

ADDENDUM #13

KITSAP TRANSIT
Request for Proposals
Bow Loading Ferry Vessel Design Build
RFP #KT 17-559
December 1, 2017

60 Washington Ave. Ste.
200
Bremerton, WA 98337
Phone: 360.479.6962
Fax: 360.377.7086

www.kitsaptransit.org



Clarification, Additions, Revisions and Corrections:

Revision: Replace Step 2 Attachment A “Sample Design Build Contract” with attached. Replacement Contract contains language related conformance to Performance Specifications and remedies for non-conformance.

All other terms and conditions remain the same.

END ADDENDUM 13



Attachment A [Revised]

VESSEL DESIGN AND BUILDING AGREEMENT

**BOW LOADING PASSENGER-ONLY FERRY VESSEL DESIGN BUILD,
CONTRACT NO. # KT 17-559**

PARTIES: KITSAP TRANSIT

60 Washington Ave., Ste. 200
Bremerton, WA 98337-1888
Phone: 360-824-4941 / Fax: 360-377-7086
Contacts: Kitsap Transit Project Manager;
Kitsap Transit Contracts Administrator;
Kitsap Transit Payments and Invoicing

(GENERAL CONTRACTOR)

Address:
Phone: / Fax:
Contacts:

THIS VESSEL DESIGN AND BUILDING AGREEMENT ("Agreement") is made this _____ day of _____, 2017, by _____ and _____ between _____ ("Contractor") and Kitsap Transit, a Washington Municipal Corporation ("Kitsap Transit" or "Owner"). The effective date of this Agreement shall be the date of the last authorized signature to complete execution of this Agreement. For good and valuable consideration, the parties agree as follows:

TERMS

ARTICLE 1. General Terms.

1.1. Design and Construction Phases. There will be two phases to this Agreement: a "Design Phase" and a "Construction Phase" (the "Work"). The Owner's Budget for the Design Phase is as follows: _____ (\$0.00). After the Letter of Intent to Award is issued and prior to Notice to Proceed, the Contractor shall promptly submit to the Owner various documents regarding the prosecution of the Design Work. These may include:

- 1.1.1. A baseline Project Schedule, fully resource-loaded, with major milestones and critical path identified in a standard Gantt format using Microsoft Project.
- 1.1.2. An agreed-upon Schedule of Values.
- 1.1.3. A complete Material/Equipment List.
- 1.1.4. A list showing anticipated dates for procurement of materials and equipment.

- 1.1.5. A list showing proposed begin and end fabrication and installation dates for piping systems, heating, ventilation and air conditioning systems, electrical installations, foundations, equipment installations, tests and trials, maintenance items, and other items of scheduled work; and proposed shipment dates for material other than stocked items.
- 1.1.6. A Submittals schedule and procedures.
- 1.1.7. A final list showing all subcontractors, vendors, and suppliers to be used, their addresses and applicable purchase order number.
- 1.1.8. A letter designating the Contractor's Project Manager, defining that person's responsibility and authority, and providing a specimen of his signature.
- 1.1.9. A Safety Plan for performance of work.

1.2. Design Phase. For the Design Phase, using the Contractors Material list, the Specifications Book, and General Arrangement Drawings, and with the assistance of its naval architect/engineer _____, Contractor will complete a final design ("Final Design"), which will include completion of structural calculations, development of "cut files," and drafting of construction drawings to deliver three (3) USCG 46 CFR Subchapter K Passenger Only Ferries as defined by drawings, specifications and reference materials ("POFs" or "Vessel(s)") to be owned by Owner. The Design Phase will commence with the execution of this Agreement. The Final Design will be completed not later than twelve weeks days from the mutual execution of this Agreement and the issuance of a Notice to Proceed with the Design Phase.

1.3. Construction Phase. The Construction Phase will commence on the date Owner has issued and delivered to Contractor a Notice to Proceed with Construction and accepted the Final Design (the Commencement Date). If Owner does not deliver the Notice to Proceed by <date>, the parties make a good-faith effort to renegotiate the purchase price, the construction Commencement Date and completion date and, if such agreement is not made within further period of 30 days, this Agreement shall terminate. If Owner rejects the Final Design this Agreement shall terminate with no financial obligation by the Owner to the Contractor.

1.4 Contract Sum. Owner shall pay the Contractor for the Contractor's performance of the Contract an amount not to exceed the amount of Contractor's Bid attached hereto (the "Contract Sum") subject to adjustments for additions and deductions as provided in the Contract Documents. Owner warrants the design and construction of the POFs is exempt from Washington State Sales Tax.

1.5 FTA Compliance. Owner discloses and Contractor acknowledges that the Owner has procured private sector financing for the Design and Construction of the vessels; however, Owner intends to seek Federal grant funds from the Federal Transit Administration ("FTA") and Federal Highway Administration (FHWA) and all terms and conditions imposed by the Federal Government as a condition of procuring such grant funding are incorporated into this Agreement and mandated.

1.6. Standard. The POFs will be designed and built as detailed in the Vessel Specifications ("Specifications") in a reasonable, professional, and good workmanship-like manner consistent with and in compliance with all Owner disclosed performance criteria and requirements. Any proprietary plans and specifications of the designer, with whom Contractor has an agreement, will be clearly marked and will not be subject to disclosure without prior consultation between

Contractor and Owner; provided that Contractor and Owner may be required to disclose that information by court order or other legal process.

1.6.1. Contractor shall provide or cause to be provided and shall pay for all design services, construction services, installation, labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and all other facilities and services necessary for the proper construction and completion of the POFs, whether temporary or permanent and whether or not incorporated or to be incorporated into the POFs.

1.6.2 Contractor shall comply with all federal, state and local laws and ordinances in effect at the date of signing of the Agreement that cover the proper performance of Contractor's obligations under this Agreement.

1.6.3. Contractor shall pay all royalties and license fees for patented designs, processes or products in connection with the design and construction of the POFs and shall arrange for any such licenses to be assigned and transferred to the Owner as may be necessary for the Owner to operate the Vessel and shall indemnify, defend and hold Owner harmless against any and all causes of action and damage of any kind or character arising from Contractor's failure to comply with this paragraph.

1.6.4. Contractor shall be responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the construction of the POFs.

1.6.5. During the Design Phase, Contractor will supply bi-weekly drawings of systems and components finalized during the preceding two weeks for the Owner's review and approval. When drawings are not available for a particular system, Contractor will make best efforts to inform Owner in advance of decisions on placement. A preliminary schedule of construction installations will be discussed at each bi-weekly project review meeting. Owner understands it must make a good faith effort to review and approve or reject Contractor's drawings within five (5) business days and Owner's failure to do so shall entitle the Contractor to an adjustment of the Contract Time.

1.7 Contract Documents: This Agreement; the Bid Documents for IFB KT 17-559 in its entirety, including the Plans, Drawings, Specifications, Progress Schedule, Appendices and any other documents identified in this Agreement or attached hereto; the Contractor's accepted Bid; any supplemental items accepted by Kitsap Transit; and all Addenda issued prior to and all modifications issued after execution of this Contract shall constitute the Contract Documents. These form the Contract and all are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract Documents are complementary; what is required by one is as binding as if required by all. It is the intent of the Contract Documents to describe a functionally complete project to be constructed in accordance with the Contract Documents. Any labor, documentation, services, materials, or equipment that reasonably may be inferred from the Contract Documents or from prevailing custom or trade usage as being required to produce the indicated result must be provided, whether or not specifically called for, at no additional cost to Kitsap Transit.

1.8 Deviations From Contract: The Contractor shall not make any alterations, variation, addition, deviation or omission to or from the terms of the Contract without the prior written consent of Kitsap Transit.

1.9 Entire Agreement: The parties agree that the Contract represents the full integrated agreement between the Parties and supersedes all prior negotiations, representations or agreements, whether written or oral. Further, any modification to the Contract shall be in writing and signed by both parties.

1.10 Interpretation: In the event of conflict between the Bid Documents and the terms and conditions of this Agreement or other Contract Documents, Kitsap Transit, in its sole authority, shall determine which requirement shall apply and considered to be the legally binding requirement. In the event of conflict between any terms within the Contract Documents and applicable laws, codes, ordinances, or regulations, the most stringent or legally binding requirement shall govern and be considered a part of this Contract.

1.11 English Language. All documentation and any other written, oral or other communications required in the performance of the Contract shall be prepared using the English language as used throughout the U.S. If English is not the prevalent language used at the job site, a person fluently proficient in the other language(s) used and in English shall be available to the representative during all working hours for interpretation.

1.12 Service Of Notices: All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments, or designations desired or required to be given under this Contract by either party to the other shall be promptly made in writing and shall be sufficiently given if served upon the party to receive the same or if sent by certified mail, return receipt requested, postage prepaid or are sent via commercial courier, and addressed to the persons identified and at the addresses set forth on Page 1 of this Agreement, or to such other addresses or persons as either party may hereafter designate in writing. Notice sent by mail shall be deemed to have been given three (3) calendar days after proper mailing or upon actual receipt of the Notice, whichever occurs first. The Contractor agrees to provide copies of any notices given Kitsap Transit to such other persons or entities as Kitsap Transit may require from time to time.

ARTICLE 2 AUTHORITY AND RESPONSIBILITY

2.1 Independent Contractor: The Contractor is, and shall be considered at all times during the term of the Contract, an independent contractor and not an agent, employee, partner, joint venturer, or associate of Kitsap Transit.

2.2 Contractor Responsibility: The Contractor will be solely and entirely responsible for its acts and for the acts of its agents, employees, servants, Subcontractors of any tier or representatives during the performance of the Contract. The implementation of all work necessary to complete the Contract and the authority to control and direct the performance of the details of the Work lies solely with the Contractor; however, the results of the Work contemplated herein must conform to the Contract Documents and shall be subject to Kitsap Transit's general rights of inspection, review and/or approval to ensure the satisfactory completion of the Work.

2.3 Kitsap Transit Representatives. The Contracts Administrator is Kitsap Transit's designated representative for Contract compliance. Kitsap Transit's Project Manager and its designee is the designated primary representative for reviewing and monitoring all Work under the Contract.

2.4 Contractor's Representative. The Contractor shall appoint a representative as the Contractor's Project Manager through whom Kitsap Transit will communicate with the Contractor. The Contractor shall respond to all written communications from Kitsap Transit's representatives within seven (7) calendar days from receipt.

2.5 Change In Representatives: Either party shall have the right to change any representative or address it may have given to the other party by giving such other party written notice of such change.

ARTICLE 3 CONTROL OF THE WORK

3.1 Contractor's Project Management And Supervision: The Contractor's Project Manager shall have complete authority to represent and to act for the Contractor. If, for any reason and at any time, the Project Manager and/or General Superintendent submitted by the Contractor is not acceptable to Kitsap Transit, or becomes unacceptable, the Contractor shall propose additional candidates within ten (10) days of receiving written notice from Kitsap Transit. If the Contractor wishes to replace its Project Manager or General Superintendent at any time during the performance of this Contract, it first shall submit the résumé of its new candidate to Kitsap Transit for Kitsap Transit's approval, which shall not be unreasonably withheld. The Contractor shall not make the substitution without Kitsap Transit's prior written approval. Kitsap Transit, in its sole discretion, may require the Contractor to remove the Project Manager, General Superintendent, or any other employee from the Site in the event such person fails to uphold or meet the requirements of the Contract. Kitsap Transit may recover actual damages caused by the improper substitution of any key Contractor staff.

3.2 Contractor Control And Responsibility Over Work: The Contractor has the sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors of any tier and for all other persons that the Contractor or any Subcontractor hire to perform or assist in performing the Work.

3.3 Maintenance Of Good Project Order And Safety: The Contractor shall enforce strict discipline and good order among its employees at all times and shall not employ on the Work any unfit person or anyone not skilled in the task assigned to him or her. Any person employed on the project by the Contractor or any of its Subcontractors who, in the opinion of Kitsap Transit, does not perform his or her work in a proper and skillful manner or is intemperate, disorderly, reckless, or engages in any abuse or harassment or does not comply with the Controlling Laws applicable to this Contract, shall, at the written request of Kitsap Transit, be removed forthwith by his or her employer, shall not again be employed on the Project without the approval of Kitsap Transit, and shall, at the Contractor's own expense, be replaced by a suitably qualified person. The Contractor shall ensure the Site is safe and secure and shall comply with all applicable health and safety codes, rules and regulations.

3.4 Contract Records: The Contractor shall keep and maintain comprehensive records and documentation relating to the Work under this Contract, as well as documents related to the Contractor's bid and contract cost accounting records for the Contract. The Contract Records shall include, but are not limited to, Bid Documents, Contract Documents, subcontracts, purchase orders, employment records, payrolls, project cost accounting records, prevailing wage records, plans, specifications, addenda, shop drawings, Schedule of Values, Change Orders, and all working documents leading to Change Orders, field test records, quality control documents, daily construction logs by all field supervisors and contract management personnel, correspondence relating to the Contract, and drawings labeled as as-built. Contract Records shall be maintained and retained by the Contractor for the Audit Period described in Section 3.5.

3.5 Audit Access To Records: The Contractor shall permit, and shall require Subcontractors to permit, authorized representatives of Kitsap Transit, the U.S. Department of Transportation, the Comptroller General of the United States and the Washington state Auditor to audit, inspect, examine, and copy the Contract Records that are maintained by Contractor, any affiliated company or any Subcontractor involved in the Contract at any reasonable time and shall provide such assistance as may be reasonably required in the course of such inspection, including the right to interview personnel. Kitsap Transit further reserves the right to examine and

re-examine the Contract Records for a six (6) year period or such shorter period as Kitsap Transit may approve (the "Audit Period") following the Final Payment and until all pending matters are closed. Such audit(s) may include examination of the Contract Records for evaluation of any Change Order, Claim or any issue related to performance of the Work. The Contractor shall in no event dispose of, destroy, alter, or mutilate said Contract Records in any manner whatsoever for six (6) years after Final Payment and until all pending matters are closed. No additional compensation beyond the Contract Sum will be provided to the Contractor for compliance with the requirements of this Article.

3.6 Submittals And Shop Drawings: Where required by the Contract Documents, the Contractor shall submit specified information that will demonstrate that the Contractor's proposed materials, equipment, or methods of Work are in compliance with the Contract Documents. Kitsap Transit will not be obligated to accept or pay for materials, equipment or Work for which submittals are required herein, unless and until all submittals have been submitted and reviewed in accordance with the Contract Documents.

Kitsap Transit's review of Submittals provided to Kitsap Transit by the Contractor shall be for general conformance with the Contract requirements and shall not relieve the Contractor of responsibility for any errors or omissions in such Submittals, nor from compliance with the requirements of the Contract Documents. The Contractor shall have no claim under the Contract on account of the failure, or partial failure, of the method of work, material, or equipment so reviewed by or on behalf of Kitsap Transit. Review by Kitsap Transit shall not constitute approval of the safety precautions employed by the Contractor during construction, or constitute approval of the Contractor's means or methods of construction. The Contractor shall not deviate from shop drawings, product data, samples, or similar submittals that have been reviewed with a finding of "No Exception Taken" without submitting the proposed deviation for Kitsap Transit's review and appropriate action. Kitsap Transit reserves the right to charge the Contractor for all, or some portion of, the costs of excessive or unreasonable costs of reviewing submittals repeatedly rejected for being incomplete or inadequate.

3.7 Progress Schedule: Not later than _____, the Contractor shall submit to Kitsap Transit for timely review a Progress Schedule for a concurrent three (3) vessel build, identifying each major element of work involved in the design and construction, and proposed timeline for the completion of key events and indicating the times (numbers of days or dates) for starting and completing the various stages of the Work, including any Milestones specified in the Contract Documents. Milestone progress will be updated to the owner monthly for inclusion in Federal reporting, if required. The submitted schedule will be reviewed by Kitsap Transit for acceptability. Such acceptance will not impose on Kitsap Transit, responsibility for the Progress Schedule, for sequencing, scheduling, or progress of the Work, nor interfere with or relieve Contractor from Contractor's full responsibility therefore. Contractor shall adhere to the established Progress Schedule established as it may be adjusted from time to time by executed Change Orders.

3.8 Final Completion Date. The Final Completion Date as to each Vessel is the date Contractor is ready to deliver the Vessel after Contractor has satisfied all other requirements for Final Completion as set forth in Article 6.14.

The Final Completion Date for each Vessel shall be no later than the following dates:

1st Vessel: _____
2nd Vessel: _____
3rd Vessel: _____

ARTICLE 4 CHANGES AND CHANGE ORDER PROCESS

4.1 Change Orders Required. Change Orders shall be the only acceptable way for the Contractor to seek a change in the Contract Sum, Contract Time or Contract Work. Changes requested by Kitsap Transit shall be referred to as "Change Order Directives" and changes requested by the Contractor shall be referred to as "Change Order Requests." No oral statement by any person shall change or modify the Contract. Should either Party conclude changes to the Contract Work are required, such Party shall notify the other Party before any work which deviates from the original requirements is started. All mutually agreed upon changes must be made in writing and incorporated into the Contract Documents through the execution of a Change Order by both Parties, which shall provide for any increase or decrease in the Contract Time, Contract Sum, or both as caused by such change. Such changes shall not invalidate or nullify any portion of the Contract Documents unless the Change Order expressly amends any provision therein nor release the Contractor's Surety. In event of disagreement on the necessity of changes to the Work, Kitsap Transit's decision shall be final.

4.2 Contractor Requested Changes: Any other written or oral direction, instruction, interpretation or determination (collectively, "Request") from any source that the Contractor believes may cause any change in cost, in time or both, shall be treated as a Change Order Request under this Article; so long as the Contractor gives Kitsap Transit written notice within seven (7) calendar days of having known of the occurrence of the event giving rise to the change. The notice must state the date, circumstances, cost details, time implications, source of the order and a certification that the Contractor regards the order as a necessary change. The Contractor's Change Order Request shall be full compensation for implementing the proposed change in the Work, including any adjustment in the Contract Sum and/or Contract Time, including compensation for all delays in connection with such change in the Work and for any expense or inconvenience, disruption to schedule, or loss of efficiency or productivity occasioned by the Change in Work.

4.3 Owner Directed Changes:

4.3.1 Kitsap Transit may, at any time, without notice to the Surety and by written order designated or indicated to be a Change Order Directive, make any changes in the Work within the general scope of the Contract, including but not limited to the following:

- (1) Deleting any part of the Work;
- (2) Increasing or decreasing quantities;
- (3) Altering Specifications, designs, or both;
- (4) Altering the way Work is to be done;
- (5) Adding new Work;
- (6) Altering Kitsap Transit-provided facilities, equipment, materials, services, or sites; or
- (7) Directing acceleration or delay in the performance of the Work.

4.3.2 For any change requested by Kitsap Transit, the Contractor shall submit to the Owner's Representative, within seven (7) calendar days of Kitsap Transit's request, a detailed price and time schedule proposal supported with documentation that reflects all cost and time related impacts on the Contract. The proposal shall be prepared in accordance with provisions hereunder and shall include a complete breakdown of direct costs of both deletions and additions directly attributable to the proposed change in the Work.

Any field direction, response to Requests for Information (RFI), or other request, interpretation or instruction (hereinafter referred to as "Direction") provided by Kitsap Transit, is not considered a Change Order Directive unless so labeled in writing or a change to Contract requirements and shall not constitute, in and of itself, entitlement to an adjustment in Contract Price, Contract Time, or both.

4.4. Cardinal Change: Any change exceeding twenty-five percent (25%) of the Contract Amount is considered a "Cardinal Change" and will not be permitted regardless of whether or not the change is "in-scope" or a significant change. For purposes of this Contract, a significant change is when the character of the Work as altered differs materially in kind or nature from that originally included in the solicitation.

4.5 Time Extension:

4.5.1 Requests for a time extension shall only be limited to the effect on the Critical Path of the Contractor's approved Progress Schedule attributable to the change or event giving rise to the request. As used herein, "Critical Path" means the longest, continuous sequence of interrelated activities that begins on the date Kitsap Transit issues a Notice To Proceed and extends to Substantial and Final Completion of the Project.

4.5.2 To be considered, the request shall be in sufficient detail to enable Kitsap Transit to ascertain the basis and amount of the time requested. The request shall include an updated schedule that supports the request and demonstrates that the change or event: (i) had a specific impact on the Critical Path, and except in cases of concurrent delay, was the sole cause of such impact; and (ii) could not have been avoided by resequencing of the Work or by using other reasonable alternatives.

4.5.3 In evaluating any request, the Kitsap Transit will consider how well the Contractor used the time from the Notice To Proceed up to the point of the delay and the effect the delay has on the Contract Time, Scope of Work or Progress Schedule. Kitsap Transit will evaluate and respond within seven (7) calendar days of receiving the request.

4.5.4 The Contract Time and the time for completion of any additional work undertaken pursuant to a Change Order will be extended as set forth in the Change Order.

4.5.5 If Kitsap Transit determines the Work is delayed because of the occurrence of an Force Majeure Event as defined in Article 10 or because of an action, neglect, or default of Kitsap Transit, its officers, or employees, or of any other Contractor employed by Kitsap Transit, the Contractor may seek an extension of the Contract Time.

4.6 Equitable Adjustment:

4.6.1 Except as specifically provided for herein, the Contractor is not entitled to an equitable adjustment, and Kitsap Transit will have no obligation or liability, on account of a change in the Work that is not made through a properly executed Change Order. The method of how a Change Order will be priced, be it negotiated lump sum or unit price, is solely at Kitsap Transit's discretion. Nothing in this Section shall be deemed to require a change in the Contract Amount when additional, extra, or changed Work is the result of an estimating, contracting or

engineering error by the Contractor. In no event shall the Contractor be entitled to compensation for the loss of anticipated profits on deleted, terminated, or uncompleted Work or consequential damages of any kind. No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after Final Completion under this Contract.

- 4.6.2 No claim for any Contractor requested change shall be allowed for any costs incurred more than seven (7) calendar days before the Contractor gives proper written notice as herein required, unless Kitsap Transit elects to extend this time for good cause.
- 4.6.3 If the Contractor intends to assert a claim for an equitable adjustment, it must, within seven (7) calendar days after receipt of a written Change Order Directive from Kitsap Transit, submit to Kitsap Transit a written Change Order Request setting forth the general nature, time implications, monetary extent of such claim. The Contractor may request, in writing, an extension in time to submit the Change Order Request.
- 4.6.4 As to requests for an increase in the Contract Sum, the Contractor's Change Order Request shall include detailed price calculations for the proposed change, which shall itemize the cost of all labor, materials, equipment, and any other allowable direct costs for the Contractor and, further, shall be accompanied by the signed Bids of any Subcontractors or suppliers who will perform any portion of the change in the Work or will furnish materials or equipment for incorporation therein. Each labor classification shall be broken out in detail. Any aggregate labor total will not be acceptable. The Contractor's Change Order Request shall also show as a separate item, the proposed amount for markup, contingency, overhead and fee, the total of which shall not exceed as follows:
- Labor – 25%
 - Materials – 15%
 - Equipment – 15%
 - Specialized Services – 15%
 - Subcontractor services – 5%

No allowance for increasing the bonds required by the Contract will be made. The same level of detail required for the Contractor's Change Order Request shall be included in all Subcontractor quotations and requests.

- 4.6.5 Overhead and profit percentage markups shall not exceed those specified as allowed under this Section and shall be deemed to cover all costs and expenses of any nature whatsoever, including without limitation those for general condition items such as clean-up, protection, supervision, estimating, field operations, small tools and security, which the Contractor or any of its Subcontractors may incur in the performance of or in connection with a Change in the Work and which are not otherwise specifically recoverable by them pursuant to this Section. The parties agree and acknowledge that the adjustments to Contract Amount and Contract Time, if any, contained in a Change Order shall constitute the total and complete compensation and remedy for the Change in the Work, including any effect of the individual change and any cumulative effects prior to Change Orders on the Work as a whole, and all direct and indirect costs of whatsoever kind or nature, including, without limitation, overhead, extended overhead, profit,

impact costs, ripple costs, delay costs, inefficiency costs, and all other special, incidental and consequential damages.

4.6.6 Upon receipt of the Contractor's fully documented Change Order Request, Kitsap Transit may accept or reject the Request, request further documentation, negotiate acceptable terms with the Contractor, or inform the Contractor that additional time is needed to evaluate the Change Order Request. Under such circumstances, Kitsap Transit will identify a date certain when a decision on the Change Order Request will be made. For any Change Order Request which has merit, Kitsap Transit will initiate a written Change Order to the Contract. If Kitsap Transit and the Contractor reach an agreement on the terms and conditions of the Change Order Request, including any adjustment in Contract Sum or Contract Time, such agreement shall be incorporated into a Change Order and signed by both parties. This bilateral Change Order shall represent full and complete payment, time adjustments, and final settlement of all changes and claims for direct, indirect, and consequential costs, including cost of delays, inconvenience, disruption of schedule, or loss of efficiency or productivity, related to any Work either covered or affected by the Change Order, or related to the events giving rise to the Change Order.

4.6.7 If the change in the Work will result in a decrease in the Work to be performed on the Project, the Contract Sum will likewise be decreased by an amount equal to the estimated cost of the Work as contained in the Contractor's or Subcontractors' underlying Bid, or Schedule of Values. Further, if such decrease in the Work will result in a decrease in the time required to complete the Project, then the Contract Time will be reduced by the length of time fairly attributable to such decrease in the Work.

4.7 Unilateral Change Orders: If Kitsap Transit and the Contractor are unable to reach an agreement concerning the terms and conditions of a Change Order arising from a Change Order Directive issued by Kitsap Transit or the Contractor's Change Order Request submitted in response to such Directive, Kitsap Transit may unilaterally issue a Change Order in its sole discretion without invalidating the Contract and without notice to the Surety, implementing changes within the general scope of the Contract and directing the Contractor to perform the Work as changed. Unless otherwise directed by Kitsap Transit, the Change Order may embody such terms as Kitsap Transit deems appropriate and the Contractor shall promptly and diligently perform the Work in the most efficient, economical, and workmanlike manner, consistent with the best interest of Kitsap Transit, and shall not slow or stop the progress of the Work pending resolution of any such disputes. The Contractor shall be entitled to seek an adjustment in the Contract Sum and or Contract Time to the extent directly caused by the change in Work by filing a Claim within seven (7) days from its receipt of a Unilateral Change Order in accordance with the provisions Article 11 hereof. Unless Kitsap Transit agrees in writing to the contrary, the Contractor shall only be permitted to perform changes in the Work with its own forces if the Contractor was the entity that performed, or was contemplated to perform, the original Work of the trade in question.

4.8 Contractor's Obligation to Proceed: Following the issuance of a Change Order Directive by Kitsap Transit, and pending agreement on the terms and conditions of any Change Order, Kitsap Transit may direct the Contractor to proceed immediately with the Work set forth in the Directive in which event, the Contractor shall promptly and diligently proceed with any changed Work, so as to avoid delay and minimize any increase in the time required for performance of the Work. The Contractor shall keep daily records of the costs incurred in connection with such Work and submit daily timesheets to Kitsap Transit. Kitsap Transit's action

in approving timesheets submitted by the Contractor shall not be construed as acceptance of the Contractor's position regarding the need for the magnitude of an equitable adjustment for such Work. An inadvertent payment made by Kitsap Transit for Work not specifically authorized in writing by Kitsap Transit shall not constitute evidence or acknowledgement of Kitsap Transit's liability for such payment.

A Change Order Directive issued by Kitsap Transit for a change in the Work which does not direct the Contractor to proceed with the changed work until a bilateral Change Order is signed, shall not constitute authorization for the Contractor to proceed with any change in the Work contained therein nor shall such Directive justify any delay in the performance of existing Work.

4.9 Contractor's Acceptance: The Contractor accepts all requirements of a Change Order Directive and Change Order by signing it or acknowledging acceptance in any writing given to Kitsap Transit which infers acceptance. The Contractor also accepts all Change Order Directives, Unilateral Change Orders, and any other instructions and directions from Kitsap Transit's Representatives that may affect the Contract Sum, Contract Time or Contract Work by failing to timely submit a Claim or protest in accordance with the provisions of this Article and Article 11 of this Agreement or any other explicit provision of this Agreement governing any matter Contractor may wish to dispute, whether denoted as a Claim, protest or dispute.

4.10 Resolution Of Claims: All Claims, protests and disputes shall be resolved in accordance with the provisions of Article 11.

ARTICLE 5 MATERIALS AND EQUIPMENT

5.1 Substitutions: After the Contract has been executed, Kitsap Transit may consider a written request for the substitution of material, equipment, fixtures or other components (hereafter referred to as "Component" or "Components") in place of those specified in the Contract Documents only under exceptional circumstances or as described in the Specifications and following the procedures set forth below. The written request must be submitted on the form included in the Contract Documents or a form approved by Kitsap Transit and include the specifications for the material or product and any proposed change in the Contract Sum or Contract Time. The Contractor may make substitutions only with the written consent of Kitsap Transit and in accordance with the Change Order procedures set forth in this Agreement. By requesting a substitution, the Contractor represents that it has personally investigated the proposed material or product and determined that it is equal or better in all respects to that specified (or if not equal or better in all respects, the contractor shall identify such deficiencies), that the same or better warranty will be provided for the substitution, that complete cost data, including all direct and indirect costs of any kind, has been presented, that it waives any other known or unknown claim for an increase in the Contract Sum or Contract Time, that it has coordinated with affected Subcontractors and will not impact other parts of the work, and that it will coordinate the installation of the substitute if accepted and make all associated changes in the Work. Requests for review of proposed substitute Components will not be accepted by Kitsap Transit's Project Manager from anyone other than Contractor.

5.2 Inspection And Rejection: Kitsap Transit's Project Manager shall have the right to inspect all Components of the Work upon delivery for the sole purpose of identification and conformance to the Specifications. Such inspection shall not be construed as acceptance if any Components do not conform to the Contract. If there are any apparent defects in any Components at the time of delivery, Kitsap Transit will promptly notify the Contractor and require that all such non-conforming components be replaced. Defects detected post-delivery shall be governed by the provisions of Article 6.

5.3 Ownership: Title to all Components after they have been attached or affixed to the Vessel or after any payment has been made by Kitsap Transit towards the value of Components, shall automatically vest in Kitsap Transit.

5.4 No Liens: No material, supplies, equipment, or items for the Work shall be purchased subject to any chattel mortgage or under a conditional sale or other agreement by which an interest therein, or in any part thereof, is retained by the seller or supplier. The Contractor shall warrant good title to all materials, supplies, equipment, and items installed or incorporated in the Work and are free from any claims, liens, or charges. Neither the Contractor, nor any person, firm, nor corporation furnishing any material or labor for any Work covered by this Contract shall have any right to lien upon any improvement or appurtenance thereon. This Article shall not defeat or impair the right of the persons furnishing materials or labor to recover under any Payment Bond given by the Contractor for their protection, or any rights under State law permitting such persons to file claims against the Retainage.

5.5 Subcontractors

5.5.1 Definitions.

(1) A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at a site or to supply materials or equipment. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor.

(2) A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site or to supply materials or equipment. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

(3) A Subcontractor of any tier is a Subcontractor or a Sub-subcontractor.

5.5.2 Identification Of Subcontracts And Subcontractors:

(1) Within ten (10) days after Kitsap Transit's notice of intent to award the Contract, the Contractor shall furnish in writing to Kitsap Transit the names of all persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work (i.e., at least 2% of the contract Sum), as well as the proprietary names and the suppliers of the principal items or systems of materials and equipment proposed for the Work. The Contractor shall organize this list of Subcontractors in the same sequence as the Index of Specifications, and state the Work category followed by the name of the Subcontractor and/or fabricator (or "Contractor" where the portion of the work is by the Contractor's own forces). This list shall be accompanied by evidence of any qualifications required within the technical sections of the Specifications and satisfactory to Kitsap Transit. The list shall be updated promptly as part of the payment process if additional Subcontractors or any tier are engaged. If this Agreement is executed, no progress payment will become due until this information is so furnished. No action or inaction of Kitsap Transit in response to receipt of the names of the proposed Subcontractors of any tier shall constitute approval of any Subcontractor of any tier or of its performance. Kitsap Transit may reply promptly to the Contractor in writing

stating (1) whether or not Kitsap Transit, after due investigation, has reasonable objection to any such proposed person or entity; or (2) that Kitsap Transit requires additional time for review. "Reasonable objection" shall include, without limitation, Kitsap Transit's determination the Subcontractor is not responsible or lacks the qualifications required to undertake the subcontract work contained within the bidding documents or the technical sections of the Specifications applicable to that Subcontractor. If within ten (10) days of its receipt of the list of Subcontractors, Kitsap Transit fails to reply, such failure shall constitute notice of no reasonable objection. If Kitsap Transit makes a reasonable objection, the Contractor shall replace the Subcontractor with no increase to the Contract Sum or Contract Time. Such a replacement shall not relieve the Contractor of its responsibility for the performance of the Work and compliance with all of the requirements of the Contract within the Contract Sum and Contract time.

(2) The Contractor shall not contract with a proposed person or entity to whom Kitsap Transit has made reasonable and timely objection.

(3) If Kitsap Transit has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom Kitsap Transit has no reasonable objection. Such a replacement shall not relieve the Contractor of its responsibility for the performance of the Work or compliance with all of the requirements of the Contract within the Contract Sum and Contract Time. The Contractor's listing or use of another Subcontractor that is not "responsible" or "qualified" shall be sufficient cause for Kitsap Transit to declare that the Contractor is not a responsible bidder, unless the Contractor agrees to substitute a responsible and qualified subcontractor at no change to the Contract Sum or Contract Time.

(4) The Contractor shall not substitute a Subcontractor, person or entity previously selected if Kitsap Transit makes reasonable objection to such substitution. If Kitsap Transit reasonably concludes that any portion of the Work subcontracted by the Contractor is not being prosecuted in accordance with the Contract Documents, the Contractor shall, upon request of Kitsap Transit, remove the Subcontractor performing such work. This removal shall not relieve the Contractor of its responsibility for the performance of the Work or complying with all of the requirements of the Contract within the Contract Sum and Contract Time, nor shall Kitsap Transit be obligated to so request.

(5) The Contractor shall verify responsibility criteria for each first-tier Subcontractor. A Subcontractor of any tier that engages other Subcontractors must verify responsibility criteria for each of its lower-tier Subcontractors. Verification shall include that each Subcontractor, at the time of subcontract execution, meets the responsibility criteria listed in the Instructions to Bidders.

5.5.3 Sub contractual Relations.

(1) The Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor and Kitsap Transit all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward Kitsap Transit. Each subcontract agreement shall preserve and protect the rights of Kitsap Transit under the Contract Documents with respect to the

Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against Kitsap Transit. The Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors. The Contractor shall provide to Kitsap Transit copies of the written agreements between the Contractor and any Subcontractor on request. Kitsap Transit will endeavor to keep these agreements confidential subject to its obligations under Chapter 42.56 RCW.

(2) The Contractor shall schedule, supervise and coordinate the operations of all Subcontractors of any tier, including any suppliers of early procurement items. No subcontracting of any of the Work shall relieve the Contractor from its responsibility for the performance of the Work in accordance with the Contract Documents or from its responsibility for the performance of any other of its obligations under the Contract Documents. The Contractor is responsible for the timely, accurate and appropriate Subcontractor coordination of the work of lower tier Subcontractors in accordance with the overall Work, including communications, meetings, drawings, illustrations and other necessary associated activities required for the successful coordination of all trades, schedules, materials and workmanship. Kitsap Transit shall provide to the Contractor copies of the written Kitsap Transit Supplier agreements for any early procurement contracts and any agreements between Kitsap Transit to the extent that such agreements are identified in the Specifications.

(3) The Contractor agrees to diligently, and using its best efforts, cause each Subcontractor of any tier to correct, at the Subcontractor's own expense, all Work performed by the Subcontractor of any tier that is defective in material or workmanship or otherwise fails to conform to the Contract Documents, including all necessary removal, replacement and/or repair of any other portion of the Project which may be damaged in removing, replacing or repairing any portion of the Project. If any Subcontractor of any tier defaults in its obligation promptly to correct any such deficiency, the Contractor shall be responsible for correcting the deficiency.

(4) The Contractor shall, and shall cause its Subcontractors of any tier to, give all required notices and comply with all applicable health and safety laws, rules, regulations, codes and lawful orders of public authorities and of quasi-governmental authorities relating to the Work, including, without limitation, all OSHA and WISHA requirements, and the Contractor shall, and shall cause applicable Subcontractors of any tier to, indemnify, defend and hold harmless Kitsap Transit from and against any and all claims, liabilities, fines and attorney fees arising from any failure of the Contractor or a Subcontractor of any tier to have complied with any such requirements in any respect.

ARTICLE 6 PROSECUTION AND PROGRESS OF THE WORK

6.1 Performance: Unless otherwise provided in the Contract Documents, the Contractor shall (i) provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work; (ii) shall diligently perform all Work in accordance with and as described in the Contract Documents; and (iii) perform any changes in the Work directed by Kitsap Transit in accordance with the Change Order provisions of the Contract.

6.2 Supervision and Coordination: The Contractor shall competently and efficiently, supervise and direct the implementation and completion of all Contract requirements specified in the Contract Documents. The Contractor shall be solely responsible for the means, methods, techniques, sequences, assembly details, and procedures for coordinating all portions of the work under the Contract, including, but not limited to compliance with the Safety Standards set forth in Section 3 of the Bid Documents. The organization of the Specifications and arrangement of Plans shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of the Work to be performed by any trade. Kitsap Transit assumes no responsibility to act as arbiter in the division and proper coordination of the Work between particular Subcontractors or workers.

6.3 Delivery: Except as to components manufactured or assembled by Subcontractors prior to delivery to the site, all Work must be made at the project Site in accordance with the Contract Documents and time frames outlined therein. The acceptance by Kitsap Transit of late performance with or without objection or reservation shall not waive Kitsap Transit's right to claim damages for such breach nor preclude Kitsap Transit from pursuing any other remedy provided herein, including termination, nor constitute a waiver of the requirements for the timely performance of any obligation remaining to be performed by the Contractor.

6.4 Performance Standards: The Contractor shall strictly comply with all Specifications and Performance Standards including, but not limited to, the required speed, noise, vibration, fuel consumption and passenger loading and unloading requirements in the Contract Documents and with recognized quality industry standards as applicable. All references to standards, whether for delivery of goods, processes, assemblies, craftsmanship, performance, or similar purposes shall mean, unless otherwise noted, the most recent available published version of such standard. When reference is made to standards, the standards are to be made a part of this Contract and to have the same effect as if fully reproduced herein.

6.5 Warranty of Work:

6.5.1 Warranty of the Work is governed by Subsection <> of the Bid Documents and this Section 6.5.

6.5.2. The Contractor shall obtain, for the benefit of the Owner and assign to Owner all warranties offered by suppliers of materials, engines, fixtures and fittings, incorporated into the Vessels and/or otherwise applicable to the Vessels. The Contractor will cooperate and assist Owner in the enforcement of all such warranties.

6.5.3 Contractor hereby warrants for a period of twenty-four (24) months from the date of Final Completion that all material, equipment and workmanship entering into the vessels and furnished by the Contractor, or any subcontractors, suppliers or

vendors, against defects in design, material or workmanship and that they meet the requirements and conditions of the Proposal documents; shall be fit for the purposes intended and fulfill its design function; shall be free of all patent and latent defects in design, materials and workmanship; and shall perform satisfactorily. If corrective work for defective Work is discovered during the Warranty period, the Warranty shall also apply to discrepancies and defects in the corrective work that are discovered within twenty-four (24) months after the corrected work is completed and accepted. Further, the Warranty Term shall be extended for any period that a portion of the Work cannot be used for the purpose intended as a result of any non-conforming or defective work. The Warranty shall apply whether or not designs, data or information provided the Contractor or its Subcontractors have been reviewed or approved by Kitsap Transit.

- 6.5.4 The Owner will notify the Contractor of all reasonably discoverable defects in a prompt and timely manner, as soon as any such defect is noticed. If Contractor fails to perform required warranty work as required by reasonable circumstances but not longer than five (5) business days after notice to repair, Owner may, at its sole discretion, undertake such work and Contractor shall pay Owner all costs associated with the warranty work within thirty (30) business days of work completion. All warranties as provided in the Specifications are incorporated by reference herein and are subject to the terms and conditions of the Specifications.
- 6.5.5 Acceptance of this vessel by the Owner does not waive any warranty, express or implied, under all applicable federal, state, and local laws, regulations and ordinances with respect to any materials, equipment or supplies manufactured, supplied or assembled by the Contractor pursuant to the Plans and Specifications Incorporated herein.
- 6.5.6 The Owner agrees to provide satisfactory evidence to the Contractor that the items or work covered by this warranty have been properly maintained, correctly lubricated in accordance with operating parameters set forth in the Vessel Specifications.
- 6.5.7 The Contractor and the Owner agree that the sole and exclusive remedy with respect to the liability for any alleged negligent or defective work shall be the repair, replacement or adjustment of the alleged negligent or defective work. All warranty repairs not completed prior to delivery of the Vessel, shall be completed at a location agreeable to both the Contractor and the Owner. Contractor reserves the right to perform such warranty work by its own crew, if it can be accomplished in a timely manner. Cost of the delivery of the item, work, or the Vessel to the agreed upon location shall be borne by the Contractor.

6.6 Contractor Representations: Execution of the Contract by the Contractor is a representation that:

- 6.6.1. The Contractor has carefully studied and compared the various drawings, Specifications and other Contract Documents;
- 6.6.2. The Contractor has investigated the Components that will need to be procured, manufactured, assembled and/or finished and the availability of all such Components in order to conform to Contract;

- 6.6.3. That the Contractor has sufficient work forces, tools, equipment and facilities to timely complete the Work;
- 6.6.4. That the Contract Sum is reasonable compensation for the completion of all the Work covered by and in conformance with the Contract Documents;
- 6.6.5. That the Contract Time is adequate for the completion of the Work;
- 6.6.6. That the Contractor can procure and provide proof of and maintain all Bonds, Insurance Policies, Licenses and Permits required by the Contract; and
- 6.6.7. That the Contractor can and will fully comply with all applicable laws that pertain to the Work to be performed and completed under the Contract.
- 6.6.8. That the Contractor can strictly comply with the Specifications and Performance Standards set forth therein.

6.7 Design Errors: Before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings, Specifications, and other Contract Documents relative to that portion of the Work, as well as any information furnished by Kitsap Transit.

If the Contractor discovers or suspects any errors, inconsistencies or omissions in any Design documents, Specifications or Drawings (“Design Errors”), the Contractor shall promptly notify Kitsap Transit, request information from Kitsap Transit and stop any Work related to Design Errors until instructed to proceed by Kitsap Transit. Contractor shall be solely responsible for investigating any Design Errors and, after consulting with the Contractor’s, design subcontractors and consultants and Kitsap Transit’s consultants and Project Manager, determine the appropriate course of action.

The Contractor shall be fully responsible for the cost of correcting any Design Errors and any fault work attributable to Design Errors unless the Design Error is solely attributable to specific written direction from Kitsap Transit. However, if the Contractor performs any Work it knows or reasonably should have known involves an error, inconsistency or omission contained in the written direction from Kitsap Transit, without such notice to Kitsap Transit, the Contractor shall be responsible for such performance and shall bear the costs required for correction.

6.8 Access: Kitsap Transit’s Project Manager, Contractors Administrator and their respective Designees shall have the right to:

- 6.8.1. Inspect the Work and all the Components thereof during normal business hours without advance notice;
- 6.8.2. Inspect or audit all of Contractor’s records and documents pertaining to the Contract, including, without limitation all payroll records for employees performing any of the work at reasonable intervals, but only after an advance appointment is made.

The Contractor will facilitate such access and cooperate in scheduling appointments without undue delay.

6.9 Non-Conforming Work: The Contractor shall promptly replace all defective or non-conforming Components and remedy any non-conforming Work without an adjustment of the

Contract Price or Time whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. If, during the course of sea trials and inspections following substantial completion, Kitsap Transit's consultants determine that the Vessels do not conform to the Performance Standards:

- 6.9.1 Contractor will meet with Kitsap Transit and its consultants to discuss the work necessary to remedy any non-compliant Performance Standard. Following that meeting, Contractor shall have fourteen (14) days to submit a remediation plan and schedule (the "Plan") for Kitsap Transit's review and approval.
 - 6.9.2 If the Contractor either fails to timely deliver the Plan or Kitsap Transit rejects the Plan, Kitsap Transit may contract with another contractor to undertake the work necessary to insure the Vessels meet the required Critical Performance Standards.
 - 6.9.3 Until the remedial work is completed, Kitsap Transit will not make any payments to Contractor for any outstanding progress payments.
 - 6.9.4 Contractor will be responsible for all costs and fees incurred by Contractor for the remedial work.
 - 6.9.5 Without limiting any right or remedy elsewhere provided in the Contract Documents or by the laws of the State of Washington, notwithstanding any other provision of the Contract seemingly to the contrary, Kitsap Transit shall be entitled to offset and recover from Contractor all costs, fees, damages and losses including consequential damage Kitsap Transit may incur or suffer as a result of the Contractor's failure to complete the Vessel in strict conformance to the Performance Standards by the Final Completion Date.
- 6.10 Covered Work:**
- 6.10.1. If a portion of the Work is covered contrary to either Kitsap Transit's request, the requirements of a governmental authority or as otherwise specifically required by the Contract Documents, it must, if requested in writing by Kitsap Transit or governmental authority, be uncovered for the requesting party's examination and be replaced at the Contractor's expense without a change in the Contract Time or Contract Sum.
 - 6.10.2. If a portion of the Work has been covered that Kitsap Transit or governmental authority has not specifically requested to examine (or that was required to be examined), prior to its being covered and for which the Contract Documents did not require inspection, Kitsap Transit or governmental authority may request to see such Work and it shall be uncovered by the Contractor. If such Work conforms to the contract Documents, the costs of uncovering and replacement shall, by appropriate Change Order, be at Kitsap Transit's expense. If such Work does not conform to the Contract Documents, such costs and the cost of correction shall be at the Contractor's expense unless the condition was caused by Kitsap Transit or a separate contractor employed by Kitsap Transit and, in that event, Kitsap Transit or the separate contractor shall be responsible for payment of such costs, and the Contractor may seek an adjustment of the Contract Sum and Time.

6.11 Notices And Contractor's Duties: As to defects and non-conformities discovered by Kitsap Transit, Kitsap Transit shall transmit written notice to the Contractor, specifying the defective Components and/or non-conforming Work. Within seven (7) days of the transmittal of said notice, the Contractor must submit to Kitsap Transit a written acknowledgment and provide a detailed description of the corrective measures the Contractor proposes to undertake and a timeline for the completion of all corrective measures for Kitsap Transit's review. The Contractor may request an extension of time to describe the corrective measures if necessary. On Kitsap Transit's review and approval, the Contractor shall immediately commence the work necessary to remedy all defective or non-conforming Work.

6.12 Contractor's Failure To Correct: In the event Contractor fails to adhere to the terms set forth in Sections 6.9 6.10 and 6.11 above, fails to adhere to the Contract Documents, or otherwise fails to timely and properly replace any defective Components or remedy any defective Work within the times set forth in Contractor's response approved by Kitsap Transit, Kitsap Transit may exercise any of the rights or remedies set forth in Article 12 of this Agreement.

6.13 Substantial Completion: Substantial Completion is defined as the time at which the Work has progressed to the point where, in the opinion of Kitsap Transit, the Work is sufficiently complete in accordance with the Contract Documents, so that the Work can be utilized for the purposes for which it is intended. Substantial Completion will include completion of the construction of the Vessel in conformance with the Contract Documents and completion of the Sea Trials that demonstrates that the operation of the Vessel conforms to the Specifications.

6.13.1 Notice And Initial Inspections. Once the Contractor determines it has achieved completion of the construction of a Vessel, the Contractor will provide written notice to Kitsap Transit and arrange and facilitate Kitsap Transit's inspection of the Vessel by its Project Manager, Contracts Administrator, Engineer and or others.

If, following the Construction, Kitsap Transit determines the Vessel or any Component thereof does not conform to the Contract Documents, Kitsap Transit shall prepare a list (the Punch List) of any deficiencies that must be remedied.

As to items that must be completed before the Vessel is launched and/or ready for sea trials, all such items must be remedied and approved by Kitsap Transit. Once those items are completed and approved, the Contractor will arrange and coordinate dates and times for Sea Trials and Coast Guard inspections on dates and at times approved by Kitsap Transit so Kitsap Transit's designees may be present.

6.13.2 Sea Trials And Coast Guard Inspections. Kitsap Transit's Project Manager, Contracts Administrator, Engineer and others as designated by Kitsap Transit, shall be entitled to be present during the Sea Trials and Coast Guard inspections. Following completion of the Sea Trials and Cost Guard inspections, a second punch List shall be developed by Kitsap Transit which will set forth any items the Coast Guard requires before it will issue its final certification, and correction of any defects or deficiencies discovered since the first inspection.

6.14 Final Completion:

6.14.1 Notice And Inspections. When the Contractor has completed all the Punch List items from both Punch Lists, the Contractor shall send written notice to Kitsap Transit and arrange a second inspection which may, at Kitsap Transit's request

include one or more additional Sea Trials over a period of up to 6 hours and no less than 3 hours each to confirm conformance to the operating protocols set forth in the Specifications.

6.14.2 Final Completion Requirements. Final Completion will be attained when the Contractor has accomplished the following at no additional cost to Kitsap Transit:

1. Complete all requirements set forth in Sections 6.13, including completion of all Punch List Work and the procurement of Kitsap Transit's approval.
2. Procure all required Coast Guard certifications.
3. Complete all instruction and training sessions.
4. Submit executed warranties.
5. Provide proof of extended insurance coverages.
6. Deliver the Vessels to the location set forth in the Bid documents.

ARTICLE 7 LEGAL REQUIREMENTS

7.1 General Requirements: The Contractor shall, at its sole cost and expense, comply with and give notices required by, all applicable Federal, State and local laws, ordinances, regulations, codes and lawful orders of any unit of government having jurisdiction over any aspect of the Contract (collectively "Applicable Laws"). Before Kitsap Transit's execution and acceptance of the Contract, the Contractor must provide evidence satisfactory to Kitsap Transit that it is authorized and licensed to do business in the State of Washington and the County and City where the Work will occur, is licensed and bonded, and otherwise has the legal right and authority to do all the Work required by the Contract at the Project Site. Without limiting the generality of the foregoing, the Applicable Laws include the FTA Rules and Regulations set forth in **Attachment A**; the Prevailing Wage provisions set forth in Section 7.2 below together with the Prevailing Wage Requirements set forth in subsection 3.13 of the Bid Documents; the provisions set forth in Subsection 3.7 of the Bid Documents governing Safety; and the provisions of this Article 7.

7.2 Prevailing Wages. The Contractor must comply with the Davis Bacon Act under Federal law and Chapter 39.12 RCW titled "Prevailing Wages on Public Works". This Project is a "Public Work" that may involve Federal funding. Accordingly, the Contractor must pay the greater of the Prevailing Wage rates required by Federal or State Law in effect on the Bid Date. In the event the required wage rate is higher than the wage rate the Contractor used in its bid the Contract Sum shall be adjusted to reflect this increased expense.

7.3 Registration: The laws of the State of Washington require that the Contractor must be registered in the State of Washington. Out-of-state corporations must secure authority from the Secretary of State to transact business in the State of Washington. Accordingly, before Kitsap Transit can enter into a Contract with an out-of-state or foreign corporation, such entity must comply with Washington's corporation laws. Information and application forms relative thereto may be obtained from the Corporations Division, Office of the Secretary of State, P.O. Box 40234, Olympia, Washington 98504. The Corporate Information Line is (360)725-0377 or e-mail at corps@sos.wa.gov.

7.4 Licenses, Permits And Similar Authorizations: The Contractor, at no expense to Kitsap Transit, shall secure and maintain in full force and effect during the term of this Contract all required licenses, permits, fees, bonds, inspection fees, and similar legal authorizations for performance and completion of the Contract Work. It is Contractor's sole responsibility to monitor and determine any changes or the enactment of any subsequent regulations regarding said fees, assessments, or charges and to immediately comply with all related requirements. If for any

reason the Contractor's required licenses or certificates are terminated, suspended, revoked or in any manner modified from their status at the time this Contract becomes effective, the Contractor shall immediately notify Kitsap Transit of such condition in writing.

7.5 Taxes: Excluding Washington State Sales Taxes, which are exempt, the Contractor will be responsible for all other taxes required by statute or regulation, which shall be the sole responsibility of the Contractor. No adjustments will be made in the Contract Amount because of any misunderstanding by, or lack of knowledge of, the Contractor as to liability for, or the amount of any taxes for which the Contractor is solely liable or responsible for by law, or under this Contract, or because of any increase in tax rates imposed by any federal, State or local government. No charge by Contractor shall be made for Federal Excise Tax and Kitsap Transit agrees to furnish the Contractor with an exemption certificate for Washington State sales.

7.6 Wage And Hours Laws: The Contractor shall comply with all applicable provisions of the Fair Labor Standards Act (FLSA) and all other legislation affecting its employees and the rules and regulations issued thereunder insofar as applicable to its employees and shall, at all times, save Kitsap Transit free, clear and harmless from all actions, claims and expenses arising out of said Act and rules and regulations that are or may be promulgated in connection therewith.

7.7 Gratuities: Kitsap Transit employees, agents, officers and board members may not solicit or accept gratuities, gifts, favors, other special consideration or anything of economic value from any present or potential Contractor, Subcontractor, supplier, vendor, customer, client, or any individual or organization doing or seeking business with Kitsap Transit. Use of one's position in a manner that constitutes a real or apparent personal or organizational conflict of interest or personal gain is strictly prohibited (See: FTA Cir 9030.1D).

7.8 Current And Former Employees: No current or former employee of Kitsap Transit and their immediate family members, or agents, officers, and Board Members of Kitsap Transit, may Contract with, influence, advocate, advise, or consult with a third party about a Kitsap Transit project or assist with preparation of Bids submitted to Kitsap Transit after leaving Kitsap Transit's employment, if he/she was substantially involved in determining the Work to be done or process to be followed under the contract while a Kitsap Transit employee. It is unethical for any Kitsap Transit employee who is participating directly or indirectly in the procurement process to become or to be, while such a Kitsap Transit employee, the employee of any third-party contracting with Kitsap Transit.

7.9 Organizational Conflicts Of Interest: An organizational conflict of interest is a situation in which, because of other activities, relationships, or Contracts, a Contractor or Subcontractor is unable, or potentially unable, to render impartial assistance or advice to Kitsap Transit; a Contractor's objectivity in performing the Contract Work is or might be otherwise impaired; or a Contractor has an unfair competitive advantage. Kitsap Transit will evaluate future procurements related to this Contract to determine if there is an organizational conflict of interest. If an organizational conflict of interest exists, Kitsap Transit may prohibit the Contractor and any of its Subcontractors from participating in such related procurements/projects.

7.10 Non-Discrimination: Kitsap Transit is an Equal Opportunity Employer. With respect to performance under this Contract, the Contractor shall take such action as may be required to ensure full compliance with Chapter 49.60 RCW, Discrimination, Title VI of the Civil Rights Act of 1964 and the Federal prohibitions against discrimination set forth in **Attachment A**. The Contractor shall not discriminate against any client, employee, or applicant for employment or for services because of race, creed, color, national origin, marital status, sex, age, Vietnam-era veteran status, disabled veteran status, income level, or disability; or the presence of any sensory, mental or physical handicap except for a bona fide occupational qualification with regard

to, but not limited to the following: Employment upgrading, demotion or transfer, recruitment or any recruitment advertising, layoffs or terminations, rates of pay or other forms of compensation, selection for training, rendition of services.

7.11 Ownership Of Documents: All documents, data, drawings, Specifications, software applications and other products or materials produced by the Contractor in connection with this Contract shall be the property of Kitsap Transit. All such documents, products and materials shall be forwarded to Kitsap Transit at its request and may be used by Kitsap Transit as it sees fit. The Contractor shall preserve the confidentiality of all Kitsap Transit documents and data accessed for use in the Contractor's Work product.

ARTICLE 8 LIABILITY, RISK ALLOCATION AND INSURANCE

8.1 Indemnification: To the maximum extent permitted by law, the Contractor shall defend, protect, indemnify and hold harmless Kitsap Transit, its officers, Board of Commissioners, employees, attorneys, agents and consultants (the "Indemnified Parties") from and against any and all claims, demands, damages, suits, penalties and liability of any kind, including injuries to persons or damages to property, which arise out of or result from any acts, errors, or omissions of the Contractor, Subcontractors of any tier and their respective employees, agents, representatives and anyone for whose acts they may be liable (collectively an "Indemnitee") whether in the course of performing Work under the Contract provided or otherwise. If such liability is caused by or results from the concurrent negligence of Kitsap Transit, its officers, employees or agents, the terms of the preceding paragraph shall be valid and enforceable only to the extent of the Contractor's negligence; and provided further, that nothing herein shall require the Contractor to hold harmless and defend Kitsap Transit, its officers, employees and agents from any claims arising from the sole negligence of Kitsap Transit, its officers, employees and agents. The Contractor's obligation to defend includes the payment of all reasonable attorney's fees and costs of Kitsap Transit's defense of any claim, suit or action within the scope of this Section whether or not suit was instituted.

The Contractor specifically waives any immunity under Title 51 RCW, the Industrial Insurance Act and assumes all liability for actions brought by it and its employees against Kitsap Transit for injuries in the performance of the Work under this Contract.

The Contractor represents that this waiver has been negotiated with Kitsap Transit. Kitsap Transit will give the Contractor prompt notice in writing of the institution of any suit or proceeding and permit the Contractor, through its counsel, to defend same and will give all needed information, assistance and authority to enable the Contractor to do so. This Section does not modify any other sections or articles regarding any other conditions as are elsewhere agreed to herein between the Parties.

8.2 Claims Of Employees: Any and all claims that may or might arise under the Workers' Compensation Act by or on behalf of said employees or other persons while so engaged, and any and all claims made by a third party as a consequence of any act or omission on the part of the Contractor's employees or other persons while so engaged on any of the Work set forth herein, shall be the sole obligation and responsibility of the Contractor.

The Contractor shall indemnify and hold harmless Kitsap Transit from and against any and all costs (including attorney fees incurred in defense) or liabilities (including payroll taxes, penalties or interest) arising out of any breach of the above representations and warranties contained in the Contract or any assertions that the Contractor is not an independent Contractor.

8.3 Insurance Requirements: The Contractor, at its sole expense and for the duration of the Contract, shall purchase and maintain all insurance described in **Attachment B** attached hereto.

8.3.1 Subcontractors. Taking into account the Scope of Work and Services to be performed by a Subcontractor, the Contractor shall require each Subcontractor to obtain and maintain liability and any other insurance coverage specified in **Attachment B** unless and to the extent waived by Kitsap Transit in writing. The failure of Subcontractor(s) to comply with the insurance requirements does not limit the Contractor's liability or responsibility of the Contractor hereunder. Any insurance required of the Contractor and Subcontractors must name Kitsap Transit and its Board of Commissioners, Officers, employees and agents as an additional insured.

8.3.2 Substitutions.

a. By Contractor. The Contractor may obtain any combination of coverage or limits that effectively provides the same or better amounts and types of coverage as stipulated above, subject to review and approval by Kitsap Transit.

b. By Kitsap Transit. If at any time any insurance policy is amended such that it does not conform to any of the standards or terms of the Contract or the Insurer's rating drops below the threshold set forth in **Attachment B**, within fourteen (14) days from written notice to Kitsap Transit, Contractor shall procure a substitute policy or policies that conform to the terms of the Contract.

8.3.3 Excess Liability: Coverage in the minimum amounts set forth herein shall not be construed to relieve the Contractor from liability in excess of such limits. Nothing contained within the insurance requirements of the Contract shall be deemed to limit the scope, application and/or limits of the coverage afforded, which coverage will apply to each insured to the full extent provided by the terms and conditions of the policy(s).

8.3.4 Cancellation: In the event of cancellation, non-renewal, revocation, or other termination of any insurance coverage required by this Contract, the Contractor shall provide written notice of such to Kitsap Transit within one (1) business day of the Contractor's receipt of such notice.

8.3.5 Access To Insurance Carriers: If a lawsuit is initiated based on an event for which the Contractor's insurance carrier and the Contractor are obligated to provide a defense and indemnification in accordance with the terms of the Contract, and the potential liability claimed exceeds the amount of insurance coverage, the Contractor shall authorize representatives of Kitsap Transit to collaborate with counsel and/or the claims adjuster for the Contractor's insurance carrier in settling or defending such claim. The Contractor shall appear and defend any such lawsuit at its own cost and expense, and if judgment is rendered or settlement made requiring payment of damages by Kitsap Transit, its Board of Commissioners, officers, agents, and employees, the Contractor shall pay the same.

8.3.6 Evidence of Insurance: Prior to the Commencement Date, the Contractor shall provide Kitsap Transit with evidence of the insurance and endorsements required herein from the insurer(s) certifying to the coverage of all insurance required

herein. All evidence of insurance must be certified by a properly authorized officer, agent, general agent or qualified representative of the insurer(s) and shall certify the name of the insured, the type and amount of insurance, the location and operations to which the insurance applies, the expiration date, and that Kitsap Transit will receive notice at least 30 days prior to the effective date of any cancellation, lapse or material change in the policy. The Contractor shall, upon request, deliver to Kitsap all such policies of insurance, and all endorsements and riders, and the receipts for payment of premiums thereon including any renewals thereof.

8.3.7 **Breach:** The Contractor's failure to fully comply with the insurance requirements of this Article during the term of the Contract shall be considered a material breach of Contract for which Kitsap Transit may exercise any available remedy hereunder if the breach is not cured within seven (7) business days after notice to the Contractor. Without waiving the right to exercise any remedy other remedy hereunder, Kitsap Transit may procure and maintain in the name of the Contractor and at the Contractor's sole expense, such types of insurance to the extent Kitsap Transit deems proper up to the amount of the required coverage(s) the Contractor is required to maintain hereunder. Kitsap Transit may offset the cost of such insurance against any payment due to the Contractor under the Contract. If Kitsap Transit is damaged by the failure of the Contractor to maintain any of these insurance requirements, or to so notify Kitsap Transit, then the Contractor shall bear all costs attributable thereto. Suspension or termination of this Contract shall not relieve the Contractor from its insurance obligations hereunder.

8.3.8 **Miscellaneous.** No provision in this Article 8 shall be construed to limit the liability of the Contractor for the Contractor's failure to conform to the Contract. The Contractor's liability for the Work shall extend as far as the applicable periods of limitation provided by law and up to any legal limits. The Contractor warrants that this Contract has been thoroughly reviewed by the Contractor's insurance agent(s)/broker(s), who have been instructed by Contractor to provide the insurance coverage required by this Contract.

8.4 Property Liability: Unless otherwise provided for, the Contractor assumes the risk of, and shall be responsible for, any loss or damage to Kitsap Transit furnished property in its possession, or in the possession of its subcontractors and their representatives, agents, or employees, except for reasonable wear and tear in the normal performance of this Contract.

8.5 Risk Of Loss: Regardless of FOB point, the Contractor agrees to bear all risks of loss, injury, or destruction of goods and materials ordered herein which occur before delivery or Final Acceptance. Such loss, injury, or destruction shall not release the Contractor from any obligation hereunder.

8.6 Performance And Payment Bonds: The Contractor shall secure, pay for and maintain from a surety company acceptable to Kitsap Transit (and authorized to do business and is licensed in the State of Washington) bonds covering the faithful performance of the Contract and payment of all obligations under the Contract, each in the full amount of the Contract Sum, pursuant to Chapter 39.08 RCW. The bond(s) shall guarantee that the Contractor will perform and comply with all obligations, duties and conditions under the Contract, including, but not limited to, the duty and obligation to indemnify, defend, protect and hold Kitsap Transit harmless from and against all losses and claims related directly or indirectly from any failure of the Contractor (or any of its employees, Subcontractors, or lower tier Subcontractors to faithfully

perform and comply with all contract obligations, conditions and duties, or for any failure of the Contractor (or the subcontractors or lower tier subcontractors of the Contractor) to pay all laborers, mechanics, suppliers, lower tier subcontractors or any other person who provides supplies or provision for carrying out the Work.

Within seven (7) days after Kitsap Transit's issuance of the notice of intent to award the Contract, the Contractor shall deliver evidence of its bond ability to Kitsap Transit and within seven (7) days of entering into the Contract, the Contractor shall deliver the bonds to Kitsap Transit. Kitsap Transit may rescind the Contract and incur no liability to Contractor if the required bonds are not timely delivered to Kitsap Transit. Kitsap Transit also may withhold payment to the Contractor until such surety bonds are received. Evidence of bond ability shall include the Contract Sum and the percentage of sums that may need to be paid to the Contractor for mutually agreed increases of up to 20% of the Contract Sum.

If Kitsap Transit is damaged by the failure of the Contractor to maintain any of the bonds required by this Agreement or to so notify Kitsap Transit, the Contractor shall bear all costs attributable thereto. In addition to its rights set forth above, Kitsap Transit may withhold payment of any sum due Contractor pending receipt of the bonds or exercise any of its remedies under this Agreement. Failure to withhold payment shall not constitute a waiver of the Contractor's obligations to maintain the bonds required hereby.

ARTICLE 9 PAYMENT

9.1 Schedule Of Values. At least fourteen (14) days before the Contractor's first Application for Payment, the Contractor shall submit to Kitsap Transit, a Schedule of Values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as Kitsap Transit may require. At a minimum, the Work shall be itemized by Specification section or system, separate values for labor, materials and equipment shall be provided, and line items on the Schedule of Values shall be tied to the Contractor's Progress Schedule. Quantities shall be provided for each section or system of the Work. The Contractor shall itemize and prepare the Schedule of Values in a form containing the content and level of detail satisfactory to Kitsap Transit. This Schedule shall be used as a basis for reviewing the Contractor's Applications for Payment.

- 9.1.1. Payment applicable to the expenses of Contractor's bonds and/or Contractor's risk and shipbuilders risk insurance will be made only upon receipt of paid invoices from its surety and/or insurance carrier.
- 9.1.2. No payment will be made for shop drawings or submittals until they have been reviewed and accepted by Kitsap Transit.
- 9.1.3. The Schedule of Values shall also allocate at least three percent (3%) of the contract Sum as a separate line item for that portion of the Work between Substantial Completion and Final Completion, allocated internally among the Contractor and Subcontractors at the Contractor's discretion, which shall be released as follows: Three-quarters shall be allocated for punch list work, launch and completion of Sea Trials, operational training, inspections, receipt of Coast Guard certificates and delivery of maintenance data as defined in the Contract Documents; and one quarter shall be allocated for completion of approved record documents, warranties and bonds and all other documentation or items of the Work required for Final Completion and Final Payment. This line item shall be entitled "Final Documentation and Punch List Completion". This allocation will be earned and paid as a part of the Final Payment. This percentage is not the Retainage described in Section 9.4 of this Agreement held by Kitsap Transit, but rather requires the Contractor to recognize (i) that the Contractor will expend

significant costs in advancing the Work from Substantial Completion to Final Completion; and (ii) that this amount is not earned until Final Completion of the Work is accomplished. Kitsap Transit may release portions of this amount progressively as items are completed at its discretion.

9.2 Applications For Payment.

- 9.2.1 Total payment shall not exceed the Contract Amount unless authorized herein by a written Change Order. Excluding retainage, and providing an L&I approved "Statement of Intent to Pay Prevailing Wages" for the Contractor and every Subcontractor has been received by Kitsap Transit, payment shall be made within thirty (30) days after Kitsap Transit's acceptance and approval of a properly executed invoice for Work completed. Incorrect invoices will be subject to rejection or correction. Pre-payments are not permitted.
- 9.2.2 Progress Payments. Kitsap Transit shall make monthly progress payments for Work performed by the Contractor. Progress payments will be based upon Kitsap Transit Owner's Representative certification of percentage complete. A breakdown of the Contract Amount shall be provided in enough detail to facilitate continued evaluation of applications for payment and progress reports. Payments will be reduced by five percent (5%) for retainage and any requirements in 9.1(3); Contractor invoices will reflect the retainage and section 9.1(3) reduction as needed.
- 9.2.3 Draft Application. At the first scheduled weekly meeting of each month, the Contractor shall submit to Kitsap Transit a report on the current progress of the Work as compared to the Contractor's Progress Schedule and a draft, itemized application for payment for Work performed during the prior calendar month on a form supplied or approved by Kitsap Transit. Payment requests, including loaded CPM schedule, Buy America update, and weight estimates, for the preceding month shall be submitted by the Contractor to the Owner's Representative for review and certified approval prior to Kitsap Transit making any payment to the Contractor. All payment requests must be accompanied by an updated Contractor's Weight Estimate (BWE) conforming to the Ship Work Breakdown Structure (SWBS) system and a copy of the Critical Path Method schedule reflecting an update within the preceding (7) calendar days. Any subsequent changes shall be submitted at least twenty (20) days before the applicable request for payment using the agreed schedules. Upon request of a Subcontractor, the Owner's Representative will furnish, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Owner's Representative and Kitsap Transit on account of portions of the Work done by such Subcontractor. This shall not constitute a payment request. The Contractor and Kitsap Transit's Project Manager shall meet within the next seven (7) days and confer regarding the current progress of the Work and the amount of payment to which the Contractor is entitled; the Contracts Administrator or other designee may also attend. Kitsap Transit may request the Contractor to provide data substantiating the Contractor's right to payment as Kitsap Transit may require, such as copies of requisitions from Subcontractors of any tier, lien releases and certified payroll records, and reflecting retainage as provided elsewhere in the Contract Documents, documentation (including any as-built drawings completed as to any stage of the Work) and copies of the Daily Reports for the prior month. The

Contractor shall not be entitled to make a payment request, nor will any payment be due the Contractor, until such documentation is furnished.

- 9.2.4 **Payment Request.** After the Contractor and Kitsap Transit's designees have met and conferred regarding the updated draft application (9.2.3), and the Contractor has furnished all progress information required and all documentation requested by Kitsap Transit, the Contractor may submit a payment request following the meeting in the agreed-upon amount, in the form of a notarized, itemized Application for Payment for Work properly performed during the prior calendar month on a form supplied or approved by Kitsap Transit. The Contractor shall also submit a lien release on a form supplied or approved by Kitsap Transit from each Subcontractor for whose Work Kitsap Transit paid the Contractor for the prior month. The Application shall also state that prevailing wages have been paid in accordance with the pre-filed statements of intent to pay prevailing wages on file with Kitsap Transit and that all payments due Subcontractors of any tier from Kitsap Transit's payment the prior month have been made. THE SUBMISSION OF THIS APPLICATION CONSTITUTES A CERTIFICATION THAT THE WORK IS CURRENT ON THE CONTRACTOR'S PROGRESS SCHEDULE, unless otherwise noted on the application. Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay. A Payment Request shall not be valid unless it complies with the requirements of the Contract Documents, including the requirements of this Section; if not in compliance, Kitsap Transit may withhold progress payment until the Contractor fully complies with the Contract. The terms "Payment Request", "Applicable for Payment" and "Invoice" are synonymous if they conform to the provisions of this Article 9. After the Owner's Representative reviews and approves the Contractor's pay request, a Certificate for Payment will be issued to Kitsap Transit to make payment within thirty (30) days of approving the invoice.
- 9.2.5 **Contents And Submittals.** Each pay request must contain the following minimum information: 1) Contract Number; 2) Date of invoice; 3) Invoice number; 4) Quantity, unit measure, unit price and item description, as appropriate; 5) Total price for invoice; and 6) sales tax as a separate line item, if applicable. The Contractor must ensure that all paperwork associated with a particular invoice references the same identifying number. For example, Work Orders, receiving documents, delivery tickets, etc. and the final invoice must all bear a corresponding number that links the paperwork together. Failure to comply with this requirement may delay payment. Payment Requests shall be submitted to: Kitsap Transit, Accounts Payable, 60 Washington Avenue, Suite 200, Bremerton, Washington 98337 for all transactions made during a calendar month by the 5th day of the following month.
- 9.2.6 **Disputed Amounts.** If the Contractor believes it is entitled to payment for Work performed during the prior calendar month in addition to the agreed-upon amount, the Contractor may, within seven (7) days following the meeting described in Section 9.2.2 submit to Kitsap Transit, along with the approved payment request, a separate written payment request specifying the exact additional amount due, the category in the Schedule of Values in which the payment is claimed due, the specific work for which the additional amount is due, and why the additional payment is due and provide certified copies of all payroll records relating to the claimed additional amount due.

If a separate payment request concerning a disputed amount does not comply with the requirements of the Contract, Kitsap Transit will provide a written statement to the Contractor stating why the disputed amount is not owed and/or why the separate payment request does not comply with the requirements of the Contract. If the Contractor disputes this decision, the Contractor must file a claim within seven (7) days from the date of Kitsap Transit's transmittal of its decision and must adhere to the Dispute Resolution provisions of Article 11.

9.2.7 Payments To Subcontractors.

a. No payment request shall include amounts the Contractor does not intend to pay to a Subcontractor because of a dispute or other reason. If, after making a request for payment, but before paying a Subcontractor for its performance covered by the payment request, the Contractor discovers that part or all of the payment otherwise due to the Subcontractor is subject to withholding from the Subcontractor under the subcontract (such as for unsatisfactory performance or non-payment of sub-subcontractors), the Contractor may withhold the amount as allowed under the subcontract, but it shall give the Subcontractor and Kitsap Transit written notice of the remedial actions that must be taken as soon as practicable after determining the cause for the withholding, but before the due date for the subcontractor payment, and pay the Subcontractor within ten (10) working days after the subcontractor satisfactorily completes the remedial action identified in the notice.

b. The Contractor shall ensure that all Subcontractors and suppliers under this Contract are promptly paid to the fullest extent required by RCW 39.04.250, as may be amended. The Contractor is required to pay each Subcontractor performing Work under this prime Contract for satisfactory performance of that Work no later than ten (10) days after the Contractor's receipt of payment for that Work from Kitsap Transit. In addition, the Contractor is required to return any retainage payments to those Subcontractors within thirty (30) days after the Subcontractor's Work related to this Contract is satisfactorily completed and any liens have been secured. Any delay or postponement of payment from the above time frames may occur only for good cause following written approval of Kitsap Transit.

c. If payment disputes arise between the Contractor and Subcontractors, such disputes shall be resolved promptly through mediation or arbitration in accordance with the Mediation and Arbitration provisions of this Agreement or an alternate process mutually agreed by the Contractor and Subcontractor in order to prevent injury to Small Business Subcontractors. The Contractor shall specify in its subcontract agreements the dispute resolution method to be used. In addition, the Contractor will not be paid for Subcontractors' Work unless it can show that a prompt payment method for Subcontractors is in place. The Contractor shall be required to provide copies of the Subcontracts to Kitsap Transit showing inclusion of these provisions, and the required Federal provisions. Kitsap Transit may withhold the applicable sum due the Contractor and or a Subcontractor for non-compliance with this Section.

9.3 Miscellaneous.

9.3.1 Unless otherwise provided in the Contract Documents, payments shall be made on account of project specific materials and equipment delivered and suitably stored at the Site for subsequent incorporation in the Work. If approved in writing and in advance by Kitsap Transit, payment may similarly be made for materials and equipment suitably stored off the Site at a location agreed upon in writing. Payment for materials and equipment stored on or off the Site shall be conditioned upon compliance by the Contractor with procedures satisfactory to Kitsap Transit to establish Kitsap Transit's title to such materials and equipment or otherwise protect Kitsap Transit's interest, and shall include the costs of applicable insurance, storage and transportation to the Site for such materials and equipment stored off the Site.

9.3.2 The Contractor warrants that title to all Work covered by an Application for Payment will pass to Kitsap Transit no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all work for which Certificates for Payment have been previously issued and payments received from Kitsap Transit shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

9.4 Retainage.

9.4.1 A sum equal to five percent (5%) of each approved Application for Payment shall be retained by Kitsap Transit. Not later than the date Contractor delivers its first Draft Pay Application, Contractor may transmit, in writing, its exercise of one of the following retainage options:

a. Retained percentages will be retained in a fund by Kitsap Transit not subject to release until forty-five (45) days following Final Acceptance of the Work; or

b. Deposited by Kitsap Transit in an interest-bearing account in a bank, mutual savings bank or savings and loan association and not subject to release until forty-five (45) days following Final Acceptance of the Work; or

c. Placed in escrow with a bank or trust company and not subject to release until forty-five (45) days following the Final Acceptance of the Work.

d. If the Contractor provides a bond in place of retainage, it shall be in an amount equal to 5% of the Contract Sum as the Contract Sum may be increased by executed change orders. The minimum requirements for the bond are that it must be on a form acceptable to Kitsap Transit issued by a surety approved by Kitsap Transit.

The forty-five (45) day period described in the preceding paragraphs shall not commence to run until all the requirements of Sections 9.9.1 and 9.9.4 have been satisfied.

9.4.2 The Contractor or a Subcontractor may withhold payment of not more than five percent (5%) as retainage from the monies earned by any Subcontractor or Sub-Subcontractor, provided that the Contractor as to its Subcontractors and

Subcontractors as to Sub-Subcontractors pays interest to the Subcontractor at the same interest rate it receives from its reserved funds. If requested by Kitsap Transit, the Contractor shall specify the amount of retainage and interest due a Subcontractor.

9.5 Certificates For Payment.

- 9.5.1 Kitsap Transit's Project Manager will, within seven (7) days after receipt of the Contractor's Application for Payment, either issue to Kitsap Transit's Contract Administrator, a Certificate for Payment, with a copy to the Contractor for such amount as the Project Manager determines is properly due, or notify the Contractor and Kitsap Transit's Contracts Administer in writing, of Kitsap Transit's Project Manager's reasons for withholding certification in whole or in part as provided in Section 9.6.1.
- 9.5.2 The issuance of a Certificate for Payment will constitute a representation by the Project Manager to Kitsap Transit, to the best of the Project Manager's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the work for conformance with the Contract documents upon Substantial and Final Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Project Manager. The issuance of a Certificate for Payment will not be a representation that the Project Manager has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work; (2) reviewed construction means, methods, techniques, sequences or procedures; (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other Documentation requested by Kitsap Transit to substantiate the Contractor's right to payment; or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

9.6 Decisions To Withhold Certification.

- 9.6.1 Kitsap Transit's Project Manager may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect Kitsap Transit from the Contractor's failure to adhere to the Contract Documents and/or because of:
- (1) Defective Work not remedied;
 - (2) Third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to Kitsap Transit is provided by the Contractor;
 - (3) Failure of the Contractor to promptly make payments due Subcontractors;
 - (4) Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
 - (5) Damage to Kitsap Transit or a separate contractor;

- (6) Reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual damages for the anticipated delay;
- (7) Unsatisfactory prosecution of the Work by the Contractor or its Subcontractors in conformance with the Contract Documents;
- (8) Delay by the Contractor and/or its Subcontractor(s) of any tier, or failure to comply with the Contractors' Construction Schedule requirements;
- (9) Failure to submit affidavits pertaining to wages paid as required by applicable law;
- (10) Failure to submit a properly updated Construction Progress Schedule;
- (11) Failure to comply with a requirement of the Contract Documents in which Kitsap Transit has reserved the right to withhold payment;
- (12) Failure to properly prepare, maintain and provide as-builts to Kitsap Transit;
- (13) Failure to properly submit daily construction reports; or
- (14) Failure to properly submit certified payrolls.

9.6.2 When the above reasons for withholding certification are removed, certification will be made for any amounts previously withheld.

9.6.3 Pursuant to Chapter 39.12 RCW, "Prevailing Wages on Public Works", the Contractor will not receive any payment until the Contractor and all Subcontractors of any tier for whom payment is sought have submitted required and approved "Statements of Intent to Pay Prevailing Wage" to Kitsap Transit. The statement must have the approval of the Industrial Statistician of the Department of Labor and Industries before it is submitted to Kitsap Transit. The statement must include the Contractor's registration number, the number of workers in each trade classification and the applicable wage rate for each trade listed. The Contractor agrees to provide each Subcontractor of any tier with a schedule of applicable prevailing wage rates. The Contractor and the respective Subcontractors of any tier shall pay all fees required by the Department of Labor and Industries, including fees for the approval of the "Statement of Intent to Pay Prevailing Wages". Approved copies of the "Statement of Intent to Pay Prevailing Wages" must be posted where workers can easily read them.

9.6.4 If the Project Manager withholds certification for payment under Section 9.6.1, Kitsap Transit may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or for materials and or equipment delivered in conformance with the Contract. If Kitsap Transit makes payments by joint check that fact shall be reflected on the next Certificate for Payment.

9.7 Progress Payments.

- 9.7.1 After Kitsap Transit's Project Manager has issued a Certificate for Payment, and it has been approved by Kitsap Transit's Contracts Administrator, Kitsap Transit shall make a progress payment within thirty (30) days.
- 9.7.2 The Contractor shall pay each Subcontractor no later than ten (10) days after receipt of payment from Kitsap Transit out of the amount paid to the Contractor on account of each Subcontractor's portion of the Work, the amount to which each respective Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall require each Subcontractor to make payments to Sub-subcontractors in a similar manner. If the Contractor does not receive payment for any cause which is not the fault of a particular Subcontractor, but does receive payment for materials supplied or work performed by that Subcontractor, the Contractor shall pay that Subcontractor in accordance with its subcontract for its satisfactorily completed Work less the retained percentage.
- 9.7.3 The Project Manager will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Project Manager and Kitsap Transit on account of portions of the Work done by such Subcontractor.
- 9.7.4 Kitsap Transit has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by Kitsap Transit to the Contractor for subcontracted Work and Kitsap Transit shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Kitsap Transit shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.
- 9.7.5 Contractor payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.7.2, 9.7.3 and 9.7.4.
- 9.7.6 A Certificate for Payment, a progress payment, or partial use of the Work by Kitsap Transit shall not constitute acceptance of the Work.

9.8 Kitsap Transit's Failure To Pay Without Cause. If the Project Manager improperly fails to issue a Certificate for Payment, through no fault of the Contractor, within seven (7) days after receipt of the Contractor's timely and complete Application for Payment pursuant to Section 9.2 or if Kitsap Transit does not pay the Contractor the amount due and owing to the Contractor, within thirty (30) days after the date Kitsap Transit's Project Manager has issued a Certificate For Payment, the Contractor may, upon seven (7) additional days' after written notice to Kitsap Transit, stop the Work until payment of the amount owing has been received. The Contractor shall be entitled to seek an adjustment of the Contract Time and the Contract Sum for any reasonable costs of shut-down, delay and start-up that the Contractor can document and substantiate for Kitsap Transit's failure to make any such payment.

9.9 Final Acceptance And Payment.

- 9.9.1 Neither final payment nor any retained percentage shall become due until after Kitsap Transit has formally accepted the Project ("Final Acceptance"). For the purposes of [RCW 60.28.011](#) "completion of all contract work" shall mean Final Acceptance as defined herein. To achieve Final Acceptance, Kitsap Transit's Project Manager and Kitsap Transit's Contracts Administrator must have

approved and issued a Final Certificate for Payment. The Final Completion requirements of Section 6.14, including delivery of the Vessels, must have been satisfied, and the Contractor must have submitted to Kitsap Transit the following:

(1) An affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which Kitsap Transit might be responsible (less amounts withheld by Kitsap Transit) have been paid or otherwise satisfied.

(2) A certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least thirty (30) days' prior written notice has been given to Kitsap Transit.

(3) A written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents.

(4) Consent of any surety to final payment.

(5) Other data establishing payment or satisfaction of or protection against obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by Kitsap Transit. If a Subcontractor of any tier refuses to furnish a release or waiver required by Kitsap Transit, Kitsap Transit may (a) retain in the fund, account or escrow funds in such amount as to defray the cost of foreclosing the liens of such claims and to pay attorney fees, the total of which shall be no less than 150% of the claimed amount; or (b) accept a bond from the Contractor, satisfactory to Kitsap Transit, to indemnify Kitsap Transit against such lien. If any such lien remains unsatisfied after all payments from the retainage are made, the Contractor shall refund to Kitsap Transit all monies that Kitsap Transit may be compelled to pay in discharging such lien, including all costs and reasonable attorney fees.

(6) Pursuant to RCW 39.12.040, an "Affidavit of Wages Paid" from the Contractor and from each Subcontractor of any tier certified by the Industrial Statistician of the Washington State Department of Labor and Industries, with the fees paid by the Contractor or Subcontractor.

(7) Any certifications or documents that may be required or requested by the Federal Transit Administration.

(8) A letter from Kitsap Transit's Project Manager indicating that the Work is complete and recommending Final Acceptance of the Project by Kitsap Transit.

(9) All warranties, guarantees, training, manuals, operation instructions, certificates, spare parts, maintenance manuals and stock, specified excess material, as-built drawings and other documents, training or items required by the Contract Documents or local governmental entities.

(10) Payment does not in any way relieve the Contractor from its responsibility for the Work or to repair, replace, or otherwise make good defective Work, materials or equipment. Likewise, the making of any payment does not

constitute a waiver of Kitsap Transit's right to reject defective or non-conforming Work, materials, or equipment, even though the same is covered by the payment, nor is it a waiver of any other rights of Kitsap Transit. Payments due and unpaid in accordance with the Contract Documents shall bear interest as specified in RCW 39.76.

(11) In the event a claim is filed against the retainage, Contractor shall be paid any portion of the retainage that is less than the amount sufficient to pay the claim and potential legal costs. If an inadequate amount of money remains in the retainage to cover all claims due to be paid, the protections provided by the Payment Bond become applicable, excluding taxes.

9.9.2 Initial Payment. If, after Substantial Completion of the Work, Final Completion is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting Final Completion, and Kitsap Transit's Project Manager so confirms, Kitsap Transit, upon application by the Contractor and without terminating the Contract, may make payment of the balance due for that portion of the Work fully completed and accepted.

9.9.3 Final Payment Excluding Retainage. All sums due the Contractor, excluding however, Retainage held by Kitsap Transit, shall be paid to the Contractor once all the requirements set forth in Section 9.9.1 have been satisfied.

9.9.4 Release Of Retainage. The retainage will be held and applied by Kitsap Transit as a trust fund in a manner required by Chapter 60.28 RCW. Release of the retainage will be processed in ordinary course of business upon the expiration of forty-five (45) days following Final Acceptance of the Work by Kitsap Transit and full compliance with and satisfaction of all the requirements of Section 9.9.1, provided, that no notice of lien shall have been given as provided in Chapter 60.28 RCW, that no claims have been brought to the attention of Kitsap Transit and that Kitsap Transit has no claims under this Contract. In addition, the following items must also be obtained prior to release of retainage: pursuant to Chapter 60.28 RCW, a certificate from the Department of Revenue; pursuant to Chapter 50.24 RCW, a certificate from the Department of Employment Security; and any information required by the Department of Labor and Industries and Federal Transit Authority must have been provided.

9.9.5 Waiver Of Claims. The making of Final Payment (other than the release of Retainage) shall constitute a waiver of Claims by Kitsap Transit, except those arising from:

(1) Liens, statutory retainage, Claims, security interests or encumbrances arising out of the Contract and unsettled;

(2) Failure of the work to comply with the requirements of the Contract Documents; or

(3) The terms of the Warranties contained within the Contract Documents.

Receipt of Retainage and acceptance of Final Payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of all claims by that payee except those previously made in writing and identified by that payee as unsettled and attached to the Contractor's final Application for Payment.

ARTICLE 10 DELAYS AND TIME EXTENSIONS

10.1 Force Majeure Definition: The term “Force Majeure” means an occurrence or event that is beyond the control of the party affected and could not have been avoided by exercising reasonable diligence. A Force Majeure event shall include acts of nature, war, riots, strikes, fire, floods, epidemics, earthquakes, or other similar occurrences. Neither party shall be liable to the other or deemed in default under this Contract if and to the extent that such party’s performance of the Contract is prevented by reason of a Force Majeure event.

10.2 Force Majeure Event Notification: If either party is delayed by a Force Majeure event, said party shall provide written notification to the other within forty-eight (48) hours. The notification shall provide evidence of the Force Majeure event to the satisfaction of the other party. Such delay shall cease when the Force Majeure event ceases to the point performance can resume. The Contract Time may be extended through the change order process for a period of time equal to the time that the affected Party was unable to perform its obligations in accordance with the Contract.

10.3 Termination For A Force Majeure Event: Kitsap Transit reserves the right to terminate the Contract and/or purchase of materials, equipment or services from the best available source during the time of a Force Majeure event, unique only to the Contractor, which has delayed performance for more than thirty (30) days and the Contractor shall have no recourse against Kitsap Transit, except for unpaid Contract Sums earned prior to the onset of the Force Majeure event.

10.4 Early Completion Incentives And Late Completion Damages: Contractor acknowledges that completion of the Vessels before the Final Completion and Acceptance date (hereafter “Final Completion Date”) set forth in Section 3.8 of the Contract is of the utmost importance to Owner. Contractor also acknowledges that the Final Completion Date is a reasonable time period, subject to adjustments of time that may be set forth in any change orders or written documents hereafter executed by the Parties or established through the Dispute Resolution provisions of the Contract.

10.4.1 *Early Completion Incentive.* So long as contractor adheres to all the terms of the Contract, if Contractor achieves Final Completion and Acceptance more than fourteen (14) days before the Final Completion Date, Owner will pay Contractor all documented costs for additional or overtime labor Contractor hired to achieve Early Completion and any documented extra costs Contractor may have paid suppliers and/or subcontractors to induce them to complete their deliveries or work earlier than the original schedule specified in their supply and subcontracts, to enable Contractor to achieve Early Completion.

10.4.2 For purposes of this subsection, the term “Early Completion”, means the achievement of Final Completion and Acceptance more than fourteen (14) days before the Final Completion Date.

10.4.3 Documented Costs will require submittal of certified payrolls, material supplier data and other documents Owner may request.

10.4.4 *Late Completion Damage Offset And Recovery.* In the event Contractor fails to achieve Final Completion and Acceptance within fourteen (14) days after the Final Completion Date, notwithstanding any other provision of the Contract

seemingly to the contrary, Owner shall be entitled to offset and recover from Contractor all costs, fees, damages and losses including direct, indirect and consequential damages Owner may incur or suffer as a result of Contractor's failure to achieve Final Completion and Acceptance within 14 days of the Final Completion Date.

ARTICLE 11 CLAIMS AND DISPUTE RESOLUTION

11.1 Claims, Disputes, Remedies And Resolution.

11.1.1 Definition. A Claim is a demand or assertion by one of the Parties seeking, as a matter of right, adjustment or interpretation of the Contract terms, payment of money, extension of time, or other relief with respect to the terms of the Contract Documents and other disputes or matters in question between the Parties arising out of or relating to the Contract Documents. The responsibility to substantiate Claims shall rest with the Party making the claim. Claims must be initiated in writing and include the information and substantiation required by the Contract Documents. Neither a Request for Information, nor a Change Order Directive, nor a Change Order, nor a reservation of rights, nor minutes of a meeting, nor a Daily Report, nor any log entry, nor Kitsap Transit's request for or the Contractor's response to a Change Order Directive or other proposal request, nor a notice of a potential or future Claim shall constitute a Claim.

11.1.2 Continuing Contract Performance. Pending final resolution of a Claim, including the dispute resolution process and, except as otherwise set forth in this Agreement or agreed by the Parties in writing, the Contractor shall proceed diligently with performance of the Contract and maintain the Contractor's Progress Schedule, and Kitsap Transit shall continue to make approved payments in accordance with the Contract Documents. Notwithstanding the foregoing, if the dispute for which a claim has been filed arises from any of the following circumstances, the Contractor shall suspend all or any portion of the Work as and if directed by Kitsap Transit:

- (1) Kitsap Transit's Suspension or Termination of the Contract; or
- (2) A default declared by Kitsap Transit arising from the Contractor's breach any of the terms of the Contract which has not been cured within the applicable cure period set forth in this Agreement.

If the Claim arises from any unpaid payments the Contractor claims due which Kitsap denies or disputes, Kitsap Transit may withhold payment until the dispute is resolved.

11.1.3 Claims For Additional Costs. If the Contractor wishes to make a Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work, and a written Claim must be made in accordance with the provisions of Section 11.2.3, or it will be waived. If the Contractor believes additional costs are involved for reasons including, but not limited to, (1) a written interpretation from Kitsap Transit's Project Manager; (2) an order by Kitsap Transit to stop the Work where the Contractor was not at fault; (3) a written order for a change in the Work issued by Kitsap Transit's Project Manager; (4) failure of payment by Kitsap Transit; (5) termination of the Contract by Kitsap Transit; (6) Kitsap Transit's suspension; or (7) other reasonable

grounds, a Claim shall be submitted to Kitsap Transit in accordance with this Article 11. The Contractor shall not be entitled to an increase in the Contract Sum or Contract Time arising out of an error or conflict in or among the Contract Documents where the Contractor failed to adequately to review the Contract Documents or failed to report the error or conflict to Kitsap Transit in a timely manner consistent with the requirements of the Contract Documents. Prior notice is not required for Claims relating to an emergency endangering life or property.

11.1.4 Claims For Additional Time. If the Contractor wishes to make a claim for an increase in the Contract Time, written notice in accordance with the provisions of Section 11.2.3 shall be given or it will be waived. The Contractor's Claim shall include an estimate of any costs and of probable effect of delay on the progress of the Work. In the case of a continuing delay, only one Claim is necessary. Any adjustment in the Contract Time arising from a Change Order directive or a Change Order shall be limited to the change in the actual critical path of the Contractor's Construction Progress Schedule directly caused thereby. If the delay was not caused by Kitsap Transit, the Contractor, a Subcontractor of any tier, or the Architect, or anyone acting on behalf of any of them, the Contractor is entitled only to an increase in the Contract Time in accordance with the Contract Documents, but not a change in the Contract Sum. If the delay was caused by the Contractor, a Subcontractor of any tier, or anyone acting on behalf of any of them, the Contractor is not entitled to an increase in the Contract Time or in the Contract Sum.

11.1.5 Claims For Adverse Weather. If adverse weather conditions are the basis for a claim for additional time, such Claim shall be documented by data substantiating the weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction. Neither the Contract Time nor the Contract Sum will be adjusted for normal inclement weather. The Contractor shall be entitled to a change in the Contract Time only (but not a change in the Contract Sum) if the Contractor can substantiate to the reasonable satisfaction of Kitsap Transit that there was materially greater than normal inclement weather for the locale of the Project Site considering the full term of the Contract Time.

11.2 Resolution Of Claims And Disputes. Except for Claims which have been waived under the terms of the Contract Documents, all Claims and Disputes shall be decided exclusively by the following alternative dispute resolution procedures unless the Parties mutually agree in writing otherwise.

11.2.1 Time Sensitive Issues. In the event either party believes a critical problem exists which should not or cannot be resolved within the regular timetable of the dispute resolution procedures in this Agreement, a senior management representative of either party may contact their counterpart of the other Party to address and seek to resolve immediately any critical problem, without giving prior notice.

11.2.2 Senior Management Negotiations. When a dispute has arisen which the Parties' Project Managers are unable to resolve, either Party may give the other Party written notice of the dispute within five (5) days from the date of an impasse or such other additional time as the Parties may mutually agree. In the event such notice is given, the Parties shall attempt to resolve the dispute promptly by negotiations between senior management representatives who have authority to

settle the controversy and who are at a higher level of management than the persons with direct responsibility for supervising the Project matter. Within seven (7) days after delivery of the notice, the receiving Party shall submit to the other a written response. Thereafter, the senior management representatives shall promptly confer in person or by telephone to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. Any Contract durations for dispute resolution activities will be extended by the number of days the Parties utilize this senior management resolution step. If the dispute has not been resolved by negotiation between the representatives within seven (7) days of the notice, the parties must utilize the dispute resolution procedures set forth below.

- 11.2.3 Claim Notices And Submissions. To initiate a Claim, the Contractor shall submit a written Claim to Kitsap Transit within the time periods allowed for the filing, transmittal and/or initiation of a claim, protest or resolution of a dispute as set forth in various Sections of this Agreement. If no time period has been specified for the initiation of a claim, protest or dispute, a written Claim must be transmitted to Kitsap Transit within twenty-one (21) days from the occurrence of an event giving rise to any such matter. The Contractor's failure to submit any such Claim within the time periods set forth herein shall constitute a waiver of any such Claim.

All Claims shall include a clear description of the claim and any proposed change in the Contract Sum (showing all components and calculations) and/or Contract Time (showing cause and analysis of the resultant delay in the critical path and other information required by Kitsap Transit) and shall provide all relevant data fully supporting the Claim, including, without limitation, a complete explanation as to why the relief sought is not within the scope of the Contract Documents. The Contractor may delay submitting documentation by an additional fourteen (14) days if it notifies Kitsap Transit in its Claim that substantial data must be assembled. Failure to properly submit the Claim shall constitute waiver of the Claim. The Claim shall be deemed to include all changes, direct and indirect, in cost and in time to which the Contractor (and Subcontractors of any tier) is entitled and may not contain reservations of rights without Kitsap Transit's written approval; any such unapproved reservations of rights shall be without effect. Any Claim of a Subcontractor of any tier may be brought only through and after review by the Contractor. For the purposes of calculating such time periods, an "event giving rise to a Claim" is not a Request for Information, but rather is a response that the Contractor believes would change the Contract Sum and/or Contract Time. The fact that Kitsap Transit and the Contractor may consider, discuss or negotiate any untimely or waived Claim shall in no way be deemed to constitute a waiver of any notice or other provisions of the Contract Documents.

- 11.2.4 Protest And Appeal Procedures. Kitsap Transit's Protest and Appeal Procedures shall be used for the resolution of disputes that are not resolved by the senior management negotiations, unless, Kitsap Transit, within seven (7) days from its receipt of a Claim elects to invoke Mediation and Binding Arbitration in accordance with the provisions set forth in Sections 11.3 and 11.4 below or both Parties agree to submit the Claim or Dispute to litigation or another dispute resolution process.

11.3 Mediation: In the event either Party elects to resolve any claim or other dispute by Mediation, the matter shall be submitted to non-binding mediation. If, within fourteen (14) days

from a demand for mediation, the Parties have not agreed upon the mediation process, who shall serve as the mediator, the location of the mediation and/or the time frame the Parties are willing to discuss the disputed issue(s), the Presiding Judge of the Kitsap County Superior Court shall appoint the mediator who shall establish the schedule, location and procedures to which the Parties must adhere.

Each Party shall bring to the mediation session, unless excused from doing so by the mediator, a representative from its side with full settlement authority. In addition, each Party shall bring counsel and such other persons as needed to contribute to a resolution of the dispute. The mediation process is to be considered settlement negotiations for the purpose of all state and federal rules protecting disclosures made during such conference from later discovery or use in evidence; provided, any Settlement Agreement executed by the Parties shall not be considered confidential and may be disclosed. Each Party shall pay its own costs for mediation and share equally in the cost of the mediator. The venue for the mediation shall be in Bremerton, Washington, unless the Parties mutually agree in writing to a different location. Each Party shall bear its own costs and attorney fees incurred during the mediation process.

11.4 Binding Arbitration: If the Parties fail to reach a settlement during the mediation process, the dispute shall be submitted to binding arbitration in Bremerton, Washington, pursuant to Chapter 7.04.A RCW. The Arbitrator shall have the authority to determine the substantially prevailing party in such proceeding and may include in the Arbitration Decision, an award of costs and attorney fees in favor of the substantially prevailing Party including the prevailing Party's share of the Arbitrator's Fee, and attorney fees incurred in the Mediation and Arbitration process.

11.5 Judicial Appeals.

11.5.1 If the dispute is resolved under Kitsap Transit's Protest and Appeal Procedures, any decision rendered thereunder shall become final and binding on either Party unless either Party initiates a judicial appeal within fifteen (15) days from the date of any such decision. Such appeal must be filed in the Kitsap County Superior Court. Such appeal shall be governed by the standards governing appeals from Administrative Decisions.

11.5.2 In the event of an appeal of the Arbitrator's decision, the substantially prevailing Party on appeal shall be entitled to an award of its costs and reasonable attorney fees.

ARTICLE 12 RIGHTS AND REMEDIES

12.1 Of The Contractor. All Claims of the Contractor are governed by the Dispute Resolution provisions of Article 11. Using those procedures, the Contractor may seek the following remedies:

12.1.1. The stop work rights described in Section 9.8 for Kitsap Transit's failure to make payments without cause;

12.1.2. All other remedies expressly provided by applicable law and/or as provided in this Agreement, except as limited by Section 13.5.6 below;

12.1.3. The termination rights described in Section 13.1.

12.2 Of Kitsap Transit.

12.2.1 In General. In the event of the Contractor's breach of any of the terms and conditions of the Contract Documents which the Contractor fails to cure within seven (7) days of written notice from Kitsap Transit, Kitsap Transit shall have the right to pursue any remedy available to it under applicable federal law, the laws of the State of Washington and/or as may be set forth elsewhere in the Contract Documents. Without limiting the generality of the foregoing, Kitsap Transit may:

(1) Suspend or terminate the Contract in accordance with the provisions of Article 13.

(2) Seek and recover damages, direct and indirect proximately caused by Contractor's negligence or breach, including Contractor's failure to complete and deliver the Vessel within the Contract Time.

(3) Exercise any available "cover" remedy and perform or cause others to take over and complete all or portions of the Work directed by Kitsap Transit in accordance with the provisions of Sections 13.2 and 13.5.

12.2.2 In the event a breach cannot be cured within the seven (7) day cure period for reasons beyond the Contractor's control, the cure period may be extended for the period of time necessary to cure such default, but in no event longer than thirty (30) days and all costs and fees incurred by Kitsap Transit as a result thereof shall be offset against any sums that may be due the Contractor. If the offset is insufficient to cover such costs and fees, such deficiency shall be paid by the Contractor.

ARTICLE 13 SUSPENSION AND TERMINATION

13.1 Termination By The Contractor.

13.1.1 Except as provided by RCW 60.28.080, the Contractor may terminate the Contract if the Work is stopped for a period of ninety (90) consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the work under direct or indirect contract with the Contractor, for any of the following reasons:

(1) Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;

(2) An act of government, such as a declaration of national emergency that requires all Work to be stopped; or

(3) Because Kitsap Transit has failed to make a payment without cause for a Payment Request approved by Kitsap Transit within 45 days from the date Kitsap Transit approved the Payment Request.

13.1.2 If one of the reasons described in Section 13.1.1 exists, the Contractor may, upon fourteen (14) days' written notice to Kitsap Transit (during which period Kitsap Transit has the opportunity to cure or contest the termination by invoking the Dispute Resolution process set forth in Article 11), terminate the Contract and recover from Kitsap Transit payment for Work properly executed and for direct

costs incurred by reason of such termination. The total recovery of the Contractor shall not exceed the unpaid balance of the Contract Sum.

13.2 Termination By Kitsap Transit For Cause.

13.2.1 Kitsap Transit may, after giving written notice to the Contractor and the opportunity to cure within the time periods set forth in Section 12.2, terminate (without prejudice to any other right or remedy of Kitsap Transit) the whole or any portion of the Work or the Contract for cause if the Contractor:

- (1) Refuses or fails to supply enough properly skilled workers or proper materials;
- (2) Fails to make prompt payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- (3) Materially disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority having jurisdiction; or
- (4) Fails to prosecute the Work or any portion thereof with sufficient diligence to ensure the Substantial Completion of the Work within the Contract Time; or
- (5) Is adjudged bankrupt, makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of its insolvency; or
- (6) Otherwise is guilty of a material or substantial breach of or default under any of the provisions of the Contract Documents as determined by Kitsap Transit.

13.2.2 If Kitsap Transit terminates the Contract in whole or part, Kitsap Transit may, without prejudice to any other rights or remedies available to Kitsap Transit and subject to any prior rights of the surety:

- (1) Take possession of the Vessel and all materials, equipment, components, tools and construction equipment and machinery thereon owned by the Contractor;
- (2) Seek to procure and accept assignment of subcontracts;
- (3) Finish the work by whatever reasonable method Kitsap Transit may deem expedient; and or
- (4) Undertake and or direct the completion of any or all of the Work necessary to complete the Contract.

13.2.3 If Kitsap Transit elects to take possession of the Vessel and Property described in subparagraph 13.2.2 (1), the Contractor shall cooperate with and not impair, impede, stop, prevent or interfere with Kitsap Transit's right to enter real property, building, structure, dock, pier or float where the Vessel and related Components may be located. The Contractor consents to such entry and such entry shall not be deemed to constitute trespass.

- 13.2.4 When Kitsap Transit terminates the Contract for any of the reasons stated in Section 13.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.
- 13.2.5 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for all costs, fees, expenses and other damages incurred by Kitsap Transit, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to Kitsap Transit. The amount to be paid to the Contractor or Kitsap Transit, as the case may be, shall survive termination of the Contract.
- 13.2.6 If Kitsap Transit terminates a portion of the Work, the Contractor shall continue the performance of the remainder of the Work in accordance with the Contract Documents to the extent not terminated.
- 13.2.7 If, after the Contractor has been terminated pursuant to this Section 13.2 or otherwise for cause, it is determined that none of the circumstances set forth in Section 13.2.1 exists, then such termination shall be considered a termination for convenience pursuant to Section 13.3.

13.3 Suspension By Kitsap Transit For Convenience.

- 13.3.1 Kitsap Transit may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part, for such period of time as Kitsap Transit may determine.
- 13.3.2 The Contract Sum and Contract Time may be adjusted for changes in the cost and time caused by suspension, delay or interruption as described in Section 13.3.1. Adjustment of the Contract Sum shall be consistent with the terms of the Contract Documents. No adjustment shall be made to the extent:
- (1) That performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
 - (2) That an equitable adjustment is made or denied under another provision of the Contract.

13.4 Termination By Kitsap Transit For Convenience.

- 13.4.1 Kitsap Transit may, at any time, terminate (without prejudice to any right or remedy of Kitsap Transit) the whole or any portion of the Contract for Kitsap Transit's convenience and without cause.
- 13.4.2 Upon receipt of written notice from Kitsap Transit of such termination for Kitsap Transit's convenience, the Contractor shall
- (1) Cease operations as directed by Kitsap Transit in the notice;
 - (2) Take actions necessary, or that Kitsap Transit may direct, for the protection and preservation of the Work; and
 - (3) Except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

13.4.3 In the Case of Kitsap Transit's termination for convenience, the Contractor shall be entitled to receive payment consistent with the Contract Documents for Work properly executed, and direct costs necessarily incurred by reason of such termination (such as the cost of settling and paying claims arising out of the termination of Work under subcontracts or orders). The total sum to be paid to the Contractor under this Section 13.4.3 shall not exceed the Contract Sum as reduced by the amount of payments otherwise made by the larger of (1) the actual value; or (2) the scheduled value of Work not terminated, and as otherwise permitted by this Contract. The amounts payable to the Contractor shall exclude the fair value of property which is destroyed, lost, stolen or damaged so as to become undeliverable to Kitsap Transit. If the Contractor has any property in its possession belonging to Kitsap Transit, the Contractor will account for the same, and dispose of it in the manner Kitsap Transit directs.

13.5 Effects Of Termination By Kitsap Transit.

13.5.1 Unless Kitsap Transit directs otherwise, after receipt of a Notice of Termination from Kitsap Transit pursuant to Section 13.2 or 13.4, the Contractor shall promptly:

- (1) Stop Work under the Contract on the date and as specified in the Notice of Termination;
- (2) Place no further orders or subcontracts for materials, equipment, services or facilities, except as may be necessary for completion of any portion of the Work that is not terminated;
- (3) Procure cancellation of all orders and subcontracts directed by Kitsap upon terms acceptable to Kitsap Transit, to the extent that they relate to the performance of Work terminated;
- (4) Assign to Kitsap Transit all of the right, title and interest of the Contractor under all orders and subcontracts, as directed by Kitsap Transit, in which case Kitsap Transit shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
- (5) With Kitsap Transit's approval, settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts not assigned to Kitsap Transit;
- (6) Transfer title to Kitsap Transit or its assigns and deliver to any entity or location designated by Kitsap Transit the fabricated or unfabricated parts, work in process, partially completed supplies and equipment, materials, parts, tools, dies, jigs and other fixtures, completed Work, supplies and other material produced as part of, or acquired in connection with the performance of, the Work terminated and the completed or partially completed plans, drawings information and other property related to the Work.
- (7) Take such action as may be necessary or as directed by Kitsap Transit to preserve and protect the Work and property related to the Project and Contract in the possession of the Contractor in which Kitsap Transit has an interest; and

(8) Continue performance only to the extent not terminated.

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

(1) All unliquidated advances or other prior payments on account made to the Contractor applicable to the terminated portion of the Contract;

(2) Any claim Kitsap Transit may have against the Contractor;

(3) An amount necessary to protect Kitsap Transit against outstanding or potential liens or claims;

(4) The agreed price for or the proceeds of sale of any materials, suppliers or other things acquired by the Contractor or sold, and not recovered by or credited to Kitsap Transit.

13.5.3 If (and only if) the termination pursuant to Section 13.4 is partial, the Contractor may file a Claim for an equitable adjustment of the price or prices specified in the Contract relating to the continued portion of the Contract. Any claim by the Contractor for an equitable adjustment under this Section must be asserted within ten (10) days from the effective date of the partial Termination.

13.5.4 The Contractor shall refund to Kitsap Transit any amounts paid by Kitsap Transit to the Contractor in excess of costs reimbursable under the Contract documents.

13.5.5 The Contractor shall, from the effective Date of Termination until the expiration of three (3) years after final settlement under this Contract, preserve and make available to Kitsap Transit, at all reasonable times at the office of the Contractor, and without charge to Kitsap Transit, all books, records, documents, photographs and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the terminated work. Kitsap Transit may have costs reimbursable under this Article 13 audited and certified by independent certified public accountants selected by Kitsap Transit, who shall have full access to all the books and records of the Contractor.

13.5.6 The relief from termination by Kitsap Transit specifically provided in Article 13 shall be the Contractor's sole entitlement in the event of Kitsap Transit's termination of the Contract.

14. Miscellaneous Provisions.

14.1 Governing Law, Venue And Attorney Fees. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. In the event any proceeding or action is instituted on account of or arising from the Contract Documents, venue and jurisdiction of any such action shall lie exclusively in Kitsap County, Washington. The substantially prevailing party in any proceeding or action, including mediation, arbitration and/or judicial proceedings shall be entitled to the recovery of its costs, expenses, witness fees and reasonable attorney fees against the least prevailing party.

14.2 Construction. This Agreement and each of its terms and provisions and the language in all parts of this Agreement will, in all cases, be construed according to its fair meaning and not strictly for or against either Party.

14.3 Additional Acts. Each Party to this Agreement shall perform any and all acts, and execute and deliver any and all documents, as may be necessary and proper under the circumstances in order to accomplish the intent and purpose of this Agreement and to carry out its provisions and the obligations of each Party hereunder.

14.4 Time Of The Essence. Time is of the essence of this Agreement and of Contractor's performance and completion of the work within the Contract Time.

14.5 Counterparts And Signatures. This Agreement may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all Parties to the counterparts had signed the same instrument. If permitted by both Parties, all documents and notices incident to this transaction may be transmitted and delivered by facsimile or electronic transmission to addresses provided by each other and any signature on any such document so transmitted shall have the same effect as an original signature.

14.6 Captions. The captions of this Agreement are for convenience and reference only and in no way define, limit or describe the scope or intent of this Agreement.

14.7 Assignment. Contractor may not assign its rights under this Agreement or delegate its duties under this Agreement without the prior written consent of Kitsap Transit and any purported assignment made without procuring such consent shall be void and of no further effect.

14.8 Binding Effect. This Agreement shall inure to the benefit of and be binding on the Parties' respective successors and permitted assigns.

14.9 Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of the remaining provisions.

14.10 Waiver. Waiver by any Party of strict performance of any provision of this Agreement shall not be a waiver of or prejudice any Party's right to require strict performance of the same provision in the future or of any other provision.

14.11 Third-Party Beneficiaries. The provisions of this Agreement are intended solely for the benefit of the Parties and shall create no rights or obligations enforceable by any third party, including creditors of the Parties, except as otherwise provided by applicable law or expressly provided in this Agreement.

14.12 Survivability. All promises or covenants herein that require performance or observance past the termination of this Agreement shall survive termination.

The Parties have executed this Agreement as of the date set forth below their signatures.

CONTRACTOR:

KITSAP TRANSIT

By: _____
Its: _____
Dated: _____

By: John Clauson
Its: Executive Director
Dated: _____

Approved as to form:

Approved as to form:

|

DRAFT