

**AGREEMENT  
BETWEEN  
CITY OF EVERETT (“CLIENT”),  
KING COUNTY DIRECTORS’ ASSOCIATION (“KCDA”),  
AND  
NORTHWEST PLAYGROUND EQUIPMENT, INC., (“CONTRACTOR”)**

**This AGREEMENT** is made as of the 24th day of June, 2024, between the public entity City of Everett (“Client”) 2930 Wetmore Avenue, Everett, WA 98201 (address); King County Directors Association (KCDA), Street Address: 18639 - 80th Ave S, Kent, WA 98032; and the Contractor: Northwest Playground Equipment, Inc.

This Agreement supplements the King County Directors’ Association (“KCDA”) Purchase Order Number 4144120 (“Purchase Order”) for the Client.

A general description of the Project is:

Renovation and restriping the sport court, including installation of a new adjustable height basketball hoop and installing a new SUTU soccer practice back board.

The Architect/Engineer (“A/E”), if any, is:

*The Client, KCDA, and Contractor agree as set forth below.*

**ARTICLE 1  
THE WORK**

**1.1** This Agreement provides supplemental terms and conditions to the Purchase Order and is incorporated by reference into the Purchase Order as if set forth in full therein. This Agreement shall be completed and executed for all KCDA projects that include any on-site construction activities. The Contractor shall fully execute and complete the entire Work described in the Contract Documents.

**ARTICLE 2  
DATES OF COMMENCEMENT AND SUBSTANTIAL AND FINAL COMPLETION**

**2.1** The date of commencement of the Work (the date from which the Contract Time is measured) shall be the date established in a notice to proceed issued by the Client, unless a different date is stated below:

**2.2** The Contractor shall achieve Substantial Completion of the entire Work no later than 12/31/2025 and Final Completion no later than 3/31/2026, subject to adjustments of the Contract Time as provided in the Contract Documents.

**2.3** Liquidated damages, if any, shall be \$0.00 per day for each calendar day after the Contract Time that Substantial Completion is not attained, and shall be paid to the Client.

**ARTICLE 3**  
**CONTRACT SUM**

**3.1** KCDA shall pay the Contractor for the Contractor's performance of the Contract the Contract Sum of one hundred six thousand two hundred sixty-nine and 91/100 Dollars (\$106,269.91), subject to additions and deductions as provided in the Contract Documents. Sales tax is not included in the Contract Sum and shall be added to the invoice between the Contractor and KCDA and to the invoice between KCDA and the Client.

The contract sum has been derived from the contractor's bid to KCDA directly, or to KCDA through the Association of Educational Purchasing Agencies (AEPA) dated May 14, 2024, and is made up of the following components: See Quote #DD-5142024-0005096.

**3.2** The Contract Sum is based upon and includes the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Client:

**3.3** Unit prices beyond those listed in the Contractor's Bid to KCDA or AEPA, if any, are as follows: N/A.

**3.4** Allowances, if any, are as follows: N/A.

**3.5** If this Agreement is for a Project for the Contract Sum of one million dollars or more, complete below the names of the following subcontractors with whom the Contractor will subcontract for performance of the work:

_____	HVAC (heating, ventilation, and air conditioning)
_____	Plumbing as described in chapter 18.106 RCW.
_____	Electrical as described in chapter 19.28 RCW.
_____	Structural Steel Installation
_____	Rebar Installation

**3.6** If the amount of the Contract Sum listed in Section 3.1 above is one million dollars or more, then this Project is subject to the apprenticeship requirements of RCW 39.04.320 and Section 10.17 in the attached General Conditions. If the amount of the Contract Sum listed in Section 3.1 is less than one million dollars, then such apprenticeship requirements do not apply.

**ARTICLE 4**  
**PAYMENT**

**4.1** Whenever this Agreement states that KCDA will make payments, the parties agree that payment from the Client to KCDA is a condition precedent to payment from KCDA to the Contractor and that KCDA will use such payments from the Client to pay Contractor. KCDA will make payments to the Contractor as provided below and elsewhere in the Contract Documents based upon Application(s) for Payment submitted by the Contractor and per Article 15. KCDA will schedule final payment, constituting the entire unpaid balance of

the Contract Sum except statutory retainage, to the Contractor when the Work has achieved Final Completion, the Agreement has been fully performed, the Client's Board of Directors has accepted the Work, and the Client has agreed to receive billing from KCDA. The retainage shall be paid pursuant to RCW 60.28 and the Contract Documents.

**4.2** Payments due and unpaid under the Agreement shall bear interest at the Bank of America prime rate plus 2%, unless a different rate is required under RCW 39.76.

## **ARTICLE 5**

### **PERMITS AND FEES**

**5.1** The Client will secure and pay for the cost of any required building permit. The Client shall secure and pay for necessary approvals, easements, assessments and charges required for the use or occupancy of permanent structures or permanent changes in existing facilities.

**5.2** The Contractor shall secure and pay, as a part of the Contract Sum, for all other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the construction of the Work.

## **ARTICLE 6**

### **PROPERTY INSURANCE**

**6.1** The Client shall include this project in its existing property insurance coverage for loss or damage to the property in the course of construction. Upon the occurrence of an insured loss, the Client shall have the power to adjust and settle any loss with the insurers.

**6.2** The Contractor shall be responsible for securing property insurance for its own equipment. This property insurance shall be on an "all-risk" or equivalent policy form and shall include, but not be limited to, coverage for fire and extended coverage, theft, vandalism, malicious mischief, collapse and windstorm. Any deductible shall be the sole responsibility of the Contractor. The Contractor's other insurance requirements are described in Article 17.

## **ARTICLE 7**

### **ENUMERATION OF CONTRACT DOCUMENTS**

The Contract Documents are enumerated as follows, except for modifications issued after execution of this Agreement:

**7.1** KCDA Invitation to Bid Number 22-315 or AEPA Invitation to Bid Number AEPA n/a and all of the terms and conditions incorporated therein, including but not limited to all terms and conditions in the Invitations for Bids, Request for Proposal, and Public Works Procedures for Members and Contractors.

**7.2** For AEPA bids, Washington, King County Directors' Association (KCDA) Additional Agency Terms and Conditions as listed in the AEPA Invitation to Bid.

**7.3** KCDA Purchase Order Number 4144120.

**7.4** This executed Agreement between the Client and Contractor, including the attached General Conditions.

7.5 Any Supplementary and other Conditions of the Agreement.

7.6 The Specifications as follows:

<u>Section</u>	<u>Title</u>	<u>Pages</u>
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7.7 The Drawings as follows:

<u>Number</u>	<u>Title</u>	<u>Date</u>
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7.8 The Addenda (if any) as follows:

<u>Number</u>	<u>Date</u>	<u>Pages</u>
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7.9 Department of Labor and Industries Prevailing Wage Rates.  
County: Snohomish County  
Effective Date: April 1, 2024

7.10 Any other documents forming part of the Contract Documents and listed below:

*This Agreement entered into as of the day and year first written above.*

KING COUNTY DIRECTORS' ASSOCIATION

CONTRACTOR

By Karri Wyman  
(Signature)  
Karri Wyman, Contract & Procurement Lead  
(Printed name and title)

By Chris McGarvey  
(Signature)  
Chris McGarvey, President  
(Printed name and title)

CLIENT

By Cassie Franklin  
(Signature)  
Cassie Franklin, Mayor  
(Printed name and title)

Attest: Maria J. [Signature]  
Office of the City Clerk

# GENERAL CONDITIONS

## **ARTICLE 8** **THE CONTRACT DOCUMENTS**

**8.1** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one is as binding as if required by all. Performance by the Contractor is required to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

**8.2** The Contract Documents shall not be construed to create a contractual relationship of any kind between the Client and a Subcontractor of any tier, between KCDA and a Subcontractor of any tier, between the A/E (if any) and a Subcontractor of any tier, or between any persons or entities other than the Client, KCDA, and Contractor.

**8.3** The term "Work" means the demolition, abatement, disposal, construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

**8.4** The term "A/E" means the entity listed as such on the first page of this Agreement, if any. The A/E may be an architect, engineering or similar company, or consultant, and is not necessarily a licensed architect or engineer. If "None" or "N/A" is listed for the A/E, then the Client or its designated representative will perform all of the functions of the A/E described herein. The A/E is not an agent of the Client or KCDA, and is not authorized to speak on behalf of or bind the Client or KCDA.

**8.5** The Contractor's execution of the Agreement is a representation and acknowledgement that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed, that the Contract Sum is reasonable compensation for all the Work, and that the Contract Time is adequate for the performance of the Work. The Contractor's execution of the Agreement is a further representation and acknowledgement that the Contractor has carefully checked and verified all pertinent figures and that it has examined the Contract Documents and the Project site, including any existing structures, and that it has satisfied itself as to the nature, location, character, quality and quantity of the Work, the labor, materials, equipment, goods, supplies, work, services and other items to be furnished, and all other requirements of the Contract Documents, as well as the surface conditions and other matters that may be encountered at the Project site or affect performance of the Work or the cost or difficulty thereof.

**8.6** KCDA is an intended third-party beneficiary of this Agreement and may enforce all of its terms directly

against the Contractor. Contractor hereby assigns to the Client all manufacturers' warranties.

## **ARTICLE 9** **ADMINISTRATION OF THE AGREEMENT**

**9.1** The Client, with assistance from the A/E, will provide administration of the Agreement. The Client must approve in writing all changes in the Contract Sum or Time and all Change Orders, Construction Change Directives, and payments to the Contractor. The Client's Representative may perform any of the duties of the A/E described herein, at the discretion of the Client.

**9.2** No representative of KCDA, the Client, or the A/E is authorized to revoke, alter, enlarge, relax or release any requirements of the Contract Documents, nor to approve or accept any portion of the Work whether or not executed in accordance with, nor to issue instructions contrary to the Contract Documents, other than the Client's Superintendent. All warranties, guarantees, and certificates shall inure to the benefit of the Client.

**9.3** The Client or the A/E may disapprove, condemn or reject work when, in its opinion, the Work does not conform to the Contract Documents. The Client or the A/E may require special inspection or testing of any Work in accordance with the provisions of the Contract Documents whether or not such Work is then fabricated, installed or completed.

**9.4** The Client or the A/E may call, schedule and conduct job meetings, which the Contractor and representatives of its Subcontractors shall attend, to discuss such matters as procedures, progress, problems and scheduling.

**9.5** The Client, KCDA, and the A/E may visit the site at intervals each considers appropriate to the stage of the Work to become generally familiar with the progress and quality of the completed Work. However, none of them will be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.

**9.6** The Client may occupy the site during the course of the Work.

## **ARTICLE 10** **THE CONTRACTOR**

**10.1** The Contractor shall perform, supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences, personnel and procedures, for safety, and for coordinating all portions of the Work under the Agreement, unless the Contract Documents specifically provide other instructions concerning these matters. The Contractor shall be and operate as an independent contractor in the performance of the Work and

shall have complete control over and responsibility for all personnel performing the Work. The Contractor is not authorized to enter into any agreements or undertakings for or on behalf of KCDA or the Client or to act as or be an agent or employee of KCDA or the Client.

**10.2** The Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, disposal, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

**10.3 Workers.** The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. The Contractor shall be responsible to KCDA and the Client for the acts and omissions of the Contractor's employees, Subcontractors of any tier and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor. At no change to the Contract Sum or Contract Time, the Client may provide written notice requiring the Contractor to remove from the Work any employee or other person carrying out the Work that the Client considers objectionable. If the Work is being performed at a site in active school use or where there is a likelihood of contact with children, a person shall be unfit and removed from the site if he or she is a registered sex offender or has pled guilty to or has been convicted of any felony crime involving the physical injury or death of a child (RCW 9A.32 or RCW 9A.36 but not RCW 46.61--motor vehicle violation), the physical neglect of a child (RCW 9A.42), sexual offenses against a minor (RCW 9A.44), sexual exploitation of a child (RCW 9.68A), the sale or purchase of a minor child (RCW 9A.64.030), promoting prostitution of a child (RCW 9A.88), or violation of similar laws of another jurisdiction. Failure to comply with this section shall be grounds for the immediate termination of this Agreement for cause.

**10.4 Warranty.** The Contractor warrants that materials and equipment furnished under the Agreement will be of good quality and new, that the Work will be performed in a skillful and workmanlike manner, free from defects not inherent in the quality required or explicitly permitted, and that the Work will conform to the requirements of the Contract Documents. The Client may conclude that Work not conforming to these requirements, including substitutions or deviations from the drawings or specifications not properly approved and authorized, is defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.

**10.5 Taxes and Fees.** In accordance with Article 3, KCDA shall invoice the Client and pay all sales tax. The Contractor shall pay all other consumer, use, B & O, and

other similar taxes that are legally enacted when bids are received, whether or not yet effective or merely scheduled to go into effect.

**10.6 Legal Compliance.** The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify KCDA, the Client, and A/E in writing if the Contractor observes the Drawings or Specifications to be at variance with them.

**10.7 Submittals.** The Contractor shall review, approve and submit to the Client or A/E with reasonable promptness Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents. The Work shall be in accordance with approved submittals.

**10.8 Progress Schedule.** Within *seven days* of execution of this Agreement, the Contractor shall submit a preliminary schedule of the Work to the Client. Failure to do so shall constitute a material breach of the Contract and a material breach of the conditions of the bid bond. Within *thirty days* after execution of the Agreement, and before any progress payment need be made, the Contractor, after consultations with its Subcontractors, shall submit a Progress Schedule to the Client. Neither the Client nor the A/E will, however, be required to review or approve the substance or sequence of the Progress Schedule, which are the Contractor's sole responsibility. The Contractor will be responsible for planning, scheduling, managing, and reporting the progress of the Work in accordance with all of the specific methods and submittals described in the Contract Documents. The Contractor shall use the Contract Schedule to plan, coordinate, and prosecute the Work in an orderly and expeditious manner.

**10.9 Clean-Up.** The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Agreement. Prior to completion of the Work or at the Client's request, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials. If the Contractor fails to do so, the Client may do so and charge to the Contractor all costs incurred.

**10.10 Access.** The Contractor shall provide KCDA, the Client, the A/E and their respective consultants access to the Work wherever located.

**10.11 Royalties and Patents.** The Contractor shall pay all royalties and license fees, shall defend suits or claims for infringement of patent rights and shall hold KCDA, the Client, and the A/E harmless from loss on account thereof, unless the Contract Documents require the particular infringing design, process or product of a particular manufacturer or manufacturers.

**10.12 Indemnification.** Subject to the following conditions and to the fullest extent permitted by law, the

Contractor shall defend, indemnify, and hold harmless KCDA, the Client, and the A/E and their respective agents, employees, directors, officers, consultants, successors and assigns ("Indemnified Parties") from and against all claims, damages, losses and expenses, direct and indirect, or consequential, including but not limited to costs and attorneys' fees incurred on such claims and in proving the right to indemnification, arising out of or resulting from performance of the Work, any act or omission of the Contractor, its agents, any of its Subcontractors of any tier, and anyone directly or indirectly employed by the Contractor or Subcontractors of any tier ("Indemnitor"). The Contractor will fully defend, indemnify, and hold harmless the Indemnified Parties for the sole negligence of the Indemnitor. The Contractor will defend, indemnify, and hold harmless the Indemnified Parties for the concurrent negligence of the Indemnitor to the extent of the Indemnitor's negligence. The Contractor agrees to being added by KCDA or the Client as a party to any mediation, arbitration, or litigation with third parties in which KCDA or the Client alleges indemnification or contribution from an Indemnitor. The Contractor agrees that all of its Subcontractors of any tier will, in the subcontracts, similarly stipulate; in the event any does not, the Contractor shall be liable in place of such Subcontractor(s). To the extent a court or arbitrator strikes any portion of this indemnification provision for any reason, all remaining provisions shall retain their vitality and effect. In claims against any person or entity indemnified under this Section 10.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 10.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts. After mutual negotiation of the parties, the Contractor waives immunity as to the Client, KCDA, the A/E and their consultants only under Title 51 RCW, "Industrial Insurance." IF THE CONTRACTOR DOES NOT AGREE WITH THIS WAIVER, IT MUST PROVIDE A WRITTEN NOTICE TO KCDA OR AEPA ALONG WITH THE SUBMISSION OF ITS BID TO KCDA OR AEPA, OR THE CONTRACTOR WILL BE DEEMED TO HAVE NEGOTIATED AND WAIVED THIS IMMUNITY. The provisions of this Section shall survive the expiration or termination of this Agreement.

### **10.13 Prevailing Wages.**

10.13.1 Pursuant to RCW 39.12, no worker, laborer, or mechanic employed in the performance of any part of this Agreement shall be paid less than the "prevailing rate of wage" (in effect as of the date that bids are due) as determined by the Industrial Statistician of the Department of Labor and Industries, ESAC Division, PO Box 44540, Olympia WA 98504-4540, Telephone (360) 902-5335. The schedule of the prevailing wage rates for the locality or localities where this Work will be performed is attached and made a part of this Agreement by reference as though fully set forth herein; if not attached, then the applicable prevailing wages are determined as of the Bid Date for the county in which the Project is located

and are available at <http://www.lni.wa.gov/TradesLicensing/PrevWage/WageRates/default.asp>. A copy is available for viewing at the Client's office, and a hard copy will be mailed upon request. To the extent that there is any discrepancy between the attached or provided schedule of prevailing wage rates and the published rates as are applicable under WAC 296-127-011, or if no schedule is attached, then the applicable published rates shall apply at no increase to the Contract Sum. The Contractor shall provide the respective Subcontractors with a schedule of the applicable prevailing wage rates. The Industrial Statistician will answer questions relating to prevailing wage data upon request.

10.13.2 Pursuant to RCW 39.12.060, in case any dispute arises as to what are the prevailing rates of wages for work of a similar nature, and such dispute cannot be adjusted by the parties in interest, including labor and management representatives, the matter shall be referred for arbitration to the director of the Department of Labor and Industries, whose decision therein shall be final and conclusive and binding on all parties involved in the dispute.

10.13.3 The Contractor shall defend, indemnify and hold the Client harmless, including attorneys' fees, from any violation or alleged violation of RCW 39.12 ("Prevailing Wages on Public Works") and RCW 51 ("Industrial Insurance"), including without limitation RCW 51.12.050, by the Contractor, any Subcontractor of any tier, or any person performing Work on behalf of the Contractor or any Subcontractor of any tier.

**10.14** The Contractor shall comply with all applicable provisions of RCW 49.28.

**10.15** Pursuant to RCW 49.70 and WAC 296-307-560 et seq., the Contractor shall provide KCDA and the Client copies of and have available at the Project Site a workplace survey or material safety data sheets for all "hazardous" chemicals under the control or use of Contractor or any Subcontractor at the Project Site.

**10.16** The Contractor shall maintain and preserve for at least three years from the date of final payment books, ledgers, records, documents, estimates, bidding documents, correspondence, logs, schedules, electronic data and other evidence relating or pertaining to the costs incurred by the Contractor in connection with or related to the Agreement and/or performance of the Contract ("records") to such extent and in such detail as will properly reflect and fully support compliance with the Contract Documents and with all costs, charges and other amounts of whatever nature for which reimbursement or payment is or may be claimed under the Contract. The Contractor agrees to make available at all reasonable times at the office of the Contractor all such records for inspection, audit and reproduction (including electronic reproduction) by KCDA and the Client and their representatives. These requirements shall be applicable to each Subcontractor of any tier and included in each Subcontract and purchase order issued with respect to the Work. The Contractor agrees, on behalf of itself, its representatives, and

Subcontractors of any tier and their representatives, that any rights under RCW 42.56 will commence at Final Acceptance, and that the invocation of such rights at any time by the Contractor or a Subcontractor of any tier or any of their representatives shall initiate an equivalent right to disclosures from the Contractor and Subcontractors of any tier for the benefit of KCDA and the Client. Because of the importance of the access of such records to the Client in the case of a Claim, if the Contractor or any Subcontractor fails to fully comply with the requirements of this section with regard to any Claim, such Claim shall be deemed to be waived.

**10.17 Apprenticeship.** If the Contract Sum is one million dollars or more (see Section 3.1 of the Agreement), then this Section 10.17 and RCW 39.04.320 shall apply. This Section 10.17 shall not apply and shall have no effect upon Projects where the Contract Sum is less than one million dollars.

**10.17.1** Pursuant to RCW 39.04.320, no less than fifteen percent (15%) of the Labor Hours shall be performed by apprentices, unless a different amount is permitted or otherwise required by law. Apprenticeship hours shall be performed by participants in training programs approved by the Washington State Apprenticeship Council.

**10.17.2** “Labor Hours” means the total hours of workers receiving an hourly wage who are directly employed on the site of the public works project. “Labor hours” includes hours performed by workers employed by the Contractor and all Subcontractors working on the Project. “Labor hours” does not include hours worked by foremen, superintendents, owners, and workers who are not subject to prevailing wage requirements of RCW 39.12.

**10.17.3** During the term of this Contract, the Client may adjust the apprenticeship labor hour requirement upon its finding or determination that includes:

- .1 A demonstration of lack of availability of apprentices in the geographic area of the Project;
- .2 A disproportionately high ratio of material costs to labor hours that does not make feasible the required minimum levels of apprenticeship participation;
- .3 Demonstration by participating contractors of a good faith effort to comply with the requirements of RCW 39.04.300, 39.04.310 and 39.04.320;
- .4 Small contractors or subcontractors (e.g., small or emerging businesses) would be forced to displace regularly employed members of their workforce;
- .5 The reasonable and necessary requirements of the Contract render apprentice utilization infeasible at the required level (e.g., the number of skilled workers required and/or limitations on the time available to perform the Work preclude utilization of apprentices); or
- .6 Other criteria the Client deems appropriate, which are subject to review by the office of the Governor.

**10.17.5** The Contractor shall report apprentice participation to the Client at least monthly, on forms provided or approved by the Client. In addition, copies of monthly certified payroll records may be requested to document the goal including copies with any birthdates and social security numbers (and any other sensitive personal information) redacted so as such copies may be used to respond to any public records requests. The reports will include:

- .1 The name of the Project;
- .2 The dollar value of the Project;
- .3 The date of the Contractor’s notice to proceed;
- .4 The name of each apprentice and apprentice registration number;
- .5 The number of apprentices and labor hours worked by them, categorized by trade or craft;
- .6 The number of journey level workers and labor hours worked by them, categorized by trade or craft; and
- .7 The number, type, and rationale for the exceptions granted.

**10.18. Certified Payrolls.** Contractor and its Subcontractors of all tiers shall submit certified payrolls in accordance with RCW 39.12.120.

## **ARTICLE 11** **SUBCONTRACTORS**

**11.1** A “Subcontractor” is a person or entity that has a direct contract with the Contractor to perform a portion of the Work at the site or to supply materials or equipment. A “Subcontractor of any tier” includes Subcontractors as well as all direct and lower level sub-subcontractors and suppliers.

**11.2** As soon as practicable after award of the Agreement, the Contractor shall confirm in writing to KCDA and the Client the names of the Subcontractors for each portion of the Work. The Contractor shall not contract with any Subcontractor to whom the Client has made reasonable and timely objection or which is different from the one listed in conjunction with the bid. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor to be bound to the Contractor by the terms of the Contract Documents to the extent of the Work to be performed by the Subcontractor and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward KCDA and the Client, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

**11.3** The Contractor shall promptly pay (and secure the discharge of any liens asserted by) all persons properly furnishing labor, equipment, materials or other items in connection with the performance of the Work (including, but not limited to, any Subcontractors). The Contractor shall furnish to KCDA and the Client such releases of liens and claims and other documents as KCDA or the Client may request from time to time to evidence such payment (and discharge).



KCDA may, at its option, withhold payment, in whole or in part, to the Contractor until such documents are so furnished. The Contractor shall defend, indemnify, and hold harmless KCDA and the Client from any liens, including all expenses and attorneys' fees. Nothing in the Contract Documents shall create any obligation on the part of KCDA, the Client, or A/E to pay or to see to the payment of any moneys due any Subcontractor of any tier or other person or entity, except as may otherwise be required by laws and regulations.

## **ARTICLE 12**

### **CONSTRUCTION BY CLIENT OR BY SEPARATE CONTRACTORS**

**12.1** The Client reserves the right to perform construction or operations related to the Project with the Client's own forces and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to those of the Contract Documents. The Contractor has the responsibility to coordinate its Work with such separate contractors and the Client's own forces.

**12.2** The Contractor shall afford the Client and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations as required by the Contract Documents.

## **ARTICLE 13**

### **CHANGES IN THE WORK**

**13.1** The Client, without invalidating the Agreement, may order changes in the Work consisting of additions, deletions or modifications ("Changes"), and the Contract Sum and Contract Time will be adjusted accordingly. Changes in the Work, the Contract Sum and/or the Contract Time shall be authorized only by written Change Order signed by KCDA, the Client, the A/E and the Contractor or by written Construction Change Directive signed by the Client and the A/E.

**13.1.1** Change Orders. A Change Order is a written instrument signed by KCDA, the Client, and the Contractor stating their agreement upon a change in the Work; the amount of the adjustment in the Contract Sum, if any; and the extent of the adjustment in the Contract Time, if any.

**13.1.2** Construction Change Directives. A Construction Change Directive is a written order prepared and signed by the Client and the A/E that directs a change in the Work and states a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. It shall be used in the absence of total agreement on the terms of a Change Order. The Contractor shall promptly proceed with the change in the Work described in the Construction Change Directive. As soon as possible, and within *seven days* of receipt, the Contractor shall advise KCDA and the Client in writing of the Contractor's

agreement or disagreement with the cost or the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

**13.2** Changes in the Work shall be priced using the Contractor's unit prices and/or R.S. Means pricing as submitted in its Bid to KCDA or AEPA. If no such unit prices are listed for the Changes in the Work, and if the parties cannot agree on the cost or credit to KCDA and the Client from a Change in the Work, the Contractor shall keep and present, in such form as KCDA or the Client may prescribe, an itemized accounting together with supporting data. The total cost of any Change or Claim shall be limited to the reasonable value of the following:

**13.2.1** Direct labor costs: The effective W.D.O.L.&I. prevailing hourly wage for the laborers, journeymen, and foremen performing and/or directly supervising the Changed Work on the site. The premium portion of overtime wages may not be included unless pre-approved in writing by the Client. The hourly cost shall be based upon basic wages and mandatory fringe benefits and workers' insurances.

**13.2.2** Direct material costs: An itemization of the quantity of materials necessary to perform the Change in the Work and the net cost therefor.

**13.2.3** Construction equipment usage costs: An itemization of the actual length of time construction equipment appropriate for the Work will be used solely on the Change in the Work at the Site times the lower of the actual rental receipt or applicable current state, NECA, EquipmentWatch, or MCA rental cost. Actual, reasonable mobilization costs are permitted if the equipment is brought to the Site solely for the Change in the Work. The rate for equipment necessarily standing by for future use on the Work shall be 50% of the rate established above.

**13.2.4** Cost of any change in insurance or bond premium. Upon request, the Contractor shall provide KCDA and the Client with supporting documentation.

**13.2.5** Subcontractor costs: Payments the Contractor makes to Subcontractors for Changed Work performed by Subcontractors of any tier. The cost of Work for Subcontractors of any tier shall be determined in the same manner as prescribed in this Section 13.2.

**13.2.6** Fee: The allowance for all combined overhead, profit, and other costs, including all office, home office, extended and site overhead (including project manager, project engineer, superintendent and general foreman time), and all delay and including impact costs of any kind, added to the total cost to the Client of any Change Order or any Claim for additional work or extra payment of any kind on this Project shall be calculated consistent with the provisions of the KCDA contract. The change order must be signed by both the Client and Contractor.

**13.3 Dispute Resolution.** All claims, disputes and other matters in question of the Contractor, direct or indirect, arising out of, or relating to, the Contract Documents or the breach thereof ("Claims"), except Claims which have been waived under the terms of the Contract Documents, shall be decided exclusively by the following dispute resolution procedure; claims that have been waived under the terms of the Contract Documents are not permitted to be brought in any forum. The Contractor shall diligently carry on the Work and maintain the progress schedule during the dispute resolution procedure, including any litigation proceedings, unless the parties mutually agree in writing otherwise.

**13.3.1 Notice of Claim.** The Contractor shall submit notice of all Claims to both KCDA and the Client in writing within *seven days* of the event giving rise to them and shall include a clear description of the event and its probable effect. Failure to comply with these requirements shall constitute waiver of the Claim.

**13.3.2 Claim Submission.** Within *21 days* of the Notice of Claim, the Contractor shall provide both KCDA and the Client in writing with a Claim, which shall include a clear description of the Claim, any and all changes in cost and in time to which the Contractor and its Subcontractors of any tier may be entitled under this Agreement for the Claim, and data supporting the Claim. The claim of a Subcontractor may be brought only through the Contractor and only after the Contractor notifies KCDA and the Client in writing that the Contractor has reviewed and agrees with the Claim. No act, omission, or knowledge, actual or constructive, of the Client shall in any way be deemed to be a waiver of the requirement for a timely written Claim unless the Client provides the Contractor with an explicit, unequivocal written waiver. Failure to comply with these requirements shall constitute waiver of the Claim.

**13.3.3 Informal Resolution.** KCDA and the Client will make a determination of the Claim. If no determination is made within two weeks of submission of the Claim, the Claim shall be deemed rejected. If the Contractor disagrees with KCDA and the Client's determination and wishes to pursue the Claim further, the Contractor must, within *fourteen days* of receipt of the determination, provide KCDA and the Client with a written request that a representative of the Contractor, KCDA, and the Client meet, confer, and attempt to resolve the Claim. This meeting will then take place at a mutually convenient time within *thirty days* of the request, unless the Client elects to proceed directly to mediation.

**13.3.4 Mediation.** The Contractor may bring no litigation against the Client or KCDA unless the Claim is first subject to non-binding mediation under the Construction Mediation Rules of the American Arbitration Association ("AAA"). The Contractor is responsible for initiating the mediation process. This requirement cannot be waived except by an explicit written waiver signed by KCDA, the Client, and the Contractor. To initiate the mediation process, the Contractor shall submit a written mediation request to KCDA and the Client within *thirty days* of the meeting undertaken in

Section 13.3.3. If the parties are unable to agree to a mediator within *thirty days* after KCDA and the Client's receipt of the written request for mediation, any party may submit a request for mediation to the AAA. An officer of the Contractor and of KCDA and the Superintendent or designee of the Client, all having full authority to settle the Claim (subject only to ratification by the Client's Board of Directors), must attend the mediation session. To the extent there are other parties in interest, such as Subcontractors, their representatives, with full authority to settle the Claim, shall also attend the mediation session. Unless KCDA, the Client, and Contractor mutually agree in writing otherwise, all unresolved Claims in the Project shall be considered at a single mediation session which shall occur prior to Final Acceptance by the Client.

**13.3.5 Litigation.** The Contractor may bring no litigation on Claims unless such Claims have been properly raised and considered in the dispute resolution procedures of Sections 13.3.1 through 13.3.4 above. All unresolved Claims of the Contractor shall be waived and released unless the Contractor has strictly complied with the time limits of the Contract Documents, and litigation is served and filed within the earlier of (a) *120 days* after the Date of Substantial Completion as designated in writing by the Client or (b) *60 days* after Final Acceptance. This requirement cannot be waived except by an explicit written waiver signed by KCDA, the Client, and the Contractor. The pendency of a mediation (calculated as the period from the written request for mediation through the day following the mediation proceeding) shall toll these filing requirements.

**13.4 Notices and Claims.** All notices and Claims shall be made in writing as required by the Agreement.

**13.4.1** Any notice of a Claim of the Contractor against KCDA or the Client and any Claim of the Contractor, whether under the Agreement or otherwise, must be made pursuant to and in strict accordance with the applicable provisions of the Contract Documents. Failure to comply with these requirements shall constitute waiver of the Claim. No act, omission, or knowledge, actual or constructive, of KCDA, the Client, or the A/E shall in any way be deemed to be a waiver of the requirement for timely written notice and a timely written Claim unless KCDA, the Client, and the Contractor sign an explicit, unequivocal written waiver approved by KCDA and the Client's Board of Directors.

**13.4.2** The fact that KCDA, the Client, and the Contractor may continue to discuss or negotiate a Claim that has or may have been defective or untimely under the Contract shall not constitute waiver of the provisions of the Contract Documents unless KCDA, the Client, and Contractor sign an explicit, unequivocal written waiver approved by the Client's board of directors.

**13.4.3** The Contractor expressly acknowledges and agrees that the Contractor's failure to timely submit required notices or timely submit Claims has a substantial impact upon and prejudices KCDA and the Client, including but not limited to the inability to fully investigate or verify the Claim, mitigate

damages, choose alternative options, adjust the budget, delete or modify the impacted Work, and/or monitor time, cost and quantities. For these and other reasons, the parties stipulate that KCDA and the Client are prejudiced by the Contractor's failure to timely submit notices or Claims as required by the Contract Documents.

**13.5 Claims for Concealed or Unknown Conditions.** If conditions unknown to the Contractor are encountered at the site which are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found and generally recognized as inherent in activities of the character provided for in the Contract Documents, then the Contractor shall give written notice to KCDA and the Client promptly before conditions are disturbed and in no event later than *seven days* after the first observance on the conditions. The Contractor shall make any Claim arising from such condition in accordance with the dispute resolution procedure in Section 13.3.

**13.6 Claims for Consequential Damages.** The Contractor, the Client, and KCDA waive Claims against each other for consequential damages arising out of or relating to this Agreement. This mutual waiver includes without limitation:

- .1** damages incurred by KCDA or the Client for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2** damages incurred by the Contractor for principal and home office overhead and expenses including without limitation the compensation of personnel stationed there, for losses of financing, business and reputation, for losses on other projects, for loss of profit, and for interest or financing costs.

This mutual waiver is applicable to all consequential damages of any cause, including without limitation due to either party's termination in accordance with Article 20. Nothing contained in this Section 13.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

**13.7** The Contractor (including Subcontractors of any tier) shall not in any event be entitled to damages arising out of actual or alleged loss of efficiency; morale, fatigue, attitude, or labor rhythm; constructive acceleration; home office overhead; expectant underrun; trade stacking; reassignment of workers; concurrent operations; dilution of supervision; learning curve; beneficial or joint occupancy; logistics; ripple; season change; extended overhead; profit upon damages for delay; impact damages; or similar damages.

## **ARTICLE 14** **TIME**

**14.1** Within *seven days* of executing the Agreement, the Contractor shall deliver any required bond to the Client with a copy to KCDA; no Progress Payments shall be due until the bond is delivered.

**14.2** If, through no fault of the Contractor or a Subcontractor of any tier, the Work is delayed at any time in progress of the Work by changes ordered in the Work, by unanticipated general labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties, delays caused by the Client or its separate contractors, or any causes beyond the Contractor's control and for which it and its subcontractors of any tier are not responsible, or by other causes which may justify delay, then the Contract Time shall be extended by Change Order to the extent the critical path is affected. The Contractor (including Subcontractors) shall be entitled to damages for delay, the total limited to the liquidated rate of Section 2.3, only where KCDA or the Client's own actions or inactions were the actual, substantial cause of the delay and where the Contractor could not have reasonably avoided the delay by the exercise of due diligence. If a delay was caused by the Contractor, a Subcontractor of any tier, or anyone acting on behalf of any of them, the Contractor is not entitled to an increase in the Contract Time or in the Contract Sum.

**14.3** THE TIMELY COMPLETION OF THIS PROJECT IS ESSENTIAL TO KCDA AND THE CLIENT. KCDA and the Client will incur serious and substantial damages if Substantial Completion of the Work does not occur within the Contract Time; however, it may be difficult if not impossible to determine the amount of such damages. Consequently, this Agreement may include provisions for liquidated damages. KCDA and the Client's right to liquidated damages is not affected by partial completion, occupancy, or beneficial occupancy. If this Agreement does not contain an agreed amount for liquidated damages, KCDA and the Client may prove their actual damages.

## **ARTICLE 15** **PAYMENTS AND COMPLETION**

**15.1 Progress Payments.** Payments shall be made as provided in Articles 3 and 4 of this Agreement. If Progress payments are specified, they will be made monthly for Work duly approved and performed during the calendar month preceding the application according to the following procedure.

**15.1.1 Draft Application.** Within the first five days of each month, the Contractor shall submit to KCDA and the Client, for the Client's approval, a report on the current status of the Work as compared to the Progress Schedule and a draft itemized AIA Application for Payment for Work performed during the prior calendar month. This shall not constitute a payment request. KCDA or the Client may request the Contractor to provide data substantiating the Contractor's right to payment, such as copies of requisitions or invoices from Subcontractors.

15.1.2 **Payment Request.** The Client shall review and approve the draft Application for Payment, or state its reasons for disapproval. Upon the Client's approval, and after the Contractor has furnished all data requested, the Contractor may submit to KCDA a payment request in the agreed-upon amount, in the form of a notarized, itemized AIA Application for Payment for Work performed during the prior calendar month. KCDA shall re-verify the amounts with the Client and, once verified and approved by the Client, will invoice the Client, and KCDA shall make payment to Contractor from funds received from the Client. Payment from the Client to KCDA is a condition precedent to payment from KCDA to the Contractor. Among other things, the Application shall state that prevailing wages have been paid in accordance with the prefiled statement(s) of intent to pay prevailing wages on file with KCDA and the Client and that all payments due Subcontractors from KCDA's prior payments have been made. The submission of this Application constitutes a certification that the Work is current on the progress schedule, unless otherwise noted on the Application. If the Contractor believes it is entitled to payment for Work performed during the prior calendar month in addition to the agreed-upon amount, the Contractor may submit to KCDA a separate written payment request specifying the exact additional amount due, the category in the Schedule of Values in which the payment is due, the specific Work for which the additional amount is due, and why the additional payment is due.

15.1.3 **Payments to Subcontractors.** No payment request shall include amounts the Contractor does not intend to pay to a Subcontractor. If, after making a request for payment but before paying a Subcontractor for its performance covered by the payment request, the Contractor discovers that part or all of the payment otherwise due to the Subcontractor is subject to withholding from the Subcontractor for unsatisfactory performance or other reasons, the Contractor may withhold the amount as allowed under the subcontract, but it shall give the Subcontractor and KCDA and the Client written notice of the remedial actions that must be taken as soon as practicable after determining the cause for the withholding but before the due date for the Subcontractor payment, and pay the Subcontractor within *eight working days* after the Subcontractor satisfactorily completes the remedial action identified in the notice.

15.2 **Prevailing Wages.** Pursuant to RCW 39.12, the Contractor will not receive any payment until the Contractor and all Subcontractors have submitted a "Statement of Intent to Pay Prevailing Wage" to KCDA and the Client. The statement must have the approval of the Industrial Statistician of the Department of Labor and Industries before it is submitted to KCDA and the Client. The Contractor and the respective Subcontractors shall pay all fees required by the Department of Labor and Industries, including fees for the approval of the "Statement of Intent to Pay Prevailing Wages." Approved copies of the "Statement of Intent to Pay Prevailing Wages" must be posted where workers can easily read them.

15.3 **Progress payments.** Unless the Client informs the Contractor that a payment will be withheld as

provided in Section 15.4, KCDA shall make progress payments within 30 days of approval of the payment request by the Client.

15.4 **Withheld Payments.** Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment or provide releases under Section 11.3.1, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, (5) damage to KCDA, the Client, or another contractor, (6) reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) failure to carry out the Work in accordance with the Contract Documents. When KCDA intends to withhold all or part of a payment for any of the foregoing reasons, KCDA will provide the Contractor, within *eight working days* after KCDA's receipt of the Application for Payment, written notification of the reasons that all or part of the payment is being withheld and what remedial actions the Contractor must take to receive the withheld amount.

#### 15.5 Substantial Completion.

15.5.1 When the Contractor believes that the entire Work is Substantially Complete, it shall notify KCDA and the Client in writing. When the Client agrees, the Client will issue a Certificate of Substantial Completion. Substantial Completion is the stage in the progress of the Work when the construction is sufficiently complete, in accordance with the Contract Documents, so the Client can fully utilize the Work (or the designated portion thereof) for the use for which it is intended. All Work other than incidental corrective or punchlist work and final cleaning shall have been completed. The Work is not Substantially Complete if all systems and parts affected by the Work are not usable, if an occupancy permit (temporary or final) has not been issued, or if utilities affected by the Work are not connected and operating normally. The fact that the Client may use or occupy the Work or designated portion thereof does not indicate that the Work is Substantially Complete, nor does such occupation toll or change any liquidated damages due KCDA.

15.5.2 Immediately before partial or complete occupancy, the Client will schedule an inspection tour of the area to be occupied. A representative of KCDA and/or the Client, A/E and Contractor will jointly tour the area and record items still remaining to be finished and/or corrected. The Contractor shall supply and install any items missed by the inspection but required or necessary for Final Completion as a part of the Contract Sum, notwithstanding their not being recorded during the inspection tour.

15.6 **Final Payment.** Pursuant to RCW 60.28, completion of the Contract Work shall occur after the Contractor has notified KCDA and the Client in writing that the Work has been concluded and submits the items listed below to KCDA and the Client, any required occupancy permit has been issued, and the Client's Board formally accepts the Project

("Final Acceptance"). Final Payment shall not become due until after Final Acceptance. Before Final Acceptance, the Contractor must have submitted the following to the Client:

.1 An affidavit that all payrolls, Subcontractors, bills for materials and equipment, and other indebtedness connected with the Work for which the Client or its property might in any way be responsible or encumbered, have been paid or otherwise satisfied,

.2 consent of surety to final payment,

.3 a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least *30 days* ' prior written notice has been given to KCDA and the Client,

.4 a written statement that the Contractor knows of no substantial reason why the insurance will not be renewable to cover the period required by the Contract Documents,

.5 other data establishing payment or satisfaction of or protection (satisfactory to KCDA and the Client) against all obligations, such as receipts, releases and waivers of liens arising out of the Agreement, satisfactorily demonstrating to KCDA and the Client that the claims of Subcontractors and laborers who have filed claims have been paid,

.6 pursuant to RCW 39.12.040, an "Affidavit of Wages Paid" from the Contractor and from each Subcontractor certified by the Industrial Statistician of the Department of Labor and Industries, with fees paid by the Contractor or Subcontractor,

.7 a certified statement that the Contractor has closed all necessary permits or otherwise met the requirements of all governing jurisdictions related to this Project (including, without limitation, city/county building departments, health districts and utility districts; attach a copy of each of these closed or signed-off permits),

.8 all warranties, guarantees, certificates, spare parts, specified excess material, and other documents or items required by the Contract Documents, and

.9 a hard copy of the "record" drawings and specifications, delivered in a clear, clean and legible condition.

If any Subcontractor of any tier refuses to furnish a release or waiver required by KCDA of the Client, KCDA may retain in the fund, account, or escrow funds such amount as to defray the cost of foreclosing the liens of such claims and to pay attorneys' fees, the total of which shall be no less than 150% of the claimed amount. If any such lien remains unsatisfied after all payments are made, the Contractor shall refund to KCDA all

moneys that the latter or the Client may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

Final payment shall be made pursuant to RCW 60.28 after the Contractor has properly submitted certificates from the Department of Revenue, the Department of Labor and Industries and, pursuant to RCW 50.24, a certificate from the Department of Employment Security.

## **15.7 Waivers.**

15.7.1 Final Payment by KCDA. The making of final payment shall constitute a waiver of claims by KCDA and the Client except those arising from (1) liens, claims, security interests, or encumbrances arising out of the Agreement and unsettled; (2) failure of the Work to comply with the requirements of the Contract Documents; or (3) terms of warranties required by the Contract Documents or law.

15.7.2 Final Payment to Contractor. Acceptance of final payment by the Contractor shall constitute a waiver of Claims except those previously made in writing and identified in writing as unsettled on the final Application for Payment.

15.7.3 Change Orders. The execution of a Change Order shall constitute a waiver of Claims by the Contractor arising out of the Work to be performed or deleted pursuant to the Change Order, except as specifically described in the Change Order. If the Contractor adds to a Change Order or any other document a reservation of rights that has not been initialed by KCDA and the Client, all the amounts previously agreed shall be considered disputed and not yet payable unless the costs are re-negotiated or the reservation is withdrawn or changed in a manner satisfactory to and initialed by KCDA and the Client. If KCDA makes payment for a Change Order or an Application for Payment that contains a reservation of rights not initialed by KCDA and the Client to indicate agreement with the reservation, and if the Contractor accepts such payment, then the reservation of rights shall be deemed waived, withdrawn, and of no effect.

## **15.8 Retainage.**

### **15.8.1 Progress Payments:**

.1 Pursuant to RCW 60.28, KCDA will reserve 5% from the moneys the Contractor earns on estimates during the progress of the Work, to be retained as a trust fund for the protection and payment of the claims of any person arising under the Agreement and the state with respect to taxes imposed pursuant to Title 82 RCW which may be due from the Contractor.

.2 The moneys reserved may, at the option of the Contractor, be (1) retained in a fund by KCDA until *45 days* following Final Acceptance; or (2) deposited by KCDA in an interest-bearing account in a bank, mutual savings bank, or savings and loan association, not subject to withdrawal until *45 days* following Final

Acceptance, with interest to the Contractor; or (3) placed in escrow with a bank or trust company until 45 days following the Final Acceptance, by KCDA's joint check to the bank or trust company and the Contractor, to be converted into bonds and securities chosen by the Contractor, approved by KCDA, and held in escrow, with interest on the bonds and securities paid to the Contractor as it accrues.

.3 If moneys are retained from the Contractor, it may retain payment of not more than 5% from the moneys earned by any Subcontractor, provided that the Contractor pays interest to the Subcontractor at the same interest rate it receives from its reserved funds.

**15.9 Warranty of Title.** The Contractor warrants and guarantees that title to Work, materials and equipment covered by an Application for Payment, whether incorporated in the Project or not, will pass to the Client no later than the time of payment, free and clear of liens. The Contractor shall promptly pay (and secure the discharge of any liens asserted by) all persons properly furnishing labor, equipment, materials or other items in connection with the performance of the Work (including, but not limited to, any Subcontractors). The Contractor shall furnish to the Client such releases of claims and other documents as may be requested by the Client from time to time to evidence such payment (and discharge). The Client may, at its option, withhold payment, in whole or in part, to the Contractor until such documents are so furnished. The Contractor shall indemnify and hold harmless the Client from any liens, including all expenses and attorneys' fees.

## **ARTICLE 16**

### **PROTECTION OF PERSONS AND PROPERTY**

**16.1** The Contractor shall have the right to control and shall be solely responsible for, and neither KCDA, the Client, nor the A/E shall have responsibility for, all aspects of safety, including initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Agreement. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to (1) employees on the Work and other persons who may be affected thereby; (2) the Work and materials and equipment to be incorporated therein; and (3) other property at the site or adjacent thereto. The Contractor shall maintain the Work site and perform the Work in a manner that meets statutory and common-law requirements for the provision of a safe place to work. This requirement shall apply continuously and not be limited to working hours.

**16.2** The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury, or loss. The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor of any tier, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they

may be liable and for which the Contractor is responsible, except for damage or loss attributable to acts or omissions of KCDA, the Client, or A/E or by anyone for whose acts any of them may be liable, and not attributable to the fault or negligence of the Contractor or a Subcontractor of any tier. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 10.12.

**16.3** The Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl ("PCB") unless specifically required by the Contract Documents.

**16.4** The Contractor shall bear the risk of any loss, damage or destruction of its own property, including without limitation its tools, trailers and equipment, whether rented or owned, to the extent that they will not be incorporated in the Work. Any insurance provided by the Client will not cover any such loss, damage or destruction.

**16.5** If the scope of the Work requires the Contractor to perform Work relating to hazardous materials, the Contractor shall be responsible to take all reasonable precautions to prevent foreseeable bodily injury or death resulting from such materials or substances, and to dispose of such materials as required by the Contract Documents and all applicable state and federal laws and regulations. The Contractor shall defend, indemnify, and hold harmless the Client, its consultants, the A/E, and their respective agents, employees, consultants, successors and assigns from and against any and all claims to the extent of the Contractor's failure to abide by such Contract Documents and all applicable state and federal laws and regulations.

## **ARTICLE 17**

### **INSURANCE AND BONDS**

#### **17.1 Contractor's Liability Insurance.**

17.1.1 The Contractor shall purchase from and maintain during the life of this Agreement, at its own cost in a company or companies admitted to do business in the State of Washington, possessing a Best's policy holder's rating of A- or better and a financial rating of no less than VII, and reasonably acceptable to KCDA and the Client, an occurrence-based Commercial General Liability Insurance Policy which shall provide bodily injury and property damage liability on the Contractor's operations, including its Subcontractors of any tier; owned, non-owned and hired vehicles; and on work the Contractor may subcontract or sublet to others; and on the indemnity provisions of this Agreement. This insurance will name KCDA and the Client and their employees as additional insureds per Additional Insured Owner's (Form B) for Work performed under this Agreement. The Contractor's policy shall be designated primary coverage for both defense and indemnity, and any KCDA or Client policies excess. Such limits of liability insurance shall have per project general aggregate provisions and shall not be less than the following:

.1 \$1,000,000 Combined Single Limit protection for both bodily injury and property damage liability per occurrence and \$2,000,000 general aggregate;

.2 \$1,000,000 per accident for bodily injury liability including sickness, disease or death and property damage liability because of damage to or destruction of property of others, including loss of use thereof arising out of the operation of automobiles.

.3 \$1,000,000 for personal injury liability coverage included and defined in the Commercial General Liability insurance policy for damages which are sustained by (1) a person as a result of an offense directly or indirectly related to employment of such person by the Contractor, or (2) by another person.

.4 \$1,000,000 for claims involving blanket contractual liability insurance (included and defined in the Commercial General Liability Insurance Policy) applicable to the Contractor's obligations under Section 10.12.

.5 In addition, the Contractor shall maintain a true umbrella policy that provides excess limits over the primary layer, in an amount not less than \$2,000,000.

17.1.2 The insurance described above shall include coverage for underground, collapse and explosion exposures.

17.1.3 In addition, the Contractor shall purchase and maintain insurance for claims under workers' compensation (industrial insurance), disability benefit and other similar employee benefit acts in the State statutory amount and Employer's Liability with coverage of at least \$250,000/\$500,000.

17.1.4 Before commencing the Work or exposure to loss can occur, and, in any event, within *ten days* after KCDA has issued its notice of intent to award contract, the Contractor shall furnish KCDA and the Client with Certificates of Insurance, in duplicate, as evidence of all insurance required by the Contract Documents. All policies and certificates must be signed copies and shall contain provision that coverages afforded under the policies cannot be materially altered, allowed to expire or canceled without first giving *45 days* written notice by certified mail to KCDA and the Client. The Contractor shall furnish to KCDA and the Client copies of any subsequently issued endorsements amending, modifying, altering, or restricting coverage of limits.

17.1.5 Coverage shall be maintained without interruption from the date of commencement of the Work until the date of Final Acceptance, except for any coverage required to be maintained after Final Acceptance. Completed operations coverage shall remain in force for three years after Final Acceptance.

17.1.6 If KCDA or the Client is damaged by the failure of the Contractor to maintain any of the above insurance

or to so notify KCDA and the Client, than the Contractor shall bear all costs properly attributable thereto. KCDA MAY WITHHOLD PAYMENT PENDING RECEIPT OF ALL CERTIFICATES OF INSURANCE. Failure to withhold payment shall not constitute a waiver.

17.1.7 KCDA's specification or approval of the insurance in this Agreement or of its amount shall not relieve or decrease the liability of the Contractor under the Contract Documents or otherwise. Coverages are the minimum to be provided and are not limitations of liability under the Contract, indemnification, or applicable law provisions. The Contractor may, at its expense, purchase larger coverage amounts or additional insurance.

## **17.2 Property Insurance.**

17.2.1 The requirements for property insurance are addressed in Article 6 above.

## **17.3 Waivers of Subrogation.**

17.3.1 KCDA, the Client, and the Contractor waive all rights against each other and any of their subcontractors of any tier, the A/E, their consultants, separate contractors described in Article 12 (if any), and any of their respective agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to Articles 6 and 17.2 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Client as fiduciary. KCDA and the Client do not waive their subrogation rights to the extent of the Client's property insurance on structures or portions of structures that do not comprise the Work. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

## **17.4 Payment and Performance Bond.**

17.4.1 Pursuant to RCW 39.08, the Contractor is required to submit payment and performance bonds secured from a surety company licensed to do business in the State of Washington. The Contractor shall pay for the bonds in the full amount of the Contract Sum plus sales tax. Within *seven days* of entering into the Agreement, the Contractor shall deliver two copies of the bond (including the original bond) to KCDA and one copy each to the Client and the A/E. The price of the bond will be added to the total contract amount to be paid by the Client. KCDA MAY DECLINE TO ENTER INTO THE CONTRACT IF EVIDENCE OF BONDABILITY IS NOT RECEIVED, AND THE CLIENT MAY WITHHOLD ITS NOTICE TO PROCEED AND/OR WITHHOLD PAYMENT TO THE CONTRACTOR UNTIL SUCH SURETY BOND IS RECEIVED.

## **ARTICLE 18**

### **CORRECTION OF WORK**

**18.1** The Contractor shall promptly and within no more than *fourteen (14) days* of notice from the Client or KCDA correct Work rejected or failing to conform to the requirements of the Contract Documents at any time through a period of one year from the date of Substantial Completion of the Agreement or by terms of a longer manufacturer's warranty or an applicable special warranty required by the Contract Documents. The provisions of this Article apply to Work done by Subcontractors of any tier as well as to Work done by direct employees of the Contractor.

**18.2** If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents or fails to carry out the Work in accordance with the Contract Documents, KCDA and/or the Client, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

**18.3** Nothing contained in this Article shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described above relates only to the specific obligation of the Contractor to correct the Work and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

## **ARTICLE 19**

### **MISCELLANEOUS PROVISIONS**

**19.1 Applicable Law and Venue.** The Agreement shall be governed by the laws of the State of Washington, without regard to its choice of law provisions. The exclusive venue for any litigation regarding this Agreement shall be in the Superior Court in the county in which the Project is located.

**19.2 Statutes.** The Contractor shall abide by the provisions of all applicable Washington statutes. The statutes referenced in the Contract Documents are not meant to be a complete list and should not be relied upon as such.

**19.3 Contractor Registration and Related Requirements.** Pursuant to RCW 39.06, the Contractor shall be registered or licensed as required by the laws of the State of Washington, including but not limited to RCW 18.27. The Contractor shall: have a current state unified business identifier number; have industrial insurance coverage for the Contractor's employees working in Washington as required in Title 51 RCW; have an employment security department number as required in Title 50 RCW; have a state excise tax registration number as required in Title 82 RCW, and; not be disqualified from bidding on any public works contract under

RCW 39.06.010 (unregistered or unlicensed contractors) or RCW 39.12.065(3) (prevailing wage violations).

**19.4 Law Against Discrimination.** Contractor shall comply with pertinent statutory provisions relating to public works of RCW 49.60.

**19.5 Provisions for Aged and Handicapped Persons.** Contractor shall comply with pertinent statutory provisions relating to public works of RCW 70.92.

**19.6 Safety Standards.** Contractor shall comply with pertinent provisions of Chapter 296-155 WAC, "Safety Standards for Construction Work."

**19.7 Unemployment Compensation.** Pursuant to RCW 50.24 in general and RCW 50.24.130 in particular, the Contractor shall pay contributions for wages for personal services performed under this Agreement or arrange for a bond acceptable to the commissioner.

**19.8 Drug-Free Workplace.** The Contractor and all Subcontractors shall fully comply with all applicable federal, state, and local laws and regulations regarding drug-free workplace, including the Drug-Free Workplace Act of 1988. Any person not fit for duty for any reason, including the use of alcohol, controlled substances, or drugs, shall immediately be removed from the Work.

**19.9 Tobacco-Free Environment.** Smoking or use of any kind of lighted pipe, cigar, cigarette or any other lighted smoking equipment, material or smokeless tobacco products, including vaping, is prohibited on all Client property.

**19.10 Asbestos Removal.** To the extent this Project involves asbestos removal, the Contractor shall comply with RCW 49.26 and any provisions of the Washington Administrative Code promulgated thereunder.

**19.11 Assignment.** The Contractor shall not let, delegate duties under, assign or transfer this Agreement, or any interest in it or part of it, without the prior written consent of KCDA and the Client.

**19.12 Weapons.** The Contractor and its employees, agents, and Subcontractors of any tier shall not bring onto the Project site or onto any Client property any firearm or any other type of weapon described in either RCW 9.41.280(1) or RCW 9.41.250. Any person violating this Section shall immediately be removed from the Work, and such a violation shall be grounds for a termination of this Agreement for cause at the Client's discretion.

**19.13 Contaminated Properties.** To the extent this Project involves the remediation of contaminated property, the Contractor shall comply with RCW 64.44 and 70.105D and any provisions of the Washington Administrative Code promulgated thereunder, including the use of authorized contractors as provided in RCW 64.44.060.



**19.14 Disposal of Materials.** To the extent this Project involves the remediation of contaminated property, the Contractor shall comply with all applicable requirements of RCW 70.95 and any provisions of the Washington Administrative Code promulgated thereunder.

## **ARTICLE 20**

### **TERMINATION OF THE CONTRACT**

**20.1 Termination for Cause by Contractor.** If KCDA fails to make payment for a period of *60 days* through no fault of the Contractor and has been given approval by the Client, the Contractor may, upon *seven additional days'* written notice to KCDA, terminate the Agreement and recover from KCDA payment for all Work properly executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including Fees applicable thereto.

**20.2 Termination for Cause by Client.** The Client may, upon *seven days'* written notice to the Contractor, terminate (without prejudice to any right or remedy of KCDA or the Client) the whole or any portion of the Work for cause, including but not limited to the following circumstances:

- .1 the Contractor fails to prosecute the Work or any portion thereof with sufficient diligence to ensure the Completion of the Work within the Contract Time;
- .2 the Contractor is in material default of or materially breaches any provisions of this Agreement;
- .3 the Contractor is adjudged bankrupt, makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of its insolvency;
- .4 the Contractor fails to supply a sufficient number of properly skilled workers or proper materials;
- .5 the Contractor fails to make prompt payment to Subcontractors or for materials or labor;
- .6 the Contractor materially disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction; or
- .7 the Contractor fails to comply with the provisions of RCW 28A.400.330 by permitting a worker on the Project having contact with children who has been convicted of or pled guilty to a felony crime involving children as described in Section 10.3.

**20.3 Termination for Convenience by Client.** The Client may, at any time upon *seven days'* written notice to the Contractor, terminate (without prejudice to any right or remedy of the Client or KCDA) the whole or any portion of the Work for the convenience of KCDA and the Client. The Client shall be liable to Contractor only for those costs reimbursable to Contractor in accordance with the following:

- .1 The amount due under Articles 4 and 15 of this Agreement for the performance of the Work actually performed; and
- .2 Other pre-approved costs, consistent with Section 13.2, necessary and reasonably incurred in connection with the termination of Work.

The total sum to be paid to the Contractor under this Section 20.3 shall not exceed the Contract Sum as reduced by the amount of payments otherwise made.

### **20.4 Effects of Termination.**

20.4.1 Unless the Client directs otherwise, after receipt of a Notice of Termination from the Client pursuant to Sections 20.2 or 20.3, the Contractor shall promptly:

- .1 stop Work under the Agreement on the date and as specified in the Notice of Termination;
- .2 place no further orders or subcontracts for materials, equipment, services or facilities, except as may be necessary for completion of any portion of the Work that is not terminated;
- .3 procure cancellation of all orders and subcontracts, upon terms acceptable to the Client, to the extent that they relate to the performance of Work terminated;
- .4 assign to the Client all of the right, title and interest of the Contractor under all orders and subcontracts, in which case the Client shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
- .5 with the Client's approval, settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts not assigned to the Client;
- .6 transfer title and deliver to the entity or entities designated by the Client the fabricated or unfabricated parts, Work in process, partially completed supplies and equipment, materials, parts, tools, dies, jigs and other fixtures, completed Work, supplies and other material produced as part of, or acquired in connection with the performance of, the Work terminated, and the completed or partially completed plans, drawings, information and other property related to the Work;
- .7 use its best efforts to sell any property of the types referred to in Section 20.4.1.6. The Contractor may acquire any such property under the conditions prescribed by and at a price or prices approved by the Client, and the proceeds of any such transfer or disposition may be applied in reduction of any payments to be made by the Client to the Contractor;
- .8 take such action as may be necessary or as directed by the Client to preserve and protect the Work and

property related to this Project in the possession of the Contractor in which the Client has an interest; and

.9 continue performance only to the extent not terminated.

20.4.2 In arriving at any amount due the Contractor after termination, the following deductions shall be made:

.1 all unliquidated advance or other prior payments on account made to the Contractor applicable to the terminated portion of the Agreement;

.2 any claim which KCDA or the Client may have against the Contractor;

.3 an amount necessary to protect KCDA and the Client against outstanding or potential liens or claims; and

.4 the agreed price for or the proceeds of sale of any materials, supplies or other things acquired by the Contractor or sold, pursuant to the provisions of Section 20.4.1.7, and not otherwise recovered by or credited to KCDA.

20.4.3 If (and only if) the termination pursuant to Section 20.3 is partial, the Contractor may file a Claim for an equitable adjustment of the price or prices specified in the Agreement relating to the continued portion of the Agreement. The Contractor must assert any Claim for an equitable adjustment under this subparagraph within *twenty-one days* from the effective date of the Termination.

20.4.4 The Contractor shall refund to KCDA any amounts KCDA paid to the Contractor in excess of costs reimbursable under Section 20.3.

20.4.5 The damages and relief from termination by the Client specifically provided in Article 20 shall be the Contractor's sole entitlement in the event of termination.

20.4.6 When this Agreement refers to a termination, it is understood that the termination is of this Agreement, the Purchase Order, and all related contract documents, but not of any contract between KCDA and the Contractor that is not specific to this Project and this Client.

End of Section











# 2022-069 Kiwanis Park Renovations-Northwest Playground\_SD rev

Final Audit Report

2024-06-25

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