

PERFORMANCE GUARANTEE AGREEMENT

1063 Block Replacement Project

April 28, 2017

PERFORMANCE GUARANTEE AGREEMENT

This Performance Guarantee Agreement ("Agreement") is made and entered into as of April 28, 2017 by and between STATE OF WASHINGTON DEPARTMENT OF ENTERPRISE SERVICES ("Owner") and SELLEN CONSTRUCTION COMPANY, INC., a Washington Corporation ("Design-Builder") (Owner and Design-Builder collectively the "Parties").

RECITALS

- A. Owner and Design-Builder entered into the Design-Build Contract for the 1063 Block Replacement Project, Project No. 2014-009 G (5-1), dated as of June 19, 2014 ("Design-Build Contract").
- B. Pursuant to the Design-Build Contract, section 3.13, the parties agreed to enter into a Performance Guarantee Agreement for the 1063 Block Replacement Project. As per ESSB 5035 (2014) Section 7014, "The term for performance validation must not be less than five years."
- C. Pursuant to the Design-Build Contract, The performance guarantee must cover the operations, maintenance, and energy performance of all systems that are related to the environmental controls of the building. The building's environmental controls consist of the mechanical systems, electrical systems, and building controls.
- D. This agreement and attached exhibits set forth the specifics of that performance guarantee as negotiated by the parties.

AGREEMENT

NOW THEREFORE, in consideration of the mutual promises, covenants, and conditions set forth herein, the parties hereto hereby agree as follows:

1. **CONTRACT.** This Agreement is a requirement of the Design-Build Contract. Pursuant to the Design-Build Contract, Design-Builder is obligated to fully perform all the Work in accordance with and subject to the terms and conditions of the Contract Documents, including the design and construction of the building for Owner. Pursuant to section 3.13 of the Design-Build Contract, Design-Builder must provide a performance guarantee for the building. The Design-Build Contract is hereby incorporated by reference into this Agreement and any terms and conditions pertinent to performance of this Agreement that by their sense and context are intended to survive the completion of the performance, cancellation, or termination of the Design-Build Contract shall so survive. In the event of any conflicting terms, the Design-Build Contract takes precedence. This clause does not alter or modify the Design-Build Contract requirements for substantial completion, final completion, final acceptance or warranty. Specifically, any Design-Builder obligations for insurance, bonding, or retainage in the Design-Build Contract are not altered or modified by this clause or this Agreement.
 - 1.1. This Agreement supersedes any reference to start dates in Section 3.13 of the Design-Build Contract.
 - 1.2. If the Design-Build Contract is terminated for any reason prior to the 1063 Block Replacement Project's final completion, this Agreement is automatically also terminated and no services, guarantees, or payments are due to either Party.

2. PERFORMANCE GUARANTEE SCOPE.
 - 2.1. Scope. Design-Builder's performance guarantee covers the operations, maintenance, and energy performance of all systems that are related to the building's environmental controls. The building's systems subject to the performance guarantee are limited to the mechanical systems, electrical systems, and building controls listed in *Exhibit A*.
 - 2.2. Intent. The performance guarantee is intended to demonstrate that the building, as designed and constructed, and as maintained and operated, achieves the designated performance criteria as set forth in *Exhibit B*. The performance guarantee is based upon a cooperative effort by both Parties. For example, the Design-Builder designs and installs the heating and ventilation system; Design-Builder and Owner operate the equipment; and the Owner maintains the equipment.
3. DESIGNATED PERFORMANCE CRITERION. The designated performance criteria for operations, maintenance, and energy are set forth in *Exhibit B*.
4. MEASUREMENT & VERIFICATION (M&V).
 - 4.1. M&V Period. The M&V period shall last five (5) years (1,825 days) and shall commence upon the date after Substantial Completion when the building is eighty percent (80%) occupied or, regardless of occupancy, three (3) months after Substantial Completion, whichever first occurs. Owner shall quarterly inform Design-Builder of the occupancy level.
 - 4.2. M&V Plan. The M&V plan is attached as *Exhibit C*.
 - 4.3. Administration. The Parties shall cooperate to provide access, information, and data to enable timely, complete, and accurate performance M&V.
 - 4.4. Reports. Design-Builder shall report M&V results to Owner quarterly for the first year of the performance guarantee period and annually for the second through fifth years. Such reports, at a minimum, shall state whether the designated performance criteria are being achieved and forecast anticipated results for the remainder of the M&V period.
5. OWNER'S OBLIGATIONS. The Parties understand and agree that the ability to achieve the designated performance criteria for the building depends, in part, on Owner's use of the building. The designated performance criteria set forth in *Exhibit B* are based, in part, on Owner's and Design-Builder's assumptions and anticipated building utilization stated in *Exhibit C*. Accordingly, the Parties understand and agree that Owner shall endeavor to perform its obligations set forth in *Exhibit D* and that, in the event of a change in circumstances, the modifications to the verification results are made in accordance to *Exhibit C*.
 - 5.1. Owner's Obligations. In regard to the designated performance criteria and Design-Builder's ability to meet such targets for the building, Owner agrees to perform the obligations set forth in *Exhibit D*.
 - 5.2. Adjustment to Designated Performance Criteria. In the event that Owner fails to satisfy its obligations set forth herein, the parties agree that the appropriate adjustments will be made to the verification results as set forth in *Exhibit C* and *Exhibit E*. The Design-Builder will suggest ways for the Owner to satisfy its obligation's for the next period as appropriate.

6. PAYMENT. The total payment for achieving the designated performance criteria is four hundred twenty thousand dollars (\$420,000). The payment shall be earned and paid as set forth in *Exhibit E*.

7. GENERAL PROVISIONS.

- 7.1. Severability. If any provision of this Agreement or the Design-Build Contract is held to be invalid or unenforceable, such provision shall not affect or invalidate the remainder of this Agreement or the Design-Build Contract, and to this end the provisions of this Agreement and the Design-Build Contract are declared to be severable. If such invalidity becomes known or apparent to the Parties, the Parties agree to negotiate promptly in good faith in an attempt to amend such provision as nearly as possible to be consistent with the intent of this Agreement of the Design-Build Contract.
- 7.2. Governing Law, Jurisdiction, & Venue. The validity, construction, and performance of this Agreement shall be governed by and construed in accordance with the laws of the State of Washington, without regard to its conflict of laws rules. The Parties agree that in any action or dispute resolution process arising out of the terms, enforcement, or breach of this Agreement jurisdiction and venue shall lie in Thurston County Superior Court.
- 7.3. Waiver. Failure of either Party to insist upon the strict performance of any of the terms and conditions hereof, or failure to exercise any rights or remedies provided herein or by law, or to notify the other Party in the event of breach, shall not release the other Party of any of its obligations under this Agreement, nor shall any purported oral modification or rescission of this Agreement by either Party operate as a waiver of any of the terms hereof. No waiver by either Party of any breach, default, or violation of any term, warranty, representation, agreement, covenant, right, condition, or provision hereof shall constitute waiver of any subsequent breach, default, or violation of the same or other term, warranty, representation, agreement, covenant, right, condition, or provision.
- 7.4. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective successors and assigns. Neither Party shall assign the Work without written consent of the other, except that Design-Builder may assign the Work for security purposes, to a bank or lending institution authorized to do business in the State of Washington. If either Party attempts to make such an assignment without such consent, that Party shall nevertheless remain legally responsible for all obligations set forth in this Agreement.
- 7.5. Ethics in Public Service Act. Design-Builder shall ensure that its owner(s) and employees, and those of its Subcontractors, comply with the Ethics in Public Service Act, Chapter 42.52 RCW, which, among other things, prohibits state employees from having an economic interest in any public works contract that was made by, or supervised by, that employee. Design-Builder shall remove or cause to be removed, at its sole cost and expense, any of its employees, or the employees of any Subcontractor, if they are in violation of this Act.
- 7.6. Third-Party Beneficiaries. Except with respect to indemnification obligations contained herein in favor of third parties, the provisions of this Agreement are intended for the sole benefit of Owner and Design-Builder, and there are no third-party beneficiaries other than assignees contemplated by the terms herein; provided, that Design-Builder's Subcontractors shall be entitled to the benefit of, and enforce, the provisions of this Agreement providing for waiver of rights or claims against, and release or limitation of liability of, such Subcontractors.

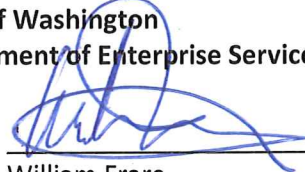
- 7.7. Non-Discrimination. Discrimination in all phases of employment is prohibited by, state and federal law. Design-Builder shall comply with all state and federal laws against discrimination in all aspects of this Agreement.
- 7.8. Time Computations. When computing any period of time, the day of the event from which the period of time begins shall not be counted. The last day is counted unless it falls on a weekend or legal holiday in the State of Washington, in which event the period runs until the end of the next day that is not a weekend or holiday. When the period of time allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation.
- 7.9. Records Retention. All records subject to audit in accordance with this Performance Guarantee Agreement, shall be retained for a period of not less than six (6) years after the date of Final Acceptance of this Agreement. Copies of all records related to this Agreement shall be produced to Owner, upon request by Owner, at no additional cost.
- 7.10. Public Records. Design-Builder acknowledges that Owner is a state agency and as such is subject to RCW 42.56, the Public Records Act. All records relating to this contract are subject to the Act and will be released to pursuant to a request for the records.
- 7.11. Antitrust Assignment. Owner and Design-Builder recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, Design-Builder hereby assigns to Owner any and all claims for such overcharges as to goods, materials, and equipment purchased in connection with this Agreement and the Work performed in accordance with the Contract Documents, except as to overcharges which result from antitrust violations commencing after the Contract Sum is established and which are not passed on to Owner under a Change Order. Design-Builder shall put a similar clause in its Subcontracts, and require a similar clause in its sub-Subcontracts, such that all claims for such overcharges on the Work are passed to Owner by Design-Builder.
- 7.12. Time is of the Essence. Time is of the essence for each and every provision of this Agreement.
- 7.13. No Agency. The Parties agree that no agency, partnership, or joint venture of any kind shall be or is intended to be created by or under this Agreement. Neither Party is an agent of the other Party nor authorized to obligate it.
- 7.14. Survival. All representations, warranties, covenants, agreements, and indemnities set forth in or otherwise made pursuant to this Agreement shall survive and remain in effect following the expiration or termination of this Agreement, provided, however, that nothing herein is intended to extend the survival beyond any applicable statute of limitations periods.
- 7.15. Integrated Agreement; Modification. This Agreement in combination with the Design-Build Contract constitutes the entire agreement and understanding of the Parties with respect to the subject matter and supersedes all prior negotiations and representations. All appendices, annexes, and exhibits referred to herein are deemed to be incorporated in this Agreement in their entirety. There are no representations or understandings of any kind not set forth herein. This Agreement and the Design-Build Contract may not be modified except in writing and signed by the Parties.
- 7.16. Interpretation. Each Party acknowledges that it and its legal counsel have reviewed this Agreement. The Parties agree that the terms and conditions of this Agreement shall not be construed against any Party on the basis of such Party's drafting, in whole or in part, of such terms and conditions.

- 7.17. Further Assurances. In addition to the actions specifically mentioned in this Agreement, the Parties shall each do whatever may reasonably be necessary to accomplish the transactions contemplated in this Agreement including, without limitation, executing any additional documents reasonably necessary to effectuate the provisions and purposes of this Agreement.
- 7.18. Headings. The headings in this Agreement are for convenience only and are not intended to, and shall not be construed to, limit, enlarge, or affect the scope or intent of this Agreement nor the meaning of any provisions hereof.
- 7.19. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which counterparts together shall constitute the same instrument which may be sufficiently evidenced by one counterpart. Execution of this Agreement at different times and places by the Parties shall not affect the validity thereof so long as all the Parties hereto execute a counterpart of this Agreement.

EXECUTED and effective as of the date first above written.

State of Washington
Department of Enterprise Services

By:



William Frare

Its: Assistant Director

Sellen Construction Company, Inc.,
a Washington corporation

By:



Wilf Wainhouse

Its: COO, Principal-in-Charge