the D/B Company or the Guarantor that would materially and adversely affect the ability of the D/B Company to perform its obligations under this Agreement or the Guarantor to perform its obligations under the Guaranty;

[12] Counsel Opinions The D/B Company shall deliver to the County such favorable opinions of counsel for the D/B Company as to the agreements to be entered into in connection with the transactions contemplated hereby, in customary form for financing transactions, as to the matters of law covered by the representations of the D/B Company set forth in Section 5.2 hereof, the representations of the Guarantor set forth in the Guaranty, similar matters of law with respect to such other agreements and as to such other matters of law as the County may reasonably request, together with appropriate certified authorized resolutions and incumbency certificates;

[13] Construction Schedule The D/B Company shall prepare and provide to the County the Design/Build Schedule detailing the anticipated dates corresponding to the occurrence of critical path items in connection with the Design/Build Work;

[14] Technology Supply Agreement The D/B Company shall provide the County a copy of all Technology Supply Agreements including but not limited to the Technology Supply Agreement or other contractual agreement between the D/B Company and the Membrane Supplier.

6.1.4 Additional Conditions to Design/Build Date

[1] Availability of Funds The proceeds of the bond issuance which the County has obtained for the Design/Build Work, and the proceeds of any other financing transaction entered into by the County, are available for disbursement in an amount at least equal to the Design/Build Price set forth herein, and all preconditions to the disbursement of proceeds (other than the submission of authorized Requisitions) shall have been satisfied prior to.

[2] Satisfaction of Conditions Upon the satisfaction or waiver of all of the conditions set forth in Sections 6.1.3 and 6.1.4 above, the parties shall hold a formal closing acknowledging such satisfaction and certifying that the Design/Build Date has occurred. The date of such closing shall be deemed the "Design/Build Date", and thereupon the County shall issue a Notice-to-Proceed. Original or certified copies of all of the documents or instruments constituting or evidencing satisfaction of such conditions shall be furnished to each party prior to or on the Design/Build Date.

6.1.5 Failure of Conditions for the Design/Build Date If by the first anniversary of the Contract Date, or such later date upon which the County and the D/B Company may agree, any conditions to the issuance of a Notice-to-Proceed set forth in subsections 6.1.3 and 6.1.4, despite the good faith efforts of the parties, have not been achieved, or waived in writing, either party may, by notice in

writing to the other party, terminate this Agreement. Neither party shall be liable to the other for the termination of this Agreement pursuant to this subsection 6.1.5 and each of the parties shall bear its respective costs and expenses incurred in seeking to satisfy the conditions of the Design/Build Date, except that following such a termination, the County shall reimburse the D/B Company its Cost-Substantiated costs incurred directly by the D/B Company and any expenses paid or incurred to third parties from the Contract Date to the termination date hereunder, which are directly related to the performance of the D/B Company's obligations relating to achieving the Design/Build Date, and which are necessary to be performed prior to the Design/Build Date ("Reimbursable Expenses") subject to a maximum amount of \$300,000. Notwithstanding the above, in the event the D/B Company fails to achieve any of the conditions set forth in subsection 6.1.3 prior to the date the notice of termination and such failure is not due to Uncontrollable Circumstances, the County shall have no payment obligation hereunder.

6.1.6 County Suspension Option During the Design/Build Period The County shall have the right at any time prior to the Design/Build Date, exercisable in its sole discretion for any reason by three business days' written notice to the D/B Company and without terminating this Agreement, to suspend the obligation of the D/B Company and the County to seek the fulfillment of the conditions to the Design/Build Date. Upon any such suspension, the County shall reimburse the D/B Company, subject to Cost Substantiation and the maximum reimbursement limitation of \$300,000, for 100% of its Reimbursable Expenses. The D/B Company shall not be further obligated during the suspension to seek to fulfill the conditions. The County may in its sole discretion at any time thereafter, upon written notice to the D/B Company, reinstate the obligations of the D/B Company to fulfill the conditions, and thereupon an amount equal to all Reimbursable Expenses previously reimbursed to the D/B Company shall be deducted from the Design/Build Price and the obligations of the D/B Company shall resume.

## **SECTION 6.2 D/B COMPANY PERMITTING.**

6.2.1 Applications for Governmental Approvals The D/B Company shall make all applications (except with respect to the renewal of the NPDES Permits as described below) and take all other action necessary to obtain and maintain all Governmental Approvals necessary to construct the Design/Build Project to commence and complete the D/B Work and to operate during the acceptance period the JCEC. Where required under Applicable Law, such applications shall be made in the name of the County, subject to the County's rights hereunder. The D/B Company shall manage the process of obtaining the Governmental Approvals on behalf of the County for which it is responsible hereunder in a manner which affords the County a reasonable opportunity to review and comment upon material documentation submitted to and issued by any Governmental Body in connection therewith.

6.2.2 No County Liability While it is the County's intention to provide reasonable assistance to the D/B Company in carrying out its obligations under this Section, the County shall have no legal or contractual obligation to do so, nor shall the County have any liability for the quality, quantity or timeliness of any such assistance it may provide. The D/B Company hereby waives any right to

make a claim, counterclaim or setoff against the County for any matter arising out of any action or inaction on the part of the County relating to the process of obtaining Governmental Approvals with respect to the Design/Build Improvements.

6.2.3 D/B Company Assumption of Permitting Risk Except, and to the extent, as set forth in subsection 6.1.5 the D/B Company assumes the risk of obtaining and maintaining all Governmental Approvals required under this Section including, without limitation, the risk of delay, nonissuance or imposition of any term or condition in connection therewith by a Governmental Body for any reason, and agrees that the occurrence of such risk shall not constitute a Change in Law or Uncontrollable Circumstance hereunder. Except, and to the extent, as set forth in subsection 6.1.5 the cost of any additions or changes to the D/B Work arising in any manner out of the process of obtaining Governmental Approvals for the construction of the Design/Build Project shall be for the account of the D/B Company. Delay in the issuance of any Governmental Approval required for the construction of the Design/Build Project shall not operate to increase the Fixed Design/Build Price but, as and to the extent provided in Section 7.9, shall extend the Scheduled Acceptance Date.

6.2.4 Change in Law Not Related to Governmental Approvals Any Change in Law which requires a modification to the design of the Design/Build Project, and with respect to which the D/B Company has not assumed risk under this Section, shall be handled as a Change in Law in accordance with Article 8 and Section 11.3.

### **SECTION 6.3 THE SITE**

6.3.1 Suitability of Site The D/B Company's agents and representatives have visited, inspected and are generally familiar with the New Site and, its physical conditions relevant to the obligations of the D/B Company pursuant to this Design/Build Contract, including surface conditions, normal and usual soil conditions, roads, utilities, topographical conditions and air and water quality conditions. The D/B Company has performed all subsurface and other investigations necessary to determine the suitability of the Site for foundation D/B Work; is familiar with all Site, local and other conditions which may be material to the D/B Company's performance of its obligations under this Design/Build Contract (including, but not limited to transportation; seasons and climate; access, availability, disposal, handling and storage of materials and equipment; and availability and quality of labor and utilities); and has received and reviewed the information regarding the Site contained in the Site Related Documents. Based on the foregoing, the D/B Company is not aware of any condition which would make the Site unsuitable for the construction and operation of the Design/Build Project in accordance herewith. The investigations referred to in this subsection, performed with this objective, did not reveal the presence of Hazardous Material on the Site.

6.3.2 Pre-Existing Environmental Conditions The D/B Company shall construct the JCEC so as not to aggravate the effect of any Pre-Existing Environmental Condition. If at any time a Pre-Existing Environmental Condition is determined to exist which requires an action under Applicable

Law, then the County shall within 60 days after written notice from any Governmental Body or the D/B Company of the presence or existence thereof, commence and diligently prosecute such actions as may be necessary to dispose of, remediate or otherwise correct the Pre-Existing Environmental Condition or otherwise make the Pre-Existing Environmental Condition comply with Applicable Law. The County shall have the right to contest any determination of a Pre-Existing Environmental Condition and shall not be required to take any action under this subsection so long as: (1) the County is contesting any determination of a Pre-Existing Environmental Condition in good faith by appropriate proceedings conducted with due diligence; and (2) Applicable Law permits continued construction of the JCEC pending resolution of the contest, so that the Company shall have no liability as a result of the failure of the County to dispose of, remediate or otherwise correct such purported Pre-Existing Environmental Condition during the period of contest.

**6.3.3 Familiarity with The Site** The D/B Company acknowledges that: (1) the Company's agents and representatives have visited, inspected, observed and are familiar with the Site and the physical condition relevant to the obligations of the D/B Company pursuant to this D/B Contract, including roads, utilities, topographical conditions and historical Influent, Effluent and Residuals quality conditions of the existing plant; (2) the D/B Company is familiar with all current local conditions which may be material to the D/B Company's performance of its obligations under this D/B Contract (including, but not limited to, transportation; seasons, climate and ambient air; access, availability, handling, storage and disposal of materials, supplies, Residuals and equipment; and availability and quality of labor and utilities); (3) the Company has received, reviewed and independently verified the Reference Documents, the background documents provided in the RFP and all other records and information pertaining to the Design/Build Project that it has deemed necessary to receive, review and verify for the purposes of entering into and performing this D/B Contract, and assumes the risk of incompleteness or inaccuracy in any information provided to it by the County or third parties in the process of entering into this D/B Contract; and (4) based on the foregoing, the Design/Build work can be designed, constructed, started up, tested and accepted by the Scheduled Acceptance Dates, so as to comply with the Performance Guarantees and the other terms and conditions hereof.

**6.3.4 "As-Is" Condition of The Site** The County makes no representation or warranty with respect to the Site. Based on its inspections of the Site, and other inquiries and investigations made by the D/B Company prior to the Contract Date, which the Company acknowledges to be sufficient for this purpose, the D/B Company assumes the risk of the adequacy and sufficiency of the "as-is" condition of the Site.

**6.3.5 Limitations on the D/B Company's Assumption of "As-Is" Risk** It is specifically understood that the D/B Company's assumption of the "as-is" risk of the condition of the Site as provided in subsection 6.3.4 of this Section shall not extend to Pre-Existing Environmental Conditions. No other Uncontrollable Circumstance, however, shall relieve or limit the D/B Company's assumption of the "as-is" risk as provided in subsection 6.3.4

#### **.4 D/B COMPANY DESIGN**

6.4.1 Sole Responsibility and Liability The D/B Company shall have the sole and exclusive responsibility and liability for the design, construction and performance of the Design/Build Project hereunder, notwithstanding the Contract Standards or the fact that the RFP for the contract services included certain minimum conceptual design criteria for the Design/Build Work and certain performance standards that the Design/Build Project would be required to meet. The D/B Company shall indemnify, defend and hold harmless the County and the County Indemnitees in accordance with Section 5.21 from any Loss-and-Expense arising out of the design, construction or performance of the Design/Build Project. The D/B Company acknowledges that, in the proposal and negotiating process leading to the execution of this Design/Build Contract, the D/B Company had the unrestricted right and opportunity not to submit a proposal, and not to execute this Design/Build Contract if the D/B Company had determined that such minimum conceptual design criteria would in any manner or to any degree impair the D/B Company's ability to perform the Design/Build Work in compliance herewith.

6.4.2 Conformity of D/B Company Design Documents with Minimum Technical Requirements The D/B Company shall prepare all plans, technical specifications, drawings, blueprints and other design documents necessary or appropriate to carry out and complete the Design/Build Work. All D/B Company working and final design documents shall comply strictly with the Minimum Technical Requirements and shall ensure that the Design/Build Project is constructed to a standard of quality, integrity, durability and reliability which is equal to or better than the standard established by the Minimum Technical Requirements. The County shall have the right to review such design documents as provided in Appendix 10, but shall have no right of approval with respect thereto except in order to confirm the compliance and consistency of the design documents with the Minimum Technical Requirements. Neither compliance by the D/B Company with the Minimum Technical Requirements, nor review and approval by the County of the D/B Company's design documents, shall in any way relieve the D/B Company of full responsibility for the design, construction, operation and performance of the Design/Build Project in accordance with the Contract Standards. Architects and engineers engaged by the D/B Company for the Design/Build Project design services shall be experienced and qualified to perform such services and shall be licensed in the State of Georgia and shall be selected in the manner provided in Section 14.6.

6.4.3 County Interest in Minimum Technical Requirements The D/B Company acknowledges the County's material interest in each provision of the Minimum Technical Requirements and, notwithstanding the Acceptance Test Procedures and Standards and Performance Guarantees of the D/B Company and the associated non-performance remedies of the County, agrees that no change to the Minimum Technical Requirements shall be made except upon the terms and conditions set forth in this Section and pursuant to a Change Order.

6.4.4 Procedure for County Review of Design Submittals A protocol for submission of design submittals to the County and for County review and comment shall be established in accordance with Appendix 10. The County shall use good faith efforts to complete its review of each preliminary

design submittal within 30 days of receipt, or such longer period as the parties may agree, and shall notify the D/B Company of any concerns, problems or perceived non-compliance with the Minimum Technical Requirements of such submittal within that time. If the County does not respond within that time, the D/B Company shall not be prohibited from submitting such design package to the appropriate Governmental Body for review and approval provided, however, that the failure of the County to comment on any aspect of a design submittal shall in no way be deemed to be an approval or consent or in any way relieve the D/B Company of full responsibility for the design, construction, and performance of the D/B Work in accordance with the Contract Standards. If the D/B Company is notified of any such concerns, problems or perceived non-compliance with the Minimum Technical requirements, the D/B Company may resubmit as often as it chooses, with or without modification, and the County review and comment period upon each such re-submittal shall be 30 days. If a design review meeting has not been scheduled by the 20<sup>th</sup> day following a design submittal by the D/B Company, the D/B Company shall provide written notice to the County of the need to schedule such a meeting prior to the end of the 30 day review period. References to the County herein shall mean the Construction Manager. This subsection shall have no application to the County in a regulatory capacity.

6.4.5 Change in Law Affecting Design The parties acknowledge that a Change in Law may affect regulator standards or impose more stringent requirements relating to equipment or processes than those established hereunder as of the Contract Date. In the event a Change in Law occurs, the D/B Company shall not be entitled to relief or additional compensation for design hereunder unless (1) such Change in Law imposes a regulatory standard which is more stringent or burdensome than the D/B Contract Standards applicable to such requirement and/or requires equipment or processes design change, (2) the Notice to Proceed for Construction has been issued and the D/B Company has to change its design and resubmit it to a regulator agency for approval; and (3) the D/B Company is unable, after taking all mitigation measures required under Section 11.2 with respect to such a Change in Law, to avoid the necessity for such performance relief or additional compensation.

## **SECTION 6.5 D/B COMPANY CONSTRUCTION**

### **6.5.1 Notice to Proceed Construction**

[1] Governmental Approvals The D/B Company has obtained, on its own behalf or behalf of the County as applicant, all Governmental Approvals necessary to commence or proceed with the construction of the Design/Build Project in form and substance satisfactory to the County which with respect to the JCEC.

[2] Environmental Notification Forms and Impact Reports The D/B Company has prepared and properly submitted any environmental notification forms and impact reports with respect to the Design/Build Work which is required under Applicable Law to undertake and complete the Design/Build Project.

[3] Survey The D/B Company has prepared the survey of the New Plant

[4] Utilities The D/B Company has secured all Utilities required to construct the Design/Build Project in the capacities required hereunder, and has evidenced such availability by letters or other appropriate assurances from the providers of such Utilities;

[5] Design Drawings The D/B Company has submitted to the Construction Manager the Post Regulatory Review Design Submittal as detailed in Appendix 10.

[6] Required Design/Build Period Insurance The D/B Company has obtained and submitted to the County certificates of insurance for all Required Construction Period Insurance for the Design/Build Period specified in Appendix 9A;

[7] Site Conditions The D/B Company shall make all soil test borings, inspections and site history reviews of the Site necessary under good construction and engineering practice as preparation for excavation and construction hereunder in accordance with Applicable Law;

[8] Site Plan The D/B Company shall prepare or have prepared a site plan showing (a) the exact dimensions and locations of the proposed New Plant; (b) the exact location of all means of access thereto and all easements relating thereto; (c) that the proposed location of the Design/Build Work is in compliance with all applicable building and set-back lines and does not encroach on or interfere with existing easements (whether on, above or below ground) nor any wetland or wetland buffers; and (d) no encroachments from the Design/Build Work extending to adjacent property or from adjacent property onto the Site, nor any gaps, gores, projections, protrusions or other survey defects;

[9] Documents Evidencing Required Activities The D/B Company shall have provided to the County copies of all filing and reports conducted, prepared or obtained with respect to or evidencing the D/B Company's activities pursuant to this Section;

[10] Construction Schedule The D/B Company shall prepare and provide to the County the Design/Build Schedule detailing the anticipated dates corresponding to the occurrence of critical path items in connection with the Design/Build Work;

[11] Technology Supply Agreement The D/B Company shall provide the County a copy of all Technology Supply Agreements including but not limited to the Technology Supply Agreement or other contractual agreement between the D/B Company and the Membrane Supplier.

6.5.2 Construction Practice The D/B Company shall perform the Design/Build Work in accordance with the Contract Standards and shall have exclusive responsibility for all construction means, methods, techniques, sequences, and procedures necessary or desirable for the correct, prompt, and orderly prosecution and completion of the Design/Build Work as required by this Design/Build Contract. The responsibility to provide the construction means, methods, techniques, sequences and procedures referred to above shall include, but not be limited to, the obligation of the D/B Company to provide the

following construction requirements: temporary power and light; temporary offices and construction trailers; temporary construction related odor control measures; required design certifications; required approvals; weather protection; clean-up and housekeeping; construction trade management; temporary parking, vehicle traffic, safety and first aid facilities; correction of or compensation for defective work or equipment; Subcontractors' insurance; storage areas; workshops and warehouses, temporary fire protection; security; temporary Utilities, potable water; sanitary services; Subcontractor and vendor qualification; receipt and unloading of delivered materials and equipment; erection rigging; temporary supports; and construction coordination.

6.5.3 Title and Risk of Loss Title to the structures, improvements, fixtures, machinery, equipment and materials constituting the Design/Build Project shall pass to the County upon delivery to the New Plant Realty, incorporation in the Design/Build Work, or payment therefor by the County, whichever first occurs. The D/B Company shall, however, bear all risk of loss concerning such structures, improvements, fixtures, machinery, equipment and materials until the Acceptance Date has occurred, regardless of the extent to which the loss was insured or the availability of insurance proceeds.

6.5.4 Subcontracts Section 14.6 shall be applicable to the D/B Company's use of Subcontracts and Subcontractors in connection with Design/Build Work.

6.5.5 Changes to Design/Build Work Any deletions from or additions or changes to the Design/Build Work, whether proposed by the D/B Company, necessitated by a Change in Law, or directed by the County, shall be considered to be Change Orders and handled in the manner provided in Article 8.

6.5.6 Encumbrances The Company shall promptly discharge or bond any Encumbrance on the Design/Build Work, New Plant Realty arising out of the Company's construction of the Design/Build Project.

6.5.7 Warranties The D/B Company warrants to the County that the structures, fixtures, machinery, equipment and materials incorporated in the Design/Build Project will be new, of recent manufacture, of good quality, free from faults and defects, suitable for its intended purpose and in conformity with Appendices 2 and 5A and 5B and the Contract Standards. The D/B Company shall, for the protection of the County, obtain from all Subcontractors, vendors, suppliers and other persons from which the D/B Company procures structures, improvements, fixtures, machinery, equipment and materials such warranties and guarantees as are normally provided with respect thereto, each of which shall be assigned to the County to the full extent of the terms thereof. No such warranty or guarantee shall relieve the D/B Company of any obligation hereunder, and no failure of any warranted structures, improvements, fixtures, machinery, equipment or material shall be the cause for any increase in the Design/Build Fixed Price or non-performance of the Contract services unless such failure is itself attributable to an Uncontrollable Circumstance or County Fault.

6.5.8 Change in Law Effecting Construction The parties acknowledge that a Change in Law may affect Effluent standards, other regulator standards or impose more stringent

requirements relating to equipment or processes than those established hereunder as of the Contract Date. In the event a Change in Law occurs, the D/B Company shall not be entitled to relief or additional compensation hereunder unless (1) such Change in Law imposes a regulatory standard which requires a more stringent or burdensome performance than the D/B Contract Standards applicable to requirement, and requires equipment or process change, (2) the Notice to Proceed for Construction has been issued and the D/B Company has issued a design submittal that has been approved by a regulatory agency; and (3) the Company is unable, after taking all mitigation measures required under Section 11.3 with respect to such a Change in Law, to avoid the necessity for such action.

6.5.9 Emergency Action Plan As detailed in Appendix 10, the D/B Company shall provide the County with a plan of action to be implemented in the event of an emergency, including fire, weather, environmental, health, safety and other potential emergency conditions. The plan shall: (1) provide for appropriate notifications to the County and all other Governmental Bodies having jurisdiction and for measures which facilitate coordinated emergency response actions by the County and all such other appropriate Governmental Bodies; (2) specifically include spill prevention and response measures; (3) assure the timely availability of all personnel required to respond to any emergency (no later than two hours during nights, weekends or holidays). The emergency plan shall be reviewed by the parties annually as part of the review of the annual operations report, and updated when necessary.

6.5.10 Emergency Action Notwithstanding any requirement of this D/B Contract requiring County approval of or consent to reports or submittals, if at any time the D/B Company determines in good faith that an emergency situation exists such that action must be taken to protect the safety of the public or its employees, to protect the safety or integrity of the Site and D/B Work, or to mitigate the immediate consequences of an emergency event, then the D/B Company shall take all such action necessary to remedy such emergency situation. As promptly thereafter as is reasonable, the D/B Company shall notify the County of the event and the D/B Company's response thereto. The cost of the D/B Company's response measures shall be borne by the D/B Company except to the extent the emergency event was caused by an Uncontrollable Circumstance.

## **SECTION 6.6 DESIGN AND CONSTRUCTION GOVERNMENTAL APPROVALS**

6.6.1 Applications and Submittals The D/B Company shall make all filings, applications and reports necessary to obtain and maintain all Governmental Approvals required to be made, obtained or maintained by or in the name of the D/B Company or the County under Applicable Law in order to design and construct the Design/Build Project. With respect to Governmental Approvals which are required to be obtained in the name of the County, the Company shall: (1) prepare the application (except with respect to the renewal of the NPDES Permit, for which the County shall prepare the application) and act as the lead interface with the EPD or other Governmental Body and develop and furnish all necessary supporting material; (2) supply all data and information which may be required; (3) familiarize itself with the terms and conditions of such Governmental Approvals; (4) attend all required meetings and hearings;

and (5) take all other action necessary or otherwise reasonably requested by the County in order to assist and support the County in obtaining, maintaining, renewing, extending and complying with the terms of such Governmental Approvals. All permit and filing fees required in order to obtain and maintain Governmental Approvals for the Contract Services shall be paid by the Company, regardless of the identity of the applicant. The D/B Company shall agree to be named as a co-permittee on any Governmental Approval if so required by the issuing Governmental Body or the County. The D/B Company shall not disadvantage the County in any application, data submittal or other communication with any Governmental Body regarding Governmental Approvals.

6.6.2 Data and Information All data, information and action required to be supplied or taken in connection with the Government Approvals required for the Contract Services shall be supplied and taken on a timely basis considering the requirements of Applicable Law and the responsibilities of the County as the legal and beneficial owner of the D/B Work and primary permittee. The data and information supplied by the D/B Company to the County and all regulatory agencies in connection therewith shall be correct and complete in all material respects, and shall be submitted in draft form to the County sufficiently in advance to allow full and meaningful review and comment by the County. The Company shall be responsible for any schedule and cost consequences which may result from the submission of materially incorrect or incomplete information. The County reserves the right to reject, modify, alter, amend, delete or supplement any information supplied by the Company pursuant to this Section.

6.6.3 Non-Compliance and Enforcement The D/B Company shall report immediately to the County all violations of the terms and conditions of any Governmental Approval or Applicable Law pertaining to the D/B Project. The County shall have the right independently to enforce compliance with the requirements of any Governmental Approval regardless of whether a concurrent or different regulatory enforcement action has been undertaken by any other Governmental Body. The failure of the D/B Company to comply with any Governmental Approval shall constitute a breach of this D/B Contract as well as an event of noncompliance with the Governmental Approval.

6.6.4 Reports to Governmental Bodies The D/B Company shall prepare all periodic reports, make all information submittals and provide all notices to all Governmental Bodies required by all Governmental Approvals and under Applicable Law with respect to the D/B Project, including sampling and testing results and monthly discharge monitoring reports during Acceptance Testing. Such reports shall contain all information required by the Governmental Body, and may be identical to comparable reports prepared for the County, if such are acceptable to the Governmental Body. The D/B Company first shall provide the County with copies of such regulatory reports for review, comment and signature, as applicable, at least seven days before their filing with the Governmental Body.

6.6.5 Potential Regulatory Change The D/B Company shall keep the County regularly apprised as to potential changes in regulatory requirements affecting the wastewater treatment industry and the Design/Build Project, and provide recommended responses to such potential changes so as

to mitigate any possible adverse economic impact on the County should a Change in Law actually occur. The D/B Company shall participate in performance evaluation surveys conducted by the EPD and EPA.

**SECTION 6.7 PAYMENT OF THE DESIGN/BUILD PRICE**

6.7.1 County Financing Payments of the Design/Build Price shall be made by the County to the D/B Company as provided in this Section.

6.7.2 Design/Build Price Generally The County shall pay the D/B Company the Design/Build Price for the Design/Build Work on a milestone progress basis in accordance with the terms of this Section. The Design/Build Price shall be the sum of the Fixed Design/Build Price and the Fixed Design/Build Price Adjustments. No payment shall be made until the Design/Build Date has been achieved.

6.7.3 Fixed Design/Build Price The Fixed Design/Build Price shall be (1) [REDACTED] multiplied by (2) the Adjustment Factor set forth in Appendix 8, provided, however, that the Fixed Design/Build Price shall not escalate if the D/B Company has not used good faith efforts to achieve the Design/Build Date and; furthermore, the Fixed Design/Build Price shall not escalate if the Design/Build Date occurs subsequent to [REDACTED] solely due to the failure of the D/B Company to obtain all necessary Governmental Approvals.

6.7.4 Fixed Design/Build Price Adjustments The following items shall constitute the Fixed Design/Build Price Adjustments:

- [1] An adjustment for the cost of any Change Orders issued by the County with respect to the Design/Build Work; and
- [2] An adjustment for the cost of any Uncontrollable Circumstances required pursuant to Section [REDACTED].

6.7.5 Limitation on Payments for Design/Build Improvement Costs The D/B Company agrees that the Design/Build Price shall be the D/B Company's entire compensation and reimbursement for the performance of the Design/Build Work applicable to the Design/Build Project, including obtaining all Utilities that the D/B Company will require to perform the Design/Build Work, starting up the Design/Build Project, and operating the Design/Build Project during the Acceptance Test. In no event shall the D/B Company be entitled to any payment for Design/Build Work costs in excess of the Design/Build Price, notwithstanding any cost overruns the D/B Company may incur. The D/B Company shall finance and pay for any such excess costs in any manner it chooses subject to the terms and conditions of this Design/Build Contract, without reimbursement from or other claim upon the County.

6.7.6 Payment of Costs The D/B Company shall pay directly all costs and expenses of the Design/Build Work of any kind or nature whatsoever, including without limitation all costs of permitting (regardless of permittee); regulatory compliance and Legal Proceedings brought against the D/B Company; obtaining and maintaining the Security Instruments; payments due under the Design/Build Contract, subcontracts with Subcontractors or otherwise for all labor and materials; legal, financial,

engineering, architectural and other professional services of the D/B Company; sales, use and similar taxes on building supplies, materials and equipment; general supervision by the D/B Company of all Design/Build Work; D/B Company preparation of schedules, budgets and reports; keeping all construction accounts and cost records; and all other costs required to achieve Acceptance.

6.7.7 Financial Books And Records The D/B Company shall prepare and maintain proper, accurate and complete books and records regarding the Design/Build Work and all other transactions related to the permitting, design, construction, startup and testing (including Acceptance Testing) of the Design/Build Work, including all books of account, bills, vouchers, invoices, personnel rate sheets, cost estimates and bid computations and analyses, Subcontracts, purchase orders, time books, daily job diaries and reports, correspondence, and any other documents showing all acts and transactions in connection with or relating to or arising by reason of the Design/Build Work, this Design/Build Contract, any Subcontract or any operations or transactions in which the County has or may have a financial or other material interest hereunder, in each case to the extent required to determine changes in the Design/Build Price or the Design/Build Fee. The D/B Company shall produce such construction books and records (except financial ledgers and statements) for examination and copying in connection with the costs of Change Order or Uncontrollable Circumstance, or other changes in or additions to the Fixed Design/Build Price or the Design/Build Fee for which the County may be responsible with respect to work performed prior to the Acceptance Date. To the extent any such information is delivered or made available to the County, such information shall be presented in a format such that an independent auditor will be able to perform a review of such information in accordance with generally accepted accounting principles. The D/B Company shall keep and maintain all such construction books and records for at least seven years after the Acceptance Date, or such longer period during which any Legal Proceeding with respect to the Design/Build Work commenced within seven years of the Acceptance Date may be pending.

6.7.8 Construction Disbursement Requisition Procedure Appendix 21 sets forth maximum payments to be made with respect to the Design/Build Work, and the sum of all such payments equals the Fixed Design/Build Price. Following the Design/Build Date, the D/B Company shall be entitled to submit Requisitions on a monthly basis and receive from the County the payments of the Fixed Design/Build Price, which: (1) shall be made based upon the percent completion as a sum of the percent completion of all activities associated with each milestone on the Design/Build Schedule and Schedule of Values as set forth in Appendix 12; (2) shall be subject to the maximum payment limitations specified in the maximum drawdown schedule set forth in Appendix 13; and (3) shall be subject to the conditions of payment set forth in this Section. On the date the Acceptance Date is permanently established under Article 7 the D/B Company shall be entitled to receive all payments due for completed work which remain unpaid as of such date with respect to the Design/Build Project, except for the payment conditioned on Final Completion in the event Final Completion has not occurred prior to the Acceptance Date. If the

Design/Build Fixed Price is escalated per subsection 6.7.4, such escalation shall be applied to the milestone payments and the maximum drawdown schedule and paid as stipulated in this section.

6.7.9 Retainage Each milestone payment will be subject to a 10% retainage holdback until 50% of the value of the Design/Build price is due the D/B Company and the Design/Build work performed is satisfactory to the County, at which time further payments will not be subject to retainage holdbacks, unless the County determines that the Design/Build Work is unsatisfactory or has fallen behind schedule. Upon final Acceptance, the amounts retained minus 200% of the estimated value of the outstanding Design/Build Work will be released to the D/B Company.

6.7.10 Certification of Requisitions Requisition shall be accompanied by a certificate of an authorized officer of the D/B Company certifying: (1) the portion of the Fixed Design/Build Price which is payable to the D/B Company, (2) that the D/B Company is neither in default under this Design/Build Contract nor in breach of any material provision of this Design/Build Contract such that the breach would, with the giving of notice or passage of time, constitute an Event of (3) that all labor, materials and services rendered through the proceeding Requisition have been paid and (4) that all items applicable to the milestone entitling the D/B Company to request payment under the payment schedule set forth in Appendix 21 have been completed in accordance therewith and with the Minimum Technical Requirements.

6.7.11 Information Supporting Requisition The D/B Company shall submit to the County, with a copy to the Construction Manager, with each Requisition:

- [1] A reasonably detailed description of all Design/Build Work actually completed to date;
- [2] Updates and annotations to the Design/Build Schedule which shall reflect the status in the D/B Company's Design/Build Schedule since the date of the last Requisition;
- [3] Revisions to the critical path schedule which shall reflect changes in the critical path schedule since the date of the last Requisition;
- [4] Notice of any Liens or Encumbrances which have been filed, together with evidence that the D/B Company has bonded or discharged such Liens or Encumbrances;
- [5] Any other documents or information relating to the Design/Build Work or this Design/Build Contract requested by the County or the Construction Manager as may be required by Applicable Law or this Design/Build Contract;
- [6] Construction progress photographs ; and
- [7] An Exhibit G, Technical Proposal Form 8

6.7.12 Review and Payment of Requisitioned Amounts The Construction Manager shall review the D/B Company's certified Requisitions to the County for each Fixed Design/Build Price payment, within 16 days of receipt of the D/B Company's written submittal delivered pursuant to section 6.7.8, shall verify or dispute in writing (or by telecommunication promptly confirmed in writing) the D/B

Company's certification that the D/B Company has achieved the level of progress indicated and is entitled to payment. If (1) the Construction Manager determines that the work has progressed to the milestone indicated in the D/B Company's certified Requisition or that the costs constituting Fixed Design/Build Price Adjustments have been paid or incurred and the Construction Manager provides written notice thereof to the D/B Company and the County, or (2) the Construction Manager fails to verify or dispute the certified Requisition within 16 days of receipt, thereupon the D/B Company shall be entitled to payment within 30 days of such determination or expiration of such 16 day period. Disputes regarding payments of the Fixed Design/Build Price shall be resolved in accordance with section 6.7.14.

6.7.13 Permissible Withholdings The County may disapprove and withhold and retain all or any portion of any payment requested in any Requisition in an amount equal to the sum of:

- [1] any amounts which are permitted under this Section to be withheld from any payment requested in any Requisition;
- [2] any delay liquidated damages which are payable under Section 12.8;
- [3] any indemnification or other amounts which are due and owing to the County under any provision of this Design/Build Contract;
- [4] any deductions which are required by Applicable Law;
- [5] any payments with respect to which the documents required to be delivered in connection therewith are not correct and complete;
- [6] an amount equal to the cost to the County of performing any work in the event of a failure by the D/B Company or any Subcontractor to timely perform its obligations under the warranties given pursuant to subsection \_\_\_\_\_
- [7] any payments with respect to which the Design/Build Work covered by such Requisition (or any previous Requisition) does not comply with this Design/Build Contract;
- [8] any payments with respect to which any person has filed a Lien or Encumbrance resulting from the acts or omissions of the D/B Company in performing the Design/Build Work, where such Lien or Encumbrance remains unreleased, unbonded or undischarged; and
- [9] all previously requisitioned payments, if an Event of Default of the D/B Company has occurred under Section 12.2.

6.7.14 Disbursement Dispute Procedures If the Construction Manager determines pursuant to subsection 6.7.12 of this Section that the work required for any payment has not progressed to the milestone indicated the Construction Manager shall provide prompt written notice to the D/B Company and the County as to the Construction Manager's reasons, in reasonable detail, for such determination or the basis for such dispute. After receiving such determination notice, the D/B Company may make the necessary corrections and resubmit a certified Requisition to the Construction Manager, or the Construction Manager may agree on a revised amount, Requisition or estimate, as applicable, in which case the D/B Company shall promptly notify the County of such agreement and thereupon be entitled to payment. Any

proceedings undertaken to resolve a dispute arising under this subsection shall immediately terminate if: (1) the D/B Company demonstrates to the Construction Manager that the work has proceeded to the milestone indicated in the certified Requisition giving rise to the dispute or that any disputed certified Requisition is correct; and (2) the Construction Manager concurs with such demonstration. The D/B Company shall not be entitled to payment of the amount so requisitioned and disputed except upon resolution of the dispute in accordance with this subsection; provided, however, that the D/B Company shall be entitled to all requisitioned amounts which are not in dispute. In the event that upon resolution of any such dispute it is determined that the D/B Company was properly entitled to the disputed amount as of a date earlier than the date on which payment is actually made, the D/B Company shall be entitled promptly to receive such disputed amount. Nothing contained in this subsection shall be deemed to alter the rights of the parties, if any, under Article 12 hereof, including the right of either party to request a referral of the dispute to Non-Binding Mediation.

6.7.15 Required D/B Company Oversight Certification Any notice, certification, report or requisition delivered by the D/B Company to the County in connection with the Design/Build Work or payment therefor under this Article, or any Appendix shall be accompanied by a certificate of the chief engineer of the D/B Company or of the D/B Company's design engineering firm personally responsible for designing and overseeing construction of the Design/Build Work, affirming the accuracy thereof to the best of his or her knowledge.

6.7.16 Certification of Amounts Due Whenever requested by the County, the D/B Company shall submit a sworn statement certifying all amounts then due (or yet to become due) the D/B Company for the Design/Build Work (or any portion thereof) and describing any payment or other dispute which may exist between the D/B Company and any Subcontractor.

6.7.17 Tax Exemption Of D/B Project It is the intent of the parties that the D/B Project shall continue to be municipally owned property and not subject to property taxation. The parties acknowledge that the Fixed Construction Price is based upon the assumption that all construction materials and supplies acquired by the Company or any Subcontractor in connection with the Design/Build Work are subject to State sales and use taxes. In the event (i) any such construction materials and supplies can legally and permissibly be acquired by the D/B Company or any Subcontractor in connection with the Design/Build Work in accordance with Applicable Law without the payment of State sales or use taxes, and such taxes are not paid, or, (ii) an exemption from the payment of such sales or use taxes is available to the D/B Company under Applicable Law and the D/B Company fails to take advantage of such exemption, then in either case, the County shall be entitled to a credit from the Fixed Design/Build Price in the amount of the sales or use taxes which the D/B Company legally and permissibly did not pay or in the amount of the available exemption.

## **SECTION 6.8 PROGRESS SCHEDULE AND REPORTS**

The D/B Company shall submit to the County a monthly progress report in accordance with Appendix 10 detailing work accomplished and an annotated D/B Schedule which reflects any change in the D/B Company's Design/Build Schedule. The D/B Company shall provide to the County, for its planning, budgeting and financing purposes, monthly estimates of the date for start-up of operations, the date upon which the Acceptance Tests shall commence, and the Acceptance Date. The D/B Company agrees that the D/B Company's submission of the monthly progress report (or any annotated D/B Schedule) is for the County's information only, and the County's acceptance of the monthly progress report (or any annotated D/B Schedule) shall not bind the County in any manner. Thus, the County's acceptance of the monthly progress report and annotated D/B Schedule (or any revised monthly critical path report and schedule) shall not imply County approval of or consent to any of the matters set forth therein.

**SECTION 6.9 CONSTRUCTION MONITORING, OBSERVATIONS, TESTING AND UNCOVERING OF WORK.**

6.9.1 Observation and Design Review Program During the progress of the Design/Build Work through Acceptance, the D/B Company shall at all times during normal working hours afford the County and the Construction Manager every reasonable opportunity for observing all Design/Build Work. During any such observation, all representatives of the County and the Construction Manager shall comply with all reasonable safety and other rules and regulations applicable to their presence in or upon the Site or the Design/Build Project, including those adopted by the D/B Company, and shall in no material way interfere with the D/B Company's performance of any Design/Build Work.

6.9.2 D/B Company Tests The D/B Company shall conduct all tests of the Design/Build Work (including shop tests) or inspections required by the Contract Standards. The D/B Company shall give the County and the Construction Manager reasonable advance notice of tests or inspections prior to the conduct thereof; provided, however, that in no event shall the inability, failure or refusal of the County or the Construction Manager to be present at or during any such test or inspection delay the conduct of such test or inspection or the performance of the Design/Build Work. If required by the Contract Standards, the D/B Company shall engage a registered engineer or architect at its sole cost and expense to conduct or witness any such test or inspection. All analyses of test samples shall be conducted by persons appearing on lists of laboratories authorized to perform such tests by the State or federal agency having jurisdiction or, in the absence of such an authorized list in any particular case, shall be subject to the approval of the County, which consent shall not be unreasonably withheld. In addition to the foregoing, Acceptance Testing of the performance of the completed Design/Build Project shall be conducted in accordance with Article 7 and Appendix 15.

6.9.3 County Tests, Observations and Inspections The Construction Manager, the County, its employees, agents, representatives and contractors (which may be selected in the County's sole discretion), and all Governmental Bodies having lawful jurisdiction, may at any reasonable time and with reasonable notice, conduct such on-site observations and inspections, and such civil,

structural, mechanical, electrical, chemical, or other tests as the County deems necessary or desirable to ascertain whether the Design/Build Work complies with this Design/Build Contract. The costs of such test, observation or inspection shall be borne by the County unless such test, observation or inspection reveals a material failure of the Design/Build Work to comply with this Design/Build Contract or Applicable Law, in which event the D/B Company shall bear all reasonable costs and expenses of such test, observation or inspection. In the event that any requested test, observation or inspection causes a material delay in the construction schedule, the Scheduled Acceptance Date shall be adjusted to reflect the actual period of time needed for completion as directly caused by the requested testing, but only if such testing, observation or inspection does not reveal any failure or noncompliance as set forth herein.

6.9.4 Certificates and Reports The D/B Company shall secure and deliver to the Construction Manager promptly, at the D/B Company's sole cost and expense, all required certificates of inspection, test reports, work logs, certified payroll and approvals with respect to the Design/Build Work as and when required by the Contract Standards. The D/B Company shall provide to the Construction Manager, immediately after the receipt thereof, copies of any notice of default, breach or noncompliance received by the D/B Company under or in connection with any Governmental Approval, Subcontract, or Security Instrument pertaining to the Construction Period.

6.9.5 Notice of Covering Design/Build Work The D/B Company shall give the Construction Manager notice in the monthly progress report of its upcoming schedule with respect to the covering and completion of any Design/Build Work, and shall update such notice, if necessary, within a reasonable time period before such covering and completion. The County shall give the D/B Company reasonable notice of any intended inspection or testing of such Design/Build Work in progress prior to its covering or completion, which notice shall be sufficient to afford the County a reasonable opportunity to conduct a full inspection of such Design/Build Work prior to such covering or completion. At the County's written request, the D/B Company shall take apart or uncover for inspection or testing any previously-covered or completed Design/Build Work. The cost of uncovering, taking apart, or replacing such Design/Build Work along with the costs related to any delay in performing Design/Build Work caused by such actions, shall be borne as follows:

[1] by the D/B Company, if such Design/Build Work has been covered prior to any observation or test required by the Contract Standards or if such Design/Build Work has been covered prior to providing the County with reasonable notice required herein of its schedule with respect to the covering of such Design/Build Work, or prior to any observation or test as to which the County has provided reasonable advance notice hereunder of its intention to conduct; and

[2] in all other cases, as follows:

(a) by the D/B Company, if such observation or test reveals that the Design/Build Work does not comply with this Design/Build Contract; or

(b) by the County, if the cost of such observation or test reveals that the Design/Build Work complies with this Design/Build Contract.

In the event such Design/Build Work does comply with this Design/Build Contract, the delay caused by such uncovering, observation or test shall be treated as having been caused by an Uncontrollable Circumstance only if the cost of such uncovering, testing and inspection is required to be borne by the County pursuant to subparagraph 2(b) above, in all other cases any such delay shall not afford the D/B Company schedule relief.

6.9.6 Meetings and Design/Build Review During the Design/Build Period, the D/B Company and the County shall conduct meetings on a monthly basis at a minimum. At such meetings, discussions shall be held concerning all aspects of the Design/Build Work including, but not limited to construction schedule, progress payments, Design/Build Work, shop drawings, catalogued and dated progress photographs, and any soil boring data and shop test results. Monthly reports containing all relevant information shall be prepared by the D/B Company and provided to the County at least 10 days prior to each monthly meeting, together with an agenda for the meeting. The D/B Company shall also attend any on-call meeting which may be required by the County from time to time in connection with the Design/Build Work, provided that the D/B Company has at least 26 hours telephone or written notice of such meeting.

#### **SECTION 6.10 CORRECTION OF WORK**

6.10.1 Correction of Non-Conforming Design/Build Work Throughout the Term of this Design/Build Contract, the D/B Company shall complete, repair, replace, restore, re-perform, rebuild and correct promptly any Design/Build Work which does not conform with the Contract Standards.

6.10.2 Election to Accept Non-Conforming Design/Build Work The County may elect, in its sole discretion, by Change Order, at the D/B Company's request, to accept non-conforming Design/Build Work and charge the D/B Company (by a reduction in the Fixed Design/Build Price) for the amount agreed upon by the parties by which the value of the D/B Company's services or Design/Build Work has been reduced.

**SECTION 6.11 DELIVERABLE MATERIAL** As the Design/Build Work progresses (or upon the termination of the D/B Company's right to perform the Design/Build Work), the D/B Company shall deliver to the County all documents, reports, submittals and other materials ("Deliverable Material") required to be delivered under the D/B Contract. The provisions of Section 14.3 shall apply to any Deliverable Material used by the D/B Company in the Design/Build Work. The County shall have the right from and after the Contract Date to use (or permit use of) all such Deliverable Material, all oral information received by the County in connection with the Design/Build Work, and all ideas or methods represented by such Deliverable Material without additional compensation.

#### **SECTION 6.12 PERSONNEL**

6.12.1 Project Manager The D/B Company shall appoint a full-time manager for the D/B Work (the "Project Manager"), as required in Section 5.10 who shall be trained, experienced and proficient in the management of design/build projects of the design and construction of wastewater treatment system projects comparable to the JCEC project, and whose sole employment responsibility shall be managing the D/B Company's performance of the Design/Build Work. The primary residence of the Project Manager shall be within a fifty mile radius of the New Site. The D/B Company acknowledges that the performance of the individual serving from time to time as the Project Manager will have a material bearing on the quality of Design/Build Project provided hereunder, and that effective cooperation between the County and the Project Manager will be essential to effectuating the intent and purposes of this Design/Build Contract. Accordingly, not fewer than 30 days prior to the date on which any candidate for Project Manager from time to time during the Term of this Design/Build Contract is proposed by the D/B Company to assume managerial responsibility for the Design/Build Work, the D/B Company shall: (1) provide the County with a comprehensive resume of the candidate's training, experience, skills and approach to management and customer relations; and (2) afford the County an opportunity to interview the candidate with respect to such matters. The County shall have the right within 20 days following such interview to disapprove the hiring of the proposed candidate, which right of disapproval shall not be exercised unreasonably. The initial Project Manager shall be [REDACTED], who shall not be replaced for a period of one year from the Design/Build Date, unless otherwise approved by the County in its sole discretion, absent retirement, resignation or cessation of employment with the D/B Company. The D/B Company shall replace the Project Manager at the request of the County, after notice and a reasonable opportunity for corrective action, in the event the County determines, in its sole discretion that an unworkable or unsatisfactory relationship has developed between the Project Manager and the County.

[1] The D/B Company shall require that its Project Manager be available at the job site five (5) days per week or a designated representative be appointed in writing during each specific absence from the project area..

[2] The D/B Company's Project Manager shall document D/B Work activities and conditions on a daily basis.

[3] The D/B Company's Project Manager shall be the primary point of contact for the Construction Manager on all issues of the D/B Project and the D/B Work.

6.12.2 Construction Superintendent The D/B Company shall designate a D/B Company Construction Superintendent, subordinate to the Project Manager, who shall be present on the Site with any necessary assistants on a full time basis when the D/B Company or any Subcontractor is performing Design/Build Work. The D/B Company Construction Superintendent shall, among other things:

[1] be familiar with the Design/Build Work and all requirements of this Design/Build Contract;

[2] coordinate the Design/Build Work and give the Design/Build Work regular and careful attention and supervision;

[3] maintain a daily status log of the Design/Build Work and any other meeting relating to the Design/Build Work requiring the attendance of the D/B Company under the Design/Build Contract; and

[4] attend monthly construction progress meetings with the County and the Construction Manager.

The D/B Company may change the person assigned as D/B Company Construction Superintendent, subject to the provisions of this Section.

6.12.3 Site Safety Representative The D/B Company shall designate a D/B Company Site Safety Representative, subordinate to the Project Manager, who shall be present on the Site with any necessary assistants on a full time basis when the D/B Company or any Subcontractor is performing Design/Build Work. The D/B Company Site Safety Representative shall, among other things

[1] administer and be responsible for the implementation of all requirements of the D/B Company's Safety and Health Program in accordance with Section 10.2, Article 10 and Appendix 9B.

[2] attend all Construction Period Progress Meetings and report on safety training, accidents and incidents in accordance with Appendix 9B and all site safety inspections conducted by the D/B Company, the County or any other entity.

[3] provide input to the Monthly Project Progress Report on Safety training, accidents and incidents and safety inspections of site performed by the D/B Company, County or other entity.

[4] be responsible for the corrective action resulting from deficiencies report and during any safety inspection of the site, the D/B Work or the D/B Project by any entity.

6.12.4 QA/QC Manager The D/B Company shall designate a D/B Company QA/QC Manager subordinate to the Project Manager, who shall be present on the Site with any necessary assistants on a full time basis when the D/B Company or any Subcontractor is performing Design/Build Work. The D/B QA/QC Manager shall, among other things:

[1] administer the D/B Company's QA/QC Program in accordance with the approved QA/QC Plan.

[2] provide input to the Construction Period Progress Meetings and Monthly Project Progress Report on the results of all testing conducted during the previous period.

[3] maintain all QA/QC records in accordance with the QA/QC Plan

6.12.5 County Rights with Respect to Key Personnel The D/B Company acknowledges that the identity of the key management and supervisory personnel proposed by the D/B Company and its Subcontractors in its proposal submitted in response to the RFP was a material factor in the selection of the D/B Company to perform this Design/Build Contract. Such personnel and their

affiliations are set forth in Appendix 12. The D/B Company shall utilize such personnel to perform such services unless such personnel are unavailable for good cause shown. "Good cause shown" shall not include performing services on other projects but shall include termination for cause, employee resignation, illness and death. In the event of any such permissible unavailability, the D/B Company shall utilize replacement key management and supervisory personnel of equivalent skill, experience and reputation. Any on-Site personnel change of key management and supervisory personnel shall be proposed to the County for its review, consideration and determination of compliance with this subsection with reasonable advance notice.

6.12.6 Labor Disputes The D/B Company shall furnish labor that can work in harmony with all other elements of labor employed for the performance of the Design/Build Work. The D/B Company shall have exclusive responsibility for disputes or jurisdictional issues among unions or trade organizations representing employees of the D/B Company or its Subcontractors, whether pertaining to organization of the Design/Build Work, arrangement or subdivision of the Minimum Technical Requirements, employee hiring, or any other matters. The County shall have no responsibility whatsoever for any such disputes or issues.

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**ARTICLE 7**  
**ACCEPTANCE OF THE DESIGN/BUILD PROJECT**

**SECTION 7.1. NOTICE OF SUBSTANTIAL COMPLETION AND ACCEPTANCE TESTING**

7.1.1 Submittal of Transition Plan At least 60 days before the earlier of the Scheduled Acceptance Date or the date upon which the D/B Company plans to begin Acceptance Testing, the D/B Company shall prepare and submit to the County for its approval a detailed Transition Plan. The Transition Plan contains the Acceptance Test Plan, the Training Plan, and the Staffing Plan, and an update to the Emergency Response Plan.

[1] The Acceptance Test Plan Shall define a test program for each objective specified in Appendix 15 and shall detail all procedures to be used, specific measurements to be made, the use of permanent and temporary instrumentation, the tests schedule (including the expected date, time and duration of each test) and the operating and maintenance schedule for the JCEC during testing. The Acceptance Test plan shall conform to the requirements of Appendix 15 in all respects. If the D/B Company and County are unable to agree upon an Acceptance Test plan within 45 days of such submission, their inability to agree may be mediated as provided in Section 12.10.

[2] The Training Plan Shall define a training program in accordance with Appendix 13. The Training Plan shall define classroom and hands-on training curriculum for each operator position and classifications. The Training Plan shall be designed such that at the completion of Acceptance Testing and the close of the Transition Period the County Personnel (or County Contract Operator) shall be sufficiently trained in the operation of the plant for the County to assume operational responsibility for the JCEC.

[3] The Staffing Plan Shall detail in accordance with Appendix 13 the labor force required to manage, operate and maintain the JCEC.

[4] The Emergency Response Plan submitted prior to the Design/Build Data in accordance with Appendix 10 shall be update to include specific responses to plant operational emergencies as detailed in Appendix 13 for use during the Transition Period and for use by the County Operators.

[5] Draft Operations and Maintenance Manual Shall be prepared in accordance with Appendix 13 and shall detail the operational and maintenance practices and routines that shall be used in the operation and maintenance of the JCEC. This includes but is not limited to detailed standard operating and maintenance procedures and other specific instructions, policies, directives, routines and schedules.

7.1.2 Notice of Substantial Completion The D/B Company shall give the Construction Manager at least 20 days prior written notice of the expected date of Substantial

Completion. Substantial Completion shall occur on any date certified by the County, which shall have discretion to waive any of the conditions in subsection 7.3.1).

7.1.3 Transition Period When all conditions of subsection 7.3.1 for Substantial Completion are met the Transition Period shall to have commenced. The Transition Period is the period during which the D/B Company operates the JCEC to accomplish Acceptance Testing, trains the County in operations of the plant and demonstrates performance guarantees.

7.1.4 Notice of Commencement of Acceptance Test The D/B Company shall also provide the Construction Manager with at least 20 days prior written notice of the expected initiation of an Acceptance Test. At least 10 days prior to the actual commencement of Acceptance Testing, the D/B Company shall certify in writing that it is ready to begin Acceptance Testing in accordance with the Acceptance Test plan and Appendix 15.

**SECTION 7.2 FINAL PUNCH LIST** The D/B Company shall submit a proposed Final Punch List to the Construction Manager when the D/B Company believes that the Design/Build Work has been substantially completed in compliance with this Design/Build Contract. The "Final Punch List" shall be a statement of repairs, corrections and adjustments to the Design/Build Project, and incomplete aspects of the applicable Design/Build Work, which in the D/B Company's opinion:

[1] The D/B Company can complete before the D/B Company's agreed date for Final Completion and with minimal interference to the occupancy, use and lawful operation of the Design/Build Project; and

[2] Would represent, to perform or complete, a total cost of not more than 2.5% of the portion of the Fixed Design/Build Price (unless the County determines that a higher percentage is acceptable).

The Final Punch List shall be approved by the County, and completion of the Final Punch List work shall be verified by a final walk-through of the Design/Build Project conducted by the County and the Construction Manager with the D/B Company and the D/B Company Engineer.

**SECTION 7.3. SUBSTANTIAL COMPLETION**

7.3.1 Conditions for Substantial Completion The D/B Company shall not commence start-up operations in preparation for conducting the Acceptance Test until Substantial Completion has occurred. Substantial Completion shall occur only when all of the following conditions have been satisfied:

[1] the D/B Company has submitted to the Construction Manager and the Construction Manager has reviewed and approved the Transition Period Plan which contains the Acceptance Test Plan, the Training Plan, the Staffing Plan, and an update to the Emergency Response Plan;

[2] a preliminary or temporary certificate of occupancy has been issued, if required by Applicable Law;

[3] the D/B Company is authorized to conduct the Acceptance Tests and to operate the Design/Build Project under Applicable Law, and such authorization has not been withdrawn, revoked, superseded, suspended, or materially impaired or amended;

[4] all Utilities specified or required under this Design/Build Contract to be arranged for by the D/B Company are connected and functioning properly;

[5] the D/B Company and the County have agreed in writing upon the Final Punch List (or, if they are unable to agree, the County shall have prepared and issued to the D/B Company the Final Punch List to the D/B Company within 15 business days of the D/B Company having submitted its Final Punch List to the County which shall be conclusively deemed the Final Punch List);

[6] the County has received (at least seven (7) days prior to the date on which Substantial Completion is deemed achieved), the certification by the D/B Company that all Design/Build Work pertaining to the Design/Build Project, excepting the items on the Final Punch List, is complete and in all respects is in compliance with this Design/Build Contract, and the County has not notified the D/B Company of any disagreement with the contents of such certification;

[7] the D/B Company has delivered to the County the Equipment and Start-Up Test Report and written certification from the machinery and equipment manufacturers that all major items of machinery and equipment included in the Design/Build Project have been properly installed and tested in accordance with the manufacturers' recommendations and requirements and the Equipment and Start-Up test plan;

[8] all warranties required to be obtained under subsection 6.5.7 have been delivered to the County;

[9] the D/B Company has delivered to the County a claims statement setting forth in detail all claims of every kind whatsoever of the D/B Company connected with, or arising out of, the Design/Build Work pertaining to the Design/Build Project and arising out of or based on events prior to the date when the D/B Company gives such statement to the County;

[10] the D/B Company has delivered the Draft Operation and Maintenance Manual for the JCEC to the Construction Manager

[11] if required by Applicable Law, the EPD has approved the plan for any required Acceptance Testing and has issued a notice of permission to conduct the Acceptance Tests;

[12] the Construction Manager has certified, that the construction and installation of the Design/Build Project have been completed in accordance with the plans and specifications therefor;

[13] the D/B Company has submitted written certification that all of the foregoing conditions have been satisfied and the Construction Manager has not disputed the D/B Company's certification.

[14] the D/B Company shall have delivered to the County a properly executed Letter of Credit as required by Section 13.3

**SECTION 7.4 CONDUCT OF ACCEPTANCE TEST** The D/B Company shall conduct the Acceptance Tests in accordance with Appendix 15 and the Acceptance Test plan, and shall notify the Construction Manager when the test shall occur. The D/B Company shall permit the designated representatives of the Construction Manager to inspect the preparations for the Acceptance Test and to be present for the conduct of the Acceptance Test.

7.4.1 Training The D/B Company shall submit a Training Plan to be responsible for training all County or Contract Operations personnel to operate the JCEC, in accordance with Appendix 10. As part of the Transition Plan the D/B Company shall submit to the County for its review and comment a personnel training program which the D/B Company proposes to institute in order to ensure that the JCEC is operated in accordance with all State and Federal Regulations, the Operations and Maintenance Manual, all manufacturer's instructions, Applicable Law, and any other pertinent requirements. Such personnel training program shall include the personnel training guidelines, policies and procedures established: (1) by the EPD and the EPA; (2) in any applicable Governmental Approval or operator's certificate required or issued by any Governmental Body; and (3) in any other Applicable Law.

7.4.2 Unauthorized Releases Prohibited The D/B Company shall operate the JCEC during the Acceptance Test Period in such a manner that Influent, Effluent, Residuals, and Hazardous Materials will not contaminate, or be released, leak or spill on or into the environment other than as permitted by the D/B Contract Standards.

7.4.3 Notification and Reporting The D/B Company, after first notifying the County, shall be responsible for fulfilling all notification and reporting requirements established by Applicable Law related to any unauthorized release into the environment from or in connection with its operation and management of the JCEC. The Company shall prepare a memorandum evidencing such notification and reporting and provide copies thereof to the County, along with any documents provided to the relevant Governmental Body regarding the release.

7.4.4 Cleanup and Costs The D/B Company shall coordinate with the County in identifying the source of any unauthorized release and cooperate with the County and all appropriate Governmental Bodies in effectuating the prompt remediation thereof. The D/B Company shall, in the most expeditious manner possible under the circumstances, cause any waste or material released without authorization to be cleaned up, removed from the JCEC or other point of release, and transported to and discharged or disposed of at a landfill or other disposal site which constitutes an Acceptable Disposal Site, and perform necessary remediation measures to be performed. All costs associated with the identification,

testing, cleanup, removal, transportation and disposal of such waste or material and performing necessary remediation measures shall be borne by the Company, except to the extent the release of the waste or material resulted from an Uncontrollable Circumstance or County Fault, in which case such costs shall be borne by the County.

7.4.5 Indemnity for Loss-and-Expense from Non-Complying Effluent In the event that any Effluent discharged by the D/B Company fails to comply with the requirements of Operational Performance Guarantee, Appendix 2 table \_\_\_\_ except to the extent such failure of compliance subsections is caused by an Uncontrollable Circumstance, the D/B Company shall indemnify, defend and hold harmless the County and the County Indemnitees in accordance with Section 11.4 from the Loss-and-Expense of any tort, environmental or other liability resulting from the discharge of such Non-Complying Effluent. This indemnity shall extend to any liability property loss or damage or death or personal injury suffered or alleged to be suffered by any person from exposure to such Non-Complying Effluent based on any theory of recovery, including theories of toxic tort or environmental impairment. The Loss-and-Expense to which the indemnity provided in this Section extends shall not be construed to constitute consequential or other damages as set forth in Section 12.8, as to which both parties have waived any rights of recovery.

7.4.6 Change in Law Affecting Effluent The parties acknowledge that a Change in Law may affect Effluent standards or impose more stringent requirements relating to equipment or processes than those established hereunder as of the Contract Date. In the event a Change in Law occurs, the D/B Company shall not be entitled to performance relief or additional compensation hereunder unless (1) such Change in Law imposes a regulatory standard or operating requirement with respect to any particular Effluent characteristic or parameter which is more stringent or burdensome to comply with than the Contract Standards applicable to such characteristic or parameter, or requires equipment or processes not then in place or practiced at the JCEC, and (2) the D/B Company is unable, after taking all mitigation measures required under Section 11.3 with respect to such a Change in Law, to avoid the necessity for such performance relief or additional compensation.

**SECTION 7.5 ACCEPTANCE DATE CONDITIONS**

7.5.1 The following conditions shall constitute the "Acceptance Date Conditions," each of which must be satisfied in all material respects by the D/B Company in order for the Acceptance Date to occur, and each of which must be and remain satisfied as of the Acceptance Date:

[1] Achievement of Acceptance Test Procedures and Standards The D/B Company shall have completed any required Acceptance Test and such test shall have demonstrated that the Design/Build Project have met the Acceptance Test Procedures and Standards;

[2] Substantial Completion The D/B Company shall demonstrate that Substantial Completion has occurred;

[3] Operating Governmental Approvals The EPD shall have issued its determination, if required, that the Design/Build Work conforms to the applicable order of approval, and all other applicable Governmental Approvals required under Applicable Law which are necessary for the routine operation of the Design/Build Project shall have been duly obtained by the D/B Company and shall be in full force and effect. Copies of all such Governmental Approvals, to the extent not in the County's possession, shall have been delivered to the Construction Manager certified by the D/B Company;

[4] Record Drawings The D/B Company shall have delivered to the Construction Manager a final and complete reproducible set of record drawings, together with six copies thereof, in a size and form required by the Construction Manager and as required by the Minimum Technical Requirements, and shall have certified that the Design/Build Project was constructed in accordance with the Minimum Technical Requirements, including any Change Orders. Such record drawings shall include one mylar copy. The D/B Company shall also provide an electronic file in AutoCad/DXF format to the extent drawings are prepared in such format or any other format mutually agreed to between the parties;

[5] Equipment Warranties and Manuals The D/B Company shall be in possession of, and shall have delivered to the Construction Manager, copies of the warranties of machinery, equipment, fixtures and vehicles constituting a part of the Design/Build Project, together with copies of all related operating manuals supplied by the equipment supplier; and

[6] No Default There shall be no Event of Default by the D/B Company under this Design/Build Contract or by the Guarantor under the Guaranty Agreement, or event which with the giving of notice or the passage of time would constitute an Event of Default by the D/B Company hereunder or an Event of Default by the Guarantor under the Guaranty Agreement.

**SECTION 7.6 TEST REPORT** Within 30 days following conclusion of the Acceptance Tests, the D/B Company shall furnish the Construction Manager with a certified written report describing and certifying (1) the Acceptance Tests conducted, (2) the results of the Acceptance Tests, and (3) the level of satisfaction of the Acceptance Standards relating thereto and all other requirements specified in Appendix 15. The written test report shall include copies of the original data sheets, log sheets and all calculations used to determine performance during the Acceptance Tests, and copies of laboratory reports conducted in conjunction with the Acceptance Tests, including all laboratory sampling and test results.

**SECTION 7.7 CONCURRENCE OR DISAGREEMENT WITH TEST RESULTS**

7.7.1 Acceptance Date Concurrence The "Acceptance Date" shall be the day on which the Acceptance Test Procedures and Standards have been achieved. If the D/B Company certifies in its written report delivered pursuant to Section 7.6 that the full Acceptance Test Procedures and Standards

have been achieved, the Construction Manager shall determine, within 15 days of its receipt of the report, whether he concurs in such certification. If the Construction Manager states in writing that he concurs with the D/B Company's certification, the Design/Build Project shall be deemed to have achieved Acceptance and the Acceptance Date shall be deemed to have been established on a permanent basis from the date of the D/B Company's original certification of the Acceptance Date.

**7.7.2 Acceptance Date Disagreement** If the Construction Manager determines at any time during such 15-day review period that he does not concur with such certification, the Construction Manager shall immediately send written notice to the D/B Company of the basis for disagreement. In the event of any such non-concurrence by the Construction Manager, either party may elect to refer the dispute to non-binding mediation for resolution pursuant to Section 12.10. Mediation shall be concluded within 70 days of the dispute referral unless both parties agree that more time is appropriate. In the event that the mediation is not concluded within 70 days, nor extended by agreement, then either party may initiate judicial proceedings. The parties acknowledge and agree that the mediator shall not be empowered to render a binding decision. Acceptance shall not be deemed to have been achieved unless the Acceptance Test, conducted in a unified and continuous manner as provided in the Acceptance Test plan and Appendix 15, demonstrates that all of the Acceptance Test Procedures and Standards have been met. In the event the D/B Company, in conducting the Acceptance Test, does not successfully meet the applicable Acceptance Test Procedures and Standard, the County shall have the right, in its sole discretion, to permit the D/B Company to re-test the Design/Build Project for compliance only with the Acceptance Test Procedures and Standards not previously achieved through an earlier Acceptance Test. Nothing in this Section shall prevent the D/B Company from bringing an action or from repeating any Acceptance Test in order to establish the achievement of an Acceptance.

**SECTION 7.8 EXTENSION PERIOD** If Acceptance shall not have occurred on or before the Scheduled Acceptance Date as set forth in, and as adjusted pursuant to, Section 7.9, the D/B Company shall be entitled to conduct or repeat the Acceptance Tests as often as it desires in order to secure Acceptance of the Design/Build Project during the applicable Extension Period. The "Extension Period" shall mean an additional period of 90 days beyond the applicable Scheduled Acceptance Date. During the Extension Period, the D/B Company shall be responsible for and shall pay any fines and penalties assessed by a Governmental Body against the County or the D/B Company due to the failure to achieve Acceptance by the Scheduled Acceptance Date, together with liquidated damages as set forth in Section 7.9.

**SECTION 7.9 SCHEDULED ACCEPTANCE DATE**

**7.9.1 Schedule for Completing the Design/Build Project** The D/B Company shall cause the Acceptance Date to occur on or prior to the Scheduled Acceptance Date. If the Acceptance Date occurs subsequent to the Scheduled Acceptance Date, then, in addition to the amounts payable under Section 7.8, the D/B Company shall pay to the County \$1,500 per day as liquidated damages and not as a

penalty for each day that the Acceptance Date falls after the Scheduled Acceptance Date, up to the end of the Extension Period and thereafter until any termination of this Design/Build Contract for an Event of Default. The parties acknowledge that such amount is a reasonable estimate of the County's extended duration costs associated with any such delay. The D/B Company shall also indemnify the County in accordance with Section 11.4 against, and be responsible for, all Loss-and-Expense associated with such failure to achieve Acceptance by the Scheduled Acceptance Date.

7.9.2 Adjustment of Scheduled Acceptance Date The Scheduled Acceptance Date shall be adjusted to account for (1) delay caused by Uncontrollable Circumstances, County Fault or County-requested Change Orders not due to D/B Company Fault, and (2) the number of days of delay by EPD in issuing required Governmental Approvals beyond 90 days following a submittal which is deemed "complete" by the EPD, reduced by the number of days the EPD delayed issuing the required Governmental Approval due to the failure of the D/B Company to exercise reasonable diligence in securing the Governmental Approval following submittal of the complete application, but only to the extent any such EPD delay actually caused delay in the overall progress of the Design/Build Work after the exercise of all commercially reasonable mitigation efforts by the D/B Company. Any such EPD delay in issuing required Governmental Approvals shall entitle the D/B Company only to an extension of time as provided in this subsection, and shall not entitle the D/B Company to any price adjustment or any other relief from its other performance obligations hereunder.

**SECTION 7.10 FAILURE TO MEET ACCEPTANCE STANDARD** If, as of the last day of an Extension Period, the Acceptance Tests have not been conducted or have failed to demonstrate that the Design/Build Project operates at a standard equal to or greater than the full Acceptance Standard, an Event of Default by the D/B Company will be deemed to have occurred under Section 12.2 notwithstanding any absence of advance notice, further cure opportunity or other procedural rights accorded the D/B Company thereunder, and the County shall thereupon have the right to terminate this Design/Build Contract upon written notice to the D/B Company. Upon any such termination, the County shall have all of the rights provided in Article 12 hereof upon a termination of the D/B Company for cause.

**SECTION 7.11 FINAL COMPLETION AND COUNTY ASSUMPTION OF OPERATIONS DATE**

7.11.1 Requirements for County Assumption of Operational Responsibility The D/B Company shall transfer operational responsibility to the County at a designated time agreed upon by all parties. When all of the following conditions have been met, the County will assume responsibility for all operational requirements of the JCEC

[1] Acceptance Achieved The Acceptance Tests have been conducted and the Acceptance Test Report approved, the Acceptance Test Procedures and Standards have been achieved, and Acceptance has occurred;

[2] Operating Governmental Approvals EDP shall have issued its determination, if required, that the Design/Build Work conforms to the applicable order of approval.

[3] Spare Parts In Storage All spare parts required by the applicable Minimum Technical Requirements have been delivered and are in storage at the New Plant;

[4] Transition Plan Complete The D/B Company shall have accomplished all the goals of the Transition Plan to the Construction Manager's satisfaction

[5] Training Plan Complete The D/B Company shall have accomplished all the goals of the training plan to the Construction Manager's satisfaction.

[6] Final Operations and Maintenance Manual The D/B Company has made the required changes to the Draft O&M Manual and has delivered the Final O&M Manual to the Construction Manager.

7.11.2 Requirements for Final Completion The D/B Company shall achieve Final Completion of the Design/Build Project within 30 days after the Scheduled Acceptance Date. The Transition Period shall have ended. "Final Completion" shall occur when all of the following conditions have been satisfied:

[1] Design/Build Work Completed All applicable Design/Build Work (including all items on the Final Punch List and all clean up, demobilization and removal of temporary facilities, construction materials and demolition debris) is complete and in all respects is in compliance with this Design/Build Contract;

[2] County Assumption of Operational Responsibility The County has assumed all operational responsibility for the ICEC.

[3] Deliverable Material Furnished The D/B Company has furnished to the Construction Manager all Deliverable Material required to be delivered prior to an Acceptance;

[4] Record Drawings The D/B Company shall have delivered to the Construction Manager a final and complete reproducible set of record drawings, together with six copies thereof, in a size and form required by the Construction Manager and as required by the Minimum Technical Requirements and shall certify that the Design/Build Project was constructed in accordance with the Minimum Technical Requirements, including any Change Orders. Such record drawings shall include one mylar copy. The D/B Company shall also provide an electronic file in AutoCad/DXF format to the extent drawings are prepared in such format; and

[5] Equipment Warranties and Manuals The D/B Company shall be in possession of, and shall have delivered to the Construction Manager, copies of the warranties of machinery, equipment, fixtures and rolling stock constituting a part of the Design/Build Project, together with copies of the Final Operations and Maintenance Manual and of all related operating manuals supplied by the equipment supplier.

If the D/B Company fails to achieve Final Completion within 45 days following the Scheduled Acceptance Date, the D/B Company shall be responsible for and reimburse the County for all costs and expenses incurred by the County as a result of such failure to achieve Final Completion within such period, including, but not limited to, the cost of the construction monitor and reasonable attorneys' fees (if any).

7.11.3 Close-Out/Final Invoice and Claims Statement The D/B Company shall prepare and submit to the Construction Manager as soon as practicable following the County's Assumption of Operational Responsibility, for purposes of demonstrating Final Completion: (1) a certificate of the D/B Company Contract Representative certifying (a) that all applicable Design/Build Work has been completed in accordance herewith and with the Minimum Technical Requirements, and (b) that Acceptance of the Design/Build Project has occurred; and (2) a claims statement setting forth a detailed, itemized description, related dollar amount and grounds for all claims of every kind whatsoever against the County in connection with or arising out of the Design/Build Work the D/B Company may have; (3) a final invoice; and (4) other documents and requirements as specified in Appendix 12. The Construction Manager shall review the certificate and the claims statement and shall verify or dispute them in writing within 30 days of receipt.

**SECTION 7.12 NO ACCEPTANCE, WAIVER OR RELEASE** Unless other provisions of this Design/Build Contract specifically provide to the contrary, none of the following, without limitation, shall be construed as the County's acceptance of any Design/Build Work which is defective, incomplete, or otherwise not in compliance with this Design/Build Contract, as the County's release of the D/B Company from any obligation under this Design/Build Contract, as the County's extension of the D/B Company's time for performance, as an estoppel against the County, or as the County's acceptance of any claim by the D/B Company:

- [1] any payment by the County to the D/B Company or any other person with respect to the Design/Build Project;
- [2] the County's approval or acceptance of any drawings, submissions, punch lists, other documents, certifications, or Design/Build Work of the D/B Company or any Subcontractor;
- [3] the Construction Manager's review of (or failure to prohibit) any construction applications, means, methods, techniques, sequences, or procedures for the Design/Build Work;
- [4] the Construction Manager's entry at any time on the Site (including any area in which the Design/Build Work is being performed);
- [5] any inspection, testing, or approval of any Design/Build Work (whether finished or in progress) by the Construction Manager or any other person;
- [6] the failure of the Construction Manager or any County consultant to respond in writing to any notice or other communication of the D/B Company; or

[7] any other exercise of rights or failure to exercise rights by the County hereunder.

**SECTION 7.13 COMPLIANCE WITH CONTRACT STANDARDS NOT EXCUSED** No delay or failure by the D/B Company in achieving Substantial Completion, Final Completion or Acceptance with respect to the Design/Build Work shall excuse the D/B Company from its obligation to comply with the Contract Standards.

**SECTION 7.14 OPERATION AND MAINTENANCE MANUAL**

7.14.1 Development The D/B Company shall provide to the Construction Manager five copies of the Draft Operation and Maintenance (O&M) Manual, prepared in accordance with Appendix 13, 30 days prior to the beginning of Acceptance testing for the Design/Build Project. The content of the Operation and Maintenance Manual shall be consistent with the Contract Standards, shall contain a detailed description of the means and methods of properly operating the JCEC and all sampling, testing and measurement procedures, shall document predictive, preventive and corrective maintenance procedures, practices and schedules, and shall otherwise be sufficiently detailed to permit the JCEC to be operated and maintained by a third party reasonably experienced in wastewater treatment. The Operation and Maintenance Manual shall be developed in a manner which is fully consistent with the computerized maintenance management system installed and utilized by the D/B Company pursuant to Section 9.4. The Acceptance Testing operations shall be performed substantially in compliance with the Operation and Maintenance Manual and the D/B Company's computerized maintenance management system

7.14.2 County Review and Comment The D/B Company shall review and discuss in good faith with the Construction Manager any aspect of the draft Operation and Maintenance Manual, and shall deliver the final Draft Operation and Maintenance Manual to the Construction Manager prior to Acceptance Testing Notwithstanding any such review and comment by and discussion with the County, the Operation and Maintenance Manual shall remain, until a final version is submitted and accepted, the responsibility of the D/B Company. Neither the review of or comment upon, nor the failure of the Construction Manager to comment upon, the Operation and Maintenance Manual shall: (1) relieve the D/B Company of any of its responsibilities under this D/B Contract; (2) be deemed to constitute a representation by the County that operating the JCEC pursuant to the Draft Operation and Maintenance Manual will cause the JCEC to be in compliance with this D/B Contract or Applicable Law; or (3) impose any liability upon the County or its officers, employees, agents, consultants or representatives. A Final O&M Manual is due 15 days prior to County's Assumption of Operational Responsibility.

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**ARTICLE 8**  
**CHANGES IN THE WORK**

**SECTION 8.1 CHANGE ORDERS**

8.1.1 A Change Order is a written order to the D/B Company signed to show the recommendation of the Construction Manager, and the approval and the authorization of the County, issued after execution of the Contract, authorizing a change in the Work and/or an adjustment in the Contract Sum or the Contract Time. Change Orders shall be written using the latest version of *AIA Document G701/CMa, Change Order – Construction Manager-Advisor Edition*, or similar form and must be approved pursuant to Fulton County Policy 800-6. The Contract Sum and the Contract Time may be changed only by approved Change Order. A Change Order signed by the D/B Company indicates the D/B Company's agreement therewith, including the adjustment in either or both of the Contract Sum or the Contract Time.

8.1.2 The County, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and the Contract Time being adjusted accordingly as determined by the Construction Manager. All such changes in the Work shall be documented by Change Order, and shall be performed under the applicable conditions of the Contract Documents. The D/B Company shall proceed with the change to the Work as soon as the change order is approved by the County and the D/B Company is given notice by the Construction Manager.

8.1.3 The cost or credit to the County resulting from a change in the Work shall be determined in one or more of the following ways:

- [1] by mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- [2] by unit prices stated in the Contract Documents or subsequently agreed upon;
- [3] by cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- [4] by the method provided in Subparagraph 8.1.4 below.

8.1.4 If none of the methods set forth in Subparagraphs 8.1.3 [1], 8.1.3 [2] or 8.1.3 [3] above is agreed upon, the D/B Company, provided a written order signed by the County Manager and Purchasing Agent is received, shall promptly proceed with the Work involved. The cost of such Work shall then be determined by the County with assistance by the Construction Manager on the basis of the reasonable expenditures and savings of those performing the Work attributable to the change. The cost of the change shall include only the items listed in Subparagraph 8.1.5 [1] below, and in the case of either a decrease or an increase in the Contract Sum, an allowance for overhead and profit in accordance with the schedules set forth in Subparagraphs 8.1.5 [2] and 8.1.6 below shall be applied to the cost or credit.

- [1] In such case, and also under Subparagraph 8.1.3 [3] above, the D/B

Company shall keep and present, in such form as the Construction Manager may prescribe, an itemized accounting of all actual costs expended, together with appropriate supporting data for inclusion in a Change Order.

[2] All hourly rate charges shall be submitted to the Construction Manager for prior review and approval by the County. All hourly rate charges shall be properly supported as required by the Construction Manager with certified payrolls, or their acceptable equivalent. When authorized to proceed for a given change and actual expenditures have been made prior to execution of a Change Order for the entire change, such actual expenditures may be summarized monthly, and if approved, incorporated into a Change Order. When both additions and credits covering related Work or substitutions are involved in any one change, the allowance for overhead and profit shall be figured on the basis of the net increase or decrease, if any, with respect to that change.

8.1.5 In Subparagraphs 8.1.3 and 8.1.4 above, the items included in "Cost" and "Overhead" shall be based on the following schedule:

[1] Unless otherwise provided in the Contract Documents, "Cost" shall be limited to the following: cost of materials incorporated into the Work, including sales tax and cost of delivery; cost of direct labor (labor cost may include a pro rata share of foreman's account of the change) including social security, old age and unemployment insurance, and fringe benefits required by agreement or custom; workers' or workmen's compensation insurance; rental value of equipment and machinery; costs for preparing Shop Drawings.

[2] Unless otherwise provided in the Contract Documents, "Overhead" shall include the following: bond and insurance premiums including increase and decreases from change in the Work, supervision, superintendence, construction parking, wages of timekeepers, watchmen and clerks, small tools, consumable supplies, expendables, incidentals, general office expense, the cost of additional reproduction for the D/B Company's subcontractors beyond that agreed upon in the Contract Documents, construction parking, any additional costs of craft supervision by the D/B Company's or subcontractors' superintendents, and overhead charges which would be customary and expended regardless of the change in the Work due to other overlapping activities which are included as part of the original Contract, and all other expenses not included in "Cost" above.

[3] In the event that a change is issued by the Owner which would require the expenditure of substantial amounts for special supervision (beyond the foreman level) by the D/B Company, the D/B Company may, at the sole discretion of the County, be allowed to incorporate these charges into the agreed cost for the change.

8.1.6 In Subparagraphs 8.1.3 and 8.1.4 above, the allowance for overhead and profit combined, included in the total cost or credit to the County, shall be based on the following schedule:

[1] For the D/B Company, for any work performed by the D/B Company's

own forces, ten (10) percent of the cost.

[2] For the D/B Company, for any work performed by a D/B Company's subcontractor, five (5) percent of the amount due the subcontractor.

[3] For each subcontractor or sub-subcontractor involved, for any work performed by that subcontractor's or sub-subcontractor's own forces, ten (10) percent of the cost.

[4] For each subcontractor, for work performed by a sub-subcontractor, five (5) percent of the amount due to the sub-subcontractor.

[5] Cost to which overhead and profit is to be applied shall be determined in accordance with Subparagraph 8.1.5 above unless modified otherwise.

8.1.7 In order to facilitate checking of quotations for extras or credits, all proposals or bids, except those so minor that their propriety can be seen by inspection, shall be accompanied by a complete itemization of costs, including labor cost, materials and subcontracts. Labor and materials shall be itemized in the manner defined in Subparagraph 8.1.4 above. Where major cost items are subcontracts, they shall be itemized also. In no case shall a change be approved without such itemization.

8.1.8 No payment shall be made for any changes to the contract that are not included in a fully executed Change Order.

#### **SECTION 8.2 REQUESTS FOR ADDITIONAL COST**

8.2.1 If the D/B Company wishes to request an increase in the Contract Sum, the D/B Company shall give the Construction Manager written notice thereof within twenty (20) days after the occurrence of the event, or identification of the conditions, giving rise to such request. This notice shall be given by the D/B Company who shall not proceed with the work without the prior approval of the County, except in an emergency endangering life or property in which case the D/B Company shall proceed in accordance with Paragraph 10.7 of this Agreement, and Subparagraph 8.1.4 above. No such request shall be valid unless so made within the twenty (20) days specified above. Any change in the Contract Sum resulting from such request for equitable adjustment shall be documented by Change Order.

8.2.2 If the D/B Company considers that additional cost is involved because of, but not limited to (1) any written interpretation pursuant to Subparagraph 2.2.7 of this Agreement, (2) any order by the County to stop the Work pursuant to Paragraph 3.3 of this Agreement where the D/B Company was not at fault, or any such order by the Construction Manager as the County's agent, or (3) any written order for a minor change in the Work issued pursuant to Paragraph 8.4 below, the D/B Company shall submit a request for an increase in the Contract Sum as provided in Subparagraph 8.2.1 above. No such request shall be valid unless the D/B Company complies with Subparagraph 8.2.1 above.

#### **SECTION 8.3 MINOR CHANGES IN THE WORK**

8.3.1 The Construction Manager will have authority to order minor changes in the Work not involving an adjustment in the Contract Sum or extension of the Contract Time and not

inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order issued by the Construction Manager, and shall be binding on the County and the D/B Company. The D/B Company shall carry out such written orders promptly.

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**ARTICLE 9**  
**DESIGN/BUILD GUARANTEES**

**SECTION 9.1. DESIGN/BUILD GUARANTEES GENERALLY** The Johns Creek Environmental Campus is a Design/Build delivery project which is performance based. However, contained in the D/B RFP, the D/B Contract and Appendices are specific process, equipment and material specifications which the owner has dictated will be used in the Design. The D/B Company shall be responsible to seek clarification of any specification contained in the D/B RFP, the D/B Contract and the Appendices that precludes achieving the expected performance.

The D/B Company is expected to understand the risk associated with each of the performance guarantees in this article. These Design/Build Guarantees are significant to the success of the project. Appendix 18 contains more details of the Design/Build Guarantees.

**SECTION 9.2. EFFLUENT QUALITY GUARANTEE** The D/B Company shall design the JCEC using the flows and pollutant loads shown in tables A2-1 and A2-2. Table A2-5 is the plant effluent quality performance guarantees for the Johns Creek Environmental Campus. During Acceptance Testing the D/B Company shall operate the JCEC in accordance with Appendix 15 so as to receive and treat all Influent flowing to or received at the JCEC and discharge Effluent in compliance with the requirements of Applicable Law.

9.2.1 **Failure of the JCEC to Achieve the Effluent Quality Guarantee** During Acceptance Testing the D/B Company shall be responsible for all Effluent exceedances and reported violations. The D/B Company shall have deducted from their final payment all fines and penalties imposed by any regulator agency for exceedances and reported violations of any Applicable Law. If the JCEC fails to achieve the effluent quality guarantee, the Whole Plant Acceptance Test specifically, and Acceptance Testing fails and the Acceptance Date cannot be obtained, the provisions of section 7.9 and section 12.2 shall apply.

9.2.2 **Failure of the JCEC to Maintain the Effluent Quality Guarantee** During the initial year of operations the D/B Company shall supply engineering services and corrective action to correct any material condition that is responsible for causing an NPDES permit violation. Failure to provide timely correct action will result in the County using funds from the \$1,000,000 letter of credit to contract for the necessary corrective action.

**SECTION 9.3. ODOR GUARANTEE** The D/B Company shall design an odor control system for the JCEC that treats odorous air in order to meet the Odor Control Guarantee. A maximum odor concentration standard of 5 dilution-to-threshold (D/T) shall be applied at a point 25 feet or greater from any building of the JCEC. D/T is as defined in ASTM E-679: *Standard of Practice for Determination of Odor and Taste*

*Thresholds by a Forced-Choice Ascending Concentration Series Method of Limits.* This standard plus the standard of zero (0) Odor Incidents during the first year of operations (from substantial completion for one (1) year) shall constitute the Odor Control Guarantee.

9.3.1 Preventing Odor Incidents With respect to odor the parties acknowledge the extreme sensitivity of this issue to the general public and the difficulties in establishing meaningful monetary remedies for odor control violations. The D/B Company further acknowledges that, in the proposal process leading to the execution of this D/B Contract, the D/B Company had a full opportunity to propose any system for odor control that would accomplish the Odor Control Guarantee which would have been accomplished at the County's expense, and by making its proposal and by executing this D/B Contract, the D/B Company assumed the risk that the JCEC is capable of controlling odor to a level required by the Contract Standards. Accordingly, in the event the JCEC fails to achieve the Odor Control Guarantee set forth or referred to in this Section, and is not excused by Uncontrollable Circumstances or County Fault, the D/B Company shall be obligated to implement such actions as the County shall determine to be necessary, in light of the nature, extent and repetitiveness of such non-compliance, to assure that the Odor Control Guarantee is satisfied.

9.3.2 Odor Incident An "Odor Incident" for purposes of this D/B Contract is an odor condition emanating from the JCEC, to the extent not caused by Uncontrollable Circumstances or County Fault, which by its intensity is offensive and repulsive to members of the surrounding community with a normal sense of smell.

9.3.3 Indicator of an Odor Incident Factors which may be relevant to the determination of an odor condition which may constitute an Odor Incident include without limitation, the number, frequency, legitimacy and forcefulness of odor complaints logged, the size of the area or magnitude of the number of individuals affected, and the degree of impact on the individuals affected. An "Odor Incident" shall be deemed to have occurred when two or more independent odor complaints are received in a 24 hour period from the general public.

9.3.4 Meeting the Odor Guarantee In the event that a period of 365 or more days elapses without any or any further Odor Incidents being noted by the County the Odor Control Guarantee shall be met and the conditions for release of the surety shall have been met.

9.3.5 Judicial Challenge to County Action No determination or other action taken by the County pursuant to this Section shall be subject to judicial challenge as provided in Section \_\_\_\_\_ except on the grounds that the County acted arbitrarily.

**SECTION 9.4. OPERATIONAL COST GUARANTEE** The D/B Company shall design the JCEC using the flows and pollutant loads shown in tables A2-1 and A2-2. Additionally the D/B Company using the instructions in Appendix 18 shall develop Operational Cost estimates for the JCEC. During Acceptance Testing the D/B Company shall operate the JCEC in accordance with Appendix 15 so as to receive and treat all Influent flowing to or received at the JCEC and discharge Effluent in compliance with the

requirements of Applicable Law. During the period of Acceptance Testing the D/B Company shall collect routine operating data to demonstrate that the operational cost of operating the JCEC in the selected areas of electrical power consumption, process chemical cost, odor control chemicals cost and sludge disposal cost is less than or equal to the Operational Cost Estimate calculated in accordance with Appendix 18 and submitted with the D/B Company's proposal on Technical Proposal Form 10. Once the Operational Cost Guarantee has been demonstrated the Guarantee is fulfilled.

9.4.1 Failure To Demonstrate Operational Cost Guarantee If the Operational Costs, as calculated using instructions in Appendix 18, are not equal to or less than the Operational Cost Estimates as provided on Technical Proposal Form 10, the County shall take 24 times the variance (Operational Cost minus Operational Cost Estimates) and deduct that amount from the final payment to the D/B Company.

**SECTION 9.5. NOISE GUARANTEE**

9.5.1 During Construction The D/B Company shall take action to minimize the noise created during construction of the Design/Build Work and to comply with the requirements of Appendices 2 and 18 with regard to the noise. The D/B Company shall comply with Fulton County Noise Ordinance and all Applicable Law with regard to noise.

9.5.2 Background Noise Measurements Background noise levels were measured at two points beyond the Plant envelope, where the public has access and where people are living or engaging in recreational activities. The data, collected over three 24-hour periods, were measured with a noise dosimeter set with A weighting, slow response, and a 5-dB exchange rate. Figure A1-2, Appendix 2 shows the location of the noise monitoring points. Table A2-6 summarizes the collected data. The average value for each monitoring point listed in the table in Appendix 2 is the benchmark for the required Noise Guarantee. Once construction has ceased, the permanent equipment associated with the plant is placed into operation and accepted by the County, noise levels measured at the two monitoring points shall not exceed benchmark background noise levels by more than 3 dB on a TWA basis. The human ear can detect a perceptible change in noise at this point. An increase in noise by 5 dB is a readily perceptible change, impacting residents in the community

9.5.3 120-Day Whole Plant Acceptance Testing During the 120 day Whole Plant Acceptance Testing the D/B Company shall verify by taking noise meter readings at the locations shown in Figure A2-2, Appendix 2 at four individual times during any four 24-hour periods and substantiating that the background noise levels are equal to or below the values in Table A2-6. Once this has been demonstrated successfully by the D/B Company the Guarantee has been met

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**ARTICLE 10**

**SAFETY**

**SECTION 10.1 DESIGN BUILDER'S SAFETY, HEALTH AND LOSS PREVENTION PROGRAM**

10.1.1 The D/B Company shall be responsible for designing and implementing a comprehensive project-specific safety, health and loss prevention process and/or program and employee substance abuse program for this project. All Sub-Contractors must either implement their own program that meets these requirements or follow the D/B Company's safety, health and loss prevention process and/or employee substance abuse program

10.1.2 The Safety, health and loss prevention process and/or employee substance abuse program must meet or exceed all governmental regulations (OSHA, EPA, DOT, State, local), and comply with other specific Fulton County or Owner Controlled Insurance Program (OCIP) (Exhibit B) requirements, and with any other safety, health and loss prevention requirements detailed in the Contract Documents, including the requirements of the Contractor Safety and Health Management Process which is attached hereto and incorporated herein.

10.1.3 Prior to Notice to Proceed the D/B Company shall submit in writing to the Construction Manager, the D/B Company's written Safety, Health and Loss Prevention Process and/or Program and Employee Substance Abuse Program and those of Sub-Contractors that meet or exceed the requirements referenced in the Contract Documents. Included in this submittal will be the name and qualifications of the site safety representative.

10.1.4 Prior to issuing the Notice to Proceed (NTP), a meeting will be held with the D/B Company and all Sub-Contractors to review the safety, health and loss prevention process and/or program requirements, submittals to be provided by the D/B Company, OCIP requirements and procedures, and the OCIP accident prevention process.

10.1.5 These program submittals must be reviewed and accepted by the Construction Manager as meeting or exceeding safety, health, and loss prevention process and/or program requirements. A Notice To Proceed (NTP) with the work will not be issued until these submittals have been accepted.

**SECTION 10.2 DESIGNATION OF SAFETY REPRESENTATIVE** The D/B Company will designate an employee by (name, phone number, pager number) as Site Safety Representative. This employee will have sufficient training and knowledge of safety and health principles, regulations, and procedures to supervise and implement the safety, health and loss prevention program and shall report to the D/B Company's Project Manager. Since the JCJC has significant risk and hazard potential, the D/B Company must designate a qualified employee to be the full time Site Safety Representative. This person should address safety, health and loss prevention activities for the complete project including Sub-Contractors.

**SECTION 10.3 SAFETY, HEALTH, AND LOSS PREVENTION PROCESS GUIDELINES AND REQUIREMENTS**

The County and Construction Manager reserve the right, but assume no duty, to establish and enforce safety, health, and loss prevention guidelines and to make the appropriate changes in the guidelines, for the protection of persons and property and to review the efficiency of all protective measures taken by the D/B Company. The D/B Company shall comply with all safety, health, and loss prevention process guidelines and requirements and changes made by the County or Construction Manager. The issuance of any such guidelines or changes by the County or Construction Manager shall not relieve the D/B Company of its duties and responsibilities under this Agreement, and the County or Construction Manager shall not thereby assume, nor be deemed to have assumed, any such duties or responsibilities of the D/B Company.

**SECTION 10.4 COMPLIANCE OF WORK, EQUIPMENT, AND PROCEDURES WITH ALL APPLICABLE LAWS and REGULATIONS**

10.4.1 All Work, whether performed by the D/B Company or its Sub-Contractors of any tier, or anyone directly or indirectly employed by any of them, and all equipment, appliances, machinery, materials, tools and like items incorporated or used in the Work, shall be in compliance with and conform to:

[1] All applicable laws, ordinances, rules, regulations and orders of any public, quasi-public or other governmental authority relating to the safety of persons and their protection against injury, specifically including, but in no event limited to, the Federal Occupational Safety and Health Act of 1970, as amended, and all rules and regulations now or hereafter in effect pursuant to said Act.

[2] All rules, regulations, and requirements of the County or Construction Manager and its insurance carriers relating thereto. In the event of a conflict or differing requirements the more stringent shall govern.

**SECTION 10.5 PROTECTION OF THE WORK**

10.5.1 The D/B Company shall, throughout the performance of the Work, maintain adequate and continuous protection of all Work and temporary facilities against loss or damage from whatever cause, shall protect the property of the County and third parties from loss or damage from whatever cause arising out of the performance of the Work, and shall comply with the requirements of the County or Construction Manager and its insurance carriers, and with all applicable laws, codes, rules and regulations, (as same may be amended) with respect to the prevention of loss or damage to property as a result of fire or other hazards.

10.5.2 Construction Manager may, but shall not be required to, make periodic inspections of the Project work area. In such event, however, the D/B Company shall not be relieved of its

aforesaid responsibilities and the Construction Manager shall not assume, nor shall it be deemed to have assumed, any responsibility otherwise imposed upon the assurance of D/B Company by this Agreement.

#### **SECTION 10.6 SAFETY EQUIPMENT**

10.6.1 The D/B Company shall provide to each worker on the Project work area the proper safety equipment for the duties being performed by that worker and will not permit any worker on the Project work area who fails or refuses to use the same. The County or Construction Manager shall have the right, but not the obligation, to order the removal of a worker from the Project work site for his/her failure to comply with safe practices or substance abuse policies, and the D/B Company shall promptly comply with the Safety Program or Substance Abuse Program and all such orders.

#### **SECTION 10.7 EMERGENCIES**

10.7.1 In any emergency affecting the safety of persons or property, or in the event of a claimed violation of any federal or state safety or health law or regulation, arising out of or in any way connected with the Work or its performance, the D/B Company shall act immediately to prevent threatened damage, injury or loss and to remedy said violation. Failing such action the County or Construction Manager may immediately take whatever steps it deems necessary including, but not limited to, suspending the Work as provided in this Agreement.

10.7.2 The County or Construction Manager may offset any and all costs or expenses of whatever nature, including attorneys' fees, paid or incurred by the County or its agent(s) (whether such fees are for in-house counsel or counsel retained by the County or Construction Manager), in taking the steps authorized by Section 10.7.1 above against any sums then or thereafter due to the D/B Company. The D/B Company shall defend, indemnify and hold the County, its officers, agents, employees and the O.C.I.P. Administrator harmless against any and all costs or expenses pursuant to Section 10.7.1, by whomsoever incurred. If the D/B Company shall be entitled to any additional compensation or extension of time on account of emergency work not due to the fault or neglect of the D/B Company or its Sub-Contractors, such additional compensation or extension of time shall be determined in accordance with Article 8 and Article 12 of this Agreement.

#### **SECTION 10.8 SUSPENSION OF THE WORK**

10.8.1 Should, in the judgment of the Construction Manager, the D/B Company or any Sub-Contractor fail to provide a safe and healthy work place or fail to follow the safety requirements defined in the Contract Documents and approvals, the Construction Manager shall have the right, but not the obligation, to suspend work in the unsafe areas until deficiencies are corrected. All costs of any nature (including, without limitation, overtime pay, liquidated damages or other costs arising out of delays) resulting from the suspension, by whomsoever incurred, shall be borne by the D/B Company.

10.8.2 Should the D/B Company or any Sub-Contractor fail to provide a safe and healthy work place or fail to follow the safety requirements defined in the Contract Documents and approvals after being formally notified in writing by the Construction Manager of such non-compliance, the D/B Contract may be terminated in accordance with Article 12 of the D/B Contract.

**SECTION 10.9 D/B COMPANY'S INDEMNITY OF THE COUNTY FOR D/B COMPANY'S NON-COMPLIANCE WITH SAFETY PROGRAM**

10.9.1 The D/B Company recognizes that it has sole responsibility to assure its Safety Program is implemented and to assure its construction services are safely provided. The D/B Company shall indemnify, defend and hold the County and its agents harmless, from and against any and all liability (whether public or private), penalties (contractual or otherwise), losses, damages, costs, attorneys' fees, expenses, causes of action, claims or judgments resulting, either in whole or in part, from any failure of the D/B Company, its Sub-Contractors of any tier or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, to comply with the safety requirements of the D/B Contract. The D/B Company shall not be relieved of its responsibilities under the safety requirements of the D/B Contract should the County or its agent(s) act or fail to act pursuant to its rights hereunder. The County, its agents, and the O.C.I.P. Administrator shall not assume, nor be deemed to have assumed, any responsibilities otherwise imposed upon the D/B Company by this Agreement, by virtue of providing the Safety Program Guidelines.

10.9.2 The D/B Company shall not raise as a defense to its obligation to indemnify under this Section 10.9 any failure of those indemnified hereunder to assure D/B Company operates safely, it being understood and agreed that no such failure shall relieve the D/B Company from its obligation to assure safe operations or from its obligation to so indemnify. The D/B Company also hereby waives any rights it may have to seek contribution, either directly or indirectly, from those indemnified hereunder.

10.9.3 In any and all claims against those indemnified hereunder by any employee of the D/B Company, any Sub-Contractor of any tier or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Section 10.9 shall not be limited in any way as to the amount or type of damages, compensation or benefits payable by or for the D/B Company or any Sub-Contractor of any tier under any workers' compensation act, disability benefit or other employee benefit acts.

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**ARTICLE 11**  
**INSURANCE, UNCONTROLLABLE CIRCUMSTANCES**  
**AND INDEMNIFICATION**

**SECTION 11.1 INSURANCE**

11.1.1 D/B Company Insurance At all times during the Term of this Design/Build Contract, the D/B Company shall obtain and maintain or cause to be obtained and maintained the Required Insurance in accordance with the requirements of Appendix 9A and shall pay all premiums with respect thereto as the same become due and payable.

11.1.2 Insurers, Deductibles and County Rights All insurance required by this Section shall be obtained and maintained from financially sound and generally recognized responsible insurance companies meeting the qualifications set forth in Appendix 9A. The insurers shall be selected by the D/B Company with the consent of the County, which consent shall not be unreasonably withheld, and shall be authorized to write such insurance in the State. The insurance coverage may be written with deductible amounts within the limits allowed in Appendix 9A, and the D/B Company shall be responsible for paying all deductible amounts. The D/B Company shall also be responsible for all self-insured retentions contained in its insurance coverages, as well as any excluded losses if such losses are within the liability of the D/B Company hereunder. All policies evidencing such insurance shall provide for: (1) payment of the losses to the County and to the D/B Company as their respective interests may appear; and (2) at least 30 days prior written notice of the cancellation thereof to the D/B Company and the County. All policies of insurance required by this Section shall be primary insurance without any right of contribution from other insurance carried by the County. The County shall have the right to fully participate in all insurance claim settlement negotiations and to approve all final insurance settlements, which approval shall not be unreasonably withheld.

11.1.3 Certificates, Policies and Notice The delivery by the D/B Company to the County of certificates of insurance is required by this Design/Build Contract as a condition to the occurrence of the Design/Build Date. The D/B Company shall also supply the County, upon request, with certified copies of such policies promptly following issuance by the insurers. Whenever a Subcontractor is utilized, the D/B Company shall either obtain and maintain or require the Subcontractor to obtain and maintain insurance in accordance with the applicable requirements of Appendix 9A.

11.1.4 Maintenance of Insurance Coverage If the D/B Company fails to pay any premium for Required Insurance, or if any insurer cancels any Required Insurance policy and the D/B Company fails to obtain replacement coverage so that the Required Insurance is maintained on a continuous basis, then, at the County's election (but without any obligation to do so), the County, following notice to the D/B Company, may pay such premium or procure similar insurance coverage from another company or companies and upon such payment by the County the amount thereof shall be immediately reimbursable to the County by the D/B Company. The D/B Company shall not perform Design/Build

Work during any period when any policy of Required Insurance pertaining to the Design/Build Work is not in effect. The D/B Company shall comply with all applicable Required Insurance and take all steps necessary to assure the Design/Build Improvements remain continuously insured in accordance with the requirements of this Design/Build Contract during the Term hereof. The failure of the D/B Company to obtain and maintain any Required Insurance shall not relieve the D/B Company of its liability for any losses intended to be insured thereby. Should any failure to provide continuous insurance coverage occur, the D/B Company shall indemnify and hold harmless the County against any Loss-and-Expense arising out of such failure. The purchase of insurance to satisfy the D/B Company's obligations under this Section shall not be a satisfaction of any D/B Company liability under this Design/Build Contract or in any way limit, modify or satisfy the D/B Company's indemnity obligations hereunder.

**SECTION 11.2. LOSS, DAMAGE OR DESTRUCTION TO THE D/B WORK**

11.2.1 Prevention and Repair The D/B Company shall use care and diligence, and shall take all appropriate precautions, to protect the Design/Build Work from loss, damage or destruction. The D/B Company shall immediately notify the County and the insurers of any damage or destruction to the Design/Build Work and as soon as practicable thereafter shall submit a full report to the County. The D/B Company shall also submit to the County within 24 hours copies of all accident and other reports filed with, or given to the D/B Company by, any insurance company, adjuster or Governmental Body. The D/B Company shall immediately repair, replace and restore the Design/Build Work to at least the character or condition thereof existing immediately prior to the loss, damage or destruction, in accordance with and subject to the procedures set forth in Article 8 and Article 11, as applicable. The County shall have the right to monitor, review and inspect the performance of any repair, replacement and restoration work by the D/B Company as if such work constituted Design/Build Work hereunder.

11.2.2 Insurance and Other Third Party Payments To the extent that any repair, replacement or restoration costs incurred pursuant to this Section can be recovered from any insurer or from another third party, the D/B Company shall assist the County in exercising such rights as it may have to effect such recovery. The D/B Company shall provide the County with copies of all relevant documentation at no cost to the County, and shall assist the County at the County's request, including participating in conferences, negotiations and litigation regarding insurance claims.

11.2.3 Uninsured Costs The D/B Company shall provide all funds necessary to pay the costs of repairing, replacing and restoring the Design/Build Work in accordance with this Section, and all insurance proceeds and recoveries from third parties resulting from damage to or the loss or destruction of the Design/Build Work shall be for the account of the County and shall be applied to pay the D/B Company for undertaking such repair, replacement and restoration; provided, however, that such costs not covered by insurance proceeds or third party payments shall be borne by the County to the extent the loss, damage or destruction was caused by Uncontrollable Circumstances or County Fault.

11.2.4 Repair of County and Private Property The D/B Company shall promptly repair or replace all County Property and all private property damaged by the D/B Company or any officer, director, employee, representative or agent of the D/B Company in connection with the performance of, or the failure to perform, the Contract Services. The repair and replacements shall restore the damaged property to its character and condition existing immediately prior to the damage.

### **SECTION 11.3 UNCONTROLLABLE CIRCUMSTANCES**

11.3.1 Relief from Obligations Except as expressly provided under the terms of this Design/Build Contract, neither party to this Design/Build Contract shall be liable to the other for any loss, damage, delay, default or failure to perform any obligation to the extent it results from an Uncontrollable Circumstance. The parties agree that the relief for an Uncontrollable Circumstance described in this Section shall apply to all obligations in this Design/Build Contract, except to the extent specifically provided otherwise, notwithstanding that such relief is specifically mentioned with respect to certain obligations in this Design/Build Contract but not other obligations. The occurrence of an Uncontrollable Circumstance shall not excuse or delay the performance of a party's obligation to pay monies previously accrued and owing under this Design/Build Contract, or to perform any obligation hereunder not affected by the occurrence of the Uncontrollable Circumstance. The County shall pay the Design/Build Fee during the continuance of any Uncontrollable Circumstance, adjusted to account for any cost reductions achieved through D/B Company mitigation measures required by subsection 11.3.2 of this Section, as well as for any cost increases to which the D/B Company is entitled under subsection 11.3.3 of this Section.

11.3.2 Notice and Mitigation The party that asserts the occurrence of an Uncontrollable Circumstance shall notify the other party by telephone or facsimile, on or promptly after the date the party experiencing such Uncontrollable Circumstance first knew of the commencement thereof, followed within 5 days by a written description of: (1) the Uncontrollable Circumstance and the cause thereof (to the extent known); and (2) the date the Uncontrollable Circumstance began, its estimated duration, and the estimated time during which the performance of such party's obligations hereunder shall be delayed, or otherwise affected. As soon as practicable after the occurrence of an Uncontrollable Circumstance, the affected party shall also provide the other party with a description of: (1) the amount, if any, by which the Fixed Design/Build Price is proposed to be adjusted as a result of such Uncontrollable Circumstance; (2) any areas where costs might be reduced and the approximate amount of such cost reductions; and (3) its estimated impact on the other obligations of such party under this Design/Build Contract. The affected party shall also provide prompt written notice of the cessation of such Uncontrollable Circumstance. Whenever an Uncontrollable Circumstance occurs, the party claiming to be adversely affected thereby shall, as promptly and as reasonably possible, use all reasonable efforts to eliminate the cause thereof, reduce costs resulting therefrom, mitigate and limit damage to itself and the other party, and resume full performance under this Design/Build Contract. While the Uncontrollable Circumstance continues, the affected party shall give notice to the other party, before the first day of each

succeeding month, updating the information previously submitted. The party claiming to be adversely affected by an Uncontrollable Circumstance shall bear the burden of proof, and shall furnish promptly any additional documents or other information relating to the Uncontrollable Circumstance reasonably requested by the other party.

11.3.3 Conditions to Performance, Design/Build Price, and Schedule Relief If and to the extent that Uncontrollable Circumstances interfere with, delay or increase the cost of the D/B Company's performing the Design/Build Work in accordance herewith, and the D/B Company has given timely notice as required by this Section, the D/B Company shall be entitled to relief from its performance obligations, an increase in the Fixed Design/Build Price, or an extension of schedule which properly reflects the interference with performance, the amount of the increased cost, or the time lost as a result thereof, in each case only to the minimum extent reasonably forced on the D/B Company by the event, and the D/B Company shall perform all other Contract services. The proceeds of any Required Insurance available to meet any such increased cost, and the payment by the D/B Company of any deductible, shall be applied to such purpose prior to any determination of cost increase payable by the County under this Section. Any cost reduction achieved through the mitigating measures undertaken by the D/B Company pursuant to subsection 11.3.2 of this Section upon the occurrence of an Uncontrollable Circumstance shall be reflected in a reduction of the amount by which the Design/Build Price would have otherwise been increased or shall serve to reduce the Design/Build Price to reflect such mitigation measures, as applicable. In the event that the D/B Company believes it is entitled to any performance, price or schedule relief on account of any Uncontrollable Circumstance, it shall furnish the County written notice of the specific relief requested and detailing the event giving rise to the claim within 30 days after the giving of notice delivered pursuant to subsection 11.3.2 of this Section. Within 30 days after receipt of such a timely submission from the D/B Company the County shall issue a written determination as to the extent, if any, it concurs with the D/B Company claim for performance, price or schedule relief, and the reasons therefor.

11.3.4 Acceptance of Relief Constitutes Release The D/B Company's acceptance of any performance, price or schedule relief under this Section shall be construed as a release of the County by the D/B Company (and all persons claiming by, through, or under the D/B Company) for any and all Loss-and-Expense resulting from, or otherwise attributable to, the event giving rise to the relief claimed

**SECTION 11.4. INDEMNIFICATION** The D/B Company shall indemnify, defend and hold harmless the County, and its appointive officers, directors, employees, representatives, agents and contractors (each, a "County Indemnitee"), from and against (and pay the full amount of) any and all Loss-and-Expense arising from or in connection with (or alleged to arise from or in connection with) (1) any failure by the D/B Company to perform its obligations under this Design/Build Contract; (2) the negligence or willful misconduct of the D/B Company or any of its officers, directors, employees, representatives, agents or Subcontractors in connection with this Design/Build Contract; (3) D/B Company Fault; or (4) the performance of the D/B Company's obligations under this Agreement. The D/B Company shall also

indemnify the County as and to the extent provided elsewhere in this Design/Build Contract. The D/B Company's indemnity obligations hereunder shall not be limited by any coverage exclusions or other provisions in any insurance policy maintained by the D/B Company which is intended to respond to such events. The D/B Company shall not, however, be required to reimburse or indemnify any County Indemnitee for any Loss-and-Expense to the extent caused solely by the negligence or willful misconduct of any County Indemnitee or to the extent attributable to any Uncontrollable Circumstance. A County Indemnitee shall promptly notify the D/B Company of the assertion of any claim against it for which it is entitled to be indemnified hereunder, and the D/B Company shall have the right to assume the defense of the claim in any Legal Proceeding and to approve any settlement of the claim. These indemnification provisions are for the protection of the County Indemnitees only and shall not establish, of themselves, any liability to third parties. This indemnification obligation shall include, but is not limited to, all claims against the County by a current or former officer, director, employee, representative or agent of the D/B Company, the Guarantor or any Subcontractor, and the D/B Company expressly waives all immunity and limitation on liability under any worker's compensation act, disability benefit act, employee benefit act or any other Applicable Law of any jurisdiction which would otherwise be applicable in the case of such a claim. The provisions of this Section shall survive termination of this Design/Build Contract.

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**ARTICLE 12**  
**BREACH, DEFAULT, REMEDIES AND TERMINATION**

**SECTION 12.1. REMEDIES FOR BREACH** The parties agree that, except as otherwise provided in Sections 12.2, 12.3 and 12.4 with respect to termination rights, in the event that either party breaches this Design/Build Contract, the other party may exercise any legal rights it has under this Design/Build Contract, under the Security Instruments and under Applicable Law to recover damages or to secure specific performance, and that such rights to recover damages and to secure specific performance shall ordinarily constitute adequate remedies for any such breach. Neither party shall have the right to terminate this Design/Build Contract for cause except upon the occurrence of an Event of Default.

**SECTION 12.2. EVENTS OF DEFAULT BY THE D/B COMPANY**

12.2.1 Events of Default Not Requiring Previous Notice or Further Cure Opportunity for Termination Each of the following shall constitute an Event of Default by the D/B Company upon which the County, by notice to the D/B Company, may terminate this Design/Build Contract without any requirement of having given notice previously or of providing any further cure opportunity:

[1] Security for Performance The failure of the D/B Company to obtain, maintain in full force and effect or renew within 30 days prior to expiration any Security Instrument required by Article 13 as security for the performance of this Design/Build Contract, without excuse for Uncontrollable Circumstances or County Fault;

[2] Failure to Achieve Acceptance The failure of the D/B Company to achieve the Acceptance Date prior to the end of the Extension Period;

[3] Gross Misfeasance The failure or refusal of the D/B Company to perform a material obligation hereunder such that the failure or refusal constitutes a gross misfeasance of duty, notwithstanding the fact that at the time the notice of an Event of Default is given such failure or refusal to perform may no longer exist or be continuing;

[4] Insolvency The insolvency of the D/B Company or the Guarantor as determined under the Bankruptcy Code;

[5] Voluntary Bankruptcy The filing by the D/B Company or the Guarantor of a petition of voluntary bankruptcy under the Bankruptcy Code; the consenting of the D/B Company or the Guarantor to the filing of any bankruptcy or reorganization petition against the D/B Company or the Guarantor under the Bankruptcy Code; or the filing by the D/B Company or the Guarantor of a petition to reorganize the D/B Company or the Guarantor pursuant to the Bankruptcy Code;

[6] Involuntary Bankruptcy The issuance of an order of a court of competent jurisdiction appointing a receiver, liquidator, custodian or trustee of the D/B Company

or the Guarantor or of a major part of the D/B Company's or the Guarantor's property, respectively, or the filing against the D/B Company or the Guarantor of a petition to reorganize the D/B Company or the Guarantor pursuant to the Bankruptcy Code, which order shall not have been discharged or which filing shall not have been dismissed within 90 days after such issuance or filing, respectively; or

[7] Default of Guarantor The failure of the Guarantor to perform any payment or other obligation under the Guaranty in a timely manner, the material untruth of any representation or warranty made by the Guarantor in the Guaranty Agreement, or the failure of the Guarantor to comply with the terms and conditions of Section 13.1.

12.2.2 Events of Default Requiring Previous Notice and Cure Opportunity for Termination It shall be an Event of Default by the D/B Company upon which the County may terminate this Design/Build Contract, by notice to the D/B Company, if: (1) any representation or warranty of the D/B Company hereunder or the Guarantor under the Guaranty Agreement was false or inaccurate in any material respect when made, and the legality of this Design/Build Contract or the Guaranty Agreement or the ability of the D/B Company to carry out its obligations hereunder or the ability of the Guarantor to carry out its obligation thereunder is thereby adversely affected; or (2) the D/B Company fails, refuses or otherwise defaults in its duty (a) to pay any amount required to be paid to the County under this Design/Build Contract within 60 days following the due date for such payment, or (b) to perform any material obligation under this Design/Build Contract (unless such default is excused by an Uncontrollable Circumstance or County Fault as and to the extent provided herein), except that no such default (other than those set forth in subsection 12.2.1 of this Section) shall constitute an Event of Default giving the County the right to terminate this Design/Build Contract for cause under this subsection unless:

[1] The County has given prior written notice to the D/B Company stating that in its opinion a specified default in its duty to pay or perform exists which gives the County a right to terminate this Design/Build Contract for cause under this Section, and describing the default in reasonable detail; and

[2] The D/B Company has not initiated within a reasonable time (in any event not more than 30 days from the initial default notice) and continued with due diligence to carry out to completion all actions reasonably necessary to correct the default and prevent its recurrence.

[3] If the D/B Company shall have initiated within such reasonable time and continued with due diligence to carry out to completion all such actions, the default shall not constitute an Event of Default during such period of time (in any event not more than 60 days from the initial default notice) as the D/B Company shall continue with due diligence to carry out to completion all such actions.

12.2.3 Other Remedies Upon D/B Company Event of Default The right of termination provided under this Section upon an Event of Default by the D/B Company is not exclusive. If

this Design/Build Contract is terminated by the County for an Event of Default by the D/B Company, the County shall have the right to pursue a cause of action for actual damages and to exercise all other remedies which are available to it under this Design/Build Contract, under the Security Instruments and under Applicable Law. Without limiting the foregoing, upon any termination of the D/B Company for an Event of Default the damages payable by the D/B Company to the County shall include: (1) the costs of 10.1.6 completing the Design/Build Project and any Change Orders then under construction, (2) making all repairs and replacements to the New Plant caused by the Event of Default (3) remedying any public health and safety problems, and (4) paying all unpaid fines and penalties payable to any Governmental Body, in each case resulting from any breach of this Design/Build Contract by the D/B Company. Such termination damages shall also include, without limitation, (1) the estimated present value (at a 6% discount factor) of the aggregate Design/Build Price for the balance of the Design/Build Project; plus (2) all reasonable costs incurred by the County in procuring, negotiating and implementing a new Design/Build contract with a replacement contractor, if any. The D/B Company shall not be entitled to any compensation for services provided subsequent to receiving any notice of termination for an Event of Default under this Section.

**SECTION 12.3. EVENTS OF DEFAULT BY THE COUNTY.**

12.3.1 Events of Default Permitting Termination Each of the following shall constitute an Event of Default by the County upon which the D/B Company, by notice to the County, may terminate this Design/Build Contract:

[1] Representations and Warranties Any representation or warranty of the County hereunder was false or inaccurate in any material respect when made, and the legality of this Design/Build Contract or the ability of the County to carry out its obligations hereunder is thereby adversely affected; or

[2] Failure to Pay or Perform The failure, refusal or other default by the County in its duty: (1) to pay the amount required to be paid to the D/B Company under this Design/Build Contract within 60 days following the due date for such payment; or (2) to perform any other material obligation under this Design/Build Contract (unless such default is excused by an Uncontrollable Circumstance or D/B Company Fault).

12.3.2 Notice and Cure Opportunity No such default described in subsections 12.3.1 [1] or [2] of this Section shall constitute an Event of Default giving the D/B Company the right to terminate this Design/Build Contract for cause under this subsection unless:

[1] The D/B Company has given prior written notice to the County stating that a specified default exists which gives the D/B Company a right to terminate this Design/Build Contract for cause under this Section, and describing the default in reasonable detail; and

[2] The County has not initiated within a reasonable amount of time (in any event not more than 30 days from the initial default notice) and continued with due diligence

to carry out to completion all actions reasonably necessary to correct the default and prevent its recurrence.

[3] If the County shall have initiated within such reasonable time and continued with due diligence to carry out to completion all such actions, the default shall not constitute an Event of Default during such period of time (in any event not more than 60 days from the initial default notice) as the County shall continue with due diligence to carry out to completion all such actions

**SECTION 12.4. COUNTY CONVENIENCE TERMINATION DURING THE DESIGN CONSTRUCTION PERIOD.**

12.4.1 Termination Right and Fee The County shall have the right at any time after the Design/Build Date, exercisable in its sole discretion, for its convenience and without cause, to terminate this Design/Build Contract upon 90 days' written notice to the D/B Company. If the County exercises its right to terminate the Design/Build Contract pursuant to this Section, the County shall pay the D/B Company a convenience termination fee equal to \$500,000. If the County exercises its rights pursuant to this Section subsequent to the issuance of the Notice-to-Proceed with the Design/Build Work and before the Acceptance Date, the County shall also pay the D/B Company the unreimbursed Cost-Substantiated amounts incurred by the D/B Company in connection with the Design/Build Work (not to exceed the amount provided therefor in the Maximum Drawdown Schedule), subject to the maximum drawdown schedule set forth in Appendix 21 hereto with respect to timing of any such payments by the County and demobilization..

12.4.2 Uncontrollable Circumstances In the event an Uncontrollable Circumstance causes a total constructive loss of the New Plant, or in the event an Uncontrollable Circumstance causes an extraordinary increase in County costs, and thereupon the County elects to exercise its right of convenience termination under this Section, the amount specified in subsection 12.4.1 shall be excluded from the termination fee payable by the County. A "total constructive loss" for this purpose shall be deemed to have occurred: if so determined by the casualty insurance carrier.

12.4.3 Termination Fee Payment Contingent Upon Surrender of Possession The County shall have no obligation to pay the convenience termination fee provided for under this Section except concurrently with the surrender of possession and control by the D/B Company of the New Plant to the County.

12.4.4 Adequacy of Termination Payment The D/B Company agrees that the applicable convenience termination fee provided in this Section shall fully and adequately compensate the D/B Company and all Subcontractors for all foregone potential profits, Loss-and-Expense, and charges of any kind whatsoever (whether foreseen or unforeseen), including initial transition and mobilization costs and demobilization, employee transition and other similar wind-down costs, attributable to the termination of the D/B Company's right to perform this Design/Build Contract.

12.4.5 Consideration for Convenience Termination Payment The right of the County to terminate this Design/Build Contract for its convenience and in its sole discretion in accordance with this Article constitutes an essential part of the overall consideration for this Design/Build Contract, and the D/B Company hereby waives any right it may have under Applicable Law to assert that the County owes the D/B Company a duty of good faith dealing in the exercise of such right.

12.4.6 Completion or Continuance by County After the date of any termination under this Section, the County may at any time (but without any obligation to do so) take any and all actions necessary or desirable to continue and complete the Design/Build Project so terminated, including, without limitation, entering into contracts with other contractors.

12.4.7 Cost Records and Reporting The D/B Company shall prepare and maintain proper, accurate and complete books and records of the cost and description of the permitting and other necessary and appropriate development work which the D/B Company has performed since the Contract Date which is directly related to the D/B Company's obligations under this Agreement, the cost of which would be the responsibility of the County if the County were to elect to terminate this Agreement or suspend the D/B Company's Design/Build Work obligations pursuant to this Section 12.4. The D/B Company shall submit such books and records or a reasonably detailed summary thereof acceptable to the County, together with a summary statement of monthly and aggregate Reimbursable Expenses incurred, to the County on a monthly basis after the Contract Date until either the County exercises its right to terminate or suspend this Agreement or until the Design/Build Date occurs, whichever is earlier. Specific requests by the D/B Company for the payment of Reimbursable Expenses shall be supported by the Cost Substantiation. Within 10 days of receipt of such information the County will advise the D/B Company as to whether and to what extent the County disputes such information contained in such books and records. In addition, on the Contract Date and on the first day of each month thereafter the D/B Company shall provide to the County an itemized list of all development work expected to be undertaken in the following two months, and the expected costs thereof. The County shall have the right to question the D/B Company's decision to undertake such activities within 10 days of receipt of such information and to provide notice to the D/B Company that such costs will not be Reimbursable Expenses.

12.4.8 Delivery of Development Work Product to the County Concurrently with payment by the County to the D/B Company of the amount due upon any termination or suspension of this Agreement under this Section, the D/B Company shall deliver to the County all of its development work product. Such work product shall include, without limitation, all plans, specifications, designs (including CADD files in a format requested by the County), drawings, rendering, blueprints, manuals, equipment layouts, and Governmental Approvals and related applications, submittals and other information prepared for the purpose of planning, designing, and constructing the JCFC.

**SECTION 12.5. OBLIGATIONS OF THE D/B COMPANY UPON TERMINATION OR EXPIRATION.**

12.5.1 D/B Company Obligations Upon a termination of the D/B Company's right to perform this Design/Build Work under Sections 12.2, 12.3 or 12.4, or upon the expiration of this Design/Build Contract under Section 2, the D/B Company shall, as applicable:

- [1] stop the Design/Build Work on the date and to the extent specified by the County;
- [2] promptly take all action as necessary to protect and preserve all materials, equipment, tools, facilities and other property;
- [3] remove from the New Plant Site all construction equipment, implements, machinery, tools, temporary facilities of any kind and other property owned or leased by the D/B Company (including, but not limited to sheds, trailers, workshops and toilets), and repair any damage caused by such removal;
- [4] clean the New Plant Site, and leave them in a neat and orderly condition;
- [5] promptly remove all employees of the D/B Company and any Subcontractors and vacate the New Plant Site;
- [6] with respect to Change Orders, promptly deliver to the County a list of all supplies, materials, machinery, equipment, property and special order items previously delivered or fabricated by the D/B Company or any Subcontractor but not yet incorporated in the New Plant;
- [7] deliver to the County any Operation and Maintenance Manuals or drafts thereof
- [8] advise the County promptly of any special circumstances which might limit or prohibit cancellation of any Subcontract;
- [9] promptly deliver to the County copies of all Subcontracts, together with a statement of:
  - (a) the items ordered and not yet delivered pursuant to each agreement;
  - (b) the expected delivery date of all such items;
  - (c) the total cost of each agreement and the terms of payment; and
  - (d) the estimated cost of canceling each agreement;
- [10] assign to the County any Subcontract that the County elects in writing, at its sole election and without obligation, to have assigned to it. The County shall assume, and the D/B Company shall be relieved of its obligations under, any Subcontract so assigned from the date of such assignment;
- [11] terminate all Subcontracts which the County has not directed the D/B Company to assign, and make no additional agreements with Subcontractors;
- [12] as directed by the County, transfer to the County by appropriate instruments of title, and deliver to the Plant (or such other place as the County may specify), all

special order items pursuant to this Design/Build Contract for which the County has made or is obligated to make payment;

[13] promptly transfer to the County all warranties given by any manufacturer or Subcontractor with respect to particular components of the New Plant or the Design/Build Work;

[14] notify the County promptly in writing of any Legal Proceedings against the D/B Company by any Subcontractor or other third parties relating to the termination of the Management Design/Builds or the Design/Build Work (or any Subcontracts);

[15] give written notice of termination, effective as of date of termination of this Design/Build Contract, promptly under each policy of Required Insurance (with a copy of each such notice to the County), but permit the County to elect to continue such policies in force thereafter at its own expense, if possible;

[16] take such other actions, and execute such other documents as may be necessary to effectuate and confirm the foregoing matters, or as may be otherwise necessary or desirable to minimize the County's costs, and take no action which shall increase any amount payable to the County under this Design/Build Contract.

12.5.2 D/B Company Payment of Certain Costs. If termination is pursuant to Section 12.2, the D/B Company shall be obligated to pay the costs and expenses of undertaking its post-termination responsibilities under this Section. If the D/B Company fails to comply with any obligation under this Section, the County may perform such obligation and the D/B Company shall pay on demand all reasonable costs thereof subject to Cost Substantiation.

12.5.3 County Payment of Certain Costs. If termination is for the convenience of the County under Section 12.4 or due to a County Event of Default pursuant to Section 12.3, the County shall pay to the D/B Company within 60 days of the date of the D/B Company's invoice supported by Cost Substantiation all reasonable costs and expenses incurred by the D/B Company in satisfying the requirements of this Section

**SECTION 12.6. SURVIVAL OF CERTAIN PROVISIONS UPON TERMINATION** All representations and warranties of the parties hereto contained in Articles 4 and 5 hereof and the rights and obligations of the parties hereto pursuant to Sections [1.2.14, 9.2.3, 11.2.1, 11.2.2, 6.4, 7.8, 7.2, 7.1, 7.3, 7.4, 7.5, 7.7, 7.10, 7.11, 7.12, 11.3, 11.4, 13.3, 13.4, 14.3, 14.6.4] hereof shall survive the termination of this Design/Build Contract. No termination of this Design/Build Contract shall limit or otherwise affect the respective rights and obligations of the parties hereto accrued prior to the date of such termination.

**SECTION 12.7 NO WAIVERS** No action of the County or the D/B Company pursuant to this Design/Build Contract (including, but not limited to, any investigation or payment), and no failure to act, shall constitute a waiver by either party of the other party's compliance with any term or provision of this

Design/Build Contract. No course of dealing or delay by the County or the D/B Company in exercising any right, power or remedy under this Design/Build Contract shall operate as a waiver thereof or otherwise prejudice such party's rights, powers and remedies. No single or partial exercise of (or failure to exercise) any right, power or remedy of the County or the D/B Company under this Design/Build Contract shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

**SECTION 12.8 NO CONSEQUENTIAL OR PUNITIVE DAMAGES** In no event shall either party be liable to the other or obligated in any manner to pay to the other, except with respect to indemnification of Loss-and-Expenses arising from third party claims for which one party is obligated to indemnify the other pursuant to the provisions of this Design/Build Contract, any special, incidental, consequential, punitive or similar damages based upon claims arising out of or in connection with the performance or non-performance of its obligations under this Design/Build Contract, or the material falseness or inaccuracy of any representation made in this Design/Build Contract, whether such claims are based upon contract, tort, negligence, warranty or other legal theory.

**SECTION 12.9 FORUM FOR DISPUTE RESOLUTION** It is the express intention of the parties that all Legal Proceedings related to this Design/Build Contract or to the New Plant or to any rights or any relationship between the parties arising therefrom shall be solely and exclusively initiated and maintained in the Superior Court of Fulton County, Georgia. The D/B Company and the County each irrevocably consents to the jurisdiction of such courts in any such actions or proceedings, waives any objection it may have to the laying of the jurisdiction of any such action or proceeding, and waives its right to a trial by jury.

**SECTION 12.10 NON-BINDING MEDIATION.**

12.10.1 Rights to Request and Decline Either party may request Non-Binding Mediation of any dispute arising under this Design/Build Contract, whether technical or otherwise. The non-requesting party may decline the request in its sole discretion. If there is concurrence that any particular matter shall be mediated, the provisions of this Section shall apply.

12.10.2 Procedure The mediator shall be a professional engineer, attorney or other professional mutually acceptable to the parties who has no current or on-going relationship to either party. The mediator shall have full discretion as to the conduct of the mediation. Each party shall participate in the mediator's program to resolve the dispute until and unless the parties reach agreement with respect to the disputed matter or one party determines in its sole discretion that its interests are not being served by the mediation.

12.10.3 Non-Binding Effect Mediation is intended to assist the parties in resolving disputes over the correct interpretation of this Design/Build Contract. No Mediator shall be empowered to render a binding decision.

12.10.4 Relation to Judicial Legal Proceedings Nothing in this Section shall operate to limit, interfere with or delay the right of either party under this Article to commence judicial Legal Proceedings upon a breach of this Design/Build Contract by the other party, whether in lieu of, concurrently with, or at the conclusion of any Non-Binding Mediation.

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**ARTICLE 13**  
**SECURITY FOR PERFORMANCE**

**SECTION 13.1 GENERALLY**

13.1.1 Cost and Expense of Security Instruments The cost and expense of obtaining and maintaining the Security Instruments required under this Article as security for the performance of the D/B Company's obligations hereunder shall be borne by the D/B Company without reimbursement from the County.

13.1.2 Release of Security The County shall have the right at any time by written notice to the D/B Company to release the D/B Company from its obligation to provide the Letter of Credit required under this Article.

**SECTION 13.2 GUARANTOR**

13.2.1 Guaranty Agreement The D/B Company shall cause the Guaranty Agreement to be provided and maintained by the Guarantor during the Term hereof .

13.2.2 Material Decline in Guarantor's Credit Standing For purposes of this Section, a "Material Decline in Guarantor's Credit Standing" shall be deemed to have occurred if neither the D/B Company nor Guarantor maintain the Minimum Financial Criteria set forth in Criteria I, Criteria II or Criteria III contained in Appendix 21 hereto. The D/B Company immediately shall notify the County of any Material Decline in Credit Standing.

13.2.3 Credit Enhancement After Acceptance If, at any time during the Term of this Design/Build Contract, a Material Decline in Guarantor's Credit Standing occurs, the D/B Company shall within 30 days after such occurrence provide credit enhancement of its obligations hereunder by increasing the amount of the Letter of Credit required by Section 13.3 to an amount equal to the 10% of Fixed Design/Build Price and shall maintain such credit enhancement until either the Guarantor's credit standing has been restored to investment grade or an additional guarantee is provided by another firm or D/B Company acceptable to the County whose credit rating would have avoided the occurrence of a Material Decline in the Guarantor's Credit Standing.

**SECTION 13.3 BONDS**

13.3.1 Construction Performance Bonds and Payment Bonds On or before the Design/Build Date, the D/B Company shall provide financial security for the performance of its construction obligations hereunder through a Construction Performance Bond and Payment Bond issued by a surety company: (1) approved by the County having a rating of "A" in the latest revision of the A.M. Best Insurance Report; (2) listed in the United States Treasury Department's Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bond and as Acceptable Reinsurance Companies"; and (3) properly registered and licensed to conduct business in the State. The Construction

Performance Bond and Payment Bond shall be issued by of the D/B Company and surety naming the County as obligee, substantially in the form ordinarily used by the American Institute of Architects for such purpose, substantially in the amount of the Fixed Design/Build Price, plus a reasonable amount to be determined by the parties for any estimated Fixed Design/Build Price Adjustments, and shall remain open until the final acceptance of the Design/Build Improvements.

13.3.2 Monitoring of Sureties The D/B Company shall be responsible throughout the Term of this Design/Build Contract for monitoring the financial condition of any surety issuing bonds under this Design/Build Contract and for making inquiries no less often than annually to confirm that each such surety maintains at least the minimum rating level specified in this Section. In the event the rating of any issuing surety falls below such minimum level, the D/B Company shall promptly notify the County of such event and shall promptly furnish or arrange for the furnishing of a substitute or an additional bond of a surety whose rating and other qualifications satisfy all above requirements, unless the County agrees to accept the surety or agrees to an alternative method of assurance. Upon such notice by the D/B Company of such an event, the County shall not unreasonably withhold its approval of such assurance.

#### **SECTION 13.4 LETTER OF CREDIT**

13.4.1 Terms and Purpose On or before the Acceptance Date, the D/B Company shall provide further security for the performance of its obligations hereunder through an irrevocable direct pay letter of credit presentable in Atlanta, Georgia, issued by a United States bank whose long-term debt is rated "A" or better by either Rating Service and which maintains a banking office in the State (the "Letter of Credit"). The Letter of Credit shall be in the stated amount of \$1,000,000, shall be for a term of one year, extended or replaced so that it remains in effect until 365 days after Acceptance Date, and shall be issued substantially in the form set forth in the Appendix 22. The County shall be authorized under the Letter of Credit to make one or more sight drawings thereon upon certification to the issuing bank that the drawing conditions described in subsection 13.3.2 of this Section have occurred. The Letter of Credit shall permit a drawing thereon in the full stated amount thereof in the event that any required renewal, extension or replacement thereof is not made prior to 30 days of its expiration. The Letter of Credit shall serve as security for the performance of the D/B Company's obligations hereunder, and the stated amount thereof shall in no way limit the amount of damages to which the County may be entitled for any D/B Company Event of Default hereunder.

13.4.2 Conditions to Drawing It shall be a condition to the right of the County to draw on the Letter of Credit, other than a draw based on a failure to renew, extend or replace the Letter of Credit or based on an Event of Default set forth in subsection 12.2.1 [4], [5], [6] that the County: has given the D/B Company a notice of termination based on an Event of Default, in which case the County shall have the right to draw the entire stated amount of the Letter of Credit. Notice to the Guarantor of a breach hereof shall not be a condition to the County's drawing rights under the Letter of Credit. In the event that the County draws on the full amount of the Letter of Credit on account of an occurrence of an Event of

Default as set forth in subsection 12.2.1 [4], [5], [6] or, the County shall use such moneys to cover any damages suffered as a result of such event and to pay itself any other amounts owed by the D/B Company under the provisions of the Design/Build Contract, and the County shall hold the balance of such amount as security for the D/B Company's obligations hereunder, until the final resolution of such bankruptcy, when any remaining funds shall revert to the D/B Company, provided the Design/Build Contract is in full force and effect and the Letter of Credit has been reinstated.

13.4.3 Effect of Final Determination of Damages In the event that subsequent to any drawing on the Letter of Credit it is determined by any court of competent jurisdiction in a final non-appealable decision that such drawing to any extent was not permitted hereunder, the County shall pay the amount wrongfully drawn to the D/B Company together with interest thereon at the Overdue Rate calculated from the date of the drawing to the date of payment to the D/B Company as the sole and exclusive remedy to the D/B Company.

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**ARTICLE 14**  
**MISCELLANEOUS PROVISIONS**

**SECTION 14.1 D/B COMPANY BUSINESS** The D/B Company agrees that its business will be limited to that contemplated by this Design/Build Contract and it will not engage in activities or incur liabilities other than in connection with the D/B Company's performance of this Design/Build Contract and the transactions contemplated hereby.

**SECTION 14.2 RELATIONSHIP OF THE PARTIES** The D/B Company is an independent contractor of the County and the relationship between the parties shall be limited to performance of this Design/Build Contract in accordance with its terms. Neither party shall have any responsibility with respect to the services to be provided or contractual benefits assumed by the other party. Nothing in this Design/Build Contract shall be deemed to constitute either party a partner, agent or legal representative of the other party, except as explicitly provided hereunder. No liability or benefits, such as workers compensation, pension rights or liabilities, or other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship shall arise or accrue to any party's agent or employee as a result of this Design/Build Contract or the performance thereof.

**SECTION 14.3 PROPERTY RIGHTS**

14.3.1 Protection from Infringement The D/B Company shall pay all royalties and license fees payable in connection with the performance of the Design/Build Work. The D/B Company shall protect, indemnify and hold harmless the County, and any of the County Indemnitees, from and against all Loss-and-Expense, and shall defend the County Indemnitees in any Legal Proceeding, arising out of or related to the infringement or unauthorized use of any patent, trademark, copyright or trade secret relating to, or for the performance of the Design/Build Work, or at its option, shall acquire the rights of use under infringed patents, or modify or replace infringing equipment with equipment equivalent in quality, performance, useful life and technical characteristics and development so that such equipment does not so infringe. The D/B Company shall not, however, be required to reimburse or indemnify any person for any Loss-and-Expense to the extent due to the negligence or willful misconduct of such person. The provisions of this Section shall survive termination of this Design/Build Contract.

14.3.2 Intellectual Property Developed by the D/B Company All intellectual property developed by the D/B Company at or through the Design/Build Work or otherwise in connection with the performance of the Design/Build Contract shall be owned by the D/B Company, and shall be made fully available to the County on demand. Such intellectual property shall include technology, inventions, innovations, processes, know-how, formulas and software, whether or not protected as proprietary information, trade secrets, or patents. The D/B Company hereby grants the County an irrevocable, perpetual and unrestricted right to use such intellectual property for any County purpose, whether before or

following any Termination Date. Neither the County nor the D/B Company shall license, transfer or otherwise make available such intellectual property to any third party for remuneration except with the consent of the other, which consent may be conditioned upon mutual agreement as to the sharing of any such remuneration.

**SECTION 14.4 INTEREST ON OVERDUE OBLIGATIONS** Except as otherwise provided herein, all amounts due the County hereunder, whether as damages, credits, revenue, charges or reimbursements, that are not paid when due shall bear interest at the rate of interest which is the Overdue Rate, on the amount outstanding from time to time, on the basis of a 365-day year, counting the actual number of days elapsed, and such interest accrued at any time shall, to the extent permitted by Applicable Law, be deemed added to the amount due as accrued.

**SECTION 14.5 COST SUBSTANTIATION.**

14.5.1 Substantiating Non-Fixed Costs The Fixed Design/Build Price has been negotiated by the parties and fixed by the terms of this Design/Build Contract. Any other cost proposed or incurred by the D/B Company which is directly or indirectly chargeable to the County in whole or in part hereunder shall be the fair market price for the good or services provided, or, if there is no market, shall be a just and commercially reasonable price. The D/B Company shall provide certified Cost Substantiation for all such other costs invoiced to the County hereunder, and for all estimates and quotations furnished to the County hereunder for the purpose of negotiating a fixed or lump-sum price for Change Orders, or other additional work necessitated on account of Uncontrollable Circumstances, County Fault or County direction.

14.5.2 Cost Substantiation Certificate Any certificate delivered hereunder to substantiate cost shall state the amount of such cost and the provisions of this Design/Build Contract under which such cost is properly chargeable to the County, shall describe the competitive or other process utilized by the D/B Company to obtain a fair market price, and shall state such cost is a fair market price for the services or materials to be supplied (or, if there is no market, that such cost is just and commercially reasonable) and that such services and materials are reasonably required pursuant to this Design/Build Contract. The certificate shall be accompanied by copies of such documentation as shall be necessary to reasonably demonstrate that the cost as to which Cost Substantiation is required has been paid or incurred. Such documentation shall be in a format reasonably acceptable to the County and shall include reasonably detailed information concerning: (1) all Subcontracts; (2) the amount and character of materials and services furnished, the persons from whom purchased, the amounts payable therefor and related delivery and transportation costs and any sales or personal property Taxes; (3) a statement of the equipment used and any rental payable therefor; (4) D/B Company and Subcontractor worker hours, duties, wages, salaries, benefits and assessments; and (5) D/B Company and Subcontractor profit, administration costs, bonds, insurance, taxes, premiums overhead, and other expenses. The D/B Company's entitlement to

reimbursement of Cost Substantiated costs of the D/B Company shall be subject to the limitations set forth in this Section.

14.5.3 Technical Services D/B Company personnel and personnel of Subcontractors providing technical services shall be billed at their then currently applicable rates for similar services on projects of similar size and scope to the Design/Build Work.

14.5.4 Mark-Up The D/B Company will be entitled to a mark-up of no more than 13% for a combination of overhead, risk, profit and contingency on costs of its own personnel, except with respect to work due to Uncontrollable Circumstances, for which the D/B Company shall be entitled to no mark-up for overhead, risk, profit and contingency. No mark-up will be added to the D/B Company's costs for Subcontractors, lodging and meals or travel. Construction and operation Subcontractors similarly will be entitled to such mark ups with respect to its personnel costs but no mark ups for costs for their subcontractors, lodging and meals or travel.

14.5.5 Evidence of Costs Incurred To the extent reasonably necessary to confirm direct costs required to be Cost Substantiated, copies of timesheets, invoices, canceled checks, expense reports, receipts and other documents, as appropriate, shall be delivered to the County with the request for reimbursement of such costs.

#### **SECTION 14.6 SUBCONTRACTORS**

14.6.1 Use Restricted Subcontractors may be used to perform any contract services, subject to the County's right of approval set forth in subsection 14.6.2 of this Section.

14.6.2 Limited County Review and Approval of Permitted Subcontractors The County shall have the right, based on the criteria provided below in this Section, to approve all Subcontractors which the D/B Company is permitted to engage under subsection 14.6.1 of this Section for contract services, except: (1) Affiliates of the D/B Company; (2) equipment suppliers; (3) Governmental Bodies; (4) approved Subcontractors listed on Appendix 6 and (5) Subcontractors hired by the D/B Company for purposes of remedying an emergency situation. The D/B Company shall furnish the County written notice of its intention to engage such Subcontractors, together with all information requested by the County pertaining to the demonstrated responsibility of the proposed Subcontractor in the following areas: (1) any conflicts of interest; (2) any record of felony criminal convictions or pending felony criminal investigations; (3) any final judicial or administrative finding or adjudication of illegal employment discrimination; (4) any unpaid federal, State, County or local Taxes; and (5) any final judicial or administrative findings or adjudication of non-performance in contracts with the County or the State. The approval or withholding thereof by the County of any proposed Subcontractor shall not create any liability of the County, to the D/B Company, to third parties or otherwise. In no event shall any Subcontract be awarded to any person debarred, suspended or disqualified from State or County contracting for any services similar in scope to the Design/Build Work.

14.6.3 Subcontract Terms and Subcontractor Actions The D/B Company shall retain full responsibility to the County under this Design/Build Contract for all matters related to the contract services notwithstanding the execution or terms and conditions of any Subcontract. No failure of any Subcontractor used by the D/B Company in connection with the provision of the contract services shall relieve the D/B Company from its obligations hereunder to perform the contract services. The D/B Company shall be responsible for settling and resolving with all Subcontractors all claims arising out of delay, disruption, interference, hindrance, or schedule extension caused by the D/B Company or inflicted on the D/B Company or a Subcontractor by the actions of another Subcontractor.

14.6.4 Indemnity for Subcontractor Claims The D/B Company shall pay or cause to be paid to all direct Subcontractors all amounts due in accordance with their respective subcontracts. No Subcontractor shall have any right against the County for labor, services, materials or equipment furnished for the Design/Build Work. The D/B Company acknowledges that its indemnity obligations under Section 11.4 shall extend to all claims for payment or damages by any Subcontractor who furnishes or claims to have furnished any labor, services, materials or equipment in connection with the contract services.

14.6.5 Membrane System Supplier Subcontract The D/B Company shall enter into a subcontract (Exhibit A) with the Membrane System Supplier, Zenon Environmental Inc (the "Subcontract for the Membrane System for Johns Creek Environmental Campus"), prior to the Contract Date. The Subcontract for the Membrane System for Johns Creek Environmental Campus shall contain the Scope of Supply and terms and conditions of Zenon's selected proposal in response to the Technology RFP and as detailed in Appendix 16 for the MBR system. The Subcontract for the Membrane System for Johns Creek Environmental Campus shall be subject to review and comment by the County for consistency with the applicable requirements of this Design/Build Contract, and shall not contain any provision which is material and adverse to the County. No such review or comment shall amend, alter or affect this Design/Build Contract or the D/B Company's obligations hereunder in any manner, nor shall the County incur any liability or expense as a result thereof.

14.6.6 Design Contract In the event the D/B Company elects to enter into a contract with a third party to design the Design/Build Project (the "Design Contract"), prior to the Contract Date, the D/B Company shall enter into the Design Contract with \_\_\_\_\_. The Design Contract shall provide for the design of the Design/Build Project. The Design Contract shall be subject to review and comment by the County for consistency with the applicable requirements of this Design/Build Contract, and shall not contain any provision which is material and adverse to the County. No such review or comment shall amend, alter or affect this Design/Build Contract or the D/B Company's obligations hereunder in any manner, nor shall the County incur any liability or expense as a result thereof.

14.6.7 Construction Contract In the event the D/B Company elects to enter into a contract with a third party to Construct the Design/Build Project (the "Construction Contract"), prior to the Contract Date, the D/B Company shall enter into the Construction Contract with

\_\_\_\_\_. The Construction Contract shall provide for the construction, installation and equipping of the Design/Build Work and the performance of all Design/Build Work except work to be performed by the D/B Company, work to be performed by other submitted and concurred in subcontract, design or Acceptance Testing, based upon detailed design drawings, blueprints, plans and specifications furnished by the D/B Company for such purpose. All such drawings, blueprints, plans and specifications shall be based on and consistent with the Minimum Technical Requirements and all other terms and conditions of this Design/Build Contract. The Construction Contract shall be subject to review and comment by the County for consistency with the requirements of this subsection, and shall not contain any provision which is material and adverse to the County. No such review or comment by the County shall amend, alter or affect this Design/Build Contract or the D/B Company's obligations hereunder in any manner, nor shall the County incur any liability or expense as a result thereof.

14.6.8 Emergency Power Generators Subcontractor and 10-year Service and Maintenance Agreement Fulton County desires the D/B Company to design and install emergency power generation systems at both the New Site to support the JCHC and at the Riverside Pump Station site to support this pump station as specified in Appendix 23. Additionally, the D/B Company shall provide a 10-year Service and Maintenance Agreement on both of these systems. In the event the D/B Company elects to enter into a contract(s) with a third party(ies) to provide the above equipment, installation and services, prior to the Contract Date, the D/B Company shall enter into a subcontract(s) with \_\_\_\_\_. After the 120-Whole Plant Acceptance Testing the D/B Company shall assign any contracts for the 10-year Service and Maintenance Agreements to the County. The complete cost of these 10-year Service and Maintenance Agreements shall be contained within the Fixed Design/Build Price and the D/B Company shall receive no additional compensation with regard to these agreements or the assigning of the agreements to the County.

14.6.9 Notice to County of Amendments, Breaches and Defaults The D/B Company shall give prior written notice to the County of any proposed and final amendments to the Design Contract, Construction Contract and the Operation Contract, and shall not enter into any such amendment which is material and adverse to the rights and obligations of the County hereunder without the County's prior written consent. The D/B Company shall notify the County promptly of any material breach or event of default occurring under the Construction Contract or the Operation Contract and the probable effect on the Design/Build Work. The D/B Company shall keep the County apprised of the course of the dispute and shall advise the County of its ultimate resolution.

14.6.10 Assignability All Subcontracts entered into by the D/B Company with respect to the contract services shall be assignable to the County, solely at the County's election and without cost or penalty, upon the expiration or termination of this Design/Build Contract.

## **SECTION 14.7 ACTIONS OF THE COUNTY IN ITS GOVERNMENTAL CAPACITY**

14.7.1 Rights as Government Not Limited Nothing in this Design/Build Contract shall be interpreted as limiting the rights and obligations of the County in its governmental or regulatory capacity, (including actions to protect health, safety and welfare or to protect the environment), or as limiting the right of the D/B Company to bring any action against the County, not based on this Design/Build Contract, arising out of any act or omission of the County in its governmental or regulatory capacity.

14.7.2 No County Obligation to Issue Governmental Approvals Nothing in this Design/Build Contract shall obligate the County to issue or approve any Governmental Approval required with respect to the JCFC or the Design/Build Work, and the County shall not be deemed to be in breach or default hereunder as a result of any delay or failure in the issuance or approval of any such Governmental Approval. The County retains all issuance and approval rights it has under Applicable Law with respect to such Governmental Approvals, and none of such rights shall be deemed to be waived, modified or amended as a consequence of the execution of this Design/Build Contract.

#### **SECTION 14.8 ASSIGNMENT**

14.8.1 By the D/B Company The D/B Company shall not assign, transfer, convey, lease, encumber or otherwise dispose of this Design/Build Contract, its right to execute the same its duties and obligations hereunder, or its right, title or interest in all or any part of this Design/Build Contractor any monies due hereunder whatsoever, whether legally or equitably, by power of attorney or otherwise, without the prior written consent of the County. Any such consent given in one instance shall not relieve the D/B Company of its obligation to obtain the prior written consent of the County to any further assignment. Any assignment of this Design/Build Contract which is approved by the County shall require the assignee of the D/B Company to assume the performance of and observe all obligations, representations and warranties of the D/B Company under this Design/Build Contract, and no such assignment shall relieve the Guarantor of any of its obligations under the Guaranty Agreement, which shall remain in full force and effect during the Term hereof. The approval of any assignment, transfer or conveyance shall not operate to release the D/B Company in any way from any of its obligations under Design/Build Contract unless such approval specifically provides otherwise.

14.8.2 By the County The County may not assign its rights or obligations under this Design/Build Contract without the prior written consent of the D/B Company. The County may, however, assign its rights and obligations under this Design/Build Contract, without the consent of the D/B Company, to a trustee in connection with future bond issuances as security for such bonds, or to another Governmental Body if such assignee assumes, and is legally capable of discharging, the duties and obligations of the County hereunder.

**SECTION 14.9 BINDING EFFECT** This Design/Build Contract shall bind and inure to the benefit of and shall be binding upon the County and the D/B Company and any assignee acquiring an interest hereunder consistent with Section 14.8.

**SECTION 14.10 AMENDMENT AND WAIVER**. This Design/Build Contract may not be amended except by a written amendment signed by the parties. Any of the terms, covenants, and conditions of this Design/Build Contract may be waived at any time by the party entitled to the benefit of such term, covenant, or condition if such waiver is in writing and executed by the party against whom such waiver is asserted.

**SECTION 14.11 NO DISCRIMINATION** Generally the D/B Company shall not discriminate nor permit discrimination by any of its officers, employees, agents and representatives against any person because of age, race, color, religion, national origin, sex or, with respect to otherwise qualified individuals, handicap and shall comply with the provisions of The Fulton County Ordinance providing for Non-Discrimination in Purchasing and Contracting approved July 7, 1999 and Section 3 of the D/B RFP. The D/B Company will take all actions reasonably necessary to ensure that qualified applicants are employed, and that employees are treated equitably during employment, without regard to their age, race, color, religion, sex, national origin or, with respect to otherwise qualified individuals, handicap. Such action shall include, without limitation: (1) recruitment and recruitment advertising; (2) layoff or termination; (3) upgrading, demotion, transfer, rates of pay or other form of compensation; and (4) selection for training, including apprenticeship. The D/B Company shall impose the non-discrimination provisions of this Section by contract on all Subcontractors hired to perform work related to the JCEC and shall take all reasonable actions necessary to enforce such provisions. The D/B Company will post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

**SECTION 14.12 SOURCES OF FUNDS** Notwithstanding anything to the contrary in this Design/Build Contract, payments of the Fixed Design/Build Price and all other amounts of any kind or nature whatsoever that may at any time be due and owing to the D/B Company pursuant to the terms of, or resulting from, this Design/Build Contract are intended by the parties to and shall be strictly limited to and payable solely out of the proceeds of bonds issued therefor, and shall not be payable from any other source. No such payments shall be, or be deemed to be, a debt of the County under any circumstance or for any purpose whatsoever, nor shall this Design/Build Contract constitute a pledge of the full faith and credit of the County, or shall the County appropriate or be required to appropriate funds to pay for any amounts due under this Design/Build Contract. The D/B Company will never have the right to compel the exercise of any taxing power of the County to pay any amount due to the D/B Company under this Design/Build Agreement, nor to enforce payment thereof against any property of the County other than the funds

available from the Bond Issue. The D/B Company shall have no recourse for payment hereunder against any other source of funds or other assets, and the D/B Company hereby irrevocably and unconditionally waives any recourse or claim it may or could otherwise have or allege to have against any other payment source other than the water and sewer fund. In the event the D/B Company shall receive any funds or proceeds attributable to or collected with respect to the JCEC, the D/B Company shall immediately turn such funds over to the County with a full accounting as to source and amount. The County and the D/B Company acknowledge that as a requirement under the financing documents, the water and sewer fund has been created and that all revenues from the New Plant are now and shall continue to be deposited into the water and sewer fund. Disbursements for the Design/Build Fee shall only be made from the water and sewer fund for payments of expenses relating to the New Plant pursuant to the financing documents.

**SECTION 14.13.        NOTICES**        All notices, consents, approvals or written communications given pursuant to the terms of this Design/Build Contract shall be: (1) in writing and delivered in person to the Construction Manager; or (2) transmitted by certified mail, return, receipt requested, postage prepaid or by overnight courier utilizing the services of a nationally recognized overnight courier service with signed verification of delivery; or (3) given by facsimile transmission, if a signed original is deposited on the United States mail within two days after transmission. No Notice, consents, approvals or written communications shall be by email. Notices shall be deemed given only when actually received at the address first given below with respect to each party. Either party may, by like notice, designate further or different addresses to which subsequent notices shall be sent.

[1]        Notices required to be given to the D/B Company shall be addressed as follows:

[D/B Company Name	with copy to:	D/B Company Name
Local Address]		National Address
Attn: Project Manager		Attn: _____

2]        Notices required to be given to the County shall be addressed as follows:

Parsons PM Team	with copy to:	Department of Public Works
141 Pryor Street SWSuite 3077		141 Pryor Street SW Suite 6001
Atlanta, GA 30303		Atlanta, GA 30303
Attn: JCEC Construction Manager		Attn: Tim Equels
		Assistant Director, Public

Works

**SECTION 14.14.        D/B COMPANY BANKRUPTCY MATTERS**

14.14.1 Exclusive Jurisdiction It is expressly agreed and understood by the parties hereto that, in the event the D/B Company shall be or become the subject of any bankruptcy proceeding, the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (the "Bankruptcy Court") shall have the sole and exclusive jurisdiction of such bankruptcy proceeding.

14.14.2 Waiver of Automatic Stay; Entitlement to Lift of Stay The D/B Company hereby acknowledges that the construction of the JCEC and the continuous provision of wastewater treatment is critical and essential to the public welfare of the citizens of the County and other jurisdictions which may be served by the New Plant. Accordingly, due to the paramount public interest affected by its construction of the New Plant, the D/B Company hereby unconditionally and irrevocably waives the benefits of the automatic stay set forth in Section 362 of the Bankruptcy Code in the event the D/B Company files for bankruptcy, and agrees not to oppose in any respect whatsoever a motion confirming the enforceability and efficacy of this waiver or a motion for relief from stay filed by the County to enforce the rights and remedies granted to the County in the Design/Build Contract. Moreover, the D/B Company hereby acknowledges and agrees that the automatic stay set forth in Section 362(a) of the Bankruptcy Code would not apply to the County's enforcement of its rights and remedies under the Design/Build Contract because any such enforcement would be in furtherance of the County's police and regulatory power that is expressly excepted the automatic stay under Section 362(b)(4) of the Bankruptcy Code. In addition to and not in limitation of the foregoing, however, in the event that the automatic stay set forth in Section 362(a) of the Bankruptcy Code were deemed to be applicable to the County's enforcement of its rights under this Agreement, in the event any voluntary bankruptcy petition is filed by, or any involuntary bankruptcy petition is caused to be filed by the D/B Company or any Affiliate of the D/B Company against the D/B Company, pursuant to any bankruptcy, insolvency, reorganization, liquidation, dissolution or similar law, the D/B Company agrees that the County shall be entitled to obtain upon ex parte application therefor, and without further notice or action of any kind or nature whatsoever, an order from the Bankruptcy Court granting immediate relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code so as to permit the County to exercise all of its rights and remedies pursuant to this Design/Build Contract, including, without limitation, termination of this Design/Build Contract pursuant to Section 12.2 hereof, the causing of the assignment by the D/B Company to the County pursuant to Subsection 14.6.10 hereof of such third party contracts as the County shall elect, and at law and in equity.

14.14.3 Executory Contract Issues The D/B Company agrees due to the paramount public interest affected by its design and construction of the New Plant pursuant to this Design/Build Contract as aforesaid that, in the event the D/B Company files for bankruptcy, the D/B Company shall, within two (2) Business Days of a bankruptcy filing, file a motion pursuant to Section 365 of the Bankruptcy Code to either assume or reject the Agreement (the "Section 365 Motion"). If the D/B Company fails to file the Section 365 Motion, the D/B Company agrees not to oppose, in any respect whatsoever, any motion filed by the County with respect to the Design/Build Contract, including, but not limited to, a (a) motion for relief from stay under Section 362 of the Bankruptcy Code to terminate the

Design/Build Contract; or (b) motion to compel the D/B Company to assume or reject the Design/Build Contract promptly under Section 365(d)(2) of the Bankruptcy Code.

14.14.4 Property of the Estate The D/B Company agrees that it owns no right, title or interest of any kind or nature whatsoever in the New Plant, the revenues or proceeds generated thereby or any equipment, materials, supplies or other real or personal property hereafter located on, in or used in connection with the operation and maintenance of the New Plant, all of which is and shall remain solely and exclusively the property of the County. Accordingly, neither the New Plant nor any part thereof, nor any such revenues or proceeds generated thereby, shall constitute property of the D/B Company's bankruptcy estate under Section 541 of the Bankruptcy Code in the event that the D/B Company files for bankruptcy and the D/B Company hereby covenants and agrees not to assert any position to the contrary at any time or in any judicial proceedings.

**SECTION 14.15** NOTICE OF LITIGATION In the event the D/B Company or County receives notice of or undertakes the defense or the prosecution of any Legal Proceedings, claims, or investigations in connection with the System, the party receiving such notice or undertaking such prosecution shall give the other party timely notice of such proceedings and shall inform the other party in advance of all hearings regarding such proceedings.

**SECTION 14.16** FURTHER ASSURANCES The County and D/B Company each agree to execute and deliver such further instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Design/Build Contract. The County and the D/B Company, in order to carry out this Design/Build Contract, each shall use all reasonable efforts to provide such information, execute such further instruments and documents and take such actions as may be reasonably requested by the other and not inconsistent with the provisions of this Design/Build Contract and not involving the assumption of obligations or liabilities different from or in excess of or in addition to those expressly provided for herein.

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**ARTICLE 15**

**FULL PERFORMANCE REPRESENTATION**

The D/B Company agrees to complete the project within the time prescribed in, for the prices set out in, and as required by, the contract documents. The undersigned D/B Company declares and represents that he has reviewed and understands the Contract Documents and has examined the site of the Design/Build Work and informed himself fully in regard to all conditions pertaining to the place where the Design/Build Work is to be done, including those conditions affecting the cost of the Design/Build Work and the delivery, handling and storage of equipment and materials at the place where the Design/Build Work is to be executed; that the D/B Company and its subcontractors, architects, and engineers have examined and read the Contract Documents; and he has satisfied himself that the Contract Documents are an adequate and acceptable reflection of Design/Build Work which is required to be performed, and that he is willing and able to perform all of the necessary Design/Build Work based upon the information and representations contained within the Contract Documents. The D/B Company hereby agrees that no additional information is required to complete the Design/Build Work within the cost and schedule constraints established and agreed upon within this Agreement.

**D/B COMPANY**

By: \_\_\_\_\_  
(ATTEST)

By: \_\_\_\_\_  
(OFFICER)

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

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

(SEAL)

**FULTON COUNTY**

By: \_\_\_\_\_  
(ATTEST) Mark Massey, Clerk to the  
Commissioners  
(SEAL)

By: \_\_\_\_\_  
Chairman, Board of Commissioners  
of Fulton County Georgia

**APPROVED AS TO FORM:**

**APPROVED AS TO CONTENT:**

By: \_\_\_\_\_  
County Attorney

By: \_\_\_\_\_  
T. K. Equels, Assistant Director

**Public Works**

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Exhibit 2:	List of Deliverables, Submittals, and Meetings
Exhibit 3:	General Scope of Work

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**SUBCONTRACT  
FOR  
THE MEMBRANE SYSTEM FOR  
JOHN'S CREEK ENVIRONMENTAL CAMPUS**

between

**THE DESIGN/BUILD COMPANY**

and

**THE MEMBRANE SYSTEMS SUPPLIER**

Dated

**DRAFT SUBCONTRACT  
FOR THE MEMBRANE SYSTEMS  
FOR JOHN'S CREEK ENVIRONMENTAL CAMPUS**

THIS SUBCONTRACT for the supply of the Membrane System for John's Creek Environmental Campus is made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2003 by and between \_\_\_\_\_ (the "Design/Build Company"), a corporation organized and existing under the laws of the State of \_\_\_\_\_ and authorized to do business in the State of Georgia and \_\_\_\_\_ (the "Membrane System Supplier"), a corporation organized and existing under the laws of the State of \_\_\_\_\_ and authorized to do business in the State of Georgia.

**Recitals**

A. Fulton County, Georgia ("the County") owns and operates the existing 7 million gallons per day (mgd) Johns Creek Water Pollution Control Plant; and

B. To provide for increased environmentally sound wastewater treatment and reclamation capacity in the northern portion of Fulton County, the County decided to undertake significant capital improvements to construct a new 15 mgd Johns Creek Environmental Campus ("JCEC") on a new site located on Holcomb Bridge Road (the "Design/Build Project"); and

C. The County determined that it was in the County's best interests to look to a single private company ("Design/Build Company") to design, obtain permits for, construct, start-up and acceptance test and deliver to the County a fully operational Johns Creek Environmental Campus ("Design/Build Work"); and

D. The County determined that it was in the County's best interest to procure the Design/Build Project in two phases, with the first phase consisting of the selection of a company to supply the membrane bioreactor process to treat the wastewater sent to the JCEC ("Membrane System Supplier"), and the second phase consisting of the selection of the Design/Build Company that will be solely responsible for the full delivery of the entire Design/Build Project to the County; and

E. The County chose to select the Membrane System Supplier through the issuance of a technology request for proposals ("Technology RFP"), and chose to procure the services of the Design/Build Company, after the County has selected the Membrane System Supplier, through the issuance of a design/build request for proposals ("Design/Build RFP"); and

F. Based on an evaluation by the County's evaluation committee utilizing the evaluation factors and selection criteria and following the review and selection process identified in the Technology RFP, the evaluation committee made a determination that the proposal submitted by the Membrane System Supplier was the most advantageous proposal to the County and forwarded its recommendation to the Fulton County Board of Commissioners; and

G. Based on the evaluations and findings of the evaluation committee, the Board of Commissioners on \_\_\_\_\_, 2003 made a determination that the proposal submitted by the Membrane System Supplier was the most advantageous proposal received in response to the Technology RFP and in reliance thereon required all Design Builders to include price and schedule submitted by the Membrane System Supplier to be included within the Design/Build RFP; and

H. The Design/Build Company selected in phase two of the procurement process will be required to enter into this Subcontract with the Membrane System Supplier consistent with the terms and conditions of the selected Membrane System Supplier's proposal, and the County will look solely to the Design/Build Company for all aspects of the Design/Build Project; and

I. The Membrane System Supplier will be required to enter into this Subcontract with the Design/Build Company under terms that are consistent with all the terms and conditions of the Membrane System Supplier's proposal accepted by the County and included as an integral and material part of the Design/Build RFP, especially those terms and conditions relating to the schedule for delivery of Membrane System supplier's Scope of Supply, the Fixed Membrane System Price, and warranties; and

J. The Design/Build Company and the Membrane System Supplier must execute this Subcontract before the County will execute a Design/Build Contract with the Design/Build Company; and

K. The Membrane System Supplier understands and agrees that the Design/Build Company's obligations to perform under this Subcontract are contingent upon the execution of a Design/Build Contract between the Design/Build Company and the County for the complete work; and

L. The Membrane System Supplier and the Design/Build Company understand and agree that such Design/Build Contract shall be expressly incorporated into this Subcontract and that both the Design/Build Company and the Membrane System Supplier are expressly bound to all portions thereof.

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, and for other good and valuable consideration, the Design/Build Company and the Membrane System Supplier agree as follows:

**Terms**

1. **Subcontract Work.** The Membrane System Supplier agrees to furnish all labor, materials, equipment and related components (Scope of Supply") required for the completion of all membrane systems work specified in Fulton County RFP #03RFP375K (the "Technology RFP"), its appendices, specifications, addenda, exhibits, drawings, those portions of the Membrane System Supplier's proposal accepted by the County, and all applicable portions of the Design/Build Contract ("Subcontract Documents").

2. **Subcontract Price.** The Membrane System Supplier shall be paid the Fixed Membrane Price of \$ \_\_\_\_\_ in exchange for the satisfactory performance of all duties, responsibilities and obligations hereunder, with monthly payments to be made by the Design/Build Company within ten (10) calendar days following receipt of payment from the County.

3. **Membrane System Supplier Responsibilities.** The Membrane System Supplier agrees to be bound to the Design/Build Company by the terms of the Subcontract Documents and to assume towards Design/Build Company all duties, obligations and responsibilities that the Design/Build Company assumes towards the County under the Design/Build Contract, except to the extent that provisions contained within the Design/Build Contract are by their terms or by law applicable only to the Design/Build Company.

4. **Design/Build Company's Responsibilities.** The Design/Build Company agrees to be bound to the Membrane System Supplier by the terms of the Subcontract Documents and to assume towards the Membrane System Supplier all duties, obligations and responsibilities that the County assumes towards the Design/Build Company under the Design/Build Contract, except to the extent that provisions contained within the Design/Build Contract are by their terms or by law applicable only to the County.

5. **The Schedule.** The Design/Build Company agrees to begin, prosecute and complete the entire work specified within the Design/Build Contract in an orderly manner so that the Membrane System Supplier can begin, prosecute and complete the Subcontract Work within the specified time frames; and, in consideration thereof, the Membrane System Supplier agrees to begin, prosecute and complete the Subcontract Work in an orderly manner and with due consideration to the date or time specified by the Design/Build Company for the completion of all portions of the entire work.

6. **Insurance.** Upon execution of this Subcontract, the Membrane System Supplier shall furnish the Design/Build Company with insurance of the type and in the limits required to be furnished to the County by the Design/Build Contract.

7. **Bonds.** Upon execution of this Subcontract, Membrane System Supplier shall furnish to the Design/Build Company, with Payment and Performance Bonds in the amount of 100% of the Subcontract Price, however, the Membrane System Supplier shall not be required to provide the Guaranty under Article 13.1 or the Letter of Credit under Article 13.3 of the Design/Build Contract.

8. **Claims.** The Membrane System Supplier agrees that no claim for additional time or money, for labor, materials or services furnished shall be valid unless submitted in accordance with the terms and conditions of the Design/Build Contract.

9. **Subcontract Interpretation.** If any portion of the Subcontract Documents shall be in conflict with any other portion, the various documents comprising the Subcontract Documents shall govern in the following order of precedence: (1) this Subcontract; (2) the Technology RFP; (3) any Addenda; (4) change orders; (5) the Appendices; (6) portions of Membrane System Supplier's proposal accepted by the County; and (7) the applicable portions of the Design/Build Contract.

IN WITNESS WHEREOF, the parties have executed this agreement upon the date and year first written above.

SEAL ATTEST

SEAL ATTEST

\_\_\_\_\_  
(Name of Membrane System Supplier)

\_\_\_\_\_  
(Name of Design/Build Company)

By \_\_\_\_\_

By \_\_\_\_\_

As its \_\_\_\_\_

As its \_\_\_\_\_

# 1827371\_v2



## Exhibit C

### General Description of D/B Work:

The information provided in this exhibit is not intended to conflict with the terms and conditions of the D/B Contract or the RFP. It is intended to be used for general information. Where there are differences the language of the D/B Contract shall prevail.

The design and construction of a 15 MGD average wastewater treatment plant on the site on Holcomb Bridge Road.

The major component of the treatment process is the Membrane Bio-Reactor (MBR) system as described in the selected Membrane System Supplier's (Zenon Environmental Inc.) Proposal to the County, Appendix 16. The County will not accept any other MBR or any other technology as an alternative to the selected MSS's scope of supply.

Design conditions as presented in Appendices 2, 5A, and 5B. This encompasses the design of the plant to meet, as a minimum the Metro Standards, as presented in the Metropolitan North Georgia Water Planning District (MNGWPD) Short and Long Term Wastewater Plans. Also the design shall meet the discharge parameters of the Urban Re-Use Water Standard.

The non-operational interior spaces and the exterior architectural and landscaping features of the design as presented in Appendices 3 and 4. The final architectural design of the buildings will be presented to the City of Roswell Design Review Board for its review. Additionally, the design should include an educational use space as presented in Appendix 4.

An effluent/re-use water pump station with a capacity for the JCEC and Cauley Creek WRF peak day flows. The pump station must have the capability to pump JCEC peak day flows to the re-use system and receive Cauley Creek WRF peak hr. flows from the re-use system, and to discharge both the JCEC and Cauley Creek WRF peak day flows to the plant outfall Appendix 2.

The plant is being constructed in close proximity to a residential area. The plant must not produce odors, it must not generate noise above the ambient levels, and its exterior lighting must be subdued and directed towards the plant. The specifications for these requirements are contained in Appendix 2.

For aesthetic reasons and to improve odor control, the entire plant must be enclosed. Process operations must not be visible from the exterior of the building or from above the buildings. All process operations must be covered, and where appropriate, provide efficient and effective odor control.

The exterior landscaping should center around the historical road that runs through the property. This road and the main entrance area to the plant should be

the center of the theme of the landscaping design. The use of water features utilizing the high quality effluent from the plant is also encouraged.

The design must consider the location of the current plant, the wastewater that flows by gravity to the current location, the location of the outfall of the plant and the influent pump station and the diversion pump station located at the existing plant site.

Design and construct using Georgia Power or equivalent contractor an emergency power generation system for the Johns Creek Environmental Campus and the Riverside Drive Pump Station. The contractor is to provide ten (10) year maintenance and service agreement for each of the two systems.

Design and Construct the JCEC within a schedule period of less than 40 months.