

AGREEMENT FOR TURNKEY DESIGN AND CONSTRUCTION ENERGY SERVICES

This Agreement for Turnkey Design and Construction Energy Services ("*Agreement*") is made effective as of **October 1, 2024** by and between the **Town of Yountville**, a California municipal corporation ("*Town*"), and **Schneider Electric Buildings Americas, Inc.**, a Delaware corporation ("*Design/Builder*"). Town and Design/Builder may be referred to herein collectively as the "*Parties*" and individually as a "*Party*".

RECITALS

This Agreement is entered into pursuant to the provisions and authority of Government Code section 4217.10 et seq. (Energy Conservation Contracts) and other applicable law.

NOW, THEREFORE, in consideration of the foregoing and of the respective rights and obligations of the Parties set forth herein, the Parties hereby agree as follows:

ARTICLE 0 DEFINITIONS

0.1. "Applicable Law" shall mean any applicable federal, California state or local law, constitution, treaty, ordinance, code, rule, regulation, order, injunction, judgment, decree, ruling or other similar requirement lawfully enacted, adopted, promulgated or applied by a Governmental Authority.

0.2. "Audit Fee" shall mean the dollar amount set forth on Exhibit D attached hereto, which shall be payable to Design/Builder as compensation for the Audit Work if Town terminates this Agreement prior to the effective date of the Design Notice to Proceed in accordance with Section 1.4.1 hereof.

0.3. "Audit Phase" shall mean the portion of the Project commencing as of the effective date of this Agreement and concluding immediately prior to the effective date of the Design Phase Notice to Proceed.

0.4. "Audit Report" shall mean the inventory of the Town's existing facilities, systems, equipment, and improvements addressing (i) current average energy consumption levels; (ii) current operating conditions; (iii) remaining useful life; (iv) feasible replacement options and comparative efficiency levels; (v) recommended improvements and alternatives; and (vi) any other environmental concerns, including hazardous materials or system vulnerabilities, revealed throughout performance of the Audit Work.

0.5. "Audit Work" shall mean all labor, equipment, materials and goods necessary to complete the Scope of Audit Work set forth on Exhibit A to this Agreement.

0.6. "Construction Phase" shall mean the portion of the Project commencing as of the effective date of the Construction Phase Notice to Proceed and concluding upon final completion of the Project.

0.7. "Construction Schedule" shall mean the Preliminary Construction Schedule developed in accordance with the Construction Phase Notice to Proceed.

0.8. "Construction Work" shall mean all labor, equipment, materials and goods necessary to complete the Scope of Construction Work set forth in the Construction Phase Notice to Proceed.

0.9. "Contract Documents" shall mean, collectively, this Agreement and all schedules, exhibits, and/or documents attached hereto and/or expressly incorporated by reference herein. Without limiting the generality of the foregoing, the following Exhibits are hereby expressly incorporated by reference into the Agreement,

subject to the terms and conditions hereof:

- a. Exhibits to the Agreement:
 - i. Exhibit A: Scope of Audit Work
 - ii. Exhibit B: Preliminary Audit Schedule
 - iii. Exhibit C: Scope of Design Work
 - iv. Exhibit D: Audit & Design Fees
- b. Design Phase Notice to Proceed (effective as of the effective date of the Design Phase Notice to Proceed)
- c. Construction Phase Notice to Proceed (effective as of effective date of the Construction Notice to Proceed)

0.10. “Design/Builder” shall have the meaning set forth in the introductory paragraph to this Agreement. Design/Builder may occasionally be referred to as “ESCO” in the Contract Documents.

0.11. “Design Fee” shall mean the dollar amount set forth on Exhibit D attached hereto, which shall be payable to Design/Builder as compensation for the Design Work if Town terminates this Agreement prior to the effective date of the Construction Notice to Proceed in accordance with Section 2.5.1 hereof.

0.12. “Design Phase” shall mean the portion of the Project commencing as of the effective date of the Design Phase Notice to Proceed and concluding immediately prior to the effective date of the Construction Notice to Proceed.

0.13. “Design Portfolio” shall mean designs, plans, drawings, and/or renderings produced by Design/Builder depicting available conservation measures and related improvements that may made to the Town’s Facilities, Design/Builder’s recommendations to the Town thereon, and the estimated costs to Town for each design option.

0.14. “Design Work” shall mean all labor, equipment, materials and goods necessary to complete the Scope of Design Work set forth in the Design Phase Notice to Proceed.

0.16 “Facilities” shall mean any structure, building, facility, or work which the Town is authorized to construct or use, and automobile parking lots, landscaping, and other improvements, including furnishings and equipment, incidental to the use of any structure, building, facility, or work, and also includes the site thereof, and any easements, rights-of-way appurtenant thereto, or necessary for its full use that the Town has made available for audit by Design/Builder.

0.15. “Governing Body” means the Town Council of Town.

0.16. “Governmental Authority” shall mean any nation, government, state or political subdivision thereof, and any entity lawfully exercising executive, legislative, judicial, regulatory or administrative powers on behalf of any of the foregoing.

0.17. “Project” shall mean the improvement to Town’s Facilities to be constructed by Design/Builder in accordance with and subject to the terms and conditions of this Agreement, as more specifically set forth the Construction Phase Notice to Proceed. For the avoidance of doubt, notwithstanding the original scope of the Project as contemplated by this Agreement or any exhibit or attachment hereto, the Construction Phase Notice to Proceed issued by Town shall represent the entirety of the intended and agreed upon scope for the Project.

0.18. “Project Fee” shall mean total dollar amount payable to Design/Builder under the Agreement as

compensation for Design/Builder's performance of the Construction Work, inclusive of the Audit Fee and Design Fee. The Project Fee shall be determined at the conclusion of the Design Phase and shall be set forth in the Construction Phase Notice to Proceed.

0.19. "Project Proposal" shall have the meaning set forth in Exhibit A.

0.20. "Project Site" or "Site" shall mean Town property on or at which Work is to be performed, specifically including Town Facilities.

0.21. "Substantial Completion" shall mean, with respect to the entirety of the Construction Work or any portion thereof, the point at which such Work has been completed in accordance with the Contract Documents, except for minor items, adjustments and/or corrections, such that it is operational and fit for use by Town.

0.22. "Town" shall have the meaning set forth in the introductory paragraph to this Agreement. Town may occasionally be referred to as "Customer" in the Contract Documents.

0.23. "Work" shall mean the Audit Work, Design Work, and the Construction Work, collectively.

ARTICLE 1

AUDIT PHASE OF THE PROJECT

Section 1.1. Scope of Audit Work. The scope of the audit services to be performed by Design/Builder under this Agreement is described in Exhibit A attached hereto (the "Scope of Audit Work").

Section 1.2. Audit Schedule. The "Preliminary Audit Schedule" attached hereto as Exhibit B sets forth a preliminary schedule for the Audit Phase milestones.

Section 1.3. Audit Report Submission. Upon completion of the audit services as described in the "Scope of Audit Work" attached hereto as Exhibit A in accordance with the "Preliminary Audit Schedule" attached hereto as Exhibit B, Design/Builder shall provide Town with a completed Audit Report.

Section 1.4. Option to Proceed into Design Phase. Within sixty (60) days of submission of the Audit Report, Town shall either (i) terminate this Agreement pursuant to Section 1.4.1 below, or (ii) execute the Design Phase Notice to Proceed in accordance with Section 1.4.2 below.

1.4.1. Early Termination and Payment of Audit Fee. If Town does not wish to proceed into the Design Phase, Town may terminate this Agreement for convenience immediately upon providing Design/Builder with written notice of termination and payment in full of the Audit Fee.

1.4.2. Execution of Design Phase Notice to Proceed. If Town wishes to authorize Design/Builder to proceed with the design of any improvements to the Town's Facilities, the Town shall unilaterally issue the Design Phase Notice to Proceed reflecting the Design Work that Town desires Design/Builder to complete and the terms upon which Town desires such Design Work to be completed, in Town's sole discretion. In such event, the Audit Fee and any additional costs incurred by Design/Builder in the performance of the Design Work shall be included in the Design Fee, and such total amount shall be payable in accordance with the provisions of Section 2.5.

Section 1.5. Site Investigation. In performing the Audit Work, Design/Builder shall exercise reasonable due diligence to understand the nature, location and extent of the Town's Facilities and shall investigate the general and local conditions which are applicable to the Project Site, such as physical conditions at the Project

Site, the conditions of the ground at the Project Site, and the character of equipment and materials needed for the performance of the Work at the Project Site (the “*Site Investigation*”).

Section 1.6. Town Information. To facilitate the Audit Work and to assist Design/Builder in recommending an appropriate Scope of Design Work and Scope of Construction Work, Town is responsible for providing Design/Builder with all such access, knowledge and history as may be relevant to Design/Builder’s analysis and/or design, including, without limitation, with respect to Town’s Facilities, systems, and equipment, as well as its accounting, maintenance, and operation practices. Town is required to disclose all known or suspected deficiencies, defects and malfunctions of or affecting the Facilities, systems, equipment and components thereof, as well as any site conditions that should be considered in planning and executing the construction services. Town responsibilities are set forth in further detail on Exhibit A.

ARTICLE 2 DESIGN PHASE OF THE PROJECT

Section 2.1 Commencement of Design Phase. Upon Town’s issuance of the Design Phase Notice to Proceed, Design/Builder shall commence the Design Work in conformance with the terms therein.

Section 2.2 Scope of Work. The scope of the design services to be performed by Design/Builder pursuant to this Agreement (the “*Scope of Design Work*”) shall be determined by Town, in Town’s sole discretion, at the conclusion of the Audit Phase and set forth in the Design Phase Notice to Proceed. The details of those design services are noted in Exhibit A. Notwithstanding anything to the contrary contained herein, Design/Builder shall have the right to reject the Design Phase Notice to Proceed issued by the Town, in which case the Town shall be obligated to pay the Audit Fee.

Section 2.3 Design Schedule. Within 14 days of Town’s issuance of the Design Phase Notice to Proceed, Design/Builder shall provide Town with a schedule (the “*Design Schedule*”) setting forth Design Phase milestones and a deadline for submission of the “*Design Portfolio*”.

Section 2.4 Design Portfolio Submission. Upon completion of the design services as described in the “*Scope of Design Work*” in accordance with the “*Design Schedule*”, Design/Builder shall provide to Town the completed “*Design Portfolio*”. Upon Town’s request, Design/Builder shall meet with Town staff to discuss the designs and drawings provided, the Town’s available options, and Design/Builder’s recommendations.

Section 2.5 Option to Proceed into Construction Phase. Within sixty (60) days of submission of the Design Portfolio, Town shall either (i) terminate this Agreement pursuant to Section 2.5.1 below, or (ii) execute the Construction Phase Notice to Proceed in accordance with Section 2.5.2 below.

2.5.1 Early Termination and Payment of Design Fee. If Town does not wish to proceed into the Construction Phase, Town may terminate this Agreement for convenience immediately upon providing Design/Builder with written notice of termination and payment in full of the Design Fee.

2.5.2 Execution of Construction Phase Notice to Proceed. If Town wishes to authorize Design/Builder to proceed with the construction of any improvements to the Town’s Facilities, the Town shall unilaterally issue the Construction Phase Notice to Proceed reflecting the Construction Work that Town desires Design/Builder to complete and the terms upon which Town desires such Construction Work to be completed, in Town’s sole discretion. In such event, the Design Fee and any additional costs incurred by Design/Builder in the performance of the Construction Work shall be included in the Project Fee, and such total amount shall be payable in accordance with the provisions of Section 3.4. Notwithstanding anything to the contrary contained herein,

Design/Builder shall have the right to reject the Construction Phase Notice to Proceed issued by the Town, in which case the Town shall be obligated to pay the Audit Fee and Design Fee.

ARTICLE 3 CONSTRUCTION PHASE

Section 3.1. Commencement of Construction Phase. Upon Town's issuance of the Construction Phase Notice to Proceed, Design/Builder shall commence the Construction Work in conformance with the terms therein.

Section 3.2. Scope of Work. The scope of the construction services to be performed by Design/Builder pursuant to this Agreement (the "*Scope of Construction Work*") shall be determined by Town, in Town's sole discretion, at the conclusion of the Design Phase and set forth in the Construction Phase Notice to Proceed.

Section 3.3. Construction Schedule.

3.3.1. Construction Time. The scheduled date of Substantial Completion of the Construction Work (the "Completion Date") and any applicable milestone dates shall be determined in accordance with the Construction Phase Notice to Proceed.

3.3.2. Substantial Completion. Upon Substantial Completion of the Construction Work (or any portion thereof, as appropriate), Design/Builder will issue to Town a "Letter of Substantial Completion" with respect to such substantially complete Work (or portion thereof). The date on which Town approves of and/or assents to any such Letter of Substantial Completion shall be the "Date of Substantial Completion" with respect to the applicable Work.

3.3.3. Delays. If Design/Builder's progress on the Project is at any point delayed due to changes in the requested scope of Work, labor disputes, fire, unusual delay in deliveries, abnormally severe weather conditions, unavoidable casualties, epidemic or pandemic conditions, quarantine restrictions, the acts or omissions of Town, or due to Town's instructions to stop Work by no fault of Design/Builder, and/or any other causes which are beyond the reasonable control of Design/Builder, then the Parties agree all affected dates and milestones shall be extended to reflect such period of interruption.

Section 3.4. Compensation, Invoicing and Payment.

3.4.1. Project Fee. The Project Fee shall be determined at the conclusion of the Design Phase and shall be set forth in the Construction Phase Notice to Proceed. The Project Fee is inclusive of, and not in addition to, the Audit Fee and Design Fee. The Project Fee shall not exceed \$15,000,000 (the "*Maximum Amount*"). Design/Builder agrees the Project Fee shall cover all expenses, the cost of performing the scope of work set forth in the Construction Phase Notice to Proceed, losses, damages, and consequences arising out of the nature of the Work during its progress or prior to its acceptance including those for well and faithfully completing the Work and the whole thereof in the manner and time specified in the aforesaid Contract Documents; and also including those arising from actions of the elements, unforeseen difficulties or obstructions encountered in the prosecution of the Work, suspension or discontinuance of the Work, and all other unknowns or risks of any description connected with the Work. Such unforeseen difficulties or obstructions includes any act of God, the elements, strike, walkout, or any other cause beyond Design/Builder's reasonable control that occurs before Town accepts the work as complete..

- 3.4.2. Schedule of Values.** Design/Builder will develop a schedule delineating the items to be completed pursuant to the Scope of Construction Work (the “*Schedule of Values*”) and shall endeavor to provide such Schedule of Values to Town within ten (10) days of the effective date of the Construction Phase Notice to Proceed.
- 3.4.3. Project Mobilization Invoice and Payment.** Within one (1) month of the effective date of the Construction Phase Notice to Proceed, Town shall make payment to Design/Builder for Project mobilization expenses and other expenses incurred to date (“*Project Mobilization Payment*”) in an amount not to exceed twenty percent (20%) and not less than ten percent (10%) of the Project Fee. Such Project mobilization and other expenses may include, without limitation, the Audit Fee, Design Fee and any design, engineering and/or development expenses incurred in connection with the Project, expenses relating to procurement of equipment, materials, and/or bonds, and any other Project start-up and mobilization expenses incurred to date.
- 3.4.4. Design/Builder Invoices.** Beginning on the date that is two (2) months following the effective date of the Construction Phase Notice to Proceed, Design/Builder shall provide monthly invoices to Town seeking payment for the Work performed in the prior month (based on the percentage completion of items delineated on the Schedule of Values).
- 3.4.5. Payment.** Payment is due within thirty (30) days of the date of each invoice. The Parties agree to meet and confer at mutually agreeable times to resolve any disputed amounts contained in an invoice submitted by Design/Builder. If any undisputed payment is over thirty (30) days late from the due date stated on the invoice, Design/Builder may impose a penalty of one percent (1%) of the amount(s) owed for each month overdue and/or may terminate the Agreement in accordance with Article 5. This Agreement is subject to the provisions of Article 1.7 (commencing at section 20104.50) of Division 2, Part 3 of the Public Contract Code regarding prompt payment of contractors by local governments. Article 1.7 mandates certain procedures for the payment of undisputed and properly submitted payment requests within thirty (30) days after receipt, for the review of payment requests, for notice to contractors of improper payment requests, and provides for the payment of interest on progress payment requests which are not timely made in accordance with that Article. This Agreement hereby incorporates the provisions of Article 1.7 as though fully set forth herein. If applicable, Town’s payments may be made from an escrow account set up in accordance with Town’s financing arrangement, in which case Town shall be responsible for forwarding Design/Builder’s invoices to the escrow agent and for authorizing and directing the escrow agent to timely release the invoiced amounts to Design/Builder.
- 3.4.6. Final Payment and Release of Liens.** Final payment shall not become due until Design/Builder has delivered to Town a conditional release of all liens arising out of this Agreement, covering all labor, materials, and equipment for which a lien could be filed, or a bond satisfactory to Town to indemnify Town against such lien.
- 3.4.7. Retention.** Following payment of the Project Mobilization Payment, which shall not be subject to any retention, Town may retain five percent (5%) of each monthly progress payment (the “Amounts Retained”). Contractor may at its own expense substitute securities equivalent to the Amounts Retained (or the retained percentage) in accordance with Public Contract Code 22300. At the request and expense of Contractor, securities equivalent to the Amounts Retained shall be deposited with Town, or with a state or federally chartered bank in this state as the escrow agent, who shall then pay those moneys to Town. The Amounts Retained with respect to a given portion of the Work shall be released to Design/Builder within thirty (30) days of the Date of Substantial Completion of such portion of the Work, and any Amounts Retained remaining upon Substantial

Completion of the Project shall be released to Design/Builder with the final payment.

Section 3.5. Guarantees & Security.

3.5.1. Performance Guarantees. If Design/Builder is providing any efficiency or energy savings guarantees upon completion of the Construction Work, the terms of such efficiency or energy savings guarantees shall be set forth and/or incorporated in the Construction Phase Notice to Proceed. If no such terms are set forth and/or incorporated in the Construction Phase Notice to Proceed, then no efficiency or energy savings guarantees are being made by Design/Builder in connection with this Agreement.

3.5.2. Payment and Performance Bonds. Promptly following the effective date of the Construction Phase Notice to Proceed and before commencing the Construction Work, Design/Builder shall provide payment and performance bonds, each for an amount equal to 100% of the Project Fee. Notwithstanding any provision to the contrary herein, any performance bonds and payment bonds provided in connection with this Agreement guarantee only the performance of the Construction Work and the payment of any Subcontractors engaged by Design/Builder in connection therewith, respectively, and shall not be construed to guarantee the performance of: (1) any efficiency or energy savings guarantees (if applicable pursuant to Section 3.5.1 hereof), (2) any support or maintenance services, or (3) any other guarantees, warranties or covenants with terms beyond one (1) year in duration from the Date of Substantial Completion.

Section 3.6. Performance of Work.

3.6.1. Standard of Performance. Design/Builder represents and warrants that it has the professional skill, knowledge and experience necessary to perform and complete the Project in a timely and competent manner. Design/Builder shall perform, or cause to be performed, the Project using at least such degree of care as is reasonably expected of professionals providing similar services to public agencies within the State of California in similar circumstances (and considering Town's goals and any financial or other constraints or parameters made known to Design/Builder before or after the effective date of the Construction Phase Notice to Proceed).

3.6.2. Licenses. Design/Builder represents and warrants that it currently has or shall timely obtain, and that it shall maintain, all licenses, permits, qualifications and approvals of whatever nature as are legally required to permit Design/Builder to perform the Work.

3.6.3. Regular Working Hours. Except as Town, in its sole discretion, may otherwise agree, Design/Builder shall perform such portions of the Work as are to occur at or in Town's Facilities only: (i) on weekdays (i.e., any day, Monday through Friday, inclusive); and (ii) commencing at or after such time, and ending by or prior to such time, as may be specified in either an applicable local ordinance, conditions of approval, or any "Mitigation Monitoring Plan" adopted by Town pursuant to the California Environmental Quality Act and made available to Design/Builder, whichever is more restrictive.

Section 3.7. Employees and Subcontractors.

3.7.1. Design/Builder's Subcontractors. Design/Builder may use one or more subcontractors to perform any portion(s) of the Project as Design/Builder may deem appropriate (each, a "Subcontractor"); provided, however, that Design/Builder shall obtain prior written approval from Town for each Subcontractor prior to use and Design/Builder shall remain ultimately responsible

for the performance of its obligations under this Agreement. Design/Builder shall ensure that all of its Subcontractors have the skill, knowledge and experience necessary to perform the services assigned to them, and shall further ensure that each of its Subcontractors holds all licenses legally required for the practice of its profession.

- 3.7.2. Design/Builder's Employees.** The employees of Design/Builder shall at all times be under Design/Builder's exclusive direction and control on the Project. Design/Builder shall pay all wages, salaries, and other amounts due to such personnel in connection with their performance of services under this Agreement, as required by law. Design/Builder shall be responsible for all reports and obligations respecting such personnel, including, but not limited to: social security taxes, federal and state income tax withholdings, unemployment insurance, and workers' compensation insurance. Design/Builder shall employ only competent workers for performance of the services and shall not employ any person who is unfit or unskilled in the Work assigned to him or her.
- 3.7.3. Supervision by Design/Builder.** Design/Builder shall at all times enforce strict discipline and good order among its Subcontractors and employees performing any portion(s) of the services. At Town's request, Design/Builder shall remove from the Project and Project Site(s) any person, regardless of whether employed by the Design/Builder or any Subcontractor, who is not performing the services in a competent manner or who is a threat to the safety of persons or the Project, and Design/Builder shall not thereafter permit any such person to perform any of the services or to be present on or at the Project Site(s). In addition, during the course of performing the Construction Work, Design/Builder shall have an experienced and competent superintendent (and any necessary assistants) present on the Project Site(s) to supervise the construction services and Design/Builder's employees and Subcontractors on the Project.
- 3.7.4. Prohibition Against Unlawful Discrimination.** Design/Builder represents and warrants that it is an equal opportunity employer and agrees that it shall not discriminate in violation of any applicable federal, state, or other law, rule or regulation, including, but not limited, to discrimination against any employee or applicant for employment on account of such person's race, religion, color, national origin, ancestry, sex, or age. Design/Builder shall apply such policy of non-discrimination in connection with all activities related to Design/Builder's employees and Subcontractors, including with respect to initial employment, promotion, demotion, transfer, recruitment or recruitment advertising, and layoff or termination.

Section 3.8. Design/Builder's Compliance with Law.

- 3.8.1. Compliance Generally.** Design/Builder and each of its Subcontractors shall perform the Project in compliance with Applicable Law. Design/Builder shall keep itself fully informed of and in compliance with all local, state, and federal laws, rules, and regulations in any manner affecting the performance of this Agreement, including but not limited to all Cal/OSHA requirements, the conflict-of-interest provisions of California Government Code section 1090 and the Political Reform Act (Government Code § 81000 et seq.).
- 3.8.2. DIR Registration.** Design/Builder acknowledges that the Project will be subject to compliance monitoring and enforcement by the California Department of Industrial Relations ("*DIR*") as well as the provisions of Public Contracts Code 6109 which prohibits Design/Builder from performing work on this project with a Subcontractor who is ineligible to perform work on the project pursuant to Labor Code section 1777.1 or Labor Code section 1777.7. Design/Builder shall be responsible for ensuring that it and all of its Subcontractors are currently and properly registered with the DIR

and in compliance with the provisions of Labor Code sections 1771 and 1725.5. Prior to commencing the Construction Work, Design/Builder and each of its Subcontractors shall: (i) complete, execute, and submit to Town a "Certification Regarding Design/Builder Registration" form; and (ii) provide evidence of registration to Town. Notwithstanding anything to the contrary in this Agreement, if at any time during the performance of the Construction Work, Design/Builder or any of its Subcontractors is not properly registered with the DIR (including, without limitation, if the registration expires or the DIR revokes the registration), such failure of registration shall constitute a material breach of this Agreement for purposes of Section 5.2 hereof (Town Termination for Cause).

3.8.3. Labor Laws. Design/Builder and each of its Subcontractors shall, at no additional cost to Town, comply with all applicable provisions of the California Labor Code and the regulations promulgated thereunder (collectively, the "*Labor Laws*"), including, without limitation, any applicable Labor Laws requiring the payment of prevailing wages in connection with the Construction Work, submission of payroll records for inspection, posting of required notices at the Project Site, and cooperation with the DIR.

(a) Prevailing Wages and Penalties for Violations. Without limiting the generality of Section 3.8.3, wages paid by Design/Builder and each of its Subcontractors in connection with the Construction Work shall be in accordance with the general prevailing rates of per diem wages determined by the DIR pursuant to Section 1770 of the California Labor Code. Wage rates shall conform to those on file at Town's principal office and posted at the Project Site. When any craft or classification is omitted from the general prevailing wage determinations, Design/Builder shall pay the wage rate of the craft or classification most closely related to the omitted classification. In the event that Design/Builder or any of its Subcontractors fails to pay the prevailing wages determined by the DIR: (1) Design/Builder shall, as a penalty to Town in accordance with Section 1775 of the Labor Code, forfeit not more than \$200 and, subject to limited exceptions, not less than certain amounts specified by law, per calendar day, or portion thereof, for each worker paid less than the prevailing wage rate; and (2) Design/Builder and/or Design/Builder's Subcontractors (as applicable) shall pay to each worker, for each calendar day or portion thereof for which the worker was paid less than the applicable prevailing wage rate, the difference between such stipulated prevailing wage rate and the amount paid to the worker. Design/Builder shall defend, indemnify, and hold harmless Town, and its officers, employees, agents, and volunteers free and harmless from any claim or liability arising out of any failure or alleged failure of Design/Builder to comply with such prevailing wage laws.

(b) Payroll Records and Penalties for Violations. Without limiting the generality of Section 3.8.3, Design/Builder and each of Design/Builder's Subcontractors must comply with all applicable provisions of Labor Code Section 1776, which relates to preparing and maintaining accurate payroll records, and making such payroll records available for review and copying by Town, the DIR's Division of Labor Standards Enforcement, and the DIR's Division of Apprenticeship Standards ("DAS"). Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following: (1) The information contained in the payroll record is true and correct; and (2) The employer has complied with the requirements of Labor Code 1811 and Labor Code 1815 for any work performed by his or her employees on the public works project. The payroll records shall be certified and shall be available for inspection at all reasonable hours as required by Labor Code 1776. The payroll records must be certified, maintained at Design/Builder's and its Subcontractors' principal offices (as applicable), and made available as required by labor

Code Section 1776. Design/Builder and each of its Subcontractors must inform Town of the location at which the payroll records are located, including the street address, Town and county, and must, within five (5) working days, provide a notice of any change of location and address. In the event that Design/Builder or any of its Subcontractors fails to timely comply with a request for certified payroll records, Design/Builder shall, as a penalty to Town, forfeit \$100 per worker for each calendar day or portion thereof until strict compliance is effectuated.

- (c) **8-Hour Workday.** This Agreement is subject to 8-hour workday and wage and hour penalty laws, including, but not limited to, Labor Code 1810 and Labor Code 1813. Design/Builder and any Subcontractor(s) of Design/Builder shall strictly adhere to the provisions of the Labor Code regarding 8-hour workday and 40-hour work week requirements, and overtime, Saturday, Sunday, and holiday work. Pursuant to the Labor Code, eight hours' labor shall constitute a legal day's work. Work performed by Design/Builder's employees or employees of any Subcontractor(s) in excess of eight hours per day, and 40 hours during any one week, must include compensation for all hours worked in excess of eight hours per day, or 40 hours during any one week, at not less than one and one-half times the basic rate of pay. Design/Builder shall forfeit as a penalty to Town \$25.00, or any greater penalty set forth in the Labor Code, for each worker employed in the execution of the work by Design/Builder or by any Subcontractor(s) of Design/Builder, for each calendar day during which such worker is required or permitted to the work more than eight hours in one calendar day or more than 40 hours in any one calendar week in violation of the Labor Code.
- (d) **Other CA Labor Laws.** Without limiting the generality of Section 3.8.3, Design/Builder and each of its Subcontractors shall comply with the each of the following provisions of the California Labor Code, as applicable:
 - i. Section 1735 (Anti-Discrimination Requirements);
 - ii. Sections 1777.5, 1777.6 and 1777.7 (Apprenticeship Requirements);
 - iii. Sections 1813 and 1814 (Penalty for Failure to Pay Overtime); and
 - iv. Section 1815 (Overtime Pay).
- (e) **No Disqualification.** Design/Builder represents and warrants that neither it, nor any of its Subcontractors, has been debarred by the California Labor Commissioner pursuant to Section 1777.1 of the California Labor Code or otherwise.
- (f) **Failure to Comply.** Any failure of Design/Builder or its Subcontractors to comply with applicable Labor Laws shall constitute a material breach of this Agreement for purposes of Section 5.2 hereof (Town Termination for Cause). In addition, Town may withhold payment to Design/Builder as necessary to satisfy any civil wage or other penalty assessment issued by the California Labor Commissioner.
- (g) **Assignment of Actions.** Design/Builder and any and all Subcontractor(s) shall offer and agree to assign to Town all rights, title, and interest in and to all causes of action it/they may have under section 4 of the Clayton Act (15 U.S.C. Sec. 4) or under the Cartwright Act (Chapter 2 [commencing with section 16700] of Part 2 of Division 7 of the California Business and Professions Code), arising from purchases of goods, services, or materials pursuant to this Agreement. This assignment shall be made and become effective at the time Town tenders final payment to Design/Builder, without further acknowledgment by the Parties.

Section 3.9. Design/Builder's Warranties and Disclaimers. Design/Builder warrants to Town that, for a period of one (1) year from the applicable Date of Substantial Completion of Work covered by a Letter of

Substantial Completion (the "*Warranty Period*"), the materials and equipment manufactured by Design/Builder will be of good quality and new unless the Contract Documents require or permit otherwise, and further warrants that such Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. Design/Builder's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by or on behalf of Design/Builder, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. Design/Builder shall repair or replace defective material or equipment and re-perform Work to correct any defect within the applicable Warranty Period. In the event warranty Work by the Design/Builder is necessary, the Design/Builder shall provide an additional one (1) year warranty on the corrected Work only from the date the corrected Work is completed or the end of the initial warranty period, whichever is later. Design/Builder does not warrant products not manufactured by Design/Builder, but it will pass on to Town any manufacturer's warranty to the extent permitted. THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES AND REMEDIES, WHETHER STATUTORY, EXPRESS OR IMPLIED (INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OR TRADE).

ARTICLE 4 CHANGES

Section 4.1. Change Orders. Design/Builder shall not be reimbursed for any expenses incurred for work performed outside the scope of the Design Phase Notice to Proceed or Construction Phase Notice to Proceed unless prior written approval is given by Town in a written Change Order by either lump sum, negotiated, or agreed unit price. Design/Builder shall not undertake any such work without prior written approval of the Town. A written Change Order may be issued without amendment to this Agreement, so long as such written Change Order does not cause the Maximum Amount to be exceeded. Upon Town's request for a change to the scope of Work authorized pursuant to the Design Phase Notice to Proceed or Construction Phase Notice to Proceed, Design/Builder shall provide to Town a written proposal that describes in reasonable detail: (i) the change; (ii) the impact of the change on the time required for performance of Design/Builder's obligations; (iii) the impact of the change on the compensation to be paid by Town to Design/Builder; and (iv) the impact of the change on any efficiency or energy savings guarantees (if applicable pursuant to Section 3.5.1 hereof). No change shall be valid or binding on the Parties unless, and except to the extent, incorporated into a Change Order executed by the Town.

Section 4.2. Materials and Equipment Procurement. In the event a significant delay in acquiring materials or equipment or a significant increase in the price of materials or equipment occurs during the performance of the Agreement by no fault of Design/Builder, the Project Fee and/or the Completion Date, as appropriate, shall be equitably adjusted by Change Order, so long as such adjustment does not cause the Maximum Amount to be exceeded. A change in the price of an item of material or equipment will be considered significant when the price of an item increases by five percent (5%) between the Project Proposal Date and the date on which such item is due to be purchased and/or installed in accordance with the Schedule of Values or the Construction Schedule. No adjustment shall occur if significant delay and/or increase in price can be avoided through use of an alternative source providing suitable replacement materials and equipment, as determined by the Public Works Director, which Design/Builder chooses not to use.

Section 4.3. Unforeseen Conditions.

4.3.1. "Unforeseen Site Conditions" shall mean and include any subsurface, concealed or latent conditions, including without limitation the presence of hazardous materials, that differ materially from those conditions (i) actually known by Design/Builder, (ii) accurately reflected in available

existing data, (iii) expected based on the results of Design/Builder's Site Investigation, and/or (iv) that would have been identified, discovered and/or confirmed by the exercise of reasonable due diligence in Design/Builder's Site Investigation.

- 4.3.2.** In the event Design/Builder encounters Unforeseen Site Conditions at the Project Site or that otherwise impact the Project, Design/Builder shall notify Town of such conditions promptly and before such conditions are further disturbed, but in no event later than three (3) business days after observing such conditions. The Public Works Director shall investigate, and if the Public Works Director determines that the Unforeseen Site Conditions will result in additional costs or delays, the Town will issue a Change Order adjusting the compensation for such portion of the Work.
- 4.3.3.** Design/Builder may not cease work or delay progress on the original work pending negotiations over changes, and must continue to diligently complete the work. Should Design/Builder disagree with the Public Works Director's decision, it may submit a written notice of potential claim to the Public Works Director before commencing the disputed work. In the event of such a dispute, Design/Builder shall not be excused from any scheduled completion date provided in the Contract Documents and shall proceed with all work to be performed in accordance with the Contract Documents. However, Design/Builder shall retain any and all rights provided by either Contract or law which pertain to the resolution of disputes and protests between the contracting parties. Design/Builder failure to give notice of Unforeseen Site conditions within five (5) business days of their discovery and before they are disturbed shall constitute a waiver of all claims in connection therewith.

ARTICLE 5

SUSPENSION AND TERMINATION

Section 5.1. Termination for Convenience by Town. Town may terminate this Agreement for convenience as set forth in Sections 1.4.1 and 2.5.1.

Section 5.2. Termination for Cause by Town. If Design/Builder repeatedly or materially breaches this Agreement, Town has provided written notice to Design/Builder detailing the alleged breach, and within thirty (30) days of Design/Builder's receipt of such written notice Design/Builder has neither cured the alleged breach nor diligently commenced to cure such breach, Town may terminate this Agreement effective immediately upon the receipt of written notice by Design/Builder. Nothing in this Agreement shall be deemed or construed as a waiver by Design/Builder of any rights it may have with respect to a wrongful suspension or termination by Town.

Section 5.3. Suspension or Termination for Cause by Design/Builder. If Town fails to make any payment(s) to Design/Builder as required in this Agreement or repeatedly or materially fails, refuses or neglects to fulfill any of its other obligations or responsibilities under this Agreement or the Contract Documents, Design/Builder may, after delivery of written notice and providing Town thirty (30) days to cure such failure, refusal or neglect, suspend the Project until such failure, refusal, or neglect is cured, or terminate this Agreement. If Design/Builder suspends the Project pursuant to this Section, the Project schedule and any anticipated completion dates shall be adjusted accordingly. If Design/Builder terminates the Agreement pursuant to this Section, Design/Builder shall be entitled to recover payment from Town in accordance with Section 5.4 below. Nothing in this Agreement shall be deemed or construed as a waiver by Town of any rights it may have with respect to a wrongful suspension or termination by Design/Builder.

Section 5.4. Compensation to Design/Builder Upon Termination. In the event of any termination other

than a termination pursuant to Section 1.4.1, Section 2.5.1, or a termination for cause by Town pursuant to Section 5.2, Town shall compensate Design/Builder: (i) for such portion of the Project as has been completed prior to the effective date of termination; (ii) for services in progress by Design/Builder and any of its Subcontractors at such time, including any overhead and/or anticipated profit attributable to such Work in progress, and (iii) for any costs and damages incurred by reason of the termination, including any proven loss with respect to subcontracts, materials, equipment, tools and machinery. In no event shall Design/Builder be entitled to receive more than the amount that would be paid to Design/Builder for the full performance of the Work required by this Agreement or the Maximum Amount, whichever is less. Town shall have the benefit of such Work as may have been completed up to the time of such termination. In the event of a termination pursuant to Section 1.4.1, Town shall pay the Audit Fee to Design/Builder on the date of such termination. In the event of a termination pursuant to Section 2.5.1, Town shall pay the Design Fee to Design/Builder on the date of such termination.

Section 5.5. Design/Builder to Provide Copies of Project Documents. Not later than sixty (60) days following the effective date of a termination pursuant to this Article 5, Design/Builder shall provide to Town copies of all Project Documents (defined in Section 8.4).

Section 5.6. Effect of Termination. Termination of this Agreement and/or any of the Contract Documents shall release Design/Builder of all remaining obligations under the Agreement and the Contract Documents as of the effective date of termination, including, without limitation, any efficiency or energy savings guarantees (if applicable pursuant to Section 3.5.1 hereof).

Section 5.7. Survival of Obligations. The Parties' respective rights and obligations pursuant to this Article 5, Article 7 (subject to Section 7.9), and Article 8 shall survive termination of this Agreement.

Section 5.8. Remedies. Town retains any and all available legal and equitable remedies for Design/Builder's breach of this Agreement.

ARTICLE 6 INSURANCE

Section 6.1. Required Insurance. Design/Builder shall, at its sole cost and expense, maintain in effect the following policies of insurance for the applicable period(s) set forth in Section 6.6:

- | | | |
|--------------|------------------------------------|------------------------------------------------|
| (a) | Professional Liability Insurance: | \$2,000,000 per claim \$4,000,000 aggregate |
| (b) | General Liability: | |
| (i) | General Aggregate: | \$5,000,000 |
| (ii) | Products Comp/Op Aggregate | \$5,000,000 |
| (iii) | Personal & Advertising Injury | \$5,000,000 |
| (iv) | Each Occurrence | \$5,000,000 |
| (v) | Medical Expense (any 1 person) | \$ 5,000 |
| (c) | Workers' Compensation: | |
| (i) | Workers' Compensation | Statutory Limits |
| (ii) | EL Each Accident | \$5,000,000 |
| (iii) | EL Disease - Policy Limit | \$5,000,000 |
| (iv) | EL Disease - Each Employee | \$5,000,000 |
| (d) | Automobile Liability | |
| (1) | Any vehicle, combined single limit | \$5,000,000 |
| (e) | Excess Liability | \$5,000,000 |

1. **Builder's Risk** (Course of Construction) insurance utilizing an "All Risk" (Special Perils) Completed Value Form basis, with limits equal to the completed value of the project and no coinsurance penalty provisions.

Section 6.2. General Liability Insurance. Commercial General Liability Insurance shall be no less broad than ISO form CG 00 01. Coverage must be on a standard Occurrence form. Claims-Made, modified, limited or restricted Occurrence forms are not acceptable.

Section 6.3. Workers' Compensation Insurance. Design/Builder is aware of the provisions of Section 3700 of the California Labor Code which requires every employer to carry Workers' Compensation (or to undertake equivalent self-insurance), and Design/Builder will comply with such provisions before commencing the performance of the work of this Agreement. If such insurance is underwritten by any agency other than the State Compensation Fund, such agency shall be a company authorized to do business in the State of California.

Section 6.4. Automobile Liability Insurance. Covered vehicles shall include owned if any, non-owned, and hired automobiles and, trucks.

Section 6.5. Claims Made Policies. If any of the required policies provide coverage on a claims-made basis, the Retroactive Date must be shown and must be before the date of the Agreement or the beginning of Work. Claims-made insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of Work. If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a Retroactive Date prior to the contract effective date, Contractor must purchase "extended reporting" coverage for a minimum of five (5) years after completion of Work.

Section 6.6. Duration of Insurance. The insurance required pursuant to this Article 6 shall be procured by Design/Builder prior to Design/Builder's commencement of the Project and shall be maintained in effect by Design/Builder at least until the date that is one (1) year following the earlier of the termination of this Agreement or the Date of Substantial Completion of the Project. Notwithstanding the foregoing, Design/Builder shall maintain the Professional Liability Policy in effect at least until the date that is three (3) years following the earlier of the termination of this Agreement or the Date of Substantial Completion of the Project.

Section 6.7. Insurer Rating Standards. The insurance policies required pursuant to this Article 6 must be issued by one or more insurers that are (i) licensed to do business in the State of California and (ii) have an A.M. Best Company rating of not less than "A-" and a financial size category of not less than "VII."

Section 6.8. Additional Insureds. The Town, its Town Council, Commissions, Boards, officers, employees, and volunteers of Yountville, shall be included as an additional insured under the General Liability policy and Automobile Liability policy required herein, for liability arising out of ongoing and completed operations by or on behalf of Design/Builder. Design/Builder's insurance policies shall be primary as respects any claims related to or as the result of the Design/Builder's work. Any insurance, pooled coverage or self-insurance maintained by the Town, its elected or appointed officials, directors, officers, agents, employees, volunteers, or contractors shall be non-contributory. All endorsements shall be signed by a person authorized by the insurer to bind coverage on its behalf. General liability coverage can be provided using an endorsement to Design/Builder's insurance at least as broad as ISO Form CG 20 10 11 85 or both CG 20 10 and CG 20 37.

Section 6.9. Waiver of Subrogation. Design/Builder hereby waives all rights of subrogation against the Town under the General Liability Policy and the Auto Liability Policy and Design/Builder hereby waives transfer of rights of recovery under the Worker's Compensation Insurance.

Section 6.10. Design/Builder Insurance is Primary. The General Liability Policy and the Auto Liability Policy provided by Design/Builder, including all endorsements, shall be primary to any coverage available to Town. Any insurance or self-insurance maintained by Town and/or its officers, employees, agents or volunteers, shall be in excess of Design/Builder's insurance and shall not contribute with it.

Section 6.11. Premiums, Deductibles and Self-Insured Retentions. Design/Builder shall be solely responsible for paying any and all deductibles and self-insured retentions applicable to any of the insurance policies that Design/Builder is required to have in effect pursuant to this Article 6.

Section 6.12. Evidence of Coverage. Prior to commencing the Work, Design/Builder must provide to Town duly authorized and executed certificates of insurance evidencing that the insurance policies required to be maintained by Design/Builder pursuant to this Article 6 are in effect (each a "*Certificate of Insurance*") . Design/Builder will provide the endorsements to the General Liability and Automobile Liability policies evidencing the additional insured coverage. Not less than thirty days prior to the expiration of any insurance policy that Design/Builder is required to maintain pursuant to this Article 6, Design/Builder must provide an updated Certificate of Insurance to Town evidencing the renewal of such policy.

Section 6.13. Premium Payments and Deductibles Design/Builder must disclose all deductibles and self-insured retention amounts to the Town.. The amount of deductibles for insurance coverage required herein are subject to Town's approval, such approval not to be unreasonably withheld. Town has no obligation to pay any premiums, assessments, or deductibles under any policy required in this Agreement. Design/Builder shall be responsible for all premiums and deductibles in all of Design/Builder's insurance policies.

Section 6.14. Notice of Change in Policies. Design/Builder shall notify Town within thirty (30) days of its receipt of written notice from an applicable insurer that a policy required herein will expire without renewal or will be canceled, terminated, or materially reduced in coverage. Design/Builder shall provide proof that cancelled or expired policies of insurance have been renewed or replaced with other policies providing at least the same coverage. Such proof will be furnished at least two weeks prior to the expiration of the coverages.

Section 6.15. Review of Coverage. Town's failure to identify any non-compliance by Design/Builder with the requirements of this Article 6 shall not be deemed or construed to relieve Design/Builder from any of its obligations hereunder.

Section 6.16. Subcontractor Insurance. Design/Builder shall require that each of its Subcontractors comply with substantially the same requirements as are set forth in this Article 6 for Design/Builder, except to the extent Town has approved any different standards or requirements applicable to any particular Subcontractor.

Section 6.17. Failure to Maintain Coverage. In the event any policy is canceled prior to the completion of Work and Design/Builder does not furnish a new certificate of insurance prior to cancellation, Town has the right, but not the duty, to obtain the required insurance and deduct the premium(s) from any amounts due Design/Builder under this Agreement. Failure of Design/Builder to maintain the insurance required by this Agreement, or to comply with any of the requirements of this Section, shall constitute a material breach of this Agreement.

Section 6.18. Report of Claims to Town. Design/Builder shall report to the Town, in addition to

Design/Builder's insurer, any and all insurance claims submitted to Design/Builder's insurer in connection with the services under this Agreement.

Section 6.19. Duty to Defend and Indemnify. Design/Builder's duties to defend and indemnify Town under this Agreement shall not be limited by the foregoing insurance requirements and shall survive the expiration of this Agreement.

ARTICLE 7 INDEMNIFICATION AND LIABILITY

Section 7.1. Definitions. For purposes of this Article 7, "Design/Builder" shall include Design/Builder, its officers, employees, servants, agents, Subcontractors, and subconsultants, and anyone directly or indirectly employed by either Design/Builder or its subconsultants, in the performance of this Agreement. "Town" shall include Town, its officers, agents, employees and volunteers.

Section 7.2. Indemnification of Town. Where the services to be provided by Design/Builder under this Agreement are design professional services, as that term is defined under Civil Code section 2782.8, Design/Builder agrees to indemnify, defend and hold harmless, Town, its officers, officials, employees, agents, and volunteers from any and all claims, demands, costs or liability that actually or allegedly arise out of, or pertain to, or relate to the negligence, recklessness or willful misconduct of Design/Builder and its agents in the performance of services under this contract, but this indemnity does not apply to liability for damages for bodily injury, property damage or other loss, arising from the sole negligence, active negligence or willful misconduct by Town, its officers, official, employees, agents, and volunteers. If it is finally adjudicated that liability is caused by the comparative active negligence or willful misconduct of Town, then Design/Builder's indemnification and defense obligations shall be reduced in proportion to the established comparative liability of Town and shall not exceed Design/Builder's proportionate percentage of fault.

As respects all acts or omissions which do not arise directly out of the performance of design professional services, including but not limited to those acts or omissions normally covered by general and automobile liability insurance, and to the full extent permitted by law, Design/Builder agrees to indemnify, defend and hold harmless Town, its officers, officials, agents, employees, and volunteers from and against any claims, demands, losses, liability of any kind or nature (including liability for claims, suits, actions, arbitration proceedings, administrative proceedings, regulatory proceedings, losses, expenses or costs of any kind, whether actual, alleged or threatened, including attorney's fees and costs, court costs, interest, defense costs, and expert witness fees) where the same arise out of, are in connection with, are a consequence of, or are in any way attributable to, in whole or in part, the performance of this Agreement by Design/Builder or by any individual or entity for which Design/Builder is legally liable, including but not limited to officers, agents, employees or subcontractors of Design/Builder, excepting those which arise out of the active negligence, sole negligence or willful misconduct of Town, its officers, officials, employees and volunteers. The Town's right to indemnity under this Agreement shall arise immediately upon the occurrence of the event giving rise to the indemnified liability. The Town shall be entitled to a defense under this Agreement immediately upon the institution of a claim or action that is covered by this indemnity, even though liability for said claim or action has not yet been determined at the time the duty to defend the Town hereunder has arisen.

Scope of Indemnity. Personal injury shall include injury or damage due to death or injury to any person. Property damage shall include injury to any personal or real property. Design/Builder shall not be required to indemnify Town for such loss or damage as is caused by the active negligence, sole negligence, or willful misconduct of Town. If it is finally adjudicated that liability is caused by the comparative negligence or willful misconduct of an indemnified party, then Design/Builder's indemnification obligation shall be reduced in

proportion to the established comparative liability.

Attorneys' Fees. Attorneys' fees and litigation expenses incurred in any action brought to enforce the indemnification provision set forth herein shall be recoverable by the prevailing party.

Section 7.3. Waiver of Statutory Immunity. The obligations of Design/Builder under this Article 7 are not limited by the provisions of any workers' compensation act or similar act. Design/Builder expressly waives its statutory immunity under such statutes or laws as to Town.

Section 7.4. Notice; Cooperation. Town shall promptly provide written notice to Design/Builder of any claims, demands, actions, judgments, damages, losses, costs and/or expenses for which Design/Builder may be responsible pursuant to this Article 7. Town shall fully cooperate with Design/Builder, at Design/Builder's cost and expense, to the extent reasonably necessary or appropriate in connection with the performance of Design/Builder's obligations pursuant to this Article 7. If any claim or action is brought against Town relating to Design/Builder's performance in connection with this Agreement that is not covered under the indemnification obligations of Design/Builder under this Agreement, Design/Builder shall render any reasonable assistance that Town may require in the defense of that claim or action.

Section 7.5. Insurance Not a Limitation. The obligations of Design/Builder pursuant to this Article 7 shall not be deemed or construed to be conditioned upon, limited by or expanded by the existence of any insurance coverage maintained by a Party or other person or entity. Design/Builder's indemnification obligations apply regardless of whether or not any insurance policies are determined to be applicable to the claim, demand, damage, liability, loss, cost or expense.

Section 7.6. Subcontractor Indemnity. Design/Builder shall require each of its Subcontractors to comply with the requirements of this Article 7 related to indemnifying, holding harmless, and defending Town, except to the extent Town agrees in writing to apply a different set of standards or requirements to a particular Subcontractor. Design/Builder agrees to obtain executed indemnity agreements with provisions identical to those set forth here in this Article 7 from each and every subconsultant or any other person or entity involved in the performance of this Agreement on Design/Builder's behalf.

Section 7.7. Indemnification of CalPERS Determination. In the event that Design/Builder or any employee, agent, or subcontractor of Design/Builder providing services under this Agreement claims or is determined by a court of competent jurisdiction or CalPERS to be eligible for enrollment in CalPERS as an employee of Town, Design/Builder shall indemnify, defend, and hold harmless Town for the payment of any employee and/or employer contributions for CalPERS benefits on behalf of Design/Builder or its employees, agents, or Subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of Town.

Section 7.8. Survival of Obligations. With respect to acts, omissions or incidents occurring prior to completion of the Project and/or termination of this Agreement, the Parties' respective rights and obligations pursuant to this Article 7 shall survive completion of the Project and/or termination of this Agreement for the applicable statute of limitations.

Section 7.9. Civil Code. The Parties are aware of the provisions of Civil Code 2782.8 relating to the indemnification and the duty and the cost to defend a public agency by a Design Professional and agree that this Article 7 complies therewith.

ARTICLE 8

MISCELLANEOUS

Section 8.1. Relationship of the Parties. Design/Builder is, for any and all purposes of or related to this Agreement, an independent contractor to Town. In no event shall Design/Builder or any of its Subcontractors, or any officer, employee or agent of either, be deemed or construed to be an officer, employee or agent of Town on account of this Agreement. Nothing herein shall be deemed to establish a relationship of principal and agent between Design/Builder and Town, or any of their respective agents or employees, and neither this Agreement nor any of the Contract Documents may be construed as creating any form of legal association or arrangement that would impose liability upon one Party for the act or failure to act of the other Party.

Section 8.2. Taxes. The Project Fee shall be deemed and construed to include compensation to Design/Builder for any and all duties, sale, use, excise or other similar taxes required by federal, state or local laws in effect as of the effective date of this Agreement or promulgated thereafter and payable in connection with the Project. Town shall not withhold applicable taxes or other payroll deductions from payments made to Design/Builder except as otherwise required by law. Design/Builder shall be solely responsible for calculating, withholding, and paying all taxes.

Section 8.3. Project Records. Design/Builder shall keep and maintain all such books and records as are necessary for proper administration and performance of the Agreement and/or as are required by law and/or this Agreement to be maintained (to the extent exclusively related to the performance of the Agreement, “Project Records”), including, but not limited to, plans and specifications, Change Orders, submittals, cut-sheets, projected energy-savings calculations, requests for information, written notices, permits, testing and inspection reports, and safety records. Pursuant to Government Code Section 8546.7, the California State Auditor has the right, for a period of three years after final payment is made under this Agreement, to examine and audit this Agreement at the request of Town or as part of any audit of Town. To the extent required by Government Code Section 8546.7 during such three-year period, Design/Builder shall allow the California State Auditor and Town to examine and/or audit this Agreement and the relevant Project Records at Design/Builder’s offices during normal business hours and upon reasonable advanced notice.

Section 8.4. Ownership and Use of Documents. Any and all conceptual, preliminary, working, and final documents (both originals and reproductions), presentations, computations, analyses, and other documents such as the Project Documents, in whatever format or storage medium, that have been obtained or prepared for Town by Design/Builder pursuant to this Agreement and that have been paid for in full by Town in accordance with this Agreement (each a “Project Document”) shall be deemed and construed to be and remain the property of Town. Assuming Town has paid in full for the Project Documents, Town shall have the unconditional right to use the Project Documents, for their intended purposes. No Project Document shall be the subject of a copyright application by Design/Builder. Except as expressly agreed in writing, Town shall not be required to employ Design/Builder in connection with any future use of the Project Documents. However, notwithstanding anything to the contrary, Town acknowledges and agrees that the Project Documents are prepared with the expectation and intent that the Project is to be performed and completed by or on behalf Design/Builder; in the event Town terminates this Agreement pursuant to Section 2.5, Town acknowledges and agrees that the Project Documents are not intended to be, and shall not be, relied upon by Town or any third party in performing or completing any aspect of the Project. Town shall indemnify and hold Design/Builder harmless for any liabilities caused by Town’s use of the Project Documents other than in connection with Design/Builder’s completion of the Project.

Section 8.5. Intellectual Property Rights. Nothing in this Agreement shall be deemed or construed to result in Town acquiring any interest or rights in any intellectual property owned, possessed or developed by Design/Builder or any third parties (“Design/Builder Intellectual Property”), including without limitation any Design/Builder Intellectual Property in or underlying the Project Documents. However, Design/Builder hereby

grants Town a perpetual, irrevocable, paid-up, worldwide license to make use of Design/Builder Intellectual Property to the extent that such Design/Builder Intellectual Property is necessary for the proper use, operation and/or maintenance of the Project Documents and/or any other products, services or deliverables provided by Design/Builder pursuant to this Agreement. Design/Builder shall indemnify, defend and hold harmless Town and Town Agents for any infringement of third-party intellectual property rights caused by Design/Builder or any of its Subcontractors in connection with this Agreement.

Section 8.6. Force Majeure. Notwithstanding anything to the contrary, Design/Builder shall not be held responsible (whether by actual or liquidated damages, termination for default, or otherwise) for any delay or non-performance that is caused by circumstances beyond Design/Builder's reasonable control (such as, for example, acts of God or the public enemy, acts of Governmental Authorities, fires, floods, epidemics and/or pandemics, quarantine restrictions, strikes, unusually severe weather, unusually severe shortages in the available supply of materials or equipment needed for performance of the Work, Unforeseen Site Conditions, and delays of common carriers). In the event that Design/Builder's performance hereunder is impacted by such force majeure circumstances, then upon Design/Builder's reasonable request (with appropriate supporting documentation) and the reasonable agreeance of the Public Work's Director, the Parties shall execute a Change Order reflecting such equitable changes to this Agreement as may be necessary or appropriate under the circumstances in accordance with Article 6. Design/Builder shall not be liable for any failure to perform if Design/Builder presents adequate evidence, in Town's reasonable judgment, that such failure was due to causes beyond the control and without the fault or negligence of Design/Builder.

Section 8.7. Ethics and Compliance with Laws. Each Party shall comply in all respects with all Applicable Law governing the duties, obligations, and business practices of that Party. Neither Party shall take any action in violation of any Applicable Law that could result in liability being imposed on the other Party.

8.7.1. This Agreement is subject to Government Code section 84308, as amended by Senate Bill 1439. Design/Builder shall disclose any contribution to an elected or appointed Town official's campaign or committee in an amount of more than two hundred fifty dollars (\$250) made within 12 months preceding the Commencement Date, by Design/Builder, its agent, or another party affiliated with Design/Builder. Design/Builder shall provide a signed copy of the attached Campaign Contribution Disclosure Form to Town prior to, or concurrent with, Design/Builder's execution of this Agreement and no later than the Commencement Date.

8.7.2. Design/Builder maintains and warrants that it has not employed nor retained any company or person, other than a bona fide employee working solely for Design/Builder, to solicit or secure this Agreement. Further, Design/Builder warrants that it has not paid nor has it agreed to pay any company or person, other than a bona fide employee working solely for Design/Builder, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the award or making of this Agreement. Design/Builder further agrees to file, or shall cause its employees or Subcontractor to file, a Statement of Economic Interest with Town's Filing Officer if required under state law in the performance of the services. For breach or violation of this warranty, Town shall have the right to rescind this Agreement without liability. For the term of this Agreement, no member, officer, or employee of Town, during the term of his or her service with Town, shall have any direct interest in this Agreement, or obtain any present or anticipated material benefit arising therefrom.

8.7.3. In the event Town has concerns related to ethics, compliance or Design/Builder's Principles of Responsibility, and/or any potential violations of these policies, Town is welcome to make use of Design/Builder's GreenLine. The GreenLine is Design/Builder's global helpline for external stakeholders. It is a confidential channel through which Public Agencies can ask questions and

raise concerns. Reports can be made using the following link:
<https://secure.ethicspoint.eu/domain/media/en/gui/104677/index.html>

Section 8.8. Export Control. The products, software, services, information, other deliverables and/or the technologies embedded therein (hereinafter referred to as “*Deliverables*”) provided by Design/Builder under this Agreement contain or may contain components and/or technologies from the United States of America (“*US*”), the European Union (“*EU*”) and/or other nations. Town acknowledges and agrees that the assignment and/or usage of Deliverables under this Agreement shall fully comply with applicable US, EU and other national and international export control laws and/or regulations. Unless any applicable export licenses have been obtained from the relevant authority and the Design/Builder has approved, the Deliverables shall not (i) be exported and/or re-exported to any destination or party (including without limitation to any individual, group and/or legal entity) restricted by the applicable export control laws and/or regulations; or (ii) be used for those purposes and fields restricted by the applicable export control laws and/or regulations. Town also agrees that the Deliverables will not be used either directly or indirectly in any rocket systems, unmanned air vehicles, and/or nuclear weapons delivery systems, nor will they be used in any design, development, production or use for any weapons (which may include, without limitation, chemical, biological or nuclear weapons). If any necessary or advisable licenses, authorizations or approvals are not obtained, whether arising from inaction by any relevant Governmental Authority or otherwise, or if any such licenses, authorizations or approvals are denied or revoked, or if the applicable export control laws and/or regulations would prohibit Design/Builder from fulfilling any order, or would in Design/Builder’s judgment otherwise expose Design/Builder to a risk of liability under the applicable export control laws and/or regulations if it fulfilled the order, Design/Builder shall be excused from all obligations under such order and/or this Agreement.

Section 8.9. Cybersecurity.

8.9.1. Town’s Obligations for Its Systems. Town is solely responsible for the implementation and maintenance of a comprehensive security program (“*Security Program*”) that contains reasonable and appropriate security measures and safeguards to protect its computer network, systems, machines, and data (collectively, “*Systems*”), including those Systems on which it runs the Deliverables provided by Design/Builder, against Cyber Threats. “*Cyber Threat*” means any circumstance or event with the potential to adversely impact, compromise, damage, or disrupt Town’s Systems or that may result in any unauthorized access, acquisition, loss, misuse, destruction, disclosure, and/or modification of Town’s Systems, including through malware, hacking, or similar attacks. Without limiting the foregoing, Town shall at a minimum:

- (i) have qualified and experienced personnel with appropriate expertise in cybersecurity maintain Town’s Security Program, and have such personnel regularly monitor cyber intelligence feeds and security advisories applicable to Town’s Systems or Town’s industry;
- (ii) promptly update or patch its Systems or implement other appropriate measures based on any reported Cyber Threats and in compliance with any security notifications or bulletins, whether publicly disclosed on Design/Builder’s security notification webpage at <https://www.se.com/ww/en/work/support/cybersecurity/security-notifications.jsp> or otherwise provided to Town;
- (iii) regularly monitor its Systems for possible Cyber Threats;
- (iv) regularly conduct vulnerability scanning, penetration testing, intrusion scanning, and other cybersecurity testing on its Systems; and
- (v) meet the recommendations of Design/Builder’s Recommended Cybersecurity Best Practices, available at <https://www.se.com/us/en/download/document/7EN52-0390/>, as may be updated by Design/Builder from time to time, and then-current industry standards.

8.9.2. Town's Use of the Deliverables. Design/Builder may release Updates and Patches for its Deliverables from time to time. Town shall promptly install any Updates and Patches for such Deliverables as soon as they are available in accordance with Design/Builder's installation instructions and using the latest version of the Deliverables, where applicable. An "Update" means any software that contains a correction of errors in a Deliverable and/or minor enhancements or improvements for a Deliverable, but does not contain significant new features. A "Patch" is an Update that fixes a vulnerability in a Deliverable. Town understands that failing to promptly and properly install Updates or Patches for the Deliverables may result in the Deliverables or Town's Systems becoming vulnerable to certain Cyber Threats or result in impaired functionality, and Design/Builder shall not be liable or responsible for any losses or damages that may result.

8.9.3. Identification of Cyber Threats. If Town identifies or otherwise becomes aware of any vulnerabilities or other Cyber Threats relating to the Deliverables for which Design/Builder has not released a Patch, Town shall promptly notify Design/Builder of such vulnerability or other Cyber Threat(s) via the Design/Builder Report a Vulnerability page (<https://www.se.com/ww/en/work/support/cybersecurity/report-a-vulnerability.jsp#PublicAgencies>) and further provide Design/Builder with any reasonably requested information relating to such vulnerability (collectively, "Feedback"). Design/Builder shall have a non-exclusive, perpetual and irrevocable right to use, display, reproduce, modify, and distribute the Feedback (including any confidential information or intellectual property contained therein) in whole or part, including to analyze and fix the vulnerability, to create Patches or Updates for its Public Agencies, and to otherwise modify its Deliverables, in any manner without restrictions, and without any obligation of attribution or compensation to Town; provided, however, Design/Builder shall not publicly disclose Town's name in connection with such use or the Feedback (unless Town consents otherwise). By submitting Feedback, Town represents and warrants to Design/Builder that Town has all necessary rights in and to such Feedback and all information it contains, including to grant the rights to Design/Builder described herein, and that such Feedback does not infringe any proprietary or other rights of third parties or contain any unlawful information.

Section 8.10. Notices.

8.10.1. General Requirements. Any and all demands and notices required or permitted to be given pursuant to this Agreement (each a "Notice") must be in writing and must be given or served in accordance with this Section 8.10.

8.10.2. Methods of Delivery. Each Notice must be sent via: (i) personal delivery, with the name and signature of the recipient obtained upon delivery; (ii) registered or certified United States mail, with postage prepaid and return receipt requested; (iii) FedEx, U.P.S. or other reliable, private delivery service, with the name and signature of the recipient obtained upon delivery; or (iv) electronic mail, with the reference line indicating that it is a "Notice Pursuant to Agreement for Turnkey Design and Construction Services", with confirmation of transmission from the sender's machine or device retained in the sender's files (a copy of which shall be provided to the recipient upon request), and with the original Notice deposited for delivery pursuant to clauses (ii) or (iii) above within 12 hours after electronic transmission. Neither Party may unreasonably refuse to accept delivery of any Notice in an attempt to avoid the giving or service of the Notice, and any such refusal by a Party shall be deemed and construed as a material breach of such Party's obligations pursuant to this Agreement.

8.10.3. Effect of Receipt. A Notice shall be deemed given or served only upon actual receipt by the addressee. In the case of electronic mail, "actual receipt" must be confirmed by a "Read Receipt" or other confirmation of receipt by the recipient. Notwithstanding the foregoing, if any Notice (including, without limitation, any Notice sent by electronic mail) is delivered after 4:00 p.m. on any weekday, on a weekend (Saturday or Sunday), on any federal or State of California holiday, or on any Town furlough day mandated by the State of California or the Governing Body, the Notice shall be deemed to have been given or served as of 9:00a.m. on the next business day.

8.10.4. Applicability of Notice Requirements. The requirements of this Section 8.10 shall not be deemed or construed to apply to: (i) communications between Town and/or Design/Builder necessary for day-to-day administration of this Agreement or performance of the Work; or (ii) service of process in accordance with any Applicable Law or court rule.

8.10.5. Contact Information; Changes. Notice must be addressed and delivered to a Party at the address set forth below, with attention to such Party's representative named below. A Party must give Notice, in accordance with this Section 8.10, of each change in such Party's address, person to whom attention should be directed, or e-mail address. If any such information applicable to a Party changes and such Party does not give Notice of such change, any subsequent Notices addressed and delivered based on such Party's prior contact information shall be deemed and construed to have been properly given or served in accordance with this Section 8.10, regardless of whether "actual receipt" has occurred.

Town:

Town of Yountville
Attn: Brad Raulston, Town Manager
6550 Yount Street
Yountville, CA 94599
Attention: Brad Raulston

Design/Builder:

Schneider Electric Buildings Americas, Inc.
1650 West Crosby Rd
Carrollton, TX 75006
Attention: Tammy Fulop

Section 8.11. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, regardless of any conflict-of-laws provisions applicable in California or any other jurisdiction.

Section 8.12. Resolution of Claims. To the extent applicable, this Agreement is subject to the provisions of California Public Contract Code section 9204, which mandates certain procedures regarding the resolution of public works claims. This Agreement is further subject to the provisions of Article 1.5 (commencing at section 20104) of Division 2, Part 3 of the California Public Contract Code regarding the resolution of public works claims of less than \$375,000. Article 1.5 mandates certain procedures for the filing of claims and supporting documentation by the contractor, for the response to such claims by the contracting public agency, for a mandatory meet and confer conference upon the request of the contractor, for mandatory nonbinding mediation in the event litigation is commenced, and for mandatory judicial arbitration if the parties fail to resolve the dispute through mediation. This Agreement hereby incorporates the provisions of Article 1.5 as though fully set forth herein.

Section 8.13. Interpretation of Agreement.

Section 8.14. Fair and Reasonable Interpretations. Prior to execution and delivery of this Agreement, each Party has received, or had unqualified opportunities to receive, independent legal advice from its legal counsel with respect to the advisability of executing this Agreement and the meaning of the provisions herein. Therefore, the provisions of this Agreement shall be construed based on their fair and reasonable meaning, and not for or against any Party based on whether such Party or its legal counsel was primarily responsible for drafting this Agreement or any particular provision herein.

Section 8.15. Headings and Captions. The headings and captions set forth in this Agreement are for the convenience of the reader only and shall not be deemed or construed to establish, define or limit the meaning of any Article, Section or other provision herein.

Section 8.16. Applicable Law Deemed Included. Each and every provision required by any Applicable Law to be included in this Agreement is hereby deemed to be so included, and this Agreement shall be construed and enforced as if all such provisions are so included. If, for any reason, any provision required by any Applicable Law is not expressly included herein, or is not correctly included herein, then, upon request of either Town or Design/Builder, the Parties shall amend this Agreement to include or incorporate, or to correctly include or incorporate, such provision.

Section 8.17. Severability. If any provision of this Agreement is determined to be invalid, illegal, or unenforceable as written, such provision shall be construed consistent with and to the fullest extent permitted under Applicable Law, and any such determination shall not affect or impair the validity, legality and enforceability of the remaining provisions.

Section 8.18. Entire Agreement. This Agreement, together with the Contract Documents, constitutes the entire understanding and agreement between the Parties pertaining to the performance by Design/Builder of the services required by this Agreement, and all prior and contemporaneous agreements, representations and understandings of the Parties relating to such subject matter, whether oral or written, are hereby superseded and replaced.

Section 8.19. Waiver. A waiver by a Party of any provision of this Agreement shall be binding only if the waiver is set forth in writing and has been duly approved and signed by the waiving Party. Unless so specified in the written waiver, a waiver by a Party of any provision of this Agreement shall not constitute a waiver of any other provision(s) herein, similar or not, and shall not be construed as a continuing waiver. Except as waived in accordance with this Section 8.19, a Party's failure to require performance of any requirement of this Agreement shall not, in any manner, affect the Party's right to enforce the same or any other provision of this Agreement at a later time.

Section 8.20. Time of the Essence. Time is of the essence for each and every provision of this Agreement.

Section 8.21. Non-Discrimination. Design/Builder shall not discriminate against any employee or applicant for employment because of race, sex (including pregnancy, childbirth, or related medical condition), creed, national origin, color, disability as defined by law, disabled veteran status, Vietnam veteran status, religion, age (40 and above), medical condition (cancer-related), marital status, ancestry, or sexual orientation. Employment actions to which this provision applies shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; or in terms, conditions or privileges of employment, and selection

for training. Design/Builder agrees to post in conspicuous places, available to employees and applicants for employment, the provisions of this nondiscrimination clause.

Section 8.22. Remedies Non-Exclusive. Each right, power and remedy provided for herein or now or hereafter existing at law, in equity, by statute, or otherwise shall be cumulative and shall be in addition to every other right, power, or remedy provided for herein or now or hereafter existing at law, in equity, by statute, or otherwise. The exercise, the commencement of the exercise, or the forbearance from the exercise by any party of any one or more of such rights, powers or remedies shall not preclude the simultaneous or later exercise by such party of any or all of such other rights, powers or remedies.

Section 8.23. Confidentiality. All data, documents, discussion, or other information developed or received by Design/Builder for performance of this Agreement are deemed confidential and Design/Builder shall not disclose it without prior written consent by Town. Town shall grant such consent if disclosure is legally required. All Town data shall be returned to Town upon the termination or expiration of this Agreement; provided that Design/Builder may retain an archival copy of its work product.

Section 8.24. Attorneys' Fees. If legal action shall be necessary to enforce any term, covenant or condition contained in this Agreement, each party shall pay its own costs, including any accountants' and attorneys' fees expended in the action.

Section 8.25. Venue. The venue for any litigation shall be the Superior Court of California for the County of Napa, and Design/Builder hereby consents to sole jurisdiction in that court for purposes of resolving any dispute or enforcing any obligation arising under this Agreement.

Section 8.26. No Presumption Against Drafter. Each Party had an opportunity to consult with an attorney in reviewing and drafting this agreement. Any uncertainty or ambiguity shall not be construed for or against any Party based on attribution of drafting.

Section 8.27. Successors and Assigns. Neither Party may assign this Agreement without the express written consent of the other Party, and any attempt to do so shall be null and void. Subject to the foregoing, this Agreement shall inure to the benefit of, and be binding on, the Parties' authorized successors and assigns.

Section 8.28. Third-Party Beneficiaries. The Parties have entered into this Agreement solely for their own purposes, and this Agreement shall not be deemed or construed to: (i) benefit any third party; (ii) create any right for any third party; or (iii) except as provided by law, provide a basis for any claim, demand, action or other proceeding by any third party.

Section 8.29. Agreement is Public Record. Subject to any legally permissible exceptions, this Agreement is a public record which Town may disclose in accordance with California law.

Section 8.30. Execution of Agreement.

Section 8.31. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which, taken together, shall constitute one and the same instrument. Signature pages may be detached from counterpart originals and combined to physically form one or more copies of this Agreement having original signatures of both Parties.

Section 8.32. Electronic Signatures. The Parties acknowledge and agree that this Agreement may be executed by electronic signature, which shall be considered as an original signature for all purposes and shall have the same force and effect as an original signature. Without limitation, “electronic signature” shall include faxed or emailed versions of an original signature, electronically scanned and transmitted versions (e.g., via pdf) of an original signature, or a digital signature.

Section 8.33. Due Authority of Signatories. Each person signing this Agreement represents and warrants that he or she has been duly authorized by appropriate action of the Party he or she represents to execute, and thereby bind such Party to, this Agreement.

In Witness Whereof, the Parties have executed this Agreement as evidenced by the signatures of their authorized representatives below.

Town of Yountville

Schneider Electric Buildings Americas, Inc.

By: _____

By: _____

Print Name: _____

Print Name: _____

Print Title: _____

Print Title: _____

Date Signed: _____

Date Signed: _____

Fed. Tax ID No: _____

Exhibit A
Scope of Work - Audit and Design Phases of the Project

1. Responsibilities

Town Will:

- A. Provide Design/Builder with all such access, knowledge and history as may be relevant to Design/Builder's analysis and/or design, including, without limitation:
 - (i) access to Town's Facilities, systems and equipment, including remote network access, as necessary or appropriate to facilitate Design/Builder's analysis and design (i.e. enabling Design/Builder to take equipment inventory, determine operating schedules, evaluate known operational deficiencies, perform an energy efficiency analysis, measure actual energy use, etc.);
 - (ii) access to key personnel to discuss operating requirements, maintenance practices, and other information relevant to Design/Builder's analysis;
 - (iii) information relating to any and all known or suspected deficiencies, defects and malfunctions of or affecting the Facilities, systems, equipment and components thereof;
 - (iv) information relating to any site conditions that should be considered in planning and executing the construction services;
 - (v) twenty-six (26) months of electric, gas, and water data, including utility billings on meters for all premises owned by Town; and
 - (vi) access to copies or loans of such documentation as may be relevant to Design/Builder's analysis, including, as applicable and without limitation, Facility plans, equipment lists, and/or other utility invoices.
- B. Meet with Design/Builder to establish Project criteria and make Project decisions in a timely manner.
- C. Promptly inform Design/Builder if at any point Town becomes aware of any portions of scope that will not be included or funding that will not be available for final Project implementation.

Design/Builder Will:

- A. Prepare grant applications, including the General Information Package, Technical Package, Environmental Package and Financial Security Packages.
- B. Conduct a Project programming meeting, Facility walk-through(s) and personnel interview(s) to gain an understanding of Facility operations, concerns, needs, and desired performance criteria.
- C. Work with Town to refine performance requirements, financial criteria, and Project scope.
- D. Provide Town a water, energy, revenue, and cost savings analysis demonstrating the simple ROI effect of project finances and operations.
- E. Provide Town a Net Present Value lifecycle financial analysis cash flow.
- F. Provide an energy analysis report sufficient to demonstrate that the anticipated cost to Town of the recommended project developed will be less than the anticipated marginal cost to Town of thermal, electrical, or other energy that would have been consumed by Town in the absence of the Project in accordance with Government Code section 4217.10 *et seq.*
- G. Provide Town with a Project Proposal setting forth the following:
 - (i) Proposed Scope of Design Work
 - (ii) Proposed Preliminary Design Schedule
 - (iii) Proposed Scope of Construction Work

Exhibits to Design and Construction Agreement

- (iv) Proposed Preliminary Construction Schedule
- (v) Proposed lump-sum Construction Fee
- (vi) If applicable:
 - A proposed form of Performance Assurance Support Services Agreement
 - A proposed Performance Guarantee
 - A proposed Measurement & Verification (“M&V”) Plan
 - A proposed schedule of Town Responsibilities for Performance Guarantee

2. **Audit Phase**

A. Conceptual Development (Project Scoping)

- i. Design/Builder shall demonstrate for Town whether recommended improvement measures are viable and whether financial benefits (including grants) can be derived by their implementation in an amount sufficient to cover costs associated with the Project.
- ii. Scope of work includes a description of the Energy Conservation Measures (ECM), Energy Generation Measures (EGM) and/or Facility Improvement Measures (FIM), a clear understanding of grant criteria and estimated probability of securing grants, calculation of energy and operational savings, and preliminary costs for the construction of the scope.
- iii. At the Audit Completion Meeting, Design/Builder shall provide Town with the Audit Report and a Project Proposal setting forth:
 - A proposed final Scope of Design Work;
 - A proposed Preliminary Design Schedule;

2. **Design Phase**

- i. The ECM, EGM, FIM to be included in the scope of work for the Design Phase will be included in the Design Phase Notice to Proceed.
- ii. Design/Builder will refine ECM, EGM, FIM identified in the Audit Phase of the project and included in the Design Phase Notice to Proceed to demonstrate for Town whether recommended improvement measures are viable and whether financial benefits (including grants) can be derived by their implementation in an amount sufficient to cover costs associated with the Project.
- iii. At the Design Completion Meeting, Design/Builder shall provide Public Agency with a Project Proposal setting forth:
 - A proposed final Scope of Construction Work (detailing any included ECMs, EGMs and/or FIMs);
 - A proposed Preliminary Construction Schedule;
 - The proposed Project Fee.
 - If applicable, any proposed energy and/or other operational savings guarantees.

4. Facilities Included

The Audit Services will be performed in Town's following facilities.

| Facilities |
|-----------------------------|
| Town Hall |
| Yountville Commons |
| Yountville Community Center |
| Corporation Yard |

Exhibit B

Preliminary Schedule – Audit and Design Phase of the Project

Following is the preliminary schedule for the Design Phase. A firm development schedule will be developed and presented for acceptance by Town once Design/Builder has discussed development requirements and timing with Town.

| Item | Target Schedule |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------|
| Town approves selection of Design/Builder and to move forward with Project at regularly scheduled Council Meeting. | October 1st, 2024 |
| Town signs Agreement for Turnkey Design and Construction Energy Services authorizing Design/Builder to proceed with design services | October 2nd 2024 |
| Town provides complete utility information, building plans, etc. | October 2024 |
| Design/Builder and Town conduct a Kick-Off Meeting | October, 2024 |
| Design/Builder performs initial site audits at Town facilities | October, 2024 |
| Audit/Conceptual Meeting (Preliminary scope of Work, budgetary savings, grant summary and probability review and other financing options) | December/January 24-2025 |
| | |
| Final Audit Meeting (Preliminary scope of Work, budgetary costs, budgetary savings, grant summary and probability review and other financing options) | February 2025 |
| | |
| Town issues Design Phase Notice-to-Proceed provided (If Applicable) | February 2025 |
| Design Phase Final Meeting (Final scope of Work, firm pricing, firm savings, preliminary construction installation schedule) | 150 Days Post Design Phase NTP |
| Town and Design/Builder complete negotiations of construction services scope and pricing and iron out all details for the Council package. | 150 Days Post Design Phase NTP |
| Town posts public notice 2 weeks prior to Council Meeting of approving going forward with the Construction Phase | 150 Days Post Design Phase NTP |
| Town approves resolution authorizing of Construction Phase Notice to Proceed at regularly scheduled board meeting. | 150 Days Post Design Phase NTP |
| Construction Phase Notice to Proceed allows Design/Builder to proceed with the Construction Work. | 150 Days Post Design Phase NTP |
| Construction Phase Complete | 4 Years Post Construction Phase NTP |

EXHIBIT C
Audit & Design Fees

Audit Fee:

The "Audit Fee" shall be: \$20,000

Design Fee:

The "Design Fee" shall be: \$22,800