

IN THE SUPREME COURT OF OHIO**KOKOSING CONSTRUCTION
COMPANY, INC.,**

Case No. 11-2100

**Original Action
in Mandamus****RELATOR,**

V.

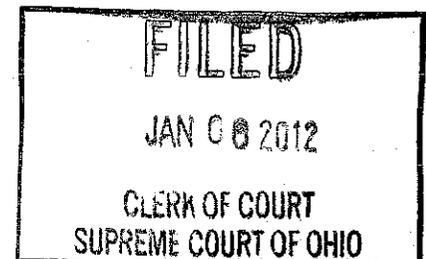
CITY OF ZANESVILLE, OHIO, ET AL.,**RESPONDENTS.**

**ANSWER OF RESPONDENT
CITY OF ZANESVILLE, OHIO**

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Counsel for Respondent
CH2M Hill**



ANSWER OF RESPONDENT CITY OF ZANESVILLE, OHIO

Now comes Respondent, ("Respondent") City of Zanesville, Ohio and in response to the Complaint for the Writ of Mandamus filed by the Relator, by and through its counsel, hereby states the following as its Answer:

FIRST DEFENSE

1. Respondent denies the averments contained in paragraph 1 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein except that Respondent admits that Relator is engaged in the construction business.
2. Respondent admits the allegations contained in paragraph 2.
3. Respondent admits the allegations contained in paragraph 3.
4. Respondent admits that Respondent and BBS Corporation Consulting Engineers entered into the February 4, 2004 Agreement for Engineering Services in Connection with Water Treatment Plant Expansion (the "Agreement") and that Exhibit 1 to the Complaint is a true and accurate copy of that Agreement, with the exception of subsequent modifications thereto, but denies any additional averments in paragraph 4 as the Agreement speaks for itself.
5. Respondent admits that subsequent to the Agreement, CH2M Hill purchased BBS Corporation Consulting Engineers, but denies the remaining averments in paragraph 5 for lack of knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.
6. Respondent admits that Respondent and CH2M Hill entered into the October 17, 2007 Modification No. 2 to Agreement ("Modification No. 2") and that Exhibit 2 to the

Complaint is a true and accurate copy of Modification No. 2, but denies any additional averments in paragraph 6 as Modification No. 2 speaks for itself.

7. Respondent admits the averments contained in paragraph 7, but denies that all documents in the custody and control of CH2M Hill are public records.

8. Respondent denies the averments contained in paragraph 8.

9. Respondent admits the averments contained in paragraph 9.

10. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 10. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

11. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 11. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

12. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 12. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

13. Respondent admits the averments contained in paragraph 13 except that it denies that such actions were taken pursuant to R.C. 153.06 and R.C. 153.07. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

14. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 14. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

15. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 15. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

16. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 16. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

17. Respondent denies the averments contained in paragraph 17.

18. Respondent denies the averments contained in paragraph 18.

19. Respondent admits the averments contained in paragraph 19.

20. Respondent admits the averments contained in paragraph 20.

21. Respondent admits the averments contained in paragraph 21.

22. Respondent denies the averments contained in paragraph 22. Respondent further states that such averments are irrelevant for purposes of the Public Records Act and this mandamus action, but states that the contract and instructions to bidders advised bidders regarding the course of action if deficiencies were found.

23. Respondent admits the averments contained in paragraph 23.

24. Respondent denies the averments contained in paragraph 24 and states that R.C. 153.01 does not apply. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.
25. Respondent denies the averments contained in paragraph 25, but admits that change orders have been approved by CH2M Hill and the City during the course of the Project.
26. Respondent admits that pursuant to the Agreement and the modifications thereto, CH2M Hill agreed to provide a Resident Project Engineer, but states in response to the remaining averments contained in paragraph 26 that the Agreement and the modifications thereto speak for themselves.
27. Respondent states in response to the averments contained in paragraph 27 that the Agreement and the modifications thereto speak for themselves.
28. Respondent admits that it reasonably relied upon CH2M Hill in the performance of the services referenced in paragraph 28 subject to review by the City.
29. Respondent admits that it reasonably relied upon CH2M Hill in the performance of the services referenced in paragraph 29 subject to review by the City.
30. Respondent admits that changes orders were issued and paid to Relator during and after the first twenty-one months of construction of the Project, but denies Relator's characterization in paragraph 30 of such changes as numerous and states that the contract with Relator states that all such change orders are final with respect to time and money.
31. Respondent admits the change orders had to be priced by Relator and negotiated and that the City reasonably relied upon CH2M Hill to conduct such negotiations subject to review by the City, but denies any remaining averments contained in paragraph 31.

32. Respondent admits that Relator submitted a number of requests for alleged additional work/cost/time and that the City reasonably relied upon CH2M Hill to negotiate such requests subject to review by the City, but denies any remaining averments contained in paragraph 32.

33. Respondent admits that Exhibit 3 to the Complaint is a true and accurate copy of Modification No. 4 to the Agreement, but denies any additional averments in paragraph 33 as Modification No. 4 speaks for itself

34. Respondent denies the averments contained in paragraph 34 as Exhibit 4 fails to include a complete copy of the Modified Standard General Conditions of the Construction Contract (“General Conditions”), a true and accurate copy of which is attached as Exhibit A hereto, and as the General Conditions speak for themselves.

35. Respondent denies the averments contained in paragraph 35 as it seeks a legal conclusion and the General Conditions and the Agreement speak for themselves.

36. Respondent admits the averments contained in paragraph 36.

37. Respondent admits the averments contained in paragraph 37.

38. Respondent denies the averments contained in paragraph 38 to the extent that the Respondent’s legal counsel had communications with CH2M Hill in CH2M Hill’s capacity as the City’s agent as set forth in the Agreement.

39. Respondent admits that a meeting was attended by the City Service Director, the Mayor, the Law Director, CH2M Hill’s Project Engineer, and Relator on July 8, 2011 to discuss pricing of certain proposed change orders, that the parties were not able to reach consensus as to all of the proposed change orders, but denies any additional averments contained in paragraph 39.

40. Respondent denies the averments contained in paragraph 40 and further states that Exhibit 5 states Respondent's legal counsel's understanding that Relator, not Respondent or its legal counsel, was the party that requested the tolling of the contractual time limitation for initiating litigation contained in the Contract Documents for the Project and that mediation be delayed until after completion of the Project. Respondent further states that while Respondent disagrees with much of Relator's General Counsel's letter dated December 21, 2011, a true and accurate copy of which is attached as Exhibit I, that such letter was in response to Respondent's legal counsel's December 20, 2011 letter, a true and accurate copy of which is attached as Exhibit J, and in such letter Relator's General Counsel admits "that you assert that it was my proposal to mediate the disputes at the end of the job. This is a true statement."

41. Respondent denies the averments contained in paragraph 41 and further states that Relator's statements regarding two alleged lawsuits against Respondent's legal counsel for interference with contract are without basis, irrelevant, and reckless and designed purely to vex and harass Respondent's legal counsel. Bricker was subject to claims filed under seal by a contractor on one occasion, but those claims were never pursued.

42. Respondent denies the averments contained in paragraph 42.

43. Respondent admits that Exhibit 6 is a copy of an email between Mike Sims, the City Service Director, and Gary Long of CH2M Hill, which has been redacted for attorney-client privileged communications, but denies any remaining averments contained in paragraph 43 as the email speaks for itself.

44. Respondent admits that Exhibit 7 is a copy of emails between Mike Sims, the City Service Director, and Gary Long of CH2M Hill regarding the tracking and accounting of

legal services provided by Respondent's legal counsel, but denies any remaining averments contained in paragraph 44 as Relator fails to include the entire email exchange in an effort to portray such exchange out-of-context and the emails speak for themselves.

45. Respondent denies the averments contained in paragraph 45.

46. Respondent states in response to the averments contained in paragraph 46 that the contract between Relator and Respondent speaks for itself and that Relator has deliberately omitted key portions of the cited language.

47. Respondent admits the averments contained in paragraph 47 and further states that while CH2M Hill requested documentation from Kokosing in support of its claims, Kokosing continues to create road blocks to the City obtaining copies of Kokosing's documents for purposes of evaluating Kokosing's claims (which claims include, for example, a claim for \$736,673 of "additional supervision" on a project that, at the time the claim was submitted, had no increase in the contract amount and had less than \$400,000 of additional labor and materials approved through the contract contingency). Respondent has legitimately questioned whether Relator can support and document a claim that it spent twice the amount in alleged supervision than it spent in additional labor and materials.

48. Respondent denies the averments contained in paragraph 48.

49. Respondent admits the averments contained in paragraph 49, but states that Respondent also reviewed documents made available by Relator on December 12, 14 and 15, 2011, but that Relator has not provided Respondent with copies of those documents.

50. Respondent admits that Exhibit 8 is a true and accurate copy of a September 9, 2011 letter from Relator to CH2M Hill, but denies any remaining averments contained in

paragraph 50 including the averment that such letter was a public records request or that such letter was ever sent to Respondent.

51. Respondent admits that the majority of Respondent's files relating to the Project are public records and that such public records were made available to Relator prior to the filing of this action, but states that certain documents such as those subject to the attorney-client privilege are not public records and accordingly denies any remaining averments contained in paragraph 51.

52. Respondent admits that certain documents in CH2M Hill's files are public records and states that all such documents provided by CH2M Hill to the City were made available to Relator prior to the filing of this action to the extent such records were not privileged, but denies the remaining averments contained in paragraph 52 as it seeks a legal conclusion.

53. Respondent admits that Exhibit 9 is a true and accurate copy of Respondent's Public Records Policy ("Policy"), but denies the averments contained in paragraph 53 as Relator fails to include language of the entire Policy in an effort to portray such Policy out-of-context and the Policy speaks for itself.

54. Respondent admits the averments contained in paragraph 54.

55. Respondent denies the averments contained in paragraph 55.

56. Respondent denies the averments contained in paragraph 56 as Relator's September 9, 2011 letter made no reference to a public records request and was not addressed to or sent to Respondent. Respondent further states that while CH2M Hill was/is a limited agent of the Respondent on the Project, CH2M Hill is not an agent of

Respondent for purposes of service of a public records request under the Ohio Public Records Act or Respondent's Policy.

57. Respondent denies the averments contained in paragraph 57 as Relator's September 9, 2011 letter made no reference to a public records request and was not addressed to or sent to Respondent. Respondent further states that while CH2M Hill was/is a limited agent of the Respondent on the Project, CH2M Hill is not an agent of Respondent for purposes of service of a public records request under the Ohio Public Records Act or Respondent's Policy.

58. Respondent denies the averments contained in paragraph 58 and states that as Relator's September 9, 2011 letter was sent only to CH2M Hill, and not to the City, the City had no obligation to respond to such letter. Respondent further states that while CH2M Hill was/is a limited agent of the Respondent on the Project, CH2M Hill is not an agent of Respondent for purposes of service of a public records request under the Ohio Public Records Act or Respondent's Policy.

59. Respondent denies the averments contained in paragraph 59 as Relator's September 9, 2011 letter made no reference to a public records request and was not addressed to or sent to Respondent. Respondent further states that while CH2M Hill was/is a limited agent of the Respondent on the Project, CH2M Hill is not an agent of Respondent for purposes of service of a public records request under the Ohio Public Records Act or Respondent's Policy.

60. Respondent denies the averments contained in paragraph 60 as Relator's September 9, 2011 letter made no reference to a public records request and was not addressed to or sent to Respondent. Respondent further states that while CH2M Hill

was/is a limited agent of the Respondent on the Project, CH2M Hill is not an agent of Respondent for purposes of service of a public records request under the Ohio Public Records Act or Respondent's Policy.

61. Respondent admits that Exhibit 11 is a true and accurate copy of Relator's General Counsel's September 23, 2011 letter to Respondent's legal counsel and CH2M Hill, but denies the remaining averments contained in paragraph 61.

62. Respondent denies the averments contained in paragraph 62 and states that Relator willingly agreed to such a time limit on the production of its documents under its contract with Respondent and in light of the fact that the documents requested from Relator relate to Relator's specific claims. Respondent further states that it is under no such 10-day contractual or legal time limitation on the production of public records to Relator, especially in light of Relator's overbroad requests spanning nearly eight years.

63. Respondent admits that Exhibit 12 is a true and accurate copy of an October 5, 2011 letter from Relator's General Counsel to Respondent's legal counsel, but denies any remaining averments contained in paragraph 63 and states that Respondent's legal counsel did respond to Exhibit 12 with an email of that same date, a true and accurate copy of which is attached as Exhibit B hereto, stating as follows:

Ohio public records law provides that documents must be made available within a reasonable time. To the extent the documents you have requested are public records, the City will respond within a reasonable time. Your client agreed by contract to provide the documents within 10 days. There is no 10 day requirement within which the City must respond. The City intends to comply with Ohio's public records law and you have no basis for alleging that it has failed to do so.

64. Respondent admits that Exhibit 13 is a true and accurate copy of an October 12, 2011 letter from Relator's General Counsel to Respondent's legal counsel, but denies any remaining averments and statements contained in paragraph 64 and in Exhibit 13.

65. Respondent admits that Exhibit 14 is a true and accurate copy of an October 12, 2011 email from Respondent's legal counsel to Relator, but denies the remaining averments contained in paragraph 65 and states that Exhibit 14 speaks for itself.

66. Respondent admits that Exhibit 15 is a true and accurate copy of an October 14, 2011 letter from Relator's General Counsel to Respondent's legal counsel, but denies the remaining averments and statements contained in paragraph 66 and in Exhibit 15.

67. Respondent admits that Exhibit 16 is a true and accurate copy of an October 20, 2011 letter from Respondent's legal counsel to Relator's General Counsel, but denies the remaining averments contained in paragraph 67 as such averments misstate the issues addressed in Exhibit 16 and Exhibit 16 speaks for itself. Respondent further states that it was under no obligation under the Ohio Public Records Act to attempt to produce documents in stages, that to do so would have created duplication of efforts and delay in the ultimate disclosure of all responsive documents, and that Respondent's prior letter dated October 12, 2011, only 8 days prior to Exhibit 16, had estimated a two week time frame for production of Respondent's documents.

68. Respondent admits that Exhibit 17 is a true and accurate copy of an October 21, 2011 letter from Respondent's legal counsel to Relator's General Counsel, but denies the remaining averments contained in paragraph 68 as such averments misstate the issues addressed in Exhibit 17 and Exhibit 17 speaks for itself.

69. Respondent admits that by email dated October 28, 2011, a true and accurate copy of which is attached as Exhibit C, Respondent's legal counsel notified Relator's General Counsel that Respondent's documents responsive to the September 23, 2011 public records request would be available on November 1, 2 or 3, 2011 between 9:00 a.m. and 4:00 p.m. at Mike Sims' office, provided the address of Mr. Sims' office and requested the date and time Relator wanted to review the documents; but denies any remaining averments contained in paragraph 69 including Relator's characterization of the timeliness of Respondent's production of documents.

70. Respondent denies the averments contained in paragraph 70 and states that Respondent made its records in response to the September 23, 2011 public records request available for Relator's review on November 1, 2011. Respondent further states that it provided at the time of production a letter dated November 1, 2011, a true and accurate copy of which is attached as Exhibit D, notifying Relator of the nondisclosure of attorney-client privileged documents and providing support for the application of the privilege to such documents and support for the City's position that it was under no obligation to provide a privilege log to Relator under the Ohio Public Records Act. Respondent further states that documents selected by Kokosing for copying during this inspection were copied onto a disc, which was provided to Kokosing on November 3, 2011.

71. Respondent denies the averments contained in paragraph 71 and states that the Respondent produced all of its documents responsive to the public records request on November 1, 2011 and by a subsequent disclosure on November 22, 2011 despite the overbroad requests spanning nearly eight years. Respondent further states that certain

records requested by Relator were being kept by CH2M Hill pursuant to CH2M Hill's record keeping obligation under the Agreement and Respondent had no legal or contractual duty or obligation to keep duplicate records of such project records in Respondent's files and that disclosure of these documents required additional time given the volume of documents requested, the electronic transfer of those documents to the City, and the review of those electronic documents for privilege issues .

72. Respondent admits that Exhibit 18 is a true and accurate copy of a November 7, 2011 letter from Relator's General Counsel to Respondent's legal counsel, but denies the remaining averments contained in paragraph 72 and in Exhibit 18 and states that Relator ignores Respondent's legal counsel's letter dated November 4, 2011, a true and accurate copy of which is attached as Exhibit E, which addressed various concerns Relator raised with respect to Respondent's public records disclosure. Respondent further states that certain records requested by Relator were being kept by CH2M Hill pursuant to CH2M Hill's record keeping obligation under the Agreement and Respondent had no legal or contractual duty or obligation to keep duplicate records of such project records in Respondent's files.

73. Respondent admits that Exhibit 19 is a true and accurate copy of a November 10, 2011 letter from Respondent's legal counsel to Relator's General Counsel further addressing Relator's alleged concerns with Respondent's November 1, 2011 public records disclosure, but denies any remaining averments contained in paragraph 73 as it misstates the issues addressed in Exhibit 19 and Exhibit 19 speaks for itself.

74. Respondent denies the averments contained in paragraph 74, states that Exhibit 19 speaks for itself, and further states that Relator's public records requests were overly

broad; requested extremely broad categories of documents covering a period of time beginning from at least February 4, 2004, the date of the Agreement; and did not identify the records wanted by Relator with sufficient clarity.

75. Respondent admits that Exhibit 20 is a true and accurate copy of a November 11, 2011 letter from Relator's General Counsel to Respondent's legal counsel, but denies the remaining averments contained in paragraph 75 and in Exhibit 20.

76. Respondent admits that Exhibit 21 is a true and accurate copy of a November 22, 2011 letter from Respondent's legal counsel to Relator's General Counsel, but denies the remaining averments contained in paragraph 76 and states that Exhibit 21 speaks for itself. Respondent further states that despite Relator's overly broad and noncompliant public records request, Respondent continued to attempt to identify responsive public records and produced such additional documents along with Exhibit 21 upon Relator's clarification of its requests. Respondent further states that during this time, Kokosing requested scanned copies of emails, which were previously produced by the City to Kokosing on November 1, 2011.

77. Respondent admits that Exhibit 22 is a true and accurate copy of a December 9, 2011 letter from Respondent's legal counsel to Relator's General Counsel and admits that in that letter Respondent notified Relator that Respondent had "acted in good faith and has voluntarily assembled an extensive volume of records for Kokosing. These documents are available to Kokosing electronically. Upon receipt of a check for \$144.00, we will download the documents onto a 250 GB external hard drive and provide the drive to you." Respondent further notified Relator that "The City is currently in the process of making copies of the emails, which were previously made available to Kokosing for

inspection. These documents will be made available to Kokosing next week.” Respondent denies any remaining averments contained in paragraph 77.

78. Respondent admits that in Exhibit 22 it estimated the production of between 1,000,000 and 2,000,000 additional documents from CH2M Hill, but denies any remaining averments contained in paragraph 78. However, Respondent states that the number of pages of documents produced on the hard drive, although over 100,000 pages, was less than originally anticipated. CH2M Hill estimated the number of pages based on the amount of electronic memory needed to store the data. Based on the total size of the data, CH2M Hill estimated that there were between 850,000 and 2.5 million pages of documents. However, it was later discovered that a substantial volume of memory was used to store drawings, which are larger files than document files. Thus, the actual number of pages, while still substantial, was much less than originally estimated. Respondent further states that Respondent did indicate that the additional documents were from the files of CH2M Hill. Exhibit 22 specifically made separate reference to two categories of electronic documents: (1) copies of the emails, which had been previously produced to Relator, which would be available in the next week, and (2) extensive records then available to Relator that would be downloaded to a 250 GB external hard drive upon receipt of a check for \$144.00. In response to a December 12, 2011 letter from Relator’s General Counsel to Respondent’s legal counsel, a true and accurate copy of which is attached as Exhibit F, in which Relator’s General Counsel indicated he would deliver the \$144.00 check on that date, Respondent’s legal counsel sent a letter dated December 14, 2011, a true and accurate copy of which is attached as Exhibit G, giving instructions for the check to reimburse Respondent for its costs of production. Included

as part of Exhibit G was an invoice with an itemized breakdown of the cost of "1 External Hard Drive with CH2M Documents Bates Nos. CH00001-CH119623 \$144.38." The invoice also included an itemized breakdown of the costs of scanning the emails, which were previously produced by Respondent, in the amount of \$260.77. This letter was sent to Relator prior to the filing of this action but Relator chose not to pay the invoice until December 20, 2011, at which time it picked up the electronic documents.

79. Respondent denies the averments contained in paragraph 79 and states that Respondent had a legal right, duty and obligation to redact attorney-client privileged communications at issue as set forth in Exhibit D.

80. Respondent states that Respondent had an obligation under Sections 3.5 and 3.6 of the Agreement to provide any legal services reasonably requested by CH2M Hill with regard to legal issues on the Project and provided such legal services through Respondent's legal counsel to CH2M Hill in CH2M Hill's capacity as agent for the Owner, but denies the remaining averments contained in paragraph 80. Respondent further states that any consultation with legal counsel did not preclude CH2M Hill from rendering impartial, good faith decisions on Relator's claims.

81. Respondent states that Respondent had an obligation under Sections 3.5 and 3.6 of the Agreement to provide any legal services reasonably requested by CH2M Hill with regard to legal issues on the Project and provided such legal services through Respondent's legal counsel to CH2M Hill in its capacity as agent for the Owner, but denies the remaining averments contained in paragraph 81. Respondent further states that any consultation with legal counsel did not preclude CH2M Hill from rendering impartial, good faith decisions on Relator's claims.

82. Respondent states that Respondent had an obligation under Sections 3.5 and 3.6 of the Agreement to provide any legal services reasonably requested by CH2M Hill with regard to legal issues on the Project in CH2M Hill's capacity as agent for the Owner and provided such legal services through Respondent's legal counsel. Respondent further states that any consultation with legal counsel did not preclude CH2M Hill from rendering impartial, good faith decisions on Relator's claims. Respondent further states that Kokosing has been provided a written decision from the design professional on each of its claims and can challenge the conclusions and decisions contained in those written decisions regardless of whether they are challenging those decisions on factual, legal or contractual grounds. Respondent denies the remaining averments contained in paragraph 82.

83. Respondent admits the averments contained in paragraph 83.

84. Respondent admits that Exhibit 24 contains copies of redacted emails, but denies any remaining averments contained in paragraph 84.

85. Respondent denies the averments contained in paragraph 85 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

86. Respondent denies the averments contained in paragraph 86 and states that CH2M Hill's responsive public records were made available to Relator on December 9, 2011 upon payment of \$144.00 to reimburse Respondent for the cost of copying such records on a 250 GB hard drive as stated in Exhibit 22. Respondent further states that on December 12, 2011, Relator's General Counsel indicated that he would deliver the check for the hard drive to Respondent's legal counsel on that date as stated in Exhibit F but did

not do so; that on December 14, 2011, Respondent's legal counsel provided Relator's General Counsel with instructions for delivery of the check along with an itemized invoice as stated in Exhibit G; that on December 14, 2011, the same day that Kokosing was given instructions for delivery of the check, Kokosing's Assistant General Counsel orally indicated to Mark Evans that it was acceptable to either have the hard drive delivered to Kokosing or for Kokosing to deliver the check to and pick up the hard drive at Bricker & Eckler's Columbus office; and that Relator did not deliver a check for the hard drive containing the CH2M Hill public records until December 20, 2011 as stated in Respondent's legal counsel's December 22, 2011 letter to Relator's General Counsel, a true and accurate copy of which is attached as Exhibit H.

87. Respondent denies the averments contained in paragraph 87 and states that Respondent made its responsive public records available to Relator on November 1 and 22, 2011 and made CH2M Hill's responsive public records available to Relator on December 9, 2011, despite Relator's overbroad requests.

88. Respondent denies the averments contained in paragraph 88 and states that it had a legal right, duty and obligation to redact the attorney-client privileged communications at issue as set forth in Exhibit D.

89. Respondent denies the averments contained in paragraph 89 and states that Respondent made its responsive public records available to Relator on November 1 and 22, 2011 and made CH2M Hill's responsive public records available to Relator on December 9, 2011, prior to the filing of this action.

90. Respondent denies the averments contained in paragraph 90 and states that it provided Relator with legal support for the redactions as set forth in Exhibit D.

91. Respondent denies the averments contained in paragraph 91 and states that Respondent made its responsive public records available to Relator on November 1 and 22, 2011 and made CH2M Hill's responsive public records available to Relator on December 9, 2011.

92. Respondent denies the averments contained in paragraph 92 and states that Respondent made CH2M Hill's responsive public records available to Relator on December 9, 2011, prior to the filing of this action.

93. Respondent denies the averments contained in paragraph 93.

94. Respondent denies the averments contained in paragraph 94.

95. Respondent admits the averments contained in paragraph 95, but denies that Relator is an aggrieved party or that it made a proper public records request.

96. Respondent denies the averments contained in paragraph 96.

97. Respondent states that the documents attached as Exhibits to this Answer are true and accurate copies of public records and are exempted from the hearsay rule under Ohio Evid. R. 803(8).

AFFIRMATIVE DEFENSES

98. The Complaint fails to state a claim upon which relief can be granted.

99. The Relator's claims are moot.

100. Relator has failed to comply with the Ohio Public Records Act.

101. Relator's Complaint fails to comply with the requirements of R.C. 2731.04.

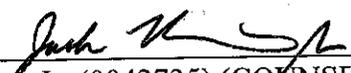
102. Relator failed to deliver its public records request via hand delivery or certified mail limiting any available damages under the Public Records Act.

103. Relator's public records request was overbroad and thereby failed to comply with the Public Records Act.

WHEREFORE, Respondents respectfully request the following:

- (a) that the Complaint of the Relator be dismissed;
- (b) that sanctions be imposed under Rule XIV, Section 5 of the Rules of Practice of the Ohio Supreme Court;
- (c) that Respondent be awarded its costs, including attorneys fees, expended herein; and
- (d) for such further relief as this Court deems equitable and just.

Respectfully submitted,



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(614) 227-2300
Counsel for Respondent City of Zanesville, Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of **ANSWER OF RESPONDENT CITY OF ZANESVILLE, OHIO** was sent by regular U.S. Mail, postage prepaid, delivery on this 6th day of January, 2012 upon the following:

Michael W. Currie
Matthew R. Wushinski
KOKOSING CONSTRUCTION COMPANY, INC.
6235 Westerville Road
Westerville, Ohio 43081
Attorney for Relator

Jeffrey W. Hutson
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Columbus, Ohio 43215-7032
Counsel for Respondent
CH2M Hill



Jack R. Rosati, Jr.

This document has important legal consequences; consultation with an attorney is encouraged with respect to its use or modification. This document should be adapted to the particular circumstances of the contemplated Project and the Controlling Law.

**MODIFIED
STANDARD
GENERAL CONDITIONS
OF THE
CONSTRUCTION CONTRACT**

Prepared by

ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

and

Issued and Published Jointly By



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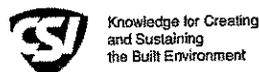
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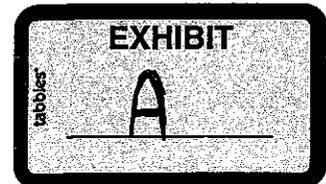
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These General Conditions have been prepared for use with the Suggested Forms of Agreement Between Owner and Contractor Nos. C-520 or C-525 (2002 Editions). Their provisions are interrelated and a change in one may necessitate a change in the other. Comments concerning their usage are contained in the EJCDC Construction Documents, General and Instructions (No. C-001) (2002 Edition). For guidance in the preparation of Supplementary Conditions, see Guide to the Preparation of Supplementary Conditions (No. C-800) (2002 Edition).

EJCDC C-700 **MODIFIED** Standard General Conditions of the Construction Contract.
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EJCDC General Conditions

EJCDC GC-2

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GENERAL CONDITIONS

ARTICLE 1 - DEFINITIONS AND TERMINOLOGY

1.01 *Defined Terms*

A. Wherever used in the Bidding Requirements or Contract Documents and printed with initial capital letters or with all capital letters, the terms listed below will have the meanings indicated which are applicable to both the singular and plural thereof. In addition to terms specifically defined, terms with initial capital letters in the Contract Documents include references to identified articles and paragraphs, and the titles of other documents or forms.

1. *Addenda*--Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Requirements or the proposed Contract Documents.

2. *Agreement or Owner-Contractor Agreement*--The written instrument which is evidence of the agreement between Owner and Contractor covering the Work.

3. *Application for Payment*--The form acceptable to Engineer which is to be used by Contractor during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Contract Documents.

4. *Asbestos*--Any material that contains more than one percent asbestos and is friable or is releasing asbestos fibers into the air above current action levels established by the United States Occupational Safety and Health Administration.

5. *Bid*--The offer or proposal of a Bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

6. *Bidder*--The individual or entity who submits a Bid directly to Owner.

7. *Bidding Documents*--The Bidding Requirements and the proposed Contract Documents (including all Addenda).

8. *Bidding Requirements*--The Advertisement or Invitation to Bid, Instructions to Bidders, bid security of acceptable form, if any, and the Bid Form with any supplements.

9. *Change Order*--A document recommended by Engineer which is signed by Contractor, and Owner and authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the Contract

Times, issued on or after the Effective Date of the Agreement.

10. *Claim*--A demand or assertion by Owner or Contractor seeking an adjustment of Contract Price or Contract Times, or both, or other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Claim.

11. *Contract*--The entire and integrated written agreement between the Owner and Contractor concerning the Work. The Contract supersedes prior negotiations, representations, or agreements, whether written or oral.

12. *Contract Documents*-- Those items so designated in the Agreement. Only printed or hard copies of the items listed in the Agreement are Contract Documents. Approved Shop Drawings, other Contractor's submittals, and the reports and drawings of subsurface and physical conditions are not Contract Documents.

13. *Contract Price*--The moneys payable by Owner to Contractor for completion of the Work in accordance with the Contract Documents as stated in the Agreement (subject to the provisions of Paragraph 11.03 in the case of Unit Price Work).

14. *Contract Times*--The number of days or the dates stated in the Agreement to: (i) achieve Milestones, if any, (ii) achieve Substantial Completion; and (iii) complete the Work so that it is ready for final payment as evidenced by Engineer's written recommendation of final payment.

15. *Contractor*--The individual or entity with whom Owner has entered into the Agreement.

16. *Cost of the Work*--See Paragraph 11.01.A for definition.

17. *Drawings*--That part of the Contract Documents prepared or approved by Engineer which graphically shows the scope, extent, and character of the Work to be performed by Contractor. Shop Drawings and other Contractor submittals are not Drawings as so defined.

18. *Effective Date of the Agreement*--The date indicated in the Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Agreement is signed by the Owner and ~~delivered by the last of the two parties to sign and deliver.~~

19. *Engineer*--The individual or entity named as such in the Agreement.

20. *Field Order*--A written order issued by Engineer which requires minor changes in the Work but which does not involve a change in the Contract Price or the Contract Times.

21. *General Requirements*--Sections of Division 1 of the Specifications. The General Requirements pertain to all sections of the Specifications.

22. *Hazardous Environmental Condition*--The presence at the Site of Asbestos, PCBs, Petroleum, Hazardous Waste, or Radioactive Material in such quantities or circumstances that may present a substantial danger to persons or property exposed thereto in connection with the Work.

23. *Hazardous Waste*--The term Hazardous Waste shall have the meaning provided in Section 1004 of the Solid Waste Disposal Act (42 USC Section 6903) as amended from time to time.

24. *Laws and Regulations; Laws or Regulations*--Any and all applicable laws, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.

25. *Liens*--Charges, security interests, or encumbrances upon Project funds, real property, or personal property.

26. *Milestone*--A principal event specified in the Contract Documents relating to an intermediate completion date or time prior to Substantial Completion of all the Work.

27. *Notice of Award*. -- A The written notice by Owner to the Successful Bidder stating that upon timely compliance by the Successful Bidder with the conditions precedent listed therein, Owner will sign and deliver the Agreement.

28. *Notice to Proceed*--A written notice given by Owner to Contractor fixing the date on which the Contract Times will commence to run and on which Contractor shall start to perform the Work under the Contract Documents.

29. *Owner*--The individual or entity with whom Contractor has entered into the Agreement and for whom the Work is to be performed. The Owner is the City of Zanesville, Ohio.

30. *PCBs*--Polychlorinated biphenyls.

31. *Petroleum*--Petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute), such as oil, petroleum, fuel oil, oil sludge, oil refuse, gasoline,

kerosene, and oil mixed with other non-Hazardous Waste and crude oils.

32. *Progress Schedule*--The Progress Schedule, sometimes called the Construction Schedule, is the document prepared by the Coordinating Contractor. The Coordinating Contractor is defined in the Agreement. A schedule, prepared and maintained by Contractor, describing the sequence and duration of the activities comprising the Contractor's plan to accomplish the Work within the Contract Times.

33. *Project*--The total construction of which the Work to be performed under the Contract Documents may be the whole, or a part.

34. *Project Manual*--The bound documentary information prepared for bidding and constructing the Work. A listing of the contents of the Project Manual, which may be bound in one or more volumes, is contained in the table(s) of contents.

35. *Radioactive Material*--Source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 (42 USC Section 2011 et seq.) as amended from time to time.

36. *Related Entity* -- An officer, director, partner, employee, agent, consultant, or subcontractor.

37. *Resident Project Representative*--The authorized representative of Engineer who may be assigned to the Site or any part thereof.

38. *Samples*--Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and which establish the standards by which such portion of the Work will be judged.

39. *Schedule of Submittals*--A schedule, prepared and maintained by Contractor, of required submittals and the time requirements to support scheduled performance of related construction activities.

40. *Schedule of Values*--A schedule, prepared and maintained by Contractor, allocating portions of the Contract Price to various portions of the Work and used as the basis for reviewing Contractor's Applications for Payment.

41. *Shop Drawings*--All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for Contractor and submitted by Contractor to illustrate some portion of the Work.

42. *Site*--Lands or areas indicated in the Contract Documents as being furnished by Owner upon which the

Work is to be performed, including rights-of-way and easements for access thereto, and such other lands furnished by Owner which are designated for the use of Contractor.

43. *Specifications*--That part of the Contract Documents consisting of written requirements for materials, equipment, systems, standards and workmanship as applied to the Work, and certain administrative requirements and procedural matters applicable thereto.

44. *Subcontractor*--An individual or entity having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work at the Site.

45. *Substantial Completion*--The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of Engineer, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms "substantially complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion thereof. Substantial Completion is further defined as (i) that degree of completion of the Project's operating facilities or systems sufficient to provide Owner the full time, uninterrupted, and continuous beneficial operation of the Work; and (ii) all required functional, performance and acceptance or startup testing has been successfully demonstrated for all components, devices, equipment, and instrumentation and control to the satisfaction of Engineer in accordance with the requirements of the Specifications.

46. *Successful Bidder*--The Bidder submitting a responsive Bid to whom Owner makes an award.

47. *Supplementary Conditions*--That part of the Contract Documents which amends or supplements these General Conditions. Modifications to the standard EJCDC general conditions document are included in the text of this document and are shown as underlined text (additions) and interlineated text (deletions). If additional supplements are included in the Contract Documents, they may be in the form of Supplementary or Special Conditions.

48. *Supplier*--A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with Contractor or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by Contractor or any Subcontractor.

49. *Underground Facilities*--All underground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities, including

those that convey electricity, gases, steam, liquid petroleum products, telephone or other communications, cable television, water, wastewater, storm water, other liquids or chemicals, or traffic or other control systems.

50. *Unit Price Work*--Work to be paid for on the basis of unit prices.

51. *Work*--The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Contract Documents.

52. *Work Change Directive*--A written statement to Contractor issued on or after the Effective Date of the Agreement and signed by Owner and recommended by Engineer ordering an addition, deletion, or revision in the Work, or responding to differing or unforeseen subsurface or physical conditions under which the Work is to be performed or to emergencies. A Work Change Directive will not change the Contract Price or the Contract Times but is evidence that the parties expect that the change ordered or documented by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract Price or Contract Times.

1.02 Terminology

A. The following words or terms are not defined but, when used in the Bidding Requirements or Contract Documents, have the following meaning.

B. Intent of Certain Terms or Adjectives

1. The Contract Documents include the terms "as allowed," "as approved," "as ordered," "as directed" or terms of like effect or import to authorize an exercise of professional judgment by Engineer. In addition, the adjectives "reasonable," "suitable," "acceptable," "proper," "satisfactory," or adjectives of like effect or import are used to describe an action or determination of Engineer as to the Work. It is intended that such exercise of professional judgment, action or determination will be solely to evaluate, in general, the Work for compliance with the requirements of and information in the Contract Documents and conformance with the design concept of the completed Project as a functioning whole as shown or indicated in the Contract Documents (unless there is a specific statement indicating otherwise). The use of any such term or adjective is not intended to and shall not be effective to assign to Engineer any duty or authority to supervise or direct the performance of the Work or any duty or authority to undertake responsibility contrary to

the provisions of Paragraph 9.09 or any other provision of the Contract Documents.

C. Day

1. The word "day" means a calendar day of 24 hours measured from midnight to the next midnight.

D. Defective

1. The word "defective," when modifying the word "Work," refers to Work that is unsatisfactory, faulty, or deficient in that it:

- a. does not conform to the Contract Documents, or
- b. does not meet the requirements of any applicable inspection, reference standard, test, or approval referred to in the Contract Documents, or
- c. has been damaged prior to Engineer's - recommendation of final payment (unless responsibility for the protection thereof has been assumed by Owner at Substantial Completion in accordance with Paragraph 14.04 or 14.05).

E. Furnish, Install, Perform, Provide

1. The word "furnish," when used in connection with services, materials, or equipment, shall mean to supply and deliver said services, materials, or equipment to the Site (or some other specified location) ready for use or installation and in usable or operable condition.

2. The word "install," when used in connection with services, materials, or equipment, shall mean to put into use or place in final position said services, materials, or equipment complete and ready for intended use.

3. The words "perform" or "provide," when used in connection with services, materials, or equipment, shall mean to furnish and install said services, materials, or equipment complete and ready for intended use.

4. When "furnish," "install," "perform," or "provide" is not used in connection with services, materials, or equipment in a context clearly requiring an obligation of Contractor, "provide" is implied.

F. Unless stated otherwise in the Contract Documents, words or phrases which have a well-known technical or construction industry or trade meaning are used in the Contract Documents in accordance with such recognized meaning.

ARTICLE 2 - PRELIMINARY MATTERS

2.01 Delivery of Bonds and Evidence of Insurance

~~A. When Contractor delivers the executed counterparts of the Agreement to Owner, Contractor shall also deliver to Owner such bonds as Contractor may be required to furnish. When Contractor delivers the executed counterparts of the Agreement to Owner, Contractor shall also deliver to Owner such bonds, insurance certificates, insurance endorsements, and other documents as Contractor may be required to furnish under the Contract Documents.~~

~~B. Evidence of Insurance: Before any Work at the Site is started, Contractor and Owner shall each deliver to the other, with copies to each additional insured identified in the Supplementary Conditions, certificates of insurance (and other evidence of insurance which either of them or any additional insured may reasonably request) which Contractor and Owner respectively are required to purchase and maintain in accordance with Article 5. Evidence of Insurance: Before any Work at the Site is started, Contractor shall deliver to the Owner with copies to each additional insured identified in the Modified General Conditions Owner-approved copies of certificates of insurance, copies of endorsements, and other evidence of insurance which either of them or any additional insured may reasonably request, which Contractor is required to purchase and maintain in accordance with Article 5.~~

2.02 Copies of Documents

A. Owner shall furnish to Contractor up to ten printed or hard copies of the Drawings and Project Manual. Additional copies will be furnished upon request at the cost of reproduction.

2.03 Commencement of Contract Times; Notice to Proceed

~~A. The Contract Times will commence to run in accordance with Section 3 of the Agreement, on the thirtieth day after the Effective Date of the Agreement or, if a Notice to Proceed is given, on the day indicated in the Notice to Proceed. A Notice to Proceed may be given at any time within 30 days after the Effective Date of the Agreement. In no event will the Contract Times commence to run later than the sixtieth day after the day of Bid opening or the thirtieth day after the Effective Date of the Agreement, whichever date is earlier.~~

2.04 Starting the Work

A. Contractor shall start to perform the Work on the date when the Contract Times commence to run. No Work shall be done at the Site prior to the date on which the Contract Times commence to run.

2.05 Before Starting Construction

A. *Preliminary Schedules*: Within 10 days after the Effective Date of the Agreement (unless otherwise specified in the General Requirements), Contractor shall submit to Engineer for timely review:

~~1. a preliminary Progress Schedule, indicating the times (numbers of days or dates) for starting and completing the various stages of the Work, including any Milestones specified in the Contract Documents;~~

2. a preliminary Schedule of Submittals; and

3. a preliminary Schedule of Values for all of the Work which includes quantities and prices of items which when added together equal the Contract Price and subdivides the Work into component parts in sufficient detail to serve as the basis for progress payments during performance of the Work. Such prices will include an appropriate amount of overhead and profit applicable to each item of Work. The total of the schedule of values prepared for the Work, as required by the General Conditions, shall not exceed the Bid submitted for the Work, unless such amount is adjusted as provided in the Contract Documents.

2.06 Preconstruction Conference

A. Before any Work at the Site is started, a conference attended by Owner, Contractor, Engineer, and others as appropriate will be held to establish a working understanding among the parties as to the Work and to discuss the schedules referred to in Paragraph 2.05.A, procedures for handling Shop Drawings and other submittals, processing Applications for Payment, and maintaining required records.

2.07 Initial Acceptance of Schedules

A. At least 10 days before submission of the first Application for Payment a conference attended by Contractor, Engineer, and others as appropriate will be held to review for acceptability to Engineer as provided below the schedules submitted in accordance with Paragraph 2.05.A. Contractor shall have an additional 10 days to make corrections and adjustments and to complete and resubmit the schedules. No progress payment shall be made to Contractor until acceptable schedules are submitted to Engineer and Owner.

~~1. The Progress Schedule will be acceptable to Engineer if it provides an orderly progression of the Work to completion within the Contract Times. Such acceptance will not impose on Engineer responsibility for the Progress Schedule, for sequencing, scheduling, or progress of the Work nor interfere with or relieve Contractor from Contractor's full responsibility therefor.~~

1. The Construction/Progress Schedule shall be prepared as provided in the Contract Documents.

2. Contractor's Schedule of Submittals will be acceptable to Engineer if it provides a workable arrangement for reviewing and processing the required submittals.

3. Contractor's Schedule of Values will be acceptable to Engineer as to form and substance if it provides a reasonable allocation of the Contract Price to component parts of the Work. Once approved by the Engineer, the Contractor will not change the allocation of the Contract Price to the component parts of the Work without the Engineer's written approval. The Engineer thereafter may from time to time require the Contractor to adjust such schedule if the Architect determines it to be in any way unreasonable or inaccurate. The Contractor then shall adjust the schedule of values as required by the Engineer within ten (10) days.

ARTICLE 3 - CONTRACT DOCUMENTS: INTENT, AMENDING, REUSE

3.01 Intent

A. The Contract Documents are complementary; what is required by one is as binding as if required by all.

B. It is the intent of the Contract Documents to describe a functionally complete Project (or part thereof) to be constructed in accordance with the Contract Documents. Any labor, documentation, services, materials, or equipment that may reasonably be inferred from the Contract Documents or from prevailing custom or trade usage as being required to produce the intended result will be provided whether or not specifically called for at no additional cost to Owner.

C. Clarifications and interpretations of the Contract Documents shall be issued by Engineer as provided in Article 9.

3.02 Reference Standards

A. Standards, Specifications, Codes, Laws, and Regulations

1. Reference to standards, specifications, manuals, or codes of any technical society, organization, or association, or to Laws or Regulations, whether such reference be specific or by implication, shall mean the standard, specification, manual, code, or Laws or Regulations in effect at the time of opening of Bids (or on the Effective Date of the Agreement if there were no Bids), except as may be otherwise specifically stated in the Contract Documents.

2. No provision of any such standard, specification, manual or code, or any instruction of a Supplier shall be effective to change the duties or responsibilities of Owner, Contractor, or Engineer, or any of their subcontractors, consultants, agents, or employees from those set forth in the Contract Documents. No such provision or instruction shall be effective to assign to Owner, or Engineer, or any of, their Related Entities, any duty or authority to supervise or direct the performance of the Work or any duty or authority to undertake responsibility inconsistent with the provisions of the Contract Documents.

3.03 *Reporting and Resolving Discrepancies*

A. Reporting Discrepancies

1. Contractor's Review of Contract Documents Before Starting Work: In addition to its obligations under the Instructions to Bidders, before undertaking each part of the Work, Contractor shall carefully study and compare the Contract Documents and check and verify pertinent figures therein and all applicable field measurements. Contractor shall promptly report in writing to Engineer any conflict, error, ambiguity, or discrepancy which Contractor may discover and shall obtain a written interpretation or clarification from Engineer before proceeding with any Work affected thereby.

2. Contractor's Review of Contract Documents During Performance of Work: If, during the performance of the Work, Contractor discovers any conflict, error, ambiguity, or discrepancy within the Contract Documents or between the Contract Documents and any provision of any Law or Regulation applicable to the performance of the Work or of any standard, specification, manual or code, or of any instruction of any Supplier, Contractor shall promptly report it to Engineer in writing. Contractor shall not proceed with the Work affected thereby (except in an emergency as required by Paragraph 6.16.A) until an amendment or supplement to the Contract Documents has been issued by one of the methods indicated in Paragraph 3.04.

3. Contractor shall not be liable to Owner or Engineer for failure to report any conflict, error, ambiguity, or discrepancy in the Contract Documents unless Contractor knew or reasonably should have known thereof or Contractor failed to perform its obligations under the Instructions to Bidders.

4. In addition to its obligations under the Instructions to Bidders, if Contractor proceeds with work that Contractor had actual knowledge or should have known that a conflict, error, ambiguity, or discrepancy existed as indicated above, correction of work constructed without such notification to Engineer shall be at

Contractor's expense, (except in an emergency as authorized by Paragraph 6.16.A.).

B. Resolving Discrepancies

1. Except as may be otherwise specifically stated in the Contract Documents, the provisions of the Contract Documents shall take precedence in resolving any conflict, error, ambiguity, or discrepancy between the provisions of the Contract Documents and:

a. the provisions of any standard, specification, manual, code, or instruction (whether or not specifically incorporated by reference in the Contract Documents); or

b. the provisions of any Laws or Regulations applicable to the performance of the Work (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Law or Regulation).

2. Within the Contract Documents, requirements of the Agreement shall take precedence over the Modified General Conditions, which shall take precedence over the Specifications, which shall take precedence over the Drawings.

3. Within a particular Contract Document, figure dimensions on Drawings shall take precedence over general Drawings. Specific instructions or specifications shall take precedence over general instructions or specifications.

3.04 *Amending and Supplementing Contract Documents*

A. The Contract Documents may be amended to provide for additions, deletions, and revisions in the Work or to modify the terms and conditions thereof by either a Change Order or a Work Change Directive.

B. The requirements of the Contract Documents may be supplemented, and minor variations and deviations in the Work may be authorized, by one or more of the following ways:

1. A Field Order;

2. Engineer's approval of a Shop Drawing or Sample; (Subject to the provisions of Paragraph 6.17.D.3); or

3. Engineer's written interpretation or clarification.

3.05 *Reuse of Documents*

A. Contractor and any Subcontractor or Supplier or other individual or entity performing or furnishing all of the Work under a direct or indirect contract with Contractor, shall not:

1. have or acquire any title to or ownership rights in any of the Drawings, Specifications, or other documents (or copies of any thereof) prepared by or bearing the seal of Engineer or Engineer's consultants, including electronic media editions; or

2. reuse any of such Drawings, Specifications, other documents, or copies thereof on extensions of the Project or any other project without written consent of Owner and Engineer and specific written verification or adoption by Engineer.

B. The prohibition of this Paragraph 3.05 will survive final payment, or termination of the Contract. Nothing herein shall preclude Contractor from retaining copies of the Contract Documents for record purposes.

3.06 *Electronic Data*

A. Copies of data furnished by Owner or Engineer to Contractor or Contractor to Owner or Engineer that may be relied upon are limited to the printed copies (also known as hard copies). Files in electronic media format of text, data, graphics, or other types are furnished only for the convenience of the receiving party. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.

B. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any errors detected within the 60-day acceptance period will be corrected by the transferring party.

C. When transferring documents in electronic media format, the transferring party makes no representations as to long term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the data's creator.

ARTICLE 4 - AVAILABILITY OF LANDS;
SUBSURFACE AND PHYSICAL CONDITIONS;
HAZARDOUS ENVIRONMENTAL CONDITIONS;
REFERENCE POINTS

4.01 *Availability of Lands*

A. Owner shall furnish the Site. Owner shall notify Contractor of any encumbrances or restrictions not of general application but specifically related to use of the Site with which Contractor must comply in performing the Work. Owner will obtain in a timely manner and pay for easements for permanent structures or permanent changes in existing facilities. If Contractor and Owner are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, as a result of any delay in Owner's furnishing the Site or a part thereof, Contractor may make a Claim therefor as provided in Paragraph 10.05.

~~B. Upon reasonable written request, Owner shall furnish Contractor with a current statement of record legal title and legal description of the lands upon which the Work is to be performed and Owner's interest therein as necessary for giving notice of or filing a mechanic's or construction lien against such lands in accordance with applicable Laws and Regulations. Upon reasonable request, Owner shall furnish Contractor with a Notice of Commencement prepared for the Project, conforming with the provisions of Ohio Revised Code Section 1311.252.~~

C. Contractor shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

4.02 *Subsurface and Physical Conditions*

~~A. Reports and Drawings: The Supplementary Conditions identify: The Agreement identifies:~~

1. those reports of explorations and tests of subsurface conditions at or contiguous to the Site that Engineer has used in preparing the Contract Documents; and

2. those drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site (except Underground Facilities) that Engineer has used in preparing the Contract Documents.

3. it is possible that there may be other reports and/or tests of subsurface conditions at or contiguous to the Site. The Owner makes no representation about such reports and/or tests, assuming they exist.

B. Limited Reliance by Contractor on Technical Data Authorized: Contractor may rely upon the general accuracy of the "technical data" contained in such reports and drawings, but such reports and drawings are not Contract Documents. Such "technical data" is identified

in the ~~Supplementary Conditions~~ the Agreement. Except for such reliance on such "technical data," Contractor may not rely upon or make any claim against Owner or Engineer, or any of their Related Entities with respect to:

1. the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, and safety precautions and programs incident thereto; or

2. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or

3. any Contractor interpretation of or conclusion drawn from any "technical data" or any such other data, interpretations, opinions, or information. For example, all interpolations and extrapolations of data performed by Contractor to estimate locations or quantities of subsurface strata are independent factual assumptions which Owner does not warrant.

4.03 Differing Subsurface or Physical Conditions

A. *Notice:* If Contractor believes that any subsurface or physical condition at or contiguous to the Site that is uncovered or revealed either:

1. is of such a nature as to establish that any "technical data" on which Contractor is entitled to rely as provided in Paragraph 4.02 is materially inaccurate; or

2. is of such a nature as to require a change in the Contract Documents; or

3. differs materially from that shown or indicated in the Contract Documents; or

4. is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents; then Contractor, as a condition precedent to any increase in the Contract Price and/or an extension of the Contract Times shall, promptly within 48 hours after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), notify Owner and Engineer in writing about such condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

B. *Engineer's Review:* After receipt of written notice as required by Paragraph 4.03.A, Engineer will promptly review the pertinent condition, determine the necessity of Owner's obtaining additional exploration or

tests with respect thereto, and advise Owner in writing (with a copy to Contractor) of Engineer's findings and conclusions.

C. Possible Price and Times Adjustments

1. The Contract Price or the Contract Times, or both, will be equitably adjusted to the extent that the existence of such differing subsurface or physical condition causes an increase or decrease in Contractor's cost of, or time required for, performance of the Work; subject, however, to the following:

a. such condition must meet any one or more of the categories described in Paragraph 4.03.A; and

b. with respect to Work that is paid for on a Unit Price Basis, any adjustment in Contract Price will be subject to the provisions of Paragraphs 9.07 and 11.03.

2. Contractor shall not be entitled to any adjustment in the Contract Price or Contract Times if:

a. Contractor knew of the existence of such conditions at the time Contractor made a final commitment to Owner with respect to Contract Price and Contract Times by the submission of a Bid or becoming bound under a negotiated contract; or

b. the existence of such condition could reasonably have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site and contiguous areas required by the Bidding Requirements or Contract Documents to be conducted by or for Contractor prior to Contractor's making such final commitment; or

c. Contractor failed to give the written notice as required by Paragraph 4.03.A.

3. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, a Claim may be made therefor as provided in Paragraph 10.05. However, Owner and Engineer, and any of their Related Entities shall not be liable to Contractor for any claims, costs, losses, or damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Contractor on or in connection with any other project or anticipated project.

4.04 Underground Facilities

A. *Shown or Indicated*: The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the Site is based on information and data furnished to Owner or Engineer by the owners of such Underground Facilities, including Owner, or by others. Unless it is otherwise expressly provided elsewhere in these Modified General Conditions:

1. Owner and Engineer shall not be responsible for the accuracy or completeness of any such information or data; and

2. the cost of all of the following will be included in the Contract Price, and Contractor shall have full responsibility for:

~~a. reviewing and checking all such information and data;~~

~~ba. locating all Underground Facilities shown or indicated in the Contract Documents, protecting all Underground Facilities in a manner at least as cautious and protective of safety and of underground facilities as those methods identified in Ohio Revised Code Sections 3781.25 and 3781.30.~~

~~eb. coordination of the Work with the owners of such Underground Facilities, including Owner, during construction, and~~

~~ec. the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work.~~

B. *Not Shown or Indicated*

1. If an Underground Facility is uncovered or revealed at or contiguous to the Site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Contract Documents, Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), identify the owner of such Underground Facility and give written notice to that owner and to Owner and Engineer. Engineer will promptly review the Underground Facility and determine the extent, if any, to which a change is required in the Contract Documents to reflect and document the consequences of the existence or location of the Underground Facility. During such time, Contractor shall be responsible for the safety and protection of such Underground Facility.

2. If Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or a Change Order will be issued to reflect and

document such consequences. An equitable adjustment shall be made in the Contract Price or Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or indicated or not shown or indicated with reasonable accuracy in the Contract Documents and that Contractor did not know of and could not reasonably have been expected to be aware of or to have anticipated. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment in Contract Price or Contract Times, Owner or Contractor may make a Claim therefor as provided in Paragraph 10.05.

4.05 *Reference Points*

A. Owner shall provide engineering surveys to establish reference points for construction which in Engineer's judgment are necessary to enable Contractor to proceed with the Work. Contractor shall be responsible for laying out the Work, shall protect and preserve the established reference points and property monuments, and shall make no changes or relocations without the prior written approval of Owner. Contractor shall report to Engineer whenever any reference point or property monument is lost or destroyed or requires relocation because of necessary changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such reference points or property monuments by professionally qualified personnel. Contractor is referred to the General Requirements for additional requirements for laying out the work.

4.06 *Hazardous Environmental Condition at Site*

A. *Reports and Drawings*: Reference is made in the Agreement to the Supplementary Conditions for the identification of those reports and drawings relating to a Hazardous Environmental Condition identified at the Site, if any, that have been utilized by the Engineer in the preparation of the Contract Documents.

B. *Limited Reliance by Contractor on Technical Data Authorized*: Contractor may rely upon the general accuracy of the "technical data" contained in such reports and drawings, but such reports and drawings are not Contract Documents. Such "technical data" is identified in the Supplementary Conditions. Except for such reliance on such "technical data," Contractor may not rely upon or make any claim against Owner or Engineer, or any of their Related Entities with respect to:

1. the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences and procedures of construction to be employed by Contractor and safety precautions and programs incident thereto; or

2. other data, interpretations, opinions and information contained in such reports or shown or indicated in such drawings; or

3. any Contractor interpretation of or conclusion drawn from any "technical data" or any such other data, interpretations, opinions or information.

C. Contractor shall not be responsible for any Hazardous Environmental Condition uncovered or revealed at the Site which was not shown or indicated in Drawings or Specifications or identified in the Contract Documents to be within the scope of the Work. Contractor shall be responsible for a Hazardous Environmental Condition created with any materials brought to the Site by Contractor, Subcontractors, Suppliers, or anyone else for whom Contractor is responsible.

D. If Contractor encounters a Hazardous Environmental Condition or if Contractor or anyone for whom Contractor is responsible creates a Hazardous Environmental Condition, Contractor shall immediately: (i) secure or otherwise isolate such condition; (ii) stop all Work in connection with such condition and in any area affected thereby (except in an emergency as required by Paragraph 6.16.A); and (iii) notify Owner and Engineer (and promptly thereafter confirm such notice in writing). Owner shall promptly consult with Engineer concerning the necessity for Owner to retain a qualified expert to evaluate such condition or take corrective action, if any.

E. Contractor shall not be required to resume Work in connection with such condition or in any affected area until after Owner has obtained any required permits related thereto and delivered to Contractor written notice: (i) specifying that such condition and any affected area is or has been rendered safe for the resumption of Work; or (ii) specifying any special conditions under which such Work may be resumed safely. If Owner and Contractor cannot agree as to entitlement to or on the amount or extent, if any, of any adjustment in Contract Price or Contract Times, or both, as a result of such Work stoppage or such special conditions under which Work is agreed to be resumed by Contractor, either party may make a Claim therefor as provided in Paragraph 10.05.

F. If after receipt of such written notice Contractor does not agree to resume such Work based on a reasonable belief it is unsafe, or does not agree to resume such Work under such special conditions, then Owner may order the portion of the Work that is in the area affected by such condition to be deleted from the Work. If Owner and Contractor cannot agree as to entitlement to or on the amount or extent, if any, of an adjustment in Contract Price or Contract Times as a result of deleting such portion of the Work, then either party may make a Claim therefor as provided in Paragraph

10.05. Owner may have such deleted portion of the Work performed by Owner's own forces or others in accordance with Article 7.

~~G. To the fullest extent permitted by Laws and Regulations, Owner shall indemnify and hold harmless Contractor, Subcontractors, and Engineer, and the officers, directors, partners, employees, agents, consultants, and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to a Hazardous Environmental Condition, provided that such Hazardous Environmental Condition: (i) was not shown or indicated in the Drawings or Specifications or identified in the Contract Documents to be included within the scope of the Work, and (ii) was not created by Contractor or by anyone for whom Contractor is responsible. Nothing in this Paragraph 4.06. G shall obligate Owner to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence.~~

~~H. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants, and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to a Hazardous Environmental Condition created by Contractor or by anyone for whom Contractor is responsible. Nothing in this Paragraph 4.06.H shall obligate Contractor to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence.~~

~~I. The provisions of Paragraphs 4.02, 4.03, and 4.04 do not apply to a Hazardous Environmental Condition uncovered or revealed at the Site.~~

ARTICLE 5 - BONDS AND INSURANCE

5.01 Performance, Payment, and Other Bonds

~~A. Contractor shall furnish performance and payment bonds, each in an amount at least equal to the Contract Price as security for the faithful performance and payment of all of Contractor's obligations under the Contract Documents. These bonds shall remain in effect until one year after the date when final payment becomes due or until completion of the correction period specified in Paragraph 13.07, whichever is later, except as provided otherwise by Laws or Regulations or by the Contract Documents. Contractor shall also furnish such other~~

bonds as are required by the Contract Documents. Contractor shall furnish a Contract Bond in the amount of the Contract Price as security for the faithful performance and payment of all of Contractor's obligations under the Contract Documents. Such bond shall be in the form that meets the requirements of the Ohio Revised Code. If the Contractor submitted a combined Bid Guaranty and Contract Bond with its bid for the Work, that form of Bond shall satisfy the Contractor's requirement to provide a Contract Bond. Contractor shall also furnish any other bonds as are required by the Contract Documents.

B. All bonds shall be in the form prescribed by the Contract Documents except as provided otherwise by Laws or Regulations, and shall be executed by such sureties as are named in the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Circular 570 (amended) by the Financial Management Service, Surety Bond Branch, U.S. Department of the Treasury and meet the other requirements of the Contract Documents. All bonds signed by an agent must be accompanied by a certified copy of the agent's authority to act.

C. If the surety on any bond furnished by Contractor is declared bankrupt or becomes insolvent or its right to do business is terminated in any state where any part of the Project is located or it ceases to meet the requirements of Paragraph 5.01.B, Contractor shall promptly notify Owner and Engineer and shall, within 20 days after the event giving rise to such notification, provide another bond and surety, both of which shall comply with the requirements of Paragraphs 5.01.B and 5.02.

D. Material Default or Termination. If the Owner notifies the Contractor's surety that the Contractor is in material default, the surety will complete its investigation of the claimed material default within 21 days. The surety is advised to start looking for a replacement contractor upon notice of material default. As part of its investigation, the surety shall promptly visit the offices of the Contractor, Engineer, and Owner to inspect and copy the available Project records. The Owner, Engineer, and Contractor, upon written request by the surety, shall make such records available during regular business hours for such inspection and copying. The Owner and Engineer's making such records available as provided herein shall satisfy the Owner's obligation to the surety to furnish documents for the investigation. The surety will provide the Owner with the results of its investigation, including any written report or documents.

If the Owner terminates the Contract and the surety proposes to takeover the Work, the surety shall do so no later than the later of the expiration of the 21-day investigation period or 10 days after the date the Owner terminates the Contract, whichever is later. If the Owner

terminates the Contract, and the surety proposes to provide a replacement contractor, the replacement contractor shall be fully capable of performing the Work in accordance with the Contract Documents. If the Contractor is terminated for cause, the replacement contractor shall not be the Contractor or its employees, unless the Owner agrees in writing. In the event the Surety takes over the Project, the surety's obligation shall not be limited to the penal sum of the Bond.

If the surety does not propose an acceptable contractor as required by this Paragraph 5.01.D, the Owner may complete the Work by such means as it deems appropriate. In the event the Owner agrees to accept a replacement contractor, the replacement contractor shall furnish its own bond for the replacement contractor's scope of work, and neither the Contractor nor the surety shall be relieved of their obligations under the Contract Documents.

This Paragraph 5.01.D is in addition to any other rights of the Owner under the Contract Documents and is not intended to create any rights of the surety, including but not limited to the right to take over the Contractor's obligations.

In the event of the Contractor's termination and if the surety does not takeover the Work as provided in this Paragraph 5.01.D., the Owner may take possession of and use all materials, facilities and equipment at the Project Site or stored off-site for which Owner has paid in whole or in part.

5.02 *Licensed Sureties and Insurers*

A. All bonds and insurance required by the Contract Documents to be purchased and maintained by Owner or Contractor shall be obtained from surety or insurance companies that are duly licensed or authorized in the jurisdiction in which the Project is located to issue bonds or insurance policies for the limits and coverages so required. Such surety and insurance companies shall also meet such additional requirements and qualifications as may be provided in the Modified General Conditions.

5.03 *Certificates of Insurance*

A. Contractor shall deliver to Owner, with copies to each additional insured identified in the Supplementary Conditions, certificates of insurance (and other evidence of insurance requested by Owner or any other additional insured) which Contractor is required to purchase and maintain. Contractor shall deliver to Owner, with copies to each additional insured identified in the Modified General Conditions, certificates of insurance, copies of endorsements, and other evidence of insurance requested by Owner or any other additional insured, which Contractor is required to purchase and maintain.

B. Owner shall deliver to Contractor, with copies to each additional insured identified in these Supplementary Modified General Conditions, certificates of insurance (and other evidence of insurance requested by Contractor or any other additional insured) which Owner is required to purchase and maintain.

C. Failure of Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Owner to identify a deficiency from evidence provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance.

D. By requiring such insurance and insurance limits herein, Owner does not represent that coverage and limits will necessarily be adequate to protect Contractor, and such coverage and limits shall not be deemed as a limitation on Contractor's liability under the indemnities granted to Owner in the Contract Documents.

5.04 Contractor's Liability Insurance

A. Contractor shall purchase and maintain such liability and other insurance as is appropriate for the Work being performed and as will provide protection from claims set forth below which may arise out of or result from Contractor's performance of the Work and Contractor's other obligations under the Contract Documents, whether it is to be performed by Contractor, any Subcontractor or Supplier, or by anyone directly or indirectly employed by any of them to perform any of the Work, or by anyone for whose acts any of them may be liable:

1. claims under workers' compensation, disability benefits, and other similar employee benefit acts;

2. claims for damages because of bodily injury, occupational sickness or disease, or death of Contractor's employees;

3. claims for damages because of bodily injury, sickness or disease, or death of any person other than Contractor's employees;

4. claims for damages insured by reasonably available personal injury liability coverage which are sustained:

a. by any person as a result of an offense directly or indirectly related to the employment of such person by Contractor, or

b. by any other person for any other reason;

5. claims for damages, other than to the Work itself, because of injury to or destruction of tangible

property wherever located, including loss of use resulting therefrom; and

6. claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.

B. The policies of insurance required by this Paragraph 5.04 shall:

1. with respect to insurance required by Paragraphs 5.04.A.3 through 5.04.A.6 inclusive, include as additional insured (~~subject to any customary exclusion regarding professional liability~~) Owner and Engineer, and any other individuals or entities identified in these Supplementary Modified General Conditions, all of whom shall be listed as additional insureds, and include coverage for the respective officers, directors, partners, employees, agents, consultants and subcontractors of each and any of all such additional insureds, and the insurance afforded to these additional insureds shall provide primary coverage for all claims covered thereby;

2. include at least the specific coverages and be written for not less than the limits of liability provided in the ~~Supplementary Conditions~~ Paragraph 5.04B.2.a or required by Laws or Regulations, whichever is greater;

a. The minimum limits of liability for the required insurance policies listed in Paragraph 5.04.A shall not be less than the following unless a greater amount is required by law:

(1) Commercial General Liability ("CGL"): Bodily injury (including death and emotional distress) and property damage with limits of \$1,000,000 each occurrence and \$2,000,000 aggregate. CGL shall include (i) Premises-Operations, (ii) Explosion and Collapse Hazard, (iii) Underground Hazard, (iv) Independent Contractors' Protective, (v) Broad Form Property Damage, including Completed Operations, (vi) Contractual Liability, (vii) Products and Completed Operations, (viii) Personal/Advertising Injury with Employment Exclusion deleted, (ix) Stopgap liability with Ohio Intentional Tort endorsement for \$1,000,000 limit, and (x) per project aggregate endorsement.

(2) Automobile Liability, covering all owned, non-owned, and hired vehicles used in connection with the Work: Bodily injury (including death and emotional distress) and property damage with a combined single limit of \$1,000,000 per person and \$1,000,000 each accident.

- (3) Such policies shall be supplemented by an umbrella policy, also written on an occurrence basis, to provide additional protection to provide coverage in the total amount of \$1,000,000 for each occurrence and \$1,000,000 aggregate for contracts with a Contract Price of \$250,000 or less; \$2,000,000 each occurrence and \$2,000,000 aggregate for contracts with a Contract Price greater than \$250,000 but less than or equal to \$500,000; \$3,000,000 each occurrence and \$3,000,000 aggregate for contracts with a Contract Price greater than \$500,000 but less than or equal to \$1,000,000; and \$5,000,000 each occurrence and \$5,000,000 aggregate for contracts with a Contract Price greater than \$1,000,000.

The following provisions shall also apply to the insurance provided by the Contractor:

- (a) Contractor's insurance shall be primary and non-contributory.
- (b) Insurance policies shall be written on an occurrence basis only.
- (c) The Contractor shall require all Subcontractors to provide Workers' Compensation, CGL, and Automobile Liability Insurance with the same minimum limits specified herein, unless the Owner agrees to a lesser amount.
- (d) Owner shall be named as a certificate holder on the policies of insurance maintained by Contractor. The Contractor shall provide each additional insured with a certificate of insurance.
- (e) The additional insured endorsement shall be ISO 20 10 11 85 or its equivalent so that Completed Operations liability extends to the additional insureds after the completion of the Project.

3. include products and completed operations insurance;

4. include contractual liability insurance covering Contractor's indemnity obligations under Paragraphs 6.11 and 6.20;

5. contain a provision or endorsement that the coverage afforded will not be canceled, materially changed with respect to coverage for the Project or renewal refused until at least 30 days prior written notice has been given to Owner and Contractor and to each other additional insured identified in the Supplementary

Modified General Conditions to whom a certificate of insurance has been issued (and the certificates of insurance furnished by the Contractor pursuant to Paragraph 5.03 will so provide);

6. remain in effect at least until final payment and at all times thereafter when Contractor may be correcting, removing, or replacing defective Work in accordance with Paragraph 13.07; and

7. with respect to products and completed operations insurance, and any insurance coverage written on a claims-made basis, remain in effect for at least two years after final payment.

a. Contractor shall furnish Owner and each other additional insured identified in these Supplementary Modified General Conditions, to whom a certificate of insurance has been issued, evidence satisfactory to Owner and any such additional insured of continuation of such insurance at final payment and one year thereafter.

5.05 *Owner's Liability Insurance*

A. In addition to the insurance required to be provided by Contractor under Paragraph 5.04, Owner, at Owner's option, may purchase and maintain at Owner's expense Owner's own liability insurance as will protect Owner against claims which may arise from operations under the Contract Documents.

5.06 *Property Insurance*

~~A. Unless otherwise provided in the Supplementary Conditions, Owner shall purchase and maintain property insurance upon the Work at the Site in the amount of the full replacement cost thereof (subject to such deductible amounts as may be provided in the Supplementary Conditions or required by Laws and Regulations). This insurance shall:~~

~~1. include the interests of Owner, Contractor, Subcontractors, and Engineer, and any other individuals or entities identified in the Supplementary Conditions, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them, each of whom is deemed to have an insurable interest and shall be listed as an insured or additional insured;~~

~~2. be written on a Builder's Risk "all-risk" or open peril or special causes of loss policy form that shall at least include insurance for physical loss or damage to the Work, temporary buildings, false work, and materials and equipment in transit, and shall insure against at least the following perils or causes of loss: fire, lightning, extended coverage, theft, vandalism and malicious mischief, earthquake, collapse, debris removal,~~

~~demolition occasioned by enforcement of Laws and Regulations, water damage, (other than caused by flood) and such other perils or causes of loss as may be specifically required by the Supplementary Conditions;~~

~~3. include expenses incurred in the repair or replacement of any insured property (including but not limited to fees and charges of engineers and architects);~~

~~4. cover materials and equipment stored at the Site or at another location that was agreed to in writing by Owner prior to being incorporated in the Work, provided that such materials and equipment have been included in an Application for Payment recommended by Engineer;~~

~~5. allow for partial utilization of the Work by Owner;~~

~~6. include testing and startup; and~~

~~7. be maintained in effect until final payment is made unless otherwise agreed to in writing by Owner, Contractor, and Engineer with 30 days written notice to each other additional insured to whom a certificate of insurance has been issued.~~

A. Contractor shall purchase and maintain property insurance upon the Work at the Site in the amount of full replacement cost thereof. Insurance shall be completed value form.

(1) This insurance shall:

(a) include the interests of Owner, Contractor, Subcontractors, Engineer, and any other individuals or entities identified herein, and the officers, directors, partners, employees, agents, and other consultants and subcontractors of any of them, each of whom is deemed to have an insurable interest and shall be listed as an insured or additional insured (Insurance certificates shall specifically indicate by name the additional insureds which are to include Owner and Engineer as well as other individuals or entities so identified.);

(b) be written on a Builder's Risk "all-risk" form that shall at least include insurance for physical loss and damage to the Work, temporary buildings, falsework, and materials and equipment in transit and shall insure against at least the following perils or causes of loss: fire, lightning, extended coverage, theft, vandalism, and malicious mischief, earthquake, collapse, debris removal, demolition occasioned by enforcement of Laws and Regulations, water damage (including that caused by flood or

hydrostatic pressure), and such other perils or causes of loss as may be specifically required by the Modified General Conditions;

(c) include expenses incurred in the repair or replacement of any insured property (including but not limited to fees and charges of engineers and architects);

(d) cover the total value of materials and equipment supplied under the Contract from the time Contractor takes possession of them until they are installed and tested by Contractor and the project is accepted as complete by Owner under an endorsement to this policy or in the form of Installation Floater Insurance of the "all risk" type;

(e) allow for partial utilization of the Work by Owner;

(f) include testing and startup; and

(g) be maintained in effect until final payment is made unless otherwise agreed to in writing by Owner, Contractor, and Engineer with 30 days written notice to each other additional insured to whom a certificate of insurance has been issued.

(2) Contractor shall be responsible for any deductible or self-insured retention.

(3) The policies of insurance required to be purchased and maintained by Contractor in accordance with this Paragraph 5.06.A and shall comply with the requirements of Paragraph 5.06.C of these General Conditions.

B. Owner shall purchase and maintain such boiler and machinery insurance or additional property insurance as may be required by these Supplementary Modified General Conditions or Laws and Regulations which will include the interests of Owner, Contractor, Subcontractors, and Engineer, and any other individuals or entities identified in these Supplementary Modified General Conditions, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them, each of whom is deemed to have an insurable interest and shall be listed as an insured or additional insured.

C. All the policies of insurance (and the certificates or other evidence thereof) required to be purchased and maintained in accordance with Paragraph 5.06 will contain a provision or endorsement that the coverage afforded will not be canceled or materially changed or

renewal refused until at least 30 days prior written notice has been given to Owner and Contractor and to each other additional insured to whom a certificate of insurance has been issued and will contain waiver provisions in accordance with Paragraph 5.07.

~~D. Owner shall not be responsible for purchasing and maintaining any property insurance specified in this Paragraph 5.06 to protect the interests of Contractor, Subcontractors, or others in the Work to the extent of any deductible amounts that are identified in the Supplementary Conditions. Contractor shall pay all deductible provisions applicable to claims related to the Project made under and paid by insurance. If more than one Contractor is responsible for the incident giving rise to the insurance coverage, the Contractors shall be responsible on a pro rata basis, according to their responsibility for the occurrence or accident giving rise to the claim, for payment of the deductible. The maximum deductible shall be \$5,000. The risk of loss within such identified deductible amount will be borne by Contractor, Subcontractors, or others suffering any such loss, and if any of them wishes property insurance coverage within the limits of such amounts, each may purchase and maintain it at the purchaser's own expense.~~

E. If Contractor requests in writing that other special insurance be included in the property insurance policies provided under Paragraph 5.06, Owner shall, if possible, include such insurance, and the cost thereof will be charged to Contractor by appropriate Change Order. Prior to commencement of the Work at the Site, Owner shall in writing advise Contractor whether or not such other insurance has been procured by Owner.

5.07 *Waiver of Rights*

A. Owner and Contractor intend that all policies purchased in accordance with Paragraph 5.06 will protect Owner, Contractor, Subcontractors, and Engineer, and all other individuals or entities identified in these Supplementary Modified General Conditions to be listed as insureds or additional insureds (and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them) in such policies and will provide primary coverage for all losses and damages caused by the perils or causes of loss covered thereby. All such policies shall contain provisions to the effect that in the event of payment of any loss or damage the insurers will have no rights of recovery against any of the insureds or additional insureds thereunder. Owner and Contractor waive all rights against each other and their respective officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them for all losses and damages caused by, arising out of or resulting from any of the perils or causes of loss covered by such policies and any other property insurance applicable to the Work; and, in addition, waive all such rights against Subcontractors, and Engineer, and all other

individuals or entities identified in these Supplementary Modified General Conditions to be listed as insured or additional insured (and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them) under such policies for losses and damages so caused. None of the above waivers shall extend to the rights that any party making such waiver may have to the proceeds of insurance held by Owner as trustee or otherwise payable under any policy so issued.

B. Owner waives all rights against Contractor, Subcontractors, and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them for:

1. loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical loss or damage to Owner's property or the Work caused by, arising out of, or resulting from fire or other perils whether or not insured by Owner; and

2. loss or damage to the completed Project or part thereof caused by, arising out of, or resulting from fire or other insured peril or cause of loss covered by any property insurance maintained on the completed Project or part thereof by Owner during partial utilization pursuant to Paragraph 14.05, after Substantial Completion pursuant to Paragraph 14.04, or after final payment pursuant to Paragraph 14.07.

C. Any insurance policy maintained by Owner covering any loss, damage or consequential loss referred to in Paragraph 5.07.B shall contain provisions to the effect that in the event of payment of any such loss, damage, or consequential loss, the insurers will have no rights of recovery against Contractor, Subcontractors, or Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them.

5.08 *Receipt and Application of Insurance Proceeds*

A. Any insured loss under the policies of insurance required by Paragraph 5.06 will be adjusted with Owner and made payable to Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgage clause and of Paragraph 5.08.B. Owner shall deposit in a separate account any money so received and shall distribute it in accordance with such agreement as the parties in interest may reach. If no other special agreement is reached, the damaged Work shall be repaired or replaced, the moneys so received applied on account thereof, and the Work and the cost thereof covered by an appropriate Change Order.

B. Owner as fiduciary shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object in writing within 15 days after the occurrence of loss to Owner's exercise of this

power. If such objection be made, Owner as fiduciary shall make settlement with the insurers in accordance with such agreement as the parties in interest may reach. If no such agreement among the parties in interest is reached, Owner as fiduciary shall adjust and settle the loss with the insurers, and, if required in writing by any party in interest, Owner as fiduciary shall give bond for the proper performance of such duties.

5.09 *Acceptance of Bonds and Insurance; Option to Replace*

A. If either Owner or Contractor has any objection to the coverage afforded by or other provisions of the bonds or insurance required to be purchased and maintained by the other party in accordance with Article 5 on the basis of non-conformance with the Contract Documents, the objecting party shall so notify the other party in writing within 10 days after receipt of the certificates (or other evidence requested) required by Paragraph 2.01.B. Owner and Contractor shall each provide to the other such additional information in respect of insurance provided as the other may reasonably request. If either party does not purchase or maintain all of the bonds and insurance required of such party by the Contract Documents, such party shall notify the other party in writing of such failure to purchase prior to the start of the Work, or of such failure to maintain prior to any change in the required coverage. Without prejudice to any other right or remedy, the other party may elect to obtain equivalent bonds or insurance to protect such other party's interests at the expense of the party who was required to provide such coverage, and a Change Order shall be issued to adjust the Contract Price accordingly.

5.10 *Partial Utilization, Acknowledgment of Property Insurer*

A. If Owner finds it necessary to occupy or use a portion or portions of the Work prior to Substantial Completion of all the Work as provided in Paragraph 14.05, no such use or occupancy shall commence before the insurers providing the property insurance pursuant to Paragraph 5.06 have acknowledged notice thereof and in writing effected any changes in coverage necessitated thereby. The insurers providing the property insurance shall consent by endorsement on the policy or policies, but the property insurance shall not be canceled or permitted to lapse on account of any such partial use or occupancy. The property insurance shall contain no partial occupancy restriction for utilization of the Project by Owner.

5.11 *Contractor Railroad Protective Liability Insurance*

A. On behalf of the [Insert Name of Railroad], Contractor shall provide a Railroad Protective Liability policy of insurance providing a combined single limit for

damages arising out of bodily injuries to or death of one or more persons and out of injury or destruction of property including such property in the care, custody and control of the Railroad Company in the amount of \$2,000,000.00 per occurrence and subject to that limit per occurrence, and aggregate limit in the amount of \$6,000,000.00 for each annual period.

B. The Railroad Protective Policy of insurance shall conform to the Railroad Liability requirements prescribed by the Federal Highway Administration in Federal Highway Policy Guide 23 CFR 646A as amended.

C. The Railroad Protective Policy of insurance shall be with an acceptable insurance company authorized to do business in the State of Ohio, and shall be obtained before the execution of the Agreement by Owner and kept in effect until all work required to be performed under the terms of the Agreement is satisfactorily completed as evidenced by the Engineer issuing a Certificate of Final Completion.

D. Contractor shall provide a copy of the Railroad Protective Policy of insurance to Owner within seven (7) calendar days after the award of the contract or such other time designated by the Engineer.

ARTICLE 6 - CONTRACTOR'S RESPONSIBILITIES

6.01 *Supervision and Superintendence*

A. Contractor shall supervise, inspect, and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. Contractor shall be solely responsible for the means, methods, techniques, sequences, and procedures of construction. Contractor shall not be responsible for the negligence of Owner or Engineer in the design or specification of a specific means, method, technique, sequence, or procedure of construction which is shown or indicated in and expressly required by the Contract Documents.

B. At all times during the progress of the Work, Contractor shall assign a competent resident superintendent who shall not be replaced without written notice to Owner and Engineer except under extraordinary circumstances. The superintendent will be Contractor's representative at the Site and shall have authority to act on behalf of Contractor. All communications given to or received from the superintendent shall be binding on Contractor.

6.02 Labor; Working Hours

A. Contractor shall provide competent, suitably qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. Contractor shall at all times maintain good discipline and order at the Site.

B. Except as otherwise required for the safety or protection of persons or the Work or property at the Site or adjacent thereto, and except as otherwise stated in the Contract Documents, all Work at the Site shall be performed during regular working hours. Contractor will not permit the performance of Work on a Saturday, Sunday, Shut Down Dates as defined in the Agreement, or any legal holiday without Owner's written consent (which will not be unreasonably withheld) given after prior written notice to Engineer. Contractor (and Subcontractor) regular working hours consist of 8 up to 10 working hours within an 11-hour period between 7:00 a.m. and 6: p.m., on a regularly scheduled basis, excluding Saturday, Sunday and holidays. Overtime work is work in excess of 40 hours per week.

C. Contractor shall reimburse Owner for Engineer's additional costs for onsite personnel overtime work resulting from Contractor's overtime operations.

6.03 Services, Materials, and Equipment

A. Unless otherwise specified in the Contract Documents, Contractor shall provide and assume full responsibility for all services, materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities, and all other facilities and incidentals necessary for the performance, testing, start-up, and completion of the Work.

B. All materials and equipment incorporated into the Work shall be as specified or, if not specified, shall be of good quality and new, except as otherwise provided in the Contract Documents. All special warranties and guarantees required by the Specifications shall expressly run to the benefit of Owner. If required by Engineer, Contractor shall furnish satisfactory evidence (including reports of required tests) as to the source, kind, and quality of materials and equipment. Contractor warrants that all materials and equipment are suitable and fit for the intended use of such materials and equipment and are free from defects in material, workmanship or design. The foregoing applies whether the materials or equipment are specified in the Contract Documents.

C. All materials and equipment shall be stored, applied, installed, connected, erected, protected, used, cleaned, and conditioned in accordance with instructions of the applicable Supplier, except as otherwise may be provided in the Contract Documents.

6.04 Progress Schedule

A. Contractor shall adhere to the Progress Schedule established in accordance with the Contract Documents. Paragraph 2.07 as it may be adjusted from time to time as provided below.

1. The Contractor, promptly after being awarded the Contract and within five (5) days of the date of any request from the Coordinating Contractor, Engineer or the Owner to submit scheduling information, shall submit proposed scheduling information for its Work to the Coordinating Contractor, Engineer and to the Owner in such form and in such detail as requested by the Coordinating Contractor. The Coordinating Contractor shall prepare the Progress Schedule within ten (10) days of the date of the Notice to Proceed. The Progress Schedule shall include and be consistent with any applicable Milestone Dates in the Construction Documents. The Coordinating Contractor shall prepare all Progress Schedules in CPM format unless provided otherwise in the Contract Document or otherwise agreed in writing by the Owner. The Progress Schedule is for the purpose of coordinating the timing, phasing and sequence of the Work of the Contractors and shall not change or modify the Date for Substantial Completion. The Date for Substantial Completion shall only be changed or modified by Change Order, other Modification or a Claim that is Finally Resolved, regardless of the date in the Proposed Schedule.

.1 The Coordinating Contractor shall update the Progress Schedule each month. In preparing and updating the Progress Schedule, the Coordinating Contractor shall take into consideration but not be bound by the scheduling and other information submitted by the Contractors.

.2 The Progress Schedule shall be manpower loaded and shall include a schedule of the submission of Shop Drawings, Product Data and Samples.

.3 The Contractor shall, on a weekly basis, prepare and submit to the Coordinating Contractor a written report describing the activities begun or finished during the preceding week, Work in progress, expected completion of the Work, a look-ahead projection of all activities to be started or finished in the upcoming two (2) weeks, including without limitation the Contractor's workforce crew size and total resource hours associated with such Work and any other information requested by the Coordinating Contractor or the Architect.

.4 The float in the Progress Schedule and any updates to it shall belong to the Owner. Float shall mean the amount of time by which activities may be delayed without affecting the Contract Date for Substantial Completion.

2. The Contractor's obligation to furnish requested scheduling information is a material term of its Contract. If the Contractor fails to furnish requested scheduling information in writing within five (5) days of a request for such information from the Coordinating Contractor, Design Professional or Owner, the Contractor shall pay and the Owner may withhold from the Contractor Liquidated Damages at the rate of Fifty Dollars (\$50.00) a day for each calendar day thereafter that the Contractor fails to furnish the requested information.

~~Contractor shall submit to Engineer for acceptance (to the extent indicated in Paragraph 2.07) proposed adjustments in the Progress Schedule that will not result in changing the Contract Times. Such adjustments will comply with any provisions of the General Requirements applicable thereto.~~

~~2. Proposed adjustments in the Progress Schedule that will change the Contract Times shall be submitted in accordance with the requirements of Article 12. Adjustments in Contract Times may only be made by a Change Order.~~

B. THE PERIODS OF TIME IN THE PROJECT CONSTRUCTION SCHEDULE ARE OF THE ESSENCE TO THIS CONTRACT. THE CONTRACTOR SHALL PROSECUTE ITS WORK IN ACCORDANCE WITH THE CURRENT PROJECT CONSTRUCTION SCHEDULE.

1. Notice of Delays. As a condition precedent to any increase in the Contract Price and/or Contract Times, the Contractor shall give the Owner and the Engineer verbal notice of any delay affecting its Work within two (2) business days of the commencement of the delay. In addition and also as a condition precedent to any increase in the Contract Price and/or Contract Times, the Contractor shall give the Owner and Engineer written notice of the delay within ten (10) business days of the commencement of the delay with specific recommendations about how to minimize the effect of the delay. The written notice of the delay shall conspicuously state that it is a "NOTICE OF DELAY." A notice of a delay shall not constitute the submission of a Claim. Contract Times shall only be changed as provided in the Agreement. The Contractor acknowledges and agrees that these notice provisions are material terms of the Contract Documents and give the Owner the opportunity to take action to minimize the cost and/or effect of delays.

6.05 *Substitutes and "Or-Equals"*

~~A. Whenever an item of material or equipment is specified or described in the Contract Documents by using the name of a proprietary item or the name of a particular Supplier, the specification or description is intended to establish the type, function, appearance, and quality required. Substitutions prior to the receipt of bids shall be governed by the Instructions to Bidders. Substitutions after the entry into the Agreement shall be governed by these Modified General Conditions. Unless the specification or description contains or is followed by words reading that no like, equivalent, or "or-equal" item or no substitution is permitted, other items of material or equipment or material or equipment of other Suppliers may be submitted to Engineer for review under the circumstances described below.~~

1. *"Or-Equal" Items:* If in Engineer's sole discretion an item of material or equipment proposed by Contractor is functionally equal to that named and sufficiently similar so that no change in related Work will be required, it may be considered by Engineer as an "or-equal" item, in which case review and approval of the proposed item may, in Engineer's sole discretion, be accomplished without compliance with some or all of the requirements for approval of proposed substitute items. For the purposes of this Paragraph 6.05.A.1, a proposed item of material or equipment will be considered functionally equal to an item so named if:

a. in the exercise of reasonable judgment Engineer determines that:

1) it is at least equal in materials of construction, quality, durability, appearance, strength, and design characteristics;

2) it will reliably perform at least equally well the function and achieve the results imposed by the design concept of the completed Project as a functioning whole,

3) it has a proven record of performance and availability of responsive service; and

b. Contractor certifies that, if approved and incorporated into the Work:

1) there will be no increase in cost to the Owner or increase in Contract Times, and

2) it will conform substantially to the detailed requirements of the item named in the Contract Documents.

2. Substitute Items

a. If in Engineer's sole discretion an item of material or equipment proposed by Contractor does not qualify as an "or-equal" item under Paragraph 6.05.A.1, it will be considered a proposed substitute item.

b. Contractor shall submit sufficient information as provided below to allow Engineer to determine that the item of material or equipment proposed is essentially equivalent to that named and an acceptable substitute therefor. Requests for review of proposed substitute items of material or equipment will not be accepted by Engineer from anyone other than Contractor.

c. The requirements for review by Engineer will be as set forth in Paragraph 6.05.A.2.d, as supplemented in the General Requirements and as Engineer may decide is appropriate under the circumstances.

d. Contractor shall make written application to Engineer for review of a proposed substitute item of material or equipment that Contractor seeks to furnish or use. The application:

1) shall certify that the proposed substitute item will:

a) perform adequately the functions and achieve the results called for by the general design,

b) be similar in substance to that specified, and

c) be suited to the same use as that specified;

2) will state:

a) the extent, if any, to which the use of the proposed substitute item will prejudice Contractor's achievement of Substantial Completion on time;

b) whether or not use of the proposed substitute item in the Work will require a change in any of the Contract Documents (or in the provisions of any other direct contract with Owner for other work on the Project) to adapt the design to the proposed substitute item; and

c) whether or not incorporation or use of the proposed substitute item in connection with the Work is subject to payment of any license fee or royalty;

3) will identify:

a) all variations of the proposed substitute item from that specified, and

b) available engineering, sales, maintenance, repair, and replacement services;

4) and shall contain an itemized estimate of all costs or credits that will result directly or indirectly from use of such substitute item, including costs of redesign and claims of other contractors affected by any resulting change,

B. Substitute Construction Methods or Procedures: If a specific means, method, technique, sequence, or procedure of construction is expressly required by the Contract Documents, Contractor may furnish or utilize a substitute means, method, technique, sequence, or procedure of construction approved by Engineer. Contractor shall submit sufficient information to allow Engineer, in Engineer's sole discretion, to determine that the substitute proposed is equivalent to that expressly called for by the Contract Documents. The requirements for review by Engineer will be similar to those provided in Paragraph 6.05.A.2.

C. Engineer's Evaluation: Engineer will be allowed a reasonable time within which to evaluate each proposal or submittal made pursuant to Paragraphs 6.05.A and 6.05.B. Engineer may require Contractor to furnish additional data about the proposed substitute item. Engineer will be the sole judge of acceptability. No "or equal" or substitute will be ordered, installed or utilized until Engineer's review is complete, which will be evidenced by either a Change Order for a substitute or an approved Shop Drawing for an "or equal." Engineer will advise Contractor in writing of any negative determination.

D. Special Guarantee: Owner may require Contractor to furnish at Contractor's expense a special performance guarantee or other surety with respect to any substitute.

E. Engineer's Cost Reimbursement: Engineer will record Engineer's costs in evaluating a substitute proposed or submitted by Contractor pursuant to Paragraphs 6.05.A.2 and 6.05.B. Whether or not Engineer approves a substitute item so proposed or submitted by Contractor, Contractor shall reimburse Owner for the charges of Engineer for evaluating each such proposed substitute. Contractor shall also reimburse Owner for the charges of Engineer for making changes in the Contract Documents (or in the provisions of any other direct contract with Owner) resulting from the acceptance of each proposed substitute.

F. *Contractor's Expense*: Contractor shall provide all data in support of any proposed substitute or "or-equal" at Contractor's expense.

6.06 *Concerning Subcontractors, Suppliers, and Others*

A. Contractor shall not employ any Subcontractor, Supplier, or other individual or entity (including those acceptable to Owner as indicated in Paragraph 6.06.B), whether initially or as a replacement, against whom Owner may have reasonable objection. Contractor shall not be required to employ any Subcontractor, Supplier, or other individual or entity to furnish or perform any of the Work against whom Contractor has reasonable objection. If Owner or Engineer after due investigations has reasonable objections to any proposed Subcontractor, Supplier, or other individual or entity, either may request Contractor submit an acceptable substitute without an increase in Contract Price.

B. If the Contract Documents - Supplementary Conditions require the identity of certain Subcontractors, Suppliers, or other individuals or entities to be submitted to Owner in advance for review or acceptance by Owner by a specified date prior to the Effective Date of the Agreement, and if Contractor has submitted a list thereof in accordance with the Contract Documents Supplementary Conditions, Owner's acceptance (either in writing or by failing to make written objection thereto by the date indicated for acceptance or objection in the Bidding Documents or the Contract Documents) of any such Subcontractor, Supplier, or other individual or entity so identified may be revoked on the basis of reasonable objection after due investigation. Contractor shall submit an acceptable replacement for the rejected Subcontractor, Supplier, or other individual or entity, and the Contract Price will be adjusted by the difference in the cost occasioned by such replacement, and an appropriate Change Order will be issued. No review or acceptance by Owner of any such Subcontractor, Supplier, or other individual or entity, whether initially or as a replacement, shall constitute a waiver of any right of Owner or Engineer to reject defective Work.

C. Contractor shall be fully responsible to Owner and Engineer for all acts and omissions of the Subcontractors, Suppliers, and other individuals or entities performing or furnishing any of the Work just as Contractor is responsible for Contractor's own acts and omissions. Nothing in the Contract Documents:

1. shall create for the benefit of any such Subcontractor, Supplier, or other individual or entity any contractual relationship between Owner or Engineer and any such Subcontractor, Supplier or other individual or entity, nor

2. shall anything in the Contract Documents create any obligation on the part of Owner or Engineer to pay or to see to the payment of any moneys due any such Subcontractor, Supplier, or other individual or entity except as may otherwise be required by Laws and Regulations.

D. Contractor shall be solely responsible for scheduling and coordinating the Work of Subcontractors, Suppliers, and other individuals or entities performing or furnishing any of the Work under a direct or indirect contract with Contractor.

E. Contractor shall require all Subcontractors, Suppliers, and such other individuals or entities performing or furnishing any of the Work to communicate with Engineer through Contractor.

F. The divisions and sections of the Specifications and the identifications of any Drawings shall not control Contractor in dividing the Work among Subcontractors or Suppliers or delineating the Work to be performed by any specific trade.

G. All Work performed for Contractor by a Subcontractor or Supplier will be pursuant to an appropriate agreement between Contractor and the Subcontractor or Supplier which specifically binds the Subcontractor or Supplier to the applicable terms and conditions of the Contract Documents for the benefit of Owner and Engineer. Whenever any such agreement is with a Subcontractor or Supplier who is listed as an additional insured on the property insurance provided in Paragraph 5.06, the agreement between the Contractor and the Subcontractor or Supplier will contain provisions whereby the Subcontractor or Supplier waives all rights against Owner, Contractor, and Engineer, and all other individuals or entities identified in these Supplementary Modified General Conditions to be listed as insureds or additional insureds (and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them) for all losses and damages caused by, arising out of, relating to, or resulting from any of the perils or causes of loss covered by such policies and any other property insurance applicable to the Work. If the insurers on any such policies require separate waiver forms to be signed by any Subcontractor or Supplier, Contractor will obtain the same.

6.07 *Patent Fees and Royalties*

A. Contractor shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product, or device which is the subject of patent rights or copyrights held by others. If a particular invention, design, process, product, or device is specified in the Contract Documents for use in the performance of the Work and if to the actual

knowledge of Owner or Engineer its use is subject to patent rights or copyrights calling for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by Owner in the Contract Documents.

B. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to any infringement of patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product, or device not specified in the Contract Documents.

6.08 Permits

A. Unless otherwise provided in the ~~Supplementary Conditions Contract Documents~~, Contractor shall obtain and pay for all construction permits and licenses. Owner shall assist Contractor, when necessary, in obtaining such permits and licenses. Contractor shall pay all governmental charges and inspection fees necessary for the prosecution of the Work which are applicable at the time of opening of Bids, or, if there are no Bids, on the Effective Date of the Agreement. Owner shall pay all charges of utility owners for connections for providing permanent service to the Work.

6.09 Laws and Regulations

A. Contractor shall give all notices required by and shall comply with all Laws and Regulations applicable to the performance of the Work. Except where otherwise expressly required by applicable Laws and Regulations, neither Owner nor Engineer shall be responsible for monitoring Contractor's compliance with any Laws or Regulations.

B. If Contractor performs any Work knowing or having reason to know that it is contrary to Laws or Regulations, Contractor shall bear all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such Work. However, it shall not be Contractor's primary responsibility to make certain that the Specifications and Drawings are in accordance with Laws and Regulations, but this shall not relieve Contractor of Contractor's obligations under Paragraph 3.03.

C. Changes in Laws or Regulations not known at the time of opening of Bids (or, on the Effective Date of the Agreement if there were no Bids) having an effect on the cost or time of performance of the Work shall be the subject of an adjustment in Contract Price or Contract Times. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment, a Claim may be made therefor as provided in Paragraph 10.05.

D. Prevailing Wage Rates. Each laborer, worker, or mechanic employed by Contractor, Subcontractor, or other persons performing Work on the Project shall be paid not less than the applicable prevailing rate of wages.

6.10 Taxes

A. Contractor shall pay all sales, consumer, use, and other similar taxes required to be paid by Contractor in accordance with the Laws and Regulations of the place of the Project which are applicable during the performance of the Work.

B. Materials purchased for use or consumption in connection with the proposed Work will be exempt from the State of Ohio Sales Tax, as provided in Section 5739.02 of the Ohio Revised Code, and also from the State of Ohio Use Tax, as provided in Section 5741.01 of the Ohio Revised Code. The Owner will provide the Contractor with a Construction Tax Exempt Certificate upon request, made through the Engineer.

C. Purchases by the Contractor of expendable items, such as form lumber, tools, oil, greases, fuel, or equipment rentals, are subject to the application of Ohio Sales or Use Taxes.

D. Contractor shall withhold any income taxes due to the City of Zanesville for wages, salaries and commissions paid to its employees for work done under this Agreement and further agrees that any of its subcontractors shall, by the terms of its subcontract, be required to withhold any such income taxes due for work performed under this Agreement.

6.11 Use of Site and Other Areas

A. Limitation on Use of Site and Other Areas

1. Contractor shall confine construction equipment, the storage of materials and equipment, and the operations of workers to the Site and other areas permitted by Laws and Regulations, and shall not unreasonably encumber the Site and other areas with construction equipment or other materials or equipment. Contractor shall assume full responsibility for any damage to any such land or area, or to the owner or

occupant thereof, or of any adjacent land or areas resulting from the performance of the Work. Contractor shall not enter upon nor use property not under Owner control until appropriate easements have been executed and a copy is on file on the Project.

2. Should any claim be made by any such owner or occupant because of the performance of the Work, Contractor shall promptly settle with such other party by negotiation or otherwise resolve the claim by arbitration or other dispute resolution proceeding or at law.

3. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to any claim or action, legal or equitable, brought by any such owner or occupant against Owner, Engineer, or any other party indemnified hereunder ~~to the extent caused or alleged to have been caused~~ by or based upon Contractor's performance of the Work.

B. Removal of Debris During Performance of the Work: During the progress of the Work Contractor shall keep the Site and other areas free from accumulations of waste materials, rubbish, and other debris. Removal and disposal of such waste materials, rubbish, and other debris shall conform to applicable Laws and Regulations.

C. Cleaning: Prior to Substantial Completion of the Work Contractor shall clean the Site and the Work and make it ready for utilization by Owner. At the completion of the Work Contractor shall remove from the Site all tools, appliances, construction equipment and machinery, and surplus materials and shall restore to original condition all property not designated for alteration by the Contract Documents.

D. Loading Structures: Contractor shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall Contractor subject any part of the Work or adjacent property to stresses or pressures that will endanger it.

6.12 *Record Documents*

A. Contractor shall maintain in a safe place at the Site ~~one~~ two record copy copies of all Drawings, Specifications, Addenda, Change Orders, Work Change Directives, Field Orders, and written interpretations and clarifications in good order and annotated to show changes made during construction. These record documents together with all approved Samples and a counterpart of all approved Shop Drawings will be

~~available to Engineer for reference. Upon completion of the Work, these record documents, Samples, and Shop Drawings will be delivered to Engineer for Owner. The Contractor shall deliver these record documents, samples, and shop drawings to the Engineer, no later than the date for Substantial Completion, for the Engineer's review and transmittal Owner.~~

6.13 *Safety and Protection*

A. Contractor shall be solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. Contractor shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:

1. all persons on the Site or who may be affected by the Work;

2. all the Work and materials and equipment to be incorporated therein, whether in storage on or off the Site; and

3. other property at the Site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, utilities, and Underground Facilities not designated for removal, relocation, or replacement in the course of construction.

B. Contractor shall comply with all applicable Laws and Regulations relating to the safety of persons or property, or to the protection of persons or property from damage, injury, or loss; and shall erect and maintain all necessary safeguards for such safety and protection. Contractor shall notify owners of adjacent property and of Underground Facilities and other utility owners when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation, and replacement of their property.

C. All damage, injury, or loss to any property referred to in Paragraph 6.13.A.2 or 6.13.A.3 caused, directly or indirectly, in whole or in part, by Contractor, any Subcontractor, Supplier, or any other individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, shall be remedied by Contractor (except damage or loss attributable to the fault of Drawings or Specifications or to the acts or omissions of Owner or Engineer, or anyone employed by any of them, or anyone for whose acts any of them may be liable, and not attributable, directly or indirectly, in whole or in part, to the fault or negligence of Contractor or any Subcontractor, Supplier, or other individual or entity directly or indirectly employed by any of them).

D. Contractor's duties and responsibilities for safety and for protection of the Work shall continue until

such time as all the Work is completed and Engineer has issued a notice to Owner and Contractor in accordance with Paragraph 14.07.B that the Work is acceptable (except as otherwise expressly provided in connection with Substantial Completion).

6.14 *Safety Representative*

A. Contractor shall designate a qualified and experienced safety representative at the Site whose duties and responsibilities shall be the prevention of accidents and the maintaining and supervising of safety precautions and programs.

B. Contractor shall keep at the Site at all times during the progress of the Work a competent person to comply with OSHA trenching and excavation requirements. The competent person shall be one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions that are unsanitary, hazardous or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

6.15 *Hazard Communication Programs*

A. Contractor shall be responsible for coordinating any exchange of material safety data sheets or other hazard communication information required to be made available to or exchanged between or among employers at the Site in accordance with Laws or Regulations.

6.16 *Emergencies*

A. In emergencies affecting the safety or protection of persons or the Work or property at the Site or adjacent thereto, Contractor is obligated to act to prevent threatened damage, injury, or loss. Contractor shall give Engineer prompt written notice if Contractor believes that any significant changes in the Work or variations from the Contract Documents have been caused thereby or are required as a result thereof. If Engineer determines that a change in the Contract Documents is required because of the action taken by Contractor in response to such an emergency, a Work Change Directive or Change Order will be issued.

6.17 *Shop Drawings and Samples*

A. Contractor shall submit Shop Drawings and Samples to Engineer for review and approval in accordance with the acceptable Schedule of Submittals (as required by Paragraph 2.07). Each submittal will be identified as Engineer may require.

I. Shop Drawings

a. Submit number of copies specified in the General Requirements.

b. Data shown on the Shop Drawings will be complete with respect to quantities, dimensions, specified performance and design criteria, materials, and similar data to show Engineer the services, materials, and equipment Contractor proposes to provide and to enable Engineer to review the information for the limited purposes required by Paragraph 6.17.D.

2. *Samples:* Contractor shall also submit Samples to Engineer for review and approval in accordance with the acceptable schedule of Shop Drawings and Sample submittals.

a. Submit number of Samples specified in the Specifications.

b. Clearly identify each Sample as to material, Supplier, pertinent data such as catalog numbers, the use for which intended and other data as Engineer may require to enable Engineer to review the submittal for the limited purposes required by Paragraph 6.17.D.

B. Where a Shop Drawing or Sample is required by the Contract Documents or the Schedule of Submittals, any related Work performed prior to Engineer's review and approval of the pertinent submittal will be at the sole expense and responsibility of Contractor.

C. Submittal Procedures

1. Before submitting each Shop Drawing or Sample, Contractor shall have determined and verified:

a. all field measurements, quantities, dimensions, specified performance and design criteria, installation requirements, materials, catalog numbers, and similar information with respect thereto;

b. the suitability of all materials with respect to intended use, fabrication, shipping, handling, storage, assembly, and installation pertaining to the performance of the Work;

c. all information relative to Contractor's responsibilities for means, methods, techniques, sequences, and procedures of construction, and safety precautions and programs incident thereto; and

d. shall also have reviewed and coordinated each Shop Drawing or Sample with other Shop

Drawings and Samples and with the requirements of the Work and the Contract Documents.

2. Each submittal shall bear a stamp or specific written certification that Contractor has satisfied Contractor's obligations under the Contract Documents with respect to Contractor's review and approval of that submittal.

3. With each submittal, Contractor shall give Engineer specific written notice of any variations, that the Shop Drawing or Sample may have from the requirements of the Contract Documents. This notice shall be both a written communication separate from the Shop Drawing's or Sample Submittal; and, in addition, by a specific notation made on each Shop Drawing or Sample submitted to Engineer for review and approval of each such variation.

D. Engineer's Review

1. Engineer will provide timely review of Shop Drawings and Samples in accordance with the Schedule of Submittals acceptable to Engineer. Engineer's review and approval will be only to determine if the items covered by the submittals will, after installation or incorporation in the Work, conform to the information given in the Contract Documents and be compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents.

2. Engineer's review and approval will not extend to means, methods, techniques, sequences, or procedures of construction (except where a particular means, method, technique, sequence, or procedure of construction is specifically and expressly called for by the Contract Documents) or to safety precautions or programs incident thereto. The review and approval of a separate item as such will not indicate approval of the assembly in which the item functions.

3. Engineer's review and approval shall not relieve Contractor from responsibility for any variation from the requirements of the Contract Documents unless Contractor has complied with the requirements of Paragraph 6.17.C.3 and Engineer has given written approval of each such variation by specific written notation thereof incorporated in or accompanying the Shop Drawing or Sample. Engineer's review and approval shall not relieve Contractor from responsibility for complying with the requirements of Paragraph 6.17.C.1.

E. Resubmittal Procedures

1. Contractor shall make corrections required by Engineer and shall return the required number of corrected copies of Shop Drawings and submit, as required,

new Samples for review and approval. Contractor shall direct specific attention in writing to revisions other than the corrections called for by Engineer on previous submittals.

2. Contractor shall furnish required submittals with sufficient information and accuracy in order to obtain required approval of an item with no more than the number of submittal reviews specified in Paragraph 14.02.D.4 of these Modified General Conditions. Engineer will record time for review subsequent submittals of Shop Drawings, samples or other items requiring approval and Contractor shall reimburse Owner for Engineer's charges for such time in accordance with Paragraph 14.02.D.4.

3. In the event that Contractor requests a substitution for a previously approved item, Contractor shall reimburse Owner for Engineer's charges for such time, unless the need for such substitution is beyond the control of Contractor.

6.18 Continuing the Work

A. Contractor shall carry on the Work and adhere to the Progress Schedule during all disputes or disagreements with Owner. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as permitted by Paragraph 15.04 or as Owner and Contractor may otherwise agree in writing.

6.19 Contractor's General Warranty and Guarantee

A. Contractor warrants and guarantees to Owner that all Work will be in accordance with the Contract Documents and will not be defective. Engineer and its Related Entities shall be entitled to rely on representation of Contractor's warranty and guarantee.

B. Contractor's warranty and guarantee hereunder excludes defects or damage caused by:

1. abuse, modification, or improper maintenance or operation by persons other than Contractor, Subcontractors, Suppliers, or any other individual or entity for whom Contractor is responsible; or

2. normal wear and tear under normal usage.

C. Contractor's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. None of the following will constitute an acceptance of Work that is not in accordance with the Contract Documents or a release of Contractor's obligation to perform the Work in accordance with the Contract Documents:

1. observations by Engineer;

2. recommendation by Engineer or payment by Owner of any progress or final payment;

3. the issuance of a certificate of Substantial Completion by Engineer or any payment related thereto by Owner;

4. use or occupancy of the Work or any part thereof by Owner;

5. any review and approval of a Shop Drawing or Sample submittal or the issuance of a notice of acceptability by Engineer;

6. any inspection, test, or approval by others; or

7. any correction of defective Work by Owner.

6.20 Indemnification

~~A. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify, defend and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants, and subcontractors of each and any of them, from and against all claims, (whether alleged or proven), demands, costs, losses, and damages, including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs, arising out of or relating to the Work or any breach of Contractor's obligations under the Contract Documents, including but not limited to the breach of any warranty provided in the Contract Documents. The Contractor's obligations under this Paragraph 6.20.A are joint and several.~~

B. In any and all claims against Owner or Engineer or any of their respective consultants, agents, officers, directors, partners, or employees by any employee (or the survivor or personal representative of such employee) of Contractor, any Subcontractor, any

Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, the indemnification obligation under Paragraph 6.20.A shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Contractor or any such Subcontractor, Supplier, or other individual or entity under workers' compensation acts, disability benefit acts, or other employee benefit acts.

~~C. The indemnification obligations of Contractor under Paragraph 6.20.A shall not extend to the liability of Engineer and Engineer's officers, directors, partners, employees, agents, consultants and subcontractors arising out of:~~

~~1. the preparation or approval of, or the failure to prepare or approve, maps, Drawings, opinions, reports, surveys, Change Orders, designs, or Specifications or~~

~~2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.~~

6.21 Delegation of Professional Design Services

A. Contractor will not be required to provide professional design services unless such services are specifically required by the Contract Documents for a portion of the Work or unless such services are required to carry out Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. Contractor shall not be required to provide professional services in violation of applicable law.

B. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of Contractor by the Contract Documents, Owner and Engineer will specify all performance and design criteria that such services must satisfy. Contractor shall cause such services or certifications to be provided by a properly licensed professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to Engineer.

C. Owner and Engineer shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided Owner and Engineer have specified to Contractor all performance and design criteria that such services must satisfy.

D. Pursuant to this Paragraph 6.21, Engineer's review and approval of design calculations and design drawings will be only for the limited purpose of checking for conformance with performance and design criteria given and the design concept expressed in the Contract Documents. Engineer's review and approval of Shop Drawings and other submittals (except design calculations and design drawings) will be only for the purpose stated in Paragraph 6.17.D.1.

E. Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

ARTICLE 7 - OTHER WORK AT THE SITE

7.01 *Related Work at Site*

A. Owner may perform other work related to the Project at the Site with Owner's employees, or via other direct contracts therefor, or have other work performed by utility owners. If such other work is not noted in the Contract Documents, then:

1. written notice thereof will be given to Contractor prior to starting any such other work; and
2. if Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times that should be allowed as a result of such other work, a Claim may be made therefor as provided in Paragraph 10.05.

B. Contractor shall afford each other contractor who is a party to such a direct contract, each utility owner and Owner, if Owner is performing other work with Owner's employees, proper and safe access to the Site, a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such other work, and shall properly coordinate the Work with theirs. Contractor shall do all cutting, fitting, and patching of the Work that may be required to properly connect or otherwise make its several parts come together and properly integrate with such other work. Contractor shall not endanger any work of others by cutting, excavating, or otherwise altering their work and will only cut or alter their work with the written consent of Engineer and the others whose work will be affected. The duties and responsibilities of Contractor under this Paragraph are for the benefit of such utility owners and other contractors to the extent that there are comparable provisions for the benefit of Contractor in said direct contracts between Owner and such utility owners and other contractors.

C. If the proper execution or results of any part of Contractor's Work depends upon work performed by

others under this Article 7, Contractor shall inspect such other work and promptly report to Engineer in writing any delays, defects, or deficiencies in such other work that render it unavailable or unsuitable for the proper execution and results of Contractor's Work. Contractor's failure to so report will constitute an acceptance of such other work as fit and proper for integration with Contractor's Work except for latent defects and deficiencies in such other work.

7.02 *Coordination*

A. If Owner intends to contract with others for the performance of other work on the Project at the Site, the Owner will provide for the coordination of the work at the Site in the Contract Documents. the following will be set forth in Supplementary Conditions:

- ~~1. the individual or entity who will have authority and responsibility for coordination of the activities among the various contractors will be identified;~~
- ~~2. the specific matters to be covered by such authority and responsibility will be itemized; and~~
- ~~3. the extent of such authority and responsibilities will be provided.~~

~~B. Unless otherwise provided in the Supplementary Conditions, Owner shall have sole authority and responsibility for such coordination.~~

7.03 *Legal Relationships*

A. Paragraphs 7.01.A and 7.02 are not applicable for utilities not under the control of Owner.

B. Each other direct contract of Owner under Paragraph 7.01.A shall provide that the other contractor is liable to Owner and Contractor for the reasonable direct delay and disruption costs incurred by Contractor as a result of the other contractor's actions or inactions.

C. Contractor shall be liable to Owner and any other contractor for the reasonable direct delay and disruption costs incurred by such other contractor as a result of Contractor's action or inactions.

7.04 *Claims By Other Contractors*

A. Should Contractor cause damage to the work or property of any separate contractor at the Site, or should any claim arising out of Contractor's performance of the Work at the Site be made by any other contractor against Contractor, Contractor shall promptly attempt to settle with such other contractor by agreement or to otherwise resolve the dispute by arbitration or at law.

B. Should Contractor cause damage to the work or property of any separate contractor at the Site, or should any claim arising out of Contractor's performance of the Work at the Site be made by any other contractor against Owner or Engineer, Contractor shall indemnify Owner and Engineer as required under Paragraph 6.20.

ARTICLE 8 - OWNER'S RESPONSIBILITIES

8.01 *Communications to Contractor*

A. Except as otherwise provided in these General Conditions, Owner shall issue all communications to Contractor through Engineer.

8.02 *Replacement of Engineer*

A. In case of termination of the employment of Engineer, Owner shall appoint an engineer, ~~to whom Contractor makes no reasonable objection,~~ whose status under the Contract Documents shall be that of the former Engineer.

8.03 *Furnish Data*

A. Owner shall promptly furnish the data required of Owner under the Contract Documents.

8.04 *Pay When Due*

A. Owner shall make payments to Contractor when they are due as provided in Paragraphs 14.02.C and 14.07.C.

8.05 *Lands and Easements; Reports and Tests*

A. Owner's duties in respect of providing lands and easements and providing engineering surveys to establish reference points are set forth in Paragraphs 4.01 and 4.05. Paragraph 4.02 refers to Owner's identifying and making available to Contractor copies of reports of explorations and tests of subsurface conditions and drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site that have been utilized by Engineer in preparing the Contract Documents.

8.06 *Insurance*

A. Owner's responsibilities, if any, in respect to purchasing and maintaining liability and property insurance are set forth in Article 5.

8.07 *Change Orders*

A. Owner is obligated to execute Change Orders as indicated in Paragraph 10.03.

8.08 *Inspections, Tests, and Approvals.*

A. Owner's responsibility in respect to certain inspections, tests, and approvals is set forth in Paragraph 13.03.B.

8.09 *Limitations on Owner's Responsibilities*

A. The Owner shall not supervise, direct, or have control or authority over, nor be responsible for, Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work. Owner will not be responsible for Contractor's failure to perform the Work in accordance with the Contract Documents.

8.10 *Undisclosed Hazardous Environmental Condition*

A. Owner's responsibility in respect to an undisclosed Hazardous Environmental Condition is set forth in Paragraph 4.06.

8.11 *Evidence of Financial Arrangements*

A. If and to the extent Owner has agreed to furnish Contractor reasonable evidence that financial arrangements have been made to satisfy Owner's obligations under the Contract Documents, Owner's responsibility in respect thereof will be as set forth in these Supplementary Modified General Conditions.

8.12 *Permits Obtained by Owner*

Owner will obtain and pay for the following construction permits and licenses:

- Permit to Install from the Ohio EPA
- Building Permit from the Ohio Department of Commerce, Division of Industrial Compliance.

A copy of each permit is available at Owner's office. Contractor shall examine the permits and conform to the requirements contained therein, including the purchase of additional bonds or insurance as specified therein, and such requirements are hereby made part of these Contract Documents as though the same were set forth herein. Failure to examine the permit(s) will not relieve Contractor from compliance with the requirements stated therein.

ARTICLE 9 - ENGINEER'S STATUS DURING CONSTRUCTION

9.01 *Owner's Representative*

A. Engineer will be Owner's representative during the construction period. The duties and responsibilities and the limitations of authority of Engineer as Owner's representative during construction are set forth in the Contract Documents and will not be changed without written consent of Owner and Engineer.

9.02 *Visits to Site*

A. Engineer will make visits to the Site at intervals appropriate to the various stages of construction as Engineer deems necessary in order to observe as an experienced and qualified design professional the progress that has been made and the quality of the various aspects of Contractor's executed Work. Based on information obtained during such visits and observations, Engineer, for the benefit of Owner, will determine, in general, if the Work is proceeding in accordance with the Contract Documents. Engineer will not be required to make exhaustive or continuous inspections on the Site to check the quality or quantity of the Work. Engineer's efforts will be directed toward providing for Owner a greater degree of confidence that the completed Work will conform generally to the Contract Documents. On the basis of such visits and observations, Engineer will keep Owner informed of the progress of the Work and will endeavor to guard Owner against defective Work.

B. Engineer's visits and observations are subject to all the limitations on Engineer's authority and responsibility set forth in Paragraph 9.09. Particularly, but without limitation, during or as a result of Engineer's visits or observations of Contractor's Work Engineer will not supervise, direct, control, or have authority over or be responsible for Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work.

9.03 *Project Representative*

A. If Owner and Engineer agree, Engineer will furnish a Resident Project Representative to assist Engineer in providing more extensive observation of the Work and to assist in carrying out the Engineer's other responsibilities under the Contract Documents and its agreement with the Owner. ~~The authority and responsibilities of any such Resident Project Representative and assistants will be as provided in the Supplementary Conditions, and limitations on the responsibilities thereof will be as provided in Paragraph 9.09. If Owner designates another representative or agent to represent Owner at the Site who is not Engineer's~~

~~consultant, agent or employee, the responsibilities and authority and limitations thereon of such other individual will be subject to the Contract Document, specifically including the requirement in the Agreement that any Change Order or other Modification be authorized by a resolution duly adopted by the Owner, or entity will be as provided in the Supplementary Conditions.~~

B. Resident Project Representative personnel on this project may include personnel furnished by Owner, Engineer, or both. The duties and responsibilities of the Resident Project Representative(s) may include the following:

1. Review schedules as required in Paragraph 2.05.A of the General Conditions and amendment thereto.
2. Attend conferences and meetings with Contractor.
3. Serve as liaison between Engineer and Contractor and help Engineer serve as liaison between Owner and Contractor.
4. Conduct on-site observation of the work.
5. Observe tests, equipment, and system startups.
6. Report to Engineer when clarifications and interpretations of the Contract Documents are needed. Consider, evaluate, and report to Engineer, Contractor's requests for modification.
7. Maintain orderly records, keep a daily log (when on a part-time basis, keep log for days visiting site), and furnish periodic reports to Engineer of the progress of the Work.
8. Before project completion, prepare final list of items to be completed or corrected and make recommendations to Engineer concerning acceptance of the Work.

9. Review Payment Applications from Contractor.

The Resident Project Representatives shall not:

1. Authorize any deviation from the Contract Documents or substitutions of materials or equipment.
2. Exceed limitations of Engineer's authority as set forth in the Contract Documents.
3. Undertake any of the responsibilities of

Contractor, Subcontractor, or Contractor's superintendent.

4. Advise on, issue directions relative to, or assume control over any aspect of the means, methods, techniques, sequences, or procedures of construction.

5. Advise on, issue directions regarding, or assume control over safety precautions and programs in connection with the Work.

6. Accept shop drawing or sample submittals from anyone other than Contractor.

7. Authorize Owner to occupy the Project in whole or in part.

8. Participate in specialized field or laboratory tests or inspections conducted by others except as specifically authorized by Engineer.

9.04 *Authorized Variations in Work*

A. Engineer may authorize minor variations in the Work from the requirements of the Contract Documents which do not involve an adjustment in the Contract Price or the Contract Times and are compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. These may be accomplished by a Field Order and will be binding on Owner and also on Contractor, who shall perform the Work involved promptly. If Owner or Contractor believes that a Field Order justifies an adjustment in the Contract Price or Contract Times, or both, and the parties are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment, a Claim may be made therefor as provided in Paragraph 10.05.

9.05 *Rejecting Defective Work*

A. Engineer will have authority to reject Work which Engineer believes to be defective, or that Engineer believes will not produce a completed Project that conforms to the Contract Documents or that will prejudice the integrity of the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. Engineer will also have authority to require special inspection or testing of the Work as provided in Paragraph 13.04, whether or not the Work is fabricated, installed, or completed.

9.06 *Shop Drawings, Change Orders and Payments*

A. In connection with Engineer's authority, and limitations thereof, as to Shop Drawings and Samples, see Paragraph 6.17.

B. In connection with Engineer's authority, and limitations thereof, as to design calculations and design drawings submitted in response to a delegation of professional design services, if any, see Paragraph 6.21.

C. In connection with Engineer's authority as to Change Orders, see Articles 10, 11, and 12.

D. In connection with Engineer's authority as to Applications for Payment, see Article 14.

9.07 *Determinations for Unit Price Work*

A. Engineer will determine the actual quantities and classifications of Unit Price Work performed by Contractor. Engineer will review with Contractor the Engineer's preliminary determinations on such matters before rendering a written decision thereon (by recommendation of an Application for Payment or otherwise). Engineer's written decision thereon will be final and binding (except as modified by Engineer to reflect changed factual conditions or more accurate data) upon Owner and Contractor, subject to the provisions of Paragraph 10.05.

B. Unit Price Work for which a typical cross section or other detail from the Contract Documents applies shall be paid only up to the quantity determined by using the dimensions provided in the typical cross section or other detail. By way of example, this provision means that if a typical trench width detail in the Drawings shows a maximum width of 30-inches, all pay quantities associated with the actual work of constructing the detail shall be calculated using a trench width not greater than 30-inches. This means that the actual pay quantity could also be less than that based upon a 30-inch wide trench, if the actual trench width is smaller and otherwise in conformance with the Contract Documents, but the Contractor would not be paid more if the actual trench width exceeds 30 inches. Contractor is responsible for determining what actual trench width may be required due to field conditions and applicable laws and regulations existing at the time of its bid.

9.08 *Decisions on Requirements of Contract Documents and Acceptability of Work*

A. Engineer will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. All matters in question and other matters between Owner and Contractor arising prior to the date final payment is due relating to the acceptability of the Work, and the interpretation of the requirements of the Contract Documents pertaining to the performance of the Work, will be referred initially to Engineer in writing within 30 days of the event giving rise to the question

B. Engineer will, with reasonable promptness, render a written decision on the issue referred. If Owner or Contractor believe that any such decision entitles them to an adjustment in the Contract Price or Contract Times or both, a Claim may be made under Paragraph 10.05. The date of Engineer's decision shall be the date of the event giving rise to the issues referenced for the purposes of Paragraph 10.05.B.

C. Engineer's written decision on the issue referred will be final and binding on Owner and Contractor, subject to the provisions of Paragraph 10.05.

D. When functioning as interpreter and judge under this Paragraph 9.08, Engineer will not show partiality to Owner or Contractor and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity.

9.09 *Limitations on Engineer's Authority and Responsibilities*

A. Neither Engineer's authority or responsibility under this Article 9 or under any other provision of the Contract Documents nor any decision made by Engineer in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by Engineer shall create, impose, or give rise to any duty in contract, tort, or otherwise owed by Engineer to Contractor, any Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent of any of them.

B. Engineer will not supervise, direct, control, or have authority over or be responsible for Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work. Engineer will not be responsible for Contractor's failure to perform the Work in accordance with the Contract Documents.

C. Engineer will not be responsible for the acts or omissions of Contractor or of any Subcontractor, any Supplier, or of any other individual or entity performing any of the Work.

D. Engineer's review of the final Application for Payment and accompanying documentation and all maintenance and operating instructions, schedules, guarantees, bonds, certificates of inspection, tests and approvals, and other documentation required to be delivered by Paragraph 14.07.A will only be to determine generally that their content complies with the requirements of, and in the case of certificates of inspections, tests, and approvals that the results certified indicate compliance with the Contract Documents.

E. The limitations upon authority and responsibility set forth in this Paragraph 9.09 shall also apply to, the Resident Project Representative, if any, and assistants, if any.

ARTICLE 10 - CHANGES IN THE WORK; CLAIMS

10.01 *Authorized Changes in the Work*

A. Without invalidating the Contract and without notice to any surety, Owner may, at any time or from time to time, order additions, deletions, or revisions in the Work by a Change Order, or a Work Change Directive. Upon receipt of any such document, Contractor shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Contract Documents (except as otherwise specifically provided). The agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the Work that is the subject of the Change Order, including, but not limited to, all direct, indirect and cumulative costs associated with such change and any and all adjustments to the Contract Sum and the Date for Substantial Completion.

B. If Owner and Contractor are unable to agree on entitlement to, or on the amount or extent, if any, of an adjustment in the Contract Price or Contract Times, or both, that should be allowed as a result of a Work Change Directive, a Claim may be made therefor as provided in Paragraph 10.05.

10.02 *Unauthorized Changes in the Work*

A. Contractor shall not be entitled to an increase in the Contract Price or an extension of the Contract Times with respect to any work performed that is not required by the Contract Documents as amended, modified, or supplemented as provided in Paragraph 3.04, except in the case of an emergency as provided in Paragraph 6.16 or in the case of uncovering Work as provided in Paragraph 13.04.B.

10.03 *Execution of Change Orders*

A. Owner and Contractor shall execute appropriate Change Orders recommended by Engineer covering:

1. changes in the Work which are: (i) ordered by Owner pursuant to Paragraph 10.01.A, (ii) required because of acceptance of defective Work under Paragraph 13.08.A or Owner's correction of defective Work under Paragraph 13.09, or (iii) agreed to by the parties;

2. changes in the Contract Price or Contract Times which are agreed to by the parties, including any undisputed sum or amount of time for Work actually

performed in accordance with a Work Change Directive; and

3. changes in the Contract Price or Contract Times which embody the substance of any written decision rendered by Engineer pursuant to Paragraph 10.05; provided that, in lieu of executing any such Change Order, an appeal may be taken from any such decision in accordance with the provisions of the Contract Documents and applicable Laws and Regulations, but during any such appeal, Contractor shall carry on the Work and adhere to the Progress Schedule as provided in Paragraph 6.18.A.

10.04 Notification to Surety

A. If notice of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Times) is required by the provisions of any bond to be given to a surety, the giving of any such notice will be Contractor's responsibility. The amount of each applicable bond will be adjusted to reflect the effect of any such change. Failure to provide notice to the surety of any such change shall not exonerate the surety from its obligations under the bond.

10.05 Claims

A. *Engineer's Decision Required:* All Claims, except those waived pursuant to Paragraph 14.09, shall be referred to the Engineer for decision. A decision by Engineer shall be required as a condition precedent to any exercise by Owner or Contractor of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims.

~~B. *Notice:* Written notice stating the general nature of each Claim, shall be delivered by the claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim. Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event (unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim). A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of Paragraph 12.01.B. A Claim for an adjustment in Contract Time shall be prepared in accordance with the provisions of Paragraph 12.02.B. Each Claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. The opposing party shall submit any response to Engineer and the claimant within 30 days after receipt of the claimant's last submittal (unless Engineer allows additional time).~~

Notice: As a condition precedent to a change in the Contract Price or the Contract Times, for each Claim the Contractor shall deliver a fully completed Statement of Claim Form, a copy of which form is a Contract Document, to the Engineer and the Owner, within 21 days of the start of the event giving rise to the Claim. The Contractor shall be responsible for substantiating its Claim. The Contractor's obligation to deliver a fully completed Statement of Claim form shall be an irrevocable waiver of Contractor's right to any form of additional compensation, be it in time or money, arising out of the Claim or the circumstances underlying the Claim. Further, the Contractor's obligation to deliver a fully completed Statement of Claim form within such 21 day period is a material term of the Contract Documents and provides the Owner with the opportunity to mitigate its damages.

The Contractor acknowledges and agrees that the Owner and/or parties in privity of contract with the Owner may delay, interfere with and/or disrupt the Contractor's Work, and such actions shall not constitute a breach of contract by the Owner, since the Contractor is entitled to additional compensation by properly pursuing a Claim as permitted by these Modified General Conditions. Pending the final resolution of a Claim, the Contractor shall continue performance of the Work.

C. *Engineer's Action:* Engineer will review each Claim and, within 30-45 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any Statement of Claim Form, take one of the following actions in writing:

1. deny the Claim in whole or in part,
2. approve the Claim, or

3. notify the parties that the Engineer is unable to resolve the Claim if, in the Engineer's sole discretion, it would be inappropriate for the Engineer to do so. For purposes of further resolution of the Claim, such notice shall be deemed a denial.

D. In the event that Engineer does not take action on a Claim within said 30-45 days, the Claim shall be deemed denied.

E. ~~Engineer's written action under Paragraph 10.05.C or denial pursuant to Paragraphs 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor invoke the dispute resolution procedure set forth in Article 16 within 30 days of such action or denial. Engineer's written action under Paragraph 10.05.C or denial pursuant to Paragraphs 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor commences an action in a court of exclusive jurisdiction~~

as set forth in Paragraph 16.01.A.2 within 30 days of such action or denial.

F. No Claim for an adjustment in Contract Price or Contract Times will be valid if not submitted in accordance with this Paragraph 10.05.

G. False or Fraudulent Claim. The Contractor shall not knowingly present or cause to be presented to the Owner a false or fraudulent Claim. Knowingly shall have the same meaning as in Section 3729(b) USC of the Federal False Claims Act. If the Contractor knowingly presents or causes to be presented a false or fraudulent Claim, then the Contractor shall be liable to the Owner for the same civil penalty and damages as the United States Government would be entitled to recover under such Section 3729(a) USC and shall also indemnify and hold the Owner harmless from all costs and expenses, including Owner's attorneys' and consultants' fees and expenses incurred in investigating and defending against such Claim and in pursuing the collection of such penalty, damages and fees and expenses.

H. Claim Documentation: Within ten (10) days of written request from the Owner, Contractor shall make available to Owner or its representative any books, records, or other documents in its possession or to which it has access, including but not limited to Contractor's daily logs/reports, original estimates of Work and applicable agreements, correspondence with subcontractors and suppliers, internal correspondence (including e-mail), accounting records, and other information from which the Contractor's costs may be derived. To the extent permitted by law, the Owner shall keep the Project accounting records and estimate for the Project confidential. As requested by the Owner, the Contractor shall provide such documents and information in paper copies and/or computer format (including the format of the Contractor's accounting software and/or ASCII format). The Contractor's provision of the requested documents and information shall be a condition precedent to any further proceeding under the Contract Documents or to payment of an Application for Payment.

Failure to provide the requested documents shall be a material breach of the Contract, and Contractor shall indemnify Owner for all of Owner's costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to Contractor's failure to comply with this provision. If the Contractor fails to provide the requested documents, the Contractor shall be precluded from presenting such documents in any subsequent dispute resolution proceedings, if the data was reasonably available at the time of the request.

ARTICLE 11 - COST OF THE WORK; ALLOWANCES; UNIT PRICE WORK

11.01 Cost of the Work

A. *Costs Included:* The term Cost of the Work means the sum of all costs, except those excluded in Paragraph 11.01.B, necessarily incurred and paid by Contractor in the proper performance of the Work. When the value of any Work covered by a Change Order or when a Claim for an adjustment in Contract Price is determined on the basis of Cost of the Work, the costs to be reimbursed to Contractor will be only those additional or incremental costs required because of the change in the Work or because of the event giving rise to the Claim. Except as otherwise may be agreed to in writing by Owner, such costs shall be in amounts no higher than those prevailing in the locality of the Project, shall include only the following items, and shall not include any of the costs itemized in Paragraph 11.01.B.

1. Payroll costs for employees in the direct employ of Contractor in the performance of the Work under schedules of job classifications agreed upon by Owner and Contractor. Such employees shall include, without limitation, superintendents, foremen, and other personnel employed full time at the Site. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits, which shall include social security contributions, unemployment, excise, and payroll taxes, workers' compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. The expenses of performing Work outside of regular working hours, on Saturday, Sunday, or legal holidays, shall be included in the above to the extent authorized by Owner.

2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers' field services required in connection therewith. All cash discounts shall accrue to Contractor unless Owner deposits funds with Contractor with which to make payments, in which case the cash discounts shall accrue to Owner. All trade discounts, rebates and refunds and returns from sale of surplus materials and equipment shall accrue to Owner, and Contractor shall make provisions so that they may be obtained.

3. Payments made by Contractor to Subcontractors for Work performed by Subcontractors. If required by Owner, Contractor shall obtain competitive bids from subcontractors acceptable to Owner and Contractor and shall deliver such bids to Owner, who will then determine, with the advice of Engineer, which bids, if any, will be acceptable. If any subcontract provides that the Subcontractor is to be paid on the basis of Cost of the

Work plus a fee, the Subcontractor's Cost of the Work and fee shall be determined in the same manner as Contractor's Cost of the Work and fee as provided in this Paragraph 11.01.

4. Costs of special consultants (including but not limited to Engineers, architects, testing laboratories, surveyors, attorneys, and accountants) employed for services specifically related to the Work.

5. Supplemental costs including the following:

a. The proportion of necessary transportation, travel, and subsistence expenses of Contractor's employees incurred in discharge of duties connected with the Work.

b. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office, and temporary facilities at the Site, and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost, less market value, of such items used but not consumed which remain the property of Contractor.

c. Construction Equipment and Machinery

(1) Rentals of all construction equipment and machinery, and the parts thereof in accordance with rental agreements approved by Owner with the advice of Engineer, and the cost of transportation, loading, unloading, assembly, dismantling, and removal thereof. All such costs shall be in accordance with the terms of said rental agreements. The rental of any such equipment, machinery, or parts shall cease when the use thereof is no longer necessary for the Work.

(2) Costs for equipment and machinery owned by Contractor will be paid at a rate shown for such equipment in the latest edition of the Associated Equipment Distributors' rental rate manual. An hourly rate will be computed by dividing the monthly rates by 176. These computed rates will include all operating costs. Costs will include the time the equipment or machinery is in use on the changed Work and the costs of transportation, loading, unloading, assembly, dismantling, and removal when directly attributable to the changed Work. The cost of any such equipment or machinery, or parts thereof, shall cease to accrue when the use thereof is no longer necessary for the changed Work. Equipment or machinery with a value of less than \$1,000 will be considered small tools.

~~Rentals of all construction equipment and machinery, and the parts thereof whether rented from Contractor or others in accordance with rental agreements approved by Owner with the advice of Engineer, and the costs of transportation, loading, unloading, assembly, dismantling, and removal thereof. All such costs shall be in accordance with the terms of said rental agreements. The rental of any such equipment, machinery, or parts shall cease when the use thereof is no longer necessary for the Work.~~

d. Sales, consumer, use, and other similar taxes related to the Work, and for which Contractor is liable, imposed by Laws and Regulations.

e. Deposits lost for causes other than negligence of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, and royalty payments and fees for permits and licenses.

f. Losses and damages (and related expenses) caused by damage to the Work, not compensated by insurance or otherwise, sustained by Contractor in connection with the performance of the Work (except losses and damages within the deductible amounts of property insurance established in accordance with Paragraph 5.06.D), provided such losses and damages have resulted from causes other than the negligence of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable. Such losses shall include settlements made with the written consent and approval of Owner. No such losses, damages, and expenses shall be included in the Cost of the Work for the purpose of determining Contractor's fee.

g. The cost of utilities, fuel, and sanitary facilities at the Site.

h. Minor expenses such as telegrams, long distance telephone calls, telephone service at the Site, expresses, and similar petty cash items in connection with the Work.

i. The costs of premiums for all bonds and insurance Contractor is required by the Contract Documents to purchase and maintain.

B. Costs Excluded: The term Cost of the Work shall not include any of the following items:

1. Payroll costs and other compensation of Contractor's officers, executives, principals (of partnerships and sole proprietorships), general managers,

safety managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expeditors, timekeepers, clerks, and other personnel employed by Contractor, whether at the Site or in Contractor's principal or branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in Paragraph 11.01.A.1 or specifically covered by Paragraph 11.01.A.4, all of which are to be considered administrative costs covered by the Contractor's fee.

2. Expenses of Contractor's principal and branch offices other than Contractor's office at the Site.

3. Any part of Contractor's capital expenses, including interest on Contractor's capital employed for the Work and charges against Contractor for delinquent payments.

4. Costs due to the negligence of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied, and making good any damage to property.

5. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in Paragraphs 11.01.A and 11.01.B.

C. *Contractor's Fee:* When all the Work is performed on the basis of cost-plus, Contractor's fee shall be determined as set forth in the Agreement. When the value of any Work covered by a Change Order or when a Claim for an adjustment in Contract Price is determined on the basis of Cost of the Work, Contractor's fee shall be determined as set forth in Paragraph 12.01.C.

D. *Documentation:* Whenever the Cost of the Work for any purpose is to be determined pursuant to Paragraphs 11.01.A and 11.01.B, Contractor will establish and maintain records thereof in accordance with generally accepted accounting practices and submit in a form acceptable to Engineer an itemized cost breakdown together with supporting data.

11.02 Allowances

A. It is understood that Contractor has included in the Contract Price all allowances so named in the Contract Documents and shall cause the Work so covered to be performed for such sums and by such persons or entities as may be acceptable to Owner and Engineer.

B. Cash Allowances

1. Contractor agrees that:

a. the cash allowances include the cost to Contractor (less any applicable trade discounts) of materials and equipment required by the allowances to be delivered at the Site, and all applicable taxes; and

b. Contractor's costs for unloading and handling on the Site, labor, installation, overhead, profit, and other expenses contemplated for the cash allowances have been included in the Contract Price and not in the allowances, and no demand for additional payment on account of any of the foregoing will be valid.

C. Contingency Allowance

1. Contractor agrees that a contingency allowance, if any, is for the sole use of Owner to cover unanticipated costs.

D. Prior to final payment, an appropriate Change Order will be issued as recommended by Engineer to reflect actual amounts due Contractor on account of Work covered by allowances, and the Contract Price shall be correspondingly adjusted.

11.03 Unit Price Work

A. Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the unit price for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement. Contractor shall not be paid for any Unit Price Work that represents an actual quantity greater than 110% of the estimated quantity, without a Change Order. The Contractor shall maintain such records as the Engineer may require to track the quantities of Unit Price Work.

B. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Determinations of the actual quantities and classifications of Unit Price Work performed by Contractor will be made by Engineer subject to the provisions of Paragraph 9.07.

C. Each unit price will be deemed to include an amount considered by Contractor to be adequate to cover Contractor's overhead and profit for each separately identified item.

D. Owner or Contractor may make a Claim for an adjustment in the Contract Price in accordance with Paragraph 10.05 if:

1. the quantity of any item of Unit Price Work performed by Contractor differs materially and significantly from the estimated quantity of such item indicated in the Agreement; and

2. there is no corresponding adjustment with respect any other item of Work; and

3. Contractor believes that Contractor is entitled to an increase in Contract Price as a result of having incurred additional expense or Owner believes that Owner is entitled to a decrease in Contract Price and the parties are unable to agree as to the amount of any such increase or decrease.

ARTICLE 12 - CHANGE OF CONTRACT PRICE; CHANGE OF CONTRACT TIMES

12.01 *Change of Contract Price*

A. The Contract Price may only be changed by a Change Order. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted by the party making the Claim to the Engineer and the other party to the Contract in accordance with the provisions of Paragraph 10.05.

B. The value of any Work covered by a Change Order or of any Claim for an adjustment in the Contract Price will be determined as follows:

1. where the Work involved is covered by unit prices contained in the Contract Documents, by application of such unit prices to the quantities of the items involved (subject to the provisions of Paragraph 11.03); or

2. where the Work involved is not covered by unit prices contained in the Contract Documents, by a mutually agreed lump sum (which may include an allowance for overhead and profit not necessarily in accordance with Paragraph 12.01.C.2); or

3. where the Work involved is not covered by unit prices contained in the Contract Documents and agreement to a lump sum is not reached under Paragraph 12.01.B.2, on the basis of the Cost of the Work (determined as provided in Paragraph 11.01) plus a Contractor's fee for overhead and profit (determined as provided in Paragraph 12.01.C).

C. *Contractor's Fee:* The Contractor's fee for overhead and profit shall be determined as follows:

1. a mutually acceptable fixed fee; or

2. if a fixed fee is not agreed upon, then a fee based on the following percentages of the various portions of the Cost of the Work:

a. for costs incurred under Paragraphs 11.01.A.1 and 11.01.A.2, the Contractor's fee shall be 15 percent;

b. for costs incurred under Paragraph 11.01.A.3, the Contractor's fee shall be five percent;

c. where one or more tiers of subcontracts are on the basis of Cost of the Work plus a fee and no fixed fee is agreed upon, the intent of Paragraph 12.01.C.2.a is that the Subcontractor who actually performs the Work, at whatever tier, will be paid a fee of 15 percent of the costs incurred by such Subcontractor under Paragraphs 11.01.A.1 and 11.01.A.2 and that any higher tier Subcontractor and Contractor will each be paid a fee of five percent of the amount paid to the next lower tier Subcontractor except, the maximum total allowable costs to Owner shall be the cost of the Work plus a maximum collective aggregate fee for Contractor and all tiered Subcontractors of 25 percent;

d. no fee shall be payable on the basis of costs itemized under Paragraphs 11.01.A.4, 11.01.A.5, and 11.01.B;

e. the amount of credit to be allowed by Contractor to Owner for any change which results in a net decrease in cost will be the amount of the actual net decrease in cost plus a deduction in Contractor's fee by an amount equal to five percent of such net decrease; and

f. when both additions and credits are involved in any one change, the adjustment in Contractor's fee shall be computed on the basis of the net change in accordance with Paragraphs 12.01.C.2.a through 12.01.C.2.e, inclusive.

12.02 *Change of Contract Times*

A. The Contract Times may only be changed by a Change Order. Any Claim for an adjustment in the Contract Times shall be based on written notice submitted by the party making the Claim to the Engineer and the other party to the Contract in accordance with the provisions of Paragraph 10.05.

B. Any adjustment of the Contract Times covered by a Change Order or any Claim for an adjustment in the Contract Times will be determined in accordance with the provisions of this Article 12.

A. Where Contractor is prevented from completing any part of the Work within the Contract Times due to delay beyond the control of Contractor, the Contract Times will be extended in an amount equal to the time lost due to such delay, if a Claim is made therefor as provided in Paragraph 12.02.A. Delays beyond the control of Contractor shall include, but not be limited to, acts or neglect by Owner, acts or neglect of utility owners or other contractors performing other work as contemplated by Article 7, fires, floods, epidemics, abnormal weather conditions, or acts of God. When the Contractor's accepted Progress Schedule depicts Work on the critical path occurring during the period from December 1 to April 30 and the Contractor is prevented from completing any part of the Work within the Contract Times due to a abnormal weather conditions, then the Contract Times will be extended by one (1) day for each weather day lost in excess of those in the following table:

Month	Number of Workdays Lost Due To Weather
December	6
January	8
February	8
March	7
April	6

The Contract Times will be extended for every workday that abnormal weather conditions reduce production by more than 50 percent on items of Work on the critical path. Weekends, Shutdown Days as defined in the Agreement, and holidays will not be considered as lost workdays unless the Contractor normally works those days or unless the Contractor is directed to work those days.

B. If Owner, Engineer, or other contractors or utility owners performing other work for Owner as contemplated by Article 7, or anyone for whom Owner is responsible, delays, disrupts, or interferes with the performance or progress of the Work, then Contractor shall be entitled to an equitable adjustment in the Contract Price or the Contract Times, or both. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times.

C. If Contractor is delayed in the performance or progress of the Work by fire, flood, epidemic, abnormal weather conditions, acts of God, acts or failures to act of utility owners not under the control of Owner, or other causes not the fault of and beyond control of Owner and Contractor, then Contractor shall be entitled to an equitable adjustment in Contract Times, if such adjustment is essential to Contractor's ability to complete the Work within the Contract Times. Such an adjustment

shall be Contractor's sole and exclusive remedy for the delays described in this Paragraph 12.03.C; it being understood and agreed that the Contractor has included in the Contract Price a contingency for the risk of such delays.

D. Owner, Engineer and the Related Entities of each of them shall not be liable to Contractor for any claims, costs, losses, or damages (including but not limited to all fees and charges of Engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Contractor on or in connection with any other project or anticipated project.

E. Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delays within the control of Contractor. Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of Contractor.

ARTICLE 13 - TESTS AND INSPECTIONS; CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK

13.01 Notice of Defects

A. Prompt notice of all defective Work of which Owner or Engineer has actual knowledge will be given to Contractor. All defective Work may be rejected, corrected, or accepted as provided in this Article 13.

13.02 Access to Work

A. Owner, Engineer, their consultants and other representatives and personnel of Owner, independent testing laboratories, and governmental agencies with jurisdictional interests will have access to the Site and the Work at reasonable times for their observation, inspecting, and testing. Contractor shall provide them proper and safe conditions for such access and advise them of Contractor's Site safety procedures and programs so that they may comply therewith as applicable.

13.03 Tests and Inspections

A. All Work is subject to testing to indicate compliance with Contract Document requirements. Duplicate copies of test results of all tests required shall be submitted to Engineer. Testing laboratories are subject to the approval of Engineer. Tests and inspection of work may be conducted by Owner or an independent laboratory employed by Owner. Tests may also be performed in the field by Engineer as a basis for acceptance of the Work. Contractor shall give Engineer timely notice of readiness of the Work for all required inspections, tests, or approvals and shall cooperate with inspection and testing personnel to facilitate required inspections or tests.

Samples required for testing shall be furnished by Contractor at no cost to Owner. In the event that completed Work does not conform to specification requirements during the initial test, the Work shall be corrected and retested for conformance. The entire cost of retesting completed Work shall be borne by Contractor. This shall include the extra cost for inspection to Owner which will be deducted from the final amount due Contractor.

B. Owner shall employ and pay for the services of an independent testing laboratory to perform all inspections, tests, or approvals required by the Contract Documents except:

1. for inspections, tests, or approvals covered by Paragraphs 13.03.C and 13.03.D below;

2. that costs incurred in connection with tests or inspections conducted pursuant to Paragraph 13.04.B shall be paid as provided in said Paragraph 13.04.C; and

3. as otherwise specifically provided in the Contract Documents.

C. If Laws or Regulations of any public body having jurisdiction require any Work (or part thereof) specifically to be inspected, tested, or approved by an employee or other representative of such public body, Contractor shall assume full responsibility for arranging and obtaining such inspections, tests, or approvals, pay all costs in connection therewith, and furnish Engineer the required certificates of inspection or approval.

D. Contractor shall be responsible for arranging and obtaining and shall pay all costs in connection with any inspections, tests, or approvals required for Owner's and Engineer's acceptance of materials or equipment to be incorporated in the Work; or acceptance of materials, mix designs, or equipment submitted for approval prior to Contractor's purchase thereof for incorporation in the Work. Such inspections, tests, or approvals shall be performed by organizations acceptable to Owner and Engineer. Tests required by the Contract Documents to be performed by Contractor that require test certificates to be submitted to Owner or Engineer for acceptance shall be made by an independent testing laboratory or agency licensed or certified in accordance with Laws and Regulations and applicable state and local statutes. In the event state license or certification is not required, testing laboratories or agencies shall meet the following applicable requirements:

1. "Recommended Requirements for Independent Laboratory Qualification," published by the American Council of Independent Laboratories.

2. Basic requirements of ASTM E329, "Standard Specification for Agencies Engaged in the

Testing and/or Inspection of Materials used in Construction" as applicable.

3. Calibrate testing equipment at reasonable intervals by devices of accuracy traceable to either the National Institute of Standards and Technology or accepted values of natural physical constants.

E. If any Work (or the work of others) that is to be inspected, tested, or approved is covered by Contractor without written concurrence of Engineer, it must, if requested by Engineer, be uncovered for observation.

F. Uncovering Work as provided in Paragraph 13.03.E shall be at Contractor's expense unless Contractor has given Engineer timely notice of Contractor's intention to cover the same and Engineer has not acted with reasonable promptness in response to such notice.

13.04 *Uncovering Work*

A. If any Work is covered contrary to the written request of Engineer, it must, if requested by Engineer, be uncovered for Engineer's observation and replaced at Contractor's expense.

B. If Engineer considers it necessary or advisable that covered Work be observed by Engineer or inspected or tested by others, Contractor, at Engineer's request, shall uncover, expose, or otherwise make available for observation, inspection, or testing as Engineer may require, that portion of the Work in question, furnishing all necessary labor, material, and equipment.

C. If it is found that the uncovered Work is defective, Contractor shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such uncovering, exposure, observation, inspection, and testing, and of satisfactory replacement or reconstruction (including but not limited to all costs of repair or replacement of work of others); and Owner shall be entitled to an appropriate decrease in the Contract Price. If the parties are unable to agree as to the amount thereof, Owner may make a Claim therefor as provided in Paragraph 10.05.

D. If, the uncovered Work is not found to be defective, Contractor shall be allowed an increase in the Contract Price or an extension of the Contract Times, or both, directly attributable to such uncovering, exposure, observation, inspection, testing, replacement, and reconstruction. If the parties are unable to agree as to the amount or extent thereof, Contractor may make a Claim therefor as provided in Paragraph 10.05.

13.05 *Owner May Stop the Work*

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

13.06 *Correction or Removal of Defective Work*

A. Promptly after receipt of notice and so as not to delay the Project, Contractor shall correct all defective Work, whether or not fabricated, installed, or completed, or, if the Work has been rejected by Engineer, remove it from the Project and replace it with Work that is not defective. Contractor shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such correction or removal (including but not limited to all costs of repair or replacement of work of others).

B. When correcting defective Work under the terms of this Paragraph 13.06 or Paragraph 13.07, Contractor shall take no action that would void or otherwise impair Owner's special warranty and guarantee, if any, on said Work.

13.07 *Correction Period*

A. If within one year after the date of Substantial Completion (or such longer period of time as may be prescribed by the terms of any applicable special guarantee required by the Contract Documents) or by any specific provision of the Contract Documents, any Work is found to be defective, or if the repair of any damages to the land or areas made available for Contractor's use by Owner or permitted by Laws and Regulations as contemplated in Paragraph 6.11.A is found to be defective, Contractor shall promptly, without cost to Owner and in accordance with Owner's written instructions:

1. repair such defective land or areas; or
2. correct such defective Work; or
3. if the defective Work has been rejected by Owner, remove it from the Project and replace it with Work that is not defective, and

4. satisfactorily correct or repair or remove and replace any damage to other Work, to the work of others or other land or areas resulting therefrom.

B. If Contractor does not promptly comply with the terms of Owner's written instructions, or in an emergency where delay would cause serious risk of loss or damage, Owner may have the defective Work corrected or repaired or may have the rejected Work removed and replaced. All claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such correction or repair or such removal and replacement (including but not limited to all costs of repair or replacement of work of others) will be paid by Contractor.

C. In special circumstances where a particular item of equipment is placed in continuous service before Substantial Completion of all the Work, the correction period for that item may start to run from an earlier date if so provided in the Specifications .

D. Where defective Work (and damage to other Work resulting therefrom) has been corrected or removed and replaced under this Paragraph 13.07, the correction period hereunder with respect to such Work will be extended for an additional period of one year after such correction or removal and replacement has been satisfactorily completed.

E. Contractor's obligations under this Paragraph 13.07 are in addition to any other obligation or warranty. The provisions of this Paragraph 13.07 shall not be construed as a substitute for, or limitation upon, or a waiver of the provisions of any applicable statute of limitation or repose.

13.08 *Acceptance of Defective Work*

A. If, instead of requiring correction or removal and replacement of defective Work, Owner (and, prior to Engineer's recommendation of final payment, Engineer) prefers to accept it, Owner may do so. Contractor shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) attributable to Owner's evaluation of and determination to accept such defective Work (such costs to be approved by Engineer as to reasonableness) and the diminished value of the Work to the extent not otherwise paid by Contractor pursuant to this sentence. If any such acceptance occurs prior to Engineer's recommendation of final payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work, and Owner shall be entitled to an appropriate decrease in the Contract Price, reflecting the diminished value of Work

so accepted. If the parties are unable to agree as to the amount thereof, Owner may make a Claim therefor as provided in Paragraph 10.05. If the acceptance occurs after such recommendation, an appropriate amount will be paid by Contractor to Owner.

13.09 *Owner May Correct Defective Work*

A. If Contractor fails within a reasonable time after written notice from Engineer to correct defective Work or to remove and replace rejected Work as required by Engineer in accordance with Paragraph 13.06.A, or if Contractor fails to perform the Work in accordance with the Contract Documents, or if Contractor fails to comply with any other provision of the Contract Documents, Owner may, after seven days written notice to Contractor, correct or remedy any such deficiency. If Contractor fails within two (2) business days of a written notice from the Owner or Engineer, or such longer time as may be stated in such notice, to correct, or take reasonable steps to commence to correct, defective Work or to remove and replace, or take reasonable steps to remove and replace, rejected Work as required by Engineer in accordance with Paragraph 13.06.A, or if Contractor fails to perform the Work in accordance with the Contract Documents, or if Contractor fails to comply with any other provision of the Contract Documents, Owner may correct or remedy any such deficiency. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor all the costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred or sustained by Owner in exercising the rights and remedies under this Paragraph 13.09. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. The Contractor irrevocably designates the Owner as the Contractor's attorney-in-fact to execute the Change Orders provided for in this Paragraph 13.09.

B. In exercising the rights and remedies under this Paragraph 13.09, Owner shall proceed expeditiously. In connection with such corrective or remedial action, Owner may exclude Contractor from all or part of the Site, take possession of all or part of the Work and suspend Contractor's services related thereto, take possession of Contractor's tools, appliances, construction equipment and machinery at the Site, and incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere. Contractor shall allow Owner, Owner's representatives, agents and employees, Owner's other contractors, and Engineer and Engineer's consultants access to the Site to enable Owner to exercise the rights and remedies under this Paragraph.

~~C. All claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred or sustained by Owner in exercising the rights and remedies under this Paragraph 13.09 will be charged against Contractor, and a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work; and Owner shall be entitled to an appropriate decrease in the Contract Price. If the parties are unable to agree as to the amount of the adjustment, Owner may make a Claim therefor as provided in Paragraph 10.05. Such claims, costs, losses and damages will include but not be limited to all costs of repair, or replacement of work of others destroyed or damaged by correction, removal, or replacement of Contractor's defective Work.~~

~~D. Contractor shall not be allowed an extension of the Contract Times because of any delay in the performance of the Work attributable to the exercise by Owner of Owner's rights and remedies under this Paragraph 13.09.~~

ARTICLE 14 - PAYMENTS TO CONTRACTOR AND COMPLETION

14.01 *Schedule of Values*

~~A. The Schedule of Values established as provided in Paragraph 2.07.A will serve as the basis for progress payments and will be incorporated into a form of Application for Payment acceptable to Engineer. Progress payments on account of Unit Price Work will be based on the number of units completed.~~

A. The Schedule of Values established as provided in Paragraph 2.07A will serve as the basis for progress payments and will be incorporated into a form of Application for Payment acceptable to Engineer. The Engineer-approved version of the Application for Payment form, which includes information on completed Schedule of Values items, is to be used by the Contractor when making an Application for Progress Payment. Progress payments on account of Unit Price Work will be based on the number of units completed.

14.02 *Progress Payments*

A. Applications for Payments

~~1. At least 20 days before the date established in the Agreement for each progress payment (but not more often than once a month), Contractor shall submit to Engineer for review an Application for Payment filled out and signed by Contractor covering the Work completed as of the date of the Application and accompanied by such supporting documentation as is required by the Contract~~

Documents--At least by the 20th day of the month (but not more often than once a month), Contractor shall submit to Engineer for review an Application for Payment (including a Schedule of Values described in Paragraph 2.07.A of the Modified General Conditions) filled out and signed by Contractor covering the Work completed as of the date of the Application, and accompanied by a properly completed Contractor's Payment Application Checklist, all the documentation required to be submitted with such Checklist, and any other supporting documentation required by the Contract Documents or by the Engineer. The Application for Payment will be in the form and submitted with the number of copies of it and all related documents as required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the Site or at another location agreed to in writing, the Application for Payment shall also be accompanied by a bill of sale, invoice, or other documentation warranting that Owner has received the materials and equipment free and clear of all Liens and evidence that the materials and equipment are covered by appropriate property insurance or other arrangements to protect Owner's interest therein, all of which must be satisfactory to Owner.

2. Beginning with the second Application for Payment, each Application shall include a) an affidavit of Contractor stating that all previous progress payments received on account of the Work have been applied on account to discharge Contractor's legitimate obligations associated with prior Applications for Payment a Waiver and Release Agreement for itself and a Subcontractors -- Suppliers Waiver and Release Agreement for each of its subcontractors, and b) a Contractor's Affidavit with List of Subcontractors and Suppliers with Amounts Withheld.

3. The amount of retainage with respect to progress payments will be as stipulated in the Agreement. Retainage. Partial payments to Contractor for labor performed shall be made at the rate of 92 percent of the amount invoiced through the Application for Payment that shows the total Contract Completion at 50 percent or greater, pursuant to Ohio Revised Code Section 153.14. After the Contract is 50 percent complete as evidenced by payments in the amount of at least 50 percent of the Contract Price to Contractor, no additional funds shall be retained from payments for labor.

4. Contractor shall submit one original and five copies (unless a different quantity is otherwise agreed upon) on 8-1/2 by 11 paper of each lien waiver submitted.

5. Contractor shall submit six copies (unless a different quantity is otherwise agreed upon) of each pay request for approval.

6. No advanced payment for shop drawing preparation will be made. Shop drawing costs will be

paid when equipment and materials are delivered and suitably stored on the site.

7. All stored equipment and materials for which payment is requested shall have six copies (unless a different quantity is otherwise agreed upon) of invoices included with the pay request. Equipment shall be identified thoroughly on the invoices, including serial numbers.

8. Payment for the stored equipment and material which are on the site shall not exceed the invoiced amount for each item, less the Contract retainage. The overhead and profit for the stored items shall not be invoiced until the item is installed.

9. Payment for off-site storage is normally reserved for sensitive or very large pieces of equipment that in Engineer's opinion would not be practical to have stored on the site. Payment for off-site stored items shall be limited to 75% of the invoiced value of the item, less Contract retainage. Contractor shall reimburse Owner the Cost of inspecting off-site stored items. When off-site storage is approved, Contractor shall provide Insurance Certificates and Document of Ownership to Owner.

10. In order to insure compliance with the Local Workforce Credit, where applicable, the Owner will withhold seven percent (7%) from the full amount of the Contract Sum until Final Completion.

B. Review of Applications

1. Engineer will, within 10 days after receipt of each Application for Payment, either indicate in writing a recommendation of payment and present the Application to Owner or return the Application to Contractor indicating in writing Engineer's reasons for refusing to recommend payment. In the latter case, Contractor may make the necessary corrections and resubmit the Application.

2. Engineer's recommendation of any payment requested in an Application for Payment will constitute a representation by Engineer to Owner, based on Engineer's observations on the Site of the executed Work as an experienced and qualified design professional and on Engineer's review of the Application for Payment and the accompanying data and schedules, that to the best of Engineer's knowledge, information and belief:

a. the Work has progressed to the point indicated;

b. the quality of the Work is generally in accordance with the Contract Documents (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, to the

results of any subsequent tests called for in the Contract Documents, to a final determination of quantities and classifications for Unit Price Work under Paragraph 9.07, and to any other qualifications stated in the recommendation); and

c. the conditions precedent to Contractor's being entitled to such payment appear to have been fulfilled in so far as it is Engineer's responsibility to observe the Work.

3. By recommending any such payment Engineer will not thereby be deemed to have represented that:

a. inspections made to check the quality or the quantity of the Work as it has been performed have been exhaustive, extended to every aspect of the Work in progress, or involved detailed inspections of the Work beyond the responsibilities specifically assigned to Engineer in the Contract Documents; or

b. that there may not be other matters or issues between the parties that might entitle Contractor to be paid additionally by Owner or entitle Owner to withhold payment to Contractor.

4. Neither Engineer's review of Contractor's Work for the purposes of recommending payments nor Engineer's recommendation of any payment, including final payment, will impose responsibility on Engineer:

a. to supervise, direct, or control the Work, or

b. for the means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or

c. for Contractor's failure to comply with Laws and Regulations applicable to Contractor's performance of the Work, or

d. to make any examination to ascertain how or for what purposes Contractor has used the moneys paid on account of the Contract Price, or

e. to determine that title to any of the Work, materials, or equipment has passed to Owner free and clear of any Liens.

5. Engineer may refuse to recommend the whole or any part of any payment if, in Engineer's opinion, it would be incorrect to make the representations to Owner stated in Paragraph 14.02.B.2. Engineer may also refuse to recommend any such payment or, because of subsequently discovered evidence or the results of subsequent inspections or tests, revise or revoke any such payment recommendation previously made, to such extent as may

be necessary in Engineer's opinion to protect Owner from loss because:

a. the Work is defective, or completed Work has been damaged, requiring correction or replacement;

b. the Contract Price has been reduced by Change Orders;

c. Owner has been required to correct defective Work or complete Work in accordance with Paragraph 13.09; or

d. Engineer has actual knowledge of the occurrence of any of the events enumerated in Paragraph 15.02.A; or

e. the Contractor is in default of any other Agreement it has with the Owner.

C. Payment Becomes Due

1. ~~Ten~~ Thirty days after presentation of the Application for Payment to Owner with Engineer's recommendation, the amount recommended will (subject to the provisions of Paragraph 14.02.D) become due, and when due will be paid by Owner to Contractor.

D. Reduction in Payment

1. Owner may refuse to make payment of the full amount recommended by Engineer because:

a. claims have been made against Owner on account of Contractor's performance or furnishing of the Work;

b. Liens have been filed in connection with the Work, except where Contractor has delivered a specific bond satisfactory to Owner to secure the satisfaction and discharge of such Liens;

c. there are other items entitling Owner to a set-off against the amount recommended; or

d. Owner has actual knowledge of the occurrence of any of the events enumerated in Paragraphs 14.02.B.5.a through 14.02.B.5.c or Paragraph 15.02.A.

2. If Owner refuses to make payment of the full amount recommended by Engineer, Owner will give Contractor immediate written notice (with a copy to Engineer) stating the reasons for such action and promptly pay Contractor any amount remaining after deduction of the amount so withheld. Owner shall promptly pay Contractor the amount so withheld, or any adjustment thereto agreed to by Owner and Contractor, when

Contractor corrects to Owner's satisfaction the reasons for such action.

3. If it is subsequently determined that Owner's refusal of payment was not justified, the amount wrongfully withheld shall be treated as an amount due as determined by Paragraph 14.02.C.1.

4. Items entitling Owner to retain set-offs from the amount recommended include, but are not limited, to the following:

a. Owner compensation to Engineer at an estimated average rate of \$200 per each extra personnel hour for labor plus expenses, if applicable, because of the following Contractor-caused events:

(1) Return visits to manufacturing facilities to witness factory testing or retesting;

(2) Submittal review in excess of two reviews by Engineer for substantially the same Submittal, in accordance with Paragraph 6.17.E of these Modified General Conditions.

(3) Evaluation of proposed substitutes and in making changes to Contract Documents occasioned thereby, in accordance with Paragraph 6.05 of these Modified General Conditions.

(4) Overtime worked by Contractor necessitating Engineer, Related Entities, Resident Project Representative or Resident Project Representative's site staff, if any, to work overtime in accordance with Paragraph 6.02C of these Modified General Conditions.

b. Liability for liquidated damages incurred by Contractor as set forth in the Contract Documents.

14.03 *Contractor's Warranty of Title*

A. Contractor warrants and guarantees that title to all Work, materials, and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to Owner no later than the time of payment free and clear of all Liens.

14.04 *Substantial Completion*

A. When Contractor considers the entire Work ready for its intended use Contractor shall notify Owner and Engineer in writing that the entire Work is substantially complete (except for items specifically listed by Contractor as incomplete) and request that Engineer issue a certificate of Substantial Completion.

B. Promptly after Contractor's notification, Owner, Contractor, and Engineer shall make an inspection of the Work to determine the status of completion. If Engineer does not consider the Work substantially complete, Engineer will notify Contractor in writing giving the reasons therefor.

C. If Engineer considers the Work substantially complete, Engineer will deliver to Owner a tentative certificate of Substantial Completion which shall fix the date of Substantial Completion. There shall be attached to the certificate a tentative list of items to be completed or corrected before final payment. Owner shall have seven days after receipt of the tentative certificate during which to make written objection to Engineer as to any provisions of the certificate or attached list. If, after considering such objections, Engineer concludes that the Work is not substantially complete, Engineer will within 14 days after submission of the tentative certificate to Owner notify Contractor in writing, stating the reasons therefor. If, after consideration of Owner's objections, Engineer considers the Work substantially complete, Engineer will within said 14 days execute and deliver to Owner and Contractor a definitive certificate of Substantial Completion (with a revised tentative list of items to be completed or corrected) reflecting such changes from the tentative certificate as Engineer believes justified after consideration of any objections from Owner.

D. At the time of delivery of the tentative certificate of Substantial Completion, Engineer will deliver to Owner and Contractor a written recommendation as to division of responsibilities pending final payment between Owner and Contractor with respect to security, operation, safety, and protection of the Work, maintenance, heat, utilities, insurance, and warranties and guarantees. Unless Owner and Contractor agree otherwise in writing and so inform Engineer in writing prior to Engineer's issuing the definitive certificate of Substantial Completion, Engineer's aforesaid recommendation will be binding on Owner and Contractor until final payment.

E. Owner shall have the right to exclude Contractor from the Site after the date of Substantial Completion subject to allowing Contractor reasonable access to complete or correct items on the tentative list.

F. Time for Completion of Items on Tentative List and Remedies. The time fixed by the Engineer for the completion of all items on the list accompanying the tentative certificate of Substantial Completion shall not be greater than forty-five (45). The Contractor shall complete all items on the list within such 45-day period. If the Contractor fails to do so, the Owner in its discretion may perform the Work by itself or others and the cost thereof shall be charged to the Contractor. The Contractor irrevocably designates the Owner as the Contractor's attorney-in-fact to execute a Change Order

deducting such cost from the balance of the Contract Price and also any additional costs or expenses incurred by the Owner arising out of or related to the failure of the Contractor to complete such items, including but not limited to attorneys', consultants', and Engineer's fees. The Contractor's warranties under the Contract Documents shall remain in full force and effect and cover any remedial Work, even if performed by others. If more than one inspection by the Engineer for purposes of evaluating corrected Work is required, it will be performed at the Contractor's expense.

14.05 *Partial Utilization*

A. Prior to Substantial Completion of all the Work, Owner may use or occupy any substantially completed part of the Work which has specifically been identified in the Contract Documents, or which Owner, Engineer, and Contractor agree constitutes a separately functioning and usable part of the Work that can be used by Owner for its intended purpose without significant interference with Contractor's performance of the remainder of the Work, subject to the following conditions.

1. Owner at any time may request Contractor in writing to permit Owner to use or occupy any such part of the Work which Owner believes to be ready for its intended use and substantially complete. If and when Contractor agrees that such part of the Work is substantially complete, Contractor will certify to Owner and Engineer that such part of the Work is substantially complete and request Engineer to issue a certificate of Substantial Completion for that part of the Work.

2. Contractor at any time may notify Owner and Engineer in writing that Contractor considers any such part of the Work ready for its intended use and substantially complete and request Engineer to issue a certificate of Substantial Completion for that part of the Work.

3. Within a reasonable time after either such request, Owner, Contractor, and Engineer shall make an inspection of that part of the Work to determine its status of completion. If Engineer does not consider that part of the Work to be substantially complete, Engineer will notify Owner and Contractor in writing giving the reasons therefor. If Engineer considers that part of the Work to be substantially complete, the provisions of Paragraph 14.04 will apply with respect to certification of Substantial Completion of that part of the Work and the division of responsibility in respect thereof and access thereto.

4. Owner may at any time request Contractor in writing to permit Owner to take over operation of any part of the Work although it is not substantially complete. A copy of such request will be sent to Engineer, and within a reasonable time thereafter, Owner, Contractor, and Engineer shall make an inspection of that part of the

Work to determine its status of completion and will prepare a list of the items remaining to be completed or corrected thereon before final payment. If Contractor does not object in writing to Owner and Engineer that such part of the Work is not ready for separate operation by Owner, Engineer will finalize the list of items to be completed or corrected and will deliver such lists to Owner and Contractor together with a written recommendation as to the division of responsibilities pending final payment between Owner and Contractor with respect to security, operation, safety, maintenance, utilities, insurance, warranties, and guarantees for that part of the Work which will become binding upon Owner and Contractor at the time when Owner takes over such operation (unless they shall have otherwise agreed in writing and so informed Engineer). During such operation and prior to Substantial Completion of such part of the Work, Owner shall allow Contractor reasonable access to complete or correct items on said list and to complete other related Work.

~~4. 5.~~ No use or occupancy or separate operation of part of the Work may occur prior to compliance with the requirements of Paragraph 5.10 regarding property insurance.

14.06 *Final Inspection*

A. Upon written notice from Contractor that the entire Work or an agreed portion thereof is complete, Engineer will promptly make a final inspection with Owner and Contractor and will notify Contractor in writing of all particulars in which this inspection reveals that the Work is incomplete or defective. Contractor shall immediately take such measures as are necessary to complete such Work or remedy such deficiencies.

14.07 *Final Payment*

A. Application for Payment

1. After Contractor has, in the opinion of Engineer, satisfactorily completed all corrections identified during the final inspection and has delivered, in accordance with the Contract Documents, all maintenance and operating instructions, schedules, guarantees, bonds, certificates or other evidence of insurance certificates of inspection, marked-up record documents (as provided in Paragraph 6.12), and other documents, Contractor may make application for final payment following the procedure for progress payments.

2. The final Application for Payment shall be accompanied (except as previously delivered) by:

a. all documentation called for in the Contract Documents, including but not limited to the evidence of insurance required by Paragraph 5.04.B.7;

- b. consent of the surety, if any, to final payment;
- c. a list of all Claims against Owner that Contractor believes are unsettled; and
- d. a Contractor's Waiver and Release Agreement for itself as of the date of the Final Application for Payment and Subcontractors – Suppliers Waiver and Release Agreements for each of its Subcontractors and Suppliers as of the date of the Final Application for Payment. complete and legally effective releases or waivers (satisfactory to Owner) of all Lien rights arising out of or Liens filed in connection with the Work.

e. proof of compliance with Contractor's Local Workforce Credit pledge in the form of final lists of names and addresses of staff employed on the Project or letters from local trade unions demonstrating that Contractor hired from local trade unions for skilled laborers where possible. The documentation required by this provision is only applicable if Contractor submitted an Affidavit for Local Workforce Credit with its bid. The failure of Contractor to demonstrate compliance with the Local Workforce Credit pledge will result in the forfeiture of the amounts withheld by the Owner under 14.02.A.10 and Contractor will lose eligibility for Local Workforce Credit for a period of not less than two years.

3. ~~In lieu of the releases or waivers of Liens specified in Paragraph 14.07.A.2 and as approved by Owner, Contractor may furnish receipts or releases in full and an affidavit of Contractor that: (i) the releases and receipts include all labor, services, material, and equipment for which a Lien could be filed; and (ii) all payrolls, material and equipment bills, and other indebtedness connected with the Work for which Owner or Owner's property might in any way be responsible have been paid or otherwise satisfied. If any Subcontractor or Supplier fails to furnish such a release or receipt in full, Contractor may furnish a bond or other collateral satisfactory to Owner to indemnify Owner against any Lien.~~

4. Prior to final payment and in accordance with ORC 4115.07, Contractor and its Subcontractors shall each file with Owner an affidavit certifying their compliance with ORC 4115.03 to ORC 4115.16 regarding wages.

B. *Engineer's Review of Application and Acceptance*

1. If, on the basis of Engineer's observation of the Work during construction and final inspection, and

Engineer's review of the final Application for Payment and accompanying documentation as required by the Contract Documents, Engineer is satisfied that the Work has been completed and Contractor's other obligations under the Contract Documents have been fulfilled, Engineer will, within ten days after receipt of the final Application for Payment, indicate in writing Engineer's recommendation of payment and present the Application for Payment to Owner for payment. At the same time Engineer will also give written notice to Owner and Contractor that the Work is acceptable subject to the provisions of Paragraph 14.09. Otherwise, Engineer will return the Application for Payment to Contractor, indicating in writing the reasons for refusing to recommend final payment, in which case Contractor shall make the necessary corrections and resubmit the Application for Payment.

C. *Payment Becomes Due*

1. Thirty days after the presentation to Owner of the Application for Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer's recommendation, including but not limited to liquidated damages, will become due and , will be paid by Owner to Contractor.

14.08 *Final Completion Delayed*

A. If, through no fault of Contractor, final completion of the Work is significantly delayed, and if Engineer so confirms, Owner shall, upon receipt of Contractor's final Application for Payment (for Work fully completed and accepted) and recommendation of Engineer, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance to be held by Owner for Work not fully completed or corrected is less than the retainage stipulated in the Agreement, and if bonds have been furnished as required in Paragraph 5.01, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by Contractor to Engineer with the Application for such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of Claims.

14.09 *Waiver of Claims*

A. The making and acceptance of final payment will constitute:

1. a waiver of all Claims by Owner against Contractor, except Claims arising from unsettled Liens, from defective Work appearing after final inspection pursuant to Paragraph 14.06, from failure to comply with the Contract Documents or the terms of any special

guarantees specified therein, or from Contractor's continuing obligations under the Contract Documents; and

2. a waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled.

ARTICLE 15 - SUSPENSION OF WORK AND TERMINATION

15.01 Owner May Suspend Work

A. At any time and without cause, Owner may suspend the Work or any portion thereof for a period of not more than 90 consecutive days by notice in writing to Contractor and Engineer which will fix the date on which Work will be resumed. Contractor shall resume the Work on the date so fixed. Contractor shall be granted an adjustment in the Contract Price or an extension of the Contract Times, or both, directly attributable to any such suspension if Contractor makes a Claim therefor as provided in Paragraph 10.05.

15.02 Owner May Terminate for Cause

A. The occurrence of any one or more of the following events will justify termination for cause:

1. Contractor's ~~persistent~~ failure to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adhere to the Progress Schedule established under Paragraph 2.07 as adjusted from time to time pursuant to Paragraph 6.04);

2. Contractor's disregard of Laws or Regulations of any public body having jurisdiction;

3. Contractor's disregard of the authority of Engineer; or

4. Contractor's violation in any substantial way of any provisions of the Contract Documents; or

5. Contractor is in material default of any other Agreement with the Owner.

B. If one or more of the events identified in Paragraph 15.02.A occur, Owner may, after giving Contractor (and surety) seven three business days written notice of its intent to terminate the services of Contractor:

1. exclude Contractor from the Site, and take possession of the Work and of all Contractor's tools, appliances, construction equipment, and machinery at the

Site, and use the same to the full extent they could be used by Contractor (without liability to Contractor for trespass or conversion),

2. incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere, and

3. complete the Work as Owner may deem expedient.

Such termination shall be effective as of the date stated in the termination notice provided to Contractor.

C. If Owner proceeds as provided in Paragraph 15.02.B, Contractor shall not be entitled to receive any further payment until the Work is completed. If the unpaid balance of the Contract Price exceeds all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Owner arising out of or relating to completing the Work, such excess will be paid to Contractor. If such claims, costs, losses, and damages exceed such unpaid balance, Contractor shall pay the difference to Owner. Such claims, costs, losses, and damages incurred by Owner will be reviewed by Engineer as to their reasonableness and, when so approved by Engineer, incorporated in a Change Order. When exercising any rights or remedies under this Paragraph Owner shall not be required to obtain the lowest price for the Work performed.

D. Notwithstanding Paragraphs 15.02.B and 15.02.C, Contractor's services will not be terminated if Contractor begins within three seven-days of receipt of notice of intent to terminate to correct its failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt of said notice.

E. Where Contractor's services have been so terminated by Owner, the termination will not affect any rights or remedies of Owner against Contractor then existing or which may thereafter accrue. Any retention or payment of moneys due Contractor by Owner will not release Contractor from liability.

~~F. If and to the extent that Contractor has provided a performance bond under the provisions of Paragraph 5.01.A, the termination procedures of that bond shall supersede the provisions of Paragraphs 15.02.B, and 15.02.C.~~

15.03 Owner May Terminate For Convenience

A. Upon seven three business days written notice to Contractor and Engineer, Owner may, without cause and without prejudice to any other right or remedy of Owner, terminate the Contract. Such termination shall be

effective as of the date stated in the written notice. In such case, Contractor shall be paid for (without duplication of any items):

1. completed and acceptable Work executed in accordance with the Contract Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Work;

2. expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Contract Documents in connection with uncompleted Work, plus fair and reasonable sums for overhead and profit on such expenses;

~~3. all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred in settlement of terminated contracts with Subcontractors, Suppliers, and others; and~~

3. reasonable expenses directly attributable to termination.

B. Contractor shall not be paid on account of loss of anticipated profits or revenue or other economic loss arising out of or resulting from such termination.

C. Contractor shall require similar provisions contained in Paragraph 15.03 in each of its subcontracts to protect Contractor from claims by Subcontractors arising from the Owner's termination for convenience, or to minimize claims by such subcontractors. The remedy provided to Contractor under this Paragraph 15.03 shall be the Contractor's sole remedy in the event of termination for convenience by Owner.

15.04 Contractor May Stop Work or Terminate

A. If, through no act or fault of Contractor, (i) the Work is suspended for more than 90 consecutive days by Owner or under an order of court or other public authority, or (ii) Engineer fails to act on any Application for Payment within 30 days after it is submitted, or (iii) Owner fails for 30 days to pay Contractor any sum finally determined to be due, then Contractor may, upon seven days written notice to Owner and Engineer, and provided Owner or Engineer do not remedy such suspension or failure within that time, terminate the Contract and recover from Owner payment on the same terms as provided in Paragraph 15.03.

B. In lieu of terminating the Contract and without prejudice to any other right or remedy, if Engineer has failed to act on an Application for Payment within 30 days after it is submitted, or Owner has failed for 30 days to pay Contractor any sum finally determined

to be due, Contractor may, seven days after written notice to Owner and Engineer, stop the Work until payment is made of all such amounts due Contractor, including interest thereon. The provisions of this Paragraph 15.04 are not intended to preclude Contractor from making a Claim under Paragraph 10.05 for an adjustment in Contract Price or Contract Times or otherwise for expenses or damage directly attributable to Contractor's stopping the Work as permitted by this Paragraph.

ARTICLE 16 - DISPUTE RESOLUTION

16.01 Methods and Procedures

~~A. Either Owner or Contractor may request mediation of any Claim submitted to Engineer for a decision under Paragraph 10.05 before such decision becomes final and binding. The mediation will be governed by the Construction Industry Mediation Rules of the American Arbitration Association in effect as of the Effective Date of the Agreement. The request for mediation shall be submitted in writing to the American Arbitration Association and the other party to the Contract. Timely submission of the request shall stay the effect of Paragraph 10.05.E.~~

A. Settlement, Methods and Procedures

1. In the event that Contractor files a Claim or files an action against Owner, Owner shall be entitled to make an offer of settlement of the Claim to Contractor at any time up to the date of trial. Such offer of settlement shall not be admissible into evidence at the litigation except on the issue of entitlement to recovery of attorneys' fees, costs and expenses. If at any stage of the litigation, including any appeals, Contractor's claim is dismissed or found to be without merit, or if the damages awarded to Contractor on its claim do not exceed Owner's offer of settlement, Contractor shall be liable to Owner and shall reimburse Owner for all attorneys fees, costs and expenses incurred by Owner from the date of the offer of settlement until the date of the final adjudication and resolution of Contractor's claim.

2. Any dispute, claim or other matter not settled by negotiation or other means as mutually agreed upon by Owner, Contractor, and surety where applicable, shall be determined by the Court of Common Pleas for Muskingum County, Ohio, which shall have exclusive venue and jurisdiction over such matters and claims.

~~B. Owner and Contractor shall participate in the mediation process in good faith. The process shall be concluded within 60 days of filing of the request. The date of termination of the mediation shall be determined by application of the mediation rules referenced above.~~

~~C. If the Claim is not resolved by mediation, Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after termination of the mediation unless, within that time period, Owner or Contractor:~~

~~1. elects in writing to invoke any dispute resolution process provided for in the Supplementary Conditions, or~~

~~2. agrees with the other party to submit the Claim to another dispute resolution process, or~~

~~3. gives written notice to the other party of their intent to submit the Claim to a court of competent jurisdiction.~~

ARTICLE 17 – MISCELLANEOUS

17.01 *Giving Notice*

A. Whenever any provision of the Contract Documents requires the giving of written notice, it will be deemed to have been validly given if:

1. delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or

2. delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the notice.

17.02 *Computation of Times*

A. When any period of time is referred to in the Contract Documents by days, it will be computed to exclude the first and include the last day of such period. If the last day of any such period falls on a Saturday or Sunday or on a day made a legal holiday by the law of the applicable jurisdiction, such day will be omitted from the computation.

17.03 *Cumulative Remedies*

A. The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by Laws or Regulations, by special warranty or guarantee, or by other provisions of the Contract Documents. The provisions of this Paragraph will be as effective as if repeated specifically in the Contract Documents in connection with each particular duty, obligation, right, and remedy to which they apply.

17.04 *Survival of Obligations*

A. All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with the Contract Documents, as well as all continuing obligations indicated in the Contract Documents, will survive final payment, completion, and acceptance of the Work or termination or completion of the Contract or termination of the services of Contractor.

17.05 *Controlling Law*

~~A. This Contract is to be governed by the law of the state in which the Project is located. This Contract shall be governed by the law of the State of Ohio.~~

17.06 *Headings*

A. Article and paragraph headings are inserted for convenience only and do not constitute parts of these General Conditions.

17.07 *Equal Employment Opportunity and Non-Discrimination.*

A. The Contractor shall comply with, and shall require all Subcontractors of any tier to comply with, the applicable equal employment opportunity and non-discrimination statutes and regulations of the State of Ohio.

17.08 *Contract Work Hours and Safety Standard Act.*

A. All Contractors and Subcontractors, of any tier, shall comply with the applicable federal regulations for contract work hours and safety standards.

17.09 *Clean Air Act.*

A. All Contractors and Subcontractors, of any tier, shall comply with the applicable standards, orders, or regulations issued pursuant to the Clean Air Act of 1970 (42 U.S.C. 1857, et seq.) and the Federal Water Pollution Control Act (33 U.S. C. 1251, et seq.), as amended.

Lamers, Debbie

From: Rosati Jr., Jack
Sent: Wednesday, October 05, 2011 10:56 AM
To: 'Mike W. Currie'
Cc: 'Gary.Long@CH2M.com'; Evans, Mark; Hyden, Benjamin; 'pservicedirector@coz.org'; 'scotthillis@rrohio.com'
Subject: FW: Kokosing - Zanesville Water Treatment Plant
Attachments: 20111005 Currie Ltr to Long and Hyden.pdf

Mike,

Ohio public records law provides that documents must be made available within a reasonable time. To the extent the documents you have requested are public records, the City will respond within a reasonable time. Your client agreed by contract to provide the documents within 10 days. There is no 10 day requirement within which the City must respond. The City intends to comply with Ohio's public records law and you have no basis for alleging that it has failed to do so at this time.

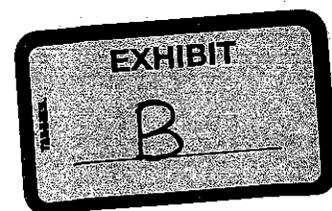
Sincerely,

Jack Rosati

From: Rhonda G. Van Arsdale [mailto:rgv@kokosing.biz]
Sent: Wednesday, October 05, 2011 10:44 AM
To: Gary.Long@CH2M.com; Hyden, Benjamin
Cc: Mike W. Currie; Rosati Jr., Jack; Evans, Mark
Subject: Kokosing - Zanesville Water Treatment Plant

Mr. Currie asked me to forward the attached to you.

Rhonda G. van Arsdale
Kokosing Construction Company, Inc.
6235 Westerville Road
Westerville, OH 43081
Phone: 614.212.5618
Fax: 614.212.5711
rgv@kokosing.biz



12/19/2011

McIntosh, Tamara

From: Evans, Mark
Sent: Friday, October 28, 2011 10:28 AM
To: 'Mike W. Currie'
Cc: Rosafi Jr., Jack; Hardesty, Lynn
Subject: Public Records Request

Mike,

The documents from the City in response to your public records request will be available for inspection on November 1, 2 or 3, 2011 between 9:00 am and 4:00 pm at Mike Sims' office. The address of Mike's office is 401 Market Street, City Hall, Room 230, Zanesville, Ohio 43701. Let me know what day and time you would like to review the documents.

Mark



Mark E. Evans

Direct Dial 513.870.6680
mevans@bricker.com

V-CARD BIO

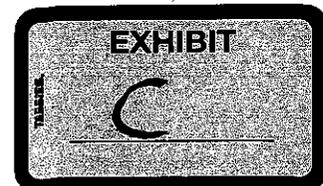
Bricker & Eckler LLP
9277 Centre Pointe Drive
Suite 100
West Chester, OH 45069

Main 513.870.6700
Fax 513.870.6699
www.bricker.com

IRS Circular 230 Disclosure. To ensure compliance with requirements imposed by the IRS, please be informed that: To the extent that this communication and any attachments contain any federal tax advice, such advice is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code or promoting, marketing, or recommending to another person any transaction, arrangement or matter addressed herein.

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ATTORNEYS AT LAW

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CINCINNATI-DAYTON

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FAX: 513.870.6699

www.bricker.com
info@bricker.com

Mark E. Evans
513.870.6680
mevans@bricker.com

November 1, 2011

VIA HAND DELIVERY

Michael W. Currie, Esq.
General Counsel
Kokosing Construction Company, Inc.
6235 Westerville Road, Suite 200
Westerville, Ohio 43081-4074

RE: City of Zanesville
New Water Treatment Plant

Dear Mike:

The City of Zanesville (the "City") is making the records responsive to your public records request available for your inspection and copying. As you know, the Ohio public records act exempts the disclosure of records subject to the attorney-client privilege as a recognized exception by state and federal law. *See Woodman v. Lakewood* (1988), 44 Ohio App.3d 118; *see, also, RC 149.43(A)(1)(v)*. Accordingly, the records in the City's possession which are subject to the attorney-client privilege are not being produced.

Further, under Section 3.6 of the Agreement between the City and CH2M Hill for Engineering Services, the City agreed to provide all of the "legal services as [the City] may require or [CH2M Hill] may reasonably request with regard to legal issues pertaining to the Project." Under the attorney-client privilege statute, the term "client" is defined as:

[A] person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for purpose of retaining the attorney or securing legal service or advice from the attorney in the attorney's professional capacity, or consults an attorney employee for legal service or advice, and who communicates, either directly or through an agent employee, or other representative, with such attorney.²⁷
[Emphasis added].

Accordingly, any records which contain communications with CH2M Hill that fall under Section 3.6 of the Agreement are also subject to the attorney-client privilege and are not being produced.

Finally, the City does not intend to produce a log of privileged documents, as the City has no obligation to prepare such a log under the

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ATTORNEYS AT LAW

Michael W. Currie, Esq.

November 1, 2011

Page 2

Ohio public records act. See State ex rel. Nix v. City of Cleveland (1998), 83 Ohio St.3d
379.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Evans", with a stylized flourish at the end.

Mark Evans



November 4, 2011

VIA ELECTRONIC AND US MAIL

COLUMBUS | CLEVELAND
CINCINNATI-DAYTON

BRICKER & ECKLER LLP
9277 Centre Pointe Drive
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West Chester, Ohio 45069-4891
MAIN: 513.870.6700
FAX: 513.870.6699

www.bricker.com
info@bricker.com

Mark E. Evans
513.870.6680
mevans@bricker.com

Michael W. Currie, Esq.
General Counsel
Kokosing Construction Company, Inc.
6235 Westerville Road, Suite 200
Westerville, Ohio 43081-4074

**RE: City of Zanesville
New Water Treatment Plant**

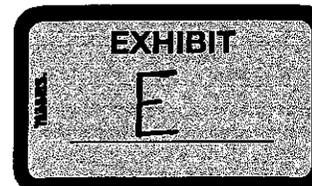
Dear Mike:

We have received your November 3, 2011 correspondence and provide the following response. First, your public records request did not include a request for the City of Zanesville Public Records Policy. The first time that this policy was requested was during the document review on Tuesday, November 1, 2011. We have been in contact with the City solicitor and are in the process of obtaining the current policy. We expect to have the current policy early next week and we will provide it to you as soon as we receive it.

Second, you incorrectly allege that the City has not produced certain records. The documents produced by the City on November 1, 2011 were all of the documents in the City's possession that were responsive to your public records request, excluding documents that are privileged communications.

Third, in addition to the documents you requested from the City, your public records request included certain documents in the possession of CH2M Hill. CH2M Hill informed us yesterday that they have between 850,000 and 2,500,000 pages that are responsive to your public records request. Please be advised that your request for these documents is overbroad and is not a proper request under Ohio's public records law. Even though your request is overbroad, we are in the process of gathering these documents for your inspection. We should know next week when these documents will be ready for your inspection and we will notify you once we have a specific date.

Fourth, you alleged that attachments to emails were not produced during the document inspection on November 1, 2011. This statement is incorrect. All non-privileged attachments were included in the production. In fact, the representatives of Kokosing that were in



Bricker & Eckler
ATTORNEYS AT LAW

Michael W. Currie, Esq.

November 4, 2011

Page 2

attendance at the inspection were informed that the attachments were included in the documents produced.

Finally, you raised an issue regarding privileged communications on the project. During the November 1, 2011 document review a letter was hand delivered to representatives of Kokosing, which addressed privileged communications between the City, the City's legal counsel and the City's agents on the project. Contrary to your November 3, 2011 letter, my November 1, 2011 letter contained legal authority in the form of contract provisions, statutes and case law. I refer you to the November 1, 2011 letter regarding any questions that you may have with respect to privileged communications on the project.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Evans", with a stylized flourish at the end.

Mark Evans

GENERAL CONTRACTORS



6235 Westerville Road, Suite 200, Westerville, OH 43081-4074
Phone 614-212-5700 Fax 614-212-5711

December 12, 2011

Via EMAIL and REGULAR U.S. MAIL

Mark E. Evans, P.E., Esq.
Bricker & Eckler LLP
9277 Centre Pointe Drive
Suite 100
West Chester, OH 45069-4844

Re: City of Zanesville

Dear Mark:

We are in receipt of your letter of December 9, 2011. We will not continue to debate the unsupported assertion by your office that the public records request was in any way overly broad. We have demonstrated, repeatedly, the fact that the City has not responded in good faith to the request.

In the second paragraph of your letter, you assert that the City has assembled an extensive volume of records and go on to state that these are available electronically if we pay \$144.00. This is confusing because the City previously represented to us that all of its responsive documents were made available at the November 2, 2011, production. The City then said it had located additional documents and these were provided several weeks ago. Are the documents that the City is now proposing in this paragraph to produce yet different documents? In addition, and consistent with my earlier letter, please confirm whether these records are those from the City's files, or those from CH2's files.

We will deliver a check today in the amount of \$144.00 in exchange for the hard drive referenced in your letter. Please advise us of the location at which you wish for this exchange to occur.

In regard to the 1,000,000 to 2,000,000 pages of documents mentioned in the last paragraph of your letter, please confirm whether these records are from the City's files or from CH2's files. In addition, please advise us of the location at which these records may be reviewed this week and whether they can be made available electronically as well.

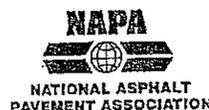
Finally, please consider this a public records request for the following documents of the City of Zanesville:

- All documents referencing or comprising evaluations of the services provided by CH2M Hill to the City relating to the project.

Corporate Office: P.O. Box 226, Fredericktown, Ohio 43019-0226 Phone 740-694-6315



AN EQUAL
OPPORTUNITY
EMPLOYER



EXHIBIT

F

Mark E. Evans, P.E., Esq.

December 12, 2011

Page 2

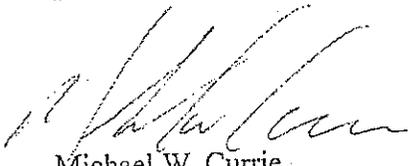
- All agreements entered into between the City and CH2M Hill relating in any way to the issues presented by, or claims asserted by, Kokosing relating to the project.
- All fee agreements entered into by the City with Bricker & Eckler LLP relating to the project, and/or relating in any way to the handling of the issues presented by, or claims asserted by, Kokosing relating to the project.

Given the limited nature of this request, we trust that it can be responded to within the next week.

We await your timely response to the issues presented above.

Very truly yours,

KOKOSING CONSTRUCTION COMPANY, INC.



Michael W. Currie
General Counsel

Lamers, Debbie

From: Rhonda G. Van Arsdale [rgv@kokosing.biz]
Sent: Monday, December 12, 2011 11:29 AM
To: Evans, Mark
Cc: Mike W. Currie
Subject: Kokosing / Zanesville
Attachments: 20111212 Currie Ltr #2 to Evans.pdf, 20111212 Currie Ltr to Evans.pdf
Mr. Currie asked me to forward the attached letters to you.

Rhonda G. van Arsdale

Kokosing Construction Company, Inc.
6235 Westerville Road
Westerville, OH 43081
Phone: 614.212.5618
Fax: 614.212.5711
rgv@kokosing.biz



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FAX: 513.870.6698

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info@bricker.com

Mark E. Evans
513.870.6680
mevans@bricker.com

December 14, 2011

Via Electronic Mail and
Regular U.S. Mail

Michael W. Currie, Esq.
General Counsel
Kokosing Construction Company, Inc.
6235 Westerville Road, Suite 200
Westerville, Ohio 43081-4074

RE: City of Zanesville
New Water Treatment Plant

Dear Mike:

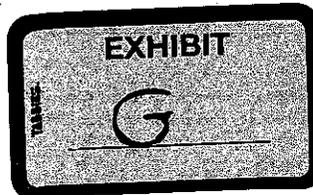
I am providing this letter on behalf of the City of Zanesville (the "City") in response to your December 12, 2011 correspondence. First, I want to reiterate that Kokosing has failed to provide a single case that supports its position that Kokosing's public records request was not overbroad. Moreover, the City of Zanesville has acted in good faith at all times in response to your public records request.

Second, there are three productions of documents. The first production of documents occurred on November 1, 2011 when Kokosing visited the City of Zanesville to review documents. The second production was sent to you on November 22, 2011 and included documents marked no. CZ2K000001 - CZ2K001101. The third production of documents will be provided to you on a hard drive as previously discussed. Additionally, per your request, the City is scanning the emails that were previously produced to Kokosing during the November 1, 2011 document inspection.

Third, the check to reimburse the City for its costs of the production in the amount of \$405.15 should be made out to the City of Zanesville and should be sent to my attention at Bricker & Eckler LLP, 9277 Centre Pointe Drive, Suite 100, West Chester, Ohio 45069. An invoice showing the costs incurred by the City is enclosed.

Finally, below are the City's responses to Kokosing's public records request in your December 12, 2011 correspondence:

1. All documents referencing or comprising evaluations of the services provided by CH2M Hill to the City relating to the Project.



Because this request does not identify specific documents and would require the City to review every document to determine if it referenced evaluations of CH2M Hill or comprised evaluations of CH2M Hill, this request is overbroad. However, to the extent that the City has any documents responsive to this request and to the extent that they are not privileged, these documents will be included in the documents previously produced to Kokosing or that will be produced to Kokosing upon the receipt of the check in the amount of \$405.15.

2. All agreements entered into between the City and CH2M Hill relating in any way to the issues presented by, or claims asserted by, Kokosing relating to the project.

To the extent that the City has any documents responsive to this request and to the extent that they are not privileged, these documents will be included in the documents previously produced to Kokosing or that will be produced to Kokosing upon the receipt of the check in the amount of \$405.15.

3. All fee agreements entered into by the City with Bricker & Eckler LLP relating to the project, and/or relating in any way to the handling of the issues presented by, or claims asserted by Kokosing relating to the project.

The fee agreement is set forth in the engagement letter between Bricker & Eckler LLP and the City. We are currently reviewing the engagement letter with the City Solicitor for privileged communications. To the extent that the engagement letter is not privileged, the City will produce the engagement letter within seven days of the date of this correspondence. Any other records responsive to this request are protected by the attorney client privilege and are not public records under Ohio's public record law.

Sincerely,

Mark E. Evans / BBH

Mark E. Evans

Enclosure

cc: Jack Rosati, Esq.

December 14, 2011

Matter: City of Zanesville – Kokosing Construction

Scanning 1929 pages @ \$.13 per page Bates Nos. Zan2K2nd_000001 – 001929	\$250.77
CD	\$10.00
1 External Hard Drive with CH2M documents Bates Nos. CH00001-CH119623	\$144.38

TOTAL AMOUNT DUE \$405.15

Please remit payment payable to the City of Zanesville and forward payment to the attention of:

Mark E. Evans
Bricker & Eckler LLP
9277 Centre Pointe Drive, Suite 100
Cincinnati, OH 45069

Lamers, Debbie

From: Lamers, Debbie on behalf of Evans, Mark
Sent: Wednesday, December 14, 2011 2:07 PM
To: 'mwc@kokosing.biz'
Subject: City of Zanesville
Attachments: 2011 12 14 Letter to Mike Currie.pdf

Mike:

Please see attached letter. The original letter will follow via regular U.S. mail.

Thank you,
Mark



Mark E. Evans

Direct Dial 513.870.6680
mevans@bricker.com

V-CARD BIO

Bricker & Eckler LLP
9277 Centre Pointe Drive
Suite 100
West Chester, OH 45069

Main 513.870.6700
Fax 513.870.6699
www.bricker.com

Think green! Please print only if necessary.

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info@bricker.com

Mark E. Evans
513.870.6680
mevans@bricker.com

December 22, 2011

Via Electronic Mail and
Regular U.S. Mail

Michael W. Currie, Esq.
General Counsel
Kokosing Construction Company, Inc.
6235 Westerville Road, Suite 200
Westerville, Ohio 43081-4074

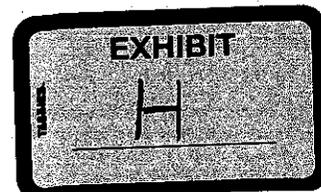
**RE: Your letter regarding the City of Zanesville/Kokosing
matter dated December 21, 2011**

Mike:

I have reviewed the above-referenced correspondence with Jack Rosati and provide the following response. First, you continue to falsely allege that there has been some effort on the part of the City of Zanesville (the "City") to not comply with the Ohio public records act. Under Ohio law, Kokosing "had an obligation to identify the records * * * with sufficient clarity." *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312, 314. As we previously informed you, the public records request submitted by Kokosing was overbroad and unenforceable under Ohio law.

Your public records request consisted of broad requests for large categories of documents. For example, your public records request included a request for "[a]ll correspondence (including email) between the City of Zanesville and CH2M Hill related to the design of the Project." As you know, CH2M Hill was engaged to perform design services for the Project on February 4, 2004. Thus, your public records request includes all correspondence generated over a 91 month period. The Supreme Court of Ohio held in *State ex rel. Glasgow v. Jones* (2008), 119 Ohio St.3d 391 that for public records act purposes, a request for all email received over a six month period was overbroad. Based on the Supreme Court's holding in *Glasgow*, your request for all correspondence over a 91 month period is overbroad. This is just one example of how your public records request was overbroad. As we have previously told you, your other requests are similarly overbroad, yet the City made every attempt to comply with your requests.

In spite of the clear case law prohibiting overbroad public records requests, you have continued to make unsupported and inaccurate allegations regarding the conduct of the City, including falsely stating that the City is "disingenuous" or acting in "bad faith" with respect to



your public records request. These allegations are even more puzzling when one considers the fact that the City has voluntarily chosen to produce its records to Kokosing even though Kokosing's public records requests are overbroad and unenforceable. The voluntary effort on the part of the City to provide all non-privileged documents to Kokosing has required the City to expend a great deal of time and resources.

Second, Kokosing has and continues to improperly withhold electronic documents from the City, which constitutes a breach of contract. On August 24, 2011, CH2M Hill, on behalf of the City, requested documents related to Claims 3 and 7. Kokosing responded on September 8, 2011 and stated that the City's request involves over 95,000 emails. On October 10, 2011, Mr. Jackson restated that the City's request involves over 95,000 emails. Kokosing did not make these emails available for inspection to the City until December 12, 2011, which was three-and-a-half months after the City first requested these documents. Further, in your December 14, 2011 correspondence, you confirmed that Kokosing only produced 49,000 emails. Please explain in detail why the other 46,000 emails were not produced.

In addition to the length of the delay in Kokosing making the emails available for inspection, Kokosing continues to delay the production of the electronic copies of these documents. On December 14 and 15, 2011, Matt Wushinske of your office made representations to us that Kokosing was in the process of transferring the emails onto a hard drive, which we provided to Kokosing on December 12, 2011, and that the hard drive would be available "in a few days." Based on this statement, the hard drive should have been available to us on Monday, December 19, 2011. To date, Kokosing still has not provided a date for when the hard drive will be available.

Third, in your December 21, 2011 correspondence, you indicated that the City made a representation regarding the format for the production of Kokosing's electronic files. This is patently false and is nothing more than a delay tactic on the part of Kokosing. At no time did we ever provide correspondence to you regarding the format of the documents. Kokosing should produce the electronic documents in the exact order and format that the documents were made available to the City for review on December 12, 2011. As you know, the documents were organized in various folders, thus there is no need for the time and expense to convert these documents into another format. Further, based on Mr. Wushinske's comments on December 14 and 15, 2011, the documents should already be copied onto the hard drive in the format that they were kept. Other than trying to delay production and needlessly increase the City's costs, we see no reason why these documents will need to be reformatted and/or reorganized. You have given us no idea what the cost will be for the production of the electronic records. But, given the fact that the City provided the external hard drive and we are only asking Kokosing to load the documents in a format in which they are already kept, there should be no significant cost.

Fourth, the statements in your December 21, 2011 correspondence regarding when the City's hard drive was available to Kokosing conveniently ignores relevant communications between our office and your office. On December 9, 2011, I sent you a letter that stated:

Although Kokosing's public records request is invalid under Ohio law, the City of Zanesville has acted in good faith and has voluntarily assembled an extensive volume of records for Kokosing. These documents are available to Kokosing electronically. Upon receipt of a check for \$144.00, we will download the documents onto a 250 GB external hard drive and provide the hard drive to you. [Emphasis added].

In response to my December 9, 2011 correspondence, you stated on December 12, 2011:

We will deliver a check today in the amount of \$144.00 in exchange for the hard drive referenced in your letter. Please advise us of the location at which you wish for this exchange to occur. [Emphasis added].

I responded to your letter on December 14, 2011 and stated:

... the check to reimburse the City for its costs of the production in the amount of \$405.15 should be made out to the City of Zanesville and should be sent to my attention at Bricker & Eckler LLP, 9277 Centre Pointe Drive, Suite 100, West Chester, Ohio 45069. An enclosed invoice showing the costs incurred by the City is enclosed.

The invoice accompanying my December 14, 2011 correspondence not only included an itemized breakdown of the cost of the hard drive and the cost of other documents requested by Kokosing, but it also stated:

Please remit payment payable to the City of Zanesville and forward payment to the attention of:

Mark E. Evans
Bricker & Eckler LLP
9277 Centre Pointe Drive, Suite 100
West Chester, Ohio 45069

Based on these communications regarding the production of the hard drive, we do not understand how you can take the position that Kokosing did not know that the hard drive

was available as of December 14, 2011. As discussed above, it was actually available on December 9, 2011.

Following your statement on December 12, 2011 that you would deliver a check to us for the hard drive, we proceeded to have the data transferred to the hard drive on December 14, 2011. This is why the metadata states that it was copied to the hard drive on December 14, 2011. Moreover, this action is consistent with our December 9, 2011 correspondence in which we stated that we would copy the data to the hard drive upon your agreement to pay for the hard drive. Further, you also questioned the authenticity of the December 14, 2011 correspondence that accompanied the hard drive that was picked up by Kokosing on December 19, 2011. Consistent with the date on this letter, the letter was created on December 14, 2011 and we have the metadata to prove it should you persist in this false assertion.

Fifth, in your December 21, 2011 letter, you misrepresented the amount of time it took the City to respond to Kokosing's overbroad and invalid public records request. Specifically, you stated in your letter that it took the City "4 months to produce a similar quantity of documents" that were produced by Kokosing.¹ As you know, in your October 5, 2011 correspondence, you confirmed that Kokosing did not submit its public records request until September 23, 2011. Moreover, the City made its files available to Kokosing for inspection on November 1, 2011, which was 39 days after Kokosing submitted an overbroad and invalid public records request. Moreover, the City made the hard drive with CH2M Hill's documents available to Kokosing on December 9, 2011, which was 77 days after Kokosing submitted an overbroad and invalid public records request. Thus, your allegation that it took the City "4 months" to respond to Kokosing's public records request is false.

Sixth, you should not make any assumptions based on the items that were not addressed in Jack's December 20, 2011 letter. In your December 21, 2011 letter you stated:

I will note, however, that you do not dispute the fact that Mr. Evans' original December 14, 2011, letter does not advise us that the documents are available, nor do you appear to dispute the fact that the hard drive was not produced on December 15, 2011, as had been represented.

This statement conveniently ignores the comments in Jack's December 20, 2011 letter where he stated that "[he] will address just two of the inaccuracies in the letter." [Emphasis added]. Thus, you should not make any assumptions based on issues that

¹ As of the date of this letter, Kokosing has not provided copies of any documents, electronic or paper, inspected on December 12, 2011 in Kokosing's Westerville office, inspected on December 14, 2011 in Zanesville, and inspected on December 15, 2011 in Fredericktown.

were not discussed in Jack's December 20, 2011 letter. Any such assumptions are purely conjecture on your part and do not reflect the actual events.

In addition to ignoring Jack's statement that he was only addressing two issues, it should be noted that the two assumptions you made in your December 21, 2011 letter regarding the availability and production of the hard drive are false. The correspondence between you and I show that:

- You were aware that the hard drive was available on December 9, 2011;
- On December 12, 2011 you said that you would deliver a check to us for the hard drive;
- You were given instructions on December 14, 2011 for delivery of the check; and
- Kokosing did not deliver a check for the hard drive until December 19, 2011.

In addition to these facts, it should also be noted that on December 14, 2011, the same day that you were given instructions for delivery of the check, Mr. Wushinske indicated to us that it was acceptable to him to either have the hard drive delivered by Ben Hyden or for Kokosing to pick it up at Bricker & Eckler's office. Thus, as of December 14, 2011, we had received instructions from you stating that Kokosing would deliver the check and pick up the hard drive and Mr. Wushinske told us that it didn't matter to him if Kokosing picked up the hard drive or if it was delivered. On December 15, 2011, during Kokosing's document production in Fredericktown, Ohio, Mr. Wushinske was informed that the hard drive was available at our Columbus office. Finally, Mr. Wushinske stated on December 14, 2011, that he would try to have Kokosing's hard drive available on December 15, 2011, which it was not. He also stated on December 15, 2011, that the hard drive would be ready in a few days, which means that it should have been available on Monday, December 19, 2011. As of the date of this letter, the City still has not received the hard drive from Kokosing.

Seventh, as discussed in previous letters, the number of pages of documents produced on the hard drive was less than originally anticipated. CH2M Hill estimated the number of pages based on the amount of electronic memory needed to store the data. Based on the total size of the data, CH2M Hill estimated that there were between 850,000 and 2.5 million pages of documents. However, it was later discovered that a substantial volume of memory was used to store drawings, which are larger files than document files. Thus, the actual number of pages was less than originally estimated.

Eighth, you requested a set of redacted documents with an explanation for each redaction. Under RC 149.43(B)(1), the City is only required to do the following in regard to redactions: "When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible." The City

notified Kokosing of the redactions by stamping the word "redaction" on the record containing the redaction. Further, all documents that were redacted were done so under the attorney-client privilege. As discussed previously, under Section 3.6 of the Agreement between the City and CH2M Hill for Engineering Services, the City agreed to provide all of the "legal services as [the City] may require or [CH2M Hill] may reasonably request with regard to legal issues pertaining to the Project." Accordingly, the attorney-client privilege extends to communications with CH2M Hill related to legal services pertaining to the Project.

Ninth, you stated in your letter that "Kokosing has no obligation to provide the City with copies of its files." [Emphasis added]. However, this assertion is incorrect and directly contradicts the terms of the contract. In fact, Paragraph 10.05(H) of the General Conditions states:

Failure to provide the requested documents shall be a material breach of the Contract . . . If the Contractor fails to provide the requested documents, the Contractor shall be precluded from presenting such documents in subsequent dispute resolution proceedings. . . [Emphasis added].

Your position on this issue is also inconsistent with Kokosing's prior conduct. The City previously received copies of some documents from Kokosing on September 12, 2011 and October 21, 2011. Clearly both Kokosing and the City agree that Kokosing is required to provide copies of requested documents to the City.

Tenth, you have requested that the City provide a privilege log to Kokosing. As we stated in our November 1, 2011 correspondence, the City has no obligation to prepare such a log under the Ohio public records act. *See State ex rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379.

Finally, your concern regarding the costs incurred by the City to review records at several locations, other than Kokosing's Westerville office, is insincere at best. Interestingly, Kokosing did not offer to make the records available electronically until after the City had traveled to the three farthest locations, which were Fredericktown, Ohio, Zanesville, Ohio and Pittsburgh, Pennsylvania.

Sincerely,



Mark Evans

GENERAL CONTRACTORS



6235 Westerville Road, Suite 200, Westerville, OH 43081-4074
Phone 614-212-5700 Fax 614-212-5711

December 21, 2011

Via EMAIL and REGULAR U.S. MAIL

RECEIVED

DEC 22 2011

Jack Rosati, Jr., Esq.
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215

Re: City of Zanesville

Dear Jack:

This letter is in response to yours of December 20, 2011.

I appreciate the assertion in your letter that you are trying to maintain a professional tone in your correspondence. That being said, what would be more appreciated would be dealing with the issues on this project in a forthright manner.

There are a number of issues, all fact based, that need to be resolved on this project. We met with the City on July 8, 2011, to begin a discussion about resolving them without the need for this to escalate to a lawsuit. Immediately after that meeting, your office became involved and it is our view that since that time the process of attempting to resolve the actual issues on the project has become mired in game playing surrounding your interpretation of the contract, attempts to create technical defenses based upon that interpretation, and obfuscation of our every attempt to obtain records relating to the facts through the public records requests.

In regard to the latter, we initially made a simple and straight forward request. That request was met with a one sentence letter that told us we would need a subpoena. Since that time, we have been forced to continually deal with arguments made by your office that are nothing short of disingenuous. Perhaps you can explain to me how it is in good faith:

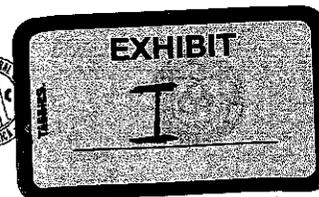
- to respond to our request by abjectly stating that documents were not requested when, in fact, they expressly were;
- to respond to our request by asserting that documents were not specifically requested when the very names of the documents that were referenced in the request came from the contract between the City and CH2.

This approach, when coupled with the constant demands that Kokosing produce all of its records within ten days or be charged with breach of contract, etc. (when it took your office 4 months to produce a similar quantity of documents), necessarily leads one to the conclusion that the approach that has been adopted on behalf of the City is neither cooperative, nor particularly forthright.

Corporate Office: P.O. Box 226, Fredericktown, Ohio 43019-0226 Phone 740-694-6315



AN EQUAL
OPPORTUNITY
EMPLOYER



Jack Rosati, Jr., Esq.
December 21, 2011
Page 2

Your office has chosen to place this project and the pending issues in this posture. So be it. We are simply responding to this approach. We will not sit back and simply accept this behavior or the positions being advanced. If you feel that it is unprofessional or insulting, or find it unpleasant, when you are called on it, that is not my issue. In nearly 30 years of the private practice of law, I have seldom found a circumstance involving counsel as disturbing as this one.

In regard to the enumerated paragraphs in your letter, you are correct -- the record will demonstrate precisely what has been transmitted and when. I will note, however, that you do not dispute the fact that Mr. Evans' original December 14, 2011, letter does not advise us that the documents are available, nor do you appear to dispute the fact that the hard drive was not produced on December 15, 2011, as had been represented.

On December 20, 2011, we picked up the external hard drive from your office. The hard drive was accompanied by a letter that was dated December 14, 2011, and referenced the hard drive's availability on that date. This is curious for several reasons. First, the hard drive indicates that the first file was loaded on it on December 14. Second, if, in fact, the hard drive was available on December 14, 2011, why does Mr. Evans' letter of December 14, 2011, not say that. Third, why did Mr. Evans indicate verbally that the hard drive would be delivered by Mr. Hyden on December 15 if this December 14 letter had been written and the intent was that Kokosing could pick it up at your office on that date? Fourth, if the hard drive was available, why didn't Mr. Hyden deliver it on December 15, 2011, as Mr. Evans had represented? Based upon these factors, we question the date on the letter. We would be happy to review the meta data tied to the creation of this letter if you would like to clear this up.

We would also like to address the volume of documents being produced by the City. The prior correspondence received from your office indicated that we should expect between 1,000,000 and 2,000,000 "documents" (although other of your correspondence refers to 850,000 to 2.5 million pages, 1,000,000 to 2,000,000 pages). The hard drive contains only ±119,000 pages. Please provide us with a reasonably detailed explanation of the criteria used to limit this production.

We also note that a number of the documents contain redactions. The applicable law requires that with respect to each redaction, the reason and authority therefore be provided. Please provide us with a set of the redacted documents with this explanation for each.

Under the terms of the contract, Kokosing has no obligation to provide the City with copies of its files. The contract merely states that they are to be made available. Kokosing has obviously made all of its files available and as an accommodation to the City, we have offered to have hard copies made at the City's expense. In addition to hard copies of certain documents, however, Mr. Hyden has requested that our electronic files be placed on an external hard drive. We will accommodate this request as well. Having performed a cursory review of the hard drive produced by your office, we now have an understanding of the format that your office wishes to use for this production. We will have the information placed on the hard drive in the same format as was used by your office.

Jack Rosati, Jr., Esq.
December 21, 2011
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The City will be responsible for all costs incurred to download the information in this format and we will follow the same protocol as was used for the City's information, e.g. an exchange of the hard drive for payment of the invoice. If this is not acceptable, please let me know so that we can stop this effort.

In the second enumerated paragraph, you assert that it was my proposal to mediate the disputes at the end of the job. This is a true statement. The conclusion, however, that this was to supplant the parties' efforts to resolve claims over the balance of the project, and hopefully obviate the need for a mediation, was never intended. If it is your view that agreeing to ultimately mediate the issues meant that the parties would simply hold all matters in abeyance and begin the legal posturing, this explains why things have proceeded as they have since July. I must also point out that the mediation was part of a larger consideration, namely that the contract document itself would otherwise require multiple lawsuits be filed. We were, again, trying to avoid the adversarial posture that has now been created.

Finally, we will again question the direction you have charted for this matter. In addition to the needless issues surrounding the response to the public records request, we fail to see any legitimate reason why you would request all daily time records for each of the unrelated projects that our personnel worked on, let alone spend the attorney time necessary to travel to Pittsburgh and Southern Ohio to review these irrelevant files. Succinctly stated, the cost that has already been incurred for attorney time spent on these side issues would have gone a long way to resolving many of the issues, and we would not now be headed down the path of multiple pieces of litigation that will only drive the City's legal cost higher.

Very truly yours,

KOKOSING CONSTRUCTION COMPANY, INC.



Michael W. Currie
General Counsel

cc: Matthew R. Wushinske, Esq.
Daniel B. Walker
Thomas G. Muraski
Doug A. Jackson



Bricker & Eckler
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Jack Rosati, Jr.
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December 20, 2011

Via Electronic Mail and
Regular U.S. Mail

Michael W. Currie, Esq.
General Counsel
Kokosing Construction Company, Inc.
6235 Westerville Road, Suite 200
Westerville, Ohio 43081-4074

**RE: Your letter regarding the City of Zanesville/Kokosing
matter dated December 19, 2011**

Mike:

I have reviewed the above-referenced correspondence. As usual, it contains unnecessary personal insults and inaccuracies. I continue to find this disappointing, but I no longer find it surprising. We are working very hard to maintain a professional tone in our letters but we do feel compelled to respond to some inaccuracies in your letter. Because you and I negotiated the tolling agreement, I thought I should respond rather than Mark. I will address just two of the inaccuracies in the letter:

1) Mark Evans' December 14, 2011 letter accurately describes the three different document productions that the City has undertaken in response to your document requests. It also clarifies that the scanned emails from the first production and the documents being put on an external hard drive (the third production) are available upon payment of the included invoice. The invoice specifically identifies the source, and includes the Bates numbering of the scanned emails (from the initial production) and the Bates numbering of the CH2MHill documents (being put on an external hard drive). Your assertion that Mark's letter didn't reference such Bates numbers or the fact that CH2MHill documents were included ignores the language of the included invoice, which clearly references these items. We have an electronic record to reflect the communication you received, so there is no basis for dispute on this issue.

2) Your statement that our office has done nothing to resolve the disputed items since we were retained is puzzling. It was, in fact, your proposal that all disputed items be scheduled for mediation after project completion and you agreed that both parties would preserve all of their defenses pending that mediation. Change orders approved by

Michael W. Currie, Esq.
General Counsel
Kokosing Construction Company, Inc.
December 20, 2011
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CH2MHill in the ordinary course have been paid. I have an email from you dated July 29, 2011 that states as follows:

"Jack, in principle I agree with you. All we are suggesting is tolling the 10.5 time limit. Neither party's claims or defenses are affected either positively or negatively. We do not expect the City to compromise its rights, but at the same time we do not intend to enter into an agreement that would purport to provide any interpretation of the terms of the contract or impact the parties actual performance thereunder.

Let me know how you want to handle the drafting of the tolling agreement. I think one or two short paragraphs handle it, along the lines of: "The parties hereby agree to amend the provisions of Article 10.5 to delete the 30 day requirement within which suit must be filed and in its stead allow any such suit to be brought after the final acceptance of the project by the owner and as a condition precedent to any such suit the parties agree that all claims between them shall first be submitted to mediation. This amendment shall not otherwise abridge, affect or compromise either party's rights, defenses or the course of conduct of the parties."

While the precise contents of the agreement were slightly modified in subsequent drafts, the approach to mediating after project completion was retained.

Unfortunately, I anticipate a long and unpleasant response from you. That is certainly your prerogative, but the record is clear.

Sincerely,



Jack Rosati