

**GEM FACILITY MANAGEMENT LLC MASTER TERMS AND CONDITIONS  
FOR SERVICE SUBCONTRACT AGREEMENTS**

**1. GENERAL; ORDER AND ACCEPTANCE.**

- 1.1. Subcontractor, for itself, its successors, executors, administrators, and permitted assigns, hereby agrees to be bound by the following terms and conditions, which are incorporated into the subcontract order ("**Subcontract**") issued by Contractor to Subcontractor, as the "Vendor", to which these terms apply (the Subcontract and these terms and conditions, collectively, the "**Agreement**"). For purposes of this Agreement, "**Contractor**" means GEM Facility Management LLC or any affiliate or subsidiary thereof issuing the Subcontract; "**Subcontractor**" means the person or entity named on the applicable Subcontract that is furnishing the Services; "**Owner**" means the person or entity with which Contractor has entered into a contract relating to the Project and, if such person or entity is not the owner of the Project, shall include the Project owner; "**Project**" means the project identified in the applicable Subcontract; and "**Services**" means the goods, merchandise, services, and/or work related to the Project that is the subject matter of the Subcontract.
- 1.2. Subcontractor's commencement of Services, promise of performance, or furnishing of any part of the Services that is the subject matter of this Agreement, whichever occurs first, shall constitute Subcontractor's acceptance of the terms and conditions of this Agreement. Any additional or different provisions in Subcontractor's invoice, proposal, billing statements, acknowledgment forms, or similar documents shall be of no force or effect, regardless of whether such provisions would materially alter the terms hereof, are hereby deemed to be material alterations, and notice of objection to and rejection of such provisions is hereby given. Any request or demand for, or statement purporting to make Subcontractor's acceptance conditional on Contractor's assent to, additional or different terms shall be of no effect unless Contractor accepts the changes in writing and initials the changes on the face hereof. Contractor may revoke or modify this Agreement at any time prior to acceptance by Subcontractor. Only stenographic, arithmetic, and clerical errors are subject to correction.

**2. INCORPORATION BY REFERENCE OF CONTRACT DOCUMENTS.**

- 2.1. The term "**Contract Documents**" shall mean the following documents or agreements that are applicable to the Project: (a) this Agreement; (b) the agreement between Owner and Contractor (the "**Owner/Contractor Agreement**"); (c) the drawings and specifications; (d) all addenda and bulletins issued in connection with the Project, (e) any Change Orders issued in connection with the Subcontract; and (f) all general, supplementary, and other conditions and documents referenced or incorporated in any of the foregoing. If Owner is not the Project owner, then all references in the Contract Documents to the "Owner/Contractor Agreement" shall mean the contract or agreement between Contractor and the person or entity that has the direct contract with the Project owner.
- 2.2. Subcontractor represents and agrees that it has carefully examined and understands the Agreement and the Contract Documents. The Contract Documents (other than provisions relating to the contract price or fee payable to Contractor) have been made available to Subcontractor and will remain available to Subcontractor at reasonable times at the construction site or at the office of Contractor. Subcontractor shall be bound to Contractor by the terms of the Contract Documents to the extent applicable to Subcontractor's Work, and shall be bound by all interpretations of the Contract Documents made by Owner, or the Project Architect/Engineer, that are binding upon Contractor. Subcontractor further agrees to be bound by, and to assume toward Contractor, all the terms, obligations, responsibilities, and conditions of the Contract Documents to the same extent that Contractor, in turn, is bound by such documents to the Owner, to the extent applicable to the Work covered by this Agreement.
- 2.3. The Agreement and the provisions of the Contract Documents are intended to supplement and complement each other and shall, where possible, be so interpreted. If, however, any provision of this Agreement conflicts with any provision of the other Contract Documents, or if there is a conflict within the Agreement or within any of the Contract Documents, the provision imposing the higher quality, greater quantity, or greater duty or obligation on Subcontractor, or granting greater rights or remedies to Contractor or Owner, shall govern.
- 2.4. The Agreement is contingent upon and shall be valid only upon formal approval by Owner or the Project architect or engineer, as applicable ("**Architect/Engineer**"), if such approval is required, of Subcontractor and of the materials proposed to be used.

**3. SERVICES: LOWER TIERS.**

- 3.1. Subcontractor shall be responsible for all Services under the Contract Documents together with any such materials, tools, equipment, supplies, services, and work reasonably inferable therefrom as being required to produce the intended result, whether or not specifically called for in this Agreement or the Contract Documents.
- 3.2. Subcontractor shall perform the Services through its own forces and through qualified subcontractors, materialmen, suppliers, and vendors (collectively, "**Lower Tiers**"). Subcontractor agrees that all Services shall be completed in strict accordance with the Contract Documents.
- 3.3. Contractor from time to time may, in its sole discretion, rent to or permit Subcontractor to use certain equipment to be provided by Contractor, such as forklifts, scaffolding, forming equipment, tools or other equipment (collectively, "**Contractor Equipment**"). Contractor does not warrant or opine as to the condition or applicability of use and it is the responsibility of Subcontractor to determine the safe condition and applicability prior to using any Contractor Equipment. Subcontractor agrees that it will only allow trained individuals to use/access any Contractor Equipment. Statements made regarding training and qualifications of Subcontractor's employees will be considered factual and Subcontractor shall be liable for the actions of its employees. The indemnity in Section 12 hereof shall apply to Subcontractor's use of any Contractor Equipment.

**4. TIME OF PERFORMANCE.**

- 4.1. Subcontractor shall diligently and continuously prosecute and complete the Services and coordinate its Services with the other work being performed on the Project, in accordance with the overall Project schedule, any revisions to the overall Project schedule, and any other scheduling requirements listed in the Contract Documents, and as otherwise directed by

Contractor, so as not to delay, impede, obstruct, hinder or interfere with the commencement, progress or completion of the whole or any part of Subcontractor's Services or other work on the Project. TIME IS OF THE ESSENCE OF THE AGREEMENT.

- 4.2. If Subcontractor fails to perform any part of Subcontractor's Services in accordance with the time, sequence, or completion requirements of the overall Project schedule, Subcontractor shall, at its expense, upon notice from Contractor, schedule such overtime work and make such increases in its working forces as Contractor may require in order for Subcontractor to promptly cure its failure to comply with the overall Project schedule. If the progress of the Project or any component thereof is delayed, obstructed, hindered, or interfered with by any fault, neglect, or failure to act of Subcontractor or any of its officers, agents, employees, or Lower Tiers so as to cause any additional cost, expense, liability, or damage to Contractor or Owner, Subcontractor shall compensate Contractor and Owner for and indemnify them against all such costs, expenses, liabilities, or damages, including administrative costs and attorneys' fees.

**5. PERMITS; LICENSES; COMPLIANCE WITH LAWS.**

- 5.1. Subcontractor shall secure, pay for and keep in effect all licenses, permits, and inspection certificates necessary for the proper execution and completion of the Services and shall deliver all certificates of inspection and other certificates and permits to Contractor.
- 5.2. Subcontractor shall comply with all laws, ordinances, codes, rules, and regulations of federal, state, county, and/or municipal governmental entities (including code and fire officials) having jurisdiction over Subcontractor, the Services, the Project, and the Project site (collectively, "**Laws**"), including but not limited to those relating to wage and hour compliance, safety, health, discrimination in employment, fair employment practices, and equal employment opportunity, and with the requirements of the Fire Underwriters with respect thereto. In accepting this Agreement, Subcontractor shall be deemed to represent that the Services will be performed in strict compliance with the requirements of the Fair Labor Standards Act of 1938, as amended. Unless otherwise agreed in writing, Subcontractor shall insert a certificate on all invoices submitted in connection with this Agreement stating that the Services covered by the invoice were performed in compliance with applicable requirements of the Fair Labor Standards Act, as amended, and of regulations and orders of the U.S. Department of Labor. Subcontractor further represents that the Services performed hereunder will be performed in compliance with Executive Order 11246 and regulations issued thereunder, and any other standards and Laws that apply to the Project or Owner, including those that are incorporated by reference into this Agreement. Subcontractor shall develop and maintain a certified or approved drug-free workplace program in compliance with Executive Order 2002-13T and fully comply with the requirements of Executive Order 2002-13T and all related regulations. Prior to commencement of the Services set forth in this Agreement, Subcontractor shall provide Contractor with written verification of the implementation of an approved drug-free workplace program, and compliance with Executive Order 2002-13T. Subcontractor must comply with all EEO regulations pertinent to the Work.

**6. PROTECTION OF WORK.**

- 6.1. Subcontractor at all times shall keep the Project site free from rubbish, debris and obstructions caused by its operations (including surplus materials, crates and packing, and the like brought to the Project site by Subcontractor or by others for the benefit of Subcontractor). At the time of completion of Subcontractor's Services in each area, Subcontractor shall leave the area "broom clean" and shall remove all of its tools, equipment, scaffolding and surplus materials.
- 6.2. Subcontractor shall diligently perform its Services in such a manner as to prevent water, moisture and other elements from entering or penetrating the building, building materials and walls or any specific areas within the building worked on, and shall take all precautions, using the best practices of the construction industry, to avoid unwanted moisture in building materials that could lead to the growth of mold, fungus, rot or other biological agents that could adversely affect the health of the construction workers or occupants of the completed Project or otherwise cause property damage.
- 6.3. Subcontractor shall not damage the work of others by its operations, and shall repair or pay the cost of repairing any such damage done by it.

**7. SUBCONTRACT AMOUNT; PAYMENT.**

- 7.1. Contractor shall pay Subcontractor in current funds for the performance of the Services, subject to additions and deductions as authorized in writing by Contractor, the amount set forth in the Subcontract (the "**Subcontract Price**"). Unless otherwise specified, prices include all applicable sales, use, transfer, excise, and other taxes, transportation fees, insurance, and tariffs or custom duties. Royalties and costs arising from the use of patented materials, equipment, devices or processes used on or incorporated in Subcontractor's Services are included in the Subcontract Price.
- 7.2. Subcontractor shall pay all other taxes of any kind that are currently or hereafter enacted by any governmental authority upon the labor and materials furnished as part of the Services or upon amounts received by Subcontractor or its Lower Tiers in connection with the Services. Such taxes include, but are not limited to, commercial activity taxes, gross receipt taxes, excise taxes, income taxes, unemployment compensation taxes and other statutory employee benefits.
- 7.3. The amounts established as compensation for the Services to be performed under the Agreement are firm for the life of the Agreement and are not subject to escalation in any form and may be amended only by a properly executed Change Order.
- 7.4. Contractor agrees to pay Subcontractor the Subcontract Price for completing the Services, providing such Services are completed to the satisfaction of Contractor. Subcontractor agrees to furnish any waivers, certificates, affidavits, warranties, guarantees, labor/material breakdowns or other documents required by Owner or Contractor within ten (10) days of need for same. If final acceptance of Subcontractor's Services can be obtained prior to final acceptance of the entire Project by Owner, all monies due Subcontractor will be paid within ten (10) days of receipt of same by Contractor from Owner, otherwise said payment will be made within ten (10) days of receipt of final payment by Contractor from Owner for Subcontractor's Services. Satisfactory receipt of payment by Contractor from Owner is a condition precedent to payment to Subcontractor. Provided Subcontractor has submitted a proper invoice with all required documentation and all material terms of the Agreement have been satisfied, Contractor will pay all undisputed amounts in Subcontractor's invoice within ten (10) days

of receipt by Contractor of corresponding payment for the Services from Owner. Subcontractor understands and agrees that Contractor's receipt of payment from Owner on account of Subcontractor's Work is an express and absolute condition precedent to Contractor's obligation to pay Subcontractor. Subcontractor hereby assumes the risk of default or nonpayment by Owner for any reason whatsoever, including the risk associated with the creditworthiness of Owner. Subcontractor shall not be entitled to recover interest on late or past due payments.

- 7.5. Contractor may deduct or set off from any amounts due or to become due to Subcontractor any sum or sums owing by Subcontractor to Contractor arising out of the Project, other projects, or otherwise. In the event of any breach by Subcontractor of any provision or obligation of the Agreement, or in the event of the assertion by other parties of any claim or lien against Contractor, Owner, or the Project site, arising out of Subcontractor's performance of the Agreement, Contractor shall have the right to retain out of any payments due or to become due to Subcontractor an amount sufficient to completely protect Contractor from any and all related loss, damage, or expense, until Subcontractor has remedied the situation to the satisfaction of Contractor or Owner. If the situation has not been adequately remedied within a reasonable period of time, Contractor may make direct payment to the party asserting a claim or lien, and all amounts so paid shall be deducted from any amounts owed by Contractor to Subcontractor.
- 7.6. Subcontractor, by accepting final payment, waives all claims except those previously made in writing and remaining unsettled at the time of acceptance of said payment. Nothing contained herein shall be deemed or construed as waiving any pending or asserted claim on the basis of final payment if, prior to final payment, Contractor has received from Subcontractor notice of the pending or asserted claim.
- 7.7. No payment of the Subcontract Price, whether a partial payment or the final payment, shall be deemed an acceptance of Subcontractor's Services covered thereby.

## **8. PAYMENTS BY SUBCONTRACTOR: MECHANICS' LIENS.**

- 8.1. Subcontractor shall pay promptly when due its labor payrolls and sums from time to time owed by it to its Lower Tiers, unions, taxing authorities (including, as applicable, all sales and use taxes), and other governmental entities. If Subcontractor does not pay the same as hereby required, Contractor with notice to Subcontractor may pay the same and charge the same together with expenses incurred by Contractor to Subcontractor.
- 8.2. To the fullest extent permitted by applicable Laws, Subcontractor hereby expressly waives and releases any and all liens and lien rights against the property of Owner and/or Contractor to which it may be entitled under any applicable Law or other provision of law or equity. Subcontractor shall not permit its Lower Tiers, laborers, or unions (including lower tiers of any of them) to file any mechanics' liens or attested accounts to secure payment for materials or work furnished in furtherance of this Agreement. Subcontractor further agrees that any such lien or attested account shall be void and unenforceable and shall constitute a substantial and material breach of this Agreement. Contractor shall be entitled to set-off against any sums due or to become due Subcontractor under this Agreement an amount equal to two times the amount of the lien or attested account or other claim of any of Subcontractor's Lower Tiers, laborers, or unions (including their lower tiers). Contractor shall be entitled to recover from Subcontractor the attorneys' fees, bond premiums, and expenses that Contractor incurs to defend and/or discharge any such mechanics' lien or attested account claim of Subcontractor's Lower Tiers, unions, or laborers (including their lower tiers). Subcontractor further agrees to indemnify, defend and hold Contractor, Owner, and their respective officers, employees, partners, agents, and representatives harmless from and against any and all liens, claims, damages, demands and causes of action by any Lower Tiers, laborers, unions, and other persons or entities working directly or indirectly for them arising from or relating in any way to any Services furnished in furtherance of this Agreement.
- 8.3. Within three (3) days of receipt of written notice from Contractor, Subcontractor shall cause to be discharged and released any lien, attested account, or claim of Subcontractor or any of Subcontractor's Lower Tiers, laborers, unions, and other persons or entities working directly or indirectly for them. In the event of a lien or attested account by a Lower Tier, laborer, union, or other person or entity working directly or indirectly for them, Subcontractor shall immediately upon demand by Contractor post a surety bond or other alternate security to discharge the lien or attested account from the Project (in accordance with Chapter 1311.01 *et seq.* of the Ohio Revised Code for Projects in the State of Ohio). If Subcontractor fails to honor its obligations under this paragraph, then Contractor may, at Contractor's sole option (and without incurring direct liability to any third party to this Agreement), pay the claim directly and deduct the amount of Contractor's direct payment from the sums due Subcontractor under this Agreement. The provisions in this paragraph shall be in addition to Contractor's other rights and Subcontractor's other obligations in this Agreement.
- 8.4. Contractor shall have the right at its sole discretion to issue checks directly to any unpaid Lower Tiers, unions, taxing authorities and other governmental entities for amounts owed to them by Subcontractor relating to any application for payment from Subcontractor, or to issue joint checks to Subcontractor and such unpaid entities for such amounts. The amount of such payments shall then be deducted from the Subcontract Price. No such payment by Contractor shall be deemed to create a contractual relationship between Contractor and any Lower Tier or other third party claiming under Subcontractor.

## **9. CHANGES.**

- 9.1. Contractor shall have the right to make changes in the Agreement. If Subcontractor claims that such changes affect the time for performance of the Services or the Subcontract Price, or if Subcontractor requests any other changes to the Agreement, then Subcontractor shall notify Contractor in writing within five (5) days or such other shorter period as may be required under the Contract Documents for Contractor to give notice to Owner and shall submit to Contractor its proposal (with computations and supporting data in such detail as may be requested by Contractor) for eliminations of, changes in, and additions to Subcontractor's Services. On receipt of such proposal, Contractor may issue a written change order ("**Change Order**") directing Subcontractor to proceed with the services, and Subcontractor shall proceed immediately in accordance with each such Change Order. Subcontractor's signature of such Change Order will constitute Subcontractor's acceptance of all adjustments indicated in the Change Order.

- 9.2. There shall be no adjustment to the time for performance or Subcontract Price unless and until Contractor has issued a written Change Order authorizing such adjustment. Subcontractor shall be deemed to have conclusively waived any and all rights to payment of additional compensation or adjustment of the time for performance if Subcontractor fails strictly to comply with the notice provisions of this Article 9. No claim for extra work, additional time, or payment of additional amounts shall be recognized or valid unless authorized in writing and in advance by Contractor in accordance with the provisions of this Article 9. No amounts for overtime, premium time, acceleration, additional work or other costs shall be payable unless and until Contractor and Subcontractor execute a mutually acceptable change order detailing such amounts. In no event shall Subcontractor be permitted to include any markup or additional fee (whether in the form of profit, overhead or otherwise) to any overtime or other premium time approved in connection with any authorized changes in Subcontractor's Work.
- 9.3. Execution of a Change Order is an acknowledgement by Subcontractor that the Change Order constitutes full and complete compensation due to Subcontractor for all costs, direct and indirect, from the modifications set forth in the Change Order and operates as a waiver of any and all claims arising from any such modifications to the Agreement. After a change order becomes final, there shall be no subsequent adjustment based upon the effect or impact of the change contemplated thereby, nor shall Subcontractor be entitled to any further time or compensation based upon the cumulative effect or impact of multiple change orders, including any claims of lost profit or lost productivity.

## **10. EXTENSIONS OF TIME: DELAY DAMAGES.**

- 10.1. If Subcontractor is delayed, obstructed, hindered, or interfered with in the commencement, prosecution, or completion of Subcontractor's Services by any cause beyond Subcontractor's reasonable control, including but not limited to any act, omission, negligence, or default of Contractor or anyone employed by Contractor, or by any other contractors or subcontractors on the Project, or by the Architect/Engineer, Owner or their contractors, subcontractors, agents or consultants, or by damage caused by fire or other casualty or by the combined action of workers or by governmental directive or order and in no way chargeable to Subcontractor, or by any extraordinary conditions arising out of war or governmental regulations, or by any other cause beyond the reasonable control of and not due to default, neglect, act or omission of Subcontractor, its officers, agents, employees, or Lower Tiers, then Subcontractor shall be entitled to an extension of time for a period equivalent to the time lost by reason of any and all of such causes; provided, however, that Subcontractor shall not be entitled to any such extension of time unless (a) Subcontractor gives Contractor notice in writing of the cause or causes of such delay within forty-eight (48) hours of the occurrence thereof, (b) Subcontractor demonstrates that it could not have anticipated or avoided such delay and has used all available means to minimize the consequences thereof, and (c) Owner grants such an extension of time for the performance of Subcontractor's Services to Contractor pursuant to the requirements of the Contract Documents.
- 10.2. Notwithstanding any extension of time, Subcontractor agrees that it shall not be entitled to, nor claim, any cost reimbursement, compensation or damages due to such delay, obstruction, hindrance, or interference to Subcontractor's Work unless Contractor agrees to pursue and subsequently receives such compensation from the Owner. Nothing contained in this Section shall be deemed or construed as waiving or precluding Subcontractor's liability for, or otherwise waiving any Contractor remedy for, delay during the course of the Services when the cause of the delay is a proximate result of Subcontractor's act or failure to act.

## **11. INSURANCE.**

- 11.1. Before commencing Services, Subcontractor shall, at its expense, obtain and maintain in effect (and furnish to Contractor policies or certificates as evidence of current coverages) insurance coverage sufficient to meet in the minimum requirements set forth below or as required in the Agreement. Failure to maintain insurance required will be grounds for termination of the Agreement. The required insurance shall be obtained from carriers acceptable to Contractor and licensed to transact business in the locale of the Project and where any other Work is performed. The requirement of any insurance in the Agreement shall not be construed as being a limitation of Subcontractor's liability under the Contract Documents. Payment will not be made to Subcontractor until and unless the aforementioned Insurance Certificates are on file in Contractor's main office. **Commencing Services without the required insurance in place shall be considered a material breach of the Agreement.**
- 11.2. Minimum Insurance Requirement Limits (all limits required below are annual limits).
- 11.2.1. Commercial General Liability (CGL)
- |                |   |
|----------------|---|
| \$1,000,000.00 | Each Occurrence                             |
| \$1,000,000.00 | Annual Aggregate (on a "per project" basis) |
| \$1,000,000.00 | Products/Completed Operations Aggregate     |
| \$1,000,000.00 | Personal Injury                             |
- (a) CGL insurance shall be written on ISO occurrence form CG 00 01 10 01 (or a substitute form providing equivalent coverage) and shall cover liability arising from Premises/Operations, Contractual Liability (sufficient to cover the liability assumed by the Subcontractor under the Agreement), Products Liability, Completed Operations, Personal Injury, and advertising injury and liability assumed under an insured contract (including the tort liability of another assumed in a business contract). Subcontractor shall maintain the completed operations coverage for at least three (3) years following final completion of Subcontractor's Services.
- (b) This insurance shall apply as primary and noncontributory insurance with respect to any other insurance or self-insurance programs of Contractor or Owner.
- (c) There shall be no endorsement or modification of the CGL insurance limiting the scope of coverage for liability arising from explosion, collapse, or underground property damage.
- (d) CGL insurance shall be endorsed to include thirty (30) days' written notice of cancellation to Contractor. A copy of this endorsement will be attached to the Certificate of Insurance.
- (e) Subcontractor shall notify Contractor in writing immediately of any material changes to coverage types or limits
- (f) The CGL insurance shall include liability coverage for resulting damage to electronic data.

- 11.2.2. Business Automobile  
 \$1,000,000.00 Combined Single Limit, including coverage for all Owned, Hired, and Non-owned automobiles
- (a) Such insurance shall cover liability arising out of any auto (including owned, hired and non-owned autos).
  - (b) Business auto coverage shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage equivalent to that provided in the 1990 and later editions of CA 00 01 (or a substitute form providing equivalent coverage).
  - (c) Pollution liability coverage equivalent to that provided under the ISO pollution liability broadened coverage for covered autos endorsement (CA 99 48) shall be provided.
- 11.2.3. Workers' Compensation  
 Statutory State Workers' Compensation - Coverage A  
 and applicable Federal (e.g., Longshoremen & Harbor Workers)
- 11.2.4. Employers' Liability (Stop Gap)  
 \$1,000,000.00 Per Accident  
 \$1,000,000.00 Disease – Policy Limits  
 \$1,000,000.00 Disease – Each Employee
- 11.2.5. Umbrella Liability  
 \$1,000,000.00 (this coverage can be used to supplement the difference in CGL and Automobile limits and cover the shortfall for Employer's Liability Coverage). The Umbrella Liability coverage shall follow the form of the CGL coverage.
- 11.2.6. Professional Liability (to the extent licensed engineering or licensed design services are required)  
 \$1,000,000.00 Per claim/annual aggregate (with an extended reporting requirement of not less than three (3) years after the date of substantial completion of the Project)

11.3. General.

- 11.3.1. All policies shall:
- (a) Be written by insurance companies with an A.M. Best Company's rating of not less than "A:IX."
  - (b) Provide that coverage shall not be suspended, voided, canceled, non-renewed, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to Contractor and Owner.
  - (c) Be endorsed to add Contractor, Affiliates of Contractor (as defined below), and Owner, and such other entities as are required by Owner/Contractor Agreement as additional insureds to all lines of coverage including completed operations, except the workers' compensation and professional liability coverages, using ISO additional insured endorsement CG 20 10 11 85 (or a substitute form providing equivalent coverage). A copy of the policy endorsement shall be attached to the certificate.
  - (d) Be endorsed to provide a waiver of subrogation in favor of Contractor, Affiliates of Contractor, and Owner, and such other entities as are required by Owner/Contractor agreements.
  - (e) Apply separately to each insured and additional insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- 11.3.2. New certificates shall be supplied annually to evidence the renewal of the required insurance coverages. At Contractor's request, Subcontractor will provide to Contractor a certified copy of any policies required to be maintained by Subcontractor.
- 11.3.3. **Name on Certificate must be the same as that shown on Subcontract, no exceptions!!!**
- 11.3.4. Subcontractor is not authorized to perform any Services and payment will not be made to Subcontractor until and unless the aforementioned Insurance Certificates are on file in Contractor's main office.
- 11.3.5. Subcontractor waives all rights against Contractor, Contractor's agents and employees, and Owner for damages caused by fire or other perils to the extent covered by property insurance applicable to the Project or Work, except such rights as it may have to the proceeds of any property insurance. Subcontractor shall require from its Lower Tiers by appropriate agreements, written where legally required for validity, similar waivers of subrogation in favor of Contractor, Contractor's agents and employees, and Owner.
- 11.3.6. The term "**Affiliates of Contractor**" means a company or entity directly controlling or controlled by or under direct or indirect common control with Contractor. For the purpose of this definition, "**control**" means the possession of the power to vote at least fifty percent (50%) of the shares, membership interests or partnership interests of the entity in question.

**12. INDEMNITY.** To the fullest extent permitted by applicable Law, Subcontractor shall indemnify, defend, and hold harmless Contractor, Contractor's surety, Affiliates of Contractor (as defined below), Owner (including their owners, affiliates, and subsidiaries), and Owner's lender, and their respective officers, directors, agents, shareholders, successors, and employees (the foregoing, collectively, the "**Indemnitees**") from and against any and all claims, demands, liability, actions, causes of actions, complaints, fines, penalties, liens, attested accounts, loss, damage of whatever kind or description (including any special, incidental, and consequential damages), costs and expenses (including prejudgment interest, legal fees, and related costs and expenses, whether incurred in defending claims or in seeking reimbursement and indemnity from Subcontractor or otherwise) (the foregoing, collectively, "**Losses**"), arising in law or in equity, including without limitation those for bodily injury, personal injury, sickness, disease, death or property damage (including, but not limited to, the Work itself), arising out of, or alleged to arise out of, or as a result of, or alleged as a result of (a) the performance of Subcontractor's Services; (b) any act, omission, negligence or wrongful act of Subcontractor; (c) Subcontractor's default or breach of this Agreement; (d) the use, misuse, erection, maintenance, operation or failure of any machinery or equipment (including, but not limited to, scaffolds, ladders, hoists, cranes, rigging supports, etc.) whether or not such machinery or equipment was furnished, rented or loaned to Subcontractor (or its subcontractors) by Contractor, Owner or any of their respective officers, employees or agents; or (e) failure of Subcontractor, its Lower Tiers, or anyone directly or indirectly employed by them or for whose acts they may be liable, to comply with safety rules or regulations

governing Subcontractor's Services. The scope of this indemnity obligation applies to the acts or omissions of Subcontractor, its agents, employees, and Lower Tiers, or anyone for whom Subcontractor is legally responsible. Subcontractor, at Subcontractor's sole expense, shall promptly dispose of all such Losses, defend all lawsuits filed against the Indemnitees on the account thereof, pay all judgments rendered against the Indemnitees in such lawsuits (including any prejudgment interest assessed against any indemnitee hereunder), and reimburse the Indemnitees in cash upon demand for all reasonable expenses incurred by them on the account thereof including, but not limited to, attorneys' fees, expert witness fees, and court costs. Subcontractor's obligation to indemnify under this provision shall not apply to any Losses to the extent initiated or proximately caused by or resulting from the sole or concurrent negligence or willful misconduct of any of the Indemnitees. However, Subcontractor shall remain obligated to defend the Indemnitees at Subcontractor's expense until such time that it is conclusively determined that the Loss is not the fault of Subcontractor or others from whom Subcontractor is legally responsible. Notwithstanding anything to the contrary contained herein, Contractor or Owner at its option shall have the right to participate in the defense of any claims asserted against it, approve the selection of counsel, and approve the terms of any settlements made in its name or on its behalf. The obligations of Subcontractor hereunder shall be in addition to all indemnification obligations set forth in the Contract Documents. With respect to any matter for which Contractor has been indemnified hereunder by Subcontractor, Subcontractor does hereby expressly and specifically waive its constitutional and statutory immunity from suit and causes of action provided to employers under the Ohio Constitution Article 2, Section 35 and Ohio Revised Code Section 4123.74 (and any and all subsequent amendments thereto), as well as any other similar immunity provided for by any statute, law or constitution of the State of Ohio or any other applicable state. The foregoing waiver is exclusively for the benefit of Contractor, Owner, and their respective employees, officers and related or affiliated companies and shall not extend to any other third parties.

### **13. WARRANTIES; CORRECTION OF SERVICES.**

- 13.1. Subcontractor warrants and guarantees that (a) all materials and equipment furnished under the Agreement shall be new unless otherwise specified, (b) all of Subcontractor's Services will conform in all respects with all applicable Laws, including, but not limited to, those regarding occupational safety and health and wage and hour laws, and (c) all Services will be of first quality, free from faults or defects in materials or workmanship, and in strict accordance with requirements of the Contract Documents. All Services not conforming to these requirements, including substitutions not properly approved and authorized, shall be considered defective. If required by Contractor or Owner, Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. All special warranties and guarantees or manufacturers' warranties and guarantees shall be assigned to Owner upon final completion of Subcontractor's Services.
- 13.2. All warranties set forth in this Agreement or any of the other Contract Documents (including warranties incorporated herein by reference), or which Law implies, shall survive any inspection, acceptance, or payment by Contractor. Such warranties shall be in addition to Contractor's other rights and remedies and shall not be construed as a limitation on Contractor's claims or rights, including the right to enforce the Agreement against Subcontractor for the applicable statutes of limitation for breach of a written contract.
- 13.3. Subcontractor shall promptly correct all of Subcontractor's Services rejected as defective or as failing to conform to the Contract Documents, whether observed before or after substantial completion of the Project. Subcontractor shall bear all costs of correcting such rejected Services, including compensation for Contractor's additional services made necessary thereby. Subcontractor shall correct any defects or deficiencies in the Services that are found within one (1) year after performance thereof or such longer period as set forth in the Contract Documents or in any special warranty or guaranty, and such warranty period shall be extended for one additional year for any such corrected Services.

14. **DISPUTE RESOLUTION.** At the sole option of Contractor, any and all claims, disputes, and other matters in question arising out of or relating to this Agreement or breach thereof shall be decided in mandatory and binding arbitration in Walbridge, Ohio in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. The award of the arbitrator(s) shall be final and binding, and the award may be entered as a judgment by any court of competent jurisdiction. This agreement to arbitrate shall be specifically enforceable under the Ohio Arbitration Act, Ohio Rev. Code Ann. § 2711.01 *et seq.* Alternatively, Contractor, in its sole discretion, may require Subcontractor to submit such claim, dispute or other matter to the dispute resolution procedures set forth in the Owner/Contractor Agreement, and such claim, dispute or other matter may, as Contractor deems appropriate, be consolidated with other claims involving common questions of law or fact.

### **15. SUSPENSION OR TERMINATION WITHOUT FAULT OF SUBCONTRACTOR.**

- 15.1. Contractor may, without cause, order Subcontractor, in writing, to suspend, delay, or interrupt Subcontractor's Services for such period of time Contractor may determine, up to a maximum of ninety (90) days, or such longer period of time as is provided for in the Contract Documents.
- 15.2. Contractor shall have the right, at any time by written notice to Subcontractor, to terminate the Agreement without cause and at Contractor's convenience, and require Subcontractor to cease work hereunder. In the event of such termination, Subcontractor, as directed by Contractor, shall discontinue Subcontractor's Work, remove its equipment, materials, employees, and Lower Tiers from the Project site and take such action as may be necessary to terminate its agreements with its Lower Tiers, and to minimize its losses resulting from such termination.
- 15.3. In the event the Agreement is terminated pursuant to Section 15.2, Subcontractor, promptly upon Contractor's written request, shall deliver to Contractor a statement covering the balance owed under the Agreement for Services properly completed prior to the termination, additional costs for which it is liable by reason of such termination, and reasonable demobilization costs; provided, however, that in no event shall such amount, together with all previous payments made to Subcontractor, exceed the Subcontract Price and the amount actually received by Contractor from Owner for Subcontractor's Services. Under no circumstances shall Subcontractor be entitled to anticipated profits or lost profits or overhead for Services not performed, it being understood and agreed that any and all such profit and overhead claims and damages are hereby waived and released. Subcontractor also shall not be entitled to any consequential, incidental, or special damages or termination costs or expenses. Contractor's obligation to pay Subcontractor is expressly conditioned on Contractor's receipt

of actual payment from Owner on account thereof. If Owner is liable to Contractor with respect to the termination, Contractor, subject to its approval of Subcontractor's statement, shall include the same in its claim against Owner by reason of such termination.

**16. DEFAULT BY SUBCONTRACTOR.**

- 16.1. If Subcontractor fails (a) to maintain a sufficient skilled work force, including supervisors, sufficient equipment in good working order, and site and offsite support to meet the requirements of Subcontractor's Services, or (b) to cause to be delivered to it at the Project Site sufficient materials of the required quality to enable it to comply with its time and sequence schedule, or (c) to meet the requirements of such time and sequence schedules, or (d) to pay when due its laborers or its Lower Tiers, fuel or equipment suppliers, unions, taxing authorities, and other governmental entities, or (e) to comply with any of its other obligations and agreements herein contained, for a period of forty-eight (48) hours after receipt of written notice by Contractor specifying the failure complained of, Contractor, at any time while such failure continues, by written notice to Subcontractor may terminate the Agreement and/or Subcontractor's right to proceed with Subcontractor's Services, in whole or in part.
- 16.2. If Subcontractor becomes insolvent, or makes an assignment for the benefit of creditors, or applies to any tribunal for the appointment of a trustee or receiver of Subcontractor or for any substantial part of its assets, or commences any proceedings relating to Subcontractor under any bankruptcy, reorganization, insolvency, readjustment of debt or liquidation law, or if any such petition or application is filed and any such proceedings are commenced against Subcontractor and Subcontractor by any act consents thereto, or an order is entered appointing any such trustee or receiver or adjudicating Subcontractor bankrupt or insolvent or approving the petition in any such proceedings and such order remains in effect for more than thirty (30) days, or if an order is entered in any proceedings against Subcontractor decreeing its dissolution and such order remains in effect for more than thirty (30) days, Contractor, by notice to Subcontractor, may terminate the Subcontract and/or Subcontractor's right to proceed with Subcontractor's Work, in whole or in part.
- 16.3. In the event of any termination for cause under Articles 16.1 or 16.2, Contractor shall have the right to notify Subcontractor's surety (if any) of any default by Subcontractor and to exercise any other rights or remedies available at Law or in equity. In addition, Contractor shall have the right to finish Subcontractor's Services by whatever method it may deem expedient, including, without limitation, the taking over of Subcontractor's outstanding subcontracts and purchase orders and taking possession of and using in completing the Services, Subcontractor's tools, equipment, scaffolding, materials, and supplies at or in transit to the Project Site in connection with Subcontractor's Services.
- 16.4. In the event of any termination, Subcontractor shall not be entitled to any further payment until the entire Project shall have been accepted by Owner. At the time of acceptance, Contractor shall aggregate its costs of completion, and all damages resulting from Subcontractor's default, including, but not limited to, any liquidated damages provided for in the Contract Documents, other setoffs as provided for in the Agreement, and related damages and costs, including Contractor's administrative costs and expenses, together with legal fees and other costs of enforcement ("**Aggregate Costs of Default**"). Upon delivery by Subcontractor to Contractor of appropriate waivers of lien and other documents required hereunder for final payment, Contractor shall pay to Subcontractor the excess, if any, of the balance of the Subcontract Price less the Aggregate Costs of Default. If the Aggregate Costs of Default exceeds the balance of the Subcontract Price, Subcontractor shall pay to Contractor such excess amount, promptly upon submission of an invoice for the same. Contractor shall have the right to withhold from any final payment a reasonable reserve to cover any unexpired warranties applicable to Subcontractor's Services.
- 16.5. In the event that a termination for cause under this Article 16 is determined to be unjustified or wrongful, then the termination shall be treated as a "convenience termination" under Article 15, and Subcontractor's remedies and damages are limited as provided for in such Article.

**17. HEALTH AND SAFETY.**

- 17.1. Subcontractor and its Lower Tiers are required to ensure the safety of their own work force and to establish, implement, and enforce safety measures, policies, and standards conforming to all applicable Laws, including, without limitation, the requirements of the current Occupational Safety and Health Administration (OSHA) regulations. Subcontractor and its Lower Tiers must also comply with all safety standards of Contractor, which may exceed government imposed minimums in a number of areas, as well as any other applicable safety rules and practices and facility regulations established by Contractor or Owner prior to or during the Project. Copies of Contractor's safety procedures for applicable work scopes will be made available upon request to Contractor's Safety Director.
- 17.2. Subcontractor is required to provide competent supervisors who have the authority and responsibility to implement and enforce safe work practices and behaviors as required by the Subcontractor's safety program and the Contractor's safety program. Subcontractor's project supervisor and safety director will be required to attend all safety and planning meetings required by Contractor, the Contract Documents, or Owner. Contractor reserves the right to remove any Subcontractor personnel including supervisory personnel who are unable or unwilling to ensure compliance with the safety requirements of the Agreement.
- 17.3. In the event of an injury or incident that requires off-site medical treatment, or results in property damage, the individual injured or responsible and any other individual involved in or associated with the incident will be required to submit to a drug/alcohol test immediately after the incident, but in no case later than the time limit listed in the applicable Substance Abuse Policy.
- 17.4. Contractor shall be immediately notified of any incident which requires first-aid or medical treatment, results in damage to property or equipment, and any theft or attempted theft. Subcontractor, immediately after the occurrence of any accident involving injury to or death of any person, or damage to the Project or any property at the Project or in any way relating to the Work, shall promptly deliver to Contractor a detailed written report thereof, which must include a copy of any accident report delivered to Subcontractor's insurance carrier. Subcontractor shall properly record and investigate any injuries and any "near-miss" situations that occur at the Project or in connection with Subcontractor's Work. Subcontractor shall fully cooperate with Contractor and its representatives in any investigation of safety or other issues. Subcontractor shall also

immediately report to Contractor any OSHA investigation relating to the Project and provide to Contractor a copy of any materials or communications supplied by OSHA to Subcontractor.

- 18. CONFIDENTIALITY.** Subcontractor shall abide by all confidentiality provisions contained in the Contract Documents and any separate confidentiality agreement executed by Contractor and Subcontractor in connection with the Project. Subcontractor shall keep confidential, and not use for any purposes outside of the Agreement, any and all information and data that Contractor or Owner may identify from time to time as confidential or proprietary (whether in printed, electronic or other form) or in which Subcontractor reasonably should know Contractor or Owner has a reasonable expectation of confidentiality. Subcontractor shall be responsible for compliance of all confidentiality provisions by its officers, directors, employees, and Lower Tiers.
- 19. NOTICES.** Except as otherwise specifically provided, all notices, claims requests, demands, and other communications required or permitted to be given hereunder shall be in writing and shall be deemed to be duly delivered (a) upon receipt if delivered in person, (b) three (3) business days after being sent via the United States Postal Service, postage prepaid, registered or certified with return receipt requested, (c) one (1) business day after being sent by nationally-recognized overnight delivery service (e.g., FedEx, UPS), or (d) upon transmission if sent by facsimile or telecopy with confirmation of transmission by the transmitting equipment. Notwithstanding the foregoing, any notice by Subcontractor of a claim for additional costs, damages or extensions of time shall be made only by certified mail, return receipt requested, to Contractor at the address stated on the Subcontract. A copy of what is delivered in accordance with this paragraph may be sent via electronic mail, but such email notice alone will not relieve Subcontractor of its obligations to send notice by one of the four means specified herein.
- 20. MISCELLANEOUS.**
- 20.1. Entire Agreement. The Agreement constitutes the entire agreement between the parties hereto and supersedes any and all prior or contemporaneous written or oral agreements between the parties hereto with respect to the subject matter hereof. The Agreement may not be amended or modified except by a written Change Order or other writing duly executed by both parties hereto. All exhibits, schedules, or other documents referenced in the Agreement shall be deemed incorporated herein by reference as though fully rewritten.
- 20.2. Independent Contractor. Subcontractor is an independent contractor and shall not be deemed an agent, employee, or partner of Contractor. Nothing contained in this Agreement shall be construed as constituting a joint venture or partnership between Subcontractor and Contractor.
- 20.3. Non-Waiver. The waiver by Contractor of any breach of any provision of the Agreement shall not be construed as, or constitute, a continuing waiver, or a waiver of any other breach of any provision of the Agreement.
- 20.4. Remedies Cumulative. All rights granted to Contractor hereunder shall be in addition to, and not in lieu of, Contractor's rights arising by operation of law or in equity.
- 20.5. Severability. The provisions of the Agreement are divisible. If any provision of the Agreement is deemed invalid or unenforceable, this shall not affect the applicability or validity of any other provision of the Agreement.
- 20.6. Assignment. Subcontractor shall not assign the Agreement without the written consent of Contractor, nor subcontract the whole or any part of the Agreement without the written consent of Contractor. Subcontractor shall not assign any amounts due or to become due under the Agreement without the written consent of Contractor. No consent to or acceptance by Contractor of any assignment or subcontract shall relieve Subcontractor of any of its responsibilities under the Agreement. However, Subcontractor agrees to the assignment of this Subcontract to the Owner as may be required by the Owner Agreement.
- 20.7. Governing Law. This Agreement and any and all claims, controversies or disputes arising from or relating to this Agreement, shall be governed by and interpreted in accordance with the laws of the state where the Work is performed without regard to its conflict of laws principles.