

**GEM INC. MASTER TERMS AND CONDITIONS
FOR 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 to which these terms apply (the Subcontract and these terms and conditions, collectively, the "**Agreement**"). For purposes of this Agreement, "**Contractor**" means GEM Inc. or any affiliate or subsidiary thereof issuing the Subcontract; "**Subcontractor**" means the person or entity named on the applicable Subcontract that is furnishing the Work; "**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 "**Work**" 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 Work, promise of shipment, or furnishing of any part of the Work that is the subject matter of the Subcontract, 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 the Subcontract 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) the Subcontract; (b) this Agreement; (c) the agreement between Owner and Contractor (the "**Owner/Contractor Agreement**"); (d) the drawings and specifications; (e) all addenda and bulletins issued in connection with the Project, (f) any Change Orders issued in connection with the Subcontract; and (g) 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. WORK; LOWER TIERS; LABORERS.

- 3.1. The Work of Subcontractor includes, but is not limited to, such of the following as may be necessary to perform and complete the Work: (a) all plant, materials, tools, equipment (whether for temporary or permanent use), scaffolding, supplies, transportation, cartage, loading, hoisting, forms, patterns, models, shop drawings, templates, measurements, and other facilities; (b) all labor, work, supervision, cutting, patching, cleaning, temporary construction and other services; and (c) all permits, fees, insurance, taxes, benefits, royalties, temporary utilities, and any other related costs, except as otherwise provided in this Agreement. Subcontractor shall be responsible for all Work under the Contract Documents together with any such materials, 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 Work through its own forces and through qualified subcontractors, materialmen, suppliers, and vendors (collectively, "**Lower Tiers**"). Subcontractor agrees that all Work shall be completed in strict accordance with the Contract Documents prepared for the Project by the Architect/Engineer.
- 3.3. All Project correspondence and communications will be in English. Subcontractor's superintendent and/or on-site project manager shall be fluent and capable of speaking and corresponding with Contractor using English and ensure that all on-site crews are able to take direction and communicate with Contractor in English.
- 3.4. Subcontractor agrees to furnish a list of all Lower Tiers within two (2) weeks of receipt of the Subcontract. Subcontractor shall keep this list current, and additions or deletions must be communicated to Contractor within two (2) weeks of such change to allow Contractor to (a) know from whom to expect to receive wage reports, EEO reports, MBE/FBE reports, etc., and (b) know from whom to expect waivers of lien, affidavits, and other required documents. Contractor reserves the right

to approve Lower Tiers and to request resumes, work experience, and other credentials of Subcontractor's proposed site supervisory personnel, and approve or reject without prejudice or cause.

- 3.5. Subcontractor's employees and Lower Tiers shall be skilled in their trades. Subcontractor's employees and Lower Tiers will work harmoniously with and shall cooperate with Owner, Contractor, Architect/Engineer, and all other contractors on the Project. Any employee or Lower Tier of Subcontractor may be refused admittance to the Project site or may be requested to leave the Project site at any time by Contractor, and Contractor shall not be required to have or to state any reason for such action. If any employee or Lower Tier of Subcontractor is so barred from the Project site, Subcontractor shall immediately replace such employee with an employee or Lower Tier satisfactory to Contractor.
- 3.6. Should any workers performing the Work engage in a strike or other work stoppage or cease to work due to picketing or a labor dispute of any kind, Contractor may, at its option and without prejudice to any other remedies it may have, after forty-eight (48) hours' written notice to Subcontractor, provide any such labor and deduct the cost thereof from any monies then due or thereafter to become due to Subcontractor. Further, Contractor may at its option, without prejudice to any other remedies it may have, terminate this Agreement, and shall have the right to enter upon the premises and take possession, for the purpose of completing the Work, of all of Subcontractor's materials, tools, and equipment thereon and to complete the Work either with its own employees or other subcontractors. In case of such termination by Contractor, Subcontractor shall not be entitled to receive any further payments under this Agreement or otherwise but shall nevertheless remain liable for any damages that Contractor incurs. If the expenses incurred by Contractor in completing the Work shall exceed the unpaid balance due Subcontractor, Subcontractor shall pay the difference to Contractor, together with any other damages incurred by Contractor as a result of Subcontractor's default.
- 3.7. Subcontractor and each of its Lower Tier Subcontractors shall at all times during the performance of the Work abide by and be signatory to any project labor agreement(s) applicable to the Project and Subcontractor shall provide evidence that it and each of its Lower Tier Subcontractors are signatories to such agreement(s) prior to performing any Work on the Project.
- 3.8. Subcontractor shall notify Contractor as promptly as possible of any actual or potential labor dispute which may affect the Work. If any such labor conditions threatens the timely completion of any portion of the Subcontract, or if Subcontractor fails to give satisfactory assurance of its ability to complete the Work even in the event of such work stoppage, or fails to employ labor that is in harmony with and compatible with other labor employed on the Project, or fails to continue to perform the Work without interruption or delay during a strike, picket, walkout, or other work stoppage or slowdown caused by a labor dispute, Contractor may terminate the Subcontract for cause and proceed in accordance with Article 22 hereof.
- 3.9. 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 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 or 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 obligations in Article 18 hereof shall apply to Subcontractor's use of any Contractor Equipment.
- 3.10. Requests for substitution of materials must be made within thirty (30) days of receipt of this Subcontract, or sooner if stated in the Contract Documents, providing that the Contract Documents allow such substitution, and that all costs in connection with said substitution are borne by Subcontractor.

4. SHIPMENTS AND UNLOADING.

- 4.1. Unless otherwise agreed by Contractor, Subcontractor in making or ordering shipments shall not consign or have consigned materials, equipment, or any other items in the name of Contractor. All material consigned to Subcontractor must be clearly marked as such or it will be returned.
- 4.2. All materials furnished under the Agreement are to be unloaded and stored/protected (if required) by Subcontractor. If Subcontractor does not have facilities or labor to accomplish this, it will be done by Contractor and all charges in connection therewith will be charged to Subcontractor. All deliveries and pick-ups must be made during regular working hours. Subcontractor agrees to indemnify Contractor for any damage or injury resulting from Contractor providing courtesy unloading or moving of materials or equipment as requested and directed by Subcontractor.
- 4.3. Any material furnished, but not installed under the terms of the Agreement, must be shipped prepaid, F.O.B. Contractor's facility or the Project site.

5. TIME OF PERFORMANCE; PROJECT CONSTRUCTION SCHEDULE; PROJECT MEETINGS.

- 5.1. Subcontractor shall commence the Work upon the first to occur of the date of the Subcontract or the delivery to Subcontractor of a notice to proceed from Contractor. Prior to commencement of Subcontractor's Work, Subcontractor shall deliver to Contractor a detailed and comprehensive schedule that (a) shows all major elements and phases of Subcontractor's Work, (b) breaks down each element or phase by trade or task, (c) shows manpower loading for each trade or task, (d) shows early and late start dates so that all "float" time will be accurately identified, and (e) otherwise is in a form satisfactory to Contractor and in compliance with the Contract Documents. The submitted Schedule shall be for Contractor's overall scheduling purposes and shall not be construed or implied as modifying Subcontractor's commitment to provide all personnel, equipment, and materials necessary to complete Subcontractor's Work in a timely manner in accordance with the Contract Documents. Subcontractor shall diligently and continuously prosecute and complete Subcontractor's Work and coordinate Subcontractor's Work with the other work being performed on the Project, in accordance with the overall Project construction schedule, any revisions to the overall Project construction schedule, and any other scheduling requirements contained 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 Work or other work on the Project and to prevent or mitigate delays and avoid discrepancies (including unnecessary cutting or patching) with contiguous work. TIME IS OF THE ESSENCE OF THE AGREEMENT.

- 5.2. If Subcontractor fails to perform any phase of Subcontractor's Work in accordance with the time, sequence or completion requirements of the overall Project construction 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 construction 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. Subcontractor agrees to the assessment of liquidated damages as set forth in the Owner/Contractor Agreement should Subcontractor not complete its Work in a timely fashion resulting in Owner imposing liquidated damages on Contractor.
- 5.3. Subcontractor agrees to cooperate and coordinate its Work with Contractor and other subcontractors to facilitate improvement of the Project construction schedule thereby allowing the potential for early completion of the overall Project.
- 5.4. Subcontractor shall not work hours outside the scheduled hours without approval from Contractor, and Subcontractor agrees to pay any costs incurred by Contractor for supervision in the event such non-scheduled hours are worked.
- 5.5. If requested by Contractor, Subcontractor shall participate and cooperate in the development of the overall Project construction schedule and any revisions thereto. Subcontractor, in person or by a duly authorized representative having power to act and acceptable to Contractor, shall attend, at its own expense, all meetings or conferences that Contractor may call, at the Project site or elsewhere.
- 5.6. Subcontractor, in person or by a duly authorized representative having power to act and acceptable to Contractor, shall attend, at its own expense, all meetings or conferences that Contractor may call, at the Project site or elsewhere, for the purpose of discussing progress or coordination of the Work, project safety, the Project schedule, or other matters bearing on the performance of Subcontractor's Work. When possible, Subcontractor will be given at least forty-eight (48) hours' notice of such meetings. Subcontractor representative shall attend monthly EEO Compliance meetings held on-site by Contractor. Failure to attend with regularity shall subject Subcontractor to possible default.

6. EXAMINATION OF DOCUMENTS AND INVESTIGATION OF SITE; CONCEALED OR UNKNOWN CONDITIONS.

- 6.1. By its execution of the Agreement, Subcontractor represents that it has carefully studied and compared the Contract Documents with each other and with the Agreement and reported to Contractor any errors, inconsistencies or omissions discovered. Subcontractor shall also review carefully any changes in the Agreement or the Contract Documents and, within five (5) days after receipt of such changes, report to Contractor any errors, inconsistencies or omissions discovered. Subcontractor shall be liable to Contractor and Owner for damage resulting from errors, inconsistencies, or omissions within or between the Contract Documents or the Agreement that Subcontractor in the exercise of reasonable diligence should have recognized and reported to Contractor.
- 6.2. Subcontractor represents that it has made such investigation and inspection (including, without limitation, any required by the Contract Documents) of the nature and location of the Work and the conditions of the Project site (including, if relevant, the character of the surface and subsurface conditions or obstacles to be encountered on, under and around the Project site, access thereto, and storage and work areas available to Subcontractor thereon) as are necessary to determine the difficulty and cost to Subcontractor of properly performing Subcontractor's Work. Subcontractor represents that it has had full opportunity to view, sample, inspect, and test the conditions at the Project site prior to the execution of this Agreement, and Subcontractor is not relying upon any opinions or representations of Contractor, Owner, or any of their respective officers, agents, or employees.
- 6.3. If conditions are encountered at the Project site that are (a) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents, or (b) unknown physical conditions of an unusual nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then Subcontractor shall give Contractor written notice promptly before conditions are disturbed and in no event later than forty-eight (48) hours after first observance of the conditions, or such other period as Contractor may be obligated to notify Owner under the Contract Documents. Subcontractor shall not be entitled to any increase in the Subcontract Amount or damages by reason of any such conditions, nor shall Subcontractor be entitled to an extension of the time for performance of Subcontractor's Work, unless and until Owner grants such compensation or extension of time for the performance of Subcontractor's Work to Contractor pursuant to the requirements of the Contract Documents. Contractor shall not be obligated to apply to Owner for an increase in the Subcontract Amount or for damages on behalf of Subcontractor or for an extension of time under the Agreement unless such application is provided for by the Contract Documents and Subcontractor, at its expense, does all things necessary in order to process such claim. Contractor, upon receipt of any payment by Owner to Contractor based upon such claim for Subcontractor, will pay the same to Subcontractor less Contractor's expenses. Except to the extent expressly provided in this Section 6.3, Subcontractor waives the right to make any claims based upon conditions (whether obvious, subsurface or concealed) encountered at the Project site.

7. PERMITS; LICENSES; COMPLIANCE WITH LAWS; PREVAILING WAGE.

- 7.1. Subcontractor shall secure, pay for, and keep in effect all licenses, permits, and inspection certificates necessary for the proper execution and completion of the Work and shall deliver all certificates of inspection and other certificates and permits to Contractor.
- 7.2. 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 Work, 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 building codes and other requirements of the Fire Underwriters with respect thereto. The completed Work must meet and comply with all prevailing Laws. In accepting this Agreement, Subcontractor shall be deemed to represent that the Work was or will be

produced or 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 Work covered by the invoice was produced 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 Work performed hereunder was or will be produced or 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 Work 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.

- 7.3. Subcontractor shall be bound by the terms, conditions, and wage rates contained in any and all of the collective bargaining agreements between Contractor and any union, which are incorporated by reference into this Agreement. Wage rates and benefits paid to employees of Subcontractor and its Lower Tiers at the Project shall be no less than the prevailing wage rates in the locality where the Work is performed or otherwise applicable to the Project. In accordance with the other provisions of this Agreement, Subcontractor shall be bound by and shall comply in all respects with any and all applicable wage determinations applicable to the Project, including Davis Bacon requirements or state prevailing wage requirements. Certified payroll compliance shall be verified by Subcontractor and warranted and represented by Subcontractor to Contractor at least monthly by, among other things, the submission of fully compliant prevailing wage reports and other documents as required by the Contract Documents and any governmental agency having authority or jurisdiction over the Work or Project. Certified payroll reports shall be submitted to the Contractor, "Attn: Certified Payroll Department."

8. SHOP DRAWINGS; DIMENSIONS; SUBMITTALS.

- 8.1. Subcontractor shall, at its own expense, prepare and submit to Contractor such shop drawings, samples, models, and other submittals (collectively, "**Submittals**") as may be necessary to completely describe the details and construction of Subcontractor's Work. Submittals shall be made within the time periods specified by the Contract Documents or, if not otherwise specified, within thirty (30) days after the date of the Subcontract. Review and/or approval of such Submittals by Contractor and/or the Architect/Engineer shall not relieve Subcontractor from its obligation to perform Subcontractor's Work in strict accordance with the drawings, specifications, and other provisions of the Agreement and the Contract Documents, nor of its responsibility for the proper matching and fitting of Subcontractor's Work with contiguous work and the coordination of Subcontractor's Work with other work being performed on the Project site, which obligation and responsibility shall continue until completion of Subcontractor's Work. Shop drawings shall be in conformance with the Contract Documents, and shop drawings shall not supersede Contract Documents regardless of review and approval.
- 8.2. All plans, drawings, reports, manuals, specifications, test data or other documents or information prepared by Subcontractor pursuant to this Agreement, and all Submittals, shall be furnished to Contractor and shall be the property of Contractor, and Contractor shall have the unlimited right to publish, transfer, sell, license and use all or any part of such documents or information without additional payment to Subcontractor. Subcontractor further grants to Contractor a royalty-free, transferable license for Contractor to use such documents and Submittals in Contractor's discretion.
- 8.3. Subcontractor shall maintain full construction and design responsibility for work performed pursuant to "performance specifications" or any value engineering work performed by Subcontractor. Subcontractor shall maintain errors and omissions coverage for such work, and all drawings submitted by Subcontractor shall be stamped by a licensed or registered engineer or design professional.

9. CLEAN-UP AND PROTECTION OF WORK.

- 9.1. Subcontractor at all times shall keep the Project Site free from rubbish, debris and obstructions caused by its operations (including surplus materials, crates, packing, and the like brought to the Project site by Subcontractor or by others for the benefit of Subcontractor). Subcontractor shall complete Subcontractor's Work in such manner as to permit the next succeeding work to start without further cleaning. At the time of completion of Subcontractor's Work in each area, Subcontractor shall leave the area "broom clean" and shall remove all of its tools, equipment, scaffolding and surplus materials. 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.
- 9.2. Subcontractor shall diligently perform and protect its Work 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.
- 9.3. Subcontractor shall cover and at all times adequately protect the Work from damage until final acceptance by Contractor and Owner, and shall properly store and protect its own materials furnished to it by others. Subcontractor shall be responsible for any damage to or destruction of the Work, and any other equipment, tools and personal property at the premises, whether owned, rented, or used by Subcontractor or anyone performing any of the Work. Subcontractor at its expense shall, as directed by Contractor, replace, repair, or restore any Work that is damaged or destroyed, whether such destruction or damage results from acts of God, fire, public enemy, civil commotion, vandalism, or acts of omission or commission by any person, firm, or corporation. Risk of loss with respect to the Work shall remain with Subcontractor until final acceptance of the completed Work. Until such final acceptance, any damage or destruction of the Work, however caused, shall be made good by Subcontractor at no extra charge or cost to Contractor. Such rework at Subcontractor's expense shall not preclude Subcontractor from making a claim under any insurance maintained for the benefit of Subcontractor, but the right to make or the pendency of such claim shall not give cause to Subcontractor to delay the commencement or completion of such rework.

10. SUBCONTRACT AMOUNT; SALES AND OTHER TAXES.

- 10.1. Contractor shall pay Subcontractor in current funds for the performance of the Work, subject to additions and deductions as authorized in writing by Contractor, the amount set forth in the Subcontract (the "**Subcontract Amount**"). Unless otherwise specified, prices are F.O.B. Contractor's facility and/or the Project site as specified in the Subcontract, and prices include all applicable sales, use, transfer, excise, and other taxes, transportation fees, insurance, and tariffs or custom duties.
- 10.2. Unless otherwise specified, purchases of supplies, materials, and equipment incorporated into the Project are not exempt from sales and use taxes. If the Project is exempt from applicable sales and use taxes, then Contractor shall provide Subcontractor with the Owner's exemption certificate, and Subcontractor shall provide such certificate to its Lower Tiers so as to take full advantage of the sales tax exemption.
- 10.3. It is agreed and understood that the amounts established as compensation for the Work to be done under the Agreement are firm for the life of this Agreement and are not subject to escalation in any form and may be amended only by a properly executed Change Order.
- 10.4. If Subcontractor is supplying materials only, then Contractor or Owner, as the case may be, shall pay all applicable sales and use taxes relating to the materials supplied, and Subcontractor shall not include sales and use taxes in the Subcontract Amount. If Subcontractor is supplying labor or other services (whether or not in addition to materials), then (a) Subcontractor shall pay all sales and use taxes relating to any materials supplied, (b) the sales and use taxes shall be included in the Subcontract Amount, and (c) the sales and use taxes shall be broken out and shown separately on each invoice or pay application that relate to the following services: cleaning and janitorial services, security guards and contract or temporary employment services, temporary electric/power hook-up, landscaping services of any kind (including but not limited to tree or stump removal), playground equipment, temporary fence rental, temporary fence installation, carpeting installation and signage and sign installation (whether temporary or permanent).
- 10.5. 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 Work or upon amounts received by Subcontractor and its Lower Tiers in connection with the Work. Such taxes include, but are not limited to, the following: commercial activity taxes, gross receipt taxes, excise taxes, income taxes, unemployment compensation taxes and other statutory employee benefits.
- 10.6. Royalties and costs arising from the use of patented materials, equipment, devices or processes used on or incorporated in Subcontractor's Work are included in the Subcontract Amount.

11. PAYMENT.

- 11.1. Prior to delivering its first progress payment application, Subcontractor shall deliver to Contractor a Schedule of Values, allocating the total Subcontract Amount to the separate phases of Subcontractor's Work, stating separately amounts for labor and materials and prorating equally overhead and profit among such separate phases. The Schedule of Values shall be subject to such adjustments as Contractor or Owner may require. Subcontractor shall deliver to Contractor for similar approval such supplements thereto as Contractor requires in order to reflect approved changes in the Subcontract Amount.
- 11.2. Contractor agrees to pay Subcontractor the Subcontract Amount for completing the Work, providing such Work as is completed is satisfactory to the Architect/Engineer or Owner, as applicable. Partial payment will be made each month in an amount equal to the value of Work done, and materials either incorporated into the Project or stored, less the amount paid by Owner for the Work on previous estimates, less the amount of retainage indicated in the Agreement. Subcontractor shall submit, as a condition precedent to any payment, details of cost, labor/material breakdowns, waivers of lien, sworn affidavits of Subcontractor, prevailing wage or payroll reports, EEO reports, consent of surety to payment, and any other documentation (in form and substance satisfactory to Contractor and Owner) as Contractor may request from time to time. If such documents are not furnished, Contractor may withhold payments currently due until such time as the documents are received. 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 Work 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.
- 11.3. The Subcontract number must be shown on all invoices. If Subcontractor has more than one subcontract with Contractor, separate invoices are required for each such subcontract. Invoices for materials stored on- or off-site must be documented by insurance coverage in accordance with Section 11.4, as well as copies of Lower Tier invoices. Unless otherwise stipulated, all invoices shall be in AIA format and are due in Contractor's office prior to the 25th day of the month. All invoices shall be accompanied by a sworn statement that includes all Lower Tiers supplying materials and/or services to the Subcontractor, as well as a full or partial unconditional waiver of lien from Subcontractor and from each Lower Tier.
- 11.4. Payment may be made for materials stored off-site provided that a certificate of insurance has been furnished indicating coverage against fire, theft, loss or other damage to the stored material, and additional documentation as requested by Contractor is provided, and that Owner has paid Contractor for same, subject to Article 11.3.
- 11.5. Subcontractor shall maintain accurate records with respect to all costs and expenses pertaining to Subcontractor's Work (including Change Order work), which records shall be kept in accordance with generally accepted accounting principles accurately applied. Contractor shall have the right to examine, copy, and audit all such records, including, without limitation, invoices for equipment and materials, all payroll records setting forth wages, fringe benefits, pension, health and welfare contributions, union dues, and similar contributions paid in connection with Subcontractor's Work. If it is determined that any such mandatory contributions or other payments have not been properly or timely made, or that Subcontractor has in any manner overstated its costs and expenses in connection with Subcontractor's Work, then Contractor shall have the right to withhold sufficient monies from the sums due Subcontractor to cover any deficiencies not rectified by Subcontractor, or, if there are no monies outstanding, Subcontractor shall pay on demand any amounts due. This requirement applies to all

Lower Tier contracts and shall be written into all such contracts. It is and will continue to be Subcontractor's responsibility to make the proper payments to Lower Tiers in a timely fashion.

- 11.6. Contractor may deduct or set off from any amounts due or to become due to Subcontractor any sum or sums owing by Subcontractor or any of its affiliates (which term, for purposes hereof, shall include any individual, corporation, partnership, joint venture or other entity controlled by, controlling or under common control with 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 or 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.
- 11.7. Unless otherwise provided in the Agreement, Contractor shall have the right to withhold a ten percent (10%) retainage from any payments (whether progress payments or the final payment) due to Subcontractor.
- 11.8. No payment of the Subcontract Amount, whether a partial payment or the final payment, shall be deemed an acceptance of Subcontractor's Work covered thereby.
- 11.9. Contractor, from time to time, may deliver to Subcontractor invoices for amounts owed (herein called charge-backs) to Contractor by Subcontractor pursuant to any provision of the Agreement, and Subcontractor shall pay the same not later than ten (10) days after delivery. Without limiting Subcontractor's obligation to pay the same as herein provided, Contractor may require the amount of any charge-backs to be deducted from the amount shown due to Subcontractor on its next payment application (progress or final) until paid in full. Any charge-backs remaining unpaid at the time of Subcontractor's final payment application shall be included as a deduction in such application. The amount of each charge-back shall bear interest at the rate per annum equal to two percent (2%) above the prime commercial rate announced from time to time by Key Bank, Toledo, Ohio (or the maximum amount permitted by applicable Law, if lower), from the 10th day after the date of delivery of the invoice to Subcontractor until the date that the charge-back is paid.

12. FINAL PAYMENT.

- 12.1. Subcontractor promptly upon completion of Subcontractor's Work shall deliver to Contractor its final payment application for amounts due and owing (exclusive of retention), which shall include a schedule of materials furnished and work done but not paid for (including amounts claimed due for additional and changed work) in prior progress payments and of all charge-backs owed to Contractor not theretofore paid or deducted from prior progress payments, and such detailed statements of payments by Subcontractor as Contractor may require. In addition, and as conditions precedent to final payment, Subcontractor shall furnish to Contractor (a) such sworn statements, materialmen's certificates and mechanics' lien waivers as Contractor deems necessary to protect Owner and Contractor against liens filed by Subcontractor's laborers and Lower Tiers who have furnished labor, material, equipment and fuel in connection with Subcontractor's Work hereunder; (b) copies of all manuals, "as-built" drawings, warranties and guarantees required by the Contract Documents; (c) the written consent of Subcontractor's sureties to final payment, in form acceptable to Contractor; (d) certificates of such insurance as may be required hereunder; and (e) all other documents required by the Agreement or the Contract Documents.
- 12.2. Upon acceptance of Subcontractor's Work by Owner and after and subject to receipt of payment by Owner to Contractor of the balance so owed to Subcontractor, Contractor shall pay to Subcontractor the remaining net balance owed to it against receipt of Subcontractor's acknowledgment that said payment is in full for all sums owed to it under the Agreement, together with all other documents required hereby. The final payment (not including retention) shall be due within thirty (30) days after all of these express conditions have been met. Retention shall be paid within thirty (30) days of Contractor's receipt of retention from Owner. Notwithstanding the foregoing, Contractor shall have the right to withhold retainage to cover any guarantee or warranty period required by the Prime Contract unless a maintenance bond is provided by Subcontractor.
- 12.3. 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 written notice of the pending or asserted claim.

13. PAYMENTS BY SUBCONTRACTOR; MECHANICS' LIENS.

- 13.1. Notice of Commencement may be attached to the Agreement, or may be sent upon request under separate cover, as it is received by Contractor. Subcontractor is required to serve copies of this Notice to its Lower Tiers, with return receipt requested. This clause must be included in all Lower Tier contracts and material orders so that Contractor can be assured that all Lower Tiers, regardless of tier, have received a Notice of Commencement. Contractor will furnish Subcontractor with affidavit, partial waiver and final waiver forms for use on this Project. No other forms are acceptable. If a Lower Tier files a lien that cannot be immediately discharged by payment because of a dispute, it shall be the responsibility of Subcontractor to bond off the lien at no expense to Contractor or Owner. Any legal expenses incurred by Contractor in connection with liens filed by Subcontractor or any of its Lower Tiers will be reimbursed by Subcontractor.
- 13.2. 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.
- 13.3. 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 Work furnished in furtherance of this Agreement.

- 13.4. 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.
- 13.5. 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 Amount. 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.

14. CHANGES.

- 14.1. Contractor shall have the right to make changes in the Agreement. If Subcontractor claims that such changes affect the time for performance of the Work or the Subcontract Amount, 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 Work or for any deviations from the drawings and specifications or substitution of materials (including "or equal" materials) thereby requested. On receipt of such proposal, Contractor may issue a written change order ("**Change Order**") directing Subcontractor to proceed with the work, 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.
- 14.2. There shall be no adjustment to the time for performance or Subcontract Amount 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 14. 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 14. 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.
- 14.3. 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.
- 14.4. If all or any portion of Subcontractor's Work (including Change Order work) is to be compensated on a cost-of-the-work or time-and-materials basis, then the following terms shall apply (see page 1 of the Subcontract to determine if this section applies to the Work).
- 14.4.1. Subcontractor furnished material and equipment: Actual cost of material and equipment, including applicable taxes, plus the percent markup indicated on page 1 of the Subcontract (unless a different markup is expressly stated within the Owner/Contractor Agreement).
- 14.4.2. Subcontractor direct hire labor: Actual cost of labor including all required taxes, Social Security and Medicare, federal and state unemployment tax, fringe benefits and Workers' Compensation insurance. Overhead and Profit on Subcontractor direct hire labor (to be applied to straight time only) shall be the percent markup indicated on page 1 of the Subcontract for overhead and profit (unless a different markup is expressly stated within the Owner/Contractor Agreement) and shall include supervision, superintendents, commercial general liability and umbrella insurances, wages of timekeepers and clerks, small tools with material value of less than \$1,500.00, incidentals, consumable materials, general office expense and all other expenses not included in the direct hire labor rate.

14.4.3. Subcontracted Work: Subcontractor markup on sub-subcontractor costs shall be the percent markup indicated on page 1 of the Subcontract (unless a different markup is expressly stated within the Owner/Contractor Agreement). Sub-subcontractor markups on material and direct hire labor shall not exceed those specified for Subcontractor.

14.5. Additional backup may be required to substantiate the actual costs and rates listed.

15. **EXTENSIONS OF TIME; DELAY DAMAGES.**

15.1. If Subcontractor is delayed, obstructed, hindered, or interfered with in the commencement, prosecution, or completion of Subcontractor's Work 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 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 Work to Contractor pursuant to the requirements of the Contract Documents.

15.2. 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. 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 Work when the cause of the delay is a proximate result of Subcontractor's act or failure to act.

16. **BONDS.** Subcontractor shall furnish to Contractor, if required by Contractor, a payment and performance bond in accordance with the requirements of the Contract Documents, on a form and from a surety acceptable to Contractor. The bond shall name Contractor, Owner, and Owner's lender (if applicable) as Obligees, shall have a penal sum not less than the entire Subcontract Amount or such greater amount as is required by the Contract Documents, and the penal sum shall be adjusted automatically to cover any increases in price on account of extra work without the necessity of surety approval. The bonded obligation shall cover any and all maintenance and warranty obligations of Subcontractor under this Agreement. Failure to supply the bond(s) upon demand shall constitute a material breach of and default under this Agreement. In lieu of a bond, at Contractor's sole option and discretion, Contractor may request or require cash security in an amount equal to fifteen percent (15%) of the amounts paid and/or to be paid to Subcontractor under this Agreement. Contractor may hold such cash security amount from payments that become due to Subcontractor. Such amounts shall be in addition to any amounts held by Owner as retainer, if any. The cash security may be held by Contractor until the Project is accepted by Owner and all of Subcontractor's warranty obligations have been fully satisfied and such warranties have expired by the terms of the Agreement.

17. **INSURANCE.**

17.1. Before commencing Work, 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 the minimum requirements set forth below or as required in the Agreement. Only certificates in the revised Accord format referenced below will be acceptable. 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. **Proper insurance coverages as required by this Agreement, together with proper certificates on file with Contractor evidencing such coverages, must be in place prior to any Work commencing at the Project site. Commencing Work without the required insurance in place shall be considered a material breach of the Agreement.**

17.2. **Minimum Insurance Requirement Limits (all limits required below are annual limits).**

17.2.1. Commercial General Liability (CGL)
\$1,000,000.00 Each Occurrence
\$2,000,000.00 Annual Aggregate (on a "per project" basis)
\$1,000,000.00 Products/Completed Operations Aggregate
\$1,000,000.00 Personal Injury

The CGL policy shall include coverage for Premises/Operations, Lower Tier subcontractors, Contractual Liability (sufficient to cover the liability assumed by the Subcontractor under the Agreement), Property Damage arising out of the "XCU" hazards, Completed Operations, Products Liability, Broad Form Property Damage, and Personal Injury. The Completed Operations coverage shall be maintained for at least three (3) years after the final completion of the Project of which the Work is a part. If the policy contains a general aggregate limitation, then the policy shall be endorsed to provide a \$1,000,000.00 specific aggregate for the Work under this Agreement. The coverages shall be written on ISO forms CG 2010 04/13 and CG 2037 04/13 or comparable coverage forms and endorsed to provide additional coverages and limits of insurance as required by this Agreement. The CGL insurance shall include liability coverage for resulting damage to electronic data.

(a) This insurance shall apply as primary and noncontributory insurance with respect to any other insurance or self-insurance programs of Contractor or Owner.

- (b) 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.
- (c) 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.

17.2.2. 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.

17.2.3. Workers' Compensation

Statutory State Workers' Compensation - Coverage A
and applicable Federal (e.g., Longshoremen & Harbor Workers)

17.2.4. Employers' Liability (Stop Gap)

\$1,000,000.00 Per Accident
\$1,000,000.00 Disease – Policy Limits
\$1,000,000.00 Disease – Each Employee

17.2.5. Umbrella Liability

\$1,000,000.00 combined single limit. The Umbrella liability coverage shall follow the form of the CGL coverage.

17.2.6. Professional Liability (to the extent licensed engineering or licensed design services are required)

\$2,000,000.00 Per claim/annual aggregate (with an extended reporting requirement of not less than three (3) years after the date of Substantial Completion). If the professional liability (errors and omissions) insurance is written on a claims made basis, then such insurance shall have a retroactive date no later than the date of the Agreement and shall include a supplemental extended reporting period provision.

17.3. General.

17.3.1. 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 the 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 the Owner/Contractor Agreement.
- (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.

17.3.2. 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.

17.3.3. **Name on Certificate must be the same as that shown on Subcontract, no exceptions!!!**

17.3.4. Payment will not be made to Subcontractor until and unless the aforementioned Insurance Certificates are on file in Contractor's main office.

17.3.5. 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.

17.3.6. 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.

17.3.7. In the event of a Builder's Risk claim resulting from the fault of the Subcontractor or the Subcontractor's Lower Tier Subcontractors, any deductible amount owed shall be the responsibility of the Subcontractor.

18. 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 Subcontractor's performance under this Agreement, Subcontractor's negligence or other wrongful acts, Subcontractor's default or breach of this Agreement, or Subcontractor's breach of any representation, warranty, or any other provisions contained herein. 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.

19. WARRANTIES: CORRECTION OF WORK.

- 19.1. Subcontractor warrants and guarantees that all Work furnished under the Agreement shall (a) be new unless otherwise specified; (b) be of first quality, free from faults or defects in materials or workmanship; (c) be in strict accordance with requirements of the Contract Documents; (d) conform in all respects with all applicable Laws, including, but not limited to, those regarding occupational safety and health and wage and hour laws; (e) not infringe or encroach upon Contractor's or any third party's personal, contractual or proprietary rights, including patents, trademarks, copyrights, rights of privacy or trade secrets; (f) be merchantable at the time of delivery to Contractor and at the time of use by Owner; and (g) be fit and safe for sale and use by Contractor and Owner for which such items are ordinarily intended and for any particular intended use of which Subcontractor has actual or constructive knowledge. All warranties set forth in this paragraph, or in any other part of this Agreement or 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. All Work 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. This warranty and guaranty is not limited by the provisions of Article 19.2. All special warranties and guarantees or manufacturers warranties and guarantees shall be assigned to Owner upon final completion of Subcontractor's Work.
- 19.2. Subcontractor shall promptly correct all of Subcontractor's Work rejected as defective or as failing to conform to the Contract Documents whether observed before or after substantial completion of the Project and whether or not fabricated, installed, or completed. Subcontractor shall bear all costs of correcting such rejected Work, including compensation for Contractor's additional services made necessary thereby. Work rejected before final completion shall be corrected prior to final completion. In addition, for a period equal to the longest applicable warranty period covering the Work or any portion of the Work, but in no event less than one (1) year from the date of final payment by Owner to Contractor, or within such other period as is required by the Contract Documents, or within such period of time as may be prescribed by Law or by the terms of any applicable special warranty or guaranty required by the Contract Documents, if any of Subcontractor's Work is found to be defective or not in accordance with the Contract Documents, Subcontractor shall correct it promptly after receipt of notice from Contractor or Owner. The expiration of any warranty or obligation of Subcontractor to correct Subcontractor's Work shall not relieve Subcontractor of the obligation to correct, at its own expense, any latent defect in Subcontractor's Work or deficiencies that are not readily ascertained, including, but not limited to, defective materials and workmanship, defects attributable to the substitutions for specified materials, and substandard performance of any of Subcontractor's Work otherwise not in compliance with the Contract Documents. Following the correction or replacement of any of Subcontractor's Work as specified in this Article 19.2, the warranties provided herein shall be fully reinstated with respect to such corrected or replaced Subcontractor's Work, and Subcontractor shall correct any defects or deficiencies in the corrected or replaced materials and workmanship that are found within one (1) year after the date of correction or replacement or such longer period as set forth in the Contract Documents or in any special warranty or guaranty.
- 19.3. Contractor may inspect and test the Work, wherever located, during manufacture, preparation, construction, delivery, and completion. Multiple inspections shall not be grounds for objection by Subcontractor. No previous inspections by Contractor shall relieve Subcontractor of any liability under this Agreement. If defects or nonconformities for which Subcontractor is responsible under the terms of this Agreement are revealed by subsequent inspection, analysis, manufacturing operations, use or otherwise, Contractor may reject or revoke its acceptance of the Work, in whole or in part, at any time after such

defects or nonconformities are discovered, require Subcontractor to cure or replace the defective or non-conforming Work, or pursue any other of its rights or remedies under this Agreement.

- 19.4. Risk of loss with respect to nonconforming Work shall not pass to Contractor unless and until Contractor has inspected the Work and has accepted it as being in conformity with this Agreement, and any nonconformities are cured to the satisfaction of Contractor or Contractor accepts the Work in writing despite the nonconformities.
- 19.5. Subcontractor represents and warrants to Contractor that Subcontractor shall have good title to the Work, free and clear of all liens, at the time of Subcontractor's delivery or furnishing of the Work.

20. DISPUTES AND SETTLEMENT.

- 20.1. Subcontractor, in connection with any disagreement by it involving interpretations of the Contract Documents, claimed inaccuracies, deficiencies and errors in the drawings and specifications, deductions from and additions to the Subcontract Amount and claims for additional time by reason of change orders, or for delays, or for additional costs or damages by reason of any act or omission of Owner or Owner's other contractors, shall proceed strictly in accordance with the administrative remedies provided with respect thereto in the Contract Documents, and Subcontractor shall be bound by the administrative determinations, arbitration awards, and other final judgments arrived at in accordance with the provisions of the Contract Documents that are binding upon Contractor with respect to any such claims.
- 20.2. Subcontractor shall give Contractor adequate and timely notification with respect to any action that it desires Contractor to take on its behalf against Owner in connection with any such dispute, and shall reimburse and indemnify Contractor against any and all expenses in connection with the presentation of any such claim. Contractor, at its election, may require Subcontractor to deposit with it a reasonable sum of money to protect it against any such costs, and if any matter is to be submitted to arbitration and does not also involve Contractor, will designate such arbitrator as Subcontractor requests. If the matter in dispute is required to be submitted to arbitration under the provisions of the Contract Documents, Subcontractor shall be bound by the decision of the arbitrators as therein provided.
- 20.3. Either Contractor or Subcontractor may from time to time call a special meeting for the resolution of claims, disputes, or other matters in question between Contractor and Subcontractor that would have a material impact on the cost or progress of the Project. Such meeting shall be held at the Project site within five (5) work days following a written request therefor, which request shall specify in detail the nature of the dispute to be resolved at such meeting. The meeting shall be attended by representatives of Contractor, Subcontractor, and any other party that may be affected in any material respect by the resolution of such dispute, which representatives shall have authority to settle the dispute and shall attempt in good faith to resolve the dispute. Neither party may file a demand for arbitration against the other on account of any such dispute until a meeting has been called pursuant to the provisions of this Article 20.3 and the parties have been unable to settle the dispute, it being agreed that this shall be a condition precedent to the right to demand arbitration on account of any dispute.
- 20.4. If any claim, dispute, or other matter in question arises between Contractor and Subcontractor and if any such claim, dispute, or other matter is not resolved pursuant to Article 20.3, then, within a reasonable time after the conclusion of the settlement meeting as provided in Article 20.3, but in no event later than thirty (30) days after conclusion of the settlement meeting, and at the sole option of Contractor, such claim, dispute, or other matter shall be decided in mandatory and binding arbitration in accordance with Article 20.5. 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 with respect to the Project, and such claim, dispute or other matter may, as Contractor deems appropriate, be consolidated with other claims involving common questions of law or fact.
- 20.5. If Contractor elects to arbitrate any claim, dispute, or other matter as set forth in Article 20.4, then the following requirements shall apply: (a) the arbitration shall be conducted in accordance with the then-prevailing Construction Industry Arbitration Rules of the American Arbitration Association, unless the parties agree otherwise in writing; (b) the decision made by the arbitrator(s) shall be final and binding upon the parties, and judgment may be entered upon such decision in any court having jurisdiction; (c) the arbitration shall be conducted in Walbridge, Ohio; (d) any arbitration may include, by consolidation, joinder or otherwise, any person or entity not a party to the Agreement if that person or entity is involved in a common question of law or fact, the presence of such person or entity is required if complete relief is to be accorded in the arbitration, and the interest of that person or entity is not insubstantial; (e) the agreement to arbitrate set forth in this Article 20.5, including, but not limited to, the agreement to arbitrate with other persons or entities, shall be specifically enforceable under the Ohio Arbitration Act and the Federal Arbitration Act; (f) all claims that are related to or are dependent upon each other shall be heard by the same arbitrator(s); (g) Contractor shall have the right, at its sole option, to defer the arbitration proceedings until the completion of Subcontractor's Work, at which time all pending disputes for which arbitration has been demanded pursuant to this Article may be heard in a single proceeding; and (h) unless otherwise provided under the Construction Industry Arbitration Rules, the arbitrator(s) shall fix their own compensation and assess the costs and charges of the proceedings against either or both of the parties. Contractor also shall have the right, at its option, to join Subcontractor in any arbitration or other proceeding between or among Contractor, Owner, or other third party.

21. SUSPENSION OR TERMINATION WITHOUT FAULT OF SUBCONTRACTOR.

- 21.1. Contractor may, without cause, order Subcontractor, in writing, to suspend, delay, or interrupt Subcontractor's Work for such period of time as 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.
- 21.2. 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.
- 21.3. In the event the Agreement is terminated pursuant to Article 21.2, Subcontractor, promptly upon Contractor's written request, shall deliver to Contractor a statement covering the balance owed under the Agreement for Work properly completed prior

to the termination, including overhead and profit on such completed Work, 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 Amount and the amount actually received by Contractor from Owner for Subcontractor's Work. Under no circumstances shall Subcontractor be entitled to anticipated profits or lost profits or overhead for Work that remains to be furnished or 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 storage charges or other 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.

22. DEFAULT BY SUBCONTRACTOR.

- 22.1. 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 Work, 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 or 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 Work, in whole or in part.
- 22.2. 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.
- 22.3. In the event of any termination for cause under Articles 22.1 or 22.2, 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 Work 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 Work, Subcontractor's tools, equipment, scaffolding, materials, and supplies at or in transit to the Project site in connection with Subcontractor's Work.
- 22.4. 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 Amount less the Aggregate Costs of Default. If the Aggregate Costs of Default exceeds the balance of the Subcontract Amount, 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 Work.
- 22.5. In the event that a termination for cause under this Article 22 is determined to be unjustified or wrongful, then the termination shall be treated as a "convenience termination" under Article 21, and Subcontractor's remedies and damages are limited as provided for in such Article.

23. HEALTH AND SAFETY.

- 23.1. Subcontractor and its Lower Tiers are required to ensure the health and safety of their workforce, and any other individuals exposed to hazards they create or become aware of, by establishing, implementing, and enforcing safety measures, policies and standards conforming to all applicable Laws, including, without limitation, the requirements of the current Occupational Health and safety 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. Subcontractor acknowledges that it has been provided an opportunity to inspect the Contractor's safety program documents and hereby certifies that it will comply with all elements of the program.
- 23.2. 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.
- 23.3. Contractor shall be immediately notified of any incident which requires off-site 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 deliver to Contractor a 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.

- 23.4. Subcontractor shall assume full and immediate responsibility for its actions, training requirements and compliance with all governing regulations concerning utilities, pipelines, or equipment-generated spills or contamination caused by Subcontractor.
- 23.5. Subcontractors shall complete and submit a Monthly Injury Summary Form, provided by the Contractor, with the monthly pay application. Failure to submit the Monthly Injury Summary Form may delay payment to Subcontractor. Upon request by Contractor, Subcontractor shall provide any safety information relating to Subcontractor's operations, including, without limitation, OSHA citations and logs, workers' compensation claims and other accident and claim records.
- 23.6. The Subcontractor shall develop a site specific safety plan which addresses the scope of work, anticipated hazards, and measures to eliminate/minimize the hazards during the performance of the Work. The plan must meet or exceed the requirements of the Contractor's safety program, and all applicable Laws, as well as Owner safety requirements, programs or facility regulations. The safety plan shall be submitted to the Contractor for review prior to beginning Work.
- 23.7. 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.

24. 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.

25. 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.

26. MISCELLANEOUS.

- 26.1. 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.
- 26.2. 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.
- 26.3. 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.
- 26.4. 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.
- 26.5. 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.
- 26.6. 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.
- 26.7. 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 Project is located, without regard to its conflict of laws principles.