

RFP VERSION

Gowanus Environmental Remediation Trust

TERMS AND

CONDITIONS

FOR

CONSTRUCTION MANAGER – GENERAL CONTRACTOR

Gowanus Canal Superfund Site

Brooklyn, NY

REQUEST FOR PROPOSAL – 10.15.18

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1.0 DEFINITIONS

For purposes of these Terms and Conditions and as used in the purchase order or Agreement incorporating these Terms and Conditions, the following commonly used terms, wherever used with initial capitalization, whether in the singular or the plural, are defined as follows:

- 1.1** “Agreement” means the form of agreement document executed by the Gowanus Environmental Remediation Trust, hereinafter referred to as the “Trust” and the Contractor setting out, among other things, the parties and the term. For the avoidance of doubt, a notification by the Trust to the Contractor of the award of a contract shall not constitute an Agreement and shall not create any contract between the Trust and the Contractor. For the further avoidance of doubt, where a purchase order and a formal form of agreement document are issued by the Trust, then the formal form of agreement document shall take precedence and no contract shall be formed until that form of agreement document has been executed by both parties.
- 1.2** “Change Notice Request” means the written document prepared by the Contractor, if necessary, due to changes in scope. All Change Notice Requests shall be provided to the Trust in the format set forth in Exhibit E (Change Proposal Request Form).
- 1.3** “Change Notice Form” means that document set forth in Exhibit F (Change Notice Form) that, when executed by Contractor and the Trust, authorizes Contractor to perform the Work described in the Change Notice Request and authorizes the change(s) to the Work Authorization Form as described therein.
- 1.4** “Contract Documents” means the Schedule, Design Documents and all documents listed in each relevant Scope of Services, Work Specifications, Work Authorization Form, these Terms and Conditions and/or identified as such in the Agreement. Said documents are incorporated by reference as if fully set forth in the Agreement.
- 1.5** “Contract Price” shall have the meaning set forth in the Agreement, or if not expressly set forth, shall mean the total amount to be paid by the Trust to Contractor under the Agreement.
- 1.6** “Contractor” means the business entity named in the Agreement as the party furnishing Work to the Trust, and, if authorized by the Trust, Contractor’s successors and assigns.
- 1.7** “Contractor Environmental Requirements” means the environmental requirements for contractors, as defined in the Work Specifications, Contract Documents, or law, codes or regulations of agencies having jurisdiction.
- 1.8** “Contractor Safety Requirements” means the safety requirements for contractors as defined in the Work Specifications, Contract Documents, other parts of the Agreement, or law, codes, or regulations of agencies having jurisdiction.
- 1.9** “Control” (including with correlative meanings, the terms “Controlling,” “Controlled by” and “under common Control with”) means the possession directly or indirectly of the power to direct or cause the direction of the management and policies of an entity, whether through the ownership of voting securities, by trust, management agreement, contract or otherwise, provided, however, that beneficial ownership of greater than 50% of the voting equity interests of an entity shall be deemed to be Control.
- 1.10** “Day” means a calendar day, except that if an obligation of the Agreement falls due on a Saturday, Sunday or legal holiday in the jurisdiction where the Site is located such obligation shall be due the next regular working day or as provided by the Project Coordinator.
- 1.11** “Defective” or “Defect” means the Work, or any portion thereof, that does not conform to the Contract Documents.
- 1.12** “Design Documents” means all of the Submittals, drawings, design plans, specifications, calculations, Product Data, technical data and other documents prepared by the Contractor or its Subcontractors, and reviewed by the Trust, that show the scope, extent and character of the Work to be furnished and performed

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- by Contractor or its Subcontractors. Design Documents include only those documents which the Trust agrees, in the Trust's sole and reasonable opinion, are Contract Documents.
- 1.13** "Dollars" and "\$" means United States of America dollars.
- 1.14** "Drawings" means those drawings listed in the Specification or other Contract Documents. Such Drawings are incorporated by reference as if fully set forth in the Agreement.
- 1.15** "Effective Date" means the date the Trust and Contractor made and entered into the Agreement.
- 1.16** "Final Acceptance" means that date when the Trust issues a certificate to the Contractor certifying that the Work has been fully performed in accordance with the terms and conditions of the Agreement.
- 1.17** "Final Completion" means that in the sole but reasonable opinion of the Trust, and as evidenced by the issuance of a definitive Final Completion Certificate, the Work is one hundred percent (100%) complete, in accordance with the Contract Documents.
- 1.18** "Goods" means all goods to be provided by the Contractor under the Agreement, including all equipment and materials indicated in the Specifications and approved changes.
- 1.19** "Gowanus Environmental Remediation Trust" or "Trust" means the Environmental Remediation Trust established by a group of Potentially Responsible Parties ("PRPs") identified pursuant to Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") by the United States Environmental Protection Agency ("EPA") to perform certain Work for the Site under the supervision of EPA. As of the Effective Date of this Agreement, the current members of the Gowanus Canal Environmental Remediation Trust are listed in Exhibit D and represent the PRPs who have received the Design Unilateral Administrative Order as of March 24, 2014 and have themselves entered into a Gowanus Canal Superfund Site Remedial Design Funding, Participation and Confidentiality Agreement ("Participation Agreement"). The members of the Trust and/or list of PRPs may change, in the Trust's sole discretion, over the course of the Project as needed based on subsequent EPA orders related to the execution of the Construction Phase.
- 1.20** "HUBZone Small Business Concern" means a Small Business Concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.
- 1.21** "Indemnified Parties" means the Trust, Trustee, and grantors to the Trust, and grantors' officers, directors, employees, agents, successors and assigns, and any third party that Trust or grantors to the Trust are required to hold harmless or indemnify by law or pursuant to this Agreement and a contract or agreement for any property or access rights obtained in support of the operations, Work, and Services performed under or in connection with this Agreement.
- 1.22** "Insured Parties" means the Trust and grantors to the Trust and grantors' officers, directors, employees, agents, successors and assigns and any third party that Trust or its grantors are required to hold harmless or indemnify by law or pursuant to this Agreement and a contract or agreement for any property or access rights obtained in support of the operations, Work, and Services performed under or in connection with this Agreement.
- 1.23** "Materials" means the materials, supplies, apparatus, equipment, machinery, and other goods to be provided by Contractor or any Subcontractor, as part of, or necessary for completion of, the Work that is permanently installed at the Site.
- 1.24** "Notice to Proceed" means the written Notice by the Trust to Contractor releasing Contractor to perform a portion of the Work associated with a Unilateral Administrative Order for Construction Phase Services.
- 1.25** "Partial Performance Payment" means the payment to which the Contractor is entitled for Work actually performed after the Trust has provided Contractor with notice to commence Work and before the Trust terminates all or a portion of the Agreement for convenience.

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- 1.26** “Party” means either the Trust or the Contractor, and any reference to “Parties” shall mean the Trust and the Contractor.
- 1.27** “Prohibited Act” means:
- 1.27.1** offering, giving or agreeing to give to the Trust, any of its representatives, or any persons associated with it, any gift or consideration of any kind as an inducement or reward: (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of the Agreement or any other contract with the Trust or any of its affiliates; or (ii) for showing or not showing favor or disfavor to any person in relation to the Agreement or any other contract with the Trust or any the Trust’s other contractors;
 - 1.27.2** entering into the Agreement or any other contract with the Trust, or any persons associated with the Trust or grantors to the Trust where a commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless, before the relevant contract is entered into, particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Trust;
 - 1.27.3** defrauding, attempting to defraud or conspiring to defraud the Trust or any grantors to the Trust, or other Trust contractors.
- 1.28** “Project” means the totality of a Trust-defined scope, to be completed within a specified time and cost, and all things associated therewith, of which the Work performed under the Agreement may be the whole or a part and which may include work performed by the Trust or its affiliates or by other contractors. The Project shall be executed in Phases as described in Article 2. Phase 1 is the Trust-defined investigative, assessment and/or remedial program referred to as the Pre-Construction Phase and authorized by the Design UAO. Phase 2 is the execution of the Construction Phase Services that the Trust will not authorize until after the issuance of the Construction UAO.
- 1.29** “Project Administrator” means the Trust’s representative(s) designated to direct, inspect and coordinate the performance and delivery of the Work.
- 1.30** “Project Coordinator” means the on-site representative of the Trust. Unless otherwise specified, all matters relating to the Agreement and coordination of the Contractor activities with the Trust shall be directed through this individual.
- 1.31** “Prudent Industry Practice” means, with respect to each of the engineering, procurement, design, and construction of the Work, the practices, methods, and acts engaged in or approved by a significant portion of the construction industry of the United States that at a particular time, in the exercise of reasonable judgment in light of the facts known or that reasonably should have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with applicable laws, permits, the Contract Documents, reliability, safety, environmental protection, economy, and expedition. Prudent Industry Practice is not intended to be limited to the optimum practice, method, or act, to the exclusion of all others, but rather is a spectrum of possible practices, methods, or acts employed by contractors, and having due regard for current editions of applicable design, safety, and maintenance codes and standards, manufacturers’ warranties and applicable laws.
- 1.32** “Purchase Order” means the serially numbered document issued by the Trust for accounting purposes. Purchase Order numbers should be referenced by the Contractor for invoicing purposes, where applicable.
- 1.33** “Purchase Order Number” means the number identified as such in the Agreement which may be used for the Trust’s internal accounting and document tracking.
- 1.34** “RFP” and “Request for Proposal” mean the documentation associated with the tender solicitation.
- 1.35** “Safety Requirements” means those requirements as set forth in Section 16.0, the Scope of Services, and in the Work Specifications.

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- 1.36** “Scope of Services” or “Scope of Work” means the written requirements and procedures set forth in Exhibit A including any accompanying appendices and as may be supplemented, referenced or contained in a relevant Work Authorization Form.
- 1.37** “Service-Disabled Veteran” means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service connected, as defined in 38 U.S.C. 101(16).
- 1.38** “Service-Disabled Veteran-Owned Small Business Concern” means a Small Business Concern not less than 51 percent of which is owned by one or more Service-Disabled Veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more Service-Disabled Veterans; and the management and daily business operations of which are controlled by one or more Service-Disabled Veterans or, in the case of a Service-Disabled Veterans with permanent and severe disability, the spouse or permanent caregiver of such veteran.
- 1.39** “Services” means all duties, responsibilities and obligations to be performed by the Contractor as specified, stated, indicated or implied by the relevant Work Authorization Form issued under the Agreement. For Phase 2 Work, the term “Services” shall also include all labor, materials, supplies and other services provided by the Contractor in connection with the Agreement.
- 1.40** “Site” means the geographical locations or facilities where the Work will be performed.
- 1.41** “Small Business Concern” means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.
- 1.42** “Small Disadvantaged Business Concern” means a Small Business Concern that represents, as part of its offer, that it has received certification as a Small Disadvantaged Business Concern consistent with 13 CFR part 124, Subpart B; and that no material change in disadvantaged ownership and control has occurred since its certification.
- 1.43** “Specification” or “Work Specifications” means the technical requirements and procedures, including any accompanying appendices, contained in, referenced by, or attached to Exhibit B of the Terms and Conditions or the Agreement.
- 1.44** “Subcontractor” means any organization, firm or individual, regardless of tier, which the Contractor or its Subcontractor retains pursuant to and during the term of the Agreement to provide labor, materials, Services and/or equipment in connection with the Agreement. Subcontractor includes its officers, directors, employees, successors, assigns, representatives and agents.
- 1.45** “Substantial Completion” means that date, as certified by the Trust, when the construction of the Work, or a specified portion of the Work, is sufficiently completed in accordance with the Agreement so the Trust can occupy or utilize the Project, or a specified portion of the Project, for its intended purpose.
- 1.46** “Supplemental Conditions” means those terms and conditions, if included in the Agreement, which add to or modify other Contract Documents and are incorporated by reference as if fully set forth in the Agreement. In the case of a conflict between the Supplemental Conditions and any other Contract Document the Supplemental Conditions shall prevail.
- 1.47** “Unilateral Administrative Order for Design” or “Design UAO” means the March 24, 2014 UAO attached as Exhibit G authorizing the Pre-Construction Phase of the Work.
- 1.48** “Unilateral Administrative Order for Construction” or “Construction UAO” means one or more Order(s) or Consent decree(s) that may be issued after the Effective Date to authorize all or a portion of the Construction Phase which is the remedial action phase of the Project.
- 1.49** “Veteran-Owned Small Business Concern” means a Small Business Concern not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly

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owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and the management and daily business operations of which are controlled by one or more veterans.

- 1.50 “Women-Owned Small Business Concern” means a Small Business Concern that is at least 51 percent owned by one or more women, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more women.
- 1.51 “Work” means all of the services, labor, and Materials needed for the design, engineering, procurement, manufacturing, fabrication, distribution, construction, supervision, project management, oversight, scheduling, quality assurance, vendor surveillance, corrective action, materials management and handling, and other related services required or reasonably inferable from the Contract Documents to be provided by Contractor to fully complete the Pre-Construction and the Construction Phases of the Project in accordance with the terms of the Contract Documents.
- 1.52 “Work Authorization Form” (WAF) means that document set forth in Exhibit H that defines the Work to be performed by the Contractor and which, when executed by Contractor and the Trust, authorizes Contractor to perform the Work described therein.

2.0 SCOPE OF WORK

- 2.1 **Phased Approach: Engineering, Procurement, Installation, Management and Construction Concept.** The Work described in the Scope of Work (Exhibit A) and Specifications (Exhibit B) will be executed in two Phases. Phase 1 includes all Pre-Construction Services performed within the Schedule, the Contract Price, and incorporating the criteria agreed upon by the Trust and Contractor as set forth in, or reasonably inferable from, the Contract Documents. Phase 2 includes all Construction Services as set forth in the Contract Documents which will not commence until after both of the following conditions precedent have occurred: (1) the EPA issues one or more Construction UAO(s); and (2) the Trust issues a Notice to Proceed and/or Work Authorization Form authorizing the start of all or a portion of the Construction Services as set forth in, or reasonably inferable from, the description of Phase 2 in the Contract Documents. Contractor acknowledges that the Trust is relying on the expertise of Contractor to furnish the completed Work in accordance with the requirements of the Contract Documents. It is contemplated that Contractor will perform all Work to accomplish this result, including, but not limited to, any design and engineering, procurement, installation, value engineering, management, construction, materials management, quality control and quality assurance, and commissioning. Contractor will provide appropriate backup and substantiation for all of its Work (including any Work provided by its Subcontractors).

The Contractor shall perform all Work, Services, duties and obligations under the Agreement in a safe and workmanlike manner according to practices customarily used by large, experienced engineering and construction firms and applicable industry standards, and in full compliance with all applicable laws, regulations, and codes as well as Contractor’s approved work plans. Contractor’s duties and obligations shall include, but not be limited to, implementation of the Specifications, the Drawings, the Design Documents, and other Contract Documents, on a schedule and in such a manner that all requirements imposed by the March 24, 2014 UAO, are fully met.

The relationship between the Trust and Contractor is one of trust and confidence, with the Trust relying upon Contractor for fair and honest, as well as experienced and competent judgments and opinions regarding all aspects of the Project. Contractor covenants with the Trust to perform the Work required by the Contract Documents, the applicable standard of care, Prudent Industry Practice and the quality generally recognized and accepted within the construction industry. Contractor shall fully cooperate with the Trust, the Trust’s Engineer, the Trust’s consultants, agents and other contractors in furthering the interests of the Trust with respect to the Project. Contractor agrees to furnish efficient business administration, Project management and Project oversight, and to use its best efforts to furnish for both Phases of the Project an adequate supply of qualified design and engineering, procurement, construction, safety and quality assurance professionals, workers, craft labor, supervision, equipment and Materials. Contractor shall perform the Work in the most expeditious and economical manner consistent with good engineering and construction practices.

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- 2.2** The Contractor shall be solely responsible for all construction means, methods, techniques, sequences, procedures, safety, and compliance programs in connection with the performance of the Work. The Contractor shall supply and be fully responsible for temporary facilities. The Contractor shall locate such facilities only in approved areas designated by the Trust. Temporary facilities, located at the Site, shall be removed by the Contractor prior to final payment, unless otherwise authorized in writing by the Trust.
- 2.3** The Contractor represents that it has fully acquainted itself with, and has carefully examined all documents and conditions relevant to the Work and the Project and that Contractor is able to perform the Work in accordance with; all Trust-provided plans, surveys, measurements, dimensions, calculations, and estimates; the nature and location of the Work, the character of equipment, materials and facilities needed preliminary to and during the prosecution of the Work; the general and local conditions (including environmental conditions and labor relations); and all other reasonably ascertainable matters which can in any way affect the Project and the Work and its cost under the Agreement. The Trust assumes no responsibility whatsoever for ascertaining for the Contractor any facts which the Contractor could have reasonably ascertained for itself through such investigation. The Contractor shall notify its Subcontractors of the requirements of this Section 2.3. Lack of knowledge of any of the foregoing matters shall not constitute an excuse for delay or failure of performance under the Agreement, nor shall it justify any increase in the price as determined under the Agreement. The Contractor hereby represents that it has all reasonably ascertainable information and documentation with respect to equipment, materials, facilities or any other matters which are or will be necessary to enable the Contractor to safely and reliably perform the Work.
- 2.4** The Contractor hereby acknowledges and agrees that the Trust will only be responsible for providing such materials and services as are expressly indicated to be the Trust's responsibility in the Work Specification. Contractor acknowledges that it does not have exclusive use of the Site and that the Site includes existing facilities, structures, and businesses owned and operated by adjacent property owners and other vessels traveling in the canal. Contractor agrees that it must work around these existing Site features and must minimize the interference with and disruption of the ongoing use and enjoyment of these existing facilities, structures, and/or businesses during the execution of the Work. To the extent that the Contractor inadvertently interferes with any adjacent property owner's use and enjoyment of the existing facilities, Contractor shall immediately mitigate and correct such interference and disruption.
- 2.5** Instructions or explanations given by the Project Administrator or the Project Coordinator to the Contractor to complete, clarify or give proper effect to the Specifications will be deemed a part of the Specifications. The Contractor shall, immediately upon identification of same, notify in writing the Trust's Project Coordinator and/or Project Administrator of any discrepancy in materials, quantity, quality defects, or damages noted upon the Contractor's receipt of Trust-furnished materials. If there is reasonable doubt as to the meaning of any portion or portions of the Specifications, such documents will be interpreted as calling for the best quality, as to materials, equipment and workmanship capable of being supplied or applied, and any reasonable explanation provided by the Project Administrator's will be final and conclusive.
- 2.6** The Trust and its engineers make no warranty for the detail, accuracy, or completeness of the Contract Documents including, but not limited to, the Specification and Drawings. The Trust's review of or comments on any document shall not relieve the Contractor of its sole responsibility for the correctness and adequacy of the Contractor's Work, including but not limited to the correctness of design, detail, dimensions, or erection or any other obligation of the Contractor hereunder.
- 2.7** All documents furnished by the Trust, including but not limited to the Specification and Drawings and copies thereof and documents produced by the Contractor for the Trust or under this Agreement, shall be the property of the Trust, shall be used by the Contractor only for performance of the Project, shall not be used on any other jobs, shall not be delivered to any third parties except as is necessary for performance of the Project hereunder, and shall be returned to the Trust upon completion, cancellation or termination of the Agreement.
- 2.8** The Contract Documents including, but not limited to, the Specification and Drawings may not be complete in every detail. The Contractor shall comply with their manifest intent and general purpose, taken as a whole, and shall not ignore or misuse any errors or omissions therein to the detriment of the Project. In the event of any conflict between or among the Contract Documents, the following order of interpretation shall prevail: (a) the terms of a duly authorized and executed Change Order with regard to the subject matter of the Change

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- Order; (b) the Agreement and Terms and Conditions (excluding the Exhibits); (c) the terms of the Specifications and Scope of Work; (d) the terms of the remaining Exhibits; (e) the Purchase Order; and (f) Design Documents. Furthermore, the several documents forming the Contract Documents shall be taken as mutually explanatory of one another; however, the Trust shall decide priority where there exists ambiguities, discrepancies, conflicts, or inconsistencies between or among respective Contract Documents of equal precedence. Should the Contractor discover any conflicts, omissions, or errors in the Contract Documents, referenced documents, or codes, standards or instructions, the Contractor shall request in writing an interpretation or clarification, or additional detailed instructions before proceeding with the applicable Work however, unless otherwise instructed, the more stringent requirement shall apply. The written request shall be given to the Trust's Project Administrator. The Trust, with the assistance of the Trust's Engineer, shall, within a reasonable time, issue in writing the interpretation, clarification or additional detailed instructions requested. Should the Contractor proceed with the applicable Work before receipt of the interpretation, clarification, or instructions from the Trust, the Contractor shall replace or adjust any Work not in conformance therewith and shall be solely responsible for any resultant damage or added cost.
- 2.9** If the Contractor observes that any requirement specified in the Agreement is at variance with any governing laws, ordinances, rules, regulations, permits or licenses it shall promptly notify the Trust's Project Administrator in writing before incurring any further liability, expense or obligation for the Contractor or the Trust.
- 2.10** **Interpretation.** Reference to any contract, document or drawing shall include each amendment, modification and supplement thereto. Any term defined by reference to any other contract or document shall have such meaning whether or not such contract or document remains in effect. The terms "hereof," "herein," "hereunder" and comparable terms refer to the entire Agreement with respect to which such terms are used and not to any particular Article, section, or other subdivision thereof. A reference to any specific laws includes any amendment or modification to such laws. A reference to any person, Party, company, corporation, partnership, or other entity includes its/their permitted successors and assigns. If any provision of this Terms and Conditions contemplates that the Parties shall negotiate or agree to any matter after the date that this Agreement is signed, such provision shall be construed to include an obligation of the Parties to negotiate or reach an agreement in good faith within the spirit and intent of mutual cooperation and the content of these Terms and Conditions and any failure of the Parties to negotiate or agree shall be a Dispute within the meaning of Article 26.
- 2.11** **Financial Assurance.** At the Trust's request, prior to the execution of the Agreement and during its term, Contractor shall submit, for the Trust's review, its most recent two years of complete (audited, if available), annual financial statements (and any quarterly financial statements released after the most recent annual financials), or such other financial information as may be available and reasonably requested by the Trust, in order to establish the Contractor's creditworthiness. If the Trust has commercially reasonable grounds to believe Contractor's creditworthiness or performance under the Agreement is or has become unsatisfactory, the Trust may provide Contractor with written Notice requesting performance assurance in a form and an amount determined by the Trust in a commercially reasonable manner. Upon receipt of such Notice, Contractor shall have five (5) Business Days to provide such performance assurance to the Trust. Failure to provide performance assurance within the five (5) business daytime period shall be a material breach and an event of default under the Contract.
- 2.12** **Commencement of Work and Issuance of Phase 1 and Phase 2 Notices to Proceed.** Contractor shall commence the Phase 1 Pre-Construction Services on a date agreed to by the Trust, after receipt of the Phase 1 Pre-Construction Services Notice to Proceed. The Trust is not authorized to commence the Phase 2 Construction Services at this time. At such time as the Trust receives one or more Construction UAO(s) to complete the Phase 2 Construction Services, the Trust may, in its sole discretion, issue a Phase 2 Notice to Proceed and/or Work Authorization Form. Contractor shall not be authorized to commence any Work, nor shall any Work be deemed to have been commenced under this Agreement, prior to the issuance of a Notice to Proceed. The Trust, at its discretion, may release Contractor for only a portion of the Work associated with each Phase, and Contractor shall proceed with only that portion of the Work.
- 2.13** **Contractor's Engineering Responsibilities.** The Contractor agrees to furnish all labor, equipment, materials, tools, supplies, services and supervision necessary and incidental to perform the Work identified

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in the relevant WAF and do all that is necessary to complete its portion of the Project in accordance with the Scope of Services and this Agreement including all Contract Documents and any attached schedules, exhibits and appendices which are incorporated by reference as if fully set forth therein. The Contractor assumes full responsibility for the Work and will re-perform any deficient Work at no additional cost to the Trust. The foregoing is without prejudice to any other remedies which the Trust may have hereunder with regard to defective Work. The Contractor shall be solely responsible for all means, methods, techniques, sequences, procedures, safety and compliance programs in connection with the performance of the Work.

2.13.1 Any and all works, expressions, inventions, ideas, discoveries, improvements or developments (whether or not patentable), as well as all copyrights, patents or trademarks thereof, that may be conceived or made by the Contractor and Contractor's partner(s), employee(s), agent(s), vendor(s), contractor(s), Supplier(s) or any other party employed by Contractor or Subcontractor of any tier, to satisfy its obligation under the Agreement or WAF shall be work made for hire and shall be deemed the property of the Trust excluding pre-existing proprietary information or intellectual property of Contractor and provided that Contractor is paid in full for the Work. All such works, expressions, inventions, ideas, discoveries, improvements or developments, as well as all copyrightable expressions thereof, shall be deemed to fit into one or more of the nine specifically enumerated categories of works contained in 17 U.S.C. Section 101 and any subsequent revisions thereof. Any Contractor or Contractor's partner(s), employee(s), agent(s), vendor(s), contractor(s), supplier(s), or any other party employed by Contractor or Subcontractor of any tier, to satisfy its obligation under the Agreement shall promptly furnish the Trust with complete information, including, without limitation, a written description thereof giving the date of the work, invention or expression and naming the inventors or authors and others involved in the development or writing of the work, invention or expression. The Trust shall have the sole power to determine whether or not and in which countries and jurisdictions patent applications shall be filed or copyrights registered and to determine the disposition of title and rights in any works, inventions, discoveries or expressions in any United States and foreign patent applications, patents, or copyrights that may result. Memoranda, notes and experimental works, descriptions, diagrams and other data generated in performance of the Work pertaining to any and all works, inventions, expressions, ideas, discoveries, improvements and developments covered by the Agreement shall be available at reasonable times to the Trust. Contractor shall assist the Trust in the implementation of this Section by obtaining and providing detailed written descriptions of each invention, idea, discovery or expression sufficient for filing patent or copyright applications, but providing an evaluation of the patentability or copyrightability of each disclosure, by assisting the Trust in the prosecution of patent and copyright applications, and by executing or having executed by appropriate persons any and all documents which may be necessary or desirable to cause title in such inventions, ideas, discoveries, or expressions to vest with the Trust. The cost of such assistance shall be considered separate and distinct and shall be mutually agreed upon between the Trust and Contractor.

2.13.2 Solely for the purpose of illustrating the nature of Contractor's obligations under the Contract Documents, Contractor shall, in fulfilling its design and engineering obligations hereunder, perform the detailed engineering as required to complete the Work in conformance with the Contract Documents.

2.13.3 Maintenance of Drawings and Specifications. In order for the Trust to verify that the Work is proceeding in accordance with Contract Documents, the Contractor shall maintain a complete and up-to-date set of drawings and Specifications and shall at all times give the Trust access thereto.

2.13.3.1 Every sheet of Contractor's Design Documents that differs from the actual construction shall be marked, and sheets so changed shall be noted on the title sheets of the drawings and Specifications.

2.13.3.2 As appropriate, Change Orders shall reference applicable sketch drawings, and any supplementary drawings or Change Order specific drawings may be developed and included.

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2.13.3.3 The Contractor shall review the “as-built” drawings with the Trust’s Engineer at the request of the Trust to demonstrate that the Contractor is fully and accurately recording all changes that have occurred.

2.13.3.4 Any altered drawings shall be sufficiently detailed so that future work on the Site may be conducted with a minimum of difficulty. Before the completion of the Project, and before release of the Final Payment, the “as-built” drawings shall be revised to include all changes made and complete and current Specifications shall be transmitted to the Trust and the Trust’s Engineer.

2.14 **Engineering Standards.** With respect to the engineering or design services, the following standards shall apply:

2.14.1 **Quality and Completeness.** Contractor shall be responsible for the quality, completeness, accuracy, and coordination of Design Documents. Contractor shall provide design services that meet all environmental and regulatory requirements. Contractor shall provide for all testing and inspections required by sound architectural and engineering practices and by governmental authorities having jurisdiction over the Project.

2.14.2 **Standards.** Contractor hereby warrants that all engineering and design performed as part of the Work shall be performed in accordance with sound engineering practice, the applicable standard of care, Prudent Industry Practice, applicable laws, applicable permits, and the requirements of the Contract Documents.

2.14.3 **Engineer of Record for Contractor-Performed Design Services.** The Contractor shall provide a Licensed Site Professional, New York State Professional Engineer or other licensed or registered environmental professional or engineer as required by the applicable state environmental regulations, and properly trained personnel, when required by law, environmental regulations, code, any applicable governmental approval, or by the Trust. This individual shall be the “LSP of Record”, “Engineer of Record” or similarly titled professional (herein referred to as the “Professional of Record”) for portions of the Work identified in the Scope of Work with all the associated responsibilities and liabilities and will act independently, regardless of whether or not the Trust’s representative on the Project is also licensed. The Trust will have no obligation as a “Professional of Record” for the design and engineering Services performed by the Contractor. Prior to the commencement of Work, Contractor shall designate an “Engineer of Record”, as appropriate, which person shall be reasonably acceptable to the Trust. All Design Documents shall be sealed by a State of New York licensed Professional Engineer (P.E.), Architect, or licensed discipline engineer, as required. The Engineer or Architect of Record shall bear the sole responsibility for the preparation completion and coordination of any drawings and Specifications required for the Work.

2.15 **Value Engineering.** Contractor shall employ good-faith efforts to suggest to the Trust, and shall review and evaluate with the Trust, alternative approaches to the design, execution and construction of the Project. Contractor, in working with its Subcontractors, shall provide value-engineering services in an effort to provide the most cost effective Work while maintaining or enhancing Project safety, quality, performance, scheduling and other Project objectives. The Trust shall be entitled to receive and review all documentation and information related to Contractor and its Subcontractors’ efforts to value engineer the Work. If Contractor identifies a value engineering option to the Trust and the Trust accepts such value engineering option, the amount of the cost increase or decrease, as applicable, shall be reflected in a Change Order as appropriate. In the event of a decrease in the cost of the Work under this Subarticle, the Trust agrees, at the Trust’s discretion, to share a portion of the net savings taking into consideration all related cost as an incentive to Contractor to identify and propose Value Engineering that reduces the Contract Price.

2.16 **Procurement.** Contractor shall, and shall cause its Subcontractors to procure and pay for, in Contractor’s name as an independent contractor and not as an agent for the Trust, the following items that are not explicitly specified to be furnished by the Trust: all Contractor and Subcontractor labor; Materials; tools; equipment, construction aids; all Contractor permits; insurance; security; supplies; manufacturing, and any other related services (whether on Site or off Site) required for completion of the Work in accordance with the Contract

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Documents. Contractor shall also provide management and supervision necessary to satisfactorily engineer, design, procure, fabricate, expedite, deliver, receive, off-load, store, construct, inspect, maintain, start-up, and test all Work in accordance with the provisions of the Contract Documents.

- 2.17 Alternate Material.** In the event the Contract Documents designate any Materials by proprietary name or name of manufacturer, Contractor shall use such designated Materials unless specifically otherwise agreed to by the Trust in writing. Proposed alternates or substitutes shall not be procured, used or installed by the Contractor until the Trust has agreed to such alternates or substitutes. If non-conforming Materials are installed without the Trust's consent, Contractor shall remove and replace the non-conforming Materials with Materials compliant with the Contract Documents.
- 2.18 Manufacturer's Directions.** Unless the Contract Documents otherwise require, Contractor shall comply with manufacturer's instructions and printed directions for any Materials or related systems supplied by such manufacturer.
- 2.19 Submittals.**
- 2.19.1 Submittal Review.** Contractor shall submit for the Trust review, with reasonable promptness and in such sequence as to cause no delay in the Work, all Submittals required by the Contract Documents. The Trust will review Submittals for general design features. The Contractor is responsible for dimensions, quantities, accuracy, fit, adequacy of details, and coordination with other trades. The Contractor must request deviations from Contract Documents in writing and receive written approval from the Trust.
- 2.19.2 Contractor Representation.** By issuing Submittals to the Trust for review, Contractor represents to the Trust that it has determined and verified all Materials, field measurements and field construction criteria related thereto; that it has checked the accuracy and coordinated the information contained within each Submittal with the requirements of the Work and of the Contract Documents; and that the Submittals comply with the Contract Documents.
- 2.19.3 Schedule of Submittals.** Contractor shall prepare and keep current, for the Trust's information, a schedule of Submittals to be coordinated with the Project Schedule. Additionally, Contractor shall maintain a log of all Submittals provided to the Trust for review and the date of each submission. Such log shall be provided to the Trust on a weekly basis. Contractor shall not receive credit for the submission of any Submittal unless the Trust deems the Submittal to be completed to the extent it is sufficient to allow the Trust to determine that the Contractor will meet the requirements of this Contract. Incomplete or improperly prepared submittals will be returned to Contractor. Unless otherwise required, all Submittals requiring the Trust review shall be submitted in such a time frame as to allow the Trust five (5) weeks to review and comment on such Submittals.
- 2.19.3.1 No purchasing, fabrication, erection, processing or shipping of the aforementioned Materials may begin until the Submittals have been submitted to the Trust's Engineer and the five (5) week review time period has elapsed.
- 2.19.3.2 The Contractor shall submit drawings electronically in a Trust-approved CAD format and Modeling software.
- 2.19.3.3 In the event that Contractor submits an extraordinary number of Submittals in a particular week as determined by the Trust, and the volume of such Submittals will prevent the Trust from performing a review of all the Submittals within the time set forth in herein, then the Trust shall notify the Contractor and the Parties will agree upon a priority list for review of the Submittals in question, including an agreed schedule (neither Party's agreement shall be unreasonably withheld or delayed) for those Submittals which may be returned after the time frames set forth in the Contract Documents in order for Contractor to maintain the Project's Critical Path. So long as the Trust adheres to the agreed revised schedule for Submittal review, Contractor will not make a claim for the Trust's delay to the Critical Path.

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- 2.20 Procurement of Long-Lead Time Items.** Contractor shall provide to the Trust its schedule and procedure for procurement and storage of long-lead time items supplied by Contractor that constitute part of the Work and shall identify those portions of the Work where such procurement is advantageous to the Project. Contractor shall expedite the delivery of long-lead time items (provided or managed by Contractor) as agreed by the Trust, and provide storage and security for such items upon their delivery.
- 2.21 Receiving, Handling and Storage.** Contractor shall receive, handle, store, warehouse or otherwise provide appropriate storage and maintenance (in accordance with manufacturers' recommendations) for all Materials and other supplies required for performance of the Work. Contractor shall provide for the procurement or disposal of all soil, gravel, and similar Materials required for performance of the Work. All Materials and other supplies or equipment which are stored at the Site shall be: (a) stored in a warehouse or other appropriate location approved in advance in writing by the Trust; (b) properly tagged and identified for the Work and segregated from other goods; (c) properly and regularly maintained in accordance with the manufacturer's recommendations with written records of such maintenance; and (d) properly insured. Contractor shall maintain appropriate records to document proper storage and maintenance of Materials and other supplies or equipment and shall make such records available to the Trust upon request.
- 2.22 Offsite Storage.** All Materials, supplies or equipment that are stored at a location other than the Site; the Trust shall receive prior notice of the location, security, environmental protections and what Materials, supplies or equipment will be stored at that location. The Trust shall have the right to access said premises at all reasonable times. All Materials, supplies or equipment will contain signage that lists the Trust as having title rights to said property, be properly tagged, segregated from other items and list the Trust as loss payee on any insurance. The Trust's rights to said Material, supplies or equipment shall vest with the Trust upon payment of same by Contractor.
- 2.23 Reduction of Scope by the Trust.** The Trust reserves the right to delete, at any time and for any reason, portions of the Work from this Contract and to perform such portions of the Work outside the scope of this Contract with its own forces or other contractors. In such instances, Contractor will provide the Trust with a deductive Change Order indicating the appropriate deduction in the Contractor's direct costs and indirect costs including its fee. Where appropriate, and at the sole discretion of the Trust, the rates set forth in Exhibit C shall be used in calculating such deductions. In the event that the Trust deletes portions of the Work from this Contract due to Contractor's refusal or demonstrated inability to perform the Work, Contractor shall be responsible for the Trust's actual incremental cost to perform the deleted Work with its own forces or other contractors, including a fifteen percent (15%) administrative fee.
- 2.24 Correction of Defective Work by the Trust.** In the event that Contractor refuses or is unable to correct Defective Work in accordance with the Contract Documents prior to Substantial Completion, the Trust may perform correct Defective Work with its own forces or other contractors. Contractor shall reimburse the Trust for any costs and expenses related to the correction of the Defective Work, including a fifteen percent (15%) administrative fee. Correction of Defective Work under this Subarticle shall not void or limit the warranties provided by Contractor under this Contract.

3.0 CONTRACTOR PERSONNEL

- 3.1** At all times during the performance of each Phase of the Work, Contractor shall engage a sufficient number of skilled workers, laborers, and other Personnel necessary to perform and complete each part and portion of the Work on Schedule. Following consultation with Contractor, the Trust has the right to disapprove and demand the removal of any craft or managerial Personnel provided by Contractor or its Subcontractors, and Contractor shall then promptly cause such Personnel to be removed. Contractor's failure to maintain an adequate or competent labor force shall constitute a material breach and an event of default by Contractor under this Contract.
- 3.2** The Contractor's personnel shall be sufficient to complete the work safely and in compliance with all applicable laws, regulations and codes.
- 3.2.1 Contractor's Representative.** The Contractor's Representative shall be authorized to act on behalf of Contractor and shall be the individual with whom the Trust may consult at all reasonable times,

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and whose instructions, requests, and decisions shall be binding upon Contractor as to all matters pertaining to this Contract. The Contractor's Representative shall also have the responsibility to ensure that the Work being performed is in accordance with all provisions of the Contract Documents.

- 3.2.2** Site Construction Manager. At all times, the Work to be performed by Contractor during the Construction Phase shall be conducted and managed under the auspices of a competent Site Construction Manager experienced in the design and construction of projects similar to the Work. The Site Construction Manager's duties shall include, among other things, coordination of Work between all entities performing Work on the Site on behalf of Contractor, including Contractor's Subcontractors.
- 3.2.3** Other Key Personnel. The Contractor and all Subcontractors shall employ only competent and experienced personnel for the tasks they are performing. The Project Manager and other key personnel identified in Exhibit I are considered to be essential to the Services performed in any WAF(s) where such personnel are designated. With respect to and for the duration of the Work to be performed by Contractor pursuant to any such WAF(s), Contractor agrees not to remove, replace, or reassign key personnel without the Trust's prior written consent. If key personnel become unavailable for reasons beyond Contractor's control for assignment to Work under any applicable WAF(s), Contractor shall immediately notify the Trust and shall submit information (including but not limited to proposed substitutions) in sufficient detail to permit the Trust to evaluate the impact of the situation on the Work to be performed. Prior to substitution of key personnel, Contractor shall obtain the Trust's written consent as to the acceptability of replacement personnel. Contractor shall exert its best efforts to promptly replace any Key Personnel to which the Trust reasonably objects in writing.
- 3.2.4** In the event that the Trust believes, in its sole judgment, that any of the Contractor's personnel are objectionable, the Trust shall so notify the Contractor, whereupon the Contractor shall promptly investigate and take appropriate corrective action including, where requested by the Trust, removal of such personnel and replacement with personnel acceptable to the Trust. Whenever required by law, regulations, or code, or any applicable governmental approval, the Contractor shall employ only licensed and properly trained personnel in the performance of the Work. The Contractor is responsible for assuring that any and all Contractor personnel and personnel engaged by or through Contractor have been properly trained and are fully qualified (in accordance with any and all applicable laws, rules and regulations) to perform their respective duties as assigned by or through Contractor. Contractor shall maintain appropriate records of the training and qualifications of its personnel assigned to work under the Agreement and shall assure that, as may be required under the law of any jurisdiction related to performance of any WAF issued hereunder, such personnel possess any requisite licenses and/or certificates required or generally recognized as appropriate to performance of duties to which they are assigned. Nothing contained in this Section shall be deemed to relieve Contractor of its responsibilities under the Agreement, at law, or in equity, or to imply any approval by the Trust of Contractor's training or personnel qualifications standards or to make the Trust responsible for any act or omission of Contractor with respect thereto. The Contractor and all Subcontractors shall have full responsibility for all employees employed on or in connection with the Project and shall employ only such employees who shall cooperate with all other individuals working at the Site.
- 3.3** The Contractor shall, and shall require its Subcontractors to comply with the background check requirements as defined in the policies and procedures, provided as Exhibit J.
- 3.4** In the event of the Contractor's non-compliance with any or all of these background-check requirements, the Trust may cancel the Agreement for its cause pursuant to the termination provisions contained in the Agreement except that in no event shall the Trust or its affiliates be liable for any termination cost/charges to the Contractor beyond compensation for Work performed up to the date of such cancellation.
- 3.5** The Contractor shall be wholly and solely responsible for all acts of its personnel while engaged in the Work. Any illegal acts, including but not limited to terrorism affecting property and/or personnel of the Trust or its

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affiliates, the Contractor or third parties shall be considered grounds for finding the Contractor in default and terminating the Agreement for cause in accordance with Section 18.1, in addition to all other rights and remedies available to the Trust and its affiliates under applicable law.

4.0 PROJECT SCHEDULE AND PROJECT CONTROLS

4.1 Schedule. Time is of the essence for the completion of the Work under these Contract Documents. The Contractor will develop, maintain, and update a fully integrated Schedule of all Pre-Construction Services in Phase 1. Upon issuance of a Notice to Proceed for Phase 2, the Contractor shall develop, maintain, and update a fully integrated Schedule of all Construction Services in Phase 2. The Contractor's Schedule for each Phase of the Work, as applicable, from this point forward referred to as "the Schedule," will include (in Level Three detail) all activities required to accurately monitor, progress and use as a forecast tool, the Contractor's scope of Work. The conditions set forth in this Article and Exhibit K are the project controls requirements for each phase of the Project. The Contractor will develop and maintain the Schedule, the Earned Value Management System and physical quantities installed and estimated as required by this Article and Exhibit K. Contractor shall complete the Work in accordance with the Schedules required by this Article, the Critical Path Milestones as contained in Exhibit L, and Exhibit K.

4.1.1 Weekly Schedule Updates. Contractor shall update the information contained in the Detailed Project Schedule weekly ("Weekly Update") throughout the course of the project. Contractor's Weekly Updates will accurately reflect the project's progress in the Schedule including updates to actual starts, actual finishes, remaining durations, physical percent completions, and any other status items in the Schedule and record such Updates as required in the Schedule software's log feature for each affected activity. As set forth herein, during construction, Contractor will identify, track and communicate to the Trust a report showing the Critical Path and the four schedule paths nearest to the Critical Path. Upon completion of the Weekly Update, the Contractor will release the resulting Schedule file to the Trust within 1 (one) working day. The Trust's receipt and review of the Schedule shall not constitute Notice for purposes of any delays, nor shall it relieve Contractor of its obligation to provide the Trust formal written Notice of all claims pursuant to Article 24.

4.1.2 Recovery Plan. Should any phase of the Work fall behind to such extent that the Milestone Dates may, as determined by the Trust, be at risk, Contractor shall submit a recovery plan to the Trust within five (5) Days that details the Contractor's plan to recover the schedule to the Milestone Dates contained in the Contract Documents. Should the Trust find that Contractor's proposed recovery plan is not sufficient to restore the Work to the Schedule, the Trust shall advise Contractor that Contractor has five (5) additional Days to submit an alternative recovery plan to recover the Project Critical Path. The Trust may withhold any pending payment to Contractor until an acceptable recovery plan is received and accepted by the Trust.

4.1.2.1 Trust's Right to Direct Recovery. If Contractor has not corrected the schedule problem or does not have a reasonably acceptable plan to correct the schedule problem within ten (10) days of the submission of the original recovery plan, the Trust shall have the right to require the Contractor to immediately: 1) increase the number of its employees performing the affected Work; 2) increase or change the amount of time or number of work shifts worked by the Contractor's employees, including increasing the number of hours worked per day or the number of Days worked per week; and/or 3) increase or substitute other Contractor-provided resources, including hiring specialty Subcontractors, until the Work has recovered the Milestone Dates, or a plan for regaining the schedule reasonably acceptable to the Trust is proposed by the Contractor or any combination thereof.

4.1.2.2 Costs For Recovery. All additional costs incurred by Contractor for providing acceleration in accordance with its recovery plan or as directed by the Trust under Subsection 4.1.2 shall be paid by Contractor, except to the extent that such additional costs are required to address delays to the Schedule that are the fault of the Trust, and that Contractor would not have had to pay such additional costs but for the Trust's delay.

- 4.1.3 Trust's Remedies For Inadequate Schedule.** Contractor's failure to adequately prepare or update the Schedule may be deemed by the Trust as a material breach and an event of default by Contractor. If, after Notice by the Trust, Contractor does not prepare or update the Schedule pursuant to this Article, the Trust may use its own forces or another contractor to develop, maintain or manage the Schedule. Any costs incurred by the Trust based upon Contractor's failures under this Article may, at the Trust's discretion, be charged to Contractor including a fifteen percent (15%) markup. In such event, Contractor shall promptly provide the Trust and/or the Trust's other contractor with all information and data reasonably requested regarding the progress, requirements and other aspects of the Work, and shall otherwise cooperate with the Trust, at no cost to the Trust, as reasonably necessary or desirable for the timely and efficient preparation, review, maintenance and revision of the Schedule. Contractor shall be bound by such schedule as if it was prepared and maintained by Contractor pursuant to this Article.
- 4.2 The Trust's Earned Value Management System.** Contractor shall report on a weekly basis the information necessary for the Trust to establish and maintain the Trust's EVMS performance indicators and indexes. This would include period and cumulative planned hours, earned hours, and actual hours. "Earned Hours" are defined as budgeted hours for each individual Schedule activity multiplied by the Contractor's assessed physical percent complete for the same Schedule activity. Actual hours are the Contractors' hours expended to perform each of the work activities and Contractor is required to report its Actual Hours in accordance with the Schedule's detailed task level. The Contractor's planned hours are those identified and allocated by the Contractor to each of the Schedule's tasks or activities in the Baseline Schedule and will equal the Contractor's total estimated or budgeted hours for the project. The Contractor shall develop and maintain the EVMS planned, earned and actual manhour tracking system for all of Contractor's Work including engineering, construction and start-up scopes of Work. Formatting of the earned-value reports to be included with Contractor's Weekly Schedule Status Report shall be subject to the Trust's approval. The Contractor's earned-value reports shall include the following detail: PART 1 - Planned man-hours allocated by the Contractor to each of the schedule activities and balanced to the Contractor's original estimate plus approved Change Orders; PART 2 - Earned man-hours determined by the Contractor's assessment of the Work progress as scheduled including its assessment of the each activities' physical percent (%) complete; and PART 3 - Actual man-hours expended by the Contractor to complete the project deliverable per the schedule dates. Actual man-hours will be confirmed by a review of the Contractor's labor force reports and payroll reports. Contractor is also required on a weekly basis to report actual hours expended for non-productive work including management, support and non-craft activities.
- 4.3 Contractor's Project Tracking System.** The Contractor and its Subcontractors shall develop a Project Tracking System ("PTS") that can track deliverables, with respective Schedule and Milestone Dates, budgeted and actual hours, and earned value. The PTS must be integrated with, or be contained in a module within, the Contractor's enterprise or project accounting system. The Contractor will provide reports from the PTS to the Trust for discussion in the weekly meetings and as otherwise requested and will also provide the Trust with weekly status reports from the Contractor's PTS as deemed appropriate by the Trust based on the PTS system's capability. The Contractor's PTS is tied directly to and fully reflects the detailed listing of Contract deliverables on the Project and has a direct one-to-one relationship to the activities in the Schedule activities. PTS and the Schedule will be maintained to be consistent with and reflective of each other throughout the Project. The Contractor may utilize its own internal Field Progress Management System processes with rights reserved for the Trust to audit said system or implement changes as the Trust may require. If Contractor does not have an existing FPMS, Contractor shall create/implement its own FPMS and submit the completed FPMS to the Trust for review and approval prior to any disbursement of funds to the Contractor. Contractor shall provide the Trust with a detailed list and all associated information regarding the Contractor's selected physical quantities for tracking by the FPMS. Contractor shall provide reports from its FPMS as required by the Trust.
- 4.4 Bulkhead Engineering Progress.** Within 30 days of execution of the contract, Contractor shall provide an estimate of the number of drawings it will issue by design discipline and/or engineering intermediate Milestones by discipline for each system for the project and shall report on a weekly basis the revision and completion status of said drawings or Milestones. Contractor shall also report on its percentage of completion of engineering drawings by comparing its planned with the actual issued for construction drawings. Contractor will provide to the Trust reports regarding trends of engineering progress.

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4.4.1 Procurement and Subcontractor Progress. Contractor will provide a complete listing of all work it subcontracts and all materials and equipment it procures for the Work. Contractor shall provide weekly status reports of all such work in which Contractor identifies: tracking of requests for proposal, bids received and contracts awarded; fabrication status reports including shop testing and surveillance; delivery status of all equipment and materials by project area and design discipline; required subcontractor and supplier on-site support; and any other details required to provide the Trust with the status of the Work. Contractor shall provide to the Trust reports regarding trends of the above.

4.4.2 Field Progress Measurement System. Contractor must implement and utilize a Field Progress Measurement System (“FPMS”) approved by the Trust to measure field-made progress and reporting of physical percent complete of work activities. The FPMS shall include allocation of predetermined quantities of work in percentage increments so that progress of the work can be physically verified in the field. Such increments will be predetermined as part of and concurrent to the development of the Baseline Schedule. Examples, which are to subject to the Trust review and approval, to be measured by the Contractor’s FPMS include, but are not limited to, comparison of planned versus actual quantities of the following for each level three schedule activity:

4.5 Schedule Reporting.

4.5.1 Daily Reporting.

4.5.1.1 Daily Force Report. Each Day, the Contractor shall submit a daily report (“Daily Force Report”) identifying Contractor’s and all Subcontractors’ total manpower head count performing the Work each respective Day with a breakdown by craft and by shift, along with a list of any major equipment deployed or being used on site having a daily rental or ownership value exceeding \$1,000 per day. The Contractor’s Daily Force Report must also include a description of the work performed for that day, along with the associated Schedule Activity ID numbers. The Daily Force Report will further separately identify any: (1) Detailed Activities included in the Detailed Project Schedule that were actually started or completed on that Day, as well as, daily weather conditions (i.e., temperature, wind speed, and moisture) measured at four (4) hour intervals; (2) schedule improvements, impediments, or delays encountered; (3) safety issues or events; and (4) other significant events occurring in the reporting period.

4.5.1.2 The Contractor shall require all Subcontractors’ performing work on the site to provide their own Daily Force Report with these same minimum characteristics and requirements. The Subcontractors’ Daily Force Reports shall be submitted each Day along with the Contractor’s Daily Force Reports.

4.5.1.3 The Daily Force Report from the prior Day shall be submitted to the Trust no later than 10:00 a.m. each Day. The form of the Contractor’s and Subcontractor’s Daily Force Report will be submitted to the Trust at least 1 week prior to the Contractor’s or Subcontractors’ mobilization to the Site and will be subject to Trust review and approval.

4.5.2 Weekly Reporting.

4.5.2.1 Weekly Schedule Status Report. Two Days following the submission of the Weekly Schedule Update, Contractor shall submit to the Trust a weekly schedule status report (“Weekly Schedule Status Report”) that identifies all changes made to the prior Schedule file as a result of the Weekly Update. The Weekly Schedule Status Report shall include the following items, as required: (1) the current Critical Path and the four nearest sub-Critical Paths; (2) all logic revisions that effect the Critical Path; (3) all decreases in Physical Percent Complete; (4) all increases to the Remaining Durations; (5) all revisions to Original Durations; (6) all added Detailed Activities; (7) total actual man hours expended to date by system, (8) actual equipment used by system; and (9) actual material quantities

installed by system. The form of the Weekly Schedule Status Report is subject to the Trust's prior review and approval.

4.5.2.1.1 Each Weekly Schedule Status Report must be accompanied by: (1) a detailed report indicating the overall status of the Work; (2) problem areas; (3) suggested recovery or mitigation plans; (4) unresolved Project issues; (5) Change Orders and their effect on the Work progress; and (6) manpower availability. An official copy of the Contractor's and its Subcontractor's PTS reports for actual hours will be submitted for verification of schedule data. When appropriate, reimbursable cost expenditure summaries and forecasts by reimbursable account number will be included in the Weekly Schedule Status Report.

4.5.2.1.2 Forecasts for the coming periods, as well as the estimate at completion will be provided for hours. Earned value indicators will be included to substantiate the forecasts. Any forecast that cannot be substantiated by the current trend must be explained in a recovery plan.

4.5.2.1.3 Each Weekly Schedule Status Report shall be accompanied by a Materials received report and a Materials status report.

4.5.3 Monthly Reporting. Contractor shall provide to the Trust Schedule information in the Monthly Progress Report as set forth in Subarticle 4.6.1 and Exhibit M.

4.6 Other Reports and Information Required by the Trust. Contractor shall submit certain reports and other information to the Trust. Regardless of any information provided by Contractor in any report submitted to the Trust, Contractor shall continue to be obligated by the Notice requirements in Article 46.0 by issuing a formal and separate Notice to the Trust of all such claims within the time limitations described therein. In addition to the Schedule Update, Contractor shall deliver to the Trust the following reports:

4.6.1 Monthly Progress Reports. Contractor shall deliver to the Trust no less frequently than monthly, by the tenth (10th) Day of each month, a written report, in a format similar to Exhibit M, of the progress of the Work during the preceding month (each a "Monthly Progress Report") and on all matters deemed significant by the Trust. The Trust has the right to rely on all information provided by Contractor in its Monthly Progress Report. Comments in Contractor's Monthly Progress Report indicating additional Work or delays to the Schedule that Contractor believes are the Trust's responsibility shall not constitute Notice by Contractor for such claims.

4.6.2 Reports on Events of Force Majeure and Emergencies. In addition to all other reports required under this Contract, should any Force Majeure event, significant problem, emergency, strike, injury, work stoppage, or legal problem be anticipated, or any Force Majeure or other unanticipated event occur which might adversely affect Contractor's ability to perform its obligations hereunder, Contractor shall immediately notify the Trust verbally, and not later than two Days after Contractor knew or should have known about the event, problem or emergency, Contractor shall prepare a written report detailing all available information and steps being taken to alleviate the effects of such Force Majeure or significant problem, emergency, or other event or problem and deliver such significant event report to the Trust as soon as practicable. The Trust may at any time request a significant event report on any event which the Trust reasonably regards as being significant.

4.6.3 Damage and Root Cause Reports. If prior to the date of Substantial Completion of the Work, any component or portion of the Work is materially damaged, Contractor shall provide the Trust, as soon as practicable after the occurrence of such damage but in no event later than seven (7) Days after Contractor knew or should have known of such damage, a damage or root cause report detailing such occurrence, an analysis of the known causes of the damage, any required repairs, and the estimated duration of such repairs.

4.7 Progress Meetings. During performance of the Work, and in addition to the Project Coordination Meeting and Project Management Meeting defined below, Contractor shall attend and participate in all regularly

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scheduled meetings and other meetings as set forth in the Contract Documents or as the Trust may request to update the Trust as to the progress of the Work, discuss and resolve commercial or technical issues, or to discuss any issue regarding the Project as deemed necessary by the Trust. The location of such meetings will be determined by the Trust, and may be held daily, weekly, monthly or as otherwise requested by the Trust. Contractor shall provide the Trust with minutes of all progress meetings. The Trust, with the reasonable agreement of Contractor, shall retain the right to amend the minutes. These meetings shall include discussion of action item lists that require action and effort by the responsible individual with deadlines for the completion of each item. All matters bearing on the progress and performance of the Work and the Schedule since the preceding progress meeting, including any open action items shall be discussed and resolved, deficiencies in the Work or the methods being employed for the Work, and problems, difficulties, or delays which may be encountered. Contractor shall be represented by Contractor's Representative and the Trust shall be represented by the Trust's Representative or other designee. The Trust shall have the right to include any individuals, consultants or attorneys in attendance at every meeting. In addition, Contractor's Representative and employees appropriate for the stage of the Work must attend daily Site coordination meetings held at the Site.

- 4.8** **Construction Plans.** As a condition precedent to the Trust's obligation to pay Contractor's first Application for Payment following the Effective Date, Contractor must submit the plans required by the Contract Documents for performing its Work for the Trust review. The Trust's review of all such plans does not constitute an approval by the Trust of Contractor's means and methods. The Contractor's plans must allow Contractor to meet its requirements in the Contract Documents, notwithstanding any review by the Trust. Contractor shall have no claim for additional Contract Time or Contract Price because of the failure or inefficiency of any plan or method reviewed by the Trust. Any method of Work suggested by the Trust shall be used at the sole risk and responsibility of Contractor. Contractor shall not make any changes to any plan specified below without providing written Notice to the Trust accompanied by a complete explanation of the changes. Contractor shall submit copies of all revised plans to the Trust for its records.
- 4.9** **Right to Withhold Payment.** If Contractor fails to timely provide any of the data or deliverables required by this Article, including, but not limited to, the data required for the Weekly Updates, the Weekly Status Report, the Monthly Report, and the Monthly Cost Report, the Trust shall have the right to withhold payments from Contractor until Contractor has provided the data and deliverables required by this Article.
- 4.10** The Contractor shall maintain a labor force of sufficient size and competence to conform to and complete all Work on schedule and within the scheduled hours and days set forth in the schedule unless otherwise directed or approved by the Trust.
- 4.11** The Contractor shall limit the Work at the Site to eight hours per day and 40 hours per week and normal working hours, between 7:00 a.m. - 6:00 p.m., Monday through Friday, unless otherwise specified elsewhere in the Agreement or arranged for by Contractor. Arrangements for extended hours must be made by the Contractor through the local regulatory/permitting office and shall be subject to the Trust's prior written approval.
- 4.12** Any failure by the Trust to invoke any of the provisions of this Article shall not constitute a waiver of its right to subsequently invoke such provisions or its entitlement to any other damages provided for elsewhere in this Agreement.
- 4.13** No request for extension of time for completion of the Work, or any other change to an approved schedule, shall be granted to the Contractor unless in a writing signed by the Trust and except as provided in Sections 21.0, 14.0, and 19.0.
- 4.14** Notwithstanding the foregoing, if the Contractor incurs delays and believes that changes in the Project or changed conditions beyond the Contractor's control are the cause of the delay, the Contractor shall provide prompt written notice to the Trust in the manner set forth in Section 14.3 of the changes or changed conditions that it believes justify excusing the Contractor from meeting the schedule. If the Trust agrees with the Contractor, then, subject to any required review and approval of the USEPA the Trust will, in accordance with Section 14.3, approve an extension of time for completion of the Work. Such extensions of time however shall not include any additional payment for extended overhead.

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- 4.15** If the Contractor is delayed by any act or omission by the Trust, or by interference by a public authority, or strikes or injunctions, none of which are caused, instituted, or provoked by the Contractor or by any Subcontractor, agent or representative of the Contractor, and if the Contractor cannot with reasonable diligence, due to such act or omission, interference, strike or injunction, make up for such delay or delays, then the specified date or dates for completion of the work or services or the portion or portions thereof so delayed will be extended by the Trust by the amount of time for such delay as determined by the Project Administrator. Notwithstanding the foregoing, no periods of such delay will be deemed to begin until written notice thereof has been given by the Contractor to the Trust. If the Contractor cannot make up for such delay by applying reasonable diligence and speed, then the Contractor may receive compensation for such delay, if appropriate. The Project Administrator shall determine the time period covered by the delay and the amount of compensation payable to the Contractor.
- 4.16** When necessary to accommodate the Trust's requirements, the Trust shall have the option to order any portion of the Project performed at times other than normal working hours or on weekends or holidays, in which event extra costs, if any, for such work shall be paid to the Contractor in accordance with Section 14.5.
- 4.17** Contractor agrees to make no claim against the Trust for damages for delay of any kind, whether delay is caused by the Trust or by any third party, and agrees that its sole remedy for such delay is to seek an extension of time as elsewhere herein provided, except to the extent if any that compensation is expressly provided for elsewhere in this Agreement.

5.0 PERMITS AND LICENSES

- 5.1** Permits and licenses of a temporary nature necessary for the prosecution of the Work shall be secured and paid for by the Contractor. Unless otherwise specified, permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the Trust. In either case the Contractor shall be responsible for prosecuting the Work in accordance with the provisions of all applicable permits and licenses.
- 5.2** The Contractor shall maintain all permits and licenses required and necessary to complete the Work so that it complies with all applicable laws, rules, regulations, requirements, orders, directives, ordinances, codes and standards of all federal, state, and local governmental agencies having jurisdiction over the Trust and, the Contractor, the Subcontractors, or the Project, whether the same are in force at the execution of this Agreement or may in the future be passed, enacted or directed.
- 5.3** The Contractor shall not enter into negotiations with any governmental authority or agency for acceptance of variations from or revisions to safety or health, or air, water or noise pollution laws or regulations relating to the Agreement or to the performance thereof, without the Trust's prior written consent and participation.

6.0 SHIPMENT AND TITLE

- 6.1** The Contractor shall select the best practical mode of transportation consistent with Schedule requirements and with the Materials being shipped unless otherwise specified in the Agreement. The Trust reserves the right to direct Contractor to route and/or specify the mode of transportation for shipments of all Materials or equipment purchased by Contractor for the Work if the Trust, in the Trust's sole judgment, deems said shipment to be in the best interest of the Project. Contractor shall expedite shipments of Material as necessary in order to maintain Schedule. The Contractor shall deliver, receive, unload, store in a secure place, and deliver from storage all equipment and material (whether furnished by the Trust or the Contractor) required for the performance of the Work, in accordance with the Agreement and all manufacturers' recommendations. Deliveries shall be made between the hours of 7:00 a.m. and 2:00 p.m., Monday through Friday, unless otherwise arranged with the Project Coordinator or otherwise specified in the Agreement. The Contractor shall bear the cost of all packaging and shipment of equipment and material to the Site, of all unloading, storage, protection and installation of equipment and material at the Site, and of any insurance on the equipment prior to Final Acceptance by the Trust, regardless of whether title has passed to the Trust.
- 6.1.1** Reputable Carriers. Contractor shall, and shall cause its Subcontractors to arrange to wrap, pack, crate, load, enclose, and brace all Materials purchased for the Work on a reputable carrier in a good,

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workmanlike manner and in accordance with applicable standard trade procedures and practices, or as may be otherwise specified by Contract Documents. Contractor shall ensure that all shipments for the Work use reputable carriers who meets or exceeds Contractor's approved insurance requirements, all required vehicle permitting is current and that the equipment utilized meet the minimum equipment safety requirements required by applicable laws and Prudent Industry Practice. Personal protective equipment shall be required for all equipment operators prior to entry onto the Site.

- 6.1.2** Acceptance and Inspection of Material. Receiving of equipment and materials, (whether furnished by the Trust or the Contractor) shall include inspection for correctness of quantity, quality, and damage, all of which shall be reported in accordance with Section 31.0. Contractor shall not deliver, or allow any Subcontractor to deliver any Materials or equipment to the Site unless Contractor will be present at the Site to accept and inspect, with qualified personnel under the QA/QC Program, such Materials or equipment. In no event will the Trust accept on behalf of Contractor (including Subcontractors), or be responsible for, any Materials or equipment ordered by Contractor and delivered to the Site. Any shipments that are sent directly to the Site (including those ordered by Subcontractors) shall be clearly marked to the Contractor's attention and show the Purchase Order number issued by the Trust to the Contractor. Contractor shall maintain all records of receipt inspections for the Trust's review upon the Trust's request.
- 6.1.3** Contractor Responsible. The Contractor shall be solely responsible for the determination of the acceptability of the Materials. Any participation by the Trust in the inspection process shall not relieve the Contractor of this obligation. Any additional costs associated with Contractor's failure to reject such damaged or non-conforming Materials shall not be the basis for an increase to the Contract Price.
- 6.2** The Contractor warrants and shall take all action necessary to ensure that all Goods and Materials are delivered to the Trust with good, clear and marketable title, free from any defects, liens, encumbrances and claims of any kind, and shall indemnify and hold harmless the Indemnified Parties and warrant and defend title against any claims or demands of third parties; and shall take such action at the Contractor's sole expense as may be necessary to discharge any defect in title, or lien or encumbrance on the Goods and Materials. Unless otherwise specified in the Agreement, title to Goods and Materials furnished hereunder shall pass to the Trust upon delivery thereof F.O.B. Destination. Passage of title shall not be construed to impair any rights which the Trust may otherwise have to recover damages or reject equipment which does not meet the requirements of the Agreement.

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7.0 RISK OF LOSS

- 7.1** Risk of loss or damage to the Work shall remain with the Contractor until Final Acceptance by the Trust, regardless of whether title has passed. The Contractor shall bear the risk of loss or damage to any Work during its repair, replacement, or cure if the Contractor is responsible for such repair, replacement or cure.
- 7.2** The Contractor shall be solely responsible for storage and protection of equipment and material (whether furnished by the Trust or the Contractor) against deterioration or damage from any cause, vandalism, and theft until Final Acceptance. The Contractor shall obtain a receipt from a duly authorized representative of the Trust when returning material or equipment to a designated Trust facility.
- 7.3** The Contractor shall be responsible for the security of all materials and equipment under its custody and control, and unless otherwise stated in the Agreement. The Contractor shall cooperate with the Trust regarding all applicable security measures.
- 7.4** The Contractor shall at all times conduct operations in a manner to ensure the safety of the general public and to avoid the risk of loss, theft, or damage by vandalism, sabotage, or any other means. The Contractor is responsible for providing all design, engineering, services, material, equipment, and labor required to maintain the stability of the bulkheads along the Site during the performance of the Work. The Contractor is responsible for the cost of repairing all upland property damage caused by the performance of the Work. The Contractor shall continually inspect the Project, materials, and equipment to discover and determine any conditions that might involve such risks and shall be solely responsible for discovery, determination, and correction of any such conditions.

8.0 REPRESENTATIONS AND WARRANTIES

- 8.1** The Contractor represents and warrants to the Trust that: (a) it is aware of the purpose for which its Services are being used and that its work shall be designed and executed in a manner timely and useful to said purpose; (b) all Work shall conform to the Scope of Services, Contract Documents, and other requirements of the Agreement; (c) all Services shall be performed by qualified and competent personnel in accordance with the standards of care, skill, and diligence exercised by, and consistent with accepted good and sound professional practices and procedures utilized by, other professional consultants in similar circumstances; any equipment utilized in connection with performance hereunder shall be safe and in proper working order; (d) any material(s) and/or equipment incorporated in the Project shall be new, properly cleaned and decontaminated and of appropriate quality (unless otherwise expressly consented to in writing by the Trust); and (e) all Work shall be performed in accordance with all applicable law. The Contractor shall ascertain and comply with the standard practices of the Trust prior to beginning to perform any Work under the Agreement.
- 8.2** Contractor understands and acknowledges that the Work performed hereunder may involve hazardous or toxic substance(s)/waste(s) and that such Work shall be performed in compliance with all applicable laws, regulations, and government agency policy and guidance documents related thereto. Contractor represents and warrants that it is technically, financially, and legally ready, willing, and able to perform Work in response to each WAF issued hereunder and that it is familiar with and knowledgeable about the applicable laws, regulations, and government agency policy documents to the extent necessary to carry out its duties under any WAF(s) issued hereunder in a professional, complete, and compliant manner.
- 8.3** Contractor represents and warrants that to the best of its knowledge and belief, neither entering into this Agreement nor performance of any of its obligations hereunder will conflict or cause a breach of any obligations of Contractor under any agreement, whether written or oral, to which Contractor is a party or any other obligation by which Contractor is bound. Prior to initiating any Work under this Agreement, Contractor shall undertake a comprehensive conflict of interest review to determine that it has no current or past obligation, direct or indirect that would conflict with the provision of Services or would otherwise hinder Contractor's provision of the Services. Contractor shall inform the Trust in writing that such conflict check has been completed prior to execution of any WAF. Until the completion of each Project, Contractor shall not directly or indirectly, provide consulting services to, or be employed by, any party to provide services that may give rise to a potential conflict with the Services provided under this Agreement in respect of such Project or otherwise inhibit Contractor from performing environmental services, unless prior written consent

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is obtained from the Trust. In no event shall Contractor perform services for another party wherein Contractor shall describe the Trust's approach or mindset (the Trust's "Confidences") in how it deals with environmental issues or any other issue to another party. Contractor recognizes that such a disclosure of the Trust's Confidences may be an irreparable damage to the Trust and the Trust shall be entitled to seek injunctive relief to remedy such damage.

- 8.4** If the Contractor breaches any of the representations or warranties set forth above, or elsewhere in the Agreement, the Trust shall have available all rights and remedies under the Agreement, in addition to any rights and remedies that it may have under statute law, common law, in tort or contract, or in equity.
- 8.5** Notwithstanding any other provision of the Agreement, this Article shall survive the termination or expiration of the Agreement.
- 8.6** **Services.** Contractor represents and warrants to the Trust that Contractor's services related to the Work, including design, engineering, and construction management services, will comply with the Contract Documents and meet the applicable standards of care set forth in Subarticle 8.1. The Trust's review or approval of any Design Documents prepared by Contractor or its Subcontractors shall not constitute a waiver by the Trust of any of Contractor's warranties or obligations hereunder.
- 8.7** **Procurement and Construction.** Contractor represents and warrants to the Trust, and shall obtain similar warranties from the appropriate Subcontractors, that the Work: (i) will be constructed in a good and workmanlike manner; and (ii) will conform in all material respects to the Contract Documents, sound construction practices and all applicable Laws. Contractor further represents and warrants that all Materials furnished by Contractor, or its Subcontractors: (i) will be of new manufacture and will be free from defects in design (if designed by Contractor or purchased by Contractor from a Subcontractor), workmanship, and Materials; (ii) will be in compliance with all applicable Laws; (iii) have been transported, handled, stored, maintained, assembled, installed and tested according to the manufacturer's recommendations (unless otherwise required by the Contract Documents); and (iv) will have been fully tested to meet the requirements of the Contract Documents. Contractor further represents and warrants that such Contractor-supplied Materials will comply with the Specifications contained in the Contract Documents.
- 8.8** **Nonconforming Work.** The Warranty Callback Period is a period of 12 months from the date of Final Completion or 24 months from the date of receipt, whichever is later. If Defective Work is discovered prior to the end of the applicable Warranty Callback Period, and the Trust gives Contractor Notice of such Defect, Contractor shall, at its sole expense, promptly reperform, repair, or replace any such item of the Work (including without limitation engineering, design, or supply of Materials) so that the Work is in conformance with the Contract Documents. Notice of noncompliance may be made by the Trust after the Warranty Callback Period has expired if such notice is made within a commercially reasonable time. Items of materials, equipment or otherwise shall not be substituted for those specified, nor shall "or equal" items be furnished pursuant to the Agreement without the Trust's prior written approval. The Trust's decision on item equality shall be final and binding.
- 8.9** If the Work provided by the Contractor or its Subcontractors fails to conform to the warranties set forth above, in addition to all other remedies available at law or equity, the Contractor shall, at its sole expense and at the Trust's option, promptly: 1) repair or replace the nonconforming Work; 2) refund the amount of money paid by the Trust for such nonconforming Work; or 3) reimburse the Trust for the cost of repairing, or replacing the nonconforming Work or having the nonconforming Work repaired or replaced by a third party. The Trust may require the Contractor to use overtime work at no cost to the Trust if such additional effort will shorten the time the Work is nonconforming. All warranty Work performed by the Contractor shall be scheduled by and at times acceptable to the Trust. If any warranty Work is provided, the Contractor's warranties shall recommence upon the Trust's acceptance of such repaired Work and shall be in effect for the duration of the warranty period or for 12 months after completion of the warranty Work, whichever is later. The terms of this section shall survive termination of the Agreement and shall survive delivery, inspection, tests, acceptance and use of the Work.

Contractor shall bear all costs and expenses associated with correcting any Defective Work and other direct property damage of the Trust to the extent caused by Contractor's breach of warranty. Such costs and direct

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- damages shall include, without limitation, the costs of necessary disassembly, transportation, reassembly, retesting, reworking, repair, or replacement of such Defective Work, as well as disassembly and reassembly of adjacent Work when necessary to give access to Defective Work, and damages caused to any other portion of the Work . Damages recoverable by the Trust shall also include reasonable attorneys' fees, engineering fees, the costs of testing reasonably required to verify that the repaired or replaced Work conforms to the applicable Warranties and requirements of this Contract in enforcing the provisions of this Article. Any repair and replacement performed by Contractor pursuant to this Article shall comply with the laws, Prudent Industry Practice (or higher standards if specified in the Contract Documents), and the Contract Documents.
- 8.10** In addition to all remedies permitted by law, the Trust reserves the right to reject and return to the Contractor for full credit and at the Contractor's expense, all over-shipments and all Work that does not conform to the Trust's specifications or requirements. Further, the Trust may, at its option, and without limiting its other rights, cancel all or any unfilled part of the Agreement if conforming deliveries are not made within the time specified. The Trust reserves the right to charge the Contractor, and the Contractor shall be liable for any loss or expense incurred as the result of the Contractor's failure to make timely delivery. The acceptance of any late delivery shall not constitute waiver to reject subsequent deliveries not made as originally scheduled.
- 8.11** The Contractor shall obtain from each Subcontractor, and extend to the Trust for its benefit, warranties for all Work performed or supplied by such Subcontractor, substantially identical to the warranties the Contractor is required to provide hereunder. All guarantees and warranties from Subcontractors shall be made to run in favor of the Trust and Contractor. Unless such guarantees and warranties generally run for a greater period of time, any such guarantees and warranties from Subcontractors shall be at least one years from Final Completion. Contractor shall provide the Trust with the information necessary to determine the additional cost involved if such guarantees and warranties are extended. Any such warranties shall be in addition to and shall not be limited by or themselves limit, the warranties of the Contractor otherwise provided in the Agreement. The Contractor shall deliver to the Trust copies of any Subcontractor's warranties. Contractor agrees during the Warranty Callback Period, as soon as reasonably possible after receipt of Notice from the Trust specifying any Defects, to cause the Subcontractor of such Work (or upon failure or refusal by such Subcontractor to do so itself), to inspect and to repair such Defects. All such repairs and replacements shall comply with this Agreement, laws and Prudent Industry Practices. Contractor shall cause the Subcontractor of such Work (or upon failure or refusal by such Subcontractor to do so itself), to bear all costs and expenses associated with correcting any such Defective Work, including necessary disassembly, transportation, reassembly, and retesting, as well as reworking, repair, or replacement of such Work, and disassembly and reassembly of adjacent Work when necessary to give access to Defective Work. Notwithstanding the issuance of or inability to obtain any Subcontractor warranties, Contractor shall be responsible for the Work and compliance thereof within the requirements of the terms of the Contract Documents.
- 8.12** Trust may be required by a relevant state Department of Transportation or other authority to produce certifications regarding the origin and manufacturing of certain products covered by the Buy America requirements of 23 U.S.C. § 313 (the "Buy America Requirements"), in the event such products are used in a project eligible for federal highway funding. In the event that Trust notifies Contractor that Goods to be provided hereunder are subject to the Buy American Requirements, Contractor represents and warrants that all relevant Goods shall be compliant with the Buy America Requirements, and Contractor shall, upon request, produce a certification, signed by an officer of the Contractor, to that effect, stating that "all manufacturing processes for these steel and iron materials, including the application of coatings (unless granted a waiver pursuant to 23 CFR 635.410), have occurred in the United States."
- 8.13** In the event that Trust notifies Contractor that a particular order is subject to the Buy America Requirements as part of the RFP or ordering process for such Work, or otherwise prior to receiving a price quotation, Contractor agrees that all quoted pricing shall be inclusive of any cost to comply with the Buy America Requirements. In the event that Trust notifies Contractor of the applicability of the Buy America Requirements subsequent to receiving a quotation, and such Buy America Requirements increase Contractor's costs, Contractor shall notify Trust of such increase, and Trust may, at its discretion: (a) require Contractor to comply with the Buy America Requirements and adjust the contract price to address such increased costs, or (b) request that the relevant state Department of Transportation or other authority petition the Federal Highway Administration for a waiver of such requirement, in which case the Contractor shall reasonably cooperate in making such petition.

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- 8.14 No Modification of the Statute of Limitations.** Nothing contained in this Article shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the Warranty Callback Period relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.
- 8.15 Cure Rights of the Trust for Breach of Warranty.** Except as otherwise provided in this Article, within ten (10) Days (or sooner, if circumstances require) of receipt by Contractor of Notice from the Trust specifying a Defect, Contractor shall give Notice to the Trust of when and how Contractor shall remedy said Defect. All defects that have cost, schedule, or safety impacts shall be remedied by Contractor immediately. If the Trust objects to Contractor's explanation of the root cause of any Defect, the proposed remedy or remedy period and Contractor does not offer a substitute root cause, remedy or remedy period satisfactory to the Trust, or if Contractor does not begin and diligently proceed to complete said remedy within the time period specified by Contractor and accepted by the Trust, or if Contractor unreasonably fails to specify a remedy or remedy period acceptable to the Trust, the Trust, after Notice to Contractor, shall have the right to perform or to have performed by third parties an acceptable evaluation of the root cause and/or remedy, and the reasonable and actual costs thereof shall be paid by Contractor, together with all reasonable attorneys' fees, and engineering fees.
- 8.16 Latent Defects.** A latent defect is a defect which exists in the Work that was not and normally would not be revealed, discovered, or located before the end of the Warranty Callback Period by any reasonably careful inspection or by any known or customary test. If and whenever a latent defect becomes apparent, the Trust shall, as promptly as practical, so notify Contractor, and Contractor shall correct such defect promptly after receiving such notice, by re-performing or replacing the Work at its expense and in accordance with applicable provisions of the Contract Documents, notwithstanding any expiration of the Warranty Callback Period.

9.0 PRICE/PAYMENT

- 9.1** The Trust will compensate the Contractor for Work provided on the basis of prices stated in the Agreement.
- 9.2** Pre-Construction Services.
- 9.2.1** Fixed Price. [INSERT BASED ON COMMERCIAL DEAL]
- 9.2.2** Rate Sheet for Time and Material Services. For certain Services as identified in the Contract Documents, the Trust shall pay the Contractor the hourly cost of Services rendered and reimbursement for all expenses and disbursements reasonably incurred in connection with the performance of the Work as follows and to the extent expressly provided by the Contract Documents or applicable WAF. Compensation to the Contractor for its performance shall be calculated by multiplying the labor rates for the "Standard Positions" for Contractor's billable personnel, attached hereto and incorporated herein as Exhibit C, by the number of hours spent by Contractor's billable personnel directly performing Service(s) under any applicable WAF(s) issued hereunder, provided that the sum(s) so calculated shall be deemed to compensate Contractor fully and finally for all of its direct and indirect labor costs, overhead charges, general and administrative expenses, and profits, including but not limited to the following:[INSERT BASED ON COMMERCIAL DEAL]
- 9.2.3** The Contractor shall make every effort to minimize Project costs; including, but not limited to, using electronic means of transmitting data, such as report drafts and initial lab results and minimizing the use of overnight mail when possible while not jeopardizing the schedule. In addition to all other cost-minimizing measures contained in the Agreement, the Contractor is encouraged to propose methods to reduce the estimated cost of the Work without impact on the quality of workmanship or other WAF requirements.

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- 9.2.4** The Contract Price shall be equitably adjusted to cover any additions, deletions or changes to the Project pursuant to Article 6.0 and for any adjustments pursuant to Articles 9.0 and 22.0.
- 9.2.5** Prices set forth herein shall not include any federal, state or local property, license, privilege, sales, excise, gross receipts, value-added or other similar taxes that may be applicable with respect to this Agreement or these Services. If a certificate of exemption or similar document is required to exempt the Services from sales or use tax liability, the Trust shall obtain and furnish to the Contractor evidence of such exemption in a form satisfactory to the applicable taxing authority.
- 9.2.6** The Contractor shall pay or cause to be paid all taxes and employer contributions imposed by present and future Federal, state, and local laws with respect to compensation of employees of the Contractor and all interest and penalties payable under said laws as a result of noncompliance therewith, and the Contractor shall indemnify and hold harmless the Trust from and against any and all claims, liabilities and expenses with respect to the foregoing.
- 9.3** Construction Phase Services. [INSERT PRICING TERMS BASED ON COMMERCIAL DEAL]
- 9.4** Standard payment terms are Net 60. The Trust shall pay all non-disputed invoice amounts, less monies withheld under Article 9 and Article 13, not more than 60 Days after receipt by the Trust of a proper invoice and any required supporting documentation, subject to the Trust's right to contest, in good faith, all or any part of the charges set forth therein. Payment shall not relieve the Contractor from any responsibilities or obligations under the Agreement, nor shall the Trust's payment constitute acceptance or a waiver of any claim arising hereunder. No payment made hereunder, except for the final payment, shall be considered as acceptance of any Work. All payments shall be subject to correction or adjustment in subsequent payments.
- 9.4.1** Monthly Payments and Schedule of Values. The Schedule of Values is set forth as Exhibit N. The Trust shall make payments to Contractor in the specific amounts identified in the Schedule of Values for Contractor's completion of certain Milestones during the previous month in the amounts identified.
- 9.4.2** Payment Terms for Change Orders. All duly executed Change Orders shall be invoiced by Contractor separately from requested payments on the Schedule of Values or shall be shown as a separate line item in the monthly Applications for Payments.
- 9.5** The Trust reserves the right to determine and choose the most economical freight mode of transportation. In cases where freight is added as a line item to an invoice or otherwise, the Trust will not accept markups of any form on the freight portion of an invoice. All freight must be invoiced at the Contractor's cost. The Trust reserves the right to require the Contractor to secure, at the Contractor's expense, original freight invoices for verification of the freight charges added to an invoice. The Trust reserves the right to withhold payment on all invoices where freight discrepancies occur, or the Contractor fails to supply validation of freight charges.
- 9.6** The Trust will not accept any restocking charges for the following returns to the Contractor: (1) defective materials, (2) over shipments, (3) material not as specified, (4) materials not requested, (5) shipments made to other than stipulated location, or (6) unauthorized delivery in advance of specified dates.
- 9.7** Monthly Applications for Payments. The Contractor shall submit invoice(s) in accordance with the Agreement. Each invoice shall reference the Trust's Purchase Order Number where applicable. Such invoice(s) shall include cost breakdowns and unit quantities as specified by the Trust. If required by the Trust, the Contractor shall submit a completed and properly executed Partial Waiver of Lien (Exhibit O), as set forth in the Agreement, with each invoice, for the Work included in such invoice. On or about the tenth (10th) Day of each calendar month, Contractor shall submit to the Trust an Application for Payment (Exhibit P) based upon activities in the Schedule of Values that have been completed by Contractor and any Change Orders that have been duly executed during the previous month. "Previous month" is characterized as beginning on the 1st day of the prior month and ending on the last day of that month. Each Application for Payment shall show and/or include:

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- 9.7.1 All compensation claimed which shall be categorized according to the Work Breakdown Structure as agreed to by the Parties reflecting the completion of discrete events or tasks where applicable.
- 9.7.2 All supporting documentation to the Trust's satisfaction to verify that contractor has completed the identified activities during the period covered by the applicable Application for Payment.
- 9.7.3 All supporting documentation to the Trust's reasonable satisfaction regarding Work performed by Contractor and its Subcontractors during the period covered by the applicable Application for Payment. Said supporting documentation may include, but shall not be limited to, the following as appropriate to verify each Application for Payment:
- 9.7.3.1 Summary of the amount invoiced per application and cumulative job to date;
 - 9.7.3.2 Subcontractor invoices (of every tier), itemized by Subcontractor, and a detailed accounting of the work performed by each Subcontractor, the amounts owed to each Subcontractor, and Percentage of Work Completed;
 - 9.7.3.3 Materials invoices, bills of sale and similar documents;
 - 9.7.3.4 Daily time sheets showing employee and regular and premium hours and actual equipment use;
 - 9.7.3.5 Summary Craft Labor report; and
 - 9.7.3.6 Any other supporting documentation reasonably required by Trust to verify the amounts requested and/or claimed by Contractor.
- 9.7.4 Contractor shall also supply the following:
- 9.7.4.1 Contractor's original Sworn Statement in the form attached to Exhibit O;
 - 9.7.4.2 Contractor's original, unconditional partial Mechanics Lien waiver for the total amount of costs and fees, on the form attached to Exhibit O;
 - 9.7.4.3 Each Major Subcontractors' (of every tier) original, unconditional partial lien waivers for the amount paid from previous invoice, on the form attached to Exhibit O (the term "Major Subcontractor" means any Subcontractor having a direct contract with Contractor with a value in excess of \$50,000);
 - 9.7.4.4 Each Major Subcontractors' (of every tier) Sworn Statements in the form attached to Exhibit O;
 - 9.7.4.5 An accounting of any Work performed by any Subcontractor (of any tier) for which no payment has been made and the reasons for such non-payment;
- 9.7.5 A signed certificate from the Contractor that all Work has been performed pursuant to and in conformance with the Contract Documents and no unauthorized substitutions have been made.
- 9.7.6 **Certification by Contractor.** In each Application for Payment, Contractor shall certify that such Application for Payment represents the amount to which Contractor is entitled pursuant to the terms of this Contract and shall also certify as follows:

There are no known Liens outstanding at the date of this Application for Payment, all amounts which are due and payable to any third party (including Subcontractors) with respect to the Work as of the date of this Application for Payment have been paid or are included in the amount requested in the current application, and, except for such bills not paid but so included, and except for amounts disputed between the Trust and Contractor

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in accordance with Article 35.0 of the Agreement between the Trust and Contractor (“Agreement”), there is no known basis for the filing of any Liens on the Project, except in respect of payments to Subcontractors withheld for proper reasons, and that lien releases or waivers from all Subcontractors required pursuant to the Agreement have been obtained in such form as to constitute an effective release of lien under the laws of the State of New York.

- 9.8** In addition to the specific requirements for each payment, the Contractor’s submittal of an invoice shall represent a certification by the Contractor that it has complied with all relevant terms of the Agreement, including, without limitation: (a) the quality assurance requirements set forth in Section 11.0; (b) all scheduling requirements set forth in Section 4.0; (c) the Safety Requirements set forth in Section 16.0; and (d) all environmental requirements set forth in Section 40.0.
- 9.9** For Phase 2 Construction Services, ten percent of each invoice shall be retained by the Trust until Final Acceptance of the Work by the Trust. Prior to Final Acceptance, Contractor shall submit an invoice to Trust for the retention and any other amounts owed, along with an affidavit affirming that all Subcontractors have been fully paid and that neither Contractor nor any Subcontractor has any liens and none are pending against Trust in relation to the Agreement.
- 9.10** The Trust shall, without waiver or limitation of any rights or remedies, be entitled from time to time to deduct from any amounts due or owing the Contractor under the Agreement any and all amounts owed by the Contractor to the Trust, whether or not in connection with the Agreement.

10.0 TAXES

- 10.1** The Contract Price shall include sales, use and similar taxes, unless otherwise provided for in the Agreement. The Trust shall not be responsible for any Federal, state, and/or local, personal property, license, privilege, or other like taxes levied on wages and/or salaries paid to Contractor’s employees, and all taxes based upon net income of Contractor’s business, which may now or hereafter be applicable to the transactions under the Agreement.
- 10.2** The Contractor shall pay or cause to be paid all taxes and employer contributions imposed by present and future Federal, state, and local laws with respect to compensation of employees of the Contractor and all interest and penalties payable under such laws as a result of noncompliance therewith, and the Contractor shall indemnify and hold harmless the Indemnified Parties from and against any and all claims, liabilities and expenses with respect to the foregoing. Contractor agrees to present, if so requested by the Trust, satisfactory evidence of payment of all such taxes and payroll deductions to the proper authorities.
- 10.3** New York law provides a sales and use tax exemptions for certain types of machinery, equipment, materials, supplies and parts. When purchasing such machinery, equipment materials, supplies and parts, Contractor must seek and obtain any applicable tax exemption. Contractor shall maintain all such tax exemption certificates in its files. Contractor shall not invoice the Trust for any New York sales and/or use tax for any machinery, equipment material, supplies or parts covered by such exemption certificate.

11.0 INSPECTION AND QUALITY ASSURANCE

- 11.1** The Contractor shall inspect all Work and make or cause to be made all tests required by the Agreement.
- 11.2** All work will be subject to the Project Administrator’s inspection, direction, and approval. The Contractor agrees to furnish all the information pertaining to the Work as the Project Administrator may require.
- 11.3** The Trust shall have the right to inspect any Work covered by the Agreement and the right to inspect and/or audit any of the Contractor’s or its Subcontractors’ inspection records and associated costs pertaining to the Agreement. Such audits may be performed by either or both the Trust’s representatives or professional auditing firms chosen by the Trust. In the event the Work or associated costs are found to be deficient or not in accordance with the Agreement, the Trust shall be entitled to seek reimbursement for payments made for the work, until repairs or other means satisfy the deficiency.

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- 11.4** In the event that the Trust discovers any errors, variations from the requirements of the Agreement, or defects in the Work, the Trust shall advise the Contractor of its discovery, however, it is expressly agreed that any omission on the Trust's part to advise the Contractor of any such errors, variations, or defects or to provide any instructions or explanations shall not give the Contractor any right or claim against the Trust, and shall not in any way relieve the Contractor from its obligation to provide the Work in accordance with the Agreement.
- 11.5** At any time during the term of the Agreement, the Trust or its designated representative shall be entitled to: (1) conduct and/or witness any test required by the Agreement; (2) otherwise inspect, witness and/or test the Work; (3) review the Contractor's and Subcontractor's procedures and documents pertaining to inspection, testing or witnessing of tests; and (4) review the Contractor's and Subcontractor's documents pertaining to the Work. For such purposes the Trust and its representatives shall be provided access to the Contractor's or Subcontractors' facilities or Work, when and in such manner as the Trust may require. In the event the Contractor employs Subcontractors for any part of the Work, the Contractor shall require Subcontractors to comply with all applicable provisions of this Agreement.
- 11.6** The Contractor shall provide and maintain an examination, inspection and testing system acceptable to the Trust as required by the Agreement. The Contractor shall submit to the Trust the results of all such examinations, tests and inspections and shall maintain records of the same and make them available to the Trust.
- 11.7** In addition to any notice requirements otherwise set forth in the Agreement, the Contractor shall give the Trust (a) five days prior written notice of any tests and inspections required by the Agreement for the Trust or its representatives' instructions, laws, regulations or ordinances to be witnessed or approved by the Trust, (b) timely notice of all other tests and inspections, and (c) 48 hours additional notice prior to actual performance of any test or inspection. Inspections by the Trust shall be made promptly, and where practicable at the source of supply. If such Work should be covered up without approval or consent of the Trust, the Work shall, if required by the Trust, be uncovered for examination and properly restored at the Contractor's expense.
- 11.8** In all cases other than those specified in Section 11.7, if the Trust requests Work to be uncovered for reexamination, the Contractor shall so comply. If such Work is found to be in accordance with the Agreement, the Trust shall pay the cost of re-examination and replacement. If such Work is not in accordance with the Agreement, the Contractor shall pay such cost. If the Trust is required to reimburse the Contractor for this Work, it shall be on the basis of Section 14.5.
- 11.9** All testing and inspections required under the Agreement shall be done in accordance with the Agreement. The Trust may perform technical inspection of the Work as may be set forth more fully in the Specification. The Project Coordinator shall have authority to reject all Work and materials which do not conform to the Agreement and respond to questions which arise in the execution of the Work.
- 11.10** Neither the Trust's nor its representative's inspection or testing, or witnessing of tests or inspections of the Work nor its failure to perform, require or approve tests or inspections shall (1) affect the warranties and guarantees of the Contractor, (2) relieve the Contractor from any responsibility or liability with respect to workmanship, materials or equipment, (3) constitute an acceptance of the Work by the Trust or an agreement by the Trust that the Work meets specified requirements, (4) impair the Trust's right to reject nonconforming or defective Work, (5) constitute a waiver by the Trust of any rights under the Agreement, or (6) relieve the Contractor of any of its obligations under the Agreement, notwithstanding the Trust's opportunity to inspect the Work, the Trust's knowledge of the nonconformance or defect, or the Trust's failure to earlier reject the Work.
- 11.11** The Trust shall have the right to inspect all materials, supplies, and equipment that are to be incorporated in the Project and make or cause to be made all tests required by the Agreement. The making of such inspections and tests by the Trust shall not relieve the Contractor of its responsibility for inspection and testing.
- 11.12** If the Trust determines that any Work has not satisfactorily passed any test or inspection or does not meet the requirements of the Agreement or that the Contractor has not conducted or has improperly conducted any

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required test or inspection, the Trust shall have the right, in addition to any other rights set forth in the Agreement, to (1) reject and stop the Work and (2) request repair of the deficiency in accordance with Section 8.0.

- 11.13** The Trust reserves the right to inspect all Work prior to shipment. The Contractor shall notify the Trust in writing of all major component shipments not less than ten Days prior to the date of shipment.
- 11.14** The Contractor shall maintain a formal quality assurance program throughout the duration of the Work. The quality assurance program shall provide continual inspection of construction operations and shall include coordination of the various trades involved in the Work.
- 11.15** The Trust shall have the right at any time during the term of the Agreement to review the Contractor's quality assurance program and to have the Contractor's Work tested and inspected by a third party. If such Work is found to be in accordance with the Agreement, the Trust shall pay the cost of re-examination and replacement. If such Work is not in accordance with the Agreement, the Contractor shall pay such cost.
- 11.16** The Trust shall have the right at any time during the term of the Agreement to require the Contractor to remove and/or correct any Work at the Contractor's expense that is not performed in compliance with the Contractor's quality assurance program.
- 11.17** The Contractor shall retain all quality assurance documents, including but not limited to nondestructive examination records and testing records for the term of the Agreement. Upon Final Acceptance, termination, cancellation, expiration or as may be otherwise required by the Agreement, or sooner if requested by the Trust, the Contractor shall submit copies of all such documents to the Trust.
- 11.18** The Contractor shall designate a quality control representative who shall be responsible for the administration and performance of the quality assurance program. This person shall be authorized to stop the Work or any portion thereof without fear of retribution.

12.0 FINAL INSPECTION/ACCEPTANCE/PAYMENT

- 12.1** Upon receipt of written notice from the Contractor that the Work is completed and ready for final inspection and acceptance, the Trust shall inspect the Work and determine if the Work has been fully performed in accordance with the terms and conditions of the Agreement.
- 12.2** If the Trust determines the Work is not complete, its written notice of rejection shall include a list of items that the Contractor shall finish in order for the Work to be complete under the terms and conditions of the Agreement. The Contractor shall within two Days of such notice provide for the Trust's review and approval of a schedule detailing when all defects will be corrected and/or the Work completed. Upon approval by the Trust, the Contractor shall remedy such defective and incomplete portions of the Work. The steps in Sections 12.1 and this Section 12.2 shall be repeated until the Trust accepts the Work as complete and so notifies the Contractor of its acceptance.
- 12.3** Upon acceptance, the Contractor shall deliver to the Trust a complete set of as-built drawings, and shall satisfy the Trust through the execution and filing with the Trust of the Release and Agreement form, as set forth in the Agreement, that all bills for labor, materials, licenses, taxes and other expenses and claims for which the Trust might be sued or for which a lien might be filed on account of the Agreement have been fully satisfied. Upon the Trust's acceptance of the Work and the Contractor's satisfactory fulfillment of the requirements of this Section 12.3 and Section 32.3, the Trust will notify the Contractor of its Final Acceptance of the Work.
- 12.4** Upon Final Completion, final payment, including money retained in accordance with Section 9.9 will be made. The Retainage shall be payable, subject to the provisions of this Subarticle, to Contractor without interest as follows: (a) one-hundred percent (100%) of the balance of the Retainage, if any, at Final Completion shall be paid to Contractor together with the payment of the Application for Payment delivered at or immediately following Final Completion (less an amount equal to the sum of (i) the Punchlist Reserve, plus (ii) liquidated damages payable by Contractor under this Contract, if applicable, plus (iii) any amounts

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permitted to be withheld by the Trust under Article 13. Notwithstanding the foregoing, the Trust in its absolute discretion, may pay all or part of the retention without waiving any of its rights or remedies hereunder.

12.5 Final Payment.

12.5.1 Contractor shall submit a final Application for Payment for the portion of the Contract Price not previously paid at Final Completion. Such final Application for Payment shall include the following:

12.5.1.1 All documents required to be submitted with an Application for Payment under Article 9;

12.5.1.2 Contractor's original, unconditional Final Mechanics Lien waiver in the form set forth in Exhibit O;

12.5.1.3 The Subcontractors' (of every tier) original, Final Mechanics Lien waivers for the total amounts of their contracts, plus any extra work, on a form to be approved by the Trust; and

12.5.1.4 A request for a Certificate of Final Completion.

The making of Final Payment shall not constitute a waiver of any claims by the Trust, including, but not limited to, those arising from: unsettled Liens; or the terms of any warranties, including faulty or Defective Work or failure of the Work to comply with the requirements of the Contract Documents. 12.5 Acceptance of the final payment shall constitute a waiver of all claims for additional compensation by the Contractor for Work performed or Losses incurred under the Contract Documents unless otherwise expressly agreed in writing by the Trust pursuant to a written request by Contractor to reserve a specific claim or claims made and granted prior to issuance of Final Payment.

12.6 Final payment shall not relieve the Contractor of any warranty, guarantee or other continuing obligations under the Agreement.

13.0 WITHHOLDING PAYMENT

13.1 The Trust may withhold payment, in whole or in part, to the extent and for the time reasonably necessary, in the Trust's reasonable judgment, to protect the Trust from loss caused by, but not limited to:

13.1.1 Defective Work not remedied;

13.1.2 Claims filed or reasonable evidence indicating probable filing of claims against the Trust or by the Trust or other parties against the Contractor; except for any such claims that are defended and accepted without reservations by Contractor's insurance company and with coverage available in the full amount of such claim.

13.1.3 Failure of the Contractor or Subcontractors (of any tier) to make payments properly to Subcontractors (of any tier) or for material or labor or for any taxes due;

13.1.4 Damage to property arising from the performance of the Work or failure to perform the Work properly ;

13.1.5 Removal and replacement of condemned Work and/or material;

13.1.6 Failure to submit documentation, data, or any other deliverable specifically required under the Agreement or as reasonably required by the Trust or its engineer;

13.1.7 Lapse of required insurance coverage;

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- 13.1.8** Disputed Work or other breach by Contractor of any of its material obligations under the Contract Documents, including the costs to the Trust of remedying the breach and all other costs directly attributable to other services that are required to be performed in connection with remedying such breach plus a fifteen percent (15%) markup;
 - 13.1.9** Environmental damage caused by or exacerbated by Contractor or any Subcontractor;
 - 13.1.10** Bonding of a Contractor lien;
 - 13.1.11** Failure of the Contractor or any Subcontractors to properly clean up the Site;
 - 13.1.12** Damage to utilities caused by Contractor's negligence or neglect;
 - 13.1.13** Liquidated damages assessed to the Contractor; and
 - 13.1.14** Disputed costs from safety shutdowns caused by Contractor or any Subcontractor.
 - 13.1.15** Unsubstantiated or unsupported amounts billed by Contractor, including the failure to provide the required supporting documentation as required by Article 9.0;
 - 13.1.16** Contractor's failure to achieve any Milestone contained in Exhibit K, Contractor's failure to provide required recovery plans, reports and updates as set forth in, or reasonably inferable from, Article 4.0 or Exhibit L, and/or Contractor's failure to accelerate its Work, as required by Article 4.0 or Exhibit L, and maintain the Project Schedule;
 - 13.1.17** Any delays caused by Contractor in the progress of the Work that delays or impacts the Trust; and
 - 13.1.18** Any amounts due to the Trust under the terms of this Agreement.
- 13.2** When the above grounds are removed or the Contractor provides a surety bond satisfactory to the Trust which protects the Trust in the amount withheld, payment shall be made within 30 Days thereafter to the Contractor for the amount withheld.
- 13.3** In addition to the right to delay payment as set forth above, the Trust shall have the right to require that the Contractor shall, in any event, take all necessary steps, at its sole cost and expense, to cause any lien filed against the Trust's or its affiliates' property to be satisfied on the record within ten days from the Trust's notice that such lien has been filed.

14.0 CHANGES TO WORK SCOPE/AGREEMENT CHANGES

- 14.1** No additions to, deletions from, or alterations in the Work and no amendment or repeal of, and no substitution for any terms, conditions, provisions or requirements of the Agreement shall be made unless first authorized in writing by the Trust. No oral changes in the Agreement shall be recognized by the Trust unless in accordance with Section 26.2.
- 14.2** The Trust may at any time make additions to or deletions from or changes in the Project and/or Work, including changes to the Specification, Drawings or the schedule. If a Trust-directed change will add to or deduct from the Contractor's cost of the Work or affect the schedule the Contractor shall notify the Trust in writing within five Days of receipt of such Trust-directed change and provide a written estimate of such cost and/or schedule modifications and, if the Trust approves a cost and/or a schedule modification for the Trust-directed change, the Agreement will be adjusted accordingly. Any claim for an extension in the schedule caused by a Trust-directed change shall be adjusted at the time of directing such change and the value of any such change shall be determined as provided in Section 14.5.
- 14.3** If the Contractor desires a change in the Work necessary to complete the Work or believes that any order, instruction, request, clarification or interpretation of the Trust, or its representatives or compliance with any laws, orders or regulations, constitutes a substantial change in the Work, the Contractor shall submit, to the

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Trust, prior to performance of any such Work, and within five Days of receipt or discovery thereof, a written change claim specifying the nature of the change, any increase or decrease in the cost of performing the Work, and any resulting adjustment in the schedule. Within 30 Days of receipt of such change claim, the Trust shall determine whether the change claim constitutes a change in the Work and if so to what extent the Agreement should be modified. The Trust shall then notify the Contractor, in writing, of its decision. Any change in the schedule resulting from the change claim shall be specified in the Trust's notice and any change in price shall be determined by the Trust in accordance with Section 14.5. Failure by Contractor to comply with the requirements of this Article shall constitute a waiver by Contractor of any and all Contractor Change Requests not pursued in accordance with the terms herein. Trust shall have no obligation to accept Contractor Change Request.

14.4 The Trust may require the Contractor to proceed with Work which is the subject of a Trust-directed change or a Contractor change claim prior to the Trust's consent to any change in the price or schedule, in which event the Trust shall so notify the Contractor in writing, and the Contractor shall then proceed with the Work, and keep an accurate account as required under Section 14.5(c), including but not limited to, submittal to the Project Coordinator by 10:00 a.m. of the next Day worked, of an accurate daily account of the cost and time thereof for each Day worked on each Trust-directed change or Contractor change claim, and the Contractor and the Trust shall then negotiate in good faith with respect to such change.

14.5 If the Trust authorizes a change in the Work as set forth in this Section 14.0 which adds to or decreases the cost of the Work, the Contractor shall proceed with the Work as changed, and the Trust shall, in its sole discretion, adjust the price by (a) a mutually agreed upon lump sum or unit price, (b) a unit price as set forth in the Agreement or, (c) in accordance with the following:

14.5.1 Reimbursement for all labor will be based on the actual direct verifiable amount of time incurred in performing the changes, at the labor rates set forth in the Agreement, which labor rates include all indirect and overhead expenses, including, but not limited to, field supervision, an allowance for small tools and equipment with a value less than \$1,500.00, and an allowance for new, and light duty vehicles up to 1.5 tons gross weight, and such items shall not be separately charged.

14.5.2 Labor not anticipated by or itemized in the Agreement shall not be utilized by Contractor without the Trust's prior written approval.

14.5.3 The labor rates payable for an individual shall be reduced for each individual when that individual reaches the maximum annual FICA, FUI and SUI contribution limits;

14.5.4 Except as otherwise provided in Section 14.5.1, reimbursement for the Contractor-owned tools and equipment not already employed at the Site (unless reimbursement is otherwise authorized by the Trust), will be based on the actual verifiable amount of time incurred in performing the changes, at the equipment rates set forth in the Agreement, which equipment rates include costs for fuel, oil, grease, repair, parts, taxes, insurance, service and maintenance of any kind and all necessary attachments, overheads and profit and such items shall not be separately charged.

14.5.5 Reimbursement shall not be allowed for any equipment or tools with a new cost of the equivalent of one thousand five hundred Dollars (\$1,500.00) or less, each.

14.5.6 Contractor owned or purchased equipment not anticipated by or itemized in the Agreement shall not be utilized by Contractor without the Trust's prior written approval, and the rate for such equipment shall in no event exceed the rates published in the most current "Rental Rate Blue Book for Construction Equipment" then in effect for the same or like equipment;

14.5.7 Reimbursement for rental of equipment, not set forth in the Agreement, will be based on the actual verifiable cost for rental and necessary attachments, to the extent actually incurred in performing changes, plus, if applicable, the hourly operating cost, less operator and any assistants included in labor rates as set forth in Section 14.5.1. The rental rates shall in no event exceed the rates published in the then-most-current "Rental Rate Blue Book for Construction Equipment". Reimbursement

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shall not be allowed for any equipment or tools with a new cost of the equivalent of one thousand Dollars five hundred (\$1,500.00) or less, each.;

- 14.5.8** Reimbursement for all Subcontractors, subject to the Trust's prior authorization to subcontract in each specific instance of change, will be based on costs actually and reasonably incurred in performing changes. Applicable Subcontractor costs shall be subject to the same terms and conditions set forth in Sections 14.5.1 through 14.5.7, and 14.5.9 and 14.5.10, unless otherwise agreed to by the Trust;
- 14.5.9** Reimbursement for the actual verifiable net (no mark-ups) cost of materials directly purchased in support of the changed Work as authorized by the Trust.
- 14.5.10** In the event that the Contractor is to be paid pursuant to Sections 14.5.1 through 14.5.9, the Contractor shall, on a daily basis, furnish the Project Coordinator with Daily Work Reports (in a format acceptable to the Trust) which briefly describe the Work rendered during the preceding Day and which are itemized to reflect: the names of all the Contractor's and the Subcontractor's personnel who performed Work under this Section 14.5(c), their rate per hour, the individual and total number of hours worked, and the total labor cost for the Day; equipment used, its rate per hour, the individual and total hours worked and the total equipment costs for the Day; and quantity(ies) of the Contractor furnished material(s) received and consumed for the Day, and the cost thereof if requested by the Trust. All labor hours, equipment hours and material quantities shall be verified by signature of the Project Coordinator. A duplicate of the original signed Daily Work Report and receipts and invoices for the Contractor furnished materials, rented equipment and Subcontractors shall accompany all invoices which the Contractor presents for payment.
- 14.6** If the Trust authorizes a change in the Work which decreases the amount and cost of the Work, such decrease shall not constitute basis for a claim by the Contractor for any loss or damages including anticipated profit.
- 14.7** The Trust shall not accept any changes submitted by the Contractor pursuant to this Section 14.0 after final payment.
- 14.8** All additional Work shall be performed in accordance with the terms and conditions of the Agreement unless otherwise specified.
- 14.9** Change Order Negotiations. Trust and Contractor shall negotiate in good faith to agree on the price for such ordered changes at the time of an issuance of a Notice to Proceed or a Contractor Change Request. If, however, the Parties cannot agree on the adjustment to be made in the Contract Price, the Work or the Schedule as a result of such Change Order, then Contractor shall nevertheless proceed to execute the Work described in the Change Order promptly upon authorization from Trust. In no event shall negotiations under this Subarticle impact the Schedule. The Parties shall resolve all disputes regarding Change Orders pursuant to Article 24.
- 14.10** All-Inclusive. The rates as contained in Exhibit C represents the all-inclusive rates that Contractor shall maintain through the life of the Contract to be used for calculating additive or deductive changes in accordance with this Article.
- 14.11** Additional Pricing. In the event of a Trust-approved change for work not contemplated or inferable by the Contract Documents for which the pricing from Exhibit C is not applicable, as determined by the Trust, the Contractor shall provide new pricing for review and acceptance by the Trust. Contractor shall provide all information requested by the Trust to substantiate the value of the new pricing.
- 14.12** Contractor Records. Contractor shall maintain complete and accurate records and supporting documentation regarding Change Orders in accordance with Contractor's established policies and procedures and generally accepted accounting practices, consistently applied. Upon three (3) Business Days prior Notice, Trust shall have access to such records during normal business hours for a period of three (3) years after Final Completion or termination of the Work, to the extent required to verify the payroll and other costs (excluding agreed-upon mark-ups and rates) set forth above.

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- 14.13** Duty to Continue the Work. In the event Trust and Contractor are unable, within twenty (20) Days of a Change Order Request, to agree upon an acceptable adjustment in the Schedule and/or acceptable changes in the Contract Price, then Contractor shall proceed with the Work following Trust's written direction to do so, provided however, Trust reserves its rights to dispute any claims of Contractor pursuant to Article 24. Trust's written direction shall include an equitable adjustment in the Schedule, if applicable.
- 14.14** Change Order For Delays. If a delay or suspension of Work or activities identified in the Schedule occurs and affects the performance of Contractor's Work on the Critical Path and Contractor has prepared an appropriate analysis identifying the extent of the delay to the Critical Path, an appropriate Change Order will be issued to adjust the Schedule and the Contract Price as specified below:
- 14.14.1** Delay to Critical Path. To the extent the delay or suspension of activities causes a delay to the Critical Path of the Schedule and is caused by the Trust, the Project Schedule shall be extended and the Contract Price shall be adjusted in an amount necessary to compensate Contractor for all reasonable Direct Costs and Contractor's Indirect Costs resulting from such delay or suspension ("Contractor's Delay Costs"). Contractor shall only be entitled to Indirect Costs to the extent Contractor can prove that it would not have had to incur the additional Indirect Costs but for the delay to the Critical Path, and under no circumstances shall Contractor be entitled to additional or extended home office overhead. In order to receive an extension of the Project Schedule or an increase in the Contract Price, Contractor must demonstrate that there was an actual delay in the performance of the Contractor's Work that impacts the Project Critical Path or an actual increase in the Contractor's costs resulting from the delay. Notwithstanding the foregoing, Contractor shall not be entitled to submit a Contract Change Request for any delay to the Critical Path that is less than two Days in total length. Contractor is not entitled to add unrelated delay events together in a single Change Request in order to meet the two Day threshold.
- 14.14.2** Delay Caused by Force Majeure. To the extent the delay or suspension on critical path activities is caused by Force Majeure, as that term is defined in Article 21.0, Contractor shall give the Trust written Notice specifying the date of commencement of such delay or suspension within five (5) Days after the date on which Contractor first becomes aware of the event or act constituting the Force Majeure. The Schedule shall be extended from the Force Majeure Delay Date only to the extent that the Force Majeure impacts the Project Critical Path. No Force Majeure event shall give rise to a change in the Contract Price.
- 14.14.3** Best Efforts to Mitigate Delay. Contractor shall use its best efforts to re-sequence the Work and/or mitigate, to the greatest extent practicable, the effect of any delay described in this Article.
- 14.14.4** Concurrent Delays. If the Contractor's Work has been delayed pursuant to the analysis set forth in Subarticle 14.4 ("Delay Event") and a separate delay also arises for all or a portion of the same period of time for which Contractor is not entitled to additional time (such as a delay under Subarticle 14.15) (the "Concurrent Delay"), then the extension of time that Contractor would otherwise be entitled to as a result of the Delay Event shall be reduced by the number of days that the Concurrent Delay exists during such Delay Event. Contractor shall not be entitled to any increase in the Contract Price for the period of time of the Concurrent Delay.
- 14.15** No Change Order for Contractor Delay or Error. To the extent the delay or suspension of the Work is caused by Contractor or any Subcontractor, no adjustment will be made to the Contract Price or Schedule, and Contractor shall propose a recovery plan as set forth in Subarticle 4.1.2. Excess costs for such work will be Contractor's responsibility. Further, no Change Order shall be issued and no increase to the Contract Price or adjustment to the Schedule shall be made in connection with any correction of errors, omissions, delays, impacts, deficiencies, or improper or Defective Work on the part of Contractor or any Subcontractors in the performance of the Work.
- 14.16** Minor Changes in the Work. Without a Change Order, the Trust may order, or the Trust and Contractor may mutually agree in writing to make, changes in the Work which do not require an adjustment in the Contract Price or an extension of the Schedule.

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14.17 Effect of Changes in Laws. The Contract Price is based on applicable Laws in effect as of the date of the Effective Date as well as those enacted or adopted but not yet in full force and effect as of the Effective Date. After the Effective Date, if a change occurs to any Laws that affects performance of the Work by Contractor, or any Subcontractor, Contractor shall comply with such changed Laws. If Contractor shall be entitled to an equitable adjustment for the impact of any changed Laws. In the event the change in Laws constitutes an event of Force Majeure for which termination of this Contract would be appropriate, the provisions of Article 18.0 shall apply.

14.18 Payment for Change Orders. Unless agreed by Trust in writing, all requests for payments made pursuant to a Change Order shall be submitted by Contractor separately from the amounts due pursuant to the Schedule of Values. Change Order payment requests and shall be submitted in accordance with the requirements of Article 9. All invoices covering additions or credits to the Purchase Order shall refer to the specific Change Order issued by the Trust with respect to the addition or credit and may not be honored unless this reference is included.

15.0 CHANGED CONDITIONS

15.1 The Contractor shall with reasonable promptness, and before such conditions are further disturbed, give the Project Coordinator written notice in accordance with Section 14.3 of subsurface or latent physical conditions at the Site differing materially from those indicated in the Agreement. The Trust shall promptly investigate the conditions, and if it finds that such conditions materially differ from those indicated in the Agreement, and materially differ from the conditions reasonably anticipated by the Parties, the Trust shall cause an increase or decrease in the cost of, or the time required for, performance of the Agreement, an equitable adjustment shall be made in accordance with Section 14.0. Any claim of the Contractor for adjustment hereunder shall not be allowed unless it has given notice as above required and before such conditions are further disturbed, strict compliance with such notice being a condition precedent to any right to receive additional compensation.

16.0 SAFETY

16.1 The Contractor shall be solely responsible and assume all liability for the safety and supervision of its employees and other persons under Contractor's or a Subcontractor's control engaged in the Work. The Contractor shall establish and effectively and continuously implement a safety program that includes both occupational and process safety as applicable. The Contractor shall, and shall require its Subcontractors and their employees to comply with all applicable Federal, state and local safety directives, requirements, rules, regulations, laws and ordinances, whether the same are in force upon the execution of the Agreement or may in the future be passed, enacted or directed, including without limitation, compliance with the safety regulations and standards adopted under the Occupational Safety and Health Act of 1970 (OSHA), as amended from time to time. The Contractor shall continually inspect the Project and supervise its personnel to determine and enforce compliance with the above provisions.

16.2 The Contractor shall, and shall require its Subcontractors and their employees to comply with Exhibit Q, Exhibit R, Exhibit S, and Exhibit T and all other applicable Safety and Process Safety Requirements and all established Project safety rules as they may be amended from time to time and to take all necessary safety and other precautions to protect property and persons from damage or injury arising out of performance on the Project, whether the same are in force at the execution of this Agreement or may in the future be passed, enacted or directed.

16.3 The Contractor shall provide adequate safeguards, safety devices and protective equipment and enforce their use and take any other needed actions to protect the life, health and safety of the public and to protect property in connection with its performance on the Project.

16.4 The Contractor shall be responsible for providing adequate fire protection, shall take all necessary measures to prevent fire from occurring at the Site, and shall be responsible for all fires associated with or affecting the Work. The Contractor shall comply with the good practices recommended in National Fire Prevention Association Standard 241 and other national consensus standards for fire safety on construction projects.

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16.5 The Contractor shall at its sole expense provide adequate first aid facilities and shall make those facilities available for the treatment of persons who may have minor injuries or become ill at the Site or while engaged in the performance of Work.

16.6 In the event that the Contractor breaches or violates (a) the terms of this Section 16.0, (b) the requirements in the Contractor Safety Requirements, or (c) any applicable Federal, state or local safety directives, requirements, rules, regulations, laws or ordinances, including without limitation, compliance with the safety regulations and standards adopted under the Occupational Safety and Health Act of 1970 (OSHA) (collectively, the “Safety Requirements”), the Trust may, in its sole discretion:

16.6.1 Interrupt, suspend or delay the Project pursuant to Section 19.0; and/or

16.6.2 Require the Contractor to implement a corrective action plan pursuant to the Contractor Safety Requirements; or

16.6.3 Terminate the Agreement for cause, pursuant to Sections 18.1 hereunder.

17.0 SURVEYS

17.1 If specified, the Trust will furnish the primary control to be used for establishing lines and grades required for the Work. The Contractor shall preserve all monuments, benchmarks, reference points and stakes. From the information provided by the Trust, the Contractor shall develop, verify the Trust survey and make all detail surveys needed for the performance of the Work.

18.0 TERM/TERMINATION

18.1 Termination for Cause.

18.1.1 If, during the term of the Agreement, the Trust notifies the Contractor that any part of the Work is defective or deficient or not in accordance with any provision of the Agreement, regardless of the stage of its completion or the time or place of discovery of such errors and regardless of whether the Trust has previously accepted it, the Trust may order the Contractor to stop performing the Work until such defect or default has been corrected at the Contractor’s sole expense. If the Contractor does not correct the default or defect within ten Days of notice, the Trust may suspend its performance until such defect or default is corrected, and/or removed and replaced at the Contractor’s expense or terminate the Agreement.

18.1.2 The Contractor shall, at its sole expense, promptly remove from the Project all Work condemned by the Trust as failing to meet the requirements of the Agreement, whether incorporated in the Project or not. The Contractor shall, at its sole expense, promptly replace and re-execute the condemned Work in accordance with the Agreement and shall remedy and/or correct all portions of the Project damaged by such removal and/or correction, including the work of other contractors.

18.1.3 If the Contractor does not take action to remove such condemned Work within ten Days after written notice from the Trust, the Trust may remove such Work and store it at the Contractor’s expense. If the Contractor does not pay the expense of such removal and storage within ten Days thereafter, the Trust may, upon written notice, remove such Work, which cost shall be borne by the Contractor, or sell such Work at auction or at private sale and retain the proceeds.

18.1.4 If the Trust corrects Work or has Work corrected that has been damaged or that was not done in accordance with the Agreement, the Trust may deduct the cost from the price as determined under the Agreement or invoice the Contractor for such costs, at its sole option. If the Trust elects to invoice the Contractor, the Contractor shall remit to the Trust such invoiced amount within thirty Days of the date of the invoice.

18.1.5 The Contractor shall not be entitled to an extension of time by reason of the Work being found defective, deficient or in any way not in accordance with the requirements of the Agreement.

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- 18.1.6** Notwithstanding any other provision of the Agreement, if the Contractor: (1) fails to prosecute the Work with diligence or has fallen behind the schedule and if in the opinion of the Trust, fails to take all necessary steps to remedy the Contractor's failure to comply with the terms of the schedule; (2) fails to make prompt payment when due to Subcontractors; (3) fails to comply with any of the terms or conditions of the Agreement; (4) sells or transfers all or substantially all of its assets without the Trust's prior written consent; (5) enters into any voluntary or involuntary bankruptcy proceeding or receivership; (6) makes a general assignment for the benefit of its creditors; (7) experiences a labor dispute which threatens adversely to affect the progress or cost of the Project hereunder; (8) abandons the Work; (9) loses control of the Work from any cause; (10) refuses or neglects to provide sufficient and properly skilled or other labor or sufficient materials of proper quality; or (11) fails to comply with the Safety Requirements, or (13) directly or indirectly causes a disruption of the Project, or should its presence result in a disruption of the Project, then the Trust shall have the right, without prejudice to any other right or remedy to terminate the Agreement, in whole or part. Such termination shall be effective upon written notice to the Contractor setting forth (a) the date of the termination and (b) that the Contractor shall immediately discontinue the Work to the extent specified in such notice. The Trust may exercise its right of partial termination under the Agreement any number of times.
- 18.1.7** In the event the Trust terminates all or any part of the Agreement for cause, the Trust may finish the Work or have the Work finished by a third party by whatever method it may deem expedient. The Trust shall not be required to obtain the lowest price for completion of the Work, but may make such reasonable expenditures as may best accomplish such completion; and the Contractor shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price as determined under the Agreement exceeds the expense of finishing the Work, including compensation for additional managerial and administrative services and all other costs and expenses actually incurred by the Trust as a direct result of the breach and termination, the Contractor hereby waives such excess. If such expenses exceed the unpaid balance, the Contractor shall pay the difference to the Trust within 30 Days of the Trust's notice thereof to the Contractor.
- 18.1.8** If all or any part of the Agreement is terminated for cause, the Trust shall be entitled, at its option, to (a) retain any Work previously delivered to the Project or paid for by the Trust, (b) require delivery of any Work and/or documents, regardless of their stage of completion which are in the Contractor's possession or control, (c) require the Contractor to assign to the Trust all or any of the Contractor's rights with respect to orders or subcontracts which relate to the Project, (d) reject all or any of the Work, regardless of whether it has been delivered to the Project, (e) require the Contractor to cooperate with a new contractor for the period of time necessary to familiarize the new contractor with the Project, (f) have another contractor complete the Agreement at the Contractor's expense, (g) require completion according to the terms of the Agreement of any Work which has not been terminated, and (h) take possession of all or part of the Contractor's equipment located at the Site for the purpose of completing the Work. The Contractor shall be required to refund to the Trust any payments theretofore made for rejected Work. The Trust shall be entitled to withhold from any payment otherwise due to the Contractor an amount sufficient to protect the Trust from any outstanding or anticipated liens or claims in connection with Work which has not been rejected or anticipated costs to complete the Work in excess of the remaining Contract Price. The Trust shall not be liable for any loss or damage (including, but not limited to, special, indirect, incidental, or consequential damages or anticipated profits) incurred by reason of termination for cause of the Agreement.
- 18.1.9** No amount shall be paid or payable by the Trust for the Contractor's termination costs including, but not limited to, demobilization costs, costs associated with the transfer or termination of personnel, or loss of anticipated profit.
- 18.1.10** All warranties and guarantees, including without limitation those set forth in Section 8.0, shall survive termination of the Agreement to the extent that they relate to Work which has not been rejected or terminated, and any other provisions of the Agreement which survive the date of termination shall continue to be binding upon the Contractor.

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18.1.11 In the event that a termination by the Trust of all or part of the Agreement for cause, under Section 18.1 is determined to have been made without cause, such termination shall thereafter be treated as termination for convenience under Section 18.2.

18.2 Termination for Convenience.

18.2.1 Notwithstanding any other provision of the Agreement, the Trust may, at its sole discretion, at any time, for any reason, by notice to the Contractor, terminate the Agreement in whole or in part without cause, and such termination shall not constitute a breach of contract. Such termination shall be effective upon the date set forth in the written notice and the Contractor, unless otherwise directed by the Trust, shall immediately:

- (a) Stop the Work hereunder on the date and to the extent specified in such notice;
- (b) Place no further orders or subcontracts for any part of the Project other than for Work which has not been terminated;
- (c) terminate, as directed by the Trust, all orders and subcontracts to the extent that they relate to Work which has been terminated;
- (d) Settle, with the approval or ratification of the Trust, to the extent the Trust may require, all outstanding liabilities and claims arising out of the Contractor's termination of orders and subcontracts pursuant to Section 18.2;
- (e) Assign to the Trust, as required by the Trust, any and all of the Contractor's rights with respect to orders or subcontracts which relate to terminated Work;
- (f) Deliver to the Trust, as required by the Trust, any or all Drawings, Design Documents, Work or documents, technical data or other information and materials regardless of their stage of completion, which are in the Contractor's possession or control;
- (g) Use its best efforts to sell, transfer or otherwise dispose, for the Trust's credit, in the manner, at the times, to the extent and at the prices directed or authorized by the Trust, any or all of the Work, provided that the Contractor (a) shall not be required to extend credit to any buyer, and (b) may acquire any such Work upon the same terms as it would be entitled to sell or transfer such Work to a third party;
- (h) Work with a new contractor for the period of time necessary to familiarize the new contractor with the Project;
- (i) Complete any Work which has not been terminated pursuant to such notice; and
- (j) Take whatever action may be necessary to preserve and protect the Work and to mitigate the Contractor's damages in connection with the partial or complete termination of the Agreement.

18.2.2 In no event shall the total of the Partial Performance Payment and/or termination costs (as provided in Section 18.2.6) exceed the price of the Work performed to the date of the notice, as determined under the Agreement.

18.2.3 The Contractor's claim for Partial Performance Payment and/or termination costs shall be contingent upon the Contractor's good faith diligent compliance with the provisions of Section 18.2 to the Trust's satisfaction which will not be unreasonably withheld, and shall be submitted to the Trust within three months of the effective date of termination for convenience. If such claim is not submitted within three months, the Contractor waives any right to the claim for Partial Performance Payment and/or termination costs.

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- 18.2.4** All warranties and guarantees set forth in Section 8.0 shall survive termination of the Agreement to the extent that they relate to Work which has not been rejected or terminated, and any other provisions of the Agreement which survive the date of termination shall continue to be binding upon the Contractor.
- 18.2.5** A termination for convenience shall not entitle the Contractor to damage remedies that would normally arise as a result of breach of contract, whether such damage remedies are categorized in contract, tort, or otherwise, as direct, special, indirect, incidental or consequential damages. Rather, the Contractor's rights are exclusively limited to Partial Performance Payment and/or termination costs.
- 18.2.6** In the case of termination for convenience of the Agreement, the Contractor's termination costs shall be limited to: (1) reasonable documented direct costs that are directly associated with termination responsibilities identified in Section 18.2; and (2) reasonable demobilization costs incurred within thirty days of the date of termination. In no case shall the Contractor be entitled to recover lost profits, nor to recover any costs and expenses associated with the inability of the Contractor to find work for idle employees and equipment that have been rendered idle as a result of termination of the Agreement.
- 18.3** In the case of termination of the Agreement, the Contractor, if notified to do so by the Trust, shall promptly, but in any event no more than seven Days from the Trust's request, remove any part or all of its equipment, material, and supplies from the Site, failing which the Trust shall have the right to remove such equipment and supplies at the expense of the Contractor.
- 18.4** **Termination at the Trust's Option Upon Completion of the Pre-Construction Phase Services.** In the Trust's sole discretion, the Trust may elect to terminate the Agreement upon the completion of the Pre-Construction Phase Services. If the Trust elects to do so, the Contractor shall deliver all final and complete Drawings, Design Documents, and all other deliverables required by the Contract Documents to the Trust within seven (7) days or such period as may be mutually agreed.
- 18.5** The Agreement shall become effective when executed by both parties and shall continue subject to the foregoing provisions of this Article 18, in full force and effect until the expiration of all guarantees, warranties and indemnities provided for therein.

19.0 TRUST'S RIGHT TO SUSPEND THE AGREEMENT

- 19.1** The Trust may at its sole discretion interrupt, suspend or delay execution of all or any part of the Project for any reason whatsoever upon written notice to the Contractor specifying the nature and expected duration of the interruption, suspension or delay ("Suspension Notice"). The Trust's Suspension Notice shall designate the amount and type of labor and equipment to be committed to the Work, if any, during the period of suspension. The Contractor shall utilize its labor, equipment and any other resources so that costs are minimized during the suspension. The provisions of this section 19.1 and section 19.2 below shall apply to any suspension by act of a governmental authority, provided such suspension is not due in whole or in part to any improper act of Contractor.
- 19.1.1** Upon receipt of such Suspension Notice, Contractor shall promptly notify the Trust of all costs associated with the suspension, delay, or interruption, and agrees not to incur avoidable costs without the Trust's prior written consent. Any costs or delays not provided by Contractor to the Trust within thirty (30) Days of Contractor's knowledge of such costs or delays shall be waived by Contractor. Despite the suspension, delay, or interruption of a portion of the Work, Contractor shall continue to perform the remaining Work.
- 19.1.2** Notwithstanding the foregoing, the Trust may immediately suspend Work in order to prevent, in the Trust's opinion, injury, loss or damage to persons or property. Work shall not thereafter proceed until Contractor agrees to conduct the Work in a manner satisfactory to the Trust and in compliance with the Contract Documents. Contractor shall not be entitled reimbursement for costs incurred due to such suspension or extension of time for performance of the Contract in the event the Trust

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suspends Contractor's Work pursuant to this Section. Failure of the Trust to inspect, observe or detect a hazardous, dangerous, or other Work condition or procedure pertaining to Contractor's Work shall not be construed as an act of omission or negligence by the Trust.

19.2 The Contractor shall immediately resume any of the Work so interrupted, suspended or delayed when directed to do so by the Trust. Except as provided in Section 18.1.9 (lost profit), the schedule and price as determined under the Agreement shall be revised to compensate for the interruption, suspension or delay. Adjustments to the price shall be adequate to compensate the Contractor for any verifiable reasonable costs or expenses the Contractor actually incurs as a direct result of the interruption, suspension or delay despite reasonable efforts to mitigate such costs and expenses. Such adjustment to the price and schedule shall constitute full settlement to the Contractor for the suspension. In no event shall the total paid to the Contractor exceed the Contract Price as adjusted pursuant to the measurement and payment terms of the Agreement. In no event shall the Contractor be entitled to any damages, including loss of anticipated profits.

19.3 In its Suspension Notice, the Trust will designate what Work, if any, is to be continued. Upon receipt of such notice, the Contractor shall, unless otherwise directed by the Trust:

19.3.1 Immediately discontinue the Work on the date and to the extent specified in the notice;

19.3.2 Place no further orders or subcontracts for or in connection with the Project other than to the extent required in the Suspension Notice;

19.3.3 Promptly make every reasonable effort to obtain suspension upon terms satisfactory to the Trust of all orders and subcontracts to the extent required by the suspension; and

19.3.4 Continue to protect and preserve the Project.

19.4 Notwithstanding any other provision of the Agreement, no compensation or extension of time will be granted to the Contractor for any suspension to the extent that the suspension is caused by the Contractor's fault, including, but not limited to, the Contractor's failure to comply with the safety and environmental protection provisions of the Agreement or to the extent that an equitable adjustment is provided for or excluded under any other provision of the Agreement.

19.5 Notwithstanding the foregoing, if the Work may directly affect the continuity of electrical or gas service, the Trust, at its option, may from time to time immediately suspend the Contractor's Work without prior written notice in order to avoid problems such as safety hazards or interruption of service.

20.0 EMERGENCY ASSISTANCE (CONTRACTOR'S RIGHT TO SUSPEND PERFORMANCE)

20.1 Not Used.

21.0 FORCE MAJEURE

21.1 As used in this Contract, the term "Force Majeure" shall mean any extraordinary acts, events, or occurrences that delay the Critical Path of the Project that are not caused by the fault, negligence, or willful misconduct of either Party, and are beyond the reasonable control of the affected Party, and could not be foreseen or anticipated by either Party, including the following: earthquakes, tidal waves, floods, fire, hurricanes, blizzards, quarantine, blockade, governmental acts, war (declared or not), rebellion, terrorism (foreign and domestic), or national or regional labor disputes (including walk-outs, work stoppages or strikes). All Force Majeure events require approval by USEPA that the event is a Force Majeure event as described in the March 24, 2014 UAO. A Party shall be excused from performance and shall not be considered to be in default with respect to any obligation hereunder, except the obligation to make payments previously due in a timely manner for liabilities actually incurred, if and to the extent that its failure of, or delay in, performance is due to a Force Majeure; provided the Party claiming excuse by reason of such Force Majeure: (a) gives the other Party written Notice describing the particulars of the Force Majeure event as soon as reasonably practicable, but in no event later than seven (7) Days after the occurrence of such event; (b) suspends performance only to the extent and for the duration that is reasonably required by the Force Majeure event; (c) is not excused

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as a result of such occurrence from any obligations of such Party which arose before the occurrence causing the suspension of performance; (d) uses commercially reasonable efforts to overcome or mitigate the effects of such occurrence; and (e) promptly resumes performance hereunder when such Party is able to resume performance of its obligations under this Contract, and shall give the other Party written Notice to that effect. Upon receipt of such notice, if necessary, the time for performing the affected activities shall be extended for a period of time reasonably necessary to overcome the effect of such delays. Such extension shall be the sole remedy and compensation for each *force majeure* event. Notwithstanding the foregoing, the Trust shall have the right to terminate the Agreement under Section 18.2.

- 21.1.1** Events Not Constituting Force Majeure. The term “Force Majeure” shall not include any of the following (including, but not limited to): local labor disputes (including walk-outs, work stoppages or strikes); labor disputes (including walk-outs, work stoppages or strikes) caused by: breaches of any applicable labor or collective bargaining agreement by the Contractor or any of its Subcontractors; actions of Contractor toward the Trust’s personnel, or personnel of the Trust’s Engineer; or unfair labor practices of Contractor; Contractor’s inability to pay monies due and owing to any third party or Subcontractor, actions, inactions or non-performance on the part Contractors Subcontractors, the inability of Contractor to secure labor to perform the Work, or weather conditions other than those specifically listed herein; any event the impact of which Contractor claims is less than two Days and the impact does not affect activities on the Critical Path.
- 21.2** The written notice required under Section 21.1 shall specify the nature, cause, date of commencement and anticipated extent of such delay or nonperformance and whether it anticipates that any delays in scheduled delivery or performance will result. Such notice shall be submitted in ample time to permit full investigation and evaluation of any claimed delay or nonperformance. Failure to provide such notice shall constitute a waiver of any claim.
- 21.3** Contractor shall be obligated to exhaust all reasonable efforts and means in the event of any labor unrest, dispute, or strike to avert or avoid delay or stoppage of Work. In the event of any strike, walkout, lockout, or other labor dispute, Contractor shall be required to cross any picket line to continue the Work. The Trust may direct Contractor, at Contractor’s costs, to take reasonable steps to resolve any strike, walkout, lockout or other labor dispute, or procure Materials or labor from other sources so as to minimize adverse impact on the Project.
- 21.4** The Trust shall extend the schedule for changes in the Project, as provided in Section 14.0, for *force majeure* events, as provided in Section 21.0, or for suspension of Work, as provided in Section 19.0, unless pursuant to Sections 14.0 or 19.0, extensions of time shall not be a basis for any increased payment under the Agreement.

22.0 LIABILITY AND INDEMNIFICATION

- 22.1** If any negligent or otherwise wrongful act or omission on the part of the Contractor or its Subcontractors or any person under Contractor's control causes in whole or in part, death or injury to any person, including but not limited to the Trust's or its affiliates' employees, or any damage to, environmental contamination of, or destruction of any property, including but not limited to property of the Indemnified Parties, the Contractor shall be liable for any claims, losses, damages and costs (including legal expenses) arising therefrom.
- 22.2** To the fullest extent allowed by law, the Contractor shall indemnify, defend, and save harmless the Indemnified Parties from any loss, damage, liability, cost, third party suit, charge, expense, or third party cause of action including reasonable legal expenses, whether unconditionally certain or otherwise, as they exist on the effective date of the Agreement or arise at any time thereafter, arising out of any damage or injury to property of an Indemnified Party, the Contractor and/or third parties (including real property, personal property and environmental damages), persons (including injuries resulting in death), or economic damages, directly or indirectly, to the extent caused by or arising out of performance of this Agreement (i) including any breach of the Agreement by Contractor, (ii) any negligence, willful misconduct, or breach of law of the Contractor, its agents, employees, Subcontractors, and suppliers, (iii) any third party claim under U.S. law pertaining to copyright infringement, trademark infringement, libel, slander, defamation, invasion of privacy, piracy, or plagiarism arising from the Trust's use, consistent with the terms of the Agreement, of the final deliverables (except to the extent that such third party claim arises from materials supplied by the Trust, or any unauthorized modifications to the deliverables by the Trust), (iv) any equipment, property or facilities used by the Contractor, its agents, employees, Subcontractors, and suppliers, (v) failure of the Contractor or its Subcontractors to comply with Laws and Standards, or (vi) failure of Contractor to provide adequate protection to prevent all damage to property along the Canal arising from the execution of the Work.
- 22.3** The Contractor shall take prompt action to defend and indemnify the Indemnified Parties against claims, actual or threatened, but in no event later than notice by the Trust to the Contractor of the service of a summons, complaint, petition or other service of process against the Trust alleging damage, injury, liability, or expenses subject to the indemnification obligations set forth in Section 22.1. If such claim is subject to the foregoing indemnity obligation, the Contractor shall defend any such claim or threatened claim, including as applicable, engagement of legal counsel, to respond to, defend, settle, or compromise any claim or threatened claim. The Contractor shall not settle any claim, action, suit or proceeding for which it is indemnifying the Trust in a manner that would impose any legal liability or financial obligation on the Trust without first obtaining the Trust's written consent.
- 22.4** Furthermore, the Contractor understands that, in the event that it has breached its obligations pursuant to this agreement, it is responsible for any and all reasonable costs and expenses incurred by the Trust to enforce this indemnification provision.
- 22.5** The Trust may (at its own expense unless reimbursement is provided by Contractor's insurance) participate in the defense and retain its own counsel in connection with any claim. If the Contractor fails to assume control of the defense of any claim, the Trust may defend the claim at the Contractor's cost. The Trust's defense of a claim does not relieve the Contractor from its obligations to defend or indemnify.
- 22.6** The obligations under Section 22.0 shall not be limited in any way by any limitation on the Contractor's insurance or by a limitation on the amount or type of damages. In addition, the obligations under Section 22.0 shall not be limited in any way by any compensation or benefits payable by or for the Contractor or any Subcontractor under worker's compensation acts, disability benefit acts or other employee acts.
- 22.7** **Workers' Compensation Waiver.** To the fullest extent permitted by Laws, Contractor expressly: (1) waives the benefit, for itself and all Subcontractors insofar as the indemnification of Indemnified Parties is concerned, of the provisions of any applicable workers' compensation law limiting the tort or other liability of any employer on account of injuries to the employer's employees; and (2) assumes liability in accordance with this Article.
- 22.8** **Professional Liability.** Contractor agrees to the fullest extent permitted by law to indemnify and hold harmless the Trust, the Indemnified Parties against all Losses arising from the negligent acts or omissions of

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Contractor in the performance of professional Work under the Contract Documents, to the extent that Contractor is responsible for such Losses on a comparative basis of fault and responsibility between Contractor and the Trust. Contractor shall not be obligated to indemnify the Trust or the Trust's Engineer for their respective negligence or misconduct.

- 22.9 Patent, Copyright, and Trade Secret Indemnity.** Contractor warrants and represents that any Material, apparatus, process, technology know-how, and the like or any part thereof used or installed pursuant to, or in connection with, the Contract Documents does not and will not violate or infringe any copyright, trademark, service mark, patent or invention, trade secret, or other intellectual process, technology, property, or proprietary right of any third party. Contractor agrees to indemnify, defend, and hold the Trust and any other Indemnified Party harmless from and against any and all Losses that any Indemnified Party may hereafter suffer or pay out by reason of any infringement of a patent or copyright, or the misappropriation of any trade secret protected under the Laws based upon the Work designed or used by Contractor or any of its Subcontractors.
- 22.9.1 Patent, Copyright and Trade Secret Infringement.** Contractor shall, at its sole expense, promptly defend against any patent, copyright, or trade secret infringement claim, demand, action, or proceeding, unless directed otherwise by the Trust, provided that the Trust shall have notified Contractor upon becoming aware of such claim, demand, action, or proceeding and provided further that Contractor's aforementioned obligations shall not apply to Materials, equipment, or processes furnished or specified by the Trust.
- 22.9.2 Trade Secret Misappropriation.** Contractor shall, at its sole expense, promptly defend against any claim, demand, action, or proceeding relating to the misappropriation of Trade Secrets, unless directed otherwise by the Trust, provided that the Trust shall have notified Contractor upon becoming aware of such claim, demand, action, or proceeding and provided further that Contractor's aforementioned obligations shall not apply to Materials, equipment or processes furnished or specified by the Trust.
- 22.10 Substitution by Contractor.** Contractor shall have the right, in order to avoid any Losses for infringement or misappropriation, to substitute, at its expense, any non-infringing Materials or processes, or to modify such infringing Materials or processes of the Work so they become non-infringing, or to obtain the necessary licenses to use the infringing Materials or processes provided that such substituted and modified Materials or processes meet all the requirements and are subject to all the provisions of the Contract Documents.
- 22.11 Removal of Injunctions.** If the Trust or Contractor is enjoined from completion of the Work or any part thereof, or from the use, operation, or enjoyment of the Work or any part thereof as a result of any claim, legal action, or litigation of the type described in this Subarticle, Contractor shall use commercially reasonable efforts to have such injunction removed promptly at no cost to the Trust, and the Trust may without thereby limiting any other right it may have hereunder or at law or in equity, require Contractor at Contractor's option to supply, temporarily or permanently, facilities not subject to such injunction and not infringing any patent or to replace all such facilities or to take such steps as may be necessary to ensure compliance by the Trust with such injunction, all to the satisfaction of the Trust while maintaining the functionality of the Work and all without cost or expense to the Trust, including any additional operating cost.
- 22.12** Contractor shall indemnify the Trust for all penalties imposed by the EPA as a result of violations of the Design UAO or any Construction UAO arising from the performance of the Contractor's Work.
- 22.13** The Contractor shall obtain from its Subcontractors, for the Indemnified Parties' benefit, agreements substantially similar to those contained in this Section 22.0. Notwithstanding any other provision of the Agreement, this Section 22.0 shall survive the termination, cancellation, or expiration of the Agreement.

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23.0 INSURANCE

23.1 From the commencement of the Agreement, through final expiration or longer where specified below, the Contractor shall provide and maintain, at its own expense, insurance policies, intended to be primary (with no right of contribution by any other coverage available to the Insured Parties), covering all Work and Services to be performed under or in connection with this Agreement, issued by reputable insurance companies with a rating in compliance with the requirements of Section 23.19, which at least meet or exceed the requirements listed herein:

23.1.1 Workers Compensation and Employers Liability Insurance as required by the applicable law. Coverage shall include the U.S. Longshoremen’s and Harbor Workers Compensation Act, the Jones Act, and Alternate Employer endorsement, if applicable. The employer’s liability limit shall be at least \$1,000,000 each per accident, per person disease and disease policy limit. In the event the Alternate Employer endorsement has not been added to the policy at the time a claim arises, the Contractor shall indemnify and hold harmless the Insured Parties from any liability that would have otherwise been covered had that endorsement been added. Contractor is required to carry and maintain Workers’ Compensation on all employees, regardless of whether or not applicable state statute allow for certain exemption. Workers Compensation carrier shall provide a Waiver of Subrogation in favor of the Trust.

23.1.2 Commercial General Liability Insurance (“CGL”), covering all Work to be performed under the Agreement, with minimum limits of:

Combined Single Limit	\$5,000,000 per occurrence
General Aggregate and Product Aggregate	\$15,000,000

The CGL policy shall include Contractual Liability (with this Agreement being included under the definition of “Insured Contract” thereunder) and no action over exclusion, Products-Completed Operations coverage, Site Liability and, if applicable, explosion, collapse, and underground coverage (“XC&U”). CGL shall be written on an occurrence basis and Completed operations coverage shall be maintained continuously until the later of: (a) three years after Final Acceptance, or (b) the applicable state statute of repose. Contractor’s protective (Independent Contractors) coverage in all cases where Subcontractors are to perform any of the operations, Work, and Services to be performed by or on behalf of the Contractor under or in connection with this Agreement. This policy shall comply with the Additional Insured provision as required in Section 23.7 below. A liability insurance policy containing an annual aggregate limit of liability shall be amended to reflect that the annual aggregate limit applies on a per project basis.

23.1.3 Commercial Automobile Liability, covering all owned, non-owned and hired vehicles used in connection with all Work or Services to be performed by or on behalf of Contractor with minimum limits of:

Combined Single Limit	\$1,000,000 per occurrence
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The Commercial Automobile Liability policy shall include coverage for sudden and accidental pollution liability, limited solely by the Insurance Services Organization Standard pollution exclusion, or its equivalent. MCS 90 endorsement and endorsement CA9948 if “pollutants” as defined in exclusion 11 of the Commercial Auto policy are to be transported. This policy shall comply with the Additional Insured provision as required in Section 23.7 below.

For Transporters of Hazardous Material, the following additional minimum limits for commercial auto liability shall apply:

Contractor shall maintain Commercial Auto Liability including owned, hired, leased, rented and non-owned vehicles with at least minimum limits as follows:

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Combined single limit, per accident \$5,000,000

And will include the MCS 90 endorsement and endorsement CA9948 if “pollutants” as defined in exclusion 11 of the Commercial Auto policy are to be transported.

Minimum scope of coverage: Automobile Liability/Transporters Liability as specified by ISO, form number CA 0001 (Ed. 1/87), code 1 (any auto), with an MCS 90 endorsement attached if “pollutants” as defined in exclusion 11 of the commercial auto policy are to be transported.

23.1.4 Umbrella or Excess Liability, with a minimum per occurrence limit of:

\$20,000,000

This coverage shall run concurrent to the CGL required in 23.1.2 above, shall apply excess of the required automobile, CGL and employer’s liability coverage required in this Section 23.0, and shall provide additional insured status as outlined below. Umbrella or Excess Liability shall be written on a follow form basis and shall not contain any exclusions or limitations that are not in the underlying policies.

23.1.5 Watercraft Liability, if the Work or Services requires the use of watercraft, with the same minimum limits of liability as outlined in Section 23.1.2.

23.1.6 Aircraft Liability, if the Work or Services requires the use of aircraft or unmanned aircraft systems, with a limit of liability of not less than \$10,000,000 combined single limit.

23.1.7 Owners & Contractors Protective Liability, with a limit of liability not less than \$1,000,000, if required by use of subcontractors in the work being performed and mutually agreed to by the Trust and the Contractor. Proof of coverage under the Contractor's CGL policy will satisfy this requirement.

23.1.8 Professional Liability insurance with a combined single limit of not less than twenty million dollars (\$20,000,000.00) per occurrence and in the aggregate. Such insurance shall provide a Limited Indemnification Endorsement for the Trust. The Professional (Errors & Omissions) Liability policy shall include coverage for damages including environmental damage resulting from the operations and services of the Contractor described under the Scope of Services and the Contract Documents. Coverage shall include claims arising out of an error, omission or negligent act in the performance of professional services by or on behalf of the Contractor. The retroactive date of such Policy shall pre-date the date of commencement of the Scope of Services.

23.1.9 If applicable, Contractors transportation insurance with a combined single limit of one hundred and twenty five percent (125%) of the shipment value. Required per shipment for materials or equipment that the loss or damage will result in a delay of a Critical Path Milestone. Contractors ocean freight insurance with a combined single limit of one hundred and twenty five percent (125%) of the shipment value. Required per shipment for materials or equipment that is shipped on the ocean or inland waterways. Contractor’s railroad protection liability insurance with a combined single limit of not less than five million dollars (\$5,000,000.00) per occurrence and have the railroad exclusion deleted from the commercial general liability insurance policy.

23.2 **Other Coverage.** These requirements are in addition to any which may be required elsewhere in this Agreement. In addition, the Contractor shall comply with any governmental site specific insurance requirements even if not stated herein. This includes providing evidence of insurance and additional insured status, if necessary, to any third party property owner on which the Contractor’s Work activities associated with this Agreement may be taking place.

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23.2.1 For Treatment, Storage and Disposal Firms the following additional minimum Risk Management Requirements shall apply:

a) **Minimum Limits of Pollution Legal Liability Insurance.** Contractor shall maintain Pollution Legal Liability with at least minimums limits as follows:

Per Occurrence	\$4,000,000
Annual Aggregate	\$8,000,000

And will cover sudden and gradual pollution losses arising from the facility, associated with work performed under this Agreement. If the insurance is on a “claims made” basis, it shall be maintained for a period of time not less than five years with the retroactive date to be held constant with the date of this Agreement.

b) **Minimum Scope of Coverage. Pollution Legal Liability.** For pollution losses arising from the insured facility, coverage shall apply to sudden and gradual pollution conditions including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, which results in bodily injury or property damage.

Coverage should include:

1. Bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death;
2. Property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, clean-up costs, and the loss of use of tangible property that has not been physically injured or destroyed.
3. Defense including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensation damages.

23.3 Additional Requirements. All above-mentioned insurance policies, including those provided by Subcontractors, shall provide the following:

23.3.1 Be primary to any other insurance carried by the Trust and the Trust’s insurance is non-contributory;

23.3.2 Contain separation of insureds clause; and

23.3.3 Provide for a waiver of all rights of subrogation that insurance carrier might exercise against the Trust where allowed by law.

23.4 Builder’s Risk Insurance. Contractor shall provide and maintain Builder’s Risk Insurance until either Substantial Completion of this contract, covering the Trust and Contractor and its subcontractors, as additional insured as their respective interests may appear, with respect to the Work and other property on Site including materials, equipment, supplies and structures to be used in the construction of the Work while located at the project site, in transit or while temporarily located away from the project site for the purpose of repair, adjustment or storage at the risk of one of the insured parties. The builder’s risk policy shall provide a waiver of subrogation in favor of all insured parties. Such builder’s risk shall be on an “all risk” form and include a sublimit for flood and earthquake of \$100,000,000, a 50/50 clause, and hot testing. The Contractor shall be responsible for any applicable deductible, but in no event shall their deductible exceed \$100,000. When not otherwise insured, Contractor shall also carry Fire, Extended Coverage, Vandalism, and Malicious Mischief Insurance on construction machinery, materials, tools, and equipment or similar property belonging to others, for which the Trust may be liable. Such property shall be insured while it is part in the open on the Trust’s Site, except that property buried in the ground or noncombustible property in the open need not be insured.

23.5 Not used.

23.6 Contractors Pollution Liability (“CPL”): covering any sudden, non-sudden, and accidental pollution liability which may arise out of, under, or in connection with this Agreement, including all Work and Services to be performed by or on behalf of Contractor, or that arise out of the Contractor's use of any owned, non-owned or hired vehicles or non-owned disposal locations, with a **minimum** liability limit of: (a) Bodily Injury (“BI”) and Property Damage (“PD”) - \$25,000,000 per incident and in the aggregate. Coverage shall apply to sudden and non-sudden pollution conditions including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants, silt or sediment into or upon land, the atmosphere or any watercourse or body of water, provided such conditions are not naturally present in the environment in the concentration or amounts discovered, unless such natural condition(s) are released or dispersed as a result of the performance of Covered Operations and Services. At the option of the Trust Contractor will provide such coverage exclusively for this Project, and the additional premium shall be reimbursed by the Trust. However, this requirement may be satisfied by providing either this CPL policy, which would include naming the Insured Parties, including their officers and employees, as additional insured's as outlined in this section. The Contractor agrees to indemnify and hold the Insured Parties harmless against any and all liability resulting from any coverage deficiency that is out of compliance with this insurance requirement.

For losses covered by the pollution conditions described above that arise from the operations of the Contractor described under the Scope of Work in the contract. This policy should include the following coverage arising from pollution from covered operations:

- a) Bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death;
- b) Property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, clean-up costs, and the loss of use of tangible property that has not been physically injured or destroyed;
- c) Defense including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensation damages; and
- d) No exclusions for dredging, sedimentation, asbestos, lead paint, silica or mold/fungus/legionella.

This requirement may be satisfied by providing either this CPL policy, which would include naming the Insured Entities, including their officers and employees, as additional insured's as outlined in Section 23.6 below; or by providing coverage for pollution liability under the CGL and commercial automobile insurance policies required herein – limited solely by the Insurance Services Organization (ISO) standard pollution exclusion, or its equivalent.

23.7 Additional Insured, Loss Payee: The Contractor shall name the Insured Parties listed in Exhibit W as additional insureds, in order to provide the same protection under the Contractor's policies as other insureds automatically covered, on the coverages in this Article. These policies shall be primary and noncontributory to the Trust and its grantors for liabilities associated with or arising out of all Work or Services to be performed by or on behalf of the Contractor, including ongoing and completed operations. The additional insured endorsement shall be ISO form CG 20 10 11 85. The intent of the Additional Insured Requirement under the CGL, Auto, CPL, and Umbrella/Excess policies is to include the Insured Entities listed in Exhibit W inclusive of their directors, officers and employees, as Additional Insured's for liabilities associated with, or arising out of, all operations, Work or Services to be performed by or on behalf of the Contractor, including ongoing and completed operations, under this Agreement.

23.8 Risk of Loss: The Contractor shall be responsible for all risk of loss to its equipment and materials, and any other equipment and materials owned by its employees or by other third parties that may be in their care, custody and control. If this coverage is excluded from the Commercial General Liability policy, then Trust will accept coverage under the Contractor's property policy. In the event that any Goods are supplied by the Insured Parties, Trust will provide the insurable value of the Goods to the Contractor in writing, both cumulatively and on a maximum per item basis. The Contractor will provide replacement cost insurance for these Goods under a blanket builder's risk policy, an equipment floater, or other equivalent coverage, while such Goods are under the care, custody and control of the Contractor. Such insurance shall cover all Goods outlined in the Agreement or as noted on subsequent contract amendments. The coverage limit shall apply

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- on either a per location basis or a maximum per item basis, and shall name the Insured Parties, as a Loss Payee with respect to their insurable interest.
- 23.9** These requirements are in addition to any which may be required elsewhere in this Agreement. In addition, the Contractor shall comply with any governmental and/or site-specific insurance requirements even if not stated herein. This includes providing evidence of insurance and additional insured status, if necessary, to any third party property owner on which the Contractor's work activities associated with this Agreement may be taking place as required by law or permit. The Contractor shall comply with any governmental and/or site-specific insurance requirements even if not stated herein.
- 23.10** **Subcontractors**. In the event that the Contractor uses subcontractors in connection with the provision of the Goods, the Contractor expressly agrees that it shall have the sole responsibility to make certain that all Subcontractors are in compliance with these insurance requirements and remains compliant throughout the course of this Agreement, and thereafter as required. The Contractor shall remain liable for the performance of the Subcontractor, and such contract relationship shall not relieve the Contractor of its obligations under this Agreement. In additions, such Subcontractor shall name both the Insured Entities and Contractor as additional insured under the coverages. If requested, Contractor will provide Trust with an insurance certificate from its subcontractor evidencing this coverage.
- 23.11** Certificate(s) of Insurance. Prior to providing the Services or starting the Work, Contractor shall promptly provide the Trust with Certificate(s) of Insurance for all coverages required in the Agreement at the address Gowanus Canal Environmental Remediation Trust, c/o de maximis, inc., 450 Montbrook Lane, Knoxville, TN 37919-2705. Policies shall provide that at least 30 days prior written notice shall be given to the Trust in the event of any cancellation or diminution of coverage and certificates shall outline the amount of deductibles or self-insured retentions which shall be for the account of the Contractor. Such deductibles or self-insured retentions shall not exceed \$100,000 unless agreed to by the Trust.
- 23.12** Not used.
- 23.13** Not used.
- 23.14** The Contractor and its insurance carrier(s) shall waive all rights of recovery against the Insured Parties and their directors, officers and employees, for any loss or damage covered under those policies referenced in this insurance provision, or for any required coverage that may be self-insured by the Contractor. To the extent the Contractor's insurance carriers will not waive their right of subrogation against the Insured Parties, the Contractor agrees to indemnify the Insured Parties for any subrogation activities pursued against them by the Contractor's insurance carriers. However, this waiver shall not extend to the gross negligence or willful misconduct of the Insured Parties or their employees, subcontractors or agents.
- 23.15** If any policy should be canceled before final payment by the Trust to the Contractor and the Contractor fails immediately to procure other insurance as specified, the Trust reserves the right to procure such insurance and to deduct the cost thereof from any sum due the Contractor under the Agreement or to invoice the Contractor.
- 23.16** The Contractor shall furnish the Trust with copies of any accident report(s) sent to the Contractor's insurance carriers covering accidents, incidents or events occurring in connection with or as a result of the provision of the Work or Services pursuant to the Notices provisions in Section 46.0. If the Trust is named in a lawsuit involving the operations and activities of the Contractor associated with this agreement, the Contractor shall promptly provide copies of all insurance policies relevant to this accident or incident if requested by Trust.
- 23.17** The Contractor represents that it has full policy limits available and shall notify the Trust in writing when coverages required herein have been reduced as a result of claim payments, expenses, or both.
- 23.18** Nothing contained in these insurance requirements is to be construed as limiting the extent of the Contractor's responsibility for payment of damages resulting from its work under the Agreement, or limiting, diminishing, or waiving the Contractor's obligation to indemnify, defend and save harmless the Trust and the Indemnified Parties in accordance with these Terms and Conditions.

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- 23.19 Ratings.** All insurance coverage shall be provided by insurance companies reasonably acceptable to the Trust and having ratings of A-/VII or better in the Best's Key Rating Insurance Guide (latest edition in effect at the latest date stated in the certificates of insurance referred to herein).
- 23.20 Breach of Contract.** Failure to obtain and maintain the required insurance shall constitute a breach of contract, unless a written waiver of the specific insurance requirement is provided to Contractor by the Trust.
- 23.21 Non-Waiver.** Failure of Contractor to provide insurance as herein required or failure of the Trust to require evidence of insurance or to notify Contractor of any breach by Contractor of the requirements of this Article shall not be deemed to be a waiver by the Trust of any of the terms of the Contract Documents. The obligation to procure and maintain any insurance required is a separate responsibility of Contractor and independent of the duty to furnish a certificate of such insurance.
- 23.22 Aggregate Limits.** If any of the required insurance coverages contain aggregate limits applying to other operations of Contractor outside of the Work performed for the Trust and such limits are diminished by any incident, occurrence, claim, settlement, or judgment against such insurance, Contractor shall notify the Trust and take immediate steps to restore such aggregate limits or shall provide other insurance protection for such aggregate limits
- 23.23 The Trust's Right to Purchase.** In the event of any failure by Contractor to comply with the insurance requirements set forth herein, the Trust may, without in any way compromising or waiving any right or remedy at law or in equity, upon five (5) Days' written Notice to Contractor, purchase such insurance, at Contractor's expense, provided that the Trust shall have no obligation to do so, and, if the Trust shall do so, Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages. All such costs incurred by the Trust shall be promptly reimbursed by Contractor and/or may be withheld from any payment due Contractor.
- 23.24 Contractor's Commencement of Work Without Insurance.** Commencement of Work without the required Certificates of Insurance, or without compliance with any other provision of the Contract Documents, shall not constitute a waiver by the Trust of any rights contained in the Contract Documents.

24.0 RIGHTS, CLAIMS AND DISPUTES

- 24.1** Any claim which the Contractor may have against the Trust arising out of the Work shall be presented in writing to the Trust no later than 30 days after the first occurrence of the circumstance which gave rise to the claim. The claim shall contain a concise statement of the question or dispute and the relevant facts and data (including the applicable Agreement provision) which support the claim. The Contractor shall furnish any additional information which the Trust may require to enable it to evaluate and decide the claim.
- 24.2** Strict compliance is a condition precedent to reimbursement or additional time. Failure to submit any claim in such 30-day period shall constitute a waiver on the Contractor's part for entitlement to either additional reimbursement or additional time for performance under the Agreement
- 24.3** Any dispute between the Trust and the Contractor with respect to the Agreement that cannot be resolved in the normal course by the respective representatives of the Parties, shall be referred to the responsible officers of the Trust and the Contractor for resolution. Notwithstanding the existence of a dispute, the Trust shall be obligated to maintain payments not in dispute to the Contractor and the Contractor shall be obligated to proceed (or to continue) with the Work unless otherwise directed by the Trust.

25.0 RIGHTS AND REMEDIES; TRUST LIABILITY

- 25.1** The rights and remedies of the Trust herein shall not be exclusive and are in addition to any other rights or remedies provided by law or equity.
- 25.2** Neither party shall be liable to the other for any incidental, consequential, special, contingent, multiple, or punitive damages in connection with the Agreement, including, without limitation, loss of profits, attorney's fees, or litigation costs for any actions undertaken in connection with or related to the Agreement, including

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without limitation damage claims based on causes of action for breach of contract, tort (including negligence), or any other theory of recovery, except to the extent, if any, that the Trust shall incur any such damages to a third party as a result of the fault of the Contractor, in which event Contractor shall be liable to Trust for any such damages the Trust actually incurs.

25.3 All provisions related to warranty, indemnification, confidentiality and proprietary rights shall expressly survive termination or expiration of the Agreement.

25.4 In no case shall the Trust's liability to the Contractor exceed the price for Work as determined under the Agreement.

26.0 DISPUTE RESOLUTION

26.1 **Step Negotiations.** The Parties shall attempt in good faith to resolve all Disputes promptly by negotiation, as follows. Either Party may give the other Party written Notice of any Dispute not resolved in the normal course of business. Executives of both Parties at levels one level above the Parties' personnel who have previously been involved in the Dispute shall meet at a mutually acceptable time and place within ten (10) Days after delivery of such Notice, and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the Dispute. If the matter has not been resolved within thirty (30) Days from the referral of the Dispute to senior executives, or if no meeting of senior executives has taken place within fifteen (15) Days after such referral, either Party may initiate mediation as provided hereinafter. If a Party intends to be accompanied at a meeting by an attorney, the other Party shall be given at least three (3) working Days' Notice of such intention and may also be accompanied by an attorney. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and state rules of evidence. Each Party will bear its own costs for this Dispute resolution phase.

26.2 **Mediation.** In the event that any Dispute arising out of or relating to the Contract Documents is not resolved in accordance with the procedures set forth in Subarticle 26.1, such Dispute shall be submitted to mediation to any of the following mediators: [INSERT], or, if neither mediator is available, another mutually agreed to mediator. The mediation session shall take place at a location identified by the Trust. Each Party will bear its own costs for this Dispute resolution phase. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purpose of the Federal Rules of Evidence and state rules of evidence. Each Party will bear its own costs for this Dispute resolution phase.

26.3 **Continued Prosecution of the Work.** In case of any Dispute which is or may be the subject of mediation, Contractor shall continue to diligently prosecute the Work and maintain its progress, and the Trust shall continue to make payments to Contractor for those portions of the Work completed that are not the subject of Dispute in accordance with the Contract.

27.0 DOCUMENTS/INTELLECTUAL PROPERTY

27.1 The Contractor shall supply all documents in quantities and types, at times, according to instructions, and in the manner set forth in the Agreement. Upon the Trust's request, any other documents prepared by the Contractor in connection with the Project shall be delivered to the Trust upon completion, cancellation or termination of the Agreement. Any document, which is prepared by the Contractor in connection with the Agreement, shall be submitted in accordance with the Agreement, with sufficient time for the Trust to review and comment.

27.2 As provided in this Subarticle, all documents prepared, procured, or developed by the Contractor and furnished to the Trust in connection with the Project shall be the property of the Trust and may be used by the Trust without restriction, whether during the term of the Agreement or thereafter. Any and all products of the Work performed by Contractor, any Subcontractor and any of their employees under the Contract Documents, including but not limited to, all inventions, discoveries, formulas, processes, devices, methods, compositions, compilations, outlines, notes, reports, system plans, flow charts, source code, and other forms of computer software including computer modeling, algorithms, procedures, policies, data, documentation, and other materials or information which Contractor, any Subcontractor or any of their employees may

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- conceive, invent, author, create, reduce to practice, construct, compile, develop, or improve in the course of performing the Work or otherwise delivered to the Trust as part of the Work (collectively, “Work Product”) shall be the sole and exclusive property of the Trust from and after the time it is created. Contractor agrees to disclose to the Trust the existence of any Work Product of which the Trust would not otherwise be aware promptly upon its creation.
- 27.3** **Assignment.** Contractor agrees to assign and hereby does assign to the Trust (together with its successors and assigns) the sole and exclusive right, title, and interest in all Work Product, including any and all related patent, copyright, trademark, trade secret, and other property or proprietary rights of any nature whatsoever. Contractor warrants and agrees to execute and deliver to the Trust, and Contractor agrees to cause Subcontractor and the employees of Contractor and Subcontractor to execute and deliver to the Trust, any and all documents that the Trust may reasonably request to convey to the Trust any interest Contractor, Subcontractor or any of their employees may have in any Work Product or that are otherwise necessary to protect and perfect the Trust’s interest in any Work Product.
- 27.4** Contractor further warrants and agrees to take, and Contractor agrees to cause Contractor’s employees to take, such other actions as the Trust may reasonably request to perfect and protect the Trust’s interest in any Work Product. Contractor further agrees that the sums paid to Contractor by the Trust in connection with Contractor’s performance of the Work serve, in part, as full consideration for the foregoing assignment, and that said consideration is fair and reasonable, and was bargained for by Contractor. Contractor represents and warrants that it has full right, power and authority to grant the assignment granted under this Section.
- 27.5** Contractor Retained Information. In the event and to the extent that any Work Product contains or requires for its use any items, elements, or components that were developed or otherwise acquired by Contractor prior to the date of this Contract and that are proprietary to Contractor (“Contractor’s Retained Information”), Contractor shall identify such Contractor’s Retained Information to the Trust in writing. Contractor hereby grants to the Trust and its affiliates an irrevocable, perpetual, non-exclusive, royalty-free, world-wide license to: (i) use, reproduce, perform, and execute the Contractor’s Retained Information; (ii) prepare derivative works based upon the Contractor’s Retained Information; (iii) distribute copies of Contractor’s Retained Information and of derivative works based upon Contractor’s Retained Information; and (iv) authorize others to do any of the foregoing.
- 27.6** Knowledge. Nothing in this Subarticle should be construed to prohibit Contractor from using its skills, knowledge and experience that have a general applicability, including such skills, knowledge or experience gained by Contractor in connection with performing services for the Trust in performing services for other clients; provided, however, that Contractor’s knowledge or use thereof shall not include any Confidential Information of the Trust.
- 27.7** Use of Work Product. Contractor agrees not to use any Work Product, including any drawings, specifications, reports or any unique design aspects of a Project in any other project without the prior written approval of the Trust. Contractor’s use of standard specification texts is specifically excluded from the provisions of this Section.
- 27.8** Survivability. The obligations of this Subarticle 31.3 shall survive any termination of this Contract.
- 27.9** If the Work, any intellectual property utilized by the Contractor in providing the Work, or the Trust’s use of the Work (each an “Infringing Element”) becomes the subject of any claim, suit, or proceeding for infringement or other intellectual property right violation, the Contractor shall, at its sole expense and at the Trust’s option: 1) secure for the Trust the right to its continued use, 2) replace the Infringing Element with a substantially equivalent, non-infringing item, or 3) modify the Infringing Element so that it is noninfringing.
- 27.10** Royalties and fees for patents covering materials, articles, apparatus, devices, equipment or processes used in the Work shall be included in the Contract Price. The Contractor shall satisfy all demands that may be made at any time for such royalties or fees.
- 27.11** Any and all works, expressions, inventions, ideas, discoveries, improvements or developments (whether or not patentable), as well as all copyrights, patents or trademarks thereof, that may be conceived or made by

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the Contractor or Contractor's partner(s), employee(s), agent(s), vendor(s), contractor(s), supplier(s) or any other party employed by Contractor, or subcontractor to Contractor of any tier, to satisfy its obligation under the Agreement shall be work made for hire and shall be deemed the property of Trust. All such works, expressions, inventions, ideas, discoveries, improvements or developments, as well as all copyrightable expressions thereof, shall be deemed to fit into one or more of the specifically enumerated categories of works contained in 17 U.S.C. Section 101 *et sea*, and any subsequent revisions thereof. The Contractor and/or Contractor's partner(s), employee(s), agent(s), vendor(s), contractor(s), supplier(s), or any other party employed by Contractor, or subcontractor to Contractor of any tier, to satisfy its obligation under the Agreement shall promptly furnish Trust with complete information, including, without limitation, a written description thereof giving the date of the work, invention or expression and naming the inventors or authors and others involved in the development or writing of the work, invention or expression. Trust shall have the sole power to determine whether or not and in which countries and jurisdictions patent application shall be filed or copyrights registered and to determine the disposition of title to and rights in any works, expressions, inventions, ideas, discoveries, improvements or developments and in any United States and foreign patent applications, patents or copyrights that may result. memoranda, notes and experimental works, descriptions, diagrams and other data generated in performance of the Work pertaining to any and all works, expressions, inventions, ideas, discoveries, improvements and developments covered by the Agreement shall be available at reasonable times to Trust. Contractor shall assist Trust in the implementation of this section by obtaining and providing detailed written descriptions of each invention, idea, discovery or expression sufficient for filing patent or copyright applications, by providing an evaluation of the patentability or copyrightability of each disclosure, by assisting Trust in the prosecution of patent and copyright applications, and by executing or having executed by appropriate persons any and all documents which may be necessary or desirable to cause title in such inventions, ideas, discoveries, or expressions to vest with Trust. The cost of such assistance shall be considered separate and distinct and shall be mutually agreed upon between the Trust and Contractor.

28.0 CONFIDENTIALITY/PROPRIETARY INFORMATION

- 28.1** The Contractor hereby acknowledges that during the course of the Contractor's participation in a bid and/or selection process and in the performance of the requirements of the Agreement, the Contractor may be furnished with or exposed to information that is proprietary and confidential to the Trust and/or grantors to the Trust, ("Confidential Information"). The Party disclosing such Confidential Information is referred to herein as the "Disclosing Party" and the Party receiving such Confidential Information is referred to herein as the "Receiving Party." Confidential Information shall include but shall not be limited to information concerning pricing, terms and conditions, customers, employees, facility locations, techniques, methods, computer programs, software, drawings, maps, plans, and data relating to the Trust and/or its affiliates.
- 28.2** The Contractor agrees that (a) the Contractor shall use such Confidential Information only in connection with its participation in a bid and/or selection process or the requirements performed under the Agreement and (b) shall not disclose such Confidential Information to third parties or use such Confidential Information for any other purpose without the prior written consent of an authorized representative of the Trust.
- 28.3** The Contractor may disclose Confidential Information to its partner(s), employee(s), agent(s), vendor(s), contractor(s), Subcontractor(s), or any other party employed by the Contractor if and only if 1) such disclosure is necessary in order to perform the Work and/or Service under the Agreement; and 2) the party to whom the Confidential Information will be disclosed has executed and delivered to the Trust a Nondisclosure Agreement. If the Contractor has any question about whether information is Confidential Information, it shall contact the Trust prior to disclosing such information for a determination as to its proprietary status.
- 28.4** Upon termination of the Agreement, the Contractor shall immediately return such Confidential Information, including without limitation any drawings, maps, or electronic data or copies thereof, to the Trust.
- 28.5** Both Parties acknowledge that the breach of the Contractor's obligations under this provision will result in irreparable harm to the Trust and/or grantors to the Trust. Any breach of these provisions by the Contractor shall entitle the Trust to make use of any and all available remedies, at law and in equity including, but not limited to, injunctive relief.

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- 28.6** If either Party is required by law to disclose Confidential Information of the other Party (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demands, regulation, statute or otherwise), the Party required to make such disclosure will, when permitted by law, (i) notify the other Party and provide the other Party the opportunity to review the Confidential Information, and (ii) provide the other Party the opportunity to seek a protective order or other appropriate remedy. In the event that a protective order or other remedy is not obtained or is not pursued within a reasonable period of time, the Party required to make disclosure or such Party's representatives will furnish only that portion of the Confidential Information that it is legally required to disclose and the Party required to make disclosure will request that confidential treatment be accorded to the Confidential Information by relevant third parties.
- 28.7** Notwithstanding anything to the contrary in this Section 28.0, neither Party shall be required to hold confidential any information that (i) becomes publicly available other than through disclosure by the Receiving Party; (ii) is independently developed by the Receiving Party; or (iii) becomes available to the Receiving Party without restriction from a third party, provided that such third party is not bound by a confidentiality agreement with the Disclosing Party or its representatives.
- 28.8** In no event shall data or information provided by the Contractor under the Agreement or generated as a result of performance of the Work thereunder be deemed as proprietary to the Contractor. Likewise, reports generated as a result of performance of the Work thereunder shall not be proprietary to the Contractor.
- 28.9** The obligations set forth in this Section 28.0 shall survive expiration or termination of this Agreement for a period of five years.

29.0 PUBLICITY

- 29.1** Notwithstanding any other provision of the Agreement, the Contractor shall not, without the Trust's prior written consent, publish any information pertaining to the Agreement or project, whether during the term of the Agreement or thereafter.
- 29.2** The Contractor shall not display any sign, posters or other advertising matter in or around the Site without prior written approval of the Trust.

30.0 COMMUNICATIONS WITH REGULATORS, MEDIA, OR PUBLIC

- 30.1** The Contractor shall immediately notify the Trust of all communications from regulatory agencies including, but not limited to, notices, postings, letters, telephone calls or visits. If a Notice of Noncompliance or any other official correspondence is received by the Contractor from a regulatory agency, a copy of the notice or correspondence shall be provided to the Trust within 24 hours of its receipt.
- 30.2** The Contractor shall immediately notify the Trust of any inquiries from the media. Requests for information from the media shall be reviewed, approved and distributed by the Trust
- 30.3** The Contractor shall immediately notify the Trust of any calls or other communications from the public. Requests for information from the public shall be reviewed, approved and distributed by the Trust.
- 30.4** The Contractor shall notify the Trust as soon as the Contractor becomes aware of a current or scheduled regulatory inspection. The Trust will arrange a time for the inspection and the Project Coordinator or other designated Trust representative will accompany the regulatory inspectors. The Contractor shall also designate a representative who will accompany the regulatory inspectors. The Contractor shall fully cooperate with the Federal, state, and local regulatory agencies during inspections or other official functions. If an inspector from a Federal, state or local regulatory agency arrives at a location unannounced and wishes to conduct an inspection, the Contractor shall notify the Project Coordinator and obtain and subsequently submit to the Trust the inspector's name, agency and telephone number and shall accommodate the inspector. If the conduct of an inspection will, for reasons such as safety considerations, put the inspector or the Contractor's representative at risk of injury, the Contractor shall attempt to reschedule the inspection at a date and time acceptable to all parties.

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30.5 During a regulatory inspection, the inspector may request permission to sample fluids, soils or other materials. If samples are taken, the Contractor shall request the inspector to provide split samples, and the Contractor shall forward them to the Trust as soon as possible. The Contractor shall request the inspector to provide duplicate copies of all photographs and/or such other records or reports taken during or generated by an inspection and shall submit them to the Trust upon their receipt by the Contractor.

31.0 NOT USED.

32.0 CLEANING UP

32.1 The Contractor shall at all times keep its work areas in a neat, clean, and safe condition in accordance with the Agreement.

32.2 The Contractor shall, on a daily basis, clean up and remove from the Site and adjoining property and rights of-way all waste materials and rubbish and appropriately manage recyclables as directed by Trust.

32.3 Upon completion of the Work, the Contractor shall remove all excess material, equipment, temporary facilities and rubbish; shall repair or replace, in an acceptable manner, all property which may have been damaged or destroyed at the Site; and shall leave the Site in a neat and presentable condition and return disrupted or damaged areas to the condition existing before the start of the Work. Site clean-up approval is required from the Trust prior to Final Acceptance.

32.4 Work shall be performed in a manner which minimizes to the greatest extent possible any disruption to the surrounding landscape, waterways, communities and the general public.

32.5 In the event of the Contractor's failure to comply with this Section 32.0, the Trust shall be entitled to withhold from the Contractor, or obtain reimbursement from the Contractor for, any costs incurred in accomplishing the same.

33.0 LABOR RELATIONS

33.1 The Contractor shall give the Trust prompt written notice of any labor dispute or anticipated labor dispute which may reasonably be expected to affect: (1) the cost, schedule or performance of the Project; (2) other activities at the Site; or (3) the Trust's ongoing operations.

33.2 The Contractor shall conduct its labor relations in accordance with its established labor agreements. The Contractor agrees to advise the Trust, prior to making any new commitments, whether the negotiation of new agreements or understandings with local or national labor organizations affect the Work to be performed under the Agreement.

33.3 In addition to the Contractor's legal obligations under the Labor Management Relations Act, in the event the Contractor is a subscriber to a multi-employer bargaining association or group, the Contractor shall, if the Trust so directs, participate to the fullest extent in the collective bargaining of that group with any of those labor organizations claiming jurisdiction over any portion of the Project under the Agreement or any subcontract.

33.4 To the extent applicable to Work being performed under the Agreement, the Contractor shall supply the Trust with copies of all national agreements to which it is a party. No later than 30 Days before the expiration of any labor agreement which may affect the Project, the Contractor shall meet with the Trust to discuss the appropriate course of action.

33.5 The Contractor shall take any and all steps that may be available in connection with the resolution of violations of collective bargaining agreements and jurisdictional disputes, including, without limitation, the filing of appropriate process with any court or administrative agency having jurisdiction to settle, enjoin or to award damages resulting from violations of collective bargaining agreements or jurisdictional disputes.

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- 33.6** In the event of a labor dispute which threatens to adversely affect the progress or cost of the Project, the Trust reserves the right to restrict additional hiring of employees by the Contractor or any Subcontractors, or to suspend or delay the Project, or in the Trust's sole discretion to terminate the Agreement for cause under Section 18.1, without incurring contractual liability to the Contractor or its Subcontractors or suppliers. This section shall be applicable whether or not the Contractor or any Subcontractor is directly involved in such labor dispute and whether or not the dispute involves or affects employees or disputing parties standing in the proximate relation of employer and employee with the Contractor or Subcontractor.

34.0 ADDITIONAL CONTRACTS AND INTERESTS

- 34.1** Whenever work being done by the Trust's or by other contractors' forces is contiguous to Work covered by the Agreement, the respective rights of the various interests involved shall be established by the Trust to secure the completion of the various portions of the Project in an orderly and timely manner. At no time shall the Contractor restrict the movement of other personnel and/or equipment in the performance of their work.
- 34.2** The Contractor shall be responsible for promptly notifying the Trust in the event that it shall be necessary to coordinate work between the Contractor and others.
- 34.3** The Trust reserves the right to enter into other contracts related to the Agreement or the Project and may require any other contractor, including the Trust or its affiliates, to provide labor or materials to the Project, and such other contracts shall not be cause for the Contractor to claim a change in the Project under Section 14.0. The Contractor shall afford other contractors, the Trust or its affiliates reasonable opportunity for the introduction and storage of their materials and the execution of their work, and the Contractor shall cooperate with the Trust, its affiliates and any other contractors in coordinating their activities.
- 34.4** Contractor shall coordinate its Work with that of other contractors and shall cooperate fully with the Trust in maintaining orderly progress towards completion of the Work as scheduled. The Contractor acknowledges that coordination with other contractors, the Trust or its affiliates and occasional rescheduling of the Work or Project may be required and that minor delays in performance of the Work may result. Any difference or conflict which may arise between the Contractor and other contractors, or between the Contractor and workmen of the Trust or its affiliates, in regard to their work, shall be resolved as determined by the Trust. The Trust's decision regarding priority between Contractor's Work and the work of other contractors at the Site shall be final. Notwithstanding any other provision of the Agreement, the Contractor acknowledges that such coordination, occasional rescheduling and minor delays shall not justify an increase in the price as determined under the Agreement or an extension of time for delivery or performance.
- 34.5** The Contractor shall promptly remedy, at its sole expense, any injury or damage that may be sustained by other contractors or the Trust and its affiliates as a result of the Contractor's activities under the Agreement.
- 34.6** If the Contractor's Work depends upon the work of others, the Contractor shall inspect and give the Trust prompt written notice of any defects in the work that renders it unsuitable for the Contractor to perform the Work.

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35.0 LIENS/BONDS

- 35.1** Contractor shall furnish at its sole cost and expense, and shall obtain from each Subcontractor whose subcontracts or equipment or material supply contracts are in excess of \$50,000 in the aggregate (“Major Subcontractor”), an unconditional partial lien waiver and release of all Liens in the amount of the current invoice, (for the benefit of the Trust), for delivery to the Trust with each Application for Payment, or such other documents necessary to ensure an effective release of all Liens with respect to the Work in compliance with the laws of the State of New York; provided that Contractor shall not be obligated to obtain Lien waivers or releases from any other Subcontractor who is not a Major Subcontractor. Except as contemplated in the preceding sentence, the Trust’s receipt of Lien waivers and releases for each portion of the Work covered by the Progress Payment shall be a condition precedent to the Trust’s obligation to pay for such portion of the Work covered in any Application for Payment. Contractor shall also furnish, at its sole cost and expense, a waiver and release of all Liens upon final payment, substantially in the form of Exhibit O, from each Major Subcontractor upon completion of the Work to be performed by such Major Subcontractor, or such other documents necessary to ensure an effective release of Liens with respect to the Site, in compliance with the laws of the State of New York. In connection with each payment request or invoice, the Contractor agrees to deliver to the Trust Partial Waiver of Lien (Exhibit O) executed by and for itself and its Major Subcontractors and suppliers and, at the time of Final Payment, Final Waiver and Release of All Claims (Exhibit O), which shall become effective as of the issuance of Final Payment to Contractor. Contractor agrees to apply all payments received from the Trust under this Agreement as required under Article 3-A of the Lien Law of the State of New York. Contractor agrees to indemnify and hold harmless the Trust against any liens filed or unpaid work claim by its subcontractors, laborers, materialmen or suppliers and any loss, cost or expense including attorney’s fees incurred by Trust by reason of any such lien or claim. The Contractor shall pay punctually for all labor, equipment and materials and all liabilities incurred by it in performance of the Agreement, and when requested shall furnish the Trust with satisfactory evidence of such payment.
- 35.2** The Contractor shall (1) indemnify and save harmless the Trust and its grantors and their officers, directors, employees, agents, servants, and assigns from all laborers’, materialmen’s, and mechanics’ liens upon the real property upon which the Project is located arising out of the Services, equipment and materials furnished by the Contractor and its Subcontractors in connection with the Project, and (2) to the full extent permitted by law, keep such property free and clear of all liens, claims, and encumbrances arising from the performance of the Agreement by the Contractor and Subcontractors.
- 35.3** The Contractor shall give the Trust 20 Days written notice prior to filing a lien on the property and shall use all reasonable efforts to give the Trust 20 Days written notice prior to a Subcontractor or supplier filing a lien on the property.
- 35.4** If the Contractor places a lien on the Trust’s or its affiliates’ property or fails to timely discharge a Subcontractor or supplier lien, the Trust shall have the right to bond such lien or take other action to remove same, and Contractor shall be liable to the Trust for all costs and legal expenses incurred by the Trust in discharging such liens, including cost of bonding same.
- 35.5** If a lien is placed on the property by any Subcontractor or supplier, the Contractor shall discharge the lien within 10 days, or such other time as agreed to by the Trust.
- 35.6** Within 15 Days of signing the Agreement, the Contractor shall, at the Trust’s option, provide the Trust with an executed copy of each a Payment Bond, a Performance Bond for the Work in the amount of the Contract Price covering the payment of, and performance of all obligations arising under the Agreement and to keep the Trust’s property clear of any encumbrances relating to the Agreement. The Trust may require additional bonds if the value of the Agreement, in the Trust’s opinion, is appreciably increased.
- 35.7** Contractor shall be required to obtain a Payment and Performance Bond. The Payment Bond and the Performance Bond forms shall be AIA Document A312, 2010 Ed., as published by the American Institute of Architects, attached as Exhibit V.
- 35.8** The Contractor shall furnish a copy of the Payment Bond to all Subcontractors (including suppliers) with whom it has a contract to furnish labor, equipment or materials for use in the performance of the Agreement,

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and shall require that all Subcontractors, of any tier, supply copies of the Payment Bond to their Subcontractors (including suppliers).

- 35.9** The Contractor's actual premium cost for the Payment Bond and Performance Bond shall be reimbursed in full by the Trust. The initial premium will be paid as part of the first payment requisition. Any rebates, increases or other premium cost adjustments shall be adjusted at time of Final Payment.

36.0 ASSIGNMENT/SUBCONTRACTING

- 36.1** The Agreement is binding upon the Parties and their heirs, executors, administrators, successors, and assigns. The Contractor shall not assign the Agreement, or any of the moneys to become due and payable under the Agreement. In addition, Contractor shall not subcontract more than five percent (5%) to any one contractor or ten percent (10%) of the total contract value, without first having obtained the Trust's written consent to such subcontract(s). Any such subcontract for which the Trust's written consent is not obtained will be null and void. If the Contractor proposes to subcontract any of the Work, it shall give written notice thereof to the Trust specifying the name, address, and contact Person of the proposed Subcontractor, as well as a description of the Work to be performed and that Contractor has pre-qualified the proposed Subcontractor. Contractor shall also furnish information with respect to past performances, safety documents as defined in the CSR (inclusive of proposed Subcontractors EMR rating and OSHA 300 reporting), and financial status of the intended Subcontractors. Such financial information shall include, without limitation, financial statements, credit reports and other information requested by the Trust. The Trust shall have the right, from time to time, to conduct such credit investigations of all Subcontractors as the Trust shall deem necessary or appropriate. The Trust may reject any Subcontractor which it considers in its sole discretion unable to perform satisfactorily the portion of the Work involved. No approval or disapproval by the Trust of any Subcontractors shall relieve Contractor of its obligations under the Contract Documents. The Trust's approval or disapproval of a Subcontractor does not create any responsibility or liability on the part of the Trust for the Subcontractor's performance. The Trust's Representative shall notify Contractor within five (5) Business Days if it objects to any proposed Subcontractor. Contractor shall identify a suitable substitute party in writing within ten (10) Business Days after it receives the Trust's disapproval of a proposed Subcontractor. All Work performed for the Contractor by a Subcontractor shall be pursuant to an agreement between the Contractor and Subcontractor which binds the Subcontractor to the applicable terms and conditions of the Agreement for the benefit of the Trust and its affiliates. The Contractor shall provide in every subcontract or purchase order exceeding \$10,000 in value as follows: "Subcontractor/Vendor is familiar with the Terms and Conditions of the Contract between Contractor and the owner (the "Trust") and agrees that, except as may be specifically otherwise provided in this Subcontract/Purchase Order, Subcontractor assumes towards Contractor the duties owed by Contractor to the Trust, and Contractor shall have every right and remedy respecting Subcontractor's/Vendor's performance under the Contract, including, without limitation, those arising under or reasonably inferable from the provisions of Terms and Conditions articles 4.0 (Time of Performance), 8.0 (Warranty/Remedy), 11.0 (Inspection and Quality Assurance), 12.0 (Final Inspection/Acceptance/Payment) 13.0 (Withholding Payment), 14.0 (Changes to Work Scope/Agreement Changes), 15.0 (Changed Conditions), 16.1 (Safety), 16.3 (Safety), 16.6 (Safety), 18.0 (Term/Termination), 19.0 (Trust's Right to Suspend Performance), 21.0 (Force Majeure), 22.0 (Liability/Indemnification), 23.0 (Insurance), 24.0 (Rights, Claims, Disputes), 25.0 (Rights and Remedies; Trust Liability), 26.0 (Discrepancies and Claims), 27.0 (Documents/Intellectual Property), 28.0 (Confidentiality/Proprietary Information), 29.0 (Publicity), 30.0 (Communications with
- 36.2** Regulators, Media, or Public), 32.0 (Cleaning Up), 33.0 (Labor Relations), 34.0 (Additional Contracts and Interests), 36.0 (Assignment/Subcontracting), 39.0 (Compliance with Laws and Standards), 40.0 (Environmental Compliance), 42.0 (Equal Employment Opportunity), 43.0 (Jurisdiction and Governing Law), and 47.0 (Prevention of Corruption and Bribery), which Subcontractor /Vendor warrants that it has reviewed or been afforded an opportunity to review prior to its execution or acceptance of this Subcontract/Purchase Order. Accordingly, the terms the "Trust" and the "Contractor" in said articles shall in this agreement be construed to mean the "Contractor" and the "Subcontractor/Vendor," respectively, and the Subcontractor/Vendor shall have one-half the time afforded to the Contractor in which to act respecting any notice or act required from or by the Contractor to allow sufficient time for review and action by Contractor. Contractor shall incorporate the following language set forth below, into the subcontract with each proposed Subcontractor:

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- Subcontractor and its subcontractors of any tier shall be bound to Contractor by the terms of the Contract Documents between the Trust and Contractor, and shall assume toward Contractor all obligations and responsibilities which Contractor, by those documents, assumes toward the Trust, provided that where any provision of the Contract Documents between the Trust and Contractor is inconsistent with any provision of this Subcontract, the terms of the Contract Documents shall govern.
- The Trust may elect at any time or from time to time, including in connection with the termination of the Contract between the Trust and Contractor, to have this Subcontract assigned from the Contractor to the Trust or any entity designated by the Trust, and the parties agree that such assignment shall be effective upon the delivery of a notice of such election by the Trust to the Subcontractor.
- The Trust is an intended third-party beneficiary to this subcontract. However, this provision shall not empower any Subcontractor with any contractual rights against the Trust.

36.3 If the Contractor terminates its existence as a corporate entity or if the Contractor is part of a merger, acquisition, sale, consolidation or take-over, or if all or substantially all of the Contractor's assets are transferred to another person, or business entity, the Trust shall, in its sole discretion, have the right to terminate the Agreement as set forth in Section 18.1 or to require the Contractor's successor to carry out the duties and obligations of the Contractor under the Agreement.

36.4 If at any time during the performance of the Project, the Trust determines that any Subcontractor is not performing in accordance with the Agreement, the Trust may so notify the Contractor who shall take immediate steps to remedy the performance or to cancel the subcontract, whichever the Trust so requests.

36.5 All Subcontractors shall be subject to the foregoing provisions, and nothing contained in the Agreement shall create any contractual relation between any Subcontractor and the Trust or its affiliates, nor relieve the Contractor of any obligation to perform the Work. No Subcontractor is intended to be or shall be deemed a third party beneficiary of the Agreement. As a condition of any subcontract, the Contractor shall require any Subcontractor to remove any claim it might have, in law or equity directly against the Trust or its affiliates. The Contractor shall be fully responsible to the Trust for the acts and/or omissions of any Subcontractor and of persons either directly or indirectly employed by them, as it is for the acts and omissions of persons directly employed by the Contractor as if no Subcontractors were in place. Any obligation imposed by the Agreement upon the Contractor, where applicable, shall be equally binding upon and shall be construed as having application to any Subcontractor.

36.6 To the fullest extent permitted by law, the Contractor shall require Subcontractors to indemnify, defend at the Trust's option, and hold the Indemnified Parties harmless from and against any and all claims, demands, actions, losses, damages and expenses, including attorney's fees and other expenses, resulting from or arising out of any of its Subcontractors' performance of Work or Services. The complete or partial failure of any insurance carrier to fully protect and indemnify the Indemnified Parties, or the inadequacy of the insurance, shall not in any way lessen or affect the obligation of the Contractor or its Subcontractors to indemnify the Indemnified Parties.

36.7 Notwithstanding any other provision of the Agreement, Section 36.5 shall survive the termination or expiration of the Agreement.

36.8 The Trust may assign its rights, claims, interests, and obligations in the Contract Documents to a third party upon notice to Contractor without the consent of Contractor or any other limitation.

36.9 **Payments to Subcontractors.** Upon receipt of payment from or on behalf of the Trust, Contractor shall promptly pay to each Subcontractor the amount paid by the Trust to Contractor for such Subcontractor's Work. Contractor must require each Subcontractor to make similar payments to its Subcontractors. Contractor shall certify to the Trust, upon submission of each Application for Payment, the value of the Work performed by each Subcontractor (of any tier), the amount of Lien waivers provided to the Trust, and the reason for any discrepancies between the value of the Work performed and the Lien waiver amounts. The

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Trust shall have the right to withhold any payments to Contractor based upon its failure to timely pay any Subcontractor. Furthermore, the Trust shall have the ability to issue joint checks in the name of both Contractor and its Subcontractor (of any tier) to ensure timely payment. The Trust shall have no obligation to pay, or cause the payment of, any money to any Subcontractor or any other party acting through, under, or on behalf of Contractor except as may be otherwise required by Laws, and then subject to Contractor's indemnity obligations under this Contract. Notwithstanding the above, Contractor shall be entitled to withhold payment(s) and/or offset amounts otherwise due any such Subcontractor based on its failure to perform other obligations under the subcontract with Contractor. However, in the event such Subcontractor files a Lien or otherwise requests or demands payment from the Trust, Contractor must defend and indemnify the Trust against any Losses related thereto.

37.0 ENTIRE AGREEMENT

37.1 The Agreement constitutes the entire Agreement between the Trust and the Contractor with respect to the Work specified, and all previous representations relative thereto, either written or oral are hereby annulled and superseded. No modification of any of the provisions of the Agreement shall be binding unless in writing and signed by a duly authorized representative of each party hereto.

38.0 SEVERABILITY/MISCELLANEOUS

38.1 If any section, phrase, provision or portion of the Agreement is, for any reason, held or adjudged to be invalid or illegal or unenforceable by any court of competent jurisdiction, such section, phrase, provision or portion so adjudged will be deemed separate, distinct and independent and the remainder of the terms of the Agreement will be and remain in full force and effect and will not be invalidated or rendered illegal or unenforceable or otherwise affected by such adjudication. The parties shall negotiate in good faith an equitable adjustment in the affected provision of the Agreement; however, the validity and enforceability of the remaining parts thereof shall be otherwise fully enforceable. Paragraph headings are for the convenience of the Parties only and are not to be construed as part of the Agreement.

39.0 COMPLIANCE WITH LAWS AND STANDARDS

39.1 The Contractor shall, in connection with any Work provided by the Contractor hereunder, comply with all applicable federal, state and local laws, ordinances, rules, regulations, codes, permits, licenses, authorizations, and orders of any governmental body, agency, authority, or court having jurisdiction over the Trust or the supply of the Work ("Laws"),

39.2 In connection with any Work provided by the Contractor hereunder, the Contractor shall and shall provide that its Subcontractors, agents, and representatives shall, at all times: 1) strictly comply with the Trust's safety and environmental standards, rules, regulations, directives, and procedures, including, without limitation, Exhibit R, Trust's Contractor Safety Requirements, Exhibit Q, Health and Safety Plan, Exhibit T, Process Safety PHA, and with any and all applicable federal, state, municipal, and local laws, rules, regulations, codes, and ordinances related to employee and public health, safety, and/or the environment (as in force upon the date of the Agreement and as in the future passed, enacted, directed, or amended), collectively, ("Contract Standards") and 2) conduct all operations in a manner to ensure the safety of all personnel, the general public, and the protection of the environment and so as to avoid the risk of injury, death, loss, theft, or damage by accident, vandalism, sabotage, or any other means. In cases where one or more conflicting Standards may be applicable, the Contractor shall comply with the most stringent applicable Standard.

39.3 The Contractor warrants that it has not offered or given and will not offer or give to the Trust or grantors to the Trust, or any of their officers, directors, employees, agents, trustees, successors or assigns ("Purchasing Parties") any gratuity, or any kickback within the meaning of the Anti-Kickback Act of 1986 in order to secure any business from or influence the Purchasing Parties with respect to the terms, conditions or performance of any contract with or purchase from the Trust.

40.0 ENVIRONMENTAL COMPLIANCE

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- 40.1** Without limiting the provisions of Section 39.0, the Contractor shall conduct all Work and Services in such a manner to minimize the impact upon the natural environment and shall comply fully with all applicable federal, state and local laws, ordinances, rules, regulations and permits for the protection and preservation of the environment, as may be amended from time to time, and all applicable environmental policies and practices prescribed by the Trust, including without limitation, the Resource Conservation and Recovery Act, the Hazardous Materials and Transportation Act, the Occupational Safety and Health Act of 1970 (“OSHA”), the New York Environmental Conservation Law, regulations of the United States Environmental Protection Agency, the United States Department of Transportation and the New York Department of Environmental Conservation (when applicable for the jurisdiction) issued pursuant thereto. The Contractor shall impose the requirements of this Section 40.0 upon its Subcontractors and suppliers.
- 40.2** The Contractor shall maintain in a location at the Site, safety data sheets (“SDS”) as required for products used in the Contractor’s performance under the Agreement. The Contractor shall post, control and disseminate SDS in accordance with the applicable edition of OSHA Standard No. 1910.1200. Contractor shall provide periodic updates of the SDS documentation; and copies thereof shall also be retained at the Site and shall be readily available to all the Contractor’s personnel engaged in the Work, including, without limitation all the Contractor’s personnel engaged in manufacturing Goods or providing Services.
- 40.3** The Contractor shall immediately notify the Trust of any citations or notices incurred on the Project and forward copies thereof immediately upon receipt to the Trust. If any violation of environmental permits, licenses, and other environmental regulations or statutes occurs, the Contractor shall take immediate action to mitigate any further violation. The Contractor shall immediately notify the Trust of the violation and wait for further instructions from the Trust. If the Trust instructs the Contractor to remedy the violation, the Contractor shall contact the appropriate government agencies as required by law and report to the Trust, in writing, what actions it has performed and intends to take to remedy the violation. The Contractor shall also report to the Trust its intended procedures for preventing recurrence of such violations.
- 40.4** The Contractor shall, at its expense, take all actions necessary to protect the Trust, grantors to the Trust and all third parties, including without limitation representatives of the Trust, from any exposure to, or hazards of, hazardous and/or toxic wastes or substances. In the event of a release or discovery of hazardous waste, the Contractor shall respond in accordance with the Agreement.
- 40.5** If the Contractor fails to correct an environmental violation when directed by the Trust to do so, the Trust may direct a third party to do so at the Contractor’s expense.
- 40.6** The Trust will notify the Contractor of any observed non-compliance; however, failure of the Trust to recognize or notify the Contractor of any non-compliance shall not relieve the Contractor of its contractual and legal responsibility for such non-compliance and to protect the environment.

41.0 UTILIZATION OF SMALL BUSINESS CONCERNS

- 41.1** It is the policy of the United States that Small Business Concerns, Veteran-Owned Small Business Concerns, Service-Disabled Veteran-Owned Small Business Concerns, HUBZone Small Business Concerns, Small Disadvantaged Business Concerns, and Women-Owned Small Business Concerns shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with Small Business Concerns, Veteran-Owned Small Business Concerns, Service-Disabled Veteran-Owned Small Business Concerns, HUBZone Small Business Concerns, Small Disadvantaged Business Concerns, and Women Owned Small Business Concerns.
- 41.2** The Contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or other Governmental Agency.

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41.3 The Contractors acting in good faith may rely on written representations by their Subcontractors regarding their status as a Small Business Concern, a veteran-owned Small Business Concern, a Service-Disabled Veterans-owned Small Business Concern, a HUBZone Small Business Concern, a Small Disadvantaged Business Concern, or a Women-Owned Small Business Concern.

42.0 EQUAL EMPLOYMENT OPPORTUNITY

42.1 The Contractor shall comply with all applicable federal, state and local anti-discrimination laws, the standards and regulations issued thereunder and the amendments thereto, including Executive Order 11141 relating to age discrimination, Executive Order 11246 relating to equal employment opportunity, Executive Order 11625 relating to minority business enterprise, Executive Order 11701 relating to employment of veterans and Executive Order 11758 relating to handicapped employment. The aforementioned are incorporated herein as if set forth herein verbatim. The Contractor agrees to comply with the Human Rights Law of the State of New York (Section 15 of the Executive Law), if applicable.

42.2 Without limiting the foregoing, the Contractor agrees as follows:

42.2.1 The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

42.2.2 The Contractor will in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, sex or national origin.

42.2.3 The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the Contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

42.2.4 The Contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

42.2.5 The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

42.3 All subcontracts and agreements that the Contractor enters into to provide the Work under the terms of the Agreement shall obligate such Subcontractors to comply with the foregoing provisions.

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43.0 JURISDICTION AND GOVERNING LAWS

- 43.1 Unless other governing laws and/or other jurisdictions are specifically established in the Agreement, the Agreement shall be deemed to be executed in the State of New York and shall be interpreted and enforced according to the Laws of the State of New York, excluding its ‘conflicts of law’ jurisprudence.
- 43.2 Unless otherwise specifically established in the Agreement, only the courts of New York shall have jurisdiction over the Agreement and any controversies arising out of the Agreement; any controversies arising out of the Agreement shall be submitted only to the courts of New York; the Contractor hereby submits to the courts of New York for the purposes of interpretation and enforcement of the Agreement.
- 43.3 The Contractor hereby waives personal service by manual delivery and agrees that service of process on the Contractor in any action arising out of the Agreement may be made by registered or certified mail, return receipt requested, directed to the Contractor at its address set forth on the Agreement.

44.0 WAIVER

- 44.1 No delay or omission in the exercise of any right under the Agreement will impair any such right or will be taken, construed or considered as a waiver or relinquishment thereof, but any such right may be exercised from time to time and as often as may be deemed expedient. If any of the provisions of the Agreement are breached and thereafter waived, such waiver will be limited to the particular breach so waived and will not be deemed to be a waiver of any other breach under the Agreement.

45.0 PROVISIONS REQUIRED BY LAW DEEMED INSERTED

- 45.1 Each and every provision of law and governmental regulation required by law to be inserted in the Agreement is deemed inserted and the Agreement will be read and enforced as though the same were so included in the Agreement. If through mistake or otherwise any such provision is not inserted or is not correctly inserted, then, upon the application of either party, the Agreement shall be deemed to be amended to make such insertion or correction.

46.0 NOTICES

- 46.1 All notices, demands, requests, and other communications required or desired to be given hereunder must be in writing and sent by United States registered mail, return receipt requested, or by nationally recognized overnight carrier as follows::

To the Trust:

Gowanus Environmental Remediation Trust
c/o R. Thomas Dorsey, de Maximis, Inc.
450 Montbrook Lane, Knoxville, TN 37919-2705

with a copy to

Brad Rochlen, Esq.
Schiff Hardin LLC
233 South Wacker Drive, Suite 6600
Chicago, IL 60606.

To the Contractor:

[INSERT]

Notices properly addressed and stamped shall be deemed received by the addressee on the Day of actual receipt. Express-type courier service and facsimile Notices shall be deemed to have been received at the end of the first Business Day following the actual date of delivery by such courier or of transmission. Any provision of this Contract

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that requires a Notice by Contractor is not deemed by the Parties hereto to be a mere formality or technicality, but rather is essential to the relationship between the Parties and shall be adhered to strictly.

47.0 PREVENTION OF CORRUPTION AND BRIBERY

- 47.1** The Contractor shall conduct itself in an ethical manner and provide services to the highest ethical standards. The Contractor shall not be a party to the following: bribery of any kind; collusion with other contractors, regulatory agencies or other third parties; provision of enticements to the Trust's and grantors to the Trusts representatives, officers, directors, employees, agents, successors, assigns, and servants in any form including, but not limited to, gifts, gratuities or other benefits. Without limiting the foregoing, the Contractor represents and warrants to the Trust that the Contractor, its Subcontractors, its and their affiliates, employees, officers, agents and shareholders, have not committed and shall not commit any Prohibited Act.
- 47.2** If the Contractor, any Subcontractor, any of its or their affiliates, employees, officers, agents or shareholders, commit any Prohibited Act, then the Trust shall be entitled to act in accordance with Sections 47.3 to 47.7 (inclusive) below.
- 47.3** If a Prohibited Act is committed by the Contractor, any of its affiliates, or any of its or their employees, officers, agents or shareholders not acting independently of the Contractor and its affiliates, then the Trust shall be entitled to terminate the Agreement for cause, under Section 18.1, by giving written notice to the Contractor, specifying the date on which the Agreement shall terminate.
- 47.4** If a Prohibited Act is committed by an employee or agent of the Contractor or of any of its affiliates, acting independently of the Contractor and its affiliates, then the Trust may give written notice to the Contractor of termination of the Agreement for cause, under Section 18.1, and the Agreement will terminate 10 business days after the date of such notice, unless, within such 10 business day period, the Contractor terminates (or arranges for the termination of) such employee's employment or agent's engagement and (where applicable) ensures that the performance of such employee's or agent's obligations in relation to the Agreement are performed by another person.
- 47.5** If a Prohibited Act is committed by a Subcontractor or by an employee or agent of that Subcontractor not acting independently of that Subcontractor, then the Trust may give written notice to the Contractor of termination of the Agreement for cause, under Section 18.1, and the Agreement will terminate 10 business days after the date of such notice, unless, within such 10 business day period, the Contractor terminates the relevant subcontract and ensures that the performance of the Subcontractor's obligations in relation to the Agreement are performed by another person.
- 47.6** If the Prohibited Act is committed by an employee or agent of a Subcontractor acting independently of that Subcontractor, then the Trust may give written notice to the Contractor of termination of the Agreement for cause, under Section 18.1, and the Agreement will terminate 10 business days after the date of such notice, unless within such 10 business day period, the Subcontractor terminates the employee's employment or agent's engagement and ensures that the performance of that employee's or agent's obligations in relation to the Agreement are carried out by another person.
- 47.7** If the Prohibited Act is committed by any person not specified in Sections 47.2 to 47.6 (inclusive) above (or by any person specified in such conditions but acting in a capacity not specified in such conditions) then the Trust may give written notice to the Contractor of termination of the Agreement for cause, under Section 18.1, and the Agreement will terminate 10 business days after the date of such notice, unless, within such 10 business day period, the Contractor (a) arranges for the termination of such person's employment or engagement, and the appointment of their employer or the person who engaged them (where not employed or engaged by the Contractor or any relevant Subcontractor) and (b) ensures that the performance of that person's obligations in relation to the Agreement are performed by another person.
- 47.8** The Trust shall specify, in any notice of termination under this Section 47.0 the general nature of the relevant Prohibited Act and the identity of the party whom the Trust believes has committed such Prohibited Act.

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- 47.9** Without prejudice to the Trust's other rights and remedies, the Contractor shall indemnify the Indemnified Parties in full and on demand against all losses, liabilities, costs, claims and expenses incurred directly or indirectly by the Trust as a result of the performance of any Prohibited Act by the Contractor, any Subcontractor, any of its or their affiliates, employees, officers, agents or shareholders, or any the Contractor personnel in connection with the Agreement, its subject matter or any agreements (including any sub-contracts of whatever tier) relating to the Agreement.
- 47.10** Without prejudice to the other provisions of this Section 47.0, the Contractor shall ensure that: 47.10.1 all the Contractor personnel are fully aware of the Trust's policies on anti-bribery and anticorruption notified in writing to the Contractor from time to time by or on behalf of the Trust and that all Subcontractors and agents (of whatever tier) are engaged upon terms which contain provisions in relation to prevention of bribery and corruption which are no less onerous than this Section 47.0; and
- 47.10.1** it has and shall maintain in place throughout the term of the Agreement, its own policies and procedures, (including adequate procedures under the Bribery Act 2010), to ensure compliance with the Trust's policies on anti-bribery and anti-corruption notified in writing to the Contractor from time to time by or on behalf of the Trust, and will enforce them where appropriate.
- 47.11** The termination of the Agreement pursuant to this Section 47.0 shall entitle the Trust and each of its affiliates to terminate any other contracts between the Contractor and the Trust, or the Contractor and such affiliate (as appropriate) on written notice to the Contractor, under their respective termination-for-cause provisions.
- 47.12** Notwithstanding Sections 24.0 and 43.0, any dispute relating to the interpretation of this Section 47.0 or the amount or value of any gift, consideration or commission shall be determined by the Trust, and the Trust's decision shall be final and conclusive.

48.0 RECORDS

- 48.1** The Contractor shall, and shall require Subcontractors, for the Trust's benefit, at their own expense, to maintain a method of accounting in accordance with generally accepted accounting procedures and practices with respect to all matters pertinent to the Agreement. In so far as the Contractor's and Subcontractors' books, records, books of account, correspondence, contracts and subcontracts, and vouchers pertain to Work under the Agreement, or claims made by the Contractor for extension of time, costs, or expenses under any provisions of the Agreement, they shall be made available to the Trust or its authorized representative for inspection and audit and shall be kept in a manner which (1) adequately permits evaluation and verification of any invoices, payments or claims based on the Contractor's or Subcontractors' actual costs incurred in the performance of the Project and (2) permits the Contractor to furnish the Trust an accurate written allocation of the total amount paid for the Project and such further records as may be reasonably required by the Trust.
- 48.2** The Contractor shall maintain records during the term of the Agreement, including any records relating to the employment or hiring of minorities and/or females, until (1) three years after the expiration of the last expiring warranty, or (2) the expiration of any period for which the Trust or its affiliates are required, by any regulatory agency, to have such records maintained, whichever is later. Additionally, records that relate to disputes, appeals, litigation, or the settlement of claims arising out of the performance of the Agreement shall be retained until such disputes, appeals, litigation, or claims have been finally settled. In lieu of retaining such records the Contractor may deliver such records to the Trust at any time after the expiration of the last expiring warranty. The Contractor agrees to make such records available to the Trust or its authorized representative at no cost to the Trust or its authorized representative for inspection or audit at any time during such period.
- 48.3** The Trust shall give the Contractor and Subcontractors reasonable notice of any intended inspection or audit of their records.
- 48.4** The Trust and its authorized representative shall have access, during normal working hours, to all necessary the Contractor and Subcontractor facilities and shall be provided with an adequate and appropriate work space in order to conduct inspections and audits of such records.

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48.4.1 Non Fixed-Price Work. For any and all non-fixed price Work, Contractor shall permit the Trust's Representative or its agents to:

48.4.1.1 Review all evidence deemed necessary by auditors or their agents to substantiate charges for Direct Costs and Indirect Costs related to non-fixed price work, including overhead allocations as may apply to associated costs. Contractor's Records shall, upon reasonable Notice, be open to inspection and subject to audit and/or reproduction during normal business working hours. Such audits may be performed by the Trust's Representative or an outside representative engaged by the Trust. The Trust or its designee may conduct such audits or inspections throughout the term of this Contract and for a period of three years after Mechanical Completion or longer if required by Law. The Trust's Representative or outside representative may (without limitation) conduct verifications such as counting employees at the Site, witnessing the distribution of payroll, verifying information and amounts through interviews and written confirmations with Contractor employees, field and agency labor, subcontractors, and vendors.

48.4.1.2 Have reasonable access to the Contractor's facilities and be allowed, in the presence of Contractor's counsel, to interview all current or former employees, subject to former employee's agreement, to the extent necessary to conduct the audit. The Trust's Representative shall be provided adequate and appropriate work space, in order to conduct audits in compliance with this Article.

48.4.2 Contractor's "Account Records" or "Records" as referred to in this Article shall include any and all information, materials and data of every kind and character, including without limitation, records, books, papers, documents, subscriptions, recordings, agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, superintendent reports, drawings, receipts, vouchers and memoranda, and any and all other agreements, sources of information and matters that may in the Trust's or auditor's judgment have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Contract Document. Such records shall include (hard copy, as well as computer readable data if it can be made available), written policies and procedures; time sheets; payroll registers; payroll records; cancelled payroll checks; subcontract files (including proposals of successful and unsuccessful bidders, bid recaps, negotiation notes, etc.); original bid estimates; estimating work sheets; correspondence; change order files (including documentation covering negotiated settlements); back charge logs and supporting documentation; invoices and related payment documentation; general ledger, information detailing cash and trade discounts earned, insurance rebates and dividends; and any other contractor records which may have a bearing on the costs and expenses at issue to the extent necessary to adequately permit evaluation and verification of any or all of the following:

48.4.2.1 Compliance with contract requirements for deliverables;

48.4.2.2 Compliance with approved plans and specifications;

48.4.2.3 Compliance with the Trust's business ethics expectations;

48.4.2.4 Compliance with Contract provisions regarding the pricing of Change Orders;

48.4.2.5 Accuracy of Contractor representations regarding the pricing of invoices; and

48.4.2.6 Accuracy of Contractor representations related to claims submitted by the contractor or any of his payees.

48.5 The Contractor shall require Subcontractors to comply with the provisions of this Section 48.0 for the benefit of the Trust.

48.6 If the Trust's inspection or audit identifies any inconsistencies, errors or costs not expended in accordance with the Agreement, the Contractor shall make appropriate adjustments as may be required, including refund to the Trust. Any adjustments and/or payments which must be made as a result of any such audit or inspection of the Contractor's invoices and/or records shall be made within a reasonable amount of time (not to exceed 90 days) from presentation of the Trust's findings to Contractor.

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49.0 REGULATORY FILINGS

- 49.1** It is understood and agreed that the Agreement and Purchase Order may be required to be filed with a state regulatory agency having jurisdiction over the Trust or one of its grantors prior acceptance in order for it to become fully effective and binding.
- 49.2** The Trust shall promptly take all necessary steps to accomplish such filing, if deemed necessary, and, if so filed, the Agreement will be subject to and conditioned upon the agency's acceptance for filing within 90 days from the date of such filing. The Trust agrees to notify the Contractor as soon as practicable of the receipt of agency's acceptance for filing.
- 49.3** If the agency's acceptance for filing is not received by the Trust, the Agreement will be deemed null and void, and neither party will have any other or further liability to the other for anything arising out of or in connection with these Terms and Conditions, except as may otherwise be mutually agreed to by the Parties.

END OF AGREEMENT