2. MODIFIED DESIGN/BUILD WRAP APPROACH

COMPANY RESPONSIBLITY	MUNICIPAL RESPONSIBLITY
Maximum Facility Price Bid	
Construction Fund - Project Hardcosts (bid by at least 3 bidders from list of pre-approved subcontractors) - Royalty payment (if any) - Fixed profit (% of Project Hardcosts specified in contract)	**Contingency Fund #1** - Force Majeure - Municipal Fault **Contingency Fund #2** - Company Fault - Subcontractor Fault
Project Management Fund (bid price)	**Pass Through Costs** - Payment and Performance Bonds - Letter of Credit
Curing Lack of Subcontractor Performance	**Curing Lack of Subcontractor Performance**

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MODIFIED DESIGN/BUILD APPROACH

- Suggest RFQ/RFP (or separate) approach with contract developed by municipality, negotiated and finalized before final RFP is issued. Otherwise, to select based on a proposal will shift negotiated leverage on contract to municipal disadvantage. Limit number of negotiation meetings. Key is to extend competition during entire process on contract terms favorable to municipality with pricing and performance standards (within parameters) to be filled in by proposer. Little or no room for proposer to protest.

- Company to propose maximum contract price and such price reduced to extent aggregate bids of subcontractors (Project Hardcosts) are less. Components and percentages of fixed fee, project management and administration fee and contingencies set during negotiation or bid.

- Amounts, if any, from contingency fee for Company and subcontractor fault left over, split 50/50 with municipality.

- Developer secures all subcontractors from pre-approval list by bid on contract that is pre-approved as to terms by municipality and municipally held harmless as to subcontractors by the Company.

- Municipality has express third party beneficiary rights against all subcontractors so as to enforce terms of their contracts if Company doesn't.

- Liability of Company and each subcontractor limited to price (lump sum) of each entity's scope of work. Payment and performance bond secured from each entity with the subcontractors having both the Company and the municipality as dual or co-obligees (with the municipality in the preference position).

- If contingency fund for Company fault and subcontractor fault exceeded, Company liable up to its price of its scope of work to the municipality.

- Payment and performance bonds, warranties, insurance and a letter of credit from the Company and each subcontractor and a Parent Guaranty from the Company are all security for the project and are in favor of the municipality.

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- **Company assumes risk for subcontractor fault to extent fault arises because of mismanagement of subcontractor.**

- **Company is liable for passage of Acceptance Tests (at least Minimum Acceptance Standard with appropriate buy down or damage) for Company fault (including subcontractor mismanagement) and required to provide Equipment that meets minimum technical requirements – specific quality or better. If not, contingency fund exhausted first followed by Company being liable up to price of its scope of work. Municipality still has third party beneficiary rights against subcontractors up to their individual price of each scope of work as further secured by payment and performance bonds, letter(s) of credit, warranties and insurance.**

- **Company remains point person and primarily liable for project.**

- **Allocation of risk somewhat shouldered by municipality because remote possibility it could be liable to extent Company's limit of liability exceeded and security features are exhausted. However, if technology well established and proven, risk is very small, and certainly not as much as it would be on a spec or A/E project.**

- **Funds Manager – require Company to establish payment entity (i.e. bank) to pay subcontractor fees and costs. Letter of direction sent with each Company invoice (inclusive of subcontractor invoices) to municipality. Municipality pays Company directly for <u>Company's</u> invoice and municipality pays Funds Manager per letter of direction for Funds Manager payment to subcontractors. Company waives all liability of municipality relative to subcontractors if approved (by municipality) for subcontractor invoiced amounts paid to Funds Manager per letter of direction. By contract, payment of Funds Manager deemed payment to Company relative to subcontractors.**

  Benefit: takes municipality out of liability to subcontractor and reduces Company's payment bond from project price to maximum aggregate invoice from Company (and subcontractors) per month. Thus, a $100M payment bond could be reduced to only a $10M payment bond, saving the municipality perhaps $1M in costs. (Performance bond for Company and subcontractors are in amount of their scope of work with the aggregate amount equaling the project price).

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- **Benefits to municipality: Company subject to competitive process throughout, rights against each entity performing services preserved; security features in place; virtually all project costs subject to bid; municipality controls terms and conditions of all contracts; construction management remains with the Company; incentive to reduce Company and subcontractor fault in place. Because of procurement approach (50/50 sharing of contingency fund that remains) and acceptance by municipality of somewhat more risk, project costs could be reduced by perhaps 20%.**

- **Drawbacks – somewhat greater risk exposure to municipality, more than one entity to look to for liability perhaps; may require consulting engineer/construction manager to oversee Company's obligations for municipality as well as those of the subcontractors.**

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