

## **1-04 Scope of the Work**

### **1-04.1 *Intent of Contract***

The Contract Documents contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations, and negotiations between the parties with respect to its subject matter.

The parties intend for the Contract to obligate the Design-Builder to perform all Work necessary to complete the Project within the Contract Time, for the Contract Price, subject only to certain specified limited exceptions. The Design-Builder will be required to coordinate its Work with WSDOT's other contractors including contractors who are engaged in other WSDOT contracts or other Persons who are engaged in construction work in the overall vicinity of the Project. The Contract includes restrictions affecting the Design-Builder's ability to make claims for an increase to the Contract Price or an extension of the Contract Time.

WSDOT has supplied the Conceptual Design to the Design-Builder for the purpose of defining certain aspects of the Project. The Design-Builder has the right to assume that the Basic Configuration is feasible and represents a reasonable engineering approach to the Project. The Design-Builder's reliance on any aspect of the Conceptual Design other than the Basic Configuration shall be at its own risk.

WSDOT and the Design-Builder both intend for the Design-Builder to assume full responsibility and liability with respect to the design of the Project, including correction of any errors, omissions, inconsistencies, or other defects in the Conceptual Design, subject only to the Design-Builder's right to a Change Order for Necessary Basic Configuration Changes. Except as specifically set forth herein, WSDOT and the Design-Builder both intend for the Design-Builder to indemnify and hold harmless WSDOT and others with respect to any defects in the Project which may relate to errors, omissions, inconsistencies, or other defects in the Conceptual Design.

#### **1-04.1(1) Work Included in the Contract**

The Design-Builder acknowledges and agrees that, subject only to the Design-Builder's rights under Section 1-04.4 and its rights to receive Change Orders as expressly provided herein, the Contract Price includes (a) all designs, permits, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit, and services relating to the Design-Builder's performance of its obligations under the Contract Documents (including all Work, equipment, materials, labor, and services provided by Subcontractors and intellectual property rights necessary to perform the Work); (b) performance of each and every portion of the Work; (c) the cost of obtaining all Governmental Approvals (except as specified in the Special Provisions); (d) all costs of compliance with and maintenance of the Governmental Approvals and compliance with Governmental Rules, except for the work to be undertaken by WSDOT or others as described in the Contract (e) payment of any taxes, duties, permit, and other fees and royalties imposed with respect to the Work and any equipment, materials, labor, or services included therein; and (f) compensation for all risks and contingencies assigned to the Design-Builder under the Contract Documents.

**1-04.1(1).1 Guiding Principles for the Project**

In recognition of the interests of Washington State and WSDOT's desire to support successful and timely Project delivery, WSDOT and the Design-Builder recognize the need to support the fundamentals for workforce development and labor harmony for this Project. As a result, the following Guiding Principles, related to the Design-Builder's delivery of this Project, are incorporated into the Contract:

1. The Design-Builder shall encourage inclusion and diversity, and shall promote SVBE and MWBE development. The Design-Builder shall acknowledge that social equity, workforce diversity, and development of local workers for construction careers is important to the residents of the state of Washington. In support of this specific Guiding Principle, the Design-Builder shall employ a full-time Inclusion Manager. This Inclusion Manager will develop and implement the Design-Builder's SVB Plan and MWBE Inclusion Plan. See Section 1-07.11(11) for further details.
2. The Design-Builder shall develop a new program or implement an existing corporate program that reinforces and supports the creation of a respectful workplace on the Project and all associated Work activities. See Section 1-07.11(2) for further details.
3. The Design-Builder shall support access for women, veterans, persons of color, and economically disadvantaged persons to meaningful work on this Project. In addition, the Design-Builder shall recognize a desire to facilitate the entry into the building and construction trades of veterans who are interested in careers in the building and construction trades. The Design-Builder shall use services such as the Center for Military Recruitment, Assessment, and Veterans Employment and their "Helmets to Hardhats" program and other appropriate veteran support programs.
4. The Design-Builder shall promote programs that are pipelines to employment of individuals that lead to careers for workers who have historically been disadvantaged within the construction industry.
5. The Design-Builder shall support the development of a skilled construction workforce through apprenticeship and training organizations, particularly for those individuals who are disadvantaged and underrepresented in the workforce. WSDOT supports all State-registered pre-apprentice programs in their missions to assist workers with particular employment barriers. In support of this specific Guiding Principle, WSDOT has established specific apprenticeship training goals and requirements. See Section 1-07.9(3) for further details.
6. The Design-Builder shall promote sound stewardship of public funds.
7. The Design-Builder shall ensure labor harmony on Site during all stages of the Project, including taking appropriate steps to prevent strikes, walkouts, Work stoppages, Work slowdowns, Work curtailments, cessations, or interruptions of production due to labor disputes.
8. The Design-Builder shall facilitate and promote fair and equitable labor standards.

**1-04.1(2) General Obligations of the Design-Builder**

The Design-Builder, in addition to performing all other requirements of the Contract Documents, shall:

- (a) Furnish all services, provide all materials, and undertake all efforts necessary or appropriate (excluding only those services, materials, and efforts which the Contract Documents specify will be undertaken by WSDOT or other Persons) in order to:
- (i) Construct the Project and maintain it during construction in accordance with the requirements of the Contract Documents, each applicable Contract Schedule, all applicable Legal Requirements, all Governmental Approvals, the Quality Management Plan (QMP), the safety program, and all other applicable safety, environmental, licensing, and other requirements, taking into account the ROW Plans and other physical limits resulting from constraints affecting the Project, and also assist WSDOT with public information, so as to achieve milestone completion, Completion, and Final Acceptance, and by the deadlines specified herein.
  - (ii) Otherwise complete all Work and activities required by and in accordance with the Contract Documents
- (b) At all times provide a Project Manager approved by WSDOT who:
- (i) Will have full responsibility for the prosecution of the Work
  - (ii) Will act as agent and be a single point of contact in all matters on behalf of the Design-Builder
  - (iii) Will be present (or its approved designee will be present) at the Site at all times that Work is performed
  - (iv) Will be available to execute instructions and directions from WSDOT or its authorized representatives
- (c) Obtain and pay the cost of obtaining all Governmental Approvals including Governmental Approvals required to implement any approved ATCs incorporated into the Contract Documents.
- (d) Comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all Governmental Approvals, including implementation of all environmental mitigation measures required by the Contract Documents, except to the extent that such responsibility is expressly assigned in the Contract Documents to WSDOT or another Person.
- (e) Provide such assistance as is reasonably requested by WSDOT in dealing with any Governmental Person and in prosecuting and defending environmental lawsuits in any and all matters relating to the Project, which may include providing information and reports regarding the Project, executing declarations, and attending meetings and hearings, but which shall in no event be deemed to require the Design-Builder to provide design or legal services.
- (f) Comply with, and ensure that all Subcontractors comply with, all requirements of all applicable Legal Requirements, including:
- (i) Compliance with all Environmental Laws and Requirements.
  - (ii) Performance of all environmental mitigation and monitoring measures required for the Project, including those set forth in the Technical Requirements.

- (iii) Requirements regarding the handling, generation, treatment, storage, transportation, and disposal of Hazardous Materials.
- (g) Perform construction inspection, sampling, testing, and all other activities in accordance with the Contract Documents and the Design-Builder's QMP.
- (h) Provide and maintain facilities as described in the Technical Requirements for the use of the Design-Builder, WSDOT, WSDOT's Engineer, and other Persons designated by WSDOT.
- (i) Cooperate with WSDOT in its oversight of the design of the Project, its oversight of construction of the Project including Quality Verification, testing, sampling, and inspection during construction, and other matters relating to the Work.
- (j) Supervise and be responsible to WSDOT for acts and omissions of the Design-Builder's employees, agents, officers, Subcontractors, and other Persons performing portions of the Work for whom the Design-Builder may be contractually or legally responsible.
- (k) Mitigate delay to the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by re-sequencing, reallocating, or redeploying the Design-Builder's forces to other Work, as appropriate.
- (l) Pay all applicable Federal, State, and local sales, consumer, use, and similar taxes, property taxes, and any other taxes, fees, charges or levies imposed by a Government Body, whether direct or indirect, relating to, or incurred in connection with, the performance of the Work.
- (m) Comply with all applicable terms and conditions of all Utility Agreements.
- (n) Obtain and pay the cost of obtaining any third-party approvals required to implement any approved ATCs incorporated into the Contract Documents.
- (o) Unless otherwise noted in the Contract, be responsible for all costs, delays, or both of any nature associated with the implementation of any approved ATC incorporated into the Contract Documents.

**1-04.2     *Vacant***

**1-04.3     *Practical Design Workshop***

Within 7 Calendar Days of Contract execution, and prior to issuing Notice to Proceed, the WSDOT Engineer and the Design-Builder shall discuss the merits of a Practical Design Workshop (PDW). If the parties agree there is merit in proceeding with the PDW, the parties will initiate and participate in the PDW. The PDW may last up to 30 Calendar Days. If mutually agreed upon by the Design-Builder and WSDOT, the Design-Builder may be granted NTP during the PDW.

The purpose of the PDW is to explore ideas and potential Contract changes that may eliminate or alter certain Project design elements yet still satisfy the Project's purpose and need. The 30 Calendar Day duration of the PDW will be used for the parties to identify potential changes, evaluate those changes, and negotiate approved changes, if any. Approved changes shall be executed by change order prior to the conclusion of the PDW, unless otherwise allowed by the WSDOT Engineer.

Should the parties agree there is merit in proceeding with the PDW, they are encouraged to consider using a facilitator or facilitated meeting to expedite this process to allow WSDOT to issue the Notice To Proceed as soon as possible.

Changes identified through the PDW shall be submitted and administered as Design-Builder Initiated Changes in accordance with Section 1-04.4(2). If mutually agreed upon by the Design-Builder and WSDOT the PDW may be extended, shortened or conclude at any time.

#### **1-04.4     *Changes***

Change Orders will be transmitted electronically to the Design-Builder for signature. The Design-Builder shall apply all signatures electronically using the software provided by WSDOT. Within 21 Calendar Days of execution of the Contract, the Design-Builder shall submit a Type 1 Working Drawing consisting of the names, email addresses, and text-message capable phone numbers for the authorized Change Order signers and shall bear the name, phone number, and email of the Design-Builder's representative providing this authorization. Delegation of authority to sign Change Orders shall be by the Design-Builder's representative authorized to sign the Contract.

##### **1-04.4(1)     WSDOT-Initiated Changes**

WSDOT reserves the right to authorize and require changes in the Work within the general scope of the Contract as provided herein. Such changes shall not invalidate the Contract nor release the Surety, and the Design-Builder agrees to perform the Work as altered. Among others, these changes may include:

1. Deleting any part of the Work
2. Adding new Work
3. Otherwise modifying the scope of the Work
4. Otherwise revising the terms and conditions of the Contract Documents
5. Altering facilities, equipment, materials, services, or Sites provided by WSDOT
6. Ordering the Design-Builder to speed up or delay the Work

The Technical Proposal is a part of the Contract and the concepts contained therein shall not be materially changed unless authorized by WSDOT. Changes in the Design Documents by the Design-Builder to meet Contract requirements or correct deficiencies, that do not materially change the Technical Proposal, are the responsibility of the Design-Builder and are not considered a change in the Work. No adjustment will be allowed to Contract Price or Contract Time for such changes.

If WSDOT determines that a change in the Work directed by WSDOT increased or decreased the Design-Builder's Contract Price or Time required for performance of the Work, WSDOT will make an equitable adjustment, excluding the loss of anticipated profits, to the Contract. The equitable adjustment will be by agreement with the Design-Builder. However, if the parties are unable to agree, WSDOT will determine the amount of the equitable adjustment in accordance with Section 1-09.4 and adjust the Contract Price as WSDOT deems appropriate. Extensions of Contract Time will be

evaluated in accordance with Section 1-08.8. WSDOT's decision concerning equitable adjustment and extension of Contract Time shall be final as provided in Section 1-05.1.

The Design-Builder shall maintain concurrent time and materials records for all Work performed which it believes constitutes extra Work (including non-construction Work), pending issuance of a Change Order or resolution of any dispute in accordance with Section 1-04.5.

The Design-Builder shall proceed with WSDOT-directed changes in the Work upon receiving:

1. A Written Change Order approved by WSDOT
2. An oral order from WSDOT before receiving the Written Change Order

Within 14 Calendar Days of delivery of the Change Order, the Design-Builder shall endorse and return the Change Order, request an extension of time for endorsement, or respond in accordance with Section 1-04.5. WSDOT may unilaterally process the Change Order if the Design-Builder fails to comply with these requirements. The Design-Builder shall obtain Written consent of the Surety or Sureties if WSDOT requests such consent.

The Design-Builder accepts all requirements of a Change Order by:

1. Endorsing it
2. Not responding within the allotted time as outlined in Section 1-04.4
3. Not protesting in accordance with Section 1-04.5.

A Change Order that is not protested as provided in this Section shall be full payment and final settlement of all claims for Contract Time and for all costs of any kind, including costs of delays, related to any Work either covered or affected by the change. By not protesting in accordance with Section 1-04.5, the Design-Builder also waives any additional entitlement and accepts from WSDOT any Written order (including directions, instructions, interpretations, and determinations).

#### **1-04.4(2) Design-Builder Initiated Changes**

It is the desire of WSDOT to allow the Design-Builder to have significant flexibility in determining how best to design and construct the Project, within the parameters established by the Contract Documents. The Design-Builder is encouraged to propose changes whenever it identifies potential savings. This Section sets forth the requirements applicable for addressing Design-Builder Initiated Changes. Approval of a Design-Builder Initiated Change is at WSDOT's sole discretion. Design-Builder Initiated Changes fall into one of the following categories:

1. Changes that are based on an idea(s) derived from a Proposal submitted by an unsuccessful Proposer. All cost savings realized shall be shared between the Parties in accordance with Section 1-04.4(2).3.
2. Changes that do not meet the requirements of item 1 above, and are deemed by WSDOT in its sole discretion to be equal or better than the Contract requirement proposed to be changed. All cost savings realized shall be kept by the Design-Builder. These changes if approved will be implemented into the Contract

as a no cost Change Order. Section 1-04.4(2).3 does not apply to this category of change.

3. Changes resulting from the PDW or other changes that require a Design Analysis. Any cost or time adjustments derived from this change shall be negotiated. Negotiations will take into consideration the value of deletions, additions, cost savings, Contract Time, risk, engineering, short- and long-term financial impacts to WSDOT and the travelling public, and other tangible costs. Section 1-04.4(2).3 does not apply to this category of change.
4. Changes that do not meet the requirements of either category 1, 2 or 3 above. Any cost savings derived from this change shall be shared as the parties mutually agree. Section 1-04.4(2).3 does not apply to this category of change.

#### **1-04.4(2).1 Required Information**

At a minimum, the following information shall be submitted by the Design-Builder with each Design-Builder Initiated Change:

- (a) A statement that the submission is a Design-Builder Initiated Change, and a narrative description of the proposed change, including identification of the type of change as described above.
- (b) Description of the existing Contract requirements that are involved in the proposed change.
- (c) Discussion of differences between existing requirements and the proposed change, together with advantages and disadvantages of each changed item.
- (d) Itemization of the Contract requirements (with reference to specific Sections) which must be changed if the Design-Builder Initiated Change is approved.
- (e) Justification for changes in function or characteristics of each item, and effect of the change on the performance of the end item, as well as on the meeting of requirements contained in the Contract Documents, including environmental compliance requirements.
- (f) A description of any previous use or tests of the proposal and the conditions and results. If the proposal was previously submitted on another WSDOT project, indicate the date, Contract number, and the action taken by WSDOT.
- (g) Date or time by which a Change Order adopting the Design-Builder Initiated Change must be issued in order to obtain the maximum cost reduction noting any effect on each applicable Contract Schedule.
- (h) A complete cost analysis, including (i) a cost estimate for the existing Contract requirements compared to the Design-Builder's cost estimate of the proposed changes, (ii) an estimate of any additional costs that will be incurred by WSDOT, including any additional Right of Way and Relocation Costs, and (iii) an analysis of cost and schedule risks due to the need to modify permits and other environmental documents as applicable.
- (i) Costs of development and implementation by the Design-Builder. Any additional information requested by WSDOT shall be provided in a timely manner. Additional information could include results of field investigations and surveys, design computations, and field change sheets.

**1-04.4(2).2 WSDOT Review and Approval or Rejection**

**Review of Design-Builder Initiated Changes**

Upon receipt of a Design-Builder Initiated Change, WSDOT will process it expeditiously, but will not be liable for any delay in acting upon any proposal submitted pursuant to this Section. The Design-Builder may withdraw all or part of any Design-Builder Initiated Change at any time prior to approval by WSDOT. Each party shall bear its own costs in connection with preparation and review of Design-Builder Initiated Changes.

**Approval of Design-Builder Initiated Changes**

WSDOT may approve, in whole or in part by Change Order, any Design-Builder Initiated Change submitted. Until a Change Order is issued on a Design-Builder Initiated Change, the Design-Builder shall remain obligated to perform in accordance with the Contract Documents. The decision of the rejection or approval of any Design-Builder Initiated Change will be at the sole discretion of WSDOT and will be final and not subject to partnering, dispute resolution, or appeal.

**Rejection of Design-Builder Initiated Changes**

WSDOT will determine whether a Design-Builder Initiated Change qualifies for consideration and evaluation. Design-Builder Initiated Changes that require excessive time or costs for review, evaluation, or investigations, or that are not consistent with WSDOT's design policies and basic design criteria may be rejected.

The Design-Builder shall have no claim for any additional costs or delays resulting from the rejection of a Design-Builder Initiated Change, including development costs, loss of anticipated profits or increased material or labor costs. In evaluating Design-Builder Initiated Changes, WSDOT will consider only proven features that have been employed under similar conditions or projects acceptable to WSDOT.

**1-04.4(2).3 Contract Price Adjustment Split Between Parties**

If WSDOT accepts a Design-Builder Initiated Change submitted by the Design-Builder pursuant to this Section, the Contract Price shall be adjusted in accordance with the following:

**Estimated Net Savings**

The term "estimated net savings" as used in this Section shall mean the difference between the cost of performing the Work according to the Contract Documents and the actual cost to perform it according to the proposed change, not including the costs of studying and preparing the Design-Builder Initiated Change as proven by the Design-Builder and approved by WSDOT in accordance with the Change Order procedures set forth herein, or any additional costs incurred by WSDOT (including costs relating to any Relocations and Right of Way) resulting from the Design-Builder Initiated Change. The Design-Builder's profit shall not be considered part of the cost.

**Collateral and Future Savings**

Except as specified elsewhere in this Section, the Design-Builder is not entitled to share in either collateral or future Contract savings. The term "collateral savings" means those



measurable net reductions in WSDOT's costs of operation resulting from the Design-Builder Initiated Change, including costs of maintenance by WSDOT, logistics, and WSDOT-furnished property. The term "future Contract savings" shall mean reductions in the cost of performance of future construction contracts for essentially the same item resulting from a Design-Builder Initiated Change submitted by the Design-Builder.

#### **Price Adjustment Factor**

The Contract Price shall be reduced by an amount equal to the sum of (a) 100 percent of any additional costs incurred by WSDOT resulting from the Design-Builder Initiated Change plus (b) 50 percent of estimated net savings, providing that the Design-Builder's profit shall not be reduced by application of the Design-Builder Initiated Change.

#### **Design-Builder Initiated Changes Affecting Right of Way Plans**

In a case where a Design-Builder Initiated Change involves an adjustment to the ROW Plans (such as a proposal that additional real property be purchased to reduce construction costs), the Design-Builder Initiated Change shall compare:

- (a) The incremental reduction in costs (such as for not designing and building a wall).
- (b) The costs involved in adjusting the ROW Plans or environmental clearances (which shall be based on the Design-Builder's additional costs, such as for providing real property acquisition support services (including profit), plus WSDOT's additional costs, including land acquisition, appraisals, negotiation, relocation, condemnation, closing, property management, and environmental permitting, specifically including allocated costs of WSDOT personnel involved in the acquisition); or (as appropriate) shall compare:
  - (i) The incremental reduction in costs (if any) for not acquiring the unnecessary real property.
  - (ii) The additional construction costs to be incurred.

The estimated net savings shall be shared 50-50 between WSDOT and the Design-Builder. In the event the Design-Builder wishes to propose such a Design-Builder Initiated Change, the Design-Builder shall provide a separate notification to WSDOT describing the proposed impact concurrently with delivery of the Design-Builder Initiated Change to WSDOT.

#### **Payment Due Date**

The Design-Builder's share of any Design-Builder Initiated Change cost savings shall be payable at such time as payments would have been made for the Work which is the subject of the Design-Builder Initiated Change had the Design-Builder Initiated Change not been implemented.

#### **1-04.4(2).4 Use of Design-Builder Initiated Changes by WSDOT**

All approved or disapproved Design-Builder Initiated Changes will become the property of WSDOT and shall contain no restrictions imposed by the Design-Builder on their use or disclosure. WSDOT retains the right to use, duplicate, and disclose in whole or in part any data necessary for the utilization of the proposal on any other or subsequent projects

without any obligation to the Design-Builder. This provision is not intended to deny rights provided by law with respect to patented materials or processes.

**1-04.4(3) Basic Configuration Changes**

The Design-Builder shall not perform any Work that is inconsistent with the requirements of the Contract Documents or that modifies the Basic Configuration unless such Work has been specifically authorized by Change Order or by an order from WSDOT specifically authorizing the change prior to receiving a Change Order. This requirement applies regardless of whether the Work in question is required by a Governmental Approval, is desired by Design-Builder for its benefit, or for any other reason. Design-Builder acknowledges and agrees that constraints set forth in the Contract Documents, as well as Site conditions, will impact Design-Builder's ability to revise the Basic Configuration.

Nevertheless, upon the Design-Builder's fulfillment of all applicable requirements and limitations relating to Change Orders specified herein, if a Necessary Basic Configuration Change increases the cost, time to perform the Work, or both, the Design-Builder shall be entitled to an increase in the Contract Price, an extension of the Contract Time, or both, excluding any costs or time that could have been avoided by the Design-Builder; provided, however, the Design-Builder shall not be entitled to an increase in the Contract Price or an extension of the Contract Time in connection with any error, omission, inconsistency or other defect in the Conceptual Plans.

If a Necessary Basic Configuration Change reduces the cost and/or time to perform the Work, the Contract Price and/or Contract Time, shall be adjusted accordingly.

**1-04.4(4) Minor Changes**

Payments or credits for any change amounting to \$25,000 or less may be authorized as a "Minor Change." At the discretion of WSDOT, this procedure for Minor Changes may be used in lieu of the more formal procedures as outlined in Section 1-04.4, Changes.

The Design-Builder will be provided a copy of the completed order for Minor Change. The agreement for the Minor Change will be documented by signature of the Design-Builder. If the Design-Builder is in disagreement with anything required by an order for Minor Change, the Design-Builder may protest the order as provided in Section 1-04.5.

Payments or credits will be determined in accordance with Section 1-09.4. For the purpose of providing a common Proposal for all Proposers, WSDOT has entered an amount for "Minor Change" in the Proposal to become a part of the total Price Proposal by the Design-Builder.

**1-04.4(5) Matters Not Eligible for Change Orders**

The Design-Builder acknowledges and agrees that no increase in the Contract Price is available except in circumstances expressly provided for in the Contract, that such price increases shall be available only as provided in Section 1-04.4, and that the Design-Builder shall bear full responsibility for the costs of all other changes. Matters which are the Design-Builder's exclusive responsibility include the following:

- (a) Errors, omissions, inconsistencies, or other defects in the Design Documents (including errors, omissions, inconsistencies, or defects directly attributable to errors, omissions, inconsistencies, or other defects in the Conceptual Design), subject only to the right to a Change Order for Necessary Basic Configuration Changes.
- (b) Any design changes required by WSDOT as part of the process of reviewing the Design Documents for consistency with the requirements of the Contract Documents, except to the extent directly attributable to errors, omissions, inconsistencies, or other defects in the Basic Configuration as provided herein.
- (c) Defects or errors in the Design-Builder's schedule for performance of the Work or changes in the planned sequence of performance of the Work (except to the extent that changes in the planned sequence of performance of the Work arise from causes which otherwise give rise to a right to a Change Order).
- (d) Action or inaction of a Subcontractor (unless arising from causes which will require a Change Order).
- (e) The action or inaction of an adjoining property owner or of another contractor (including failure to organize and integrate their work with the Design-Builder's Work).
- (f) Any delay in the use and incorporation of borrow and excavated materials into the Work, or the removal and disposal of excavated materials.
- (g) Untimely delivery of equipment or material, or unavailability, defectiveness, or increases in costs of material, equipment, or products specified by the Contract Documents (except to the extent caused by a strike as set forth in Section 1-08.8).
- (h) Costs associated with any delay not on the Critical Path.
- (i) Costs covered by insurance proceeds received by or on behalf of the Design-Builder.
- (j) Correction of Nonconforming Work and oversight and related activities in connection therewith by WSDOT (including rejected design submittals).
- (k) Failure by the Design-Builder to comply with Contract requirements.
- (l) Delays in obtaining Governmental Approvals that are required to be obtained by the Design-Builder.
- (m) Delays in obtaining or failure to obtain any third-party approvals required to implement any approved ATCs incorporated into the Contract Documents.
- (n) Unless noted otherwise in the Contract, any increases in costs or time incurred implementing an ATC.
- (o) All events beyond the control of WSDOT except for events that WSDOT has agreed to assume liability for in the Contract.
- (p) Delays in obtaining the Governmental Approval that are required to be obtained by WSDOT, or changes to requirements of Governmental Approvals, or both, where said delay, change(s), or both, are the result of the Design-Builder's design choices within the Design-Builder's control.

- (q) Changes of any nature to the Environmental Commitments List (Appendix C) that are imposed by, or agreed to by a Governmental Body having jurisdiction, that are the result of the Design-Builder's design choices within the Design-Builder's control.
- (r) Costs and delays of any nature associated with the failure to maintain labor harmony on the Project. However, if the costs or delays to the Project arise from strikes, disputes, slowdowns, stoppages, boycotts, or disruptions that were not caused by the Design-Builder or any Subcontractors, suppliers, their employees, agents, and officers and all other Persons for whom the Design-Builder may be legally or contractually responsible, the Design-Builder will be entitled to an extension of Contract Time as set forth in Section 1-08.8, but shall not be entitled to any adjustment in the Contract Price.
- (s) Increases in prevailing wages arising from the implementation of a prevailing wage update after the Proposal Due Date, and prior to the execution date of this Contract.

The Design-Builder hereby assumes responsibility for all such matters, and acknowledges and agrees that assumption by the Design-Builder of responsibility for such costs and delays, and the consequences and costs resulting there from, is reasonable under the circumstances of the Contract and that contingencies included in the Contract Price in the Design-Builder's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

#### **1-04.5      *Procedure, Protest, and Dispute by the Design-Builder***

If in disagreement with anything required in a Change Order, or the WSDOT Engineer's Written Determination or decision for which the Design-Builder believes they are entitled to an increase in the Contract Price or Time, the Design-Builder shall:

1. Give a signed Written notice of protest to the WSDOT Engineer within 14 Calendar Days of receiving a Change Order or a WSDOT Engineer's Written Determination.
2. Supplement the Written protest within 14 Calendar Days, or an extension of time as agreed by the WSDOT Engineer in writing, with a Written statement and supporting documents providing the following:
  - (a) The date and nature of the protested order, direction, instruction, interpretation, or determination.
  - (b) A full discussion of the circumstances which caused the protest, including names of Persons involved, time, duration and nature of the Work involved, and a review of the Contract Documents/Design Documents referenced to support the protest.
  - (c) The estimated dollar cost, if any, of the protested Work and a detailed breakdown showing how that estimate was determined.
  - (d) An analysis of the progress schedule showing the schedule change or disruption if the Design-Builder is asserting a schedule change or disruption.

If the WSDOT Engineer determines, in writing the supplemental information is insufficient to evaluate the protest or fails to include all required information, the

Design-Builder may be allowed one correction of the supplemental information. The corrected supplemental information, when requested by the WSDOT Engineer, shall be submitted within 14 Calendar Days or as specified by the WSDOT Engineer, in writing.

Throughout any protested Work, the Design-Builder shall keep complete records of extra costs and time incurred. The Design-Builder shall permit the WSDOT Engineer access to these and any other records related to the protested Work as determined by the WSDOT Engineer.

The WSDOT Engineer will evaluate all protests provided the procedures in this Section are followed. If the WSDOT Engineer determines that a protest has merits, the WSDOT Engineer will adjust payment for Work or time by an equitable adjustment in accordance with Section 1-09.4. Extensions of time will be evaluated in accordance with Section 1-08.8. No adjustment will be made for a protest without merit.

If the WSDOT Engineer determines that the protest is without merit, that determination and the reasons for it will be provided in writing to the Design-Builder. The determination will be provided within 21 Calendar Days after receipt of the Design-Builder's supplemental Written statement (including any additional information requested by the WSDOT Engineer to support a continuing protest) described in item 2 above.

If the Design-Builder does not accept WSDOT's determination, then the Design-Builder shall pursue the dispute and claims procedures set forth in Section 1-04.5(1). In spite of any protest, the Design-Builder shall proceed promptly with the Work as the WSDOT Engineer orders.

By failing to follow the procedures of this Section, the Design-Builder waives any claims for protested Work.

#### **1-04.5(1) Disputes**

When protests occur during a Contract, the Design-Builder shall first pursue resolution through the WSDOT Engineer as outlined in Section 1-04.5. Unless noted otherwise in the Contract, compliance with all the requirements of Section 1-04.5 is a condition precedent to initiating any action pursuant to this Section.

If the negotiations using the procedures outlined in Section 1-04.5 fail to provide satisfactory resolution of the protest, then the Design-Builder shall provide the WSDOT Engineer with Written notification of dispute stating that the Design-Builder will continue to pursue the dispute in accordance with the provisions of this Section. The Written notification shall be provided within 14 Calendar Days after receipt of the WSDOT Engineer's determination of merit that the Design-Builder's protest is without merit pursuant to Section 1-04.5.

When the Proposal Form includes the Price Proposal item "Disputes Review Board," unresolved protests shall be subject to the provisions of Section 1-04.5(1).1. Either party, Engineer or Design-Builder, may refer a matter in dispute to the Disputes Review Board (DRB or Board). Compliance with the requirements of Section 1-04.5(1).1 is a condition precedent to any further right of the Design-Builder to pursue the dispute either by Certified Claim or litigation/arbitration.

When the Proposal Form does not include the Price Proposal item “Disputes Review Board,” the Design-Builder’s Written notice of dispute noted above shall indicate whether the Design-Builder is requesting to resolve the dispute through the use of a Disputes Review Board as outlined in Section 1-04.5(1).1 or will submit a formal Certified Claim directly to the WSDOT Engineer pursuant to Section 1-09.11(2). If the Design-Builder requests a DRB, the WSDOT Engineer will notify the Design-Builder in writing within 7 Calendar Days of receipt of the request whether the request is acceptable. If both parties to the dispute agree to use a DRB, then a Price Proposal item “Disputes Review Board” shall be added to the Contract by Change Order and the dispute will be subject to the provisions of Section 1-04.5(1).1. If the parties do not mutually agree to establish a DRB or the Design-Builder does not request a DRB in its Written notice of dispute, the Design-Builder shall comply with the formal Certified Claim process outlined in Section 1-09.11(2).

Regardless of any protest or dispute, the Design-Builder shall proceed promptly with the Work as the WSDOT Engineer orders and WSDOT will continue to pay for all undisputed amounts.

#### **1-04.5(1).1 Disputes Review Board**

The procedures set forth in Section 1-04.5(1).1 shall apply only when a DRB has been created in accordance with Section 1-04.5(1).

##### **1-04.5(1).1.1 Disputes Review Board – General**

In order to assist in the resolution of dispute(s) between WSDOT and the Design-Builder arising out of the Work of this Contract, a Disputes Review Board will consider disputes referred to it and furnish Written recommendations to WSDOT and Design-Builder to assist in resolution of the dispute(s). The purpose of the Board response to such issues is to provide nonbinding findings and recommendations designed to expose the disputing parties to an independent view of the dispute.

##### **1-04.5(1).1.2 Disputes Eligible for Consideration by the Board**

The Board will consider and provide Written recommendations concerning the following disputes:

1. Interpretation of the Contract.
2. Entitlement to additional compensation and/or time for completion.
3. Other subjects mutually agreed by WSDOT and Design-Builder to be a Board issue.

##### **1-04.5(1).1.3 Board Member Qualifications**

The following definitions apply for the purpose of setting forth experience and disclosure requirements for Board members.

Financial ties – any ownership interest, loans, receivables, or payables.

Party directly involved – WSDOT or Design-Builder of this Contract.

Party indirectly involved – The firms associated with the Design-Builder on this Contract, including joint venture partners, Subcontractors of any tier, and suppliers; and

firms associated with the Design-Builder or WSDOT on this Contract, such as designers, architects, engineers, or other professional service firms or consultants.

The Board members shall:

1. Be experienced in the interpretation of construction contract documents.
2. Have attended training by the Dispute Resolution Board Foundation in dispute resolution within the last five years.
3. Be experienced in construction Contract dispute resolution for an owner or Design-Builder at the level of having responsibility and authority to settle disputes.
4. Discharge their responsibilities impartially and independently, considering the facts and conditions related to the matters under consideration in strict compliance with the provisions of the Contract.
5. Not be a current employee of any Party directly or indirectly involved.
6. Not have been an employee of any Party directly or indirectly involved with the Project within a period of one year of the Contract execution date.
7. Not have a financial interest in the Contract except for payments for services on the Board.

#### **1-04.5(1).1.4 Board Member Ongoing Responsibilities**

While serving as a Board member on this project:

1. No member will participate in any discussion contemplating the creation of an agreement or making an agreement with any party directly or indirectly involved in the Contract regarding employment or fee-based consulting services, or any other business arrangement after the Contract is completed.
2. No Board member will officially give any advice to either party. The individual members will act in a completely independent manner and will have no consulting or business connections with either party, except for payments for services on the Board.
3. During routine meetings of the Board as well as during formal hearings, Board members should refrain from expressing opinions on the merits of statements on matters under dispute or potential dispute. Opinions of Board members expressed in private sessions with other Board members should be kept strictly confidential.
4. The Board shall comply with the terms of the Contract and enforce such terms consistent with the laws of the State. Board members shall not supplant or otherwise interfere with the respective rights, authorities, duties, and obligations of the Parties as defined in the Contract. In making its recommendations, the Board shall not make a recommendation that ignores, disregards, or undermines the intention, requirements, or allocation of risk, established by the Contract.
5. Disclosure of potential conflicts of interest is a continuing obligation of all Board members throughout the life of the Contract.

#### **1-04.5(1).1.5 Establishment of the Board**

Process to establish the Board:

1. WSDOT and Design-Builder shall meet no later than 30 Calendar Days after NTP to jointly select three prospective Board members.
2. WSDOT and the Design-Builder shall provide to the Board nominees a list of the firms directly and indirectly involved with the Project, including, but not limited to designers, architects, engineers, professional service firms, consultants, JV partners, Subcontractors, and suppliers, along with a listing of Key Personnel of each.
3. Board nominees shall provide to the Design-Builder and WSDOT the following information:
  - a. Resume showing:
    - i. Full name and contact information
    - ii. Experience qualifying the person as a Board member.
    - iii. Previous DRB participation, if any. List each DRB assignment separately, indicating the name and location of the project, approximate dates of DRB service, name of contracting agency, name of Design-Builder, names of the other Board members and the approximate number of disputes heard. When previous DRB experience is extensive, the list may be truncated at the prospective Board member's discretion.
  - b. Disclosure statement addressing the following:
    - i. Previous or current direct employment by one of the parties directly or indirectly involved.
    - ii. Previous or current engagement as a consultant to any party directly or indirectly involved - by the prospective Board member or by the firm to which the prospective Board member is directly employed.
    - iii. Previous, current, or future financial ties to any of the parties directly or indirectly involved.
    - iv. Previous or current personal or professional relationships with a key member of any party directly or indirectly involved.
    - v. Previous and current service as a Board member on projects where any of the parties directly or indirectly involved in this Contract were also involved.
    - vi. Any prior involvement in this project.
- WSDOT and the Design-Builder shall have three weeks to solicit and receive information from the three prospective candidates, and another two weeks to review and jointly agree on the final selection of the three members to serve on the Board. In the event that any of the three members cannot be agreed upon, the process shall be repeated for the positions not agreed upon until all positions are filled.
4. WSDOT, the Design-Builder, and the Board shall execute the Three-Party Agreement not later than the first Board meeting (WSDOT Form 134-091, *Disputes Review Board Three-Party Agreement*).
5. The Board members shall determine amongst themselves who will act as the Board Chair.

#### **Use of the WSDOT/AGC Pool of Board Candidates**



The qualifications of some potential DRB members have been reviewed and deemed potentially acceptable by both the Washington State Department of Transportation and the Associated General Contractors of Washington. This list of potential DRB members is available at <https://wsdot.wa.gov/business/construction/dispute-review-boards>, and their resumes are available upon request from the Deputy State Construction Engineer. Nevertheless, either party may propose a DRB member or members that are not on the WSDOT/AGC Pool list. In either case, every potential Board member must comply with the requirements of Sections 1-04.5(1).1.3, 1-04.5(1).1.4, and 1-04.5(1).1.5, and every Board member must be deemed acceptable by both WSDOT and the Design-Builder.

#### **Replacement or Termination of a Board Member**

Should a Board member need to be replaced, the replacement will be done in accordance with WSDOT Form 134-091, *Disputes Review Board Three-Party Agreement*.

#### **1-04.5(1).1.6 Board Procedures – General**

The Board, WSDOT, and Design-Builder may mutually develop rules of operation of the Board that supplement the Three Party Agreement. Such supplemental rules must be in writing and accepted by the Board, WSDOT, and Design-Builder.

It is expressly understood that the Board members are to act impartially and independently in the consideration of facts and conditions surrounding any dispute presented by the WSDOT or the Design-Builder and that the recommendations concerning any such dispute are advisory.

WSDOT will furnish to the Board documents which are or may become pertinent to the activities of the Board. WSDOT shall furnish the following services and items:

1. Contract-Related Documents: WSDOT will furnish the Board three copies of the Contract documents, including change orders, Written instructions issued by WSDOT to the Design-Builder, correspondence, or other documents pertinent to the performance of the Contract, and therefore, necessary to the Board's work.
2. Coordination and Services: WSDOT will, in cooperation with the Design-Builder, coordinate the operations of the Board. WSDOT will arrange or provide conference facilities at or near the job site and copying services.

The Design-Builder shall furnish to the Board three sets of documents, which are or may become pertinent to the activities of the Board, except documents furnished by WSDOT. Pertinent documents may include any drawings or sketches, calculations, procedures, schedules, estimates, correspondence, or other documents that are created in the planning or the performance of the Contract work. Copies of any documents provided to the Board must also be furnished to WSDOT.

#### **1-04.5(1).1.7 Regular Board Meetings**

All regular Board meetings are expected to be held at or near the job site. The frequency of regular meetings will be set by mutual agreement of the Board, WSDOT and the Design-Builder, consistent with the construction activities and the matters under the Contract. Each regular meeting is expected to consist of a round table discussion and a field inspection of the work. A member of WSDOT and Design-Builder are expected to

jointly facilitate the round table discussion. Round table discussion attendees are expected to include selected personnel from WSDOT and the Design-Builder. The agenda for each meeting will be set by the Board and may include the following elements:

1. Meeting opened by the Board Chair.
2. Remarks by WSDOT's representative.
3. By the Design-Builder: a description of work accomplished since the last meeting, the current status of the work schedule, and a forecast for the coming period.
4. By the Design-Builder: An outline and description of potential problems.
5. By the WSDOT Engineer: An outline and description of the status of the work, including an assessment of potential problems (if any), from WSDOT's point of view.
6. A brief description, by the Design-Builder or WSDOT, of potential claims or disputes, which have surfaced since the last meeting.
7. A summary, by the Design-Builder, WSDOT or the Board, of the status of past disputes and claims.
8. A construction site visit. The Board must be accompanied by both WSDOT and Design-Builder personnel.

#### **1-04.5(1).1.8**

#### **Standard Procedure for Consideration of Disputes**

##### **Dispute Referral**

The dispute referral shall be made in writing to the Board Chair with a copy concurrently provided to the other Board members and the other party.

1. The dispute referral shall concisely define the nature and specifics of the dispute that is proposed to be considered by the Board and the scope of the recommendation requested. This referral is not expected to contain a mutually agreed upon statement of the dispute.
2. The Board Chair shall confer with the parties to establish a briefing schedule for delivering prehearing submittals/rebuttals, and a date, time, and location for convening the Board hearing.

##### **Pre-Hearing Submittal**

1. WSDOT and the Design-Builder shall each prepare a pre-hearing submittal and transmit an electronic copy of it to all three members of the Board and the other party. The pre-hearing submittal, comprising a position paper with such backup data as is referenced in the position paper, shall be tabbed, indexed, and the pages consecutively numbered.
2. Both position papers shall, at a minimum, contain the following:
  - a. A mutually agreed upon joint statement of the dispute and the scope of the desired report being requested of the Board, placed at the beginning of the papers. The language of this joint statement shall summarize in a few sentences the nature of the dispute. If the parties are unable to agree on the wording of the

joint statement of dispute, each party's position paper shall contain both statements, and identify the party authoring each statement.

- b. The basis and justification for the party's position, with reference to Contract language and other supporting documents for each element of the dispute. In order to minimize duplication and repetitiveness, the parties may identify a common set of documents that will be referred to by both parties, and submit them in a separate package.
3. If requested by the Board or either party, WSDOT and the Design-Builder shall each prepare and submit a rebuttal paper in response the position paper of the other party.
4. The distribution requirements and time for submittal will be established by the Board and communicated to the parties by the Chair.

### **Board Hearings**

1. WSDOT will arrange for or provide hearing facilities at or near the site.
2. Attendance:
  - a. WSDOT and the Design-Builder will have a representative at all hearings.
  - b. WSDOT and Design-Builder shall both limit attendance at the hearing to personnel directly involved in the dispute and participants in the good-faith negotiations that were conducted prior to submittal to the Board except as noted below.
  - c. At least 14 Calendar Days before the hearing, each party shall provide a list of proposed attendees to the Board and to the other party. In the event of any disagreement, the Board shall make the final determination as to who attends the hearing.
  - d. Attorneys shall not attend Board hearings except as provided below:
    - i. Attorneys are identified as such on the list of proposed attendees.
    - ii. All parties desiring their attorney present are able to do so.
    - iii. Attorneys shall not participate in the hearing, unless the scope and ex-tent of Attorney participation is mutually agreed to by WSDOT, Design-Builder and the Board at least 7 Calendar Days before the hearing.
  - e. At Board hearings regarding disputes involving a Subcontractor, the Design-Builder shall require and ensure that each Subcontractor involved in the dispute have present an authorized representative with actual knowledge of the facts underlying the Subcontractor disputes.
3. A party furnishing Written evidence or documentation of any kind to the Board must furnish copies of such information to the other party and the Board a minimum of 21 Calendar Days prior to the date the Board sets to convene the hearing for the dispute, unless otherwise mutually agreed to by the parties and the Board. Either party shall produce such additional evidence as the Board may deem necessary and furnish copies to the other party prior to submittal to the Board.
4. The conduct of the hearing shall be established by the Board and be generally consistent with the following guidelines:

- a. The party who referred the dispute to the Board shall present first, followed by the other party.
  - b. To assure each party a full and adequate opportunity to present their position, both parties shall be allowed successive rebuttals and to rebut the opposing party's position until, in the Board's opinion, all aspects of the dispute have been fully and fairly covered.
  - c. The Board shall be fully prepared to, and may at any time, ask questions, request clarifications, or ask for additional data, documents, and/or job records.
  - d. Either party may request that the Board direct a question to, or request a clarification from the other party. The Board shall determine at what point in the proceedings such requests may be made and if they will be granted. In general, the Board will not allow one party to be questioned directly by the other party.
  - e. In difficult or complex cases, additional hearings may be necessary to facilitate full consideration and understanding of the dispute.
  - f. The Board, in its discretion, may allow introduction of arguments, exhibits, handouts, or documentary evidence that were not included in that party's prehearing position paper or rebuttal and have not been previously submitted to the other party. In such cases the other party will be granted time to review and prepare a rebuttal to the new material, which may require a continuation of the hearing.
5. After the hearing is concluded, the Board shall meet in private and reach a conclusion supported by two or more members. Its findings and recommendations, together with its reasons shall then be submitted as a Written report to both parties. The recommendations shall be based on the pertinent Contract provisions, facts, and circumstances involved in the dispute. The Contract shall be interpreted and construed in accordance with the laws of the State. The Board shall make every effort to reach a unanimous decision. If this proves impossible, the dissenting member may prepare a minority report.

#### **Failure to Prepare a Pre-Hearing Submittal or Attend a Board Hearing**

1. In the event that either party fails to deliver a pre-hearing submittal by the date established by the Board, the Board shall, at its discretion, determine whether the hearing shall proceed as originally scheduled, or allow additional time for the submittal and/or reschedule the hearing. On the final date and time established for the hearing, the Board shall proceed with the hearing utilizing the information that has been submitted.
2. In the event that representatives of either WSDOT or the Design-Builder fail to appear at the appointed time of a Board hearing, the Board shall postpone the hearing until such time as representatives from both parties are available to proceed with the hearing.

#### **Use of Outside Experts**

1. By WSDOT or the Design-Builder:
  - a. A party intending to offer an outside expert's analysis at the hearing shall notify the other party and the Board in writing no less than 30 Calendar Days prior to

1 the due date for delivering the pre-hearing submittal, and provide the following  
2 disclosure:

- 3 i. The expert's name and a general statement of the area of the dispute that will  
4 be covered by his or her testimony.
- 5 ii. A statement prepared by the proposed expert which addresses the  
6 requirements of Section 1-04.5(1).1.5, item 3(b).
- 7 iii. A statement prepared by the proposed expert which identifies the experience  
8 and training which qualifies them as an expert.
- 9 b. Upon receipt of the above disclosure, the other party shall have the opportunity  
10 to secure the services of an outside expert to address or respond to those issues  
11 that may be raised by the other party's outside expert. The notification and  
12 disclosure requirement shall be the same as that specified above, except the time  
13 requirement is 21 Calendar Days.
- 14 c. In the event that either WSDOT or the Design-Builder fail to notify the other  
15 party of their intent to provide an outside expert; the Board, in its discretion,  
16 may allow introduction of the outside experts' arguments, exhibits, handouts, or  
17 documentary evidence that were not included in that party's prehearing position  
18 paper or rebuttal and have not been previously submitted to the other party. In  
19 such cases the other party will be granted time to review and prepare a rebuttal  
20 to the new material, which may require a continuation of the hearing.

21 2. By the Board:

- 22 a. When requested by the Board and subject to approval of the parties, outside  
23 experts may be needed to assist the Board. In such cases, the outside expert  
24 shall in no way be deemed authorized to usurp the Board's authority to issue the  
25 Board recommendations. Such authority shall remain vested solely in the Board.
- 26 b. Prior to arranging for outside experts, the Board shall obtain prior approval from  
27 WSDOT and the Design-Builder by providing:
  - 28 i. A statement explaining why the expert assistance is needed.
  - 29 ii. An estimate of the cost of the expert assistance.
  - 30 iii. The expert's name and a general statement of the area of expertise they will  
31 provide.
  - 32 iv. A statement prepared by the proposed expert which addresses the  
33 requirements of Section 1-04.5(1).1.5, item 3(b).
  - 34 v. A statement prepared by the proposed expert which identifies the experience  
35 and training which qualifies them as an expert.
  - 36 vi. A confidentiality statement, consistent with the confidentiality obligations of  
37 the Board described in the Three Party Agreement, executed by the  
38 proposed expert.

39 **Board Report**

- 40 1. The Board's recommendations for resolution of a dispute will be formalized in a  
41 writ-ten report signed by all Board members. The recommendations shall be based  
42 on the Contract Provisions and the facts and circumstances involved in the dispute.  
43 The report should include a description of the dispute, statements of each party's

position, findings as to the facts of the dispute, discussion and rationale for the recommendation(s), and the recommendation(s). The report shall be submitted concurrently to the parties, as soon as possible after completion of the hearing as agreed by all parties.

2. If the Board cannot arrive at a unanimous report, the Board shall prepare minority findings and recommendations, which, together with the majority findings and recommendations shall comprise the DRB report. The minority report shall identify the issues of disagreement, along with the reasons for disagreement.
3. Clarification:
  - a. Either party may request clarification of a report within 14 Calendar Days following receipt of the report. Within a reasonable period of time, the Board shall provide Written clarification to both parties.
  - b. Requests for clarification shall be submitted in writing simultaneously to the Board and the other party.
4. Reconsideration:
  - a. Either party may request reconsideration of a report, provided:
    - i. The request is made within 14 Calendar Days following receipt of the report, and
    - ii. New information is obtained or developed that was not known at the time of the hearing or, in the party's opinion, the Board misunderstood or failed to consider pertinent facts of the dispute.
  - b. Within a reasonable time, the Board shall provide Written reconsideration to both parties.
  - c. Requests for reconsideration shall be submitted in writing simultaneously to the Board and the other party.
  - d. The Board will give the party not requesting reconsideration the option of submitting a rebuttal to any information that is the basis of the request for re-consideration.

### **Acceptance of Board Recommendations**

Within 30 Calendar Days of receiving the Board recommendations or within 14 Calendar Days of receiving the Board's Written clarification and/or reconsideration both WSDOT and the Design-Builder shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. Although both parties should place weight upon the Board recommendations, the recommendations are not binding.

If the Board's assistance does not lead to resolution of the dispute, the Design-Builder must file a claim according to Section 1-09.11(2) before seeking any form of judicial relief.

In the event the Board's recommendations do not lead to resolution of the dispute, the Board's recommendation consisting solely of the Board's Written report and any Written minority reports, along with the Board's Written clarifications and Written responses to requests for reconsideration, if any, will be admissible in any subsequent dispute resolution proceedings including, but not limited to litigation/arbitration. The aforementioned list of documentation shall be considered all-inclusive.

**1-04.5(1).1.9 Vacant**

**1-04.5(1).1.10 Payment for the Board Processes**

1. The Design-Builder and WSDOT shall each bear their respective in-house costs.
2. WSDOT and Design-Builder shall share equally in the cost of the Board's services and all operating expenses of the Board. The Board members' compensation shall be in accordance with the Three Party Agreement. After the Design-Builder and WSDOT review invoices from the Board and other operating expenses of the Board, the Design-Builder shall make full payment for all Board members and Board operating expenses. WSDOT will reimburse the Design-Builder for 50 percent of such payments, under the Price Proposal item "Disputes Review Board".
3. The Design-Builder and WSDOT shall equally bear the cost of the services of the outside expert hired to advise the Board. Outside experts hired to advise the Board shall Contract directly with the Design-Builder after concurrence from the Board and approval from WSDOT. Invoices for these services shall be submitted by the expert to both the Design-Builder and WSDOT for approval by both parties. The Design-Builder shall pay approved invoices in full, and WSDOT will reimburse the Design-Builder for 50 percent of such payments, under the Price Proposal item "Disputes Review Board".
4. The cost for securing outside expert services for WSDOT or the Design-Builder shall be borne by the party securing such services.
5. WSDOT, through the WSDOT Engineer, will provide administrative services, such as conference facilities and copying services, to the Board and WSDOT will bear the costs for these services.

**1-04.5(1).1.11 Indemnification of Board Members**

WSDOT and Design-Builder shall indemnify and hold harmless the Board members from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees arising out of and resulting from the actions and recommendations of the Board.

**1-04.6 Paths and Trails**

The Design-Builder shall calculate the percentage of paths and trails and submit with the RFC Plans per RCW 47.30. This percentage will be provided to the WSDOT Engineer. For projects with no paths and trails calculation, use zero percent. Communicating zero percent ensures the review of the paths and trails percentage occurred.

**1-04.7 Differing Site Conditions**

For Work unrelated to an ATC, Differing Site Conditions shall mean (a) actual subsurface or latent physical conditions encountered at the Site that are substantially or materially different from the baseline conditions identified in the GBR and the data in the GDR as set forth in Section 1-02.4(2) and which are not discoverable from a reasonable investigation and analysis of the Site, or (b) physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as

1 inherent in the type of Work provided for in the Contract and the Work Site  
2 characteristics, or (c) the discovery of Hazardous Materials , or asbestos, not identified in  
3 the Hazardous Materials Report, asbestos GFI report, or not ordinarily encountered and  
4 generally recognized in the type of Work provided for in the Contract and the Work Site  
5 characteristics provided in all cases that the Design-Builder had no actual or constructive  
6 knowledge of such conditions as of the Proposal Due Date.

7 For Work related to an ATC, Differing Site Conditions shall mean (a) actual subsurface  
8 conditions or latent physical conditions encountered at the Site that are substantially or  
9 materially different from the conditions indicated in the Design-Builder's geotechnical  
10 investigation, including its geotechnical basis of design, included in said ATC (see  
11 Section 1-02.4(2)), and which are not discoverable from a reasonable investigation and  
12 analysis of the Site, or (b) physical conditions of an unusual nature, differing materially  
13 from those ordinarily encountered and generally recognized as inherent in the type of  
14 Work provided for in the Contract and the Work Site characteristics, or (c) the discovery  
15 of Hazardous Materials or asbestos not identified in the Design-Builder's Hazardous  
16 Materials investigation (see Section 1-02.4(3)), and which are not discoverable from a  
17 reasonable investigation and analysis of the Site, provided in all cases that the  
18 Design-Builder had no actual or constructive knowledge of such conditions as of the  
19 Proposal Due Date. The party discovering such conditions shall promptly notify the other  
20 party in writing of the specific Differing Site Conditions before they are disturbed and  
21 before the affected Work is performed. Such notification shall identify the conditions  
22 represented in the Contract Documents, the conditions encountered at the Site, and an  
23 explanation of the difference.

24 Upon Written notification, WSDOT will investigate the conditions to determine if  
25 conditions materially differ and cause an increase or decrease in the cost or time required  
26 for the performance of any Work under the Contract, an adjustment, excluding loss of  
27 anticipated profits, will be made and the Contract modified in writing accordingly.  
28 WSDOT will provide the Design-Builder a Written Determination whether an adjustment  
29 of the Contract is warranted.

30 Notwithstanding the above, the Design-Builder shall be entitled to an equitable  
31 adjustment adjusting the Contract Price only for the actual, reasonable cost increase  
32 resulting from Differing Site Conditions which in the aggregate exceeds \$1,500,000. The  
33 responsibility for the first \$1,500,000 worth of Differing Site Conditions shall rest solely  
34 with the Design-Builder.

35 If WSDOT determines that Differing Site Conditions do not exist and no adjustment in  
36 costs or time is warranted, such determination shall be final as provided in  
37 Section 1-05.1.

38 No Contract adjustment which results in a benefit to the Design-Builder will be allowed  
39 unless the Design-Builder has provided the required Written notice.

40 The equitable adjustment will be by agreement with the Design-Builder. However, if the  
41 parties are unable to agree, WSDOT will determine the amount of the equitable  
42 adjustment in accordance with Section 1-09.4. Extensions of time will be evaluated in  
43 accordance with Section 1-08.8.



1 If WSDOT determines that Differing Site Conditions do not exist and no adjustment in  
2 costs or time is warranted, such determination shall be final as provided in  
3 Section 1-05.1.

4 If the Design-Builder does not agree with the WSDOT Engineer's Written  
5 Determination, the Design-Builder shall pursue the protest procedures in accordance with  
6 Section 1-04.5.

7 No claim by the Design-Builder shall be allowed unless the Design-Builder has followed  
8 the procedures provided in Section 1-04.5 and 1-09.11.

9 **1-04.7(1) Burden of Proof**

10 The Design-Builder shall bear the burden of proving that a Differing Site Condition  
11 exists and that it could not reasonably have worked around the Differing Site Condition  
12 so as to avoid additional cost. Each request for a Change Order under Section 1-04.7 shall  
13 be accompanied by a statement signed by a qualified professional setting forth all  
14 relevant assumptions made by the Design-Builder with respect to the condition of the  
15 Site, justifying the basis for such assumptions and explaining exactly how the existing  
16 conditions differ from those assumptions, and stating the efforts undertaken by the  
17 Design-Builder to find alternative design or construction solutions to eliminate or  
18 minimize the problem and the associated costs.

19 **1-04.7(2) Insurance Claims**

20 Prior to filing any request for a Change Order relating to a Differing Site Condition,  
21 Design-Builder shall inquire whether insurance proceeds may be available to cover any  
22 of its costs. If Design-Builder finds that reasonable grounds for filing an insurance claim  
23 exist, then Design-Builder shall so notify WSDOT and shall take appropriate steps to file  
24 and pursue the claim in accordance with Section 1-07.18(4). Upon receipt of a Change  
25 Order request and evidence that the claim has been properly filed, WSDOT will process  
26 the Change Order request pursuant to the Contract.

27 **1-04.8 *Progress Estimates and Payments***

28 Progress estimates or payments for the Work shall not be used as evidence of  
29 performance for the Work. Progress estimates serve only as basis for partial payments.  
30 WSDOT may revise progress estimates at any time before Final Acceptance. If WSDOT  
31 deems it proper to do so, changes may be made in progress estimates and in the final  
32 estimate.

33 The failure by WSDOT to deduct from a progress payment any of the sums which  
34 WSDOT is entitled to recover from the Design-Builder under the terms of the Contract  
35 shall not constitute a waiver of WSDOT's right to such sums.