



**CITY OF MEMPHIS**

**REQUEST FOR QUOTE**

**#286754**

**Lichterman Nature Center Major Maintenance – Phase 1**

**Addendum No. 2**

This Addendum will become part of the Contract Documents. In case of difference with any previous Addenda or communications, this Addendum takes precedence. Receipt will be acknowledged by inserting the Addendum number and its date in the RFQ Response.

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**TO**

Name: Plan Holders

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**PROJECT**

Name: Lichterman Nature Center  
Major Maintenance

A2H #: 21513

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**DETAILS**

Addendum #: 2

Date of Issuance: 5/7/25

Sent Via: Email

Total Pages: 62

This addendum modifies the original drawings/specifications and shall be included as part of the contract documents. Items in this addendum apply to all drawings and specification sections whether referenced or not involving the portion of the work added, deleted, modified, or otherwise addressed in the addendum.

The bidder shall acknowledge receipt of this addendum by placing the addenda dates and addenda numbers on the outside of their proposal envelope and in the place provided on the bid form. In addition, the bidder shall confirm receipt of this addendum by returning the signature page with appropriate initial where indicated via email (Bidding@a2h.com) or fax (901) 373-4002. Failure to do so may subject the bidder to disqualification.

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**ACKNOWLEDGEMENT OF RECEIPT**

Name: \_\_\_\_\_

Company: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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**GENERAL**

1. Use the attached, revised sections to replace the original corresponding sections in the Project Manual.
2. Bid Location Room Number has changed (see Section 00010 – Legal Notice to Bidders, attached):

“Sealed bids will be received at the Office of the City of Memphis Purchasing Agent, **Room 368**, City Hall, 125 N. Main, Memphis, TN 38103, until 12:00 p.m., May 14, 2025...”

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**CLARIFICATIONS**

1. The laydown yard is across the ditch, but there's currently no access crossing the ditch as the bridge recently fell.
  - *The culvert crossing that is used to access the west side of Lichterman Nature Center has washed out in one of the recent storms. It was planned to use the entrance off Quince for construction access to build the low water crossings and footbridges. Low water crossing #4 that is on the west side of the stream is still available to access from Quince. The work for the other low water crossing and footbridges will need to be accessed from the parking lot entrance.*

2. I offered the site walk to our many hundreds/thousands of subs, but turnout was poor with only two subs showing up. Perhaps this addendum would be a good opportunity to push the due date and offer another site visit.....I know we have 10 days from due date to submit RFI's, so that date is rapidly approaching if we want to get another site walk in.
  - *We haven't had concerns from others about subconsultants being interested so we still plan to bid as currently posted.*

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#### CHANGES TO SPECIFICATIONS

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1. Table of Contents: revised to show revisions dates to specification sections.
2. Section 00010 – Legal Notice to Bidders, revised.
  - a. Bid Opening Location Room Number has changed.
  - b. Address information for A2H, Inc. has changed.
3. Section 00100 – Instructions to Bidders, updated.
4. Section 00430 – Equal Business Opportunity Program: removed.
  - a. The City's EBO Program requirements are no longer applicable to this project. Bidders are not required to include M/WBE participation in their bids.
5. Section 00510 – Construction Contract, updated.
6. Section 00520 – Escrow Agreement, updated.
7. Section 00710 – General Conditions of the Contract, updated.

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#### ATTACHMENTS

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1. Table of Contents.
2. Section 00010 – Legal Notice to Bidders.
3. Section 00100 – Instructions to Bidders.
4. Section 00510 – Construction Contract.
5. Section 00520 – Escrow Agreement.
6. Section 00710 – General Conditions of the Contract.

Sincerely,  
**A2H, Inc.**



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Chet Winstead, ASLA, PLA  
Landscape Architect

LICHTERMAN NATURE CENTER MAJOR MAINTENANCE  
5992 QUINCE RD, MEMPHIS, TN 38119  
MEMPHIS, TN

PROJECT MANUAL

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**SECTION 00010 - LEGAL NOTICE TO BIDDERS**

Sealed bids will be received at the Office of the City of Memphis Purchasing Agent, Room 368, City Hall, 125 N. Main, Memphis, TN 38103, until **12:00 p.m., May 14, 2025**, for furnishing the City of Memphis with the following:

FOR THE DIVISION OF: **Park Services**

FOR THE CONSTRUCTION OF: **Lichterman Nature Center Major Maintenance**

Plans, Specifications and attendant deposit information available from:

A2H, Inc.  
65 Germantown Court, Suite 300  
Memphis, TN 38018  
(901) 372-0404  
Chet Winstead, Project Manager  
[chetw@a2h.com](mailto:chetw@a2h.com)

All bids must include on the outside of the bid envelope, the name of the project, the bid due date and the bid opening time.

**LICENSING DISCLOSURE REQUIREMENTS:**

Classification for this Project shall be **BC, BC-B**

All bidders must be licensed contractors as required by Title 62, Chapter 6, of the Tennessee Code Annotated and must comply with the requirements of Tenn. Code Ann. 62-6-119.

In addition, the City of Memphis requires that the bidder's license number, license expiration date, and that part of the license classification that applies to the bid, appear on the outside of the envelope containing the bid. The bidder shall also include, on the outside of the bid envelope, the name, license number, license expiration date, and license classification of any subcontractor to be used by the bidder for electrical, plumbing, heating, ventilation & air conditioning work, and masonry provided that such classifications (i.e. electrical, plumbing, heating ventilation & air conditioning and masonry) are applicable to the project. In the event that such classifications are not applicable to the project, the bidder shall indicate same on the outside of the bid envelope, by designating the classification and the words "not applicable" or "NA".

The above licensing disclosure requirements shall not apply to any bid that is less than \$25,000. If any bid amount, whether for the total bid submitted by the bidder as general contractor or for a sub-bid for electrical, plumbing, and/or heating ventilation & air conditioning work, is less than \$25,000, or if the masonry bid amount is less than \$100,000, the licensing disclosure requirements set out above are not applicable. In lieu thereof the bidder must provide on the outside of the bid envelope, his name and address and/or the name and address of any such subcontractor whose sub-bid is less than \$25,000 (\$100,000 for masonry), along with the words "exempt from licensing requirement."

**THE CITY OF MEMPHIS WILL NOT OPEN OR CONSIDER ANY BID WHICH DOES NOT COMPLY WITH THE ABOVE LICENSING DISCLOSURE REQUIREMENTS.**

**"CERTIFICATION BY EACH BIDDER MUST BE MADE WITH RESPECT TO NONDISCRIMINATION IN EMPLOYMENT."**

**"CERTIFICATION BY EACH BIDDER MUST BE MADE WITH RESPECT TO A DRUG FREE WORKPLACE."**

**A BID BOND IS REQUIRED IF THE BID AMOUNT EXCEEDS \$100,000.**

Award of contracts will be made on the basis of the lowest and best bids as determined by the City of Memphis. **"Lowest Bid" is defined as the total amount of the Base Bid plus any alternates the City elects to use. "Best Bid" shall be defined as the responsive quotation, that meets the contract documents.**

Any claim of error in a bid must be filed in writing with the **Park Services Division, 2599 Avery Ave, Memphis TN 38112**, by noon the next working day following bid opening if a contractor wishes to withdraw his bid without forfeiture of his bid bond.

Any protest of award must be filed in writing with the City Purchasing Agent within ten calendar days of the intent of award announcement. Intent of award announcement will be sent to all bidders by the City Purchasing Agent, after review of all opened bids.

A Pre-Bid Conference will be held on **April 22, 2025 at 10:00 a.m. at Memphis Parks, 2599 Avery Ave., Memphis, TN 38112** All parties interested in bidding on this project are hereby invited and urged to attend this meeting.

By Order of the Mayor of the City of Memphis, Tennessee.

CITY PURCHASING AGENT

**END OF SECTION**

**SECTION 00100 - INSTRUCTIONS TO BIDDERS****1. PROJECT DESCRIPTION**

Project consists of: the demolition of selective site elements, construction of new footbridges, new low water crossings, sitework, improvements to existing boardwalk and existing greenhouse, a new lake control structure and stream bank restoration and other related work as shown in the plans and specifications..

**2. BIDDING DOCUMENTS**

For the mutual protection of the City, City's Consultant (hereafter "the Consultant"), and all subcontractors and material suppliers, partial sets of documents will not be issued. Therefore, all contractors intending to submit a bid shall obtain one (1) complete set of documents from the consultant or the consultant's designated plans provider for his bid to be accepted. This will also place the Contractor on the mailing list for possible addenda issuance.

Bidding documents are available per the instructions below:

**a) Contractor Bidders:**

Complete sets of bidding documents, drawings, and specifications in electronic format may be downloaded free of charge from the A2H Planroom at [www.a2hplanroom.com](http://www.a2hplanroom.com). Hard copy sets of plans and specifications will also be available for purchase on the planroom, at the contractor's expense, for the cost of printing and shipping. For questions regarding obtaining bidding documents, contact Laurie Smith, Project Coordinator by email ([lauries@a2h.com](mailto:lauries@a2h.com)) or by cell phone (662-587-2058).

**b) Subcontractors, material suppliers, and other interested parties desiring to acquire a Construction Bid Set:** Drawings and Specifications in electronic format may be downloaded free of charge from the A2H Planroom at [www.a2hplanroom.com](http://www.a2hplanroom.com). Hard copy sets of plans and specifications will also be available for purchase on the planroom for the cost of printing and shipping. For questions regarding obtaining bidding documents, contact Laurie Smith, Project Coordinator by email ([lauries@a2h.com](mailto:lauries@a2h.com)) or by cell phone (662-587-2058).**c) All such bidding documents are available to be shipped to any out-of-town bidder and interested parties via appropriate carrier or electronically:** Drawings, and Specifications in electronic version may be downloaded free of charge from the A2H Planroom at [www.a2hplanroom.com](http://www.a2hplanroom.com). Hard copy sets of plans and specifications will also be available for purchase on the planroom for the cost of printing and shipping.**3. PLAN ROOM DISTRIBUTION:**

Complete sets of contract documents are available for review at the following locations:

**a) A2H Planroom ([www.a2hplanroom.com](http://www.a2hplanroom.com)).****b) Builders Exchange Plan Room; 642 South Cooper Street; Memphis, TN; Phone # 901-272-7495. [www.memphisbx.com](http://www.memphisbx.com).****4. ADDENDA**

The Consultant will forward one (1) copy of all addenda to holders of each set of documents. All such addenda will become a part of the contract documents and subject to all conditions contained therein, and must be listed on the Bid Form for the bid to be accepted. Note: no

addendum shall be issued within seven (7) calendar days prior to the date set for opening of bids, unless said addendum, delays the opening of said bids.

#### **5. INTERPRETATION**

Requests for interpretation should solely be addressed to the Consultant either in writing or via telephone. No oral interpretation will be made to any bidder as to meaning of drawings and specifications. Requests for interpretation will be accepted up to ten (10) calendar days prior to date set for opening of bids. All interpretations will be made in the form of an addendum and will be issued as promptly as practicable to all parties registered with the Consultant as having documents. Note: no addendum shall be issued inside of seven (7) calendar days prior to the date set for opening of bids, unless said addendum, delays the opening of said bids.

#### **6. PREPARATION OF BIDS**

Each bid must be submitted using the forms attached hereto, and must include in the Bid Envelope the following fully executed items:

- a) The written bid on the form provided by the City's Consultant; all spaces must be completed in ink or typewritten.
- b) Bid security in the form of a Bid Bond or certified check in the amount of 5% of the bidder's proposed bid if the bid amount exceeds \$100,000.
- c) City of Memphis Construction Contract Certificate of Nondiscrimination on the form provided.
- d) City of Memphis Construction Contract Certificate of a Drug Free Workplace on the form provided.

#### **7. BIDS**

Bid Forms with attachments are incorporated herein. DO NOT REMOVE any bidding forms from the Project Manual. Prior to bid date, the Consultant will furnish a duplicate copy of bid forms to each bidder to be used in the submission of his/her bid as previously stipulated. Note that the bid enclosure documents are printed on colored paper for easy identification.

#### **8. BID EXCLUSIONS/QUALIFICATIONS**

Any bid that is qualified in any way or which contains any exclusions will automatically be classified as non-conforming and shall not be given consideration for contract award.

#### **9. BID GUARANTEE REQUIREMENTS**

Submit bid guarantee as a guarantee that:

- a) Bidder will not withdraw bid for one hundred twenty (120) days after opening of proposals without Owner's written consent.
- b) If bid is accepted, bidder will enter into formal contract with Owner, within ten (10) days after receipt of contract documents for execution.
- c) If bid is accepted, bidder will execute required Performance bond and will obtain required insurance coverage within ten (10) days after receipt of contract.

- d) Contract between Owner and Contractor will be submitted to the Contractor for signature, then returned to the Owner for signature. Performance Bond and all certificates of insurance must be submitted by the Contractor at the same time as he returns the signed contract to the Owner.

For bid proposals which exceed \$100,000, a bidder's bond or certified or cashier's check made payable to the City of Memphis on a solvent bank will be provided in the amount of 5% of the bid. Said instrument to remain in effect and will be returned only after the contract has been fully executed and secured. Additionally, the successful bidder shall execute a performance bond in an amount equal to 100% of the contract sum as security for the faithful performance of the contract and for the payment of labor and material furnished and incorporated into the work. The only acceptable form of instrument for this bond is bound herein. Bond shall be furnished through an agent domiciled and legally authorized to do business in the State of Tennessee, and delivered to the Owner not later than ten (10) calendar days after the date shown on written notice from the City. The proposed surety company must be one acceptable to the City of Memphis.

Bidder shall be liable to the Owner for full amount of bid guarantee as representing damage to the Owner on account of default of bidder if:

- (a) Bid is withdrawn within one hundred twenty (120) days after receipt of bids without approval of Owner.
- (b) Bidder fails to enter into contract with Owner and execute required Performance Bond and provide required insurance coverage within ten (10) calendar days subsequent to notice of award of contract.

#### **10. EXAMINATION OF SITE**

Before submitting a bid, the bidder shall personally visit the site of proposed work and arrive at a clear understanding of the conditions under which the work is to be performed. No consideration will be allowed subsequently by reason of error or oversight on the part of the bidder or on account of interference by either the City or existing conditions. Neglecting any of the above requirements will not be acceptable as reason for delay in the work or for adjustments of the contract sum. Bidders must make an appointment with Kevin Thompson at telephone # (901) 210-8405 to visit the project site.

#### **11. FIELD MEASUREMENTS**

The Contractor shall make his own measurements to verify square footage, dimensions and quantities to complete the project. The dimensions and areas indicated on the drawings are for reference only and are not to be construed as the actual dimensions and areas.

#### **12. STATE OF TENNESSEE CONTRACTOR REQUIREMENTS**

If bid is \$25,000 or over, bidders must be licensed contractors in the State of Tennessee as required by Title 62, Chapter 6, of the Tennessee Code Annotated. CLASSIFICATION FOR THIS PROJECT SHALL BE BC, BC-B.

Additionally, the bidder shall include the name, license number, expiration date thereof, and license classification of the contractor applying to the bid for electrical, plumbing, heating/ventilation/air conditioning and masonry, on the outside of the envelope containing the bid; otherwise, the bid shall not be opened or considered. In the event the aforementioned classifications are not applicable to the project, the bidder shall indicate not applicable (NA) on the appropriate line.

### 13. SUBCONTRACTORS

No less than thirty percent (30%) of the total contract cost of the work shall be performed by the Contractor's own organization, thus limiting the total allowable amount of subletting to no more than seventy percent (70%) of the total contract cost of the work to be performed. All transactions, negotiations, and correspondence of the City shall be with the Contractor. The City will refer all matters regarding payments, changes, scheduling work progress, etc. of sub-contractors to the contractor. Sub-contractors shall be recognized only in the capacity of employees or work crews of the contractor and shall be subject to the same requirements as to character and competence. The Contractor shall not assign, transfer, convey, sell, or otherwise dispose of the whole or any part of the contract to any person, firm, or corporation without the written consent of the City. Subletting any part of the work to be done under the contract shall not, under any circumstances, relieve the Contractor of any liabilities or obligations. At pre-construction the contractor shall submit copies of executed sub-contracts to the City.

If the Contractor shall sublet any part of this contract, the Contractor shall be as fully responsible to the City for the acts or omissions of the subcontractor and of the persons either directly or indirectly employed by his subcontractor as he is for the acts and omissions of persons directly employed by himself. Within fourteen days (14) after bids are opened, the apparent low bidder and any other bidder so requested, shall submit a list of all subcontractors he expects to use in the work. An experience statement with pertinent information as to similar projects and other evidence of qualifications shall be furnished for each named subcontractor, as requested by the City. If the City, after due investigation, has reasonable objection to any proposed subcontractor, City may, before contract execution, request the apparent low bidder to submit an acceptable substitute without an increase in his bid. If the apparent low bidder declines to make any such substitution, he will not thereby sacrifice his bid security. Any subcontractor so listed and to whom the City does not make any written objection prior to contract execution will be deemed acceptable by City.

Contractor shall not be required to employ any subcontractor against whom he has reasonable objection.

The use of subcontractors listed by the bidder and accepted by the City prior to contract execution will be required in the performance of the work.

### 14. CONTINGENCY ALLOWANCE

Once bids have been received and a successful bid identified, the City may add a contingency allowance to the construction contract as part of the total contract amount. This contingency allowance is to be used for any possible construction change orders that occur during the life of the contract and shall be reflected as a separate line item on the schedule of values. Any unused portion of the allowance remaining at the completion of the contract shall revert back to the City as a credit.

While calculating bond and insurance costs for bid preparation purposes only, bidders should add 8% to their overall bid to accommodate the increase in the contract amount due to the possible inclusion of a contingency allowance by the City after bids have been taken.

### 15. PRE-BID CONFERENCE

A Pre-Bid Conference will be held on **April 22, 2025 at 10:00 a.m.** at **Memphis Parks, 2599 Avery Ave., Memphis, TN 38112** All parties interested in bidding on this project are hereby invited and urged to attend this meeting.

**16. POST BID OBJECTIONS**

No objections with regard to the application, meaning, or interpretation of these specifications will be considered after the opening of the subject bids.

**17. RECEIPT AND OPENING OF BIDS**

The City of Memphis (herein called the "City") invites bids on the forms attached hereto. All blanks must be appropriately filled in. Bids will be received by the City at the office of the City Purchasing Agent, Room 368, City Hall, 125 N. Main, Memphis, TN 38103, until **12:00 p.m., May 14, 2025**, and then opened and read during the City of Memphis Bid Session. Bid Sessions are now available on Teams for viewing. You can visit the City of Memphis Business website to obtain the link. Please see link below for access to attend the weekly Teams meeting. <https://www.memphistn.gov/business/>

Each bid shall be submitted in a sealed envelope, with the name, license number, expiration date thereof, and license classification of the contractors applying to bid for the prime contract and for the electrical, plumbing, heating, ventilation, and air conditioning contracts, appear on the outside of the envelope containing the bid. All bidders are requested but not required to use the "City of Memphis Bid Envelope" with all applicable information filled out on the outside of the envelope including:

- a) Name of Project: **Lichterman Nature Center Major Maintenance**
- b) Contractor's Name:
- c) Contractor's Address:
- d) Contractor's License Number, expiration date, and that part of the classification applying to the bid. This information shall also be provided for the contractor applying to the bid for electrical, plumbing, heating/ventilation/air conditioning, and masonry work.
- e) The above due date, and bid opening time:

If forwarded by mail, the sealed envelope containing the bid must be enclosed in another envelope addressed to City Purchasing Agent; Room 368, City Hall; 125 N. Main; Memphis, TN 38103.

Any bid may be withdrawn prior to the above scheduled time for opening of bids or authorized postponement thereof. Any bid received after the time and date specified shall not be opened. Bidders must comply with all applicable licensing requirements.

The City of Memphis reserves the right to reject any and all bids and to waive any informality in bidding.

THE CITY OF MEMPHIS RESERVES THE RIGHT TO DELAY AWARD OF THIS CONTRACT FOR A PERIOD OF UP TO ONE HUNDRED TWENTY (120) DAYS AFTER RECEIPT OF BIDS.

**18. TIME OF COMPLETION**

The work shall begin immediately upon date indicated on the Notice-to-Proceed and shall be completed in accordance with the following schedule:

Work shall be completed within **One Hundred Twenty (120)** Calendar Days.

All time noted above is based upon consecutive calendar days (and the time allowed for each bid item is intended to be concurrent with the other bid items). Upon acceptance of this contract, the contractor agrees to pay the City of Memphis the sum of **(\$500.00)** per day for liquidated damages for every calendar day that the work remains incomplete beyond **120** calendar days from date of Notice-to-Proceed. Additionally, the Contractor agrees to pay the City of Memphis **(\$100.00)** per day for liquidated damages for each calendar day the punchlist work and submission of all close-out documents remains incomplete beyond thirty **(30)** days from date of Substantial Completion.

Construction time shall include all normal weather conditions, such as rain, snow, and freezing temperatures. Extension of time will not be allowed for normal inclement weather, as recorded by the Memphis Area Office of the National Weather Service. Claims for delay attributed to unusually severe weather must be supported by National Weather Service climatological data covering the period in question and the same calendar period for the five preceding years.

## 19. NONDISCRIMINATION

All entities contracting with the City agree to abide by and to take affirmative action when necessary to ensure compliance with the nondiscrimination clauses set out below, and agree to show proof of non-discrimination upon request and to post in conspicuous places available to all associate agents and their employees. In the event of non-compliance with city nondiscrimination clauses, or with provisions of Executive Orders 11141 (age), 11246, 11375 (women), 12086 (Viet Nam veterans), 110478 (federal employees), 11625 (minority business) 11701 (veterans), Title 41, Chapter 60 (handicapped) and specifically the handicapped affirmative action clause in Section 60-741.6.9 of OFCCP Rules, and any and all other federal laws prohibiting discrimination, contracts may be canceled, terminated, or suspended in whole or in part by the City of Memphis.

The bidder shall execute the specified City of Memphis Certificate agreeing that, if awarded the contract, he/she shall not discriminate against any subcontractor, employee, or applicant for employment on the grounds of race, color, national origin or sex, in accordance with the citations listed in the above paragraph; and shall require the execution of such a certificate for each subcontractor prior to award of any subcontract with the further requirement that each subcontractor shall include identical requirements in any lower tier subcontracts which might in turn be made. FAILURE TO EXECUTE AND SUBMIT SUCH CERTIFICATE WITH THE BID SHALL CAUSE THE BID TO BE REJECTED AS NON-CONFORMING.

The successful bidder and all subcontractors under the general contract shall maintain copies of their payrolls and all subcontracts for each weekly payroll period for the life of the construction and for a period of **FIVE YEARS** after final release and payment is made by the City to the contractor.

## 20. PREVAILING WAGE ORDINANCE

It is the policy of the City of Memphis that a responsible bidder awarded a contract by the City of Memphis that falls within the guidelines of the current City of Memphis Prevailing Wage Ordinance must comply with the most current Prevailing Wage Rates (as determined by the U.S. Department of Labor) for corresponding classes of laborers and mechanics employed on similar projects in the area **on the date the legal notice is published**. Any firm, individual, partnership or corporation that is awarded a contract by the City of Memphis for the construction, improvement, enlargement, alteration or replacement of a City of Memphis public work or project in excess of **\$50,000** shall be required by the City of Memphis to pay local Prevailing Wages for laborers, workers, mechanics or others, as listed by the Tennessee Department of Labor,

Classification of Workers, established for Region 1, at the time the project is bid and continue until the completion of such project. **Furthermore, the entity awarded the contract will classify its employees according to the State of Tennessee, Department of Labor and Workforce Development, Classification of Workers, and if applicable, adhere to the guidelines for apprentice and apprenticeship programs.** Toward achieving that objective, the Prevailing Wage Program is hereby established and requires each bidder to abide by the following:

a). CONTRACTOR/SUBCONTRACTOR RESPONSIBILITIES

Every contractor and all subcontractors **must**:

1. Classify all workers in conformity with the wage rate as determined by the U.S. Department of Labor. Refer to <https://sam.gov> for the most current classifications and wage rate determinations.
2. Post and keep posted in a conspicuous place at the site of the construction work a copy of the Prevailing Wage Rates and make these rates available to all covered workers employed on the project at all reasonable times. Fringe benefits, when listed by the U.S. Department of Labor, **are** included in City Prevailing Wage Rates and must be paid to laborers/mechanics on City-funded projects.
3. Pay overtime compensation of one and one-half times the basic rate of pay for all hours worked over 40 per week as required by any applicable federal or state laws, rules or regulations.
4. Make only those deductions from wages authorized by law. Indicate the amount of FICA, Withholding Tax and if applicable "Other" when a voluntary deduction is withheld. A voluntary deduction must be authorized in writing and signed by the employee. A short note from the employee is all that is needed and should accompany the first payroll that identifies the deduction.
5. Keep contracts for the construction, demolition, improvement, enlargement, alteration or replacement of a City of Memphis public work or project as a single contract, and **not** deliberately divide it into multiple contracts for the sole purpose of circumventing the Prevailing Wage Ordinance.
6. **Notify the Prevailing Wage Office at the address set forth below of the contract(s) contractor and/or subcontractors have been awarded, and list subcontractors expected to be used. Award recipients shall submit expected classifications of laborers/mechanics to ensure all worker classifications have prevailing wages listed.** If classifications are not listed, the Prevailing Wage Office will determine the wages to be used for such classifications.
7. Submit payroll reports on a **weekly** basis to the Prevailing Wage Office utilizing the LCPTracker certified payroll reporting software. Each weekly certified payroll report must be submitted by the award recipient within **7 DAYS** after the regular payment date period. It is the responsibility of the award recipient to review **ALL** payroll reports for proper compliance prior to submitting such reports to the Prevailing Wage Office. The award recipient is responsible for the full compliance of all subcontractors and will be held accountable for any payroll reporting and wage restitution. The contractor and subcontractor must complete a Statement of Compliance which states that the certified payrolls are correct and complete, and that the wage rates paid to the workers during the reporting period equal or exceed the Prevailing Wage Rates included in the construction contract, and that

the classifications used conform with the work the employee performs. The primary contractor is responsible for submitting all certified payrolls including those of the subcontractor(s) used through the life of the construction project.

b) PAYMENTS TO COVERED WORKERS

1. CLASSIFICATION OF COVERED WORKERS

All contractors and subcontractors must classify covered workers in the contract and payroll records, in conformity with the schedule of classifications appearing in the “City of Memphis Prevailing Wage Rates with Fringe Benefits” which are bound herein. The contractor and subcontractors must pay each worker at least the minimum Prevailing Wage rate for that classification regardless of their level of skill. The only workers who can be paid less than the rate for their craft are apprentice and trainees who are registered in an approved Bureau of Apprenticeship Training (BAT) program. For an employee with split classifications, list the employee once for each classification, distribute the hours of work accordingly and list the rate of pay and gross earnings for each classification.

2. INSPECTION OF RECORDS

The contractor and subcontractor(s) will make their employment records available for inspection by representatives of the contracting agency, the Prevailing Wage Commission, and the Tennessee Department of Labor, and will permit such representatives to visit construction projects at all reasonable times.

3. RESTITUTION FOR UNDERPAYMENT OF WAGES

Where underpayment of wages has occurred, the employer will be required to pay wage restitution to the affected employee. Wage restitution must be paid promptly in the full amount due, less the permissible and authorized deductions. Wage restitution is the difference between the hourly wage paid to the employee and the Prevailing Wage Rate required, as stated on the Prevailing Wage Rates schedule, for all hours worked in which underpayment occurred. The difference in the wage rate is called the “Adjustment Rate.” The Adjustment Rate multiplied by the number of hours worked equals the gross amount of restitution due the employee.

4. BOND FOR COMPLIANCE

The bond of the contractor or subcontractor shall contain a provision obligating such contractor or subcontractor to a faithful performance of each requirement imposed upon such contractor or subcontractor under the terms of the contract.

5. VIOLATIONS, PENALTIES, SANCTIONS

A contractor who knowingly or willfully fails to comply with the provisions of the Prevailing Wage Ordinance as determined by the Prevailing Wage Commission shall be fined not less than the maximum amount allowable under Tennessee Code Annotated § 6-54-306, as amended, for each violation. Any contractor who is found to have knowingly or willingly committed two (2) violations of the Prevailing Wage Ordinance in any twenty-four (24)- month period shall be prohibited from being awarded a contract by the City of Memphis for a period of twenty-four (24) months from adjudication of the second violation.

c) SUBCONTRACTS

The contractor shall insert in all subcontracts the clause set forth in (b) and a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

d) CITY OF MEMPHIS PREVAILING WAGE OFFICE

City of Memphis  
Prevailing Wage Office  
125 N. Main St.  
Memphis, TN 38103  
(901) 636-6311  
[prevailingwage@memphistn.gov](mailto:prevailingwage@memphistn.gov)

END OF SECTION

SECTION 00510 - CONSTRUCTION CONTRACT

Contract For: **Lichterman Nature Center Major Maintenance, 5992 Quince Rd, Memphis, TN 38119**

This Agreement made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_ (hereafter "Contractor"), and the City of Memphis, a Municipal Corporation organized under the laws of the State of Tennessee (hereafter "City").

Whereas City published a legal Notice to Bidders pursuant to Lichterman Nature Center Major Maintenance, and issued drawings and specifications for the construction and performance of specified incidental work; and

Whereas Contractor submitted a proposal dated May 14, 2025, in accordance with such Notice to Bidders, drawings and specifications; and such proposal was accepted by City as the lowest and best bid;

NOW, THEREFORE, in consideration of the mutual covenants, conditions, and promises herein contained, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

Contractor hereby agrees to construct the project in accordance with the drawings and specifications bid upon and provided hereto, and in accordance with all other documents incorporated herein as set forth in this Section, at the stipulated sum price of

\_\_\_\_\_ (\$ \_\_\_\_\_ )

Contractor shall promptly begin construction on the date specified hereafter in the written Notice to Proceed provided by City's Consultant, and shall fully complete all work within **120** calendar days.

Should Contractor fail to complete all work within **120** days, Contractor shall pay City **\$500.00** per day as liquidated damages for each calendar day required for the completion of the contract beyond the time stipulated. Additionally, Contractor shall pay City **\$100.00** per day as liquidated damages for each calendar day that all punchlist work and submission of all close-out documents remain incomplete beyond thirty (30) days from the date of substantial completion.

A. Contractor agrees to execute a Performance Bond in an amount equal to 100% of the contract sum with Surety to be approved by the Mayor and City Attorney, or their designated representatives, as security for full and faithful performance of the contract and for the payment of labor and material furnished.

B. City reserves the right to require that Contractor provide an additional bond or bonds in such form and amount, and with such surety or sureties as approved by City, should City determine that the surety or sureties provided by Contractor to be insufficient to cover the performance of Contractor's work. In such event, no further payment shall be due Contractor until such new or additional bonds shall be provided in the manner and form satisfactory to City. This Contract shall not take effect until such Bond has been executed and approved.

C. Contractor agrees to maintain the different types of insurance deemed appropriate by City as expressly set forth in the Contract Specifications with insurance companies acceptable to City at Contractor's sole cost and expense, and shall provide evidence of such insurance to City contemporaneous with the commencement of this Agreement.

Upon completion of all work to be performed under this Agreement, Contractor shall provide a written statement of all work performed. Any outstanding balance owed by City shall be paid to Contractor or Contractor's successors or assigns out of the funds designated by City for this project, excepting therefrom any sum to be lawfully retained under the terms of this Agreement, and all such funds as may be due the City,

The Mayor or his designated representative shall have the right to suspend the work provided for herein due to any default by Contractor, and such suspension shall not affect the right of the City to any damages for such breach.

The Mayor or his designated representative reserves the right to discharge the Contractor for breach of any provision of this Contract, and such discharge shall not affect the right of the City against Sureties on the bond provided.

It is agreed an enumeration of drawings, specifications and addenda which form a part of this Contract, as set forth in Article 2 of the General Conditions, "Contract Documents", is as follows:

- Project Manual dated April 4, 2025
- Legal Notice to Bidders
- Instructions to Bidders
- Bid Form
- Bid Bond
- City of Memphis Construction Contractor's Certificate of Nondiscrimination
- City of Memphis Construction Contractor's Certificate of a Drug Free Workplace
- Construction Contract
- Escrow Agreement
- Performance Bond
- Partial Release of Liens for Subcontractors
- Final Release of Liens for Subcontractors
- Final Release of Liens for General Contractors
- General Conditions of the Contract for Construction
- Drawings as listed in Index of Drawings, Section 00850
- Addenda Issued

Witness the signatures of the parties hereto, by their duly authorized officers, on the day and year first written.

**CONTRACTOR**

\_\_\_\_\_  
Contractor's Company Name

\_\_\_\_\_  
Corporate Secretary – Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed or Typed Name

\_\_\_\_\_  
Printed or Typed Name

**OWNER**

\_\_\_\_\_  
**CITY OF MEMPHIS**  
Owner

APPROVED AS TO LEGAL FORM

\_\_\_\_\_  
City Attorney

\_\_\_\_\_  
Mayor

**ATTESTED:**

\_\_\_\_\_  
Deputy Comptroller

**END OF SECTION**

SECTION 00520 - ESCROW AGREEMENT

“This Agreement is entered into, as of the date of execution, by and between City of Memphis ("City"), \_\_\_\_\_ ("Contractor"), and First Horizon Bank ("Bank" or "Escrow Agent").”

WITNESSETH:

WHEREAS, City and Contractor have entered into a contract dated \_\_\_\_\_ (the "Contract") for the construction of certain improvements to real property in connection with a project designated in City's Funding Source PK08037; and Lichterman Nature Center Major Maintenance,

WHEREAS, Section 00710, Article 4 of the Contract provides for a certain percentage to be withheld by City from each progress payment made on account of the Contract price (hereinafter referred to as "Retainage"); and

WHEREAS, City has selected Bank to be “Escrow Agent” for said Retainage;

NOW, THEREFORE it is mutually agreed among the parties hereto that:

1. City hereto shall cause a separate interest-bearing Escrow Account, Account No. Provided by First Horizon Bank ("the Escrow Account") to be established with the Escrow Agent. The proceeds of the Escrow Account shall be the property of Contractor and shall be subject to the rights of City if Contractor defaults on or does not complete the Contract. All interest earned on deposited Retainage shall be retained in the Escrow Account and paid to the Contractor in accordance with this Agreement. Contractor shall provide Bank with a W-9 and such other information as Bank may require to set up the Escrow Account. The Escrow Account will use Contractor’s tax identification number. The Escrow Account shall be titled in the following form:

First Horizon Bank
Construction Retainage for Contract No.
and the City of Memphis

One or more authorized representatives of Bank will be the only authorized signers on the Escrow Account. Except as specifically provided in this Agreement, City and Contractor agree that the Escrow Account will be subject to, and Bank’s operation of the Escrow Account will be in accordance with, (a) the right of Bank to place holds on uncollected funds pursuant to Federal Reserve Regulation CC, and (b) the terms of Bank’s applicable deposit account agreement governing the Escrow Account and any other agreements or disclosures governing the operation of the Escrow Account (such as interest rate, frequency of compounding, etc.) or requested services provided by Bank to City or Contractor in connection with the Escrow Account (“Account Agreements”). In connection with the interpretation and application of the

Account Agreements, Bank shall be considered the depository bank and City and Contractor shall be considered the account holders, jointly and severally. All documentation referenced in this Agreement as governing the Escrow Account is hereinafter collectively referred to as the "Account Documentation." Except as otherwise provided herein, the Account Documentation shall continue to govern the relationships between City, Contractor, and Bank relative to the Escrow Account. The Escrow Agent shall provide City with monthly statements pertaining to the Escrow Account and may, on request, provide Contractor with such statements or other information pertaining to the Escrow Account. The Escrow Agent shall not charge any fees against the funds deposited into the Escrow Account.

2. Such Retainage shall not be released from the Escrow Account without the prior written approval of City (a letter bearing the signature of the Chief Financial Officer or Comptroller of the City of Memphis or their designee must be presented to the Bank requesting such release of Retainage) with a copy of said letter to be sent to Contractor in the manner provided for transmission of notice as provided in the Contract between City and Contractor. Any such letter shall be on letterhead for the City's Division of Finance and shall be sent to Bank at the following address:

First Horizon Bank  
Attn: George Slade / Roberta Turntine / Melissa Wilson  
165 Madison Avenue  
Memphis, TN 38103

Escrow Agent may rely on any such letter that it believes in good faith to be genuine and need not inquire about the authenticity of the signature on such letter or the authority of the person who signs such letter.

3. From and after the date hereof, as each progress payment is made pursuant to Section 00710, Article 4 of the Contract, the Retainage withheld by City pursuant to the provisions of the Contract shall be concurrently deposited to the Escrow Account. If any such deposit is made by check, Bank is authorized to deposit such check into the Escrow Account without the endorsement of Contractor.
4. Until satisfactory completion in full of the Contract, as between the City and Contractor, City has and shall retain a first lien on and security interest in the Escrow Account, though Escrow Agent is not responsible for perfection of any such security interest. The parties hereto acknowledge and agree that this Agreement shall be deemed to grant "control" (as defined in Section 9-104 of the UCC) of the Escrow Account to City in connection with any security interest City may have in the Escrow Account. This security interest shall terminate upon City's execution of a release, to the extent of such release. Upon request for partial reduction of retainage as provided in the contract, or upon satisfactory completion in full of the Contract by the Contractor, to be evidenced by a written release delivered to the Escrow Agent, said release to be signed and executed by City, either (i) all funds accumulated in the Escrow Account, together with any accumulated interest or other earnings thereon, or (ii) the specific amount identified in the release, shall be paid promptly to the Contractor. Notwithstanding anything herein to the contrary, Contractor hereby agrees that the Escrow Account may be drawn against by City to pay any and all costs, including reasonable attorneys' fees and court costs arising out of any lien or claim for lien filed by anyone claiming by, through or under the Contractor in

connection with the Contract and/or arising out of any breach of the Contract by Contractor. Bank shall be entitled to comply with any such withdrawal instructions provided by City without further consent of Contractor and without regard to whether City has the right to request such withdrawals or has provided notice to Contractor of such withdrawal instructions.

5. In the event of any dispute regarding this Agreement, or in the event that any of the parties hereto do not agree as to the disposition of the funds in the Escrow Account, the parties hereto agree that the Escrow Agent shall be released of any further obligation under this Agreement by tendering the funds maintained in the Escrow Account into a court of competent jurisdiction in an action in the nature of an interpleader.
6. City may replace Escrow Agent by notifying Bank. Upon receipt of such notice, Escrow Agent shall transfer all funds then on deposit in the Escrow Account to such bank selected by City within 10 business days of such notice from City. City shall notify Contractor of the substitute escrow agent and related escrow account within 30 business days of such transfer of funds to said substitute escrow agent. Upon transfer of all funds on deposit in the Escrow Account in accordance with the instructions provided by City, Bank shall be released from any further obligations to City or Contractor with respect to such funds or this Agreement.
7. Escrow Agent may resign as Escrow Agent by notifying City and Contractor in writing of its intent to resign as Escrow Agent. Upon receipt of such notice, City and Contractor agree that City shall have the right to approve a substitute escrow agent within 10 business days of such notice from Escrow Agent. Escrow Agent shall transfer all funds then on deposit in the Escrow Account to such bank selected by City. Upon transfer of all funds on deposit in the Escrow Account in accordance with the instructions provided by City, Bank shall be released from any further obligations to City or Contractor with respect to such funds or this Agreement.
8. To the extent permitted by law, the parties hereto agree to Indemnify and hold the Escrow Agent harmless from any loss, damages, or liabilities of any kind whatsoever, whether foreseen or unforeseen, whether direct or indirect arising out of or in connection with this Agreement, the Escrow Account and the funds contained therein, or the performance of the Escrow Agent's obligations hereunder, except liability resulting from Escrow Agent's negligence or misconduct. The Escrow Agent may rely upon the signatures of any correspondence from either or both of City and/or Contractor as being the authentic signatures of persons duly authorized to act on behalf of the City or Contractor. Further, the Escrow Agent may rely upon and assume the authority of the persons signing this Agreement to execute such on behalf of City and Contractor. This Agreement does not create any obligations of Bank, and Bank makes no express or implied representations or warranties with respect to its obligations under this Agreement, except for those expressly set forth herein. In particular, Bank will not have any responsibility to either City or Contractor with regard to the rights and responsibilities of City or Contractor under any construction or related agreement(s) between them.
9. Except for the expressed provisions made in this Agreement, nothing provided in this Agreement shall be construed to modify or to amend the terms and provisions of the Contract.

In witness thereof, the parties, by their signatures hereto have executed or approved this ESCROW AGREEMENT.

**CITY OF MEMPHIS**

Approved as to Legal Form

By: \_\_\_\_\_  
Mayor

By: \_\_\_\_\_  
Chief Legal Officer/City Attorney

**CONTRACTOR**

**BANK**

By: \_\_\_\_\_  
Signature

By: \_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed or Typed Name and Title

\_\_\_\_\_  
Printed or Typed Name and Title

**END OF SECTION 00520**

**SECTION 00710 - GENERAL CONDITIONS OF THE CONTRACT**

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**GENERAL CONDITIONS OF THE CONTRACT****ARTICLE 1 - SCOPE OF THE WORK****Section 1.1 Scope of the Work**

- A.. The Contractor shall provide for the Lump Sum Price set forth herein, all of the labor, supervision, materials, supplies, tools, equipment, appliances, and facilities necessary to construct the Project upon the real property owned by the Owner as described in the contract documents. Contractor agrees that the Project shall be constructed in accordance with the terms of this Agreement and the Contract Documents as defined in Article Two of this Agreement (herein the “Work”). The term “Work” includes, but is not limited to, all labor necessary to construct the Project as described in the Contract Documents, all materials and/or equipment incorporated or to be incorporated in the Project as described in the Contract Documents.

**ARTICLE 2 - CONTRACT DOCUMENTS****Section 2.1 Definition**

- A. The Contract Documents include the General Conditions of the Contract, the Construction Contract, the Drawings and Specifications, all Addenda, all Exhibits or modifications to any of them, issued prior to or after execution of the Construction Contract, as well as each document as set forth in Section 00510-2 of the Agreement attached hereto. As used in this Agreement, a “modification” is either:
1. A written and signed amendment to the Agreement;
  2. A Change Order or Construction Change Order (as defined in this Agreement);
  3. A written interpretation issued by the Owner;
  4. A Construction Change Directive issued by the Owner.

**Section 2.2 Intent of Contract Documents**

- A. The intent of the Contract Documents is to include all materials, appliances, labor and services of every kind necessary for the proper execution of the Work. The Contract Documents are to be considered as one document, and whatever is called for by any one of the documents shall be as binding as if called for by all.

**Section 2.3 Errors in Contract Documents**

- A. If the Contractor finds any error, inconsistency, omission, discrepancy or variance with any applicable laws in any respect in the Contract Documents, it shall notify the Owner in writing of any errors discovered within five working (5) calendar days of such discovery and before beginning the affected portion of the Work. The Owner will make any correction, interpretation or clarification promptly, basing its decision on the intent of the Contract Documents. Failure of the Contractor to timely notify the Owner of any such error or inconsistency within the time provided by this paragraph shall bar the Contractor from making any claim for additional time or compensation caused by any such error or inconsistency even if the error or inconsistency caused the Contractor to incur additional expense or time of performance.

**ARTICLE 3 - PROGRESS OF THE WORK****Section 3.1 Commencement and Completion**

- A. The Contractor shall commence the Work within seven (7) calendar days following receipt of a written Notice to Proceed from the Owner and shall substantially complete the work per Section 00510, the "Construction Contract". The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time. The Contractor warrants that it will deliver the Project to the Owner free from any and all liens or other encumbrances. Contractor further agrees to promptly (which is defined for purposes of this paragraph as no more than three calendar days from receipt of any lien or other notice) notify the Owner of the existence of any and all liens filed by any subcontractors, materialmen, suppliers or sub-contractors. Time is of the essence, and the Substantial Completion Date may be altered only as provided in this Agreement. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work. For purposes of this Agreement, substantial completion shall occur when the Project has been constructed to the point that only minor or punch list items remain to be performed and the Work can be occupied by the Owner and used for the purpose for which it was intended ("Substantial Completion"). Owner will, upon request of the Contractor, issue a certificate establishing the Substantial Completion Date at any time after Substantial Completion has occurred.

**Section 3.2 The Progress Schedule**

- A. Prior to commencement of on-site construction activities and in any event within seven (7) calendar days from the receipt of the Notice to Proceed from Owner, Contractor shall submit to the Owner a preliminary progress schedule in the form of either a bar chart or Critical Path Method (CPM) schedule. Said preliminary progress schedule will be consistent with the information set forth in the bidding documents concerning the Substantial Completion Dates, the sequencing of activities and shall include, but not be limited to, the durations for all major items of work to be performed; the start and finish date of all such activities; and the Substantial Completion Date of the Project as set out in this Agreement. Within thirty (30) calendar days from the submission of the preliminary progress schedule, the Contractor shall submit to the Owner for approval, a more detailed progress schedule, which shall be either a bar chart or Critical Path Method (CPM) schedule depicting all activities which will occur on the Project; the duration of such activities; the start and finish dates of such activities; the final and Substantial Completion Date; and the inter-dependence of all such activities. The Contractor shall submit to the Owner updated progress schedules each month to reflect actual progress made and to forecast future progress of the Work. The Owner reserves the right to reasonably reschedule the Work or the sequence of the activities of the Contractor for no additional compensation should it deem such rescheduling to be in its best interest. Float is defined as the amount of time between the early start date and the late start date for any of the activities depicted on the CPM Progress Schedule. Float is not for the exclusive use or benefit of either the Owner or the Contractor. Ownership of the float is vested in the Project rather than the Owner or the Contractor.

**Section 3.3 Extension of Substantial or Final Completion Date**

- A. Time is of the essence and an extension of the Substantial Completion Date or Final Completion Dates (which are defined in Sections 3.1A and 4.6B respectively of this Agreement) will only occur as permitted in this Section 3.3. Contractor may receive an extension of the Substantial or Final Completion Date equal to the duration of any delay that occurs by reason of any of the following (an "Excusable Delay"):

- 1) A written request from the Owner to the Contractor for extra Work or change in the Work pursuant to Section 9.2 of this Agreement;
  - 2) Unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities similar to the Work;
  - 3) An order of a court of competent jurisdiction suspending the Work;
  - 4) Abnormal inclement weather as defined in Section 3.3D; or
  - 5) A natural catastrophe, such as a flood or earthquake.
- B. Local strikes, lock outs, the non-availability of labor, materials, inclement weather, the Owner's right to suspend work, or delays caused or attributable to the negligence or fault of the Contractor or its Subcontractors will not constitute the basis for an Excusable Delay justifying an extension of the Substantial or Final Completion Date. No extension to the Substantial or Final Completion Date shall be granted for the period of time during a delay in the performance of the Work which is caused in part by the Owner or the Architect and in part by the Contractor or one for whom the Contractor is responsible ("Concurrent Delays").
- C. In order to obtain an extension of the Substantial or the Final Completion Date due to an Excusable Delay, the Contractor in each instance shall give written notice to the Owner within five (5) calendar days after the discovery of the occurrence of each Excusable Delay, which shall also include the Contractor's anticipated schedule impact on the CPM progress schedule, the Substantial and the Final Completion Dates. Upon the failure of the Contractor to do so, its right, if any, to an extension will be considered waived. The term "discovery of the occurrence," for purposes of this paragraph, means when a competent Construction Manager discovered or should have discovered such occurrence. The Owner shall render a written decision which shall be made in good faith and shall be conclusive upon the parties granting, or refusing the request of the Contractor for an extension, within thirty (30) calendar days after receipt of the request for a time extension of the Substantial and/or Final Completion Date. The Owner may in its sole and absolute discretion deny the Contractor's request for an extension of the Substantial or Final Completion Date for an Excusable Delay that only affects portions of the Work not found on the CPM progress schedule. Notwithstanding the Owner granting the Contractor's claim for an extension of time for an Excusable Delay, the Contractor must take reasonable steps to limit the duration of the Excusable Delay giving rise to the claim. The Owner's granting of the Contractor's claim for an extension of time caused by an Excusable Delay will not impair any right to terminate this Agreement or to exercise any other remedy which the Owner has elsewhere in this Agreement or the Contract Documents.
- D. Construction time shall include all normal weather conditions, such as rain, snow, and freezing temperatures. Extension of time will not be allowed for the normal inclement weather, as recorded by the Memphis area office of the National Weather Service. Refer to specification section 01 2664 – Weather Days for delays attributed to unusually severe weather.

**Section 3.4 No Damage for Delay**

- A. Contractor agrees to prosecute the Work and to require the subcontractors to prosecute the Work in a timely and proper method so as to meet the dates reflected on the progress schedule, including the Substantial and Final Completion Dates. In the event that the Contractor is delayed in the prosecution of the Work through no fault of the Contractor or its subcontractors, and for causes as set forth in Paragraph 3.3A(3) through (5) of this Agreement, and defined therein as Excusable Delay, then the Contractor may seek a time extension in accordance with the provisions of Paragraph 3.3C. Except as otherwise provided in Section 3.4B below, Contractor agrees that such time extension is the sole and exclusive remedy for any damages, delays, disruptions and/or interferences caused by or

attributable to such Excusable Delays. Contractor also agrees that the Owner shall not be liable for any monetary damages, including but not limited to, home office overhead, sustained by Contractor for acceleration, disruption, suspension of the work or any other damages related to the progress schedule. In no event shall Owner be liable to Contractor for any consequential or incidental damages arising out of or relating in any manner to the Project, the Work, and/or the Contract Documents, including but not limited to, damages incurred by Contractor for rental expenses, lost profit, overhead, income, financing, business and reputation, loss of management or employee productivity or of the services of such persons, or damages incurred by the Contractor for principal offices expenses including the compensation of personnel stationed there.

- B. Limited Circumstances Permitting Increase in the Lump Sum Price. If an Excusable Delay of the nature described in Section 3.3A(1) or (2) occurs, the Contractor may receive, in addition to an extension of the Substantial or Final Completion Date, a reasonable adjustment in the Lump Sum Price to reflect the actual costs, if any, that the Contractor and its Subcontractors incur due to such Excusable Delays. In order to obtain an adjustment for an Excusable Delay set forth in Section 3.3A(1) or (2), the Contractor must promptly and fully comply with all Change Order and Change Directive procedures set forth in Section 9.2 hereinbelow. If the Contractor fails to make a claim for an adjustment in the Lump Sum Price in accordance with Section 9.2, the Contractor waives its right, if any, to an adjustment in the Lump Sum Price by virtue of the occurrence of an Excusable Delay pursuant to Section 3.3A(1) or (2).

### **Section 3.5 Liquidated Damage**

- A. In order to compensate the Owner for failing to achieve the Substantial Completion Date or Final Completion Date, as such date has been adjusted for Excusable Delays as defined herein, the Contractor shall pay to the Owner as liquidated damages and not as a penalty the following amounts:
- 1) The Contractor agrees to pay the City of Memphis the sum of \$500.00 per day for every calendar day the work remains incomplete until Substantial Completion is achieved.
  - 2) The Contractor agrees to pay the City of Memphis the sum of \$100.00 per day for each calendar day the punchlist work and submission of all close-out documents remains incomplete beyond thirty (30) calendar days from date of Substantial Completion.
- B. The Contractor agrees that any assessment by the Owner of liquidated damages or payment by the Contractor to the Owner of liquidated damages is to compensate the Owner only for the damages arising out of the Contractor 's delay in achieving the Substantial or Final Completion Date, and is not a release of any of the Owner's other rights, claims or damages against the Contractor, including claims of the Owner for defective or improper workmanship of the Contractor.

## **ARTICLE 4 - PAYMENT**

### **Section 4.1 Payment Procedure**

- A. Progress payments shall be made by the Owner to the Contractor in accordance with the following procedure:

1. a. Within ten (10) calendar days from the Notice to Proceed, the Contractor shall send the Consultant the completed schedule of values contained in the bidding document for approval by the Consultant.
  - b. At least ten days before the date established for each progress payment, the Contractor shall submit to the Consultant an itemized and notarized Application and Certificate for Payment, based on the Work completed during the current month, using AIA Document G702. Contractor shall not be paid any amounts exceeding the Lump Sum Price as set forth in the construction contract, Section 00510, unless modified by a properly executed written Change Order or Change Order Directive in accordance with the Provisions of Article 9 of this Agreement.
2. Each Application and Certificate for Payment, at the Owner's request, shall be accompanied by:
  - a. Payroll information.
  - b. Affidavit from each certified sub-contractor indicating they have been paid what is due them through the previous applications for payment utilizing the forms found in section 00640 or section 00641 as appropriate.
  - c. An approved updated progress schedule as required in Section 3.2.
  - d. Certification of M/WBE payments utilizing the forms found in section 00640 or section 00641 as appropriate.
  - e. Updated schedule of submittals/submittal status log per Section 15.6.
  - f. Other documentation as may be requested by the Owner for his proper review of the Application and Certificate for Payment.
3. The Owner shall promptly review each Application and Certificate for Payment and approve it for such amount as is properly due under the Contract Documents.
4. Payments by the Owner shall be made within thirty (30) calendar days after receipt of such Application by the Owner, subject to the Owner's right to withhold payments pursuant to Article 7, Section 7.7.

#### Section 4.2 Retainage

- A. In making progress payments pursuant to Section 4.1, the Owner may retain five percent (5%) of the approved amount of any Application and Certificate for Payment. Such retained amounts shall not be due and payable to the Contractor until Final Completion of the Work by the Contractor and Final Acceptance, as defined in Section 4.6 of this Agreement, of the Work by the Owner. Periodic reductions in the amount of retainage will be permitted by the Owner if deemed appropriate to the state of contract completion. The contractor may retain from each sub-contractor a percentage no greater than that retained by the Owner.
- B. For Contract values of \$500,000 or greater, the retained funds must be deposited in a separate interest bearing escrow account with a third party providing proper security for the performance of the obligation of the Owner or the Contractor pursuant to T.C.A. 66-11-144. The Contractor must submit the signed document contained in Section 00520 "Escrow Agreement" at the time he submits his signed contract to the City. If the Contractor fails to submit the document at the time of contract submission to the City, the City will not execute a construction contract with the Contractor.
- C. By signing this Agreement, the Contractor expressly waives (herein referred to as a "Waiver") all liens, claims, rights, encumbrances, security interests, any other benefit of, and all rights that might arise pursuant to T.C.A.' 66-11-101 et. seq. or any other Tennessee statute (herein referred to as a "Lien"). As a condition precedent to subcontracting any portion of

the Work, the Contractor shall first obtain a similar universal Waiver of Lien in writing from each Subcontractor, Sub-subcontractor, materialman, supplier, lessor, vendor performing services or providing materials or labor in connection with the Work and any other person that could qualify for a Lien, claim, right or other security interest under Tennessee law.

**Section 4.3 Payment for Material Stored On-Site**

- A. Payment for the actual unit cost of materials suitably stored on the site of the Work and intended for incorporation in the Work will be made by the Owner to the Contractor upon storage subject to the provisions of Sections 4.1 and 4.2 and the following conditions:
  - 1. The Contractor shall furnish supporting evidence satisfactory to the Owner evidencing the cost of the materials and shipment to the site of the Work;
  - 2. The materials shall not be stored on the site of the Work for more than forty-five (45) calendar days before they are installed in place, without the written consent of Owner;
  - 3. The materials shall be stored on-site in accordance with applicable recommendations of the manufacturer and the instructions of the Owner;
  - 4. All materials delivered to the site of the Work shall be stored and handled so as to preclude inclusion of any foreign substances and to prevent any discoloration or damage which might reduce the effectiveness of the materials as part of the Work.
  - 5. Payment for stored materials will be subject to retainage as defined in Section 4.2;
  - 6. The representative of the Owner may inspect and inventory any stored materials;
  - 7. No payment will be made for stored material unless such material is specially manufactured for the Project. For example, no payment will be made for material that is commercially available such as conduit, sheetrock, piping, etc.
- B. Payment will not be made for materials stored off the site of the Work without the written consent of Owner. In the event that the Owner consents to payment for materials stored off site, such payment shall be conditioned upon submission by the Contractor of bills of sale or such other documentation satisfactory to the Owner to establish the title of the Owner to such materials or equipment, and the submission of satisfactory insurance certificates for the stored materials.

**Section 4.4 Use of Payments**

- A. The Contractor shall use all sums paid to it pursuant to this Agreement for the performance of the Work in accordance with the Contract Documents and Article 8 of this agreement. Upon the request of the Owner, the Contractor shall furnish satisfactory proof, including but not limited to partial releases of liens utilizing the form found in section 00640 of the contract documents, as to the disposition of any monies paid to the Contractor by the Owner; provided, however, no provision of this agreement shall be construed to require the Owner to be in any way responsible for the proper disposition or application of the monies paid to the Contractor.

**Section 4.5 Payment Not a Waiver**

- A. Neither the approval or making of any payment to the Contractor, nor the partial or entire use or occupancy of the Work by the Owner shall be an acceptance of any portion of Work.

**Section 4.6 Final Payment, Final Acceptance and Final Completion**

- A. Final Payment by the Owner shall constitute a waiver of all claims by the Owner for performance of the Work except for claims of the Owner arising from unsettled liens, incomplete or defective workmanship, defective materials, failure to perform in accordance with the progress schedule, or for the breach of any guarantees of warranties provided by the Contractor under this Agreement. Acceptance of the Final Payment by the Contractor shall constitute a waiver and release of any and all claims which the Contractor may have then or in the future have against the Owner arising from the Work or this Agreement.
- B. Final Completion of the Work shall occur only after all Work (including punch list items) provided for in the Contract Documents has been finally completed (“Final Completion”). Final Acceptance of the Work shall occur when all Work has been accepted in writing by the Owner and the Contractor has provided the Owner with instructions and operating manuals, parts lists, modified construction documents approved by the Architect are suitable for preparing final “as-built” drawings, final release of liens by all subcontractors utilizing the form found in section 00641 of the contract documents, final release of liens from the General Contractor utilizing the form found in section 00642 of the contract documents and all other items required by the Contract Documents and this Agreement (“Final Acceptance”).
- C. Neither the Final Payment nor the remaining retainage shall become due until the Contractor submits to the Owner the following:
  - 1. An affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or its property might in any way be responsible, have been paid or otherwise satisfied;
  - 2. A consent of surety to Final Payment; and
  - 3. Other data establishing payment or satisfaction of all such obligations, such as receipts, final release of liens by all subcontractors utilizing the form found in section 00641 of the contract documents and final release of liens from the General Contractor utilizing the form found in section 00642 of the contract documents.
- D. If any subcontractor, sub-subcontractor, laborer, vendor or materialman refuses to furnish a release or waiver required by the Owner, the Contractor shall furnish a bond satisfactory to the Owner to indemnify it against any such lien. If any such lien remains unsatisfied after all payments are made, the Contractor shall refund to the Owner all monies that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys’ fees incurred by Owner.
- E. The Owner shall issue a Certificate of Final Completion when, the Project has been completed and all conditions required by Paragraph 4.7 have been complied with by Contractor.

**Section 4.7 The Right of Owner to Withhold Payment**

- A. The Owner may withhold or, on account of subsequent discovered evidence, nullify the whole or part of any payment, including Final Payment, and withhold retainage, to such extent as may be necessary to reasonably protect itself from any of the following:

1. Defective work; or
2. Third-party claims filed or reasonable evidence indicating probable filing of such claims; or
3. Reasonable doubt that the Work will be substantially completed by the Substantial Completion Dates; or
4. Failure of the Contractor to make payments to subcontractors or for equipment, materials or labor; or
5. Evidence of fraud, over-billing or overpayment; or
6. Failure of the Contractor to prosecute the Work in accordance with the Contract Documents; or
7. A reasonable doubt that the Work can be completed for the unpaid balance of the Lump Sum Price as defined herein; or
8. Damage to another contractor, subcontractor or sub-subcontractor caused by the Contractor; or
9. Failure to submit M/WBE Certificate of Payment; or
10. Failure to pay Prevailing Wage Rates per Section 00100, paragraph 21; or
11. Failure of the Contractor to maintain monthly updates to the As-Built Drawings.
12. Failure of the Contractor to submit partial release of liens from all subcontractors utilizing the form found in section 00640 of the contract documents.

**ARTICLE 5 - EQUIPMENT AND MATERIALS**

**Section 5.1 Materials Provided by Contractor**

- A. Unless otherwise provided in the Contract Documents, the Contractor shall provide all equipment, materials, labor, tools, water, power to the site of the Work, and all other facilities necessary for the performance of the Work.
- B. All equipment, machinery, material, and articles incorporated in the Work shall be new and unused, and when not specified in detail in the Contract Documents, the same shall be of the most suitable grade and quality for the purpose intended.

**Section 5.2 Type of Equipment Used**

- A. When any equipment, material or article is referred to by trade name, make or catalog number, the reference shall be regarded as establishing the standard of quality and performance required and shall not be construed as limiting competition. The Contractor may, with the prior written approval of the Owner, use other equipment, materials or articles which are equal in quality and performance to that named in the Contract Documents; provided, however, that in no event shall such approval be construed as a waiver of the right of Owner to require equipment, materials or articles which conform to the standard of quality and performance established by reference to the trade name, make or catalog number of the equipment, materials or article for which the situation has been approved. Any cost of

re-design and additional expense resulting from the substitution shall be at the sole expense of the Contractor.

**Section 5.3 Non-Conforming Materials**

- A. Equipment, materials or articles installed or used in the Work which do not comply with the requirements of the Contract Documents, and which have not been previously approved in writing by the Owner shall be installed or used at the risk to the Contractor of subsequent rejection by the Owner.
- B. The Contractor shall be fully and solely responsible for quality control for all materials used in the performance of the Work.

**Section 5.4 Owner Furnishing Equipment or Fixtures**

- A. The Owner may directly furnish any or all of the equipment or fixtures required for the Project. In the event the Owner elects to do so, the contract contingency shall be increased by the amount which was to be charged by the Contractor for such equipment or fixtures as set forth and included in the Contract Documents. A Construction Change Order increasing the contract contingency for that item of work shall be executed by Owner and Contractor to reflect an increase in the contract contingency for that item of Work. The Contractor shall assume responsibility for and be fully responsible for the care, custody and control of all Owner furnished equipment once said equipment arrives on the job site or in any approved off site storage facility.

**Section 5.5 Substitutes or “Or Equal” Items**

- A. Whenever materials or equipment are specified or described in the Contract Documents by using the name of a proprietary item or the name of a particular Supplier the naming of the item is intended to establish the type, function and quality required. Unless the name is followed by words indicating that no substitution is permitted, materials or equipment of other Suppliers may be accepted by the Owner if sufficient information is submitted by the Contractor to allow the Owner to determine that the material or equipment proposed is equivalent or equal to that named. The procedure for review by the Owner will include the following as supplemented in the General Requirements.
  - 1) Requests for review of substitute items of material and equipment will not be accepted by the Owner from anyone other than the Contractor.
  - 2) The Contractor shall make written application to the Owner for acceptance thereof;
  - 3) The application will certify that the proposed substitute will perform adequately the functions and achieve the results called for by the general design;
  - 4) The application will state that the substitution is similar and of equal substance to that specified and be suited to the same use as that specified;
  - 5) The application will state that the evaluation and acceptance of the proposed substitute will not prejudice the Contractor’s achievement of Substantial Completion on time;
  - 6) The application will state whether or not acceptance of the substitute for use in the Work will require a change in any of the Contract Documents (or in the provisions of

- any other direct contract with the Owner for work on the Project) to adapt the design to the proposed substitute;
- 7) The application will state whether or not incorporation or use of the substitute in connection with the Work is subject to payment of any license fee or royalty;
  - 8) The application will identify all variations of the proposed substitute from that specified and also indicate available maintenance, repair and replacement service;
  - 9) The application will also contain an itemized estimate of all costs that will result directly or indirectly from acceptance of such substitute, including costs of redesign and claims of other contractors affected by the resulting change, all of which shall be considered by the Owner in evaluating the proposed substitute. The Owner may require the Contractor to furnish at the Contractor's expense additional data about the proposed substitute;
- B. The Owner will be allowed a reasonable time within which to evaluate each proposed substitute during the course of construction. The Owner will be the sole judge of acceptability, and no substitute will be ordered, installed or utilized without the Owner's prior written acceptance which will be evidenced by either a Change Order or an approved Shop Drawing. The Owner may require the Contractor to furnish at the Contractor's expense a special performance guarantee or other surety with respect to any substitute. The Owner will record the Owner's consultants in evaluating substitutions proposed by the Contractor and in making changes in the Contract Documents occasioned thereby.

## **ARTICLE 6 - "AS BUILT" DRAWINGS AND DATA**

### **Section 6.1 "As Built" Drawings**

- A. A complete set of drawings shall be maintained by the Contractor at the construction site for the purpose of showing "as built" conditions. The drawings shall be kept up-to-date and marked each day to show all changes and variations and each entry shall be dated and verified as made. At the completion of the Work and prior to Final Payment, a complete set of modified construction documents approved by the Consultant and suitable for preparing final "as built" drawings shall be submitted to the Consultant.

### **Section 6.2 Operation Maintenance Data and Training**

- A. The Contractor shall furnish complete and necessary data for the operation, repair and maintenance of each operating component of the Work (herein the "Data"). The Data shall include prints of shop drawings, "as-installed" conditions, sources of equipment and principal materials, specified tests and performance data, repair and maintenance data, lubrication instructions and recommendations, parts lists, and other catalog data or information required to operate and maintain any part of the Work. Care shall be taken to include all pertinent data and to exclude inapplicable or duplicate information. As specified in the Contract Documents, the Contractor shall also provide systems training of maintenance personnel.
- B. Prior to Final Payment, Data shall be provided to the Owner in accordance with associated sections of the contract documents.
- C. Installation information for all machinery and equipment also shall be kept on the site of the Work during construction, but used or marked prints or data sheets are not to be used in assembling the final maintenance and operating manuals described in Paragraph (a).

**Section 6.3 Information From Suppliers**

- A. The Contractor shall make it a requirement or condition of purchase from its suppliers of equipment and/or materials (1) to furnish complete and adequate operating and maintenance data pertaining to their equipment, (2) to assign to the Owner any warranty, express or implied, furnished by the manufacturer of the equipment, and (3) to assign to the Owner any customary maintenance or repair service, spare parts supply service, or personnel support service furnished by the manufacturer of the equipment. If the terms and conditions of any warranty, maintenance or repair service, spare parts supply service, or personnel support service furnished by the manufacturer of the equipment are negotiable, they shall be negotiated by the Owner and the manufacturer. The Contractor shall also advise the Owner in advance of placing any order for equipment if the warranty furnished by the manufacturer commences upon purchase, shipment or installation of such equipment.

**ARTICLE 7 - SUBCONTRACTS****Section 7.1 Definition**

- A. As used in the Contract Documents, a “Subcontractor” is a person or organization that has a contract with the Contractor to perform any portion of the Work or to furnish any equipment or materials to the Project.
- B. As used in the Contract Documents, a “Sub-subcontractor” is a person or organization that has a direct or indirect contract with the Subcontractor to perform any portion of the Work, or to furnish any equipment or materials to the Project.

**Section 7.2 No Contractual Relationship with Owner**

- A. Nothing contained in the Contract Documents or otherwise shall create any contractual relationship between the Owner and any Subcontractor or Sub-subcontractor, and no subcontract or sub-subcontract shall relieve the Contractor of its responsibilities and obligations should any Subcontractor or Sub-subcontractor fail to perform its work in a satisfactory manner. The Contractor agrees to be as fully responsible to the Owner for the acts and omissions of its Subcontractors and their Sub-subcontractors and of persons either directly or indirectly employed by them as it is for the acts and omissions of persons directly employed by it.

**Section 7.3 Award of Subcontracts**

- A. Unless otherwise specified in the Contract Documents, the Contractor, within fourteen (14) calendar days after bids are opened, the apparent low bidder, and any other bidder so requested, shall submit a list of all subcontractors he expects to use in the work. An experience statement with pertinent information as to similar projects and other evidence of qualification shall be furnished for each named subcontractor, as requested by the City. If the City or Consultant, after due investigation, has a reasonable objection to any proposed subcontractor, he may, before contract execution, request the apparent low bidder to submit an acceptable substitute without an increase in his/her bid. If the apparent low bidder declines to make any such substitution, he will not thereby sacrifice his/her bid security. Any subcontractor so listed and to whom the City or Consultant does not make any written objection prior to contract execution will be deemed acceptable to City and Consultant. The Contractor shall not be required to employ any subcontractor against whom he has reasonable objection. The use of subcontractors listed by the bidder and accepted by the

City prior to contract execution will be required in the performance of the work. Every subcontractor proposed for this project shall be required to execute the appropriate City form entitled “Construction Contract Certificate of Non Discrimination”, Section 00420.

- B. The Contractor shall not contract with any Subcontractor or material supplier (nor shall they contract with any Sub-subcontractor) or any person or organization (including those who are to furnish materials or equipment) proposed for portions of the Work designated in the Contract Documents or, if none is so designated, with any Subcontractor proposed for principal portions of the Work who has not been previously approved in writing by the Owner.
- C. If the Owner, for good cause, refuses to accept any Subcontractor or material supplier (or Sub-subcontractor) or person or organization on a list submitted by the Contractor, the Contractor shall submit an acceptable substitute. The Contractor shall indemnify, defend and hold harmless the Owner, its directors, officers and employees from all liabilities, claims or causes of action arising from the rejection of any Subcontractor, Sub-subcontractor or material supplier by the Owner.

**Section 7.4 Change of Subcontractors**

- A. The Owner may require a change of any Subcontractor. In such event, the Contractor shall submit a suitable substitute which is approved by the Owner.

**Section 7.5 No Substitution of Subcontractors**

- A. The Contractor shall not make any substitution for any Subcontractor nor allow the substitution of any Sub-subcontractor who has been accepted by the Owner, unless the substitution is required and previously approved by the Owner. Acceptable reasons for substitution (other than where required by the Owner) shall be limited to the following:
  - 1. Inability of the Subcontractor or Sub-subcontractor to provide bonds, if required;
  - 2. Failure of the Subcontractor or Sub-subcontractor to perform according to approved schedules or other provisions of the Contract Documents; or
  - 3. Other reasons which would reasonably render the Subcontractor or Sub-subcontractor unable to perform its work according to the Contract Documents as evidenced in writing by the Contractor.

**Section 7.6 Subcontract Terms**

- A. All portions of the Work performed by a Subcontractor or Sub-subcontractor shall be pursuant to an appropriate agreement between the Contractor and the Subcontractor (and where appropriate between Subcontractors and Sub-subcontractors) which shall contain provisions that:
  - 1. Preserve and protect the rights of the Owner under the Contract Documents with respect to the portion of the Work to be performed under the Subcontract (or Sub-subcontract) so that the subcontracting will not prejudice such rights;
  - 2. Require that such work be performed in accordance with the requirements of the Contract Documents;

3. Require submission to the Contractor of applications for payment under each subcontract to which the Contractor is a party including a partial release of liens utilizing the form found in section 00640 of the contract documents;
4. Require that all requests for additional compensation, extensions of time or otherwise with respect to subcontracted portions of the Work shall be submitted to the Contractor (via any Subcontractor or Sub-subcontractor where appropriate) in sufficient time so that the Contractor may comply in the manner provided in the Contract Documents for like requests by the Contractor upon the Owner; and
5. Obligate each Subcontractor or Sub-subcontractor specifically to consent to the provisions of Sections 3.2, 3.3, 3.4, 16.1, 24.2 and 24.3.

**Section 7.7 Subcontractor Reporting**

- A. Contractor shall submit and, as necessary, update subcontractor information (including but not limited to payments thereto), for any and all subcontractors used on City project(s), in the Owner's compliance tracking software, B2GNow. The City shall have the right to withhold future disbursement of funds under this Agreement and any future agreements until the requirements of this provision have been met.

**ARTICLE 8 - PAYMENT TO SUBCONTRACTORS FROM CONTRACTOR**

**Section 8.1 Payments to Subcontractors From the Contractor**

- A. The Contractor shall pay each Subcontractor an amount equal to the percentage of completion allowed to the Contractor on account of the work of such Subcontractor, less the percentage retained from payments to the Contractor. The Contractor shall also require each Subcontractor to make similar payments to its Sub-subcontractors.

**Section 8.2 Withholding of Payment by the Owner**

- A. If the Owner withholds monies for any cause which is the fault of the Contractor and not the fault of a particular Subcontractor, the Contractor shall pay that Subcontractor on demand, made at any time after the progress payment by the Owner should otherwise have been issued, for its work to the extent completed, less the retained percentage. Notwithstanding this Section 8.2, Contractor may withhold funds from any Subcontractor that is not performing its work in accordance with the Contract Documents. If the Owner has paid the Contractor for the work of a Subcontractor, which is withheld by the Contractor, then the Contractor shall refund to the Owner all funds paid by the Owner for such Subcontractor's work.

**Section 8.3 Independent Obligation to Pay**

- A. The obligation of the Contractor to pay its subcontractors (and their obligation to pay sub-subcontractors) is an independent obligation from the obligation of the Owner to make payment to the Contractor. The Owner shall have no obligation to pay or to see to the payment of any monies to any Subcontractor or Sub-subcontractor.

**ARTICLE 9 - CHANGES**

**Section 9.1 Changes in The Work**

- A. The Owner, without invalidating the Agreement, may order extra work or make changes by altering, adding to or deducting from the Work by executing a Change Order, Change Order Directive, Construction Change Order or Construction Change Order Directive in a form provided by the Owner. A Change Order/Change Order Directive is defined as any change to the contract which increases the Lump Sum Price or increases contract time. A Construction Change Order/Construction Change Order Directive is defined as any action taking place within the confines of the contract contingency fund. A Construction Change Order cannot change the Lump Sum Price nor can it change contract time. All work performed pursuant to a valid Change Order/Change Order Directive or Construction Change Order/Construction Change Order Directive shall be performed under the conditions of this Agreement and the Contract Documents.
- B. The Owner shall have authority to make changes in the Work not involving extra cost, and not inconsistent with the purposes of the Work, but otherwise, no extra Work or change in the Work shall be made unless pursuant to a Change Order and no claim by Contractor for additional cost or fee or any extension of the Substantial or Final Completion Date shall be valid unless so ordered in a written Change Order.

**Section 9.2 Change Order / Construction Change Order Procedure**

- A. Upon receipt of a request from the Owner for extra Work or changes in the Work, the Contractor shall promptly furnish to the Owner a statement setting forth in detail the proposal of the Contractor for performing the extra Work or changes and the effect of the extra Work or changes, if any, on the Lump Sum Price / Substantial or Final Completion Date (Change Order), including a statement of what effect, if any, the proposal will have on the CPM progress schedule, or changes in the contingency fund (Construction Change Order). The Contractor's statement in response to a request from the Owner for extra Work or Changes in the Work shall also include all supporting documentation for any request, including but not limited to, qualities of product of labor, equipment, hours, labor rates, labor burden, number of personnel, material cost, material quantities and equipment costs, taxes, insurance and bonds, overhead and profit, justification for any change in the Substantial or Final Completion Date, including any change on the CPM progress schedule, and credit for deletions from the Work. Any delays in the processing of a Change Order due to the lack of proper submittals or documentation by the Contractor shall not constitute grounds for a time extension or the basis of any claim. If the Owner approves in writing the proposal of the Contractor, a Change Order or Construction Change Order in the form provided by the Owner shall be executed by the parties and, where applicable, the Lump Sum Price or Substantial or Final Completion Date or the contingency fund shall be adjusted accordingly. In making any proposal in accordance with this Section 9.2 with respect to extra Work or changes in the Work, that will require materials or work covered by unit prices obtained from Subcontractors, the Contractor shall base its proposal on those unit prices without application of any multiplier or mark-up. In making any such proposal, the Contractor must observe, and must cause each of its Subcontractors to observe, that the extra work or changes in the Work will observe the requirements set forth hereinbelow.

**Section 9.3 Changes in the Lump Sum Price / Contingency Fund**

- A. Increases in the Scope: The increase in the Lump Sum Price or decrease in the contract contingency fund attributable to a Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive (as defined in Section 9.4 "Force

Account”), performed by the Contractor or any of its subcontractors shall not exceed the sum of the following:

1. The actual labor cost to perform the Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive, including insurance and taxes;
2. The actual unit cost of materials used in performing the Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive, including sales taxes;
3. The actual cost of increased, field related General Conditions directly related to the Change Order/Construction Change Order;
4. The actual cost for additional bond (change orders/change order directives only); and
5. For Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive, the total percentage of overhead and profit (OH&P), shall not exceed the following:
  - a. Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive involving contractor’s work only: The contractor shall be entitled to a 10% OH&P mark-up.
  - b. Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive involving subcontractor and contractor work: The firm(s) doing the work shall be entitled to a 10% OH&P mark-up. The contractor shall be entitled to a 5% OH&P Mark-up on the subcontractor’s work.
  - c. Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive involving multiple (two or more) tiers of subcontractors: The firm(s) doing the work shall be entitled to a 10% OH&P mark-up. One 5% OH&P subcontractor mark-up shall be allowed. The contractor shall be entitled to a 5% OH&P mark-up on the subcontractor’s work.

For purposes of adjustments in the Lump Sum Price, “overhead” by either the Contractor or any of its Subcontractors shall include items such as drawing detailing, document/revision control, common tools, communications, modeling, common safety equipment, uniforms, and other home office expenses.

- B. Decreases in the Scope: The decrease in the Lump Sum Price or increase in the contract contingency fund attributable to a Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive deleting a portion of the Scope of Work shall equal the sum of the following:
1. The actual labor cost that the Contractor would have incurred to perform the Work deleted in the Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive including the cost of overhead, profit, general conditions, insurance and taxes.
  2. The actual unit cost of materials, supplies, products, equipment and rental equipment that the Contractor would have used in performing the Work deleted in the Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive, including sales taxes;
  3. The actual cost of Subcontractors and Sub-subcontractors that the Contractor would

have incurred in performing the Work deleted in the Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive, including overhead, profit, general conditions, insurance and taxes; and

4. The actual credit for the cost associated with the lower limits required for the bonds including Subcontractor and Sub-subcontractor bonds, if applicable, as a result of the reduction in the Scope of the Work.

**Section 9.4 Force Account**

- A. In the event that the Owner and the Contractor cannot agree on the amount or time extension, if any, due to the Contractor for a Change Order or Construction Change Order pursuant to this Agreement, the Owner may direct the Contractor to proceed with the performance of the Change Order or Construction Change Order by a Change Order Directive or Construction Change Order Directive as applicable. In such event, the Contractor's compensation will be calculated pursuant to the provisions of Section 9.3.

**Section 9.5 Unconditional Obligation to Proceed**

- A. Notwithstanding anything herein to the contrary, the Contractor will proceed with the Work so as to complete the Work on or before the Substantial Completion Dates even if it has a dispute with the Owner concerning the amount to be paid under this Section or any extension of time which is or could be due to the Contractor pursuant to a Change Order/Construction Change Order or Change Order Directive/Construction Change Order Directive or otherwise.

**ARTICLE 10 - THE UNDERSTANDING OF THE CONTRACTOR**

**Section 10.1 Examination of Work Site**

- A. The Contractor acknowledges that it has, by careful examination, satisfied itself as to the nature and location of the Work, the conformation of the ground, the character, quality and quantity of the materials, equipment and facilities needed preliminary to and during the prosecution of the Work, the general and local conditions and all other matters which can in any way affect the Work.
- B. If the Owner has obtained any geotechnical data, soil and subsurface tests and other soil engineering tests and reports in areas where the Work is to be performed for the purpose of study and design, which data, tests and reports will be made available to Contractor on request. The interpretation of such data, tests and reports shall be the sole responsibility of the Contractor. Owner does not assume any responsibility whatsoever in respect to the sufficiency or accuracy of such investigation, the reports thereof, or the interpretation set forth and there is no warranty or guarantee, either express or implied, that the conditions indicated by such investigations or records thereof are representative of those existing throughout such areas, or any part thereof, or that unforeseen developments may not occur, or that materials other than or in proportions different from those indicated may not be encountered. Notwithstanding anything herein to the contrary, should the Contractor encounter underground conditions which were unknown, unforeseen in the exercise of the Contractor's best professional judgment, and not reflected on the geotechnical data, the soils and subsurface tests or reports furnished to or available to the Contractor, the Contractor shall be reimbursed, pursuant to Section 9.3 of this Agreement, by the Owner for all actual documented additional costs incurred by the Contractor as a result of the unknown and unforeseen underground conditions.

**Section 10.2 Sufficiency of Contract Documents**

- A. The Contractor acknowledges that the Contract Documents are sufficient to enable it to determine the cost of all of the Work and that the Work can be completed in accordance with the Contract Documents for the Lump Sum Price.
- B. The Contractor acknowledges that any observed discrepancies, omissions, ambiguities or conflicts in the Contract Documents will be brought to the attention of the Owner, as set forth in Section 2.3 “Errors in Contract Documents” of this Agreement, and in a timely manner in order to insure substantial completion of the Work by the Substantial Completion Dates. In addition, the Contractor acknowledges that the Owner has not made nor shall it be deemed to have made any warranties, guarantees or representations of any kind whatsoever regarding the sufficiency of the Contract Documents.
- C. The Owner shall not be responsible for any damages resulting from any errors, inconsistencies or omissions in the Contract Documents which were discovered or observed and not noted by the Contractor in accordance with Paragraph (B) and Section 2.3.

**Section 10.3 No Oral Modification**

- A. No oral agreement or conversation with any officer, agent or employee of the Owner or its representatives, either before or after the execution of this Agreement shall affect or modify any of the terms or obligations contained in this Agreement or the Contract Documents. No extra compensation will be due from the Owner as a result of the Contractor not being aware of any matter which may affect the Work.

**ARTICLE 11 - THE REPRESENTATIVE OF THE OWNER**

**Section 11.1 The Representative of the Owner**

- A. The Representative of the Owner (The Owner is defined as the City of Memphis) will be a City project manager assigned from the Building Design & Construction Office of the Division of Engineering. The Owner shall have the right to replace the Representative of the Owner at any time with or without cause.

**Section 11.2 Decisions of the Owner**

- A. Initial Decision: The Representative of the Owner and/or the Consultant shall decide meaning and intent of the technical specifications and any plan or drawing where same may be found obscure or to be in dispute.
- B. Final Decision: Any unresolved dispute between the Representative of the Owner and/or the Consultant and the Contractor shall be referred to the Building Design & Construction (BD&C) Administrator for resolution. Should the Contractor not be satisfied with the decision of the BD&C Administrator, he shall be allowed to appeal the decision to the City Engineer, who, after such hearings and discussions as he deems appropriate, shall render a final and conclusive decision.
- C. Disputes: Any dispute arising from the execution of this contract shall be governed, construed and enforced according to the laws of the State of Tennessee. All actions, whether sounding in contract or in tort, relating to the validity, the construction, the interpretation, and the enforcement of this contract shall be instituted and litigated in courts of the State of Tennessee located in Shelby County, Tennessee, and in no other. In accordance herewith

parties to this contract submit to the jurisdiction of the courts of the State of Tennessee, located in Shelby County, Tennessee.

## **ARTICLE 12 - SUPERVISION OF THE WORK; SAFETY AND SECURITY**

### **Section 12.1 The Project Management of the Contractor**

- A. The Contractor shall designate in writing to the Owner and keep on the Work during its progress a competent Project Management Team, including at a minimum a Project Manager and a Superintendent, satisfactory to the Owner. Any of these individuals shall be changed upon written request of the Owner, but shall not be changed by the Contractor except with the consent of the Owner. These individuals shall represent the Contractor and all directions given to any of them by the Owner shall be as binding. These individuals shall devote their full time to the Work and shall maintain an office on the site of the Work. They shall direct, coordinate and supervise all Work, inspect all materials delivered to the site of the Work to ascertain whether or not they comply with the requirements of the Contract Documents, and reject all non-conforming materials or workmanship.
- B. The Superintendent shall be designated by the Contractor in writing at the time of submission of proposed subcontractors and a list of work experience shall be submitted for the Superintendent. The Superintendent shall be subject to the approval of the Owner. The Owner through the Consultant shall be notified immediately in writing of any change in superintendent. A list of work experience shall be submitted for the newly designated superintendent.

### **Section 12.2 Order and Discipline**

- A. The Contractor shall at all times be responsible for enforcing strict discipline and good order among its employees, and any employee of its subcontractors and sub-subcontractors. If any person on the site of the Work shall appear to be incompetent, disorderly or intemperate, in any way disrupts or interferes with the Work, or is in any other way disqualified for or unfaithful to the job entrusted to him, such person shall be discharged immediately and he shall not again be employed on the Work without the prior written consent of the Owner.

### **Section 12.3 Cleaning Up**

- A. During the performance of the Work, the Contractor shall keep the site of the Work clean and free of all rubbish, waste materials, debris and other materials in accordance with the instructions set forth in the Contract Documents. At the end of each working day the Contractor shall remove all waste materials, rubbish and debris from and about the Work as well as all surplus materials, and will leave the site of the Work clean in accordance with the Contract Documents.

### **Section 12.4 Safety and Security**

- A. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
  - 1. employees on the Work and other persons who may be affected thereby;

2. the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
  3. other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
- B. The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.
  - C. The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.
  - D. When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such The Contractor shall promptly remedy all damage or loss to any property referred to in clause 12.4.A.2 activities under supervision of properly qualified personnel.
  - E. The Contractor shall promptly remedy all damage or loss to any property referred to in clause 12.4.A.2 and 12.4.A.3 caused in whole or in part by the Contractor, any Subcontractor, and Sub-subcontractor, anyone directly or indirectly employed by and of them, or by anyone for whose acts any of them may be liable, and for which Contractor is responsible under clause 12.4.A.2 and 12.4.A.3.
  - F. The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's Superintendent unless otherwise designated by the Contractor in writing to the Owner and the Consultant.
  - G. These construction documents and the construction hereby contemplated are to be governed at all times by applicable provisions of the Federal and Local Laws including but not limited to the latest amendments of the following:
    1. William-Steiger Occupational Safety and Health Act of 1970 Public Law 91-596.
    2. Part 1910 -Occupational Safety and Health Regulations for Construction, Chapter XIII of Title 29, Code of Federal Regulations.
    3. Part 1518 - Safety and Health Regulations for Construction , Chapter XII of Title 29, Code of Federal Regulations.
  - H. Contractor alone shall be responsible for the safety, efficiency, and adequacy of his/her plant, appliances and methods; and for any damage which may result from their failure or their improper construction, maintenance or operation.

**Section 12.5 Inspection of the Work**

- A. The Owner and persons designated by the Owner shall at all times have access to the Work whenever it is in preparation or progress and the Contractor shall provide proper facilities for such access and for inspection. If the Owner discovers any defective Work in connection

with any inspection, it shall report such defective Work to the Contractor in writing and the Contractor shall, at its expense, correct it.

- B. If the Contract Documents, the written instructions of the Owner, laws, ordinances, rules or regulations, or any public authority require any of the Work to be specifically tested or inspected, the Contractor shall give the Owner timely notice of its readiness for inspection and testing, and if the test or inspection is performed by an authority other than the Owner, of the date set for such test or inspection. Inspections by the Owner shall be promptly made and, where practicable, at the source of supply. If any of the Work should be covered up without the approval or consent of the Owner or any necessary authority, it shall be uncovered for examination, if required by the Owner or such other authority, at the sole expense of the Contractor.
- C. Re-examination of questioned Work that has been previously inspected by the Owner may be ordered by the Owner and, if so ordered, the questioned Work shall be uncovered by the Contractor. If such Work is found to be in compliance with the Contract Documents, the Owner shall pay the actual cost of the re-examination and repairs. If such Work is found not to be in compliance with the Contract Documents, the Contractor shall bear the costs of the re-examination and repairs.

## **ARTICLE 13 - PERMITS, LICENSES, LAWS AND REGULATIONS**

### **Section 13.1 Contractor to Secure all Permits**

- A. The Contractor shall secure and pay for all permits. Contractor shall be responsible for all inspections required by the City in conjunction with the issuance of said permits. Contractor shall secure and pay for all governmental fees, utilities, licenses and other permits necessary for the lawful and proper execution and completion of the Work.

### **Section 13.2 Compliance with Laws**

- A. The Contractor shall give all notices and shall comply with all laws, ordinances, rules, regulations and orders of any public authority having jurisdiction over the Work, which have any bearing on the execution of the Work. If the Contractor observes that any of the Contract Documents are at variance in any respect with any such laws, ordinances, rules, regulations and orders, it shall promptly notify the Owner in writing and any necessary changes shall be made. If the Contractor fails to give such notice or executes any of the Work when it knew or should have known such Work was contrary to any such laws, ordinances, rules, regulations or orders, it shall bear all resulting costs to correct said Work to comply with such laws and regulations and be liable for any resulting fines, penalties, judgments or damages imposed on or incurred by the Owner.
- B. The Contractor certifies that it is qualified or will take steps necessary to qualify to do business in the State of Tennessee and that it shall take such action as, from time to time, may be necessary to remain so qualified and shall obtain and maintain, at its own expense, all licenses, permits, insurance, and governmental approvals, if any, necessary to the performance of its obligations under this Agreement. Such permits and licenses shall be made available to the City, upon request.

The Contractor is assumed to be familiar with and shall comply with all applicable federal, state, and local laws, ordinances, and regulations in performing any of its obligations under this Agreement, including but not limited to the Fair Labor Standards Act, Occupational Safety and Health Administration (OSHA), and the Americans with Disabilities Act (ADA). The Contractor shall promptly notify the City of any conflict discovered between this

Agreement and any applicable laws, rules, regulations, and/or permits and licenses, and await resolution of the conflict.

## **ARTICLE 14 - TAXES**

### **Section 14.1 Payment of Taxes by Contractor**

- A. Any and all taxes, excise, duties and assessments in any manner levied, assessed or imposed by any government or subdivision or agency having jurisdiction over the Work (other than taxes on the real property of Owner) shall be the sole responsibility and liability of the Contractor. The taxes to be paid by the Contractor are those legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.
- B. The Contractor shall promptly pay and discharge when due, unless the validity or application is being contested by the Contractor in good faith, any and all taxes, excises, duties and assessments, together with any interest and penalties, if any, the responsibility and liability for which the Contractor has assumed pursuant to the provisions of Paragraph (a), unless any such tax, excise, duty or assessment is levied, assessed or imposed upon the Owner, in which case the Owner shall promptly give the Contractor notice of such levy, assessment or imposition, whereupon the Contractor shall promptly pay and discharge the same. Upon the written request and at the sole expense of the Contractor, the Owner shall assist the Contractor in contesting the validity or application of any such levy, assessment or imposition, and in the event a refund of all or any part of any tax, excise, duty or assessment (including interest and penalties, if any), said refund shall be refunded to the Contractor (less the amount of expenses associated with such contest not previously reimbursed by the Contractor to the Owner).

## **ARTICLE 15 - SHOP DRAWINGS AND SAMPLES; MATERIAL TESTING**

### **Section 15.1 Definitions**

- A. As used in this Agreement “Shop Drawings” are drawings, diagrams, illustrations, schedules, performance charts, brochures and other data which are prepared by the Contractor, any subcontractor, sub-subcontractor, manufacturer, supplier or distributor, and which illustrates some portion of the Work. One (1) electronic copy of required shop drawings shall be submitted to the Consultant for review approval or correction. One (1) electronic shop drawing copy shall be returned to the Contractor with approval or rejection.
- B. As used in this Agreement, “Samples” are physical examples furnished by the Contractor to illustrate materials, equipment or workmanship.

### **Section 15.2 Submissions**

- A. Contractor shall review, stamp with its approval and submit, in orderly sequence so as to cause no delay in the Work or the work of any other contractor, all Shop Drawings and Samples required by the Contract Documents or subsequently by the Owner. Shop Drawings and Samples shall be properly identified as specified in the Contract Documents, or as the Owner may require. At the time of submission the Contractor shall inform the Consultant in writing of any deviation in the Shop Drawings or Samples from the requirements of the Contract Documents.

- B. By approving and submitting Shop Drawings and Samples, the Contractor represents that it has determined and verified all field measurements, field construction criteria, materials, catalog numbers and other data, and that it has checked and coordinated each Shop Drawing and Sample with the requirements of the Work and the Contract Documents.

**Section 15.3 Review by The Consultant**

- A. The Consultant will review and approve Shop Drawings and Samples within fourteen (14) calendar days for conformance with the design concept of the Work and with the information given in the Contract Documents. The approval of the Owner or its agents of a given item shall not indicate approval of an assembly in which the item functions.
- B. The approval by the Consultant of Shop Drawings or Samples shall not relieve the Contractor of responsibility for any deviation from the requirements of the Contract Documents unless the Contractor has informed the Owner in writing of such deviation at the time of submission and the Owner has given written approval of the specific deviation, nor shall the approval of the Owner relieve the Contractor from responsibility for errors or omissions in the Shop Drawings or Samples.

**Section 15.4 Corrections Made by Contractor**

- A. The Contractor shall make any corrections required by the Consultant and shall submit the required number of corrected copies of Shop Drawings or new Samples until approved. The Contractor shall direct specific attention in writing or on resubmitted Shop Drawings to revisions other than the corrections requested by the Consultant on previous submissions.

**Section 15.5 Prior Approval Required**

- A. No portion of the Work requiring a Shop Drawing or Sample submission shall be commenced until the submission has been approved by the Consultant. All such portions of the Work shall be performed in accordance with approved Shop Drawings and Samples and the Contract Documents.

**Section 15.6 Submittal Schedule**

- A. Within seven (7) calendar days after execution of this Agreement, the Contractor shall provide the Owner with a preliminary submittal schedule of the dates that each Shop Drawing or Sample will be submitted for approval. Within thirty (30) calendar days after execution of this Agreement, the Contractor shall provide the Owner with a final schedule of the dates that each Shop Drawing or Sample will be submitted for approval. The sequence of the submittals of the Contractor shall be scheduled so as to permit an orderly review by the Owner. The schedule shall allow reasonable added time according to the number or complexity of Shop Drawings in each submittal for the checking, correction and rechecking of corrections, as well as for return of approved or rejected Shop Drawings and Samples to the Contractor. The submittal schedule shall allow not less than fourteen (14) calendar days for the Owner to review any Shop Drawing or Sample.

**Section 15.7 Material Testing**

- A. If the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any portion of the Work to be inspected, tested or

approved, the Contractor shall give the Owner timely notice of its readiness so the Owner may observe such inspection, testing or approval. The Owner shall bear all costs of other inspection, tests or approvals.

- B. If the Owner determines that any Work requires special inspection, testing or approval which paragraph 15.7(A) does not include, he will instruct the Contractor to order such special inspection, testing or approval, and the Contractor shall give notice as provided in paragraph 15.7(A). If such special inspection or testing reveals a failure of the Work to comply with the requirements of the Contract Documents, the Contractor shall bear all costs thereof, including compensation for the Owner's additional services made necessary by such failure; otherwise the Owner shall bear such costs, and an appropriate Change Order or Construction Change Order shall be issued.

## **ARTICLE 16 - THE RIGHT OF THE OWNER TO AUDIT**

### **Section 16.1 Right to Audit**

- A. The Contractor shall keep full and accurate records of all costs incurred and items billed in connection with the Work, which records shall be open to audit by the Owner, or any authorized representative for the Owner, during the course of the Work and until five (5) years after the Final Payment by Owner. In addition, the Contractor shall make it a condition of all subcontracts and sub-subcontracts entered into in furtherance of the Work that any and all Subcontractors and Sub-subcontractors will keep accurate records of costs incurred and items billed in connection with the subcontract (or sub-subcontract), and that such records shall be open to audit by the Owner, or any authorized representative of the Owner, during the course of the Work of the Subcontractor (or Sub-subcontractor) and until four (4) years after Final Payment by the Owner to the Contractor. The failure of the Contractor to obtain such a clause in any subcontract (or sub-subcontract) shall be grounds for termination of this Agreement by the Owner.

### **Section 16.2 Review of Subcontracts**

- A. The Contractor shall provide the Owner with an executed copy of all subcontracts, sub-subcontracts and purchase orders entered into in furtherance of the Work, within seven (7) calendar days after the execution by Contractor of any and all subcontracts. Notwithstanding the provisions of this section, the Contractor shall furnish all M/WBE information, including copies of Subcontracts, in a timely manner and as set forth in Article 27.

## **ARTICLE 17 - SEPARATE CONTRACTS**

### **Section 17.1 The Right of The Owner to Award Separate Contracts**

- A. The Owner reserves the right to award other contracts in connection with work at or in the vicinity of the Work and the Contractor agrees to cooperate fully and not to unreasonably interfere with the work of such other contractors.

### **Section 17.2 Cooperation**

- A. The Contractor shall afford the other contractors of Owner the opportunity for the introduction and storage of their materials and equipment and the execution of their work, and shall, in

accordance with the Contract Documents, properly connect and coordinate the Work with their work.

**Section 17.3 Inspection of Work of Other Contractors**

- A. If any part of the Work depends for proper execution or results upon the work of any other of the contractors of Owner, the Contractor shall inspect and promptly report to the Owner any discrepancies or defects in such work that render it unsuitable for such proper execution or results. Failure of the Contractor to so inspect and report shall constitute an acceptance of the Work of the other contractor as fit and proper to receive the Work.

**Section 17.4 Responsibility for Damage**

- A. Should the Contractor cause damage to the work or property of any other contractor of the Owner, including but not limited to, delay, disruption, suspension of work and/or acceleration damages, the Contractor shall settle with such other contractor by agreement or arbitration (if appropriate) if the other contractor will so settle. If such other contractor sues the Owner on account of any damage alleged to have been so sustained, the Owner shall notify the Contractor who shall defend such proceedings at the expense of the Contractor, or provide counsel of Owner's choice for Owner at the expense of Contractor, and if any judgment or award against the Owner results, the Contractor shall pay or satisfy it and shall reimburse the Owner for all attorney's fees and court costs which the Owner has incurred.

**Section 17.5 Owner's Right to Clean Up**

- A. If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish as described in Section 12.3, the Owner may clean up and allocate the cost amount those responsible as determined by the Owner.

**ARTICLE 18 - WARRANTIES OF THE CONTRACTOR**

**Section 18.1 Warranty of Title**

- A. The Contractor warrants and guarantees that title to all Work, materials and equipment covered by an Application and Certificate for Payment, whether incorporated in the Work or not, will pass to the Owner upon the receipt of payment by the Contractor, free and clear of all liens, claims, security interests or encumbrances (herein "Liens") and that none of the Work, materials or equipment covered by an Application and Certificate for Payment will have been acquired by the Contractor, or by any other person performing any part of the Work or furnishing materials and equipment for the Work, subject to an agreement under which a Lien is retained by the seller or supplier.

**Section 18.2 Special Warranties**

- A. When special guarantees or warranties are required by the Contract Documents for specific parts of the Work, the Contractor shall procure certified copies of such guarantees or warranties, countersign them and submit them to the Owner in triplicate. Delivery of such guarantees or warranties will not relieve the Contractor from any obligations assumed under any provision of this Agreement of the Contract Documents

**Section 18.3 Assignment of Warranties**

- A. The Contractor hereby assigns to the Owner any and all existing assignable warranties, service life policies and patent indemnities of manufacturers other than the Contractor of materials, equipment or items incorporated in the Work. Upon the request of the Owner, the Contractor shall give the Owner assistance in enforcing the rights of the Owner arising under such warranties, service life policies and patent indemnities. At the request of the Owner, the Contractor shall give notice (with copies to the Owner) to any such manufacturers of the assignment of such warranties, service life policies and patent indemnities.

**Section 18.4 General Warranty and Correction of Work**

- A. In addition to any special guarantees or warranties contained in the Contract Documents, the Contractor warrants to the Owner that all materials and equipment furnished in performance of the Work will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All work not so conforming to these standards shall be considered defective.
- B. The Contractor shall promptly correct all defective Work whether observed before or after the Substantial Completion Dates and whether or not fabricated, installed or completed. The Contractor shall bear all costs of correcting such defective Work.
- C. If, within one (1) year after either Substantial Completion Date or within such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee or warranty required by the Contract Documents, any of the Work is found to be defective and not in accordance with the Contract Documents, the Contractor shall correct it promptly after receipt of a written notice from the Owner to do so.
- D. All defective or non-conforming Work shall be removed from the site of the Work if necessary, and the Work shall be corrected to comply with the Contract Documents without cost to the Owner. The Contractor also shall bear the cost of making good all work of other contractors destroyed or damaged by removal or correction of the defective Work of Contractor.
- E. If the Contractor fails to correct defective Work in accordance with this Section and the Contract Documents, the Owner may correct it and hold the Contractor liable for all costs, expenses and damages, including attorney's fees and litigation costs incurred by Owner in correcting it.
- F. In addition to the foregoing warranty, a warranty period of one (1) year shall apply to workmanship under the same terms and conditions as the original warranty, to any work, supplied in correction of the defective work under warranty or the property of the Owner pursuant to the provisions of this Section 18.4 and the Contractor shall assign to the Owner any warranties, including extended warranties, as to materials or designs furnished in the performance of such correction of defective Work.
- G. The Contractor shall furnish a written guarantee that all work executed under this contract shall be free from defects of materials and workmanship for a period of one year from date of acceptance of work by the Owner. This shall be understood to mean the replacement or correction of such defective work and material, together with the correction of damage to other work, occasioned by the defect, at the Contractor's expense. Where guarantees and/or warranties are written in the specification (or offered by the manufacturer at no additional cost) for a longer period than one year, such longer terms shall apply.

- H. Where a guarantee and/or warranty is required covering the results obtained from the use of a proprietary product or from installation, detail or method of application shown in the drawings or specified, if the Contractor is of the opinion that he will not be able to produce the required results, he shall file a written objection with the Consultant and await further instructions before proceeding with this part of the work.
- I. A manufacturer's warranty shall not relieve the contractor from his/her full responsibilities under guarantees and/or warranties called for in these specifications.
- J. The Contractor and/or the Manufacturer, depending which warranty is in effect, shall respond to a request for warranty work within one (1) working day of written notification by the Owner. Required repairs shall be initiated immediately upon response and proceed continuously until satisfactorily completed.
- K. It is understood that the Owner will perform or have performed emergency repairs as necessary, and that such work will in no way void the Contractor's and/or the Manufacturer's responsibilities under the warranty.

**ARTICLE 19 - RIGHT OF THE OWNER TO DO WORK**

**Section 19.1 Right of The Owner to Do Work**

- A. If the Contractor should neglect to prosecute the Work properly or fail to do anything required by the Contract Documents, and the Owner does not receive assurances from the Contractor of due performance reasonably satisfactory to the Owner within seven (7) calendar days after written demand is made, then the Owner may, without prejudice to any other remedy it may have under this Agreement or at law or in equity, make good any deficiencies in the Work, including but not limited to, supplementing the forces of the Contractor and deduct all costs of doing so from the payment then due and any payment thereafter due the Contractor.

**Section 19.2 Deduction For Uncorrected Work.**

- A. If the Owner deems it inexpedient to correct deficiencies in the Work pursuant to Section 19.1, the Owner may deduct the reasonable cost of doing so from the payment then due or any payment thereafter due the Contractor, but the making of such a deduction shall in no way be deemed an election of remedies by the Owner.

**Section 19.3 Correction of Work Before Final Payment**

- A. The Contractor shall promptly remove from the site of the Work all materials, equipment or other items rejected by the Owner as failing to conform to the Contract Documents, whether incorporated in the Work or not, and the Contractor shall promptly replace and re-execute its original work to comply with the Contract Documents and without expense to the Owner. In addition, the Contractor shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement.
- B. If the Contractor does not remove rejected material, equipment or other items within a reasonable time (as fixed by written notice from the Owner) the Owner may remove such items and store them at the expense of the Contractor, or dispose of such material, equipment or other items at the sole discretion of Owner. If the Contractor does not pay the expense of such removal within ten (10) calendar days, the Owner may, upon ten (10) calendar days written notice, sell such items at auction or at private sale and shall account

for the net proceeds of such sale, after deducting all the costs and expenses of removal that should have been borne by the Contractor.

**Section 19.3 Owner May Stop the Work**

- A. If the Work is defective, or the Contractor fails to supply sufficient skilled workers or suitable materials or equipment, or fails to furnish or perform the Work in such a way that the completed Work will conform to the Contract Documents, the Owner may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of Owner to stop the Work shall not give rise to any duty on the part of Owner to exercise this right for the benefit of the Contractor or any other party.

**Section 19.5 Acceptance of Defective Work**

- A. If, instead of requiring correction or removal and replacement of defective Work, the Owner prefers to accept it, the Owner may do so. The Contractor shall bear all direct, indirect and consequential costs attributable to the Owner's evaluation of and determination to accept such defective Work. If any such acceptance occurs prior to final payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work; and owner shall be entitled to an appropriate decrease in the Contract Price, and, if the parties are unable to agree as to the amount thereof, the Owner may issue a Change Order Directive as provided in Article 9.

**ARTICLE 20 - INSURANCE**

**Section 20.1 Owner Controlled Insurance Program**

- A. If the Owner is utilizing an Owner Controlled Insurance Program for the Work, substitution insurance language will be provided by the Owner.

**Section 20.2 Contractor's Liability Insurance**

- A. The Contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the City of Memphis Risk Manager, nor shall the contractor allow any sub-contractor to commence work on his sub-contract until all similar insurance required of the sub-contractor has been so obtained and approved by the City.
- B. Before commencing any work, the Contractor shall furnish the City of Memphis Risk Manager with Certificates of Insurance attested by a duly authorized representative of the insurance carrier evidencing that the insurance required hereunder is in force and effect. The theme/title of the project shall also be specified on the Certificate of Insurance.
- C. The Contractor shall be responsible from the time of signing the Contract or from the time of the beginning of the first work, whichever shall be earlier, for all injury or damage of any kind resulting from this work to persons or property. In addition to the liability imposed upon the Contractor on account of bodily injury (including death) or property damage suffered through the Contractor's negligence, which liability is not impaired or otherwise affected hereby, the Contractor assumes the obligation to protect, defend, indemnify and hold the City, its officers and directors, employees and agents free and harmless from and against any and all losses, penalties, damages, settlements, costs, charges, professional fees or other expenses or liabilities of any kind and character in connection with or arising directly or indirectly out of this contract and/or the performance hereof by act or omission of the Contractor or sub-

contractor, or anyone either (1) directly or indirectly employed or (2) under the supervision of any of them in the prosecution of the work included in this contract.

- D. The Contractor, upon award of the contract, shall provide at his own cost and expense the following insurance to the City of Memphis utilizing insurance companies acceptable to the City and licensed in the State of Tennessee, which insurance shall be evidenced by certificates and/or policies as determined by the City. **Each certificate of policy shall require and contain verbatim the following clause:**

**1. “THE CITY OF MEMPHIS, ITS OFFICIALS, AGENTS, EMPLOYEES AND REPRESENTATIVES ARE NAMED ADDITIONAL INSURES”**

**(The additional insured endorsement stating that the City of Memphis, its officials, agents, employees and representatives are additionally insured shall be attached to the Certificate of Insurance and will apply to both general liability and automobile liability.)**

- E. If any of the Insurance Requirements are not complied with at their renewal dates, payment to the Contractor may be withheld until those requirements have been met, or at the option of the City, the City may pay the renewal premiums and withhold such payments from any monies due the contractor.

1. **Workers Compensation Insurance:** The Contractor shall maintain in force Workers’ Compensation coverage in accordance with the Statutory Requirements and Limits of the State of Tennessee and shall require all sub-contractors to do likewise.

Employer’s Liability	\$100,000 Each Accident
	\$500,000 Disease-Policy Limit
	\$100,000 Disease-Each Employee

2. **Automobile Liability Insurance:** To be taken out in the name of the Contractor as Named Insured and City as an Additional Insured; covering owned, non-owned, and hired vehicles with MINIMUM LIMITS OF:

\$1,000,000 each occurrence - Combined Single Limit

3. **Commercial General Liability Insurance:** Comprehensive General Liability Insurance, including Premises and Operations, Contractual Liability, Independent Contractor’s Liability, and Broad Form Property Damage Liability coverage.

Commercial General Liability Insurance: MINIMUM LIMITS of:

\$2,000,000	General Aggregate per Project
\$2,000,000	Products-Completed Operations
\$1,000,000	Personal and Advertising Injury
\$1,000,000	Each Occurrence
\$ 50,000	Fire Damage any one Fire
\$ 5,000	Medical Expense any One Person

4. **Property Insurance:** Contractor shall be responsible for maintaining any and all property insurance on their own equipment and shall require all sub-contractors to do likewise.

Builder’s Risk Coverage: To be taken out in the name of the City and Contractor as their interest may appear.

An “All Risk” installation floater in the amount of the contract endorsed to contain the following condition: “It is understood and agreed that coverage will cease only when the new construction (including building materials) is accepted by the City.

Additional coverage and limits may be required based upon the particular services contracted. If such additional coverage is required for a specific contract, those requirements will be described in the “Special Conditions” of the contract specifications.

The Contractor is required to provide copies of the insurance policies upon request.

- F. The Contractor shall provide notice to the Owner within three (3) business days following receipt of any notice of cancellation or material change in the Contractor’s insurance policy from Contractor’s insurer. Such notice shall be provided to the Owner by registered mail, return receipt requested, to the following addresses:

**City of Memphis  
Attn: Risk Management Department  
170 N. Main St., 5<sup>th</sup> Floor  
Memphis, TN 38103**

**City of Memphis Park Services Division  
2599 Avery Ave  
Memphis, TN 38112**

**ARTICLE 21 - SURETY BONDS**

**Section 21.1 Performance Bonds Required**

- A. The Contractor shall furnish a performance bond in an amount equal to 100% of the contract sum as security for the faithful performance of the contract for the payment for labor and material furnished and incorporated into the work. The only acceptable form of instrument for this bond is bound herein (see Section 00610). Bond shall be furnished through an agent domiciled and legally authorized to do business in the State of Tennessee and delivered to the Consultant for the Owner not later than ten (10) calendar days after the date shown on written notice from the City or its Consultant. Surety company proposed shall be one acceptable to the Owner.

**ARTICLE 22 - INDEMNIFICATION**

**Section 22.1 Indemnification of the Contractor**

- A. To the fullest extent permitted by law, Contractor, on behalf of itself, its Subcontractors their agents, their employees or any entity or person for which the Contractor is or may be responsible, (all of said parties are herein sometimes collectively referred to as the “Indemnitors”), shall fully indemnify, defend, save and hold Owner, the Consultant and the Project Manager, their agents, employees, officers, directors, partners and related entities, (all of said parties are herein collectively referred to as the “Indemnitees”) harmless from and against all liability, damage, loss, claims, demands, actions and expenses of any nature whatsoever, including, but not limited to reasonable attorney’s fees which arise out of or are connected with: (i) any negligent act, error or omission by any Indemnitor in the performance of this Agreement; or (ii) the failure of the Indemnitor in the performance of this Agreement to comply with the laws, statutes, ordinances or regulations of any governmental authority; or (iii) the material breach of any term or condition of this Agreement by any of the Indemnitors.

- B. Without limiting the generality of the foregoing, the indemnity herein above set forth shall include all liability, damages, loss, claims, demands and actions on account of personal injury, death or property loss to any third party, any Indemnitee, any of Indemnitee's employees, agents, licensees or invitees which arose out of or in connection with the work.
- C. The indemnity set forth in this Article shall survive any termination of this Agreement for the applicable statute of limitations period.

**Section 22.2 Labor Indemnity**

- A. The Contractor shall indemnify, defend and hold harmless the Owner from any and all administrative and judicial actions (including reasonable attorney's fees related to any such action) incurred by the Owner in connection with any labor related activity arising from the performance of the Work of the Contractor. As used in this Agreement, "labor related activity" includes, but is not limited to, strikes, walk-outs, informational or organizational picketing, use of placards, distribution of hand-outs, leaflets or in the vicinity of any facility where the Owner conducts business. The Owner shall advise the Contractor if any labor related activity occurs and the Contractor shall arrange for the legal representation necessary to protect the Owner, provided such representation is previously approved by the Owner.

**Section 22.3 Royalties and Patents**

- A. The Contractor shall pay all royalties and license fees in any way relating to the Work, shall defend all suits or claims for infringement of any patent rights, and shall indemnify and hold the Owner harmless from loss on account of any such suit or claim.

**Section 22.4 Attorneys' Fees**

- A. In the event it becomes necessary for Owner to employ an attorney to enforce any provision of this Agreement, then the Contractor shall be liable for all attorneys' fees and litigation expense of Owner.

**ARTICLE 23 - RIGHT TO OCCUPY BY OWNER**

**Section 23.1 Early Occupancy by Owner**

- A. The Owner has the right to occupy or use ahead of schedule, at no additional cost to Owner, all or any substantially completed or partially completed portion of the Work when such occupancy and use are in its best interest, notwithstanding the time of completion for all of the Work.

**Section 23.2 Corrections After Occupancy**

- A. During the performance of the Work and after the Owner has taken occupancy of all or any substantially completed portion of the Work, the Contractor shall not disrupt the use and occupancy of the Owner to perform the Work or to make corrections in the Work but shall, at the discretion of the Owner, make such corrections at the expense of Contractor after normal working hours.

**Section 23.3 Heating, Ventilating and Air-Conditioning Systems**

- A. The Owner may require the use and operation of any completed heating, ventilating and air-conditioning equipment at the time it occupies or uses any portion of the Work. In such event, the Owner may require the Contractor to operate such equipment and will pay the Contractor the cost of such utilities required for the use and occupancy of the Owner, but the Contractor shall be responsible for such equipment and for its careful and proper operation. At any time, the Owner may assume the care and maintenance of any portion of the Work which it is occupying and using for the operation of any such equipment, but in each case, the Contractor shall not be relieved of its responsibility for the full completion of the Work and the protection of its tools, materials and equipment.

**ARTICLE 24 - DEFAULT; RIGHT TO TERMINATE OF OWNER**

**Section 24.1 Event of Default**

- A. For the purposes of this Agreement, an Event of Default shall be if:
1. At any time there shall be filed by or against the Contractor in any court a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee of all or a portion of the property of the Contractor, and within twenty (20) calendar days from the filing date the Contractor fails to secure a discharge; or
  2. The Contractor makes an assignment for the benefit of creditors or petitions for or enters into an agreement or arrangement with its creditors; or
  3. The Contractor fails to timely and properly prosecute the Work, or fails to complete the work, or any portion thereof, entirely on or before any date established for partial, substantial or final completion; or
  4. The Contractor fails to make prompt payment to its Subcontractors or for materials or labor used in the Work; or
  5. The Contractor fails to supply sufficient labor, material and/or equipment so as to complete the Work timely and in accordance with the Contract Documents including, but not limited to the progress schedule; or
  6. The Contractor performs defective work and fails to promptly and properly correct such defective work; or
  7. Without limitation, the Contractor fails to perform any provision of this Agreement or the Contract Documents.
  8. The Contractor persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction.
- B. Upon the occurrence of an Event of Default, the Owner, by giving seven (7) calendar days prior written notice to the Contractor, and without prejudice to any other remedy the Owner may have, may provided such Event of Default has not been cured, terminate this Agreement and take possession of all or some of the materials, tools, equipment and appliances of the Contractor, and complete the Work by such means as the Owner deems fit. In such case, the Contractor shall not be entitled to receive any further payment until the Work is completed. If the unpaid balance of the Lump Sum Price shall exceed the aggregate of (1) the expense of the Owner of completing the Work, including compensation for additional managerial and administrative services, and (2) the losses and damages of Owner, including

reasonable attorneys' fees and litigation expense because of the default of Contractor, such excess shall be paid to the Contractor. If the expense of completing the Work and the losses and damages of Owner shall exceed the unpaid balance of the Lump Sum Price, the Contractor and its Surety shall pay the difference to the Owner promptly on demand.

#### **Section 24.2 Suspension by the Owner for Convenience**

- A. The Owner may order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine (herein referred to as "Suspension").
- B. Provided the Suspension lasts for more than one hundred twenty (120) calendar days, an adjustment to the Lump Sum Price ("Adjustment") shall be made for the increased costs set forth in Section 24.2(c) which were incurred because of the Suspension. No Adjustment shall be made nor shall the date of Substantial Completion be extended except by written Change Order. No Adjustment shall be made to the extent:
  - 1. That performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is in full or in part responsible; or
  - 2. That an equitable adjustment is made or denied under another provision of this Agreement.
- C. The amount of the Contractor's compensation for a Suspension pursuant to this Section shall be limited to any properly documented costs of maintaining personnel and equipment in the field provided such costs are pre-approved by the Owner in writing. The Owner shall not be liable at any time for home office overhead expense or consequential damages. At the Owner's option, the Contractor may be ordered to demobilize its forces because the Project is suspended. In such event, the Owner will reimburse the Contractor for the reasonable cost of demobilization and remobilization.

#### **Section 24.3 Termination Without Cause**

- A. The Owner may terminate this Agreement without cause by giving seven-(7) calendar days' prior written notice to the Contractor. In such event, the Owner will pay the Contractor for that portion of the Lump Sum Price, less the aggregate of previous payments, allocable to the Work completed by the Contractor as of the date of termination. The Owner also will reimburse the Contractor for all documented costs necessarily incurred by the Contractor for organizing and carrying out the stoppage of the Work which are paid directly by the Contractor. The Owner will not compensate the Contractor for any loss of its own profits or the profits of its Subcontractors, suppliers, vendors and materialmen. The Owner will not be responsible to reimburse the Contractor for any of its continuing contractual commitments to subcontractors, suppliers, vendors and materialmen or for penalties or damages for canceling such contractual commitments, and the Contractor shall make all of its subcontracts and other commitments subject to this provision.

#### **Section 24.4 Assignment of Subcontracts**

- A. In the event of termination by the Owner pursuant to this Article 24, the Owner may require the Contractor to promptly assign to it all or some subcontracts, materials, tools, equipment to be installed under this Agreement, or rental agreements, and any other commitments which the Owner, in its sole discretion, chooses to take by assignment. In such event, the

Contractor shall promptly execute and deliver to the Owner written assignments of such commitments.

## **ARTICLE 25 - HAZARDOUS MATERIALS COVENANTS**

### **Section 25.1 Hazardous Materials Covenants**

- A. Contractor hereby represents and warrants to and for the benefit of Owner that the Project or Project Site will not be used or operated in any manner that will result in the storage, use, treatment, manufacture and disposal of any Hazardous Materials (hereinafter defined) upon the Project or Project Site or any portion thereof or which will result in Hazardous Materials contamination (hereinafter defined). For purposes hereof, the term “Hazardous Materials” shall mean and refer to (i) any “hazardous waste” as defined by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. ' 6901 et. seq.), as amended from time to time, and regulations promulgated thereunder, (ii) any “hazardous substance” as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. ' 9601 et. seq.) (ACERCLA@), as amended from time to time, and regulations promulgated thereunder. (iii) asbestos; (iv) polychlorinated biphenyls; (v) urea formaldehyde; (vi) any substance the presence of which on the premises is prohibited by any applicable environmental laws or regulations (“Laws”) or by any other legal requirements affecting the Project or the Project Site; (vii) petroleum based materials (with the exception of times affixed to vehicles); and (viii) any other substance which is defined as hazardous, toxic, infectious or radioactive by any Laws or by any other legal requirements affecting the Project or Project Site. The term “Hazardous Materials Contamination” shall mean and refer to the contamination of the Project or Project Site, soil, surface water, ground water, air, or other elements on, or of, the buildings, facilities, soil, surface water, ground water, air, or other elements on, or of, any other property as a result of Hazardous Materials at any time emanating from the Project or Project Site.
- B. In addition to and without limiting the generality of any other provision of this Contract, Contractor shall and hereby does indemnify and hold Owner harmless from and against any and all losses, damages, expenses, fees, claims, demands, causes of action, judgments, costs and liabilities, including, but not limited to, attorney’s fees and costs of litigation, and costs and expenses of response, remedial and corrective work and other clean up activities, arising out of or in the manner connected with (i) the “release” or “threatened release” (as those terms are defined in CERCLA and the rules and regulations promulgated thereunder, as from time to time amended) by Contractor or Contractor’s employees, agents, delegees, invitees, licensees, concessionaires, sub-contractors or representatives, of any Hazardous Materials, or (ii) any occurrence of Hazardous Materials Contamination affecting the Project or Project Site. The provisions of this paragraph shall survive any payment or satisfaction of the Contract and such provisions shall remain in full force and effect.

## **ARTICLE 26 - MISCELLANEOUS**

### **Section 26.1 No Waiver**

- A. No consent or waiver, express or implied, by either party to or of any breach or default by the other in the performance of any of its obligations shall be deemed or construed to be a consent or waiver to or of any other breach or default by such party. Failure on the part of either party to complain of any act or failure to act of the other party or to declare the other party in default, irrespective of how long such failure continues, shall not constitute a waiver of the rights of such party.

**Section 26.2 Conflicts**

- A. In the event of any conflict between the terms or provisions expressed in this Agreement and any term or provision in any of the other Contract Documents, the term or provision of this Agreement shall govern to the extent of the conflict.

**Section 26.3 Assignment**

- A. This Agreement shall not be assigned, delegated or transferred in whole or in part by the Contractor nor shall the Contractor assign any monies due or to become due to it without the prior written consent of the Owner.

**Section 26.4 Governing Law**

- A. This Agreement is entered into in Tennessee and shall be governed by and construed according to the Laws of Tennessee. Any and all disputes arising out of this Agreement, and/or the Project shall be decided by a state or federal court of competent jurisdiction in Memphis, Shelby County, Tennessee.

**Section 26.5 Counterparts**

- A. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

**Section 26.6 Article and Section Headings**

- A. Article and Section headings contained in this Agreement are for ease of reference only and shall not affect the interpretation or meaning of this Agreement.

**Section 26.7 Parties in Interest**

- A. This Agreement shall inure to the benefit of and be binding upon the parties and their respective successors, assigns and legal representatives.

**Section 26.8 Severability**

- A. If any one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal, unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, but it shall be construed as if such invalid, illegal or unenforceable provision had never been contained in it.

**Section 26.9 Subcontractor Relations Requirements**

- A. By appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the obligations, terms and conditions of this Agreement and the Contract Documents, and to assume toward the Contractor the obligations, terms, conditions and responsibilities which the Contractor, by this Agreement and these Contract Documents, assumes toward the Owner. Each Subcontractor agreement shall preserve and protect the rights of the Owner under this Agreement and the Contract Documents which respect to the Work to be

performed by the Subcontractor so that subcontracting thereof will not prejudice the rights of the Owner. The Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor prior to the execution of the Subcontract agreement, copies of this Agreement and the Contract Documents to which the Subcontractor will be bound. Subcontractors shall similarly make copies of this Agreement and the Contract Documents available to their respective Sub-subcontractors.

**Section 26.10 Third Party Beneficiary**

- A. This Agreement shall not be deemed to create any other relation between Contractor and Owner other than as expressly provided herein and shall not be for the benefit of any third party.

**Section 26.11 Entire Agreement**

- A. This Agreement, together with the other Contract Documents, constitutes the entire agreement between the Owner and the Contractor and supersedes all prior written or oral agreements, understandings, representations, negotiations and correspondence between the parties. This Agreement shall not be supplemented, amended or modified by any course of dealing, course of performance or usage of trade and may only be amended or modified by a written instrument duly executed by officers of both parties.

**ARTICLE 27 - NON-DISCRIMINATION**

- A. Contractor agrees that it will not discriminate upon the basis of race, color, creed, religion, national origin, age, disability or sex in the performance of the Work and that each solicitation or advertisement for employees, and each Agreement to which Contractor is a party, including without limitation, Subcontractors, shall specifically contain a provision to this effect. The Contractor shall, upon request, show evidence of such non-discrimination and shall post notices of non-discrimination in conspicuous places available to all employees and applicants.
- B. The Contractor shall execute the specified City of Memphis Certificate of Nondiscrimination at the time he executes the formal bid form and includes it in the bid envelope.
- C. The Contractor and all subcontractors under general contract shall maintain copies of every subcontract awarded and their own payrolls, for each weekly payroll period for the life of the construction contract and for a period of five (5) years after final release and payment is made by the City to the Contractor.
- D. Each contractor's request for payment, including final payment and each partial payment, if permitted by the contract, shall contain a certification by the Contractor that the performance by the contractor and subcontractor for the period of work covered by the payment request has been in accordance with the clauses of the contract and the requirements with respect to nondiscrimination.
- E. Representatives of the State of Tennessee, Department of Labor and the City Of Memphis, as designated by the Mayor, shall have the right to inspect the Contractor's facilities and payroll records during the life of the construction contract and for a period of five (5) years after final release and final payment by the City for the purposes of verifying nondiscrimination in employment and payment of prevailing wages as appropriate.

- F. The Contractor shall incorporate the same requirements set forth in paragraphs A, B, C, D and E above, in all subcontracts awarded by him with the further requirement that each subcontract include identical requirements to be included in any lower tier subcontracts, together with the requirement to include it in any further subcontracts that might be made.

**ARTICLE 28 - SUSPENSIVE LIABILITY AGREEMENT**

Section 28.1 Suspensive Liability Condition

- A. Notwithstanding any term, condition, obligation or provision in this Agreement, any other writing, any other agreement, any oral understanding or agreement, or any conduct or failure to act by the Owner, Contractor stipulates and agrees conclusively that Contractor has against the Owner no right, entitlement or claim for any payment, compensation, cost or remuneration of any type other than pursuant to the terms of this Agreement.

**ARTICLE 29 – EMPLOYMENT OF ILLEGAL IMMIGRANTS**

- A. The Contractor hereby certifies to comply with all applicable federal and state laws prohibiting the employment of individuals not legally authorized to work in the United States. Contractor shall not knowingly (i) utilize the services of illegal immigrants; or (ii) utilize the services of any subcontractor who will utilize the services of illegal immigrants in the performance of the contract. In the event the Contractor fails to comply with any and all local, state and federal laws prohibiting the employment of individuals not legally authorized to work in the United States, this agreement may be canceled, terminated or suspended in whole or in part by the City, and the Contractor may be prohibited from contracting to supply goods and/or services to the City for a period of one (1) year from the date of discovery of the usage of illegal immigrant services in the performance of a contract with the City.

**ARTICLE 30 – BOYCOTT OF ISRAEL**

- A. In connection with Tennessee Code Annotated Section 12-4-119, Contractor certifies that it is not currently engaged in nor will it engage in a boycott of Israel. For this purpose, a “boycott of Israel” shall mean engaging in refusals to deal, terminating business activities, or other commercial actions that are intended to limit commercial relations with Israel, or companies doing business in or with Israel or authorized by, licensed by, or organized under the laws of the State of Israel to do business, or persons or entities doing business in Israel, when such actions are taken (i) in compliance with, or adherence to, calls for a boycott of Israel, or (ii) in a manner that discriminates on the basis of nationality, national origin, religion, or other unreasonable basis, and is not based on a valid business reason. This provision is not applicable to contracts with a value of less than \$250,000 or to companies with less than 10 employees.

**END OF SECTION 00710**