

DB-121R2 Moccasin Powerhouse Rewind General Conditions Indemnification Language Comparison

Standard Design-Build Indemnification language:

3.21 INDEMNIFICATION AND DEFENSE OBLIGATIONS

A General Indemnity and Defense. Consistent with Civil Code section 2782, Design-Builder shall immediately defend, indemnify, and hold harmless the City, its boards, commissions, officers, agents, and employees, and the portion of other parties designated in Article "Insurance for Others" of Section 00 73 16 employed by City or to which the City owes a contractual duty of defense or indemnity, and all of their officers, agents, members, employees, and authorized representatives, (collectively, "Indemnitees"), from and against any and all claims, causes of action, losses, lawsuits, litigations, liabilities, damages, expenses, penalties, costs, and fees (collectively, "Claims") that arise out of, pertain to, or relate to, directly or indirectly, in whole or in part, this Design-Build Agreement, the Work, and/or the Services, except to the extent such Claims arise out of the sole negligence, active negligence, or willful misconduct of the party seeking indemnity. Design-Builder's defense obligation is immediate upon an Indemnitee's tender of defense with counsel of Indemnitee's choice.

B. Qualified Indemnity and Defense for design professionals. Consistent with Civil Code section 2782.8, if Design-Builder is a design professional, then its indemnity and defense obligations under 3.21A are contingent upon the Claims arising from, pertaining to, or relating to Design-Builder's negligence, recklessness, or willful misconduct. If Design-Builder is a design professional, it shall be entitled to reimbursement for the proportionate percentage of defense costs exceeding its proportionate percentage of fault for the Claims as determined by a Court of competent jurisdiction or agreement of the City and Design-Builder. Notwithstanding, a design professional that is a joint venture partner to the Design-Build Agreement shall not be entitled to reimbursement for defense costs.

C. Design-Builder acknowledges that any claims, demands, losses, damages, costs, expenses, and legal liability that arise out of, result from, or are in any way connected with the release or spill of any legally designated hazardous material or waste or contaminated material as a result of the Work performed under this Contract are expressly within the scope of this indemnity, and that the costs, expenses, and legal liability for environmental investigations, monitoring, containment, removal, repair, cleanup, restoration, remedial work, penalties, and fines arising from the violation of any local, state, or federal law or regulation, attorney's fees, disbursements, and other response costs are expressly within the scope of this indemnity.

D. Indemnitee shall provide Design-Builder with prompt written notice after receipt of any claim, action or demand ("claim") made by a third party against the Indemnitee, provided, however, that no delay on the part of the Indemnitee shall relieve Design-Builder from any obligation hereunder, except to the extent of actual prejudice to Design-Builder. Design-Builder shall obtain the City's and other indemnified parties' consent for Design-Builder's choice of counsel and such consent shall not be unreasonably withheld or delayed, such that any responsive pleadings may be timely filed, and in every instance, within thirty (30) days after City or other indemnified party has given notice of the claim, and provided further that City and other indemnified parties may retain separate co- counsel at their expense and participate in the defense of the claim. If the interests of Design-Builder and the City and/or other indemnified party conflict and counsel chosen by Design-Builder cannot, in City's or other indemnified parties' reasonable opinion, adequately represent Design-Builder, City and/or other indemnified party, then the cost and expense associated with the City and/or other indemnified party retaining separate co-

counsel shall be borne by Design-Builder, otherwise, the cost and expense of separate co-counsel retained by City and/or other indemnified party shall be borne by the City or other indemnified party, as applicable. Subject to Design-Builder's obligation to reimburse City's and other indemnified parties' costs of same, City and other indemnified parties will assist Design-Builder in the defense of the claim by providing cooperation, information and witnesses, as needed to the extent there is no material conflict of interest.

1. So long as Design-Builder has assumed and is conducting the defense of a claim in accordance with the requirements set forth herein, (i) Design-Builder will not consent to the entry of any judgment or enter into any settlement with respect to the claim without the prior written consent of City or other indemnified party, as applicable, which consent will not be unreasonably withheld, unless the judgment or proposed settlement involves only the payment of money damages by Design-Builder and does not impose any obligation upon City and/or other indemnified party in connection with such judgment or settlement and Design-Builder obtains the full and complete release of City and/or other indemnified parties; and (ii) City and/or other indemnified parties will not consent to the entry of judgment or enter into any settlement without the prior written consent of Design-Builder.

2. If Design-Builder does not assume and conduct the defense of any claim as required above, (i) City or other indemnified party may defend against, and consent to, the entry of any judgment or enter into any settlement with respect to the claim in any manner reasonably deemed appropriate, and City or other indemnified party need not consult with, or obtain any consent from, Design-Builder, and (ii) Design-Builder will remain responsible for any losses City and/or other indemnified party may suffer resulting from, arising out of, relating to, in the nature of, or caused by the claim to the fullest extent provided in this Paragraph 3.21.

E. Design-Builder's liability shall not be limited to the amount of insurance coverages required under the Contract Documents.

F. In the event that Design-Builder and its insurance carrier(s) in bad faith refuse to negotiate and compensate a third party or parties for property damage or personal injuries which arise out of Design-Builder's performance of the Work, the City shall have the right to reasonably and in good faith estimate the amount of damages and to pay the same, and the amount so paid shall be deducted from the amount due Design-Builder under this Contract, or an appropriate amount shall be retained by the City until all suits or claims for said damages shall have been settled or otherwise disposed of and Design-Builder has provided satisfactory evidence to that effect to the City.

G. The defense and indemnity obligations of this Paragraph shall survive Final Completion and termination of this Contract. Design-Builder's defense and indemnity obligations shall extend to claims arising after the Work is completed and accepted if the claims are directly related to alleged acts or omissions by Design-Builder that occurred during the course of the Work.

Negotiated language subject to Board of Supervisors approval:

3.21 INDEMNIFICATION AND DEFENSE OBLIGATIONS

A. General Indemnity and Defense. Consistent with Civil Code section 2782, Design-Builder shall immediately defend, indemnify, and hold harmless the City, its boards, commissions, officers, agents, and employees, and the portion of other parties designated in Article "Insurance for Others" of Section 00 73 16 employed by City or to which the City owes a contractual duty of defense or indemnity, and all of their officers, agents, members, employees, and authorized representatives, (collectively, "Indemnitees"), from and against any and all claims, causes of action, losses, lawsuits, litigations, liabilities, damages, expenses, penalties, costs, and fees (collectively, "Claims") for bodily injury (including death) and damages to third party tangible property, to the extent caused by the negligence or willful misconduct of Design Builder in performing its obligations under this Agreement. Contractor agrees that the assertion of liens against the City's property by Contractor's suppliers and the release of Hazardous Materials brought onto the work site by Contractor are within the scope of this indemnity. The obligations of indemnity herein are applicable on a pro rata basis. Design- Builder shall not be required to indemnify and hold harmless the City for liability attributable to the negligence of City, provided such negligence is determined by agreement between Design-Builder and City or by the findings of a court of competent jurisdiction. In instances where City is shown to have been negligent and where City's negligence accounts for a percentage of the liability involved, the obligation of Design-Builder will be for that portion or percentage of liability attributable to the negligence of the Design Builder.

B. Design-Builder's defense obligation is immediate upon an Indemnitee's tender of defense with counsel of Design Builder's choice. Design-Builder shall be solely responsible for all costs of providing the defense; however, City will reimburse Design-Builder for its share of the defense costs, if any, in proportion to its degree of fault as determined by a court of competent jurisdiction. Design Builder agrees to consult the City on the selection of counsel and give serious consideration to the City's input.

C. Qualified Indemnity and Defense for design professionals. Consistent with Civil Code section 2782.8, if Design-Builder is a design professional, then its indemnity and defense obligations under 3.21A are contingent upon the Claims arising from, pertaining to, or relating to Design-Builder's negligence, recklessness, or willful misconduct. If Design-Builder is a design professional, it shall be entitled to reimbursement for the proportionate percentage of defense costs exceeding its proportionate percentage of fault for the Claims as determined by a Court of competent jurisdiction or agreement of the City and Design-Builder. Notwithstanding, a design professional that is a joint venture partner to the Design-Build Agreement shall not be entitled to reimbursement for defense costs.

D. Design-Builder acknowledges that any claims, demands, losses, damages, costs, expenses, and legal liability that arise out of, result from, or are in any way connected with the release or spill of any legally designated hazardous material or waste or contaminated material as a result of the Work performed under this Contract are expressly within the scope of this indemnity, and that the costs, expenses, and legal liability for environmental investigations, monitoring, containment, removal, repair, cleanup, restoration, remedial work, penalties, and fines arising from the violation of any local, state, or federal law or regulation, attorney's fees, disbursements, and other response costs are expressly within the scope of this indemnity.

E. Indemnitee shall provide Design-Builder with prompt written notice after receipt of any claim, action or demand ("claim") made by a third party against the Indemnitee, provided, however, that no delay on the part of the Indemnitee shall relieve Design-Builder from any obligation hereunder, except to the extent of actual prejudice to Design-Builder. Design-Builder shall obtain the City's and other

indemnified parties' consent for Design-Builder's choice of counsel and such consent shall not be unreasonably withheld or delayed, such that any responsive pleadings may be timely filed, and in every instance, within thirty (30) days after City or other indemnified party has given notice of the claim, and provided further that City and other indemnified parties may retain separate co- counsel at their expense and participate in the defense of the claim. If the interests of Design-Builder and the City and/or other indemnified party conflict and counsel chosen by Design-Builder cannot, in City's or other indemnified parties' reasonable opinion, adequately represent Design-Builder, City and/or other indemnified party, then the cost and expense associated with the City and/or other indemnified party retaining separate co-counsel shall be borne by Design-Builder, otherwise, the cost and expense of separate co-counsel retained by City and/or other indemnified party shall be borne by the City or other indemnified party, as applicable. Subject to Design-Builder's obligation to reimburse City's and other indemnified parties' costs of same, City and other indemnified parties will assist Design-Builder in the defense of the claim by providing cooperation, information and witnesses, as needed to the extent there is no material conflict of interest.

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2. If Design-Builder does not assume and conduct the defense of any claim as required above, (i) City or other indemnified party may defend against, and consent to, the entry of any judgment or enter into any settlement with respect to the claim in any manner reasonably deemed appropriate, and City or other indemnified party need not consult with, or obtain any consent from, Design-Builder, and (ii) Design-Builder will remain responsible for any losses City and/or other indemnified party may suffer resulting from, arising out of, relating to, in the nature of, of caused by the claim to the fullest extent provided in this Paragraph 3.21.

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G. In the event that Design-Builder and its insurance carrier(s) in bad faith refuse to negotiate and compensate a third party or parties for property damage or personal injuries which arise out of Design-Builder's performance of the Work, the City shall have the right to reasonably and in good faith estimate the amount of damages and to pay the same, and the amount so paid shall be deducted from the amount due Design-Builder under this Contract, or an appropriate amount shall be retained by the City until all suits or claims for said damages shall have been settled or otherwise disposed of and Design-Builder has provided satisfactory evidence to that effect to the City.

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