

Office of Management & Enterprise Services ■ Capital Assets Management ■ Construction and Properties

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion.

EFFECTIVE DATE is the _____ day of _____ in the year **20**__.

BETWEEN THE OWNER:

State of Oklahoma
OMES/CAM/CAP
P.O. Box 53448
Oklahoma City, OK 73152-3448
cap@omes.ok.gov

PROJECT:

(CAP Project Number) (Solicitation Number)

(CAP Project Name)

(Address/Location)

This Exhibit is attached to and made a part of the Underlying Contract between the parties.

ARTICLE 1. Project Goals.

1.1 The Parties shall discuss prior to execution of the Design-Build Agreement the extent to which they will incorporate sustainable design elements, including whether LEED® Certification will be required, under the guidelines of the U.S. Green Building Council's (USGBC) LEED® Rating Systems. The Parties can either select one or both of the boxes below as they deem appropriate.

(The following 1.1.1 clause, if selected with an "X," shall become the valid clause(s) of this Exhibit)

- 1.1.1** It is the shared goal of the Parties to design and construct a Project that imposes a minimal negative impact on the environment while maximizing the health and comfort of the Project's users and occupants by exploring commercially available sustainable design products, technologies, and practices that can be incorporated into the Project. Accordingly, Design-Builder and Owner shall discuss with the Design Consultant, during the design phase, and incorporate into the Project, design and construction methods, materials and systems for an environmentally beneficial, cost effective, and resource efficient Project. This may include sustainable practices that impact the Project site, energy and water use, materials, indoor air quality, and maintenance, provided that the sustainable design elements and construction practices are consistent with the Contract Price and Project Schedule. In the event said sustainable design elements and practices are not included in the Basis of the Design Documents or the Contract Price and Project Schedule, Design-Builder will be entitled to a Change Order.
- 1.1.1** Owner and Design-Builder agree that a shared goal is that the Project will achieve (1) the following sustainable rating system _____, or (2) the following level of LEED® certification under version _____ of the USGBC's _____ [E.g., New Construction & Major Renovations, Core and Shell, Commercial Interiors, etc.] Rating System.
 - Certified Gold
 - Silver Platinum

1.2 The requisite credits to achieve the applicable LEED® certification will be set forth in the Basis of Design Documents if feasible. If it is not feasible to ascertain the achievable LEED® credits as part of the Basis of Design Documents, the Design-Builder and Owner will work together as part of the design development process described in Section 2.4 of the CAP Form DB535 *General Conditions for Design-Build Contracts* ("General Conditions of Contract") to identify the achievable LEED® credits. In the event said LEED® credits are not included in the Basis of Design Documents or the Contract Price and Project Schedule, Design-Builder will be entitled to a Change Order.

ARTICLE 2. Project Commissioning.

2.1 The Parties agree that if LEED® certification is required, that an independent Commissioning Authority (CxA) shall be retained to lead, review, and oversee the completion of all commissioning process activities, including monitoring compliance with the Contract Documents and completing all necessary documentation for commissioning credits. The CxA shall be a LEED® Accredited Professional (LEED® AP) and meet the credit requirements of the applicable LEED® rating system. The CxA shall report results, findings and recommendations directly to the Owner, with a copy to the Design-Builder.

2.2 The CxA shall conduct, consistent with the review requirements of the LEED® rating system, the necessary commissioning design reviews of the Basis of Design Documents and design documents prior to completion of the Construction Documents, and back-check the review comments in subsequent design submissions. The CxA shall also review Design-Builder's submittals applicable to systems being commissioned for compliance with the Basis of Design Documents. This review shall be concurrent with Design Consultant's reviews and submitted to the Design-Builder and the Owner.

- 2.3** The CxA shall be retained by:
- (The following 2.3 clause(s), if selected with an "X," shall become the valid clauses of this Exhibit)*
- Design-Builder, as part of the Contract Price;
 - The Owner, as an independent consultant.

- 2.4** The CxA shall provide the following level(s) of service:
- (The following 2.4 clause(s), if selected with an "X," shall become the valid clauses of this Exhibit)*
- Fundamental Building Systems Commissioning
 - Enhanced Commissioning
 - Building Envelope

ARTICLE 3. Legal Requirements.

3.1 The parties will discuss whether LEED® certification or other sustainable standards are required by law (Legal Requirements). The Owner shall be responsible to identify any such requirements applicable to the Project and the Design-Builder is entitled to rely on the Owner's representations without any independent verification.

3.2 The Design-Builder shall not be liable for any costs or delay due to changes in the law after establishment of the agreed Contract Price which increases the cost or time for completion of the Project due to sustainable requirements.

3.3 The Owner has identified the following Legal Requirements for the Project that relate to sustainable design:

3.4 The Design-Builder acknowledges that as a matter of law the Project is obligated to satisfy or achieve the level of LEED® certification or other sustainable standards identified in the above-cited Legal Requirements. Owner recognizes that the ultimate decision to certify the Project under a LEED® Rating System and/or the satisfaction of other sustainable standards is dependent on a variety of circumstances, including the subjective determination of the USGBC and/or other interested organizations or entities. Therefore, Owner and Design-Builder pledge to each other to use best efforts to satisfy or achieve the level of LEED® certification or to satisfy the other sustainable standards indicated in the Basis of Design Documents or mandated by Legal Requirements.

ARTICLE 4. Remedies.

4.1 In the event that the Project fails to satisfy or obtain such level of LEED® certification or other sustainable standards as identified or as required by the Legal Requirements, the parties agree to file a timely appeal to the USGBC, or other appropriate entity, of such action. The costs of such appeal shall be paid for by the _____.

4.2 In the event that, after a timely appeal to the USGBC or other certifying organization, the Project fails to satisfy or obtain such level of LEED® certification or other sustainable standards as are identified in, or as required by the Legal Requirements, the parties agree as follows:

(The following 4.2.2 clause, if selected with an "X," shall become the valid clauses of this Exhibit)

4.2.2 Waiver. In no event shall the failure of the Project to satisfy or obtain such level of LEED® certification or other sustainable standards be deemed a breach of contract, or otherwise actionable by the Owner, and any claims for failure of Design-Builder to satisfy or achieve LEED® certification at any level or other sustainable standards are hereby waived by the Owner against Design-Builder

4.2.2 Liquidated Damages. Design-Builder has a contractual obligation to satisfy or achieve the level of LEED® certification indicated above and/or to satisfy or achieve other sustainable standards as are identified, or as required by the Legal Requirements, provided the Owner has fully satisfied its obligations in relation thereto. In the event such level of LEED® certification or other sustainable standards are not satisfied or achieved, subject to a timely filed appeal, and provided the Owner has fully performed its obligations in relation thereto, Design-Builder agrees to pay the Owner the following amount not by way of penalty, but as liquidated damages, the sum of _____ Dollars (_____). Design-Builder shall not be liable for any other related damages including, but not limited to consequential damages as identified in the General Conditions of Contract.

4.2.2 Limited Obligation to Cure. Design-Builder has an obligation to cure the situation through the addition, replacement or correction of materials, configurations, systems or equipment in order to obtain the level of LEED® certification indicated above and/or to satisfy or achieve other sustainable standards as are identified, or as required by the Legal Requirements, provided the Owner has fully satisfied its obligations in relation thereto. However, Design-Builder's obligation is limited to:

- Design-Builder's remaining contingency (if a GMP contract);
- Design-Builder's share of the savings (if a GMP contract); or,
- The sum of _____ Dollars (_____).

ARTICLE 5. Experimental Products, Design or Systems.

5.1 In order to achieve the desired LEED® level of certification or other similar rating, the Design-Builder or its Design Consultant has recommended the use of the products, materials or building systems (hereafter "Sustainable Product") identified on the attached **Exhibit _____**. The Design-Builder has disclosed to the Owner that it has limited or no prior professional experience with such Sustainable Product in actual construction. However, the Design-Builder and its Design Consultant have reviewed technical literature on the Sustainable Product and, if the Sustainable Product performs as represented by the manufacturer, the Design-Builder believes that it will meet the Owner's requirements and help achieve the desired LEED® certification or other similar rating.

5.2 The Design-Builder has advised the Owner of the risks and benefits of such Sustainable Product, and that the proposed use of such Sustainable Product is untested with this Design-Builder and, therefore, experimental. The Design-Builder and Owner have discussed alternative methods, products, materials or building systems, and the Owner desires, nonetheless, to use the Sustainable Product identified in **Exhibit _____**.

5.3 Given all this information, and with full knowledge of the risks and rewards, the Owner consents to the Design-Builder's inclusion of the Sustainable Product identified in **Exhibit _____** in the Project design. The Owner understands that the Design-Builder does not warrant the performance of the Sustainable Product and, in the event the Owner is not satisfied with the performance of the same, the Owner shall look solely to the manufacturer, supplier or installer of the same, and waives any claim against the Design-Builder and its Design Consultant that result from the Owner's selection of the Sustainable Product for use on this Project.

ARTICLE 6. Miscellaneous.

6.1 The registration, certification, credit interpretation ruling, and any other fees charged by the USGBC, The Green Building Certification Institute or other similar organizations shall be paid by the Owner, directly to such organizations, and shall not be an obligation of the Design-Builder, nor included in the Contract Price unless otherwise agreed in writing.

6.2 In no event shall the dates of Substantial Completion or Final Completion be contingent on any certification of the Project to meet any level of the USGBC's LEED® rating system or other similar system.

I have read this consent form and understand that by signing below I sign this consent as my own free act, with knowledge of the risks involved and sign under no coercion or duress.

OWNER: **USING AGENCY:**

State of Oklahoma
Office of Management and Enterprise Services
Capital Assets Management
Construction and Properties

The Using Agency certifies that funds are available and dedicated to completing the contract sums stated in this Contract. The Using Agency agrees to pay all project related costs including but not limited to work related to unknown site conditions, remediation of discovered environmental conditions, legal expenses, judgments and any reasonable project related expense.

(Owner Signature) (Date Signed)

(Authorized Representative Signature) (Date Signed)

(Owner Printed Name)

(Authorized Representative Printed Name)

(Owner Printed Title)

(Authorized Representative Printed Title)

DESIGN-BUILDER:

Non-Collusion Statement

The Authorized Representative for the Design-Builder, of lawful age, solemnly swears or affirms, under penalty of perjury, that (s)he is the duly authorized agent of the Company indicated herein under the contract, which is attached to this statement, for the purpose of certifying the facts pertaining to the giving of things of value to government personnel in order to procure said Contract.

(S)He is fully aware of the facts and circumstances surrounding the making of the Contract to which this statement is attached and has been personally and directly involved in the proceedings leading to the procurement of said Contract: and

Neither the Company nor anyone subject to the Company's direction or control has paid, given or donated or agreed to pay, give or donate to any office or employee of the State of Oklahoma any money or other thing of value, either directly or indirectly, in procuring the Contract to which this statement is attached.

Attachment list:

(Authorized Representative Signature) (Date Signed)

(Authorized Representative Printed Name)

(Authorized Representative Printed Title)

(EIN/TIN number)