

OWNER / CONTRACTOR AGREEMENT

BETWEEN

**NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT**

AND

“CONTRACTOR”

FOR

HUTCHINSON CHAPEL ROOF REPLACEMENT

Dated:

CONSTRUCTION AGREEMENT

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CONSTRUCTION AGREEMENT

This Agreement made this ____ of _____ 2022 between _____ (“Contractor”) a corporation authorized to do business in the State of New York, having an office at _____ and the New York State Urban Development Corporation d/b/a Empire State Development (“ESD” of “Owner”) a public benefit corporation and political subdivision of the State of New York, having an office at 633 Third Avenue, New York, NY 10017.

WITNESSETH :

WHEREAS, the Owner and Contractor for the consideration named agree to perform under the terms and conditions set forth herein,

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, Contractor and the Owner hereby agree as follows:

ARTICLE 1

CONTRACT PRICE

Contractor has been selected to provide construction services as denoted in the Drawings, Project Manuals and all other Contract Documents referenced herein (the “Hutchinson Chapel Roof Replacement”) upon the terms and conditions hereinafter provided and agrees to perform all work and labor required, necessary, proper for or incidental to the work and to furnish all supplies and materials required, necessary, proper for or incidental to the work for the total not to exceed the sum of _____ (the “Contract Price”), which sum shall be deemed to be in full consideration for the performance by Contractor of all the duties and obligations of Contractor under the Contract (the “Project”).

ARTICLE 2

SCOPE OF WORK, MATERIALS AND LABOR

2.1 Owner's Representative

The Owner may designate a representative to act on its behalf with respect to certain obligations and duties under this agreement (the “Owner’s Representative”). The Owner’s Representative may be an employee of the Owner, or an independent consultant. The Owner may change the designation of the Owner’s Representative, in its sole discretion, with written notice to the Contractor. The Owner’s Representative shall be the only individual with authority to bind the Owner under the terms of this Agreement. More than one Owner’s Representative may be designated by the Owner from time to time during the Project unless otherwise noted, the Owner’s Representative shall be Foit Albert Associates, Architecture, Engineering & Surveying, P.C. (“FOIT”).

2.2 Architect

- (a) For the purposes of this Agreement, FOIT shall be deemed to be the Architect/Engineer retained by the Owner to provide design or consulting services related to Contractor’s Work as the Owner may designate from time to time.

2.3 Definition of Work

- (a) All materials to be furnished and labor and work to be performed and completed by Contractor and all duties and obligations of Contractor as required in the Contract Documents are herein collectively referred to as the "Work". Contractor shall perform and complete for the Owner all Work required by and in conformity with the Contract Documents for this contract.
- (b) Pursuant to section 220 (3-a) of the New York State Labor Law, each Contractor and Subcontractor shall maintain payroll records, subscribed and affirmed by him as true, showing the hours and days worked by each worker, laborer, or mechanic, the occupation at which he worked, the hourly wage rate paid and the supplements paid or provided for this Project. The Contractor shall submit such payroll records for himself and each of his Subcontractors, 30 days after the issuance of the first payroll and every 30 days thereafter until submission of the last payroll for this project, including weeks not worked. Failure to submit payroll records in the accordance with Section 220 (3-2) of the New York State Labor Law shall be sufficient condition to withhold progress payments, until compliance. The payroll records shall be submitted to the Owners Representative

2.4 Contract Documents

The "Contract Documents" shall consist of the following:

- (a) This instrument (the "Agreement").
- (b) Drawings and revisions, if any, as identified in Exhibit E (such Drawings and revisions, as the same may be revised from time to time, are herein referred to as the "Drawings").
- (c) Project Manual and Addenda, if any, as identified in the project manual (such Specifications and Addenda, as the same may be amended from time to time, are herein referred to as the "Specifications").
- (d) The Payment Bond in Exhibit B.
- (e) Notice to Bidders.
- (f) Information to Bidders.
- (g) Special Conditions
- (h) Bid Form including alternates and unit prices accepted by the Owner as applicable.
- (i) Change Orders adopted pursuant to this Agreement.

The Contract Documents form the contract between the Owner and Contractor. Reference in the Contract Documents to "the Contract", "the contract", "this contract", or "the Construction Contract" shall be deemed to include all of the Contract Documents. References to "this Agreement", "the Agreement", or "the agreement" shall refer to this instrument, which is one of the Contract Documents.

2.5 Intent of Contract Documents

- (a) The intent of the Contract Documents is to include in the Work all labor and materials, insurance, tools, equipment, permits, licenses, taxes, approvals, transportation, surveys, testing, field engineering, and other professional services water, heat, utilities, transportation and other professional services (other than the services of the architect, engineers, attorneys and the inspection, survey and testing services of the Owner) whether temporary or permanent and whether or not incorporated or to be incorporated in the Work and any other items required to execute and complete the Work satisfactorily and in accordance with the Contract Documents.

Contractor shall perform and complete the Work in accordance with this intent and shall perform all work incidental thereto or as is usually performed in connection therewith, or as is reasonably inferable therefrom, it being the intention that all work usually performed by the trade covered by this Agreement and necessary to produce the intended result be performed by Contractor whether or not specifically covered by the Contract Documents.

- (b) The Contract Documents are complementary and what is called for one shall be as binding as if called for by all.
- (c) If any conflicts or ambiguities are found or between the Drawings and Specifications, or among any of the Contract Documents, they shall be brought to the attention of the Architect and the Owner's Representative immediately for resolution. The Contract Documents will be interpreted so as to secure in all cases the most substantial and complete performance of the Work as is most consistent with the needs and requirements of the Work such that the best quality or greatest quantity of labor or material is provided. *In the event of a conflict between any of the Contract Documents, the intent as interpreted by the Architect/Engineer, shall govern.*
- (d) Addenda to parts of the Contract Documents are for the purpose of varying, modifying, rescinding or adding to portions of the Contract Documents. Where an addendum modifies a portion of a paragraph or a section, the remaining paragraphs, sections or portions thereof shall remain in force, unless otherwise stated in the addendum.
- (e) Captions, headings, cover pages and table of contents contained in the Contract Documents are inserted only to facilitate reference and for convenience and in no way define, limit or describe the scope, intent or meaning of any provision of the Contract.
- (f) Words and abbreviations which have well-known technical or trade meanings are used in the Contract Documents in accordance with such recognized meanings.
- (g) A typical or representative detail indicated on the Drawings shall constitute the standard for workmanship and material throughout corresponding parts of the Work. Where necessary, and where reasonably inferable from the Drawings or Specifications, Contractor shall adapt such representative detail for application to such corresponding parts of the Work. The details of such adaptation shall be subject to prior approval by Architect. Repetitive features shown in outline on the Drawings shall be in exact accordance with corresponding features completely shown.
- (h) The layout of utilities, mechanical and electrical systems, equipment, fixtures, piping, ductwork, conduit, specialty items and accessories indicated on the Drawings is diagrammatic and is not complete. Contractor shall be responsible for locating all such items.
- (i) (Intentionally Deleted)

2.6 Completion of Drawings and Specifications

Contractor acknowledges that there are items of Work which may not be drawn or specified with complete detail in the Drawings and Specifications but which are required for the completion of the Work. Any such item, when identified as part of the reasonable development of the Work, shall be drawn or specified by Architect in consultation with Contractor. When such drawing or specification is approved by the Owner, the Drawing or Specification so approved shall thereupon be part of the Contract Documents and the item of Work shall be performed by Contractor as part of the Work without further action or order of the Owner and without any increase in the Contract Price as if such Drawing and Specification were originally included in the Contract Documents.

2.7 Title to Materials – (INTENTIONALLY DELETED)

2.8 Contractor's Obligations

- (a) Contractor shall in a good and workmanlike manner perform all the Work required by the Contract Documents in accordance with the highest standards on the construction industry on projects of similar complexity and direct the Work using its best skill and attention. Contractor shall be solely responsible for all construction means, methods, techniques, sequences and procedures within the scope of Contractor's Work.
- (b) Contractor shall be responsible for the safety, efficiency and adequacy of Contractor's plant, equipment, appliances and methods, and for damage which may result from failure or improper construction, maintenance or operation of such plant, equipment, appliances and methods. Contractor shall comply with all terms of the Contract Documents do, carry on and complete the entire Work under the direction of and to the satisfaction of the Owner.
- (c) Contractor shall provide any engineering services, scaffolding, hoists, or any temporary structures, such as bracing and supports, light, heat, power, toilets, water or temporary connections which are required by this Agreement or necessary to perform the Work.
- (d) Contractor shall deliver all materials at such times and in such quantities as will insure the speedy and uninterrupted progress of the Work. Contractor shall handle and take care of all materials used in performance of the Work whether furnished by Contractor of the Owner, as the same are delivered to the site and shall be solely responsible for the loss, damage, theft, security and condition of the same. After final completion and acceptance of the Work, or sooner if requested by the Owner, Contractor shall remove all surplus materials (excluding any attic stock required by the Contract Documents) and scaffolding furnished by it which have not been incorporated in the Work.
- (e) Unless otherwise provided in the Contract Documents, Contractor shall secure and pay for all permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work. Contractor shall give all notices and comply with all laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the variance with any applicable laws in any respect. Contractor shall promptly notify the Owner, in writing, and any necessary changes shall be accomplished by appropriate modification. If Contractor performs any Work contrary to such laws, ordinances, rules and regulations, it shall assume full responsibility therefore and shall bear all costs attributable to correcting such deficiencies in the Work.
- (f) Contractor shall be responsible for keeping the site neat and broom clean on a regular basis.

2.9 "Or Equal" Clause – (INTENTIONALLY DELETED)

2.10 Dust Hazards

If in the construction of the Work, a harmful dust hazard is created for which appliances or methods of elimination of harmful dust hazards have been approved by the Board of Standards and Appeals, Contractor shall install, maintain and operate said appliances or methods.

2.10.1 Cutting and Patching

Contractor shall be responsible for all cutting, fitting or patching that may be required to complete the Work, to make its several parts fit together properly and to make the Work fit together properly with previous and surrounding work. The requirement to cut, fit or patch shall be determined by the Owner; provided, that structural elements of the Project shall not be cut, patched or otherwise altered or repaired without prior authorization by Architect. Authorization to proceed with remedial operations on any damaged or defective element or portion of the Project shall not constitute a limitation or a waiver of the Owner's or Architect's right to require the removal and replacement of any Work which fails to fulfill the requirements of the Contract Documents.

2.11 Nomenclature

The terms Construct, Construction, Build, Work, etc. shall be construed to include all work shown on the plans. The terms Architect, Engineer, Project Architect, Corporation's Representative, the Owner, Corporation, the Owner's Representative, Construction Manager, and similar derivations exist within the Contract Documents and shall be construed to mean the Owner's Representative.

2.12 Construction Parking

Parking will be allowed on the Project site as approved by the Architect/Engineer.

2.13 Construction Traffic

Contractor shall submit a construction traffic plan to the Owner's Representative for approval. The plan must show routes that all construction traffic will follow to minimize any impacts on the adjacent community.

2.14 Hazardous Waste Disposal Transportation

Contractors shall, as part of its Work, in addition to complying with any and all applicable laws, rules or regulations concerning the removal, abatement, handling, transportation and disposal of all hazardous waste (as that term is most broadly defined under local, state or federal laws) encountered in the performance of its Work, be responsible to pay all fees, taxes, levies or assessments; obtain and execute all permits, licenses, manifests, logs, reports, certifications or other documents necessary to effectuate the lawful removal and disposal of such hazardous waste; and obtain an identification number from the United States Environmental Protection Agency or any other necessary identifying information, all in a timely manner to permit the timely performance of the work. The obligations of Contractor under this Section shall be performed as part of the Contract Price without any additional compensation from the Owner. Contractor shall be aware of the presence of contaminated materials and should refer to the Technical Specifications of the Project Manual for procedures.

ARTICLE 3

COMMENCEMENT AND COMPLETION OF WORK AND OCCUPANCY

3.1 Start of Work and Completion

- (a) Contractor shall commence the Work upon receipt of a written notice to proceed signed by the Owner. Contractor shall thereafter prosecute the Work to be performed hereunder diligently, without interruption, and in accordance with the time requirements of the Project as determined and directed by the Owner.

- (b) Contractor shall Substantially Complete, as defined by Section 7.6, all of the Work in accordance with the Contract Documents to the satisfaction of Architect and the Owner on or before December 1, 2022.

3.2 Project Scheduling

- (a) Contractor shall prepare a schedule showing times for performance of all major activities of the Work (the "Project Schedule") within seven (7) days of commencing the Work for review and approval by the Owner. Contractor shall attend all scheduled meetings as directed by the Owner or the Owner's Representative and update the Project Schedule at intervals required by the Owner.
- (b) If, in the opinion of the Owner, Contractor falls behind the Project Schedule, Contractor shall take all steps that are necessary to improve its progress and shall, if requested by the Owner, submit operational plans in a CPM schedule format demonstrating how the lost time may be regained subject to the Owner's approval. Contractor is responsible to maintain its schedule so as not to delay the progress of the Project or the schedules of other contractors. If Contractor delays the progress of its Work or the work of other contractors, it shall be the responsibility of Contractor to increase the number of tradesmen, the number of shifts, the days of work and to the extent permitted by law, to institute or increase overtime operations, all without additional costs to the Owner in order to regain lost time and maintain the Project Schedule then in effect as approved by the Owner. All expenses incurred by the Owner attributable to Contractor's efforts to regain lost time shall be the responsibility of Contractor.
- (c) Refer to the Special Conditions and Division 1 – General Requirements for additional requirements.

3.3 Cooperation with other Contractors

- (a) During the progress of the Work, other contractors may be engaged in performing work for the Owner. Contractor shall cooperate and coordinate its Work with the work of said other contractors, as applicable, and in such manner as the Owner may direct.
- (b) If the Owner shall determine that Contractor is failing to coordinate the Work with the work of other contractors:
 - 1. The Owner shall have the right to withhold any payments due under the Contract until its directives are complied with by Contractor; and
 - 2. Contractor shall indemnify and hold the Owner harmless from any and all claims or judgments for damages and from any costs or damages to which the Owner may be subjected or which the Owner may suffer or incur by reason of Contractor's failure to coordinate its Work with that of other contractors.
- (c) If Contractor notifies the Owner in writing that another contractor on the site is failing to coordinate the work of said contractor with Contractor's Work, the Owner shall investigate the charge. If the Owner finds it to be true, the Owner shall promptly issue such directions to the other contractor with respect thereto as the situation may require. The Owner shall not be liable for any damages suffered by Contractor by reason of the other contractor's failure to promptly comply with the directions so issued by the Owner or by reason of another contractor's default in coordinating its work with that of Contractor.
- (d) Should Contractor sustain any damage through any act or omission of any other contractor having a contract with the Owner or through any act or omission of any subcontractor of said other contractor, Contractor shall have no claim against the Owner for said damage.

- (e) Should any other contractor having, or who shall have, a contract with the Owner, sustain damage through any act or omission of Contractor or through any act or omission of a subcontractor, Contractor shall reimburse said other contractor for all said damages and shall indemnify and hold the Owner harmless from all said claims.
- (f) The Owner does not guarantee the performance of any contractor. Contractor acknowledges these conditions and agrees to bear the risk of all delays including, but not limited to, delays caused by the presence of operations of other contractors and the Owner shall not incur any liability by reason of any delay to Contractor's Work by reason of the performance of work or defaults by other contractors.
- (g) Where the Contractor shall perform Work in close proximity to work of other contractors, the Contractor shall assist in arranging space conditions to make satisfactory adjustment for the performance of any work in such areas. If the Contractor's Work interferes with work of other contractors, the Contractor shall make changes necessary to correct such conditions.

3.4 Notice of Delay

In addition to any information required elsewhere in this Agreement and without limiting any other provision of this Agreement including Contractor's obligation to Substantially Complete the Work by the Completion Date, should Contractor be, or anticipate being delayed or disrupted in performing the Work hereunder for any reason, including without limitation, its financial condition or Contractor's general non-payment of its debts as such debts become due, it shall within three (3) days after the commencement of any condition which is causing or is threatening to cause such delay or disruption, notify the Owner in writing of the effect of such condition upon the Completion Date. Contractor shall state why and in what respects the condition is causing or is threatening to cause delay, identify specific contract milestones that will be affected and provide as estimate of the duration of the delay. Failure to strictly comply with this notice requirement shall be sufficient cause to deny Contractor's change in the Project Schedule and/or Completion Date. Nothing in this section or Contractor's compliance with its terms should be deemed to obligate the Owner to grant a change in the Project Schedule or the Completion Date or to restrict the Owner's right to recover damages for delay.

3.5 Extension of Time

Contractor may be entitled to an extension of time for delays in the performance of the Work caused solely by the acts or omissions of Architect or the Owner, or unforeseeable causes beyond the control and without the fault or contributing negligence of Contractor including, but not limited to, acts of God, acts of the public enemy, unforeseen or unforeseeable acts of any Government body, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes or unusually severe weather; provided Contractor shall have used its best efforts and diligently sought to have minimized any such period of delay, by taking whatever measures are necessary, including with limitation, if applicable, seeking alternate sources of materials, other subcontractors or other facilities in which to perform the required construction operations; and provided, further, that notice is given to the Owner pursuant to the requirements of the immediately preceding paragraph.

3.6 No Claim for Delay Damages

Contractor agrees to make no claim for damages for delay in the performance of this Contract occasioned by any act or omission to act, including active interference, of the Owner or any of its agents, other contractors, or representatives and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of such Work that is delayed in accordance with the provisions for obtaining an extension of time specified herein. Contractor alone hereby specifically assumes the risk of all delays, obstructions, or interferences of any kind or duration whatsoever, whether or not within the contemplation of the parties, and whether or not

foreseeable or unforeseeable and agrees that its sole remedy is an extension of time where applicable.

ARTICLE 4

METHOD, SCHEDULE AND TERMS OF PAYMENT

4.1 Contract Payment Breakdown and Requisition

- (a) Contractor's applications for partial payments ("Requisitions") and its application for final payment ("Final Requisition") are to be submitted to the Owner, or its designee, and Architect in (6) copies in the manner hereinafter provided (see Exhibit J). Each Requisition must be supported by such data substantiating Contractor's right to payment as the Owner may require.
- (b) Prior to the submission of the first Requisition, Contractor shall present to the Owner for approval a contract payment breakdown (the "Contract Payment Breakdown") (See Exhibit N) itemizing the dollar values for the various trades which comprise the Work, including quantities where applicable, which in the aggregate equal the Contract Price. The Contract Payment Breakdown shall be prepared in such form as included in the Contract Documents and supported by such data to substantiate its correctness as the Owner may require. It is understood and Contractor acknowledges that the model contract payment breakdown is included with the Contract Documents as an administrative tool for the purpose of illustrating a format and minimum level of detail required for the Contract Payment Breakdown shall not be changed or revised in any way without the Owner's written consent and shall become part of this Agreement.
- (c) On any Requisition, Contractor shall be entitled to partial payment on account of the Contract Price in an amount equal to the value of the portions of the Work completed and acceptable to the Owner and approved by the Owner's Representative based upon the percentage of completion of each item specified on the Contract Payment Breakdown, less Retainage specified under Section 4.5 on the total amount so computed, and less any additional withholdings deemed necessary by the Owner pursuant to Section 4.8 hereof, less the total amount of prior partial payments.

4.2 Receipts and Releases of Liens

With each Requisition, Contractor shall furnish the following documents:

- (a) Contractor's Receipt and Waiver of Lien (See Exhibit N)
- (b) Subcontractor's Receipt and Waiver of Lien (See Exhibit O)
- (c) Any other documentation required elsewhere in the Specifications

The Owner may also require Contractor to attach to each Requisition the consent of the surety issuing the Payment Bond to such payment.

In addition to the documents required to be furnished by the immediately preceding paragraph, with the Final Requisition, Contractor shall furnish:

- (a) Contractor's Affidavit, Final Waiver of Claims and Liens, and Release Rights (See Exhibit P); and
- (b) Subcontractor's Affidavit, Final Waiver of Claims and Liens, and Release Rights (See Exhibit Q) for all subcontractors and materialmen who provided labor or materials for the Project.

Should any such subcontractor or materialmen fail or refuse to furnish such release, Contractor will be required to furnish a bond satisfactory to the Owner to indemnify it against any such lien, claim or demand. If any such lien, claim or demand is asserted or remains unsatisfied after Final Payment is made to the Contractor, Contractor shall refund to the Owner all monies that the latter may be compelled to pay in discharging such lien, claim or demand including all costs, expenses and attorney's fees which the Owner may incur in connection therewith.

4.3 Release and Consent of Surety

Notwithstanding any other provision of the Agreement to the contrary, Final Payment shall not become due pursuant to this Agreement until Contractor submits to the Owner a General Release and a consent of Surety to said payment both in form and content acceptable to the Owner.

4.4 Time of Payment

Requisitions shall be submitted by Contractor to the Owner by the thirtieth day of each month for Work completed up to the last day of the previous month, and if such Requisition is properly supported, payment shall be made within thirty (30) days after approval of the Requisition by the Owner. All requisitions shall be subject to the approval of the Owner's Representative and Owner. Contractor shall submit to and review with the Owner a draft copy of each Requisition on or around the twenty fifth of the month. Contractor shall only be entitled to payment in the amount approved by the Owner with respect to such Requisition. Each Requisition must be signed by the Owner before payment is due to Contractor. The value of any Work included in a Requisition for partial payment which is found unacceptable by the Owner shall be deducted from that or any subsequent Requisition.

4.5 Retainage

The Owner shall retain five (5%) percent of the portion of the Contract Price covered by each Requisition submitted by Contractor (the "Retainage"). The Owner has the right to increase the amount of retainage held if any breach of the Contract is deemed by the Owner to remain uncorrected after notice of such breach has been provided to Contractor.

Reduction of Retainage

- (a) Upon Substantial Completion, the Retainage shall be reduced to two and one-half (2 1/2%) percent of the Contract Price until any remaining items of Work to be completed or corrected on the Final Punch-List, as defined in Section 7.6; and
- (b) An amount necessary to satisfy any and all claims, liens or judgments against Contractor.

The Final Punch-List may be expanded to include additional items of Work to be corrected or completed until final acceptance of the Work by the Owner. Additional sums may be withheld in the manner prescribed above to cover the value of these items pursuant to this Section.

4.6 Final Payment

- (a) The final balance due Contractor under this Agreement shall be payable to Contractor by the Owner, as final payment hereunder, within thirty (30) days after all of the following have taken place:
 - 1. Final inspection and acceptance by the Owner as evidenced by the Certificate of Completion being delivered to Contractor.
 - 2. Contractor's Final Requisition has been submitted by Contractor and approved by the Owner and Architect.

3. The affidavits attached as Exhibits P and Q hereof have been submitted by Contractor, and any other documents or actions expressly specified in the Contract Documents as preconditions to Final Payment have been submitted or completed.
 4. Any inspection or approvals with respect to any of the Work that the Owner deems appropriate or which is required by governmental authorities or by the applicable Board of Fire Underwriters, have been performed or obtained.
- (b) Contractor's acceptance of Final Payment will constitute full and final settlement of all obligations of the Owner to Contractor with respect to payments required by this Agreement.

4.7 Withholding of Payments

- (a) The Owner may withhold from Contractor any part of any payment as may, in the judgment of the Owner, be necessary:
1. To assure payment of just claims of any persons supplying labor or materials for the Work;
 2. To protect the Owner from loss due to defective Work and unsatisfactory work not remedied;
 3. To protect the Owner and its representatives from loss due to death or injury to persons or damage to the Work or property of other contractors, subcontractors or others caused by the act or neglect of Contractor or any subcontractors;
 4. In the event that there is reasonable evidence that the Work will not be completed for the unpaid balance of the Contract Price;
 5. In the event that there is reasonable evidence that the Work will not be completed within the Project Schedule; or
 6. In the event that Contractor persistently fails to perform the Work in accordance with the Contract Documents.

In any of such events, the Owner shall have the right to apply any such amounts so withheld in such manner as the Owner may deem proper to satisfy such claims, to secure such protection, complete the Work or to compensate the Owner for any loss suffered by reason on Contractor's delay. Such application shall be deemed payment for the account of Contractor. In the event that the Owner gives Contractor notice that it intends to make such application, Contractor shall be stopped from disputing liability or the amount of liability unless, within three days after receipt of such notice, it indicates to the Owner in writing that it is not liable or that the amount of its liability is different from that set forth in the notice.

- (b) The provision of this Section 4.8 is solely for the benefit of the Owner, and any action or non-action by the Owner shall not give rise to any liability on the part of the Owner.

4.8 Right to Audit

Contractor shall maintain and shall keep for a period of at least three years after the date of final acceptance of the Work all records and other data relating to the Work.

The Owner or its designees shall have the right to inspect and audit all records, subcontracts, purchase orders and other data of Contractor relating to the Work at any time and from time to time until the end of such three (3) year period. Contractor shall promptly respond to any inquires of the Owner or any representative of the Owner arising out of any such inspection or audit. If an audit reveals an overpayment by the Owner exceeding two (2%) percent, Contractor shall be responsible

to pay the costs associated with the audit incurred by the Owner. Any overpayment to Contractor shall immediately be returned to the Owner.

ARTICLE 5

CONTRACTOR

5.1 Superintendence by Contractor

- (a) Contractor shall employ a full-time competent construction superintendent who shall be approved by the Owner and shall be in charge of the Work. The construction superintendent shall be devoted full time to the Work, shall be present at the Site during the time the Work is required to be performed and shall have full authority to accept instructions, make decisions and act for Contractor at all times. Contractor shall submit to the Owner for approval the resume of his proposed superintendent.
- (b) If at any time the superintendent is not satisfactory to the Owner, Contractor shall, if requested by the Owner, replace the superintendent with another satisfactory to the Owner within five (5) business days of such request.
- (c) Contractor shall not remove or replace the superintendent or person-in-charge of the Work without the consent of the Owner unless he or she is discharged by Contractor or resigns from the employ of Contractor.

5.2 Representations of Contractor

Contractor represents and warrants that:

- (a) Contractor is financially solvent and is experienced in, and competent to perform the Work;
- (b) Contractor is familiar with all Federal, State, City or other laws, ordinances, orders, rules and regulations, which may in any way affect the Work;
- (c) Any temporary and permanent Work required by this Agreement can be satisfactorily constructed and such construction will not injure any person or damage any property extraneous to the Work; and
- (d) Contractor has carefully examined the Contract Documents and the site and, from Contractor's own investigations, is satisfied as to the nature and location of the Work, the character, quality and quantity of surface and subsurface materials likely to be encountered, the character of equipment and other facilities needed for the performance of the Work, the general and local conditions, and all other conditions or items which may affect the Work. Based on the foregoing, Contractor represents that the Contract Documents are adequate for the complete performance of the Work.

5.3 Verifying Dimensions and Site Conditions

- (a) Before proceeding with the Work, Contractor will accurately check all previous and surrounding work and determine the correctness of same.
- (b) Contractor shall take, determine, investigate and verify all field measurements, dimensions, field construction criteria and site conditions for the performance of the Work and shall check and coordinate the information contained in the Contract Documents.

- (c) Contractor shall be responsible for determining the exact location of and to verify the spatial relationships of all Work. If any conflicts are found in the Contract Documents, or if Contractor has any questions concerning the foregoing, it shall immediately notify the Owner and shall thereafter perform the Work in accordance with directions from the Owner.
- (d) Contractor shall be responsible for locating all utilities on or below the site.

5.4 Copies of Contract Documents for Contractor

The Owner shall furnish to Contractor, without charge, four (4) sets of the Contract Documents. Any sets in excess of the number mentioned above may be furnished to Contractor for the cost of reproduction and mailing.

5.5 Progress Meetings

- (a) Job meetings shall be coordinated and scheduled by the Owner during the course of construction as per specification 01310 – Project Management and Coordination.
- (b) Contractor's Project Managers and Superintendents shall attend all meetings as directed by the Owner.
- (c) Contractor shall require the appropriate subcontractors to attend such job meetings.
- (d) The purpose of the job meeting is to ensure proper coordination, determine construction progress, monitor and update progress schedules, review requisitions and change orders, expedite completion of the Project in accordance with the Contract Documents and review other relevant items.

5.6 Reports and Access

- (a) Contractor shall furnish daily manpower reports to the Owner and such other reports as may be required.
- (b) (Intentionally Deleted)
- (c) The Owner will monitor compliance with the Non-Discrimination, Affirmative Action, Minority Business Enterprise and Minority Workforce Participation Sections of this Agreement. (See Exhibit F)

5.7 Financial Information

Contractor agrees to furnish at the Owner's request, current quarterly and, if available, audited annual financial statements and from time to time, such additional information as the Owner shall deem necessary or desirable to satisfy itself of Contractor's continuing ability to complete the Work.

ARTICLE 6

CONTRACT ADMINISTRATION

6.1 Architect's, and the Owner's Representatives Responsibilities and Functions

- (a) Contractor acknowledges that the Owner's Representative, on behalf of the Owner, has immediate responsibility for general administration of the Contract, shall observe the Work for conformity with requirements of the Contract, shall review Contractor's performance of

or compliance with other requirements on the Contract and shall issue directives to Contractor in regard to such matters. The Owner's Representative will not be responsible for Contractor's or subcontractor's construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and the Owner's Representative will not be responsible for Contractor's failure to carry out the Work in accordance with the Contract Documents or its failure to fulfill any requirements of the Contract.

- (b) Contractor acknowledges that Architect, on behalf of the Owner, shall review all Shop Drawings and samples and other submittals and shall observe the general quality of construction for reasonable conformance with the design scheme of Architect and adherence to the Contract Documents, and may review Contractor's performance for compliance with the requirements of this Agreement.
- (c) Architect's and the Owner's Representative's duties and services shall not in no way supercede or dilute Contractor's obligation to perform and complete the Work in full conformity with the Contract Documents.

ARTICLE 7

INSPECTION AND ACCEPTANCE

7.1 Access to the Work

The Owner, the Owner's Representative, the Construction Manager, Architect/Engineer or any of their authorized agents shall at all times have access to and the right to observe the Work. Contractor shall provide proper facilities for such access and observation, including adequate workspace on site for any designated Owner Representative.

7.2 Required Inspections and Tests

If the Contract Documents, or any laws, rules, ordinances, regulations or any governmental agency requirement, require that any Work be inspected or tested, Contractor shall give the Owner timely notice of readiness of the Work for inspection or testing and the date fixed for such inspection or testing. The responsibility for the cost of inspection and testing shall be in accordance with the provisions of the Specifications and or Project Manual.

7.3 Special Inspections and Tests

Whenever, in the opinion of the Owner or the Owner's Representative, it is desirable to require special inspection or testing of the Work or its individual components, they shall have authority to do so whether or not such Work be then fabricated, installed, covered or completed. If such special inspection or testing reveals a failure of the Work to comply (1) with the requirements of the Contract Documents, or (2) with laws, ordinances, rules, regulations or any order of any public authority having jurisdiction over the Project, Contractor shall bear all costs for the inspection or testing thereof, including Architect's and the Owner's additional services made necessary by such failure and the costs to correct the deficiencies noted; otherwise the Owner shall bear such inspection or testing costs, and an appropriate change order shall be issued.

7.4 Uncovering of Work

- (a) If any Work shall be covered or concealed contrary to the request of the Owner, such Work shall, if required by the Owner, be uncovered for examination, inspection or testing. Any examination, testing or inspection shall not relieve Contractor of the responsibility to maintain quality control over the Work. The cost of all such testing including examination,

inspection and additional professional services required, and any other expenses incurred by the Owner as a result of such examination, inspection or testing shall be borne by Contractor.

- (b) In the event that a typical detail fails inspection or testing, the Owner may require inspection or testing of any or all other such typical details at Contractor's cost and expense.

7.5 Correction of Work

Any Work not approved by the Owner, shall immediately be reconstructed, made good, replaced or corrected by Contractor including all Work of other Contractors destroyed or damaged by such removal or replacement. Rejected material shall be removed immediately from the site. Acceptance of material and workmanship by the Owner shall not relieve Contractor from Contractor's obligation to replace all Work which is not in full compliance with the Contract Documents.

7.6 Certificate of Substantial Work Completion

"Substantial Completion" shall occur when all of the following conditions have been satisfied:

- (a) All of the Work has been completed in accordance with the Contract Documents and to the Owner's satisfaction except as noted on the Final Punch List, as defined in Section 7.6 (b), such that the Owner can occupy the site for the intended use and purpose or otherwise take it over for beneficial use;
- (b) Contractor and the Owner have agreed in writing upon a comprehensive list of all incomplete, defective or incorrect Work to be completed by Contractor (the "Final Punch List") (or, if they are unable to agree, the Owner shall have prepared and issued the Final Punch List to Contractor).
- (c) Contractor has delivered to the Owner a written statement of the Surety (in form and substance satisfactory to the Owner) to the effect that the Owner's payment of unpaid balance of the Contract Price shall not modify or discharge the obligations of the Surety under the Bonds; and
- (d) Contractor has submitted written certification that all of the foregoing conditions have been satisfied; and the Owner has approved Contractor's Certification.

7.7 Certificate of Final Completion

Upon receipt of written notice from Contractor stating its belief that the Work is fully performed in conformity with the Contract Documents, and confirming that Contractor has completed any items of Work previously noted to it by the Owner as not being acceptably completed in the Final Punch List or any subsequent punch list, which may amend the Final Punch List, the Owner and Architect shall perform an inspection for purposes of determining whether the Work is finally completed. The Owner and Architect shall commence such inspection within ten (10) days of receipt of such notice and shall pursue and complete it with all due diligence. When Architect and the Owner find, upon inspection, that to the best of their knowledge and belief, the Work is so performed, they shall prepare and sign a Certificate of Final Completion and furnish such Certificate to Contractor. Such Certificate shall specify the date of completion of the Work for purpose of this Agreement and shall constitute final acceptance of the Work by the Owner. The delivery of a Certificate of Final Completion shall not terminate or alter Contractor's guarantees and other obligations under this Agreement to complete the Work in conformity with the Contract Documents and to fulfill all terms and conditions of this Agreement.

7.8 Acceptance

No inspection shall relieve Contractor of the obligation to perform the Work in strict accordance with the Contract Documents. No payment, either partial or full, by the Owner to Contractor shall be deemed an acceptance of the Work or waiver by the Owner of any terms or conditions of this Agreement.

ARTICLE 8

CHANGES IN THE WORK

8.1 Change Orders

Without invalidating this Agreement, the Owner may order extra work or make changes by altering, adding to, or deducting from the Work, the Contract Price being adjusted accordingly. No claims for extra work shall be allowed unless said extra work is ordered in writing by the Owner or the Owner's Representative. No changes in the Work shall be made unless ordered in writing by the Owner or the Owner's Representative and formalized as a change order (a "Change Order"). In the event that a change directed by the Owner requires Contractor to obtain any special or additional license or permit, the Contractor shall procure the same promptly so as not to impede the progress of the Work. Contractor bears all risk associated with any delay related to obtaining licenses or permits necessary to perform work required by a Change Order. Contractor acknowledges that the Owner has the absolute right to change the sequence of the Work set forth in the Project Schedule for its convenience. If the Owner directs a change to the sequence of the Work for any reason other than due to a default or failure by the Contractor to timely and properly perform the Work, the Contractor shall only be entitled to additional time to complete the Work pursuant to a Change Order, if necessary.

8.2 Changes in Contract Price and Time

- (a) The amount by which the Contract Price is to be increased or decreased by any Change Order shall be determined by the Owner by one or more of the following methods;
1. By accepting an amount agreed upon by both parties;
 2. By applying the applicable unit price or prices previously bid and approved. This method shall be used if the Contract contains applicable unit prices;
 3. By adding to the Contract Price only the amount of the premium portion of overtime pay resulting from an acceleration of the Work, if required by the Owner and not because of a failure by Contractor to maintain the Project Schedule.
 4. By receiving from Contractor a detailed breakdown satisfactory to the Owner, including actual time slips and invoices; itemizing the direct cost of labor and material to perform the changed Work and adding thereto fifteen percent (15%) to cover the profit and all indirect and overhead costs, except that where the changed Work is performed by a subcontractor, the direct cost of labor and material to perform the changed Work plus Fifteen percent (15%) for profit and all indirect and overhead costs to subcontractor and an additional sum for all indirect and overhead costs of Contractor equal to five percent (5%). Such percentage shall be applied to direct costs prior to any mark-ups for subcontractor(s). Where the changed Work involves an increase and a reduction in any contract Work, the above percentage override shall be applied only on the amount, if any, that the cost of the increase exceeds the cost of the reduction. The allowance for overhead

and profit shall include supervision (including General Foreman, Foreman and Project Management), field office and general expenses, overhead, and profit.

- (b) The compensation specified in a Change Order shall constitute a release and full payment for the extra work covered thereby and for any delay and disruption costs or expense occasioned by reason of said charge in the Work.
- (c) No time extension shall be granted Contractor by reason of the issuance of any Change Order unless expressly stated therein.

8.3 Change Order Format

- (a) All Change Orders shall be processed, executed and approved on the Owner's Change Order form, (Exhibit C) of this Agreement. No alteration to this form shall be acceptable to the Owner and no payment for extra work shall be due Contractor unless it executes a Change Order on said form.
- (b) Five (5) copies of proposed Change Orders shall be submitted to the Owner. All Change Orders shall become part of the Contract only when they are issued and signed by the Owner.

8.4 Changed Conditions

- (a) Contractor shall within three (3) days of discovery and before such conditions are disturbed, notify the Owner and its Representative in writing of: (1) subsurface or latent physical conditions differing materially from those indicated in the Contract Documents which could not have been anticipated by Contractor, or (2) unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work provided for in this Agreement. The Owner or the Owner's Representative shall promptly investigate the conditions, and if it finds that such conditions do materially so differ and cause an increase or decrease in Contractor's cost of, or the time required for performance of any part of the Work under this Agreement, adjustments to Contractor's compensation shall be made in the manner provided for payment with respect to any Change Order and a time extension, if warranted, will be granted.
- (b) No claim of Contractor under this clause shall be allowed and shall be deemed waived unless Contractor has given written notice required in (a) above.

ARTICLE 9

SUBCONTRACTS AND PURCHASE ORDERS

9.1 Selection of Subcontractor and Material men and Approval of Subcontracts and Purchase Orders

- (a) The list of proposed subcontractors submitted by Contractor and approved by the Owner (See Exhibit O) identifies the subcontractors with whom Contractor agrees to contract with respect to the Work and is incorporated by reference herein. Any subcontractor engaged by Contractor shall be skilled and, if necessary, licensed to perform such work that it is retained to perform. Contractor shall incorporate all terms of this Agreement which may be applicable to the subcontractor's work in the subcontract or purchase order for such work.
- (b) Any subcontract or purchase order for labor or materials from a person or firm not listed on the above referenced list of proposed subcontractors shall be subject to approval by the Owner. The Owner may approve or disapprove any such subcontract or purchase order by reason of lack of responsibility of the subcontractor or materialmen or failure to conform with the Owner's non-discrimination, affirmative action, training or minority participation

policies and programs. Contractor shall submit such information as the Owner may request in a form acceptable to the Owner concerning each such proposed subcontract or purchase order.

9.2 Access by the Owner and Others

Contractor shall include a provision in all subcontracts and purchase orders, except as may otherwise be specified by the Owner with respect to purchase orders for minor purchases (valued at \$500 or less), that, in order to permit verification of Contractor's costs, the Owner shall have the right to have its representatives inspect and audit the books of account and records of the subcontractors and materialmen, including the right to make excerpts from such books and records. All payments by Contractor to a subcontractor or materialmen shall be by check specifically indicating that payment is attributable to this Agreement. Contractor shall include a provision in all subcontracts and purchase orders that will enable representatives of the Owner to obtain access during working hours to the appropriate books of account and records of the subcontractors and materialmen relating to the Work to determine if there is a compliance with the requirements of law or this Agreement.

9.3 Retainage

Contractor may provide for a retainage under any of their subcontracts or purchase orders provided that where a subcontract or purchase order provides for a retainage, the retainage shall be no greater in percentage than that provided for under this Agreement hereof with respect to Contractor itself, unless otherwise approved in writing by the Owner. Contractor shall submit with each Requisition a statement setting forth the amounts of all retainage withheld, if any, under its subcontracts and purchase orders.

9.4 Miscellaneous

- (a) Contractor shall be fully responsible for the work, supervision, acts and omission of subcontractors and materialmen, and of any person either directly or indirectly employed by subcontractors and materialmen.
- (b) Contractor's use of subcontractors and materialmen shall not diminish Contractor's obligation to complete the Work in accordance with the Contract Documents. Contractor shall supervise control and coordinate the Work of subcontractors and materialmen.
- (c) Nothing contained in this Agreement shall create any contractual relationship between subcontractors or materialmen and the Owner, nor shall it obligate the Owner to pay or to see to the payment of any sums to any subcontractors or materialmen.
- (d) Contractor shall include a provision in all subcontracts and purchase orders requiring the subcontractor, if requested by the Owner until the subcontractor finishes its portion of the Work, to deliver to Contractor unaudited financial statements of the subcontractor similar to the obligation of Contractor hereunder. Promptly upon receipt thereof, Contractor shall deliver copies thereof to the Owner.

ARTICLE 10

ASSIGNMENT

10.1 No Assignment of Duties

Contractor shall not assign this Agreement or the performance of any obligations of Contractor under this Agreement, nor subcontract the Work or any part thereof except in compliance with the terms hereof or with the expressed written consent of the Owner, and each and every such

assignment and subcontracting without such compliance or consent shall be void and Contractor shall not be entitled to any compensation for labor or materials provided by its subcontractors in violation of this provision.

10.2 Assignment of Monies

Contractor shall not assign any monies payable hereunder nor execute and deliver any order on payment unless Contractor and the assignee shall have complied with the following terms and conditions: (a) assignee shall be a commercial bank or finance company regularly engaged in the business of providing financing to construction contractors and shall be providing such financing to contractor; and (b) assignee shall, simultaneously with the assignment, execute and deliver to the Owner an undertaking, in favor of the Owner, in form and substance satisfactory to the Owner, providing that (i) assignee will cause Contractor to apply for trust purposes, as defined in Article 3-A of the Lien Law of the State of New York (the "Lien Law"), all funds advanced by assignee to Contractor (ii) assignee will file a copy of the assignment, containing the covenant required by the Lien Law, with the County Clerk of Monroe County, (c) assignee agrees that the Owner and Contractor may modify any of the terms of this Agreement, including any of the terms of payment without the consent of assignee; (d) assignee agrees that after the effective date of the assignment, the Owner may make payment directly to any subcontractor, material or equipment supplier without any liability to assignee; (e) assignee will require and cause Contractor to keep his books and records in the form and manner described in Section 75 of the Lien Law; and (f) assignee will indemnify and hold the Owner harmless from and against all loss, claim or expense incurred as a result of any failure or performance in accordance with the terms of such undertaking.

10.3 Assignment to ESD

This Agreement or any rights of Owner under this Agreement, including any guarantees or warranties or workmanship or material, may at any time be assigned by the Owner to ESD, any subsidiary of ESD, any successor of ESD or subsidiary of such successor, or to the State of New York, or any political subdivision or agency of the State.

ARTICLE 11

MECHANIC'S LIENS AND CLAIMS

If any mechanic's lien, public improvement lien, or other claim should be filed for or on account of the Work, Contractor shall, within thirty (30) days after notification thereof, discharge such lien or claim or otherwise make provision satisfactory to the Owner for its satisfaction. If Contractor fails to comply with this provision, the Owner may take any steps it deems appropriate to discharge such lien or other claim and Contractor shall be obligated to indemnify any costs and expenses associated with the discharge or satisfaction of the lien or other claim incurred by the Owner, including reasonable attorney's fees.

ARTICLE 12

INSURANCE AND CONTRACT SECURITY

12.1 Effect of Insurance

Contractor covenants and agrees that, prior to the commencement of Work, Contractor shall provide, or cause to be provided, and thereafter shall keep in full force and effect, or cause to be kept in full force and effect, all insurance required under this Article until Final Acceptance of all the Work, at no cost to the Owner.

12.2 Certificates of Insurance

Contractor shall furnish to the Owner a certificate or certificates in duplicate of the insurance required hereunder. Said certificates shall be in a form satisfactory to the Owner, shall list the various coverages and shall contain a provision that the policies shall not be changed or canceled and that they shall be automatically renewed upon expiration and continued in force until Final Acceptance unless the Owner is given thirty (30) days written notice to the contrary. Upon request, Contractor shall furnish the Owner or the Owner's Representative with a certified copy of each policy.

12.3 Authorized Insurance Companies

All insurance required to be procured and maintained as aforesaid must be procured from insurance companies authorized to do business in the State of New York with a rating by Bests Insurance Reports of A-1X or better.

12.4 Termination of Insurance

If at any time any of the above required insurance policies should be canceled, terminated or modified so that the insurance is not in effect as above required, then, if the Owner shall so direct, Contractor shall suspend performance of the Work. If the Work is so suspended, no extension of time shall be due on account thereof. If the Work is not suspended then the Owner may, at the Owner's option, obtain insurance affording coverage equal to that required herein, the costs of said insurance to be payable by Contractor to the Owner.

12.5 Insurance Requirements

Contractor and each subcontractor shall secure insurance in accordance with the requirements stated in the Notice to Bidders.

12.6 Contract Security – (INTENTIONALLY DELETED)

12.7 Additional or Substitute Bond

If at any time the Owner shall become dissatisfied with any surety or sureties then upon the Payment Bond, or if for any other reason such bonds shall cease to be adequate security to the Owner, Contractor shall within ten (10) days after the notice from the Owner, substitute an acceptable bond or bonds in such form and sum and signed by such other surety or sureties as may be satisfactory to the Owner, except that the penal sum of said bond shall not exceed the Contract Price as adjusted by Change Orders. The premiums on such bond or bonds shall be paid by Contractor. No further payments shall be deemed due nor shall be made until the new surety or sureties shall have furnished such an acceptable bond or bonds to the Owner.

12.8 Builder's Risk Insurance – (INTENTIONALLY DELETED)

ARTICLE 13

DISPUTES

13.1 Claims for Extra Work

(a) If Contractor is of the opinion that (1) any work which it has been ordered to perform is extra work and not Work as set forth in the Contract Documents, (2) any determination, order or directive of the Owner is contrary to the terms of the Contract Documents and will

require the performance of extra work or will cause additional expense to Contractor, or (3) any action or omission of the Owner or Architect is contrary to the terms and provisions of the Contract Documents and will require the performance of extra work or will cause additional expense to Contractor, Contractor shall:

1. Not suspend Work, but promptly comply with such determination, order or directive and proceed diligently with the performance of the Work in accordance with the Owner's instructions;
2. Notify the Owner in writing within 72 hours of such determination, order or directive of its reasons for its opinion and request a final determination thereon by the Owner.

If within three (3) business days the Owner determines that the Work is not extra work, the Contractor, in order to reserve its right to claim compensation resulting from the performance of such work or the compliance with such determination, order or directive, must notify the Owner in writing within three (3) business days after receiving notice of the Owner's determination that it is performing such work or complying with such determination, order or directive under protest. In addition to the foregoing, Contractor must submit to the Owner within thirty (30) days after it has performed such work or complied with such determination, order or directive, a detailed statement of the extra expense incurred from the performance of such work or the compliance with such determination, order or directive.

- (b) No claims for extra work shall be allowed unless the same was done pursuant to written order approved by the Owner. If Contractor fails to comply with any provisions of the Article:
1. It shall constitute a conclusive and binding determination that such action, omission, determination order or directive does not involve extra work, has not caused extra expense to Contractor, and is not contrary to the terms and provision of the Contract Documents; and
 2. It shall be deemed to have waived any claim for compensation resulting from the performance of such work or the compliance with such determination, order or directive.
- (c) The value of claims for extra work, if allowed shall be determined by the methods described in the Agreement for Change Orders.

ARTICLE 14

TERMINATION

14.1 Termination for Cause

In the event that any material provision of this Contract is breached by Contractor or by any subcontractor, the Owner may serve a three (3) calendar day written notice upon Contractor, and upon Contractor's surety, if any, of the Owner's intention to terminate the Contract. Said notice shall contain the reasons for said intention to terminate the Contract upon a date specified by the Owner. If said breach shall not be cured by Contractor within three (3) calendar days or arrangements satisfactory to the Owner shall not be made, the Contract shall terminate upon the date so specified by the Owner. In the event of any said termination, the Owner may take over the Work and prosecute same to completion for the account and at the expense of Contractor, and Contractor and Contractor's surety shall be liable to the Owner for all costs occasioned the Owner. In the event of said termination the Owner may take possession of and may utilize such materials or equipment as may be on the site and necessary or useful in completing the Work irrespective of whether such materials or equipment were intended to be incorporated in the Project.

14.2 Termination for Convenience of the Owner

The Owner at any time may terminate the Contract in whole or in part for any reason and without cause. Any said termination shall be effected by delivering to Contractor a notice of termination specifying the extent to which performance of Work under the Contract is terminated and the date upon which said termination becomes effective. Upon receipt of the notice of termination, Contractor shall act promptly to minimize the expenses resulting from said termination. The Owner shall pay Contractor the costs actually incurred by Contractor in the performance of the Work up to the effective date of said termination, but in no event shall Contractor be entitled to compensation in excess of the total compensation earned through the date of termination. Contractor shall not be entitled to any compensation for lost profits, which may be attributable to such termination. In the event of said termination, the Owner may take over the Work and prosecute same to completion and may take possession of and may utilize such materials and equipment as may be on the Site and necessary or useful in completing the Work.

14.3 The Owner's Right to do Work

The Owner may, after notice to Contractor, without terminating the Contract and without prejudice to any other right or remedy the Owner may have, perform, or have performed by others, all of the Work or any part thereof and may deduct the cost thereof from any monies due or to become due Contractor.

14.4 Suspension of Work

The Owner may at any time and for any reason direct Contractor to suspend, stop or interrupt the Work or any part thereof for any period of time. Such direction shall be in writing and shall specify the period during which the Work is to be stopped. Contractor shall resume the Work upon the date specified in such direction or upon such other date as the Owner may thereafter specify in writing. The period during which the Work shall have been suspended, stopped or interrupted may, if warranted, be added to the time fixed for performance of the Work. A suspension for any consecutive period of 120 days or less during any 365-day period of the Work pursuant to this provision shall not give rise to any claim against the Owner by Contractor for additional compensation; otherwise, Contractor may be entitled to an equitable adjustment of the Contract Price in the Owner's sole discretion.

ARTICLE 15

INDEMNITY AND PROTECTION OF RIGHTS, PERSONS AND PROPERTY

15.1 Accident Prevention

Contractor shall at all times take every precaution against injuries to persons or damage to property and for the safety of persons engaged in the performance of the Work.

15.2 Safety Program

Contractor shall be responsible for the initiation, maintenance and supervision of safety precautions and programs in connection with the Work. Contractor shall submit a safety program to be approved by the Owner or the Owner's Representative and designate a Safety Officer to carry out the approved program.

15.3 Protection of Work and Property

Contractor shall at all times guard the Owner's property from damage or loss in connection with the

Work. Contractor shall at all times guard and protect the site, the Work and adjacent property. Contractor shall replace or make good any such loss or injury unless such loss or injury is caused directly by the Owner.

15.4 Delay or Failure

Contractor and its sureties shall be responsible for and pay to the Owner all loss, damage and additional cost incurred at the Project by reason or on account of (i) the unexcused delays of Contractor or (ii) Contractor's failure to fully and completely carry out the terms of this Agreement.

15.5 Adjoining Property

Contractor shall protect all adjoining property and shall repair or replace any such property damaged or destroyed during the progress of the Work by Contractor or any of its subcontractors at Contractor's sole cost and expense.

15.6 Risks Assumed by Contractor

(a) Contractor solely assumes the following distinct and several risks whether such risks arise from acts or omissions (whether negligent or not, and whether supervisory or otherwise) of the Owner, of Architect, of Contractor, of any subcontractor, of third persons or from any other cause, including unforeseen obstacles and difficulties which may be encountered in the prosecution of the Work, whether such risks are within or beyond the control of Contractor and whether such risks involve any legal duty, primary or otherwise, imposed upon the Owner:

1. The risk of loss or damage, direct or indirect, or whatever nature, to the Work or to any materials furnished, used, installed or received by the Owner, Contractor or any subcontractor, materialmen or workmen performing services or furnishing materials for the Work, whether or not such work or materials are stored at the site. Contractor shall bear such risk of loss or damage until final acceptance of the Work by the Owner or until completion or removal of such materials from the site and the vicinity thereof, whichever event occurs last. A portion of the risk of such loss or damage may be insured against under the terms of a "builder's risk" insurance policy maintained by the Owner. Notwithstanding the status of any actual or potential recovery or claim under the said "builder's risk" insurance policy, in the event of any loss or damage, Contractor immediately shall repair, replace or make good any such loss or damage.
2. The risk of claims, just or unjust, by third persons against Contractor, the Owner, ESD, the Owner's Representative, and Architect on account of wrongful death, bodily injuries and property damage, economic loss, direct or consequential, and loss or damage of any kind whatsoever arising or alleged to arise out of or as a result of or in connection with the performance by Contractor of the Work or out of or in connection with Contractor's operations or presence at or in the vicinity of the site. Contractor shall bear such risk for all such deaths, injuries, damages or losses sustained or alleged to have been sustained, including indemnity loss, also.
- 3a. Contractor assumes the entire responsibility and liability for any and all damage or injury of any kind or nature whatsoever (including death resulting therefrom) to all persons, whether employees of Contractor or otherwise, and to all property caused by, resulting from, arising out of or occurring in connection with the execution of the Work. Contractor shall hold the Owner, ESD, Construction Manager, Architect/Engineer, and their successors, assigns, servants, agents and employees (the "Indemnities") harmless from and shall indemnify them against and for any and all liability, loss, cost, damage or expense, including attorneys' fees,

by reason of claims of its employees or employees of its subcontractors for injuries or death, by reason of claims of any other person or persons, including the Indemnities, for injuries to person or property or for death occasioned in whole or in part by any act or omission of Contractor, its subcontractors and their servants, agents or employees. If, however, this indemnification is limited by applicable law, then the said indemnification hereby shall be similarly limited to conform with such law, it being the intention that this indemnification shall be as broad as permitted by applicable law. The Owner may retain any monies due or to become due hereunder sufficient to indemnify the Owner, ESD, Construction Manager, Architect/Engineer, and their servants, agents and employees against such injuries, claims, suits, actions, costs or damages should any such claim arise. Contractor shall, at the sole option of the Owner and upon written demand of the Owner, assume the defense in behalf of the Indemnities of any action or proceeding commenced against them whether or not Contractor is named as a party therein as part of Contractor's aforementioned obligation to indemnify and hold them harmless.

- b. Contractor shall not, without obtaining express advance permission of the Owner, raise any defense involving in any way jurisdiction of the tribunal over Contractor, the Owner or any Additional Insured, the governmental nature of the Owner or any Additional Insured or the provision of any statutes respecting suits against the Owner or any Additional Insured.
- c. Contractor's obligations under this Article shall not be deemed waived, limited or discharged by the procurement of any insurance by the Owner or the Contractor.
- d. Neither Final Acceptance of the Work nor making any payments shall release Contractor from Contractor's obligations under this Article. The enumeration elsewhere in this Agreement of particular risks assumed by Contractor or of particular claims for which Contractor is responsible shall not be deemed to limit the effect of the provisions of this Article or to imply that Contractor assumes, or is responsible for, only risks or claims of the type enumerated; and neither the enumeration in this Article nor the enumeration elsewhere in this Agreement of particular risks assumed by Contractor or particular claims for which Contractor is responsible shall be deemed to limit the risks which Contractor would assume or the claims for which Contractor would be responsible in the absence of such enumerations. All of the foregoing obligations of Contractor in this Article shall survive the termination of this Agreement for any reason.

ARTICLE 16

16.1 Occupancy Prior to Final Acceptance

- (a) If, before Final Acceptance of the Work, the Owner desires occupancy of the Project or any part thereof which is completed or partly completed, or to place or install therein equipment and furnishings, the Owner shall have the right to do so, and Contractor shall in no way interfere with or object to such occupancy by the Owner.
- (b) Such occupancy: (1) shall not constitute acceptance of space, systems, materials or elements of the Work, nor shall such occupancy effect the start of any guaranty period; and (2) shall not effect the obligations of Contractor under the Contract Documents.
- (c) Contractor shall continue the performance of the Work in manner which shall not unreasonably interfere with such use, occupancy and operation by the Owner.

ARTICLE 17

17.1 Exemption

The Owner is exempt from payment of sales and compensating use taxes of the State of New York and of cities and counties on all materials, which will become an integral component part of the Project pursuant to this Agreement. Contractor and its subcontractors shall be responsible for and shall pay such taxes on any and all items, which will not become an integral component part of the Project.

17.2 Sales Tax Exemption Form Letter

A sales tax exemption form letter is available from the Owner. Owner shall not be responsible for payment of sales tax and Contractor must obtain exemption letter or bear the expense of such taxes.

17.3 The Contractor's attention is called to the fact that materials not actually incorporated in the Work will not be exempt from payment of a sales tax. This will apply to such things as:

- (a) Construction machinery and equipment including rentals or repair parts.
- (b) Contractor's office supplies.
- (c) Contractor's supplies, tools and miscellaneous equipment including forms, material and scaffolding (whether purchased or rented).
- (d) Temporary heat.
- (e) Any other items purchased or rented by Contractor for Contractor's use in performing contract and not incorporated into realty.

ARTICLE 18

WARRANTIES AND GUARANTEES

18.1 Guarantees

Contractor shall in all respects guarantee the Work to the Owner and be responsible for all material, equipment and workmanship of the Work. Contractor shall forthwith repair, replace or remedy in a manner approved by the Owner or the Owner's Representative, any said materials, equipment, workmanship, or other part of the Work found by the Owner or the Owner's Representative to be defective or otherwise faulty and not acceptable to the Owner or the Owner's Representative which defect or fault appears during the period of one (1) year from the date of Final Completion as evidenced by the Certificate of Final Completion.

18.2 Specific Guarantees

Specific guarantees shall be as set forth in the Specifications and shall be submitted as indicated.

18.3 (Intentionally Deleted)

18.4 Expenses of Correction of Work

- (a) In the event that the Owner is required to incur any expense relating to the correction of the Work even if such expense relates to work on the Project not performed by Contractor, all such expense shall be the sole obligation of Contractor and shall be reimbursed to the Owner upon demand, Contractor hereby acknowledging that the Owner may be required

to incur substantial expense if correction involves the uncovering, removal or replacement of paving concrete, wiring and piping installed at the Site. If Contractor shall fail to reimburse the Owner for any such expense which may become payable as provided in this paragraph, the Owner shall be entitled to deduct such expense from any payments required to be made by the Owner to Contractor pursuant to this Agreement. Contractor, upon demand, shall pay for all damage to all other work resulting from such defects and all expenses necessary to remove, replace and repair such other work which may be damaged in removing, replacing or repairing such defects.

- (b) If the Owner has requested Contractor to correct any Work and Contractor shall not have completed any correction of the Work as shall be required pursuant to Article 18 within ten (10) working days after receipt of written notice from the Owner specifying the defect or damage required to be removed, repaired and replaced within such ten (10) day period or shall not thereafter with reasonable diligence and in good faith proceed to do such work, the Owner may employ such other person, firm or corporation as it may choose to perform such removal, replacement and repair, and Contractor shall, upon demand, pay to the Owner all amounts which the Owner expends for such work.
- (c) The benefits of this Article 18 shall inure to the benefit of the Owner and its respective successors and assigns. In addition, any bond or guarantee which may be required of Contractor or any subcontractor under the Contract Documents shall inure to the benefit of the Owner and its respective successors and assigns.
- (d) The rights and remedies afforded the Owner under this Section are in addition to and not in lieu of and do not in any way affect, limit, change, alter, modify, vary or prejudice any right, remedy or recourse which the Owner may have under other provisions of this Agreement or pursuant to statute, common law, or otherwise.

ARTICLE 19

PATENTS AND ROYALTIES

19.1 Patents & Royalties

- (a) In the prosecution of the Work, Contractor will not use or furnish any patented appliance, article, device or method of construction unless it has authorization for such use. Contractor shall pay all royalty and license fees.
- (b) Contractor shall indemnify and hold harmless the Owner from claims, demands or liabilities of any kind or nature, including costs and expenses, for or on account of any patented plan, design, invention, article, arrangement, appliance, material, or preparation manufactured, used or followed in the performance of or incidental to the Work hereunder, and shall defend any and all actions arising out of the same. In the event of any injunction or legal action by reason thereof, which shall operate to stop or delay the Work, the Owner shall have the right to substitute such other articles of like kind as will enable it to complete the Project, and all costs and expenses occasioned thereby shall be borne by Contractor.
- (c) Contractor hereby and presently grants to the Owner an irrevocable and nonexclusive license to utilize all of Contractor's rights in and to:
 - 1. All United States patents and patents registered in any other foreign country;
 - 2. All proprietary knowledge, data and trade secrets;

3. All engineering data and information in connection with all work performed by Contractor or other contractors hired by the Owner to complete the Work after termination of this Agreement. Each purchase order and subcontract shall contain a similar clause with respect to the rights of the Owner with respect to the subcontractors' rights in and to the foregoing, in form and substance acceptable to the Owner, granting the Owner the aforesaid license. The Owner shall not be obligated to pay any royalties, license fees or any other consideration to Contractor or any subcontractor for this license. Contractor and each subcontractor shall execute a separate license agreement, in form and substance satisfactory to the Owner, concurrently with the execution of this Agreement, or any subcontract or purchase order, or within ten (10) days thereafter embodying the terms of this Section. On request, Contractor and each subcontractor shall furnish the Owner or the Owner's Representative with copies of all related engineering and technical data required to complete the Work.

ARTICLE 20

AS-BUILT DRAWINGS

(INTENTIONALLY DELETED)

ARTICLE 21

SHOP DRAWINGS AND SAMPLES

21.1 Contractor Submittal

- (a) Contractor shall prepare for the Owner's and the Owner's Representative's approval, a submittal schedule, including all information contained in the Project Schedule, for all submittals hereafter required and shall deliver same for approval to the Owner's Representative within seven (7) days of the signing of this Agreement.
- (b) Contractor shall submit the Shop Drawings, Product Data and Samples required by the Contract Documents to the Owner's Representative for transmittal to Architect in sufficient time to allow ten (10) calendar days for review by Architect and shall adhere to the approved submittal scheduling requirements with respect thereto. After review of such Shop Drawings, Product Data and Samples by Architect, each of such items shall be returned in accordance with the procedures established herein. If Contractor deviates from the approved submittal schedule, it bears all of the risk for any delay in turn-around by Architect.
- (c) Shop Drawings, shall be accompanied by a letter of transmittal to the Owner's Representative requesting review. Contractor shall number transmittals consecutively and indicate, whether the Shop Drawings, are resubmittals, the Owner's Representative's file number of the original submittal. The letter of transmittal shall also set forth the information required in subparagraph (d) thereof.
- (d) Each Shop Drawing and letter of transmittal shall contain the following information:
 1. The name of the Project.
 2. The name of Contractor.
 3. The name of the firm or organization preparing the Shop Drawing.

4. The date of submittal.
 5. The number of the Shop Drawing.
 6. The number and date of each revision, if any.
 7. The applicable section of the Specifications.
 8. The applicable number of the Contract Drawings and detail.
 9. The name of the person and/or persons who prepared the Shop Drawing.
 10. Any deviations or changes from the Contract Documents.
 11. Each copy of Shop Drawings shall be stamped and signed by Contractor indicating clearly his complete approval and signifying that the Shop Drawings (and product data) do comply with all the Contract Documents.
- (e) Shop Drawings shall show the design, dimension, connections and other details necessary to insure an accurate interpretation of the Contract Documents and shall also show adjoining work in such detail as required to provide proper connections with said adjoining work. Where adjoining connected work requires Shop Drawings, such Shop Drawings shall be submitted to the Owner's Representative for transmittal to Architect for review at the same time so that connections can be reviewed.
- (f) By submitting Shop Drawings, Product Data and Samples, Contractor represents that it has determined and verified all materials, field measurements and field construction criteria related thereto, that it has checked the Shop Drawings, Product Data and Samples for complete dimensional accuracy, that it has checked to insure that Work contiguous with and having bearing on the Work shown on the Shop Drawings is accurately and clearly shown, that it has checked the Shop Drawings against the composite drawings, that the Work has been coordinated, that the equipment will fit into the assigned spaces and that it has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents. Measurements not available prior to submission of Shop Drawings shall be noted on the Shop Drawings as not available and such measurements shall be obtained prior to fabrication.
- (g) Contractor shall submit Product Data when necessary or requested by the Owner's Representative or Architect to explain fully apparatus or equipment required by the Work. The Product Data shall be treated as Shop Drawings. Manufacturer's catalogue numbers alone are not acceptable as sufficient information or compliance with this requirement.
- (h) Samples shall be accompanied by a letter of transmittal to the Owner's Representative requesting review. Contractor shall number transmittals consecutively in sequence with Shop Drawing transmittals. Where appropriate, test data and/or manufacturers' certificates shall be referenced and forwarded with the letter of transmittal. Samples without accompanying test data or certificates will be returned without action. The letter of transmittal shall also set forth the information required in subparagraph (i) hereof.
- (i) Each Sample shall be labeled, tagged or clearly identified and each Sample and letter of transmittal shall contain the following information:
1. The name of the Project.
 2. The name of Contractor.

3. The name of subcontractor and/or supplier, manufacturer, fabricator or processor.
4. The trade designation and the grade or quality of the material or product.
5. The date of submittal.
6. The specific identification of each Sample.
7. A precise reference to the section of Specifications, article and paragraph wherein the material, product or element of the Work is specified.

Each label or tag shall have sufficient clear space to permit the application of the approval stamps of Contractor and Architect.

- (j) In the event that a range of variations in textures, graining, color or other characteristics may be anticipated in finished materials, assemblies or elements of the Work, a sufficient number of Samples of such materials or products shall be submitted to indicate the full range of characteristics which will be present in the materials or products proposed for the Work. Any such materials or products delivered or erected prior to approval of full range Samples shall be subject to rejection.
- (k) Samples shall be submitted from the same source, which shall actually supply the Project. Samples shall be of adequate size to show quality, type, color, range, finish, texture and other specified characteristics.
- (l) Samples of materials or products which are normally furnished in containers or packages which bear descriptive labels and/or application or installation instructions shall be submitted with such labels and/or instructions.
- (m) Contractor shall submit copies of Shop Drawings, Product Data and Samples in accordance with the submittal procedure listed below. Reproducible prints shall be sepia or ozalid prints with positive side up that will provide good quality readable prints. Black and white prints shall be black line on white background. The following shall be submitted:
 1. Shop Drawings: One reproducible print and (six) black and white prints submitted to the Owner's Representative.
 2. When Shop Drawings are submitted in the form of brochures, manufacturer's standard drawings or catalogue cuts not readily available in reproducible form, seven (7) copies of each shall be submitted to the Owner's Representative.
 3. Three Samples shall be submitted to the Owner's Representative except as otherwise set forth in other sections of the Contract Documents.
- (n) Following Architect's review of each Shop Drawing Submission, the Owner's Representative will retain one black and white print and return the reviewed reproducible print to Contractor with Architect's stamp and signature affixed thereto annotated as follows:
 1. Refer to Division 1 Sections "Submittals" for review annotations:
- (o) After the review of all Product Data and Samples, the procedures set forth below will be followed:

The Owner's Representative will return three Product Data or two (2) Samples of each set

to Contractor with Architect's stamp and signature affixed thereto and annotated in accordance with paragraph (n) above.

- (p) Contractor shall have available at the Project site all reviewed Shop Drawings, Product Data and Samples at all times for use by Contractor, its subcontractors, Architect, the Owner, or their designees, to insure that all Work is being installed in accordance with the reviewed Shop Drawings, Product Data and Samples.
- (q) The Owner shall be furnished copies of all transmittals during the processing of Shop Drawings. The Owner shall be furnished copies of all "reviewed" (no comments) or "reviewed" (see comments) Shop Drawings and product data by Contractor.

21.2 Contractor's Responsibility

Architect's review of Shop Drawings, Product Data and Samples shall not relieve Contractor of responsibility for any deviation from the requirements of the Contract Documents. Contractor shall be responsible for the accuracy of the Shop Drawings, Product Data and Samples and for the conformity of Shop Drawings, Product Data and Samples with the Contract Documents unless Contractor has notified the Owner's Representative and Architect of the deviations in writing at the time of submission and has received from the Owner's Representative written approval of the specified deviations. Architect's review shall not relieve Contractor of responsibility for dimensions, errors or omissions in the Shop Drawings, Product Data or Samples. Contractor is solely responsible for the fit of all materials and assemblies.

21.3 Prior Approval of Architect

No portion of the Work shall be commenced until required Shop Drawings, Product Data or Samples are reviewed and approved by Architect.

ARTICLE 22

NOTICES

Any notice required or permitted to be given under this Agreement must be in writing and shall be deemed to have been given when delivered personally or by registered or certified mail, return receipt requested, to the party to whom the notice is given at the address designated below or, if any party subsequently designates a different address for this purpose, at such subsequently designated address. Notices to Contractor shall be addressed and delivered to its address stated at the beginning of this Agreement, or to Contractor's superintendent at the site. Notices to the Owner shall be addressed and delivered as follows:

To the Owner:

Attention: Michael Fitzner, Sr Construction Manager
c/o Empire State Development
95 Perry Street, Suite 500
Buffalo, NY 14203

With a copy to the Construction Manager:

Attention: Daniel J. Sullivan, Senior Architect
Foit-Albert Associates – Architecture, Engineering, Surveying
295 Main Street, Suite 200
Buffalo, NY 14203

With a copy to ESD:

Attn: General Counsel
Empire State Development
633 3rd Avenue
New York, NY 10017

ARTICLE 23

NON-DISCRIMINATION AND AFFIRMATIVE ACTION

23.1 Non-Discrimination

- (a) Contractor shall comply with any and all federal, state and local laws, orders, rules and regulations which prohibit discrimination in employment or hiring because of age, race, creed, color, national origin, sex, disability or marital status of any individual.
- (b) Contractor shall make a good faith effort to achieve an overall participation by Minority and/or Women-Owned Business Enterprises, as defined in Exhibit F to this Agreement, and shall make a good faith effort to comply with ESD's/Owner Affirmative Action and Non-Discrimination program and policies, as set forth in Exhibit F to this Agreement.

ARTICLE 24

(INTENTIONALLY DELETED)

ARTICLE 25

STANDARD PROVISIONS

25.1 Provisions Required by Law Deemed Inserted

Each and every provision of law and governmental regulation required by law to be inserted in the Contract Documents shall be deemed to be inserted herein and this Agreement shall read and shall be enforced as though so included therein, and if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party, this Agreement shall be deemed to be amended to make such insertion or correction. If this Agreement contains any unlawful provision, the same shall be deemed of no effect and shall, upon the application of either party, be deemed stricken from this Agreement without affecting the binding force of the remainder of this Agreement.

25.2 Compliance with Laws, Rules and Regulations

Contractor and each subcontractor shall comply fully with all applicable laws, rules and regulations pertaining to the Project or the Work including, but not limited to, all environmental laws, rules or regulations promulgated by the federal, state and local governments, in effect at the time of the Work. Contractor bears all risk associated with any deviation from such laws, rules or regulations pertaining to the Work and agrees to indemnify and hold the Owner harmless for, from and against any costs, expenses, fines or judgments which may be incurred by the Owner as a result of Contractor's deviation therefrom.

25.3 Laws Governing this Agreement

The Agreement shall be governed by the laws of the State of New York without giving effect to

principles of conflicts of law.

25.4 No Third Party Rights

Nothing in this Agreement shall create or shall give to any third parties any claim or right of action against the Owner's Representative, Architect, the Owner, or ESD.

25.5 Protection of Lives and Health

- (a) Contractor's and subcontractor's attention is specifically called to the rules and regulations, codes and bulletins of the New York State Department of Labor. Attention is also directed to the standards imposed under the Federal Occupational Safety and Health Act of 1970, as amended.
- (b) Contractor shall maintain an accurate record of all cases of death, occupational disease, and injury requiring medical attention or causing loss of time from work, arising out of and in the course of employment of work under this Agreement, and shall immediately notify the Owner in writing of any injury which results in hospitalization or death.
- (c) Contractor alone shall be responsible for the safety, efficiency and adequacy of Contractor's Work, plants, equipment, appliances and methods, and for any damage or injury which may result from the failure, or the improper construction, maintenance, or operation of such Work, plant, equipment, appliances and methods.

25.6 Waiver of Immunity Clause

Contractor hereby agrees to the provisions of Section 139-a of the State Finance Law, which section requires that upon the refusal of a person, when called before a grand jury, head of a State department, temporary State Commission, the Organized Crime Task Force in the State Department of Law, or other State agency which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the State, any political subdivision thereof, or with any public department, agency or official of the State or any political subdivision thereof or a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant questions concerning such transaction or contract:

- (a) Such person, and any firm partnership or corporation of which such person is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with the State of any public authority or official thereof, for goods, work or services, for the period of five (5) years after such refusal; and
- (b) Any and all contracts made with the State of any public department, agency or official thereof, since the effective date of Section 139-a of the State Finance Law, by such person and by any firm, partnership or corporation of which such person is a member, partner, director or officer may be canceled or terminated for cause without incurring any penalty or damages on account of such cancellation or termination, but any sums owing for goods delivered or work done prior to the cancellation or termination shall be paid.

25.7 Labor Provisions

- (a) It is hereby agreed that all applicable provisions of the Labor Law of the State of New York shall be carried out in the performance of the Work including, but not limited to, Labor Law Sections 220, 220-d and 220-e, as amended (Exhibit I).

- (b) The minimum wage rates, if any, herein specified for apprentices shall apply only to persons working with the tools of the trade which such persons are learning under the direct supervision of journeymen mechanics. Except as otherwise required by law, the number of apprentices in each trade or occupation employed by Contractor or any subcontractor shall not exceed the number permitted by the applicable standards of the New York State Department of Labor, or, in the absence of such standards, the number permitted under the usual practice prevailing between the unions and the employer's association of the respective trades or occupations.
- (c) All employees of Contractor and each subcontractor shall be paid in accordance with the provisions of the Labor Law. All payments shall be made in cash, except a payment may be by check upon certification of the Industrial Commissioner of the State of New York.
- (d) Contractor agrees that, in case of underpayment of wages to any worker engaged in the Work by Contractor or any subcontractor, the Owner shall withhold from Contractor out of payments due an amount sufficient to pay such worker the difference between the wages required to be paid under the Contract Documents and the wages actually paid such worker for the total number of hours worked, and that the Owner may disburse such amount so withheld by the Owner for and on account of Contractor to the employee to whom such amount is due. Contractor further agrees that the amount to be withheld pursuant to this paragraph may be in addition to the percentages to be retained by the Owner pursuant to other provisions of the Contract documents.
- (e) Contractor shall immediately notify the Owner and the Owner's Representative of any actual or impending labor disputes which may effect or are affecting the Project Schedule of Contractor or any other contractor's work. In addition, Contractor shall take all appropriate measures to eliminate or minimize the effect of such labor dispute on the Project Schedule.
- (f) Any labor, materials, or means whose employment or utilization during the course of this Contract may tend to or in any way cause or result in strike, work stoppages, delays, suspension of Work or similar troubles by workmen employed by Contractor, its subcontractors or material suppliers, or by any of the trades working in or about the premises where Work is being performed under this Contract, or by other contractors, their subcontractors or material suppliers pursuant to other contracts shall not be allowed. Any violation by Contractor of this requirement may in the sole judgment of the Owner be considered as proper and sufficient cause for declaring Contractor to be in default, and for the Owner to terminate Contractor or take such other action as the Owner may deem proper. Contractor shall include this section in every subcontract and every lower tier subcontract.

25.8 Dispute Procedure

Unless the parties hereto otherwise agree in writing, Contractor shall continue to perform its obligations hereunder, pursue prosecution of the Work and maintain the Project Schedule, if applicable, during any claim, dispute or proceeding arising under or out of this Agreement ("Claim"):

- (a) Any Claim not resolved by the parties through negotiation shall be first submitted to non-binding mediation within thirty (30) days of such Claim pursuant to the American Arbitration Association's ("AAA") Construction Industry Dispute Resolution Rules as a condition precedent to litigation in a court of competent jurisdiction in the state and county where the Project is located. If such mediation is not conducted within thirty (30) days of submission to the AAA, the requirement to mediate shall be deemed waived. All disputes not resolved through non-binding mediation may only be submitted to a Court of competent jurisdiction in the state and county where the Project is located.

- (b) All sureties of Contractor in connection with the Work shall be bound by any negotiated resolution agreed to by the parties or any judgment rendered by a Court of competent jurisdiction. No such agreement or judgment shall operate in any manner whatsoever to release or discharge any such surety from all or any portion of its liabilities and obligations for which it is a surety.
- (c) If the Owner is the prevailing party in any dispute arising under this Agreement, it shall be entitled to recover from Contractor, in addition to any judgment, award or settlement, reasonable attorneys' fees, and expert witness fees, attributable to the prosecution or defense of any Claim.

25.9 Confidentiality

Contractor acknowledges that it or its employees may, in the course of performing its responsibilities under this Agreement, be exposed to or acquire information which is proprietary to or confidential to the Owner, its affiliated entities or third parties to whom the Owner has a duty of confidentiality. Any and all information of any form obtained by Contractor or its employees in the performance of this Agreement shall be deemed to be confidential and proprietary information. Contractor agrees to hold such information in strict confidence and not to disclose such information to third parties or to use such information for any purpose whatsoever other than the provision of services to the Owner as contemplated by this Agreement and to advise each of its employees and subcontractors who may be exposed to such proprietary and confidential information of their obligations to keep such information confidential. Confidential information shall not include information which is: (1) in or becomes part of the public domain other than by disclosure by Contractor in violation of this Agreement; (2) demonstrably known to Contractor previously, without a duty of confidentiality; (3) independently developed by Contractor outside of this Agreement; (4) rightfully obtained by Contractor from third parties without a duty of confidentiality; or (5) which is required to be disclosed by law, statute or regulation. This Section shall survive Final Completion or any earlier termination of this Agreement.

25.10 No Promotion

Contractor agrees that it will not without the prior written consent of the Owner in each instance, (i) use in advertising, publicity, or otherwise, the name of the Owner or any affiliate of the Owner, or any employee of the Owner nor any trade name, trademark, trade device, service mark, symbol or any abbreviation, contraction or simulation thereof owned by the Owner or its affiliates; (ii) take or cause to be taken any photographs of the Project or the site except insofar as same is necessary for the performance of the Work; or (iii) represent, directly or indirectly, that any product or any service provided by Contractor has been approved or endorsed by the Owner. This Section shall survive Final Completion or any earlier termination of this Agreement.

25.11 Limitation on Actions

No action or proceeding shall lie or shall be maintained by Contractor against the Owner unless such action shall be commenced with six (6) months after the date payment is mailed or otherwise made in respect of the Final Requisition or, if this Agreement is terminated by the Owner, unless such action is commenced within six (6) months after the date of such termination. No action or proceeding shall be commenced by Contractor against the Owner and/or the Owner's Representative except in the Supreme Court of the State of New York.

25.12 Waiver of Remedies

Contractor acknowledges that it can be compensated adequately by money damages for any breach of this Agreement which may be committed by the Owner, the Owner's Representative or Architect. Contractor agrees that no default, act or omission of the Owner, the Owner's Representative or Architect shall constitute a material breach of contract entitling Contractor to

cancel or rescind this Agreement or to suspend or abandon performance thereof, other than the failure of the Owner to make a payment of the Contract Price in accordance with the terms hereof solely because sufficient funds to pay the Contract Price have not been appropriated or will otherwise not be made available to the Owner. Except as provided in this paragraph, Contractor hereby waives all rights and remedies to which Contractor might otherwise be or become entitled to become of any wrongful act or omission of the Owner, the Owner's Representative or Architect saving only Contractor's rights to money damages.

25.13 Modification of Agreement

No change in or modification, termination or discharge of this Agreement in any form whatsoever shall be valid or enforceable unless it is in writing and signed by the party to be charged therewith or its duly authorized representative, provided, however, that any change in or modification, termination or discharge of this Agreement expressly provided for in this Agreement shall be effective as so provided.

25.14 Signs and Parking

Contractor agrees that it shall not display on or about the Site any sign, trademark or other advertisement without the written approval of the Owner and to remove the same when so directed by the Owner. Contractor shall not permit any of its subcontractor or materialmen to park vehicles on the Site. Contractor shall be obligated to display at the Site any signage as required by the Owner.

25.15 Entire Agreement

The Contract Documents constitute the entire Agreement between the parties and incorporate all prior understandings in connection with the subject matter hereof.

25.16 Reservation of Rights and Remedies

The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by Architect, the Owner, the Owner's Representative or Contractor including, but not limited to, the making of any payment nor permitting Contractor to continue with the performance of the Work shall constitute a waiver of any right or duty afforded any of them under this Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

25.17 Review of the New York State Comptroller

This contract shall be subject to review and approval by the Office of the State Comptroller ("OSC") pursuant to Public Authorities Law section 2879-a and the regulations issued thereunder. Such OSC review and approval is required of contracts with a value in excess of one million dollars, or modifications to contracts that result in an aggregate value in excess of one million dollars, where such contracts are paid in whole or in part with monies appropriated by the state, or were awarded on a basis other than a competitive procurement (as that term is defined in the law and regulations). **This contract shall not be valid and enforceable, nor shall the Owner have any liability of any kind arising from or in connection with this contract, unless and until OSC approval has been received.**

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

CONTRACTOR:

(SEAL)

BY: _____

TITLE:

THE OWNER: Empire State Development

(SEAL)

BY: _____

TITLE:

ACKNOWLEDGEMENT OF CONTRACTOR

STATE OF NEW YORK)
) ss.:
COUNTY OF)

On the ___ day of _____, in the year 2022, before me, the undersigned, personally appeared _____, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or person upon behalf of which the individual acted, executed the instrument.

Notary Public

ACKNOWLEDGEMENT OF THE OWNER

STATE OF NEW YORK)
) ss.:
COUNTY OF)

On the ___ day of _____, in the year 2022, before me, the undersigned, personally appeared _____, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or person upon behalf of which the individual acted, executed the instrument.

Notary Public

EXHIBIT A

(INTENTIONALLY OMITTED)

EXHIBIT B

LABOR AND MATERIAL PAYMENT BOND

PLEASE TAKE NOTICE:

That _____ (Here insert the name and address of Contractor) _____ (hereinafter called the "Principal") and the _____ a Corporation created and existing under the laws of the State of _____ having its principal office in the City of _____ (hereinafter called the "Surety"), are held and firmly bound unto Empire State Development, its successors and assigns (hereinafter called the "the Owner"), as Obligee, in the full and just sum of _____ (\$ _____) Dollars good and lawful money of the United State of America, for the payment of which said sum of money, well and truly to be made and done, the said Principal binds themselves (himself, herself, itself), their (his, her, its) heirs, executors, administrators, successors and assigns, and the said Surety binds itself, its successors and assigns jointly and severally, firmly by these presents: Signed, sealed and dated this _____ A.D.

WHEREAS, said principal has entered into a certain written Contract with the Owner for the following:

HUTCHINSON CHAPEL ROOF REPLACEMENT, which Construction Agreement and all other documents which are defined therein as Contract Documents, are by reference made a part hereof, and are hereinafter referred to as the "Contract" and,

WHEREAS, the Owner has required this Bond guaranteeing prompt payment of monies due to all persons furnishing the Principal or any subcontractor of the Principal with labor or materials in the prosecution of the work provided in such Contract;

NOW, THEREFORE, the condition of the foregoing obligation is such that if the Principal shall promptly pay all monies due to all persons furnishing the Principal or any subcontractor of the Principal with labor or materials in the prosecution of the Contract, then this obligation shall be null and void, otherwise to remain in full force and effect;

PROVIDED, HOWEVER, that the said Surety for value received, hereby stipulates and agrees that no change, extension, alteration or addition to the terms of the Contract Documents shall in any wise effect its obligation under this Bond, and it does hereby waive notice of any such change, extension, alteration or addition; and further

PROVIDED, HOWEVER, that the place of trial of any action on this Bond shall be in the county in which the said Contract was to be performed, or if said Contract was to be performed in more than one county, then in any such county, and not elsewhere; and further

PROVIDED, HOWEVER, that this Bond shall be enforceable in accordance with the terms and provisions of Section 137 of the State Finance Law.

IN WITNESS, WHEREOF, the Principal has hereunto set its hand and seal and the Surety has caused this instrument to be signed by its Attorney-in-fact, and its corporate seal to be hereunto affixed, this ___ day of _____, 2022

Signed and sealed this ___ day of _____, 2022

(Principal)

(Seal)

(Witness)

(Title)

(Surety)

(Seal)

(Witness)

(Title)

EXHIBIT C

CONTRACT CHANGE ORDER FORM

To be issued to the successful contractor.

EXHIBIT D

(INTENTIONALLY OMITTED)

EXHIBIT E

SCHEDULE OF DRAWINGS AND SPECIFICATIONS

Refer to Drawing Index in Project Manual

EXHIBIT F

NON-DISCRIMINATION AND CONTRACTOR & SUPPLIER DIVERSITY

See the following attachments.

EXHIBIT G

(INTENTIONALLY OMITTED)

EXHIBIT H

(INTENTIONALLY OMITTED)

EXHIBIT I

**REQUIREMENTS OF ARTICLE 8 SECTION (220-223) OF
THE NEW YORK STATE LABOR LAW**

PREVAILING WAGE RATES

There are no federal funds involved in this project and work will not be bound by Federal Davis-Bacon wage rules, but instead be under the New York State Labor Department Prevailing Wage Regulations.

Note:

The Contractor is obligated to update and post the schedule on the jobsite and to provide copies of the schedule to all their subcontractors.

EXHIBIT J

REQUEST FOR PAYMENT

See the following attachment(s).

EXHIBIT K

CONTRACTOR'S AFFIDAVIT

See the following attachment(s).

EXHIBIT L

LIST OF SUBCONTRACTORS FOR PAYMENT REQUESTS

See the following attachment(s).

EXHIBIT M

APPLICATION AND CERTIFICATION FOR PAYMENT (G702 & G703)

See the following attachment(s).

EXHIBIT N

CONTRACTOR'S RECEIPT AND WAIVER OF LIEN

See the following attachment(s).

EXHIBIT O

SUBCONTRACTOR'S RECEIPT AND WAIVER OF LIEN

See the following attachment(s).

EXHIBIT P

**CONTRACTOR'S AFFIDAVIT, FINAL WAIVER OF CLAIMS
AND LIENS, AND RELEASE OF RIGHTS**

See the following attachment(s).

EXHIBIT Q

**SUBCONTRACTOR'S AFFIDAVIT, FINAL WAIVER OF CLAIMS
AND LIENS, AND RELEASE OF RIGHTS**

See the following attachment(s).

EXHIBIT R

CONTRACTOR'S CERTIFICATION OF COMPLETED CONSTRUCTION

See the following attachment(s).

EXHIBIT S

AFFIDAVIT THAT ALL TAXES HAVE BEEN PAID

See the following attachment(s).

EXHIBIT T

CERTIFICATION FOR ANTI-BRIBERY, ANTI-COLLUSION AND FAIR PRICING

See the following attachment(s).

EXHIBIT U

BID PROPOSAL

See the following attachment(s).

EXHIBIT V

APPROVED LIST OF SUBCONTRACTORS

Contractor to attach and each subcontractor is subject to Owner approval.

EXHIBIT W

INSURANCE CERTIFICATES AND ADDITIONAL INSURED

EXHIBIT X
PROJECT MANUAL

Project Manual dated _____

EXHIBIT Y

CONTRACTORS CERTIFICATION ST-220

EXHIBIT Z

W-9 – REQUEST FOR TAXPAYER IDENTIFICATION NUMBER & CERTIFICATION

SPECIFICATIONS AND DRAWINGS

See the following attachments.