

TOWN OF ANDOVER  
CONSTRUCTION CONTRACT  
(PROJECTS \$100,000.00 AND OVER)

OWNER - CONTRACTOR AGREEMENT

PROJECT: West Middle Basketball Court Improvements - IFB 001/07-20/185

This agreement ("Contract") is made as of the 13<sup>th</sup> day of OCT, 2020, by and between the Town of Andover ("Town" or "Owner") with a principal place of business at 36 Bartlet Street, Andover, MA 01810, and Heimlich Landscaping & Construction Corp., a corporation with a principal place of business at 66 Burlington Street, Woburn, MA 01801, hereinafter called the "Contractor."

Terms used in this Owner - Contractor Agreement which are defined in the General Conditions of the Contract shall have the meanings designated therein.

The Town and the Contractor agree as follows:

**Article 1. Scope of Work.** The Work under this Contract is defined as all work required by the Contract Documents for the construction of re-painting and repair of an existing basketball court surface, additional striping of pavement games, new basketball goal, new retaining walls, new vehicular gate, metal bollards and vehicular asphalt pavement, Contract No. 001/07-20/185, in accordance with and as described in the Plans and Specifications dated, 07/09/2020, prepared by Warner Larson Landscape Architects ("Designer"), as modified by Addenda Nos. 1, 2 and 3 dated 7/22, 7/24, and 8/5, 2020.

**Article 2. Time for Completion.** The Contractor shall commence the Work under this Contract on the date specified in the written "Notice to Proceed," and shall, within 50 days after such date, bring the Work to Final Acceptance. Time is of the essence of this Contract.

**Article 3. Contract Price.** The Town shall pay the Contractor, in current funds, for the performance of the Work, subject to additions and deductions by Approved Change Order(s), the Contract Price of One Hundred and Forty Nine Thousand Dollars (\$ 149,000.00). The Unit Prices, if any, approved by the Town are those included in the Contractor's General Bid. The following Alternates have been accepted and their costs are included in the Contract Price:

Alternate No(s): 1 and 2

**Article 4. Approved Subcontractors.** The filed Subcontractors listed in the Contractor's General Bid submitted by the Contractor have been approved for the performance of the specified portions of the Work subject to the Town's verification that they have complied with state corporation and partnership registration laws. No other filed Subcontractors and no non-filed Subcontractors shall be used for these or any other portions of the Work without the prior written approval of the Town.

**Article 5. Certifications.** Pursuant to M.G.L. c. 62(c), s.49 (a), the individual signing this Contract on behalf of the Contractor hereby certifies, under the penalties of perjury, that to the best of his or her knowledge and belief the Contractor has complied with any and all applicable state and federal tax laws. The individual signing this Contract on behalf of the Contractor further certifies under penalties of perjury that the Contractor is not presently debarred from doing public construction work in the Commonwealth under the provisions of M.G.L. c. 29, s. 29F, or any other applicable debarment provisions of any other chapter of the General Laws or any rule or regulation promulgated thereunder and is not presently debarred from doing public construction work by any

agency of the United States.

**Article 6. The Contract Documents:** The following documents form the Contract, are incorporated by reference herein, and are referred to as the "Contract Documents:"

- Invitation to Bid
- The Instructions to Bidders
- The General Bid submitted by the Contractor
- This Owner — Contractor Agreement
- The General Conditions of the Contract
- The Plans, Specifications, Project Manual and Drawings, including Addenda identified in Article 1 above
- All Approved Change Orders issued after execution of this Owner - Contractor Agreement

**Article 7. Minority Business Enterprise and Women Business Enterprise Participation Goals and Minority/Women Workforce Utilization Percentages:** The applicable goals, if any, for minority business enterprise and woman business enterprise participation established for this Contract are as follows:

The Minority Business Enterprise/Women Business Enterprise (MBE/WBE) participation goal for this Contract is a combined goal of \_\_\_\_\_ % of the Contract Price.

The applicable minority workforce utilization percentage is 0 %.

The applicable women workforce utilization percentage is 0 %.

**Article 8. Liquidated Damages.** For the purposes of Article VI of the General Conditions of the Contract, liquidated damages for delay shall be as follows:

\$ 250.00 per day

**Article 9. Subject to Appropriation.** Notwithstanding anything in the Contract documents to the contrary, any and all payments which the Town is required to make under this Contract shall be subject to appropriation or other availability of funds as certified by the Town Accountant. The Town may immediately terminate or suspend this Agreement without liability on the part of the Town for damages, penalties or other charges in the event the appropriation(s) funding this Agreement is terminated or reduced to an amount which will be insufficient to support anticipated future obligations under this Agreement.

**Article 10. Additional Insurance Provisions.** The insurance requirements set forth in Article XIII of the General Conditions of the Contract are supplemented by the provisions, if any, appearing in Exhibit A attached hereto and incorporated herein.

In witness whereof, the parties hereto have caused this instrument to be executed in triplicate under seal as of the date set forth above.

**CONTRACTOR:**

By: Mark Heimlich

Name: [Signature]

Title: Secretary/Treasurer

Date: 9/9/20

TOWN:

By: Janet Nicosia

Name: Janet Nicosia

Title: Division/Department Head

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

By: [Signature]

Name : Andrew Flanagan

Title: Town Manager

Date: 10/13/20

Approved as to Form:

By: Thomas Urdelis

Name: THOMAS URDELIS

Title: Town Counsel

Date: 10/17/2020

Certified as to Availability of Funds (M.G.L. c. 44 s. 31C)

[Signature]  
Town Accountant

Amount \_\_\_\_\_

Fund \_\_\_\_\_

64490-5700	\$ 78,700.00
623120-5700	25,000.00
64340-5700	8,397.00
623025-5700	11,640.00
620819-5700	2,377.00
64230-5700	8,105.68
623121-5700	7,779.66
WMS PTO	7,000.00
	<u>\$ 149,000.00</u>

**EXHIBIT A to the Owner-Contractor Agreement****Insurance Provisions**

<u>Workmen's Compensation:</u>	<u>Statutory Requirements</u>
Employer's Liability:	\$1,000,000
<u>Comprehensive General Liability:</u>	
Each person/each occurrence:	<u>Bodily Injury</u> \$1,000,000
General Aggregate per project:	\$2,000,000 Or a Combined Single Limit of 2,000,000
Each Occurrence:	<u>Property Damage</u> \$1,000,000
General Aggregate per project:	\$2,000,000 Or a Combine Single Limit of \$2,000,000
<u>Comprehensive Automobile Liability:</u>	
Each person/each occurrence:	<u>Bodily Injury</u> \$1,000,000 Or a Combined Single Limit of \$1,000,000
Each occurrence:	<u>Property Damage</u> \$1,000,000 Or a Combined Single Limit of \$1,000,000
Excess Liability (Umbrella):	\$1,000,000

- (a) **The Town shall be named as an additional insured on the Contractors' General Liability, Auto Liability and Excess Umbrella Liability Insurance Policies.**
- (b) **The General Liability & Auto Liability policies shall contain a Waiver of Subrogation In favor of the Town.**

TOWN OF ANDOVER  
CONSTRUCTION CONTRACT

GENERAL CONDITIONS OF THE CONTRACT

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**ARTICLE I: DEFINITION OF TERMS**

The following words shall have the following meanings as used in this Contract:

**Advertisement:** The Advertisement or Notice Inviting Bids or Proposals for the Work identified in Article 6 of the Owner - Contractor Agreement.

**Approval:** (or Approved): An approval in writing signed by the authorized signatory of the Town.

**Architect:** The architect identified as the Designer in Article 1 of the *Owner - Contractor Agreement*.

**As directed (As permitted, as required, as determined or words of like effect):** The direction, permission, requirement or determination of the Designer or the Town. Similarly, *approved, acceptable, satisfactory* or words of like import shall mean approved by or acceptable or satisfactory to the Designer, except as may be otherwise determined by the Town.

**Building Code:** All applicable rules and regulations to which the Town is subject and which are contained or referenced in the code authorized by M.G.L. c. 143, s. 93 et seq., including all amendments thereto.

**Certificate of Use and Occupancy:** A certificate signed by the Designer and the Town pursuant to the requirements of Article VI of these General Conditions of the Contract, indicating that the Town has determined that (1) the Work has been completed in accordance with the Contract Documents, except for Punch List items, (2) certificates of inspection, testing and/or approval (including a certificate of occupancy under the Building Code), operating permits for any mechanical apparatus which may be required to permit full use and occupancy of the Work by its intended users (which in a Subcontractor's case may include the Contractor) have been delivered to the Town, (3) any applicable written warranties, operating instructions and related materials have been delivered to the Town, and (4) the Work may be used for its intended purpose without substantial inconvenience or interference.

**Change Order:** A written document executed by the Town directing the Contractor to make changes in the Work and/or in the Contract Price or Contract Time.

**Contract:** The Contract formed by the Contract Documents as defined in Article 6 of the Owner - Contractor Agreement.

**Contract Documents:** The documents listed in Article 6 of the Owner-Contractor Agreement.

**Contract Modification:** Any alteration of the Contract Documents accomplished by a written agreement properly executed by the parties to this Contract.

**Contract Price:** The Contract Price stated in Article 3 of the Owner - Contractor Agreement which is the total sum owed to the Contractor for all of the Work.

**Contract Time:** The time beginning with the execution of the Contract and continuing through Final Acceptance.

**Designer:** The architect or engineer identified as the Designer in Article 1 of the Owner-Contractor Agreement, subject to the provisions of Article III, Section 1 of these General Conditions of the Contract.

**Engineer:** The Designer, except that the term "Resident Engineer" shall have the meaning otherwise specified herein.

**Drawings:** The Drawings are the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the design, location and dimensions of the Work, generally including Plans, elevations, sections, details, schedules, and diagrams.

**Final Acceptance:** The written determination by the Designer and by the Town that the Work has been 100% completed, except for the Contractor's indemnification obligations, warranty obligations, obligations to continue to maintain insurance coverage for the time periods provided in the Contract Documents, and any other obligations which are intended to survive Final Acceptance and/or the termination of the Contract.

**General Bid:** The completed bid form submitted by the Contractor.

**Laws:** All applicable statutes, regulations, ordinances, codes, laws, orders, decrees, approvals, certificates and requirements of governmental and quasi-governmental authorities.

**Neutral:** An impartial third party not having an interest in the Owner, the Designer, the Contractor or the Project.

**Notice to Proceed:** The written notice provided by the Town to the Contractor which authorizes the Contractor to commence the Work as of a date specified therein, from which date the time of completion specified in Article 2 of the Owner - Contractor Agreement is measured.

**Or equal (or words of like import):** Equal in the opinion of the Town determined pursuant to the provisions of M.G.L. c.30, s. 39M and the provisions of these General Conditions of the Contract.

**Owner:** The Town of Andover.

**Plan(s):** Drawing(s).

**Product Data:** Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor or its Subcontractors and suppliers to illustrate materials or equipment for some portion of the Work. Product data also include any such information or instructions produced by the manufacturer or distributor of such materials or equipment and made readily available by said manufacturer or distributor.

**Progress Schedule:** The progress schedule Approved by the Designer and the Town in accordance with Article VI of these General Conditions of the Contract.

**Project:** The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

**Project Manager:** The Town's representative assigned to the Project.

**Punch List:** A list of items determined by the Town to be minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the Work for its intended purpose.

**Resident Engineer:** The on-Site representative of the Town.

**Samples:** Samples are physical examples, that illustrate materials, equipment, or workmanship and establish standards by which the Work will be judged.

**Schedule of Values:** The schedule Approved by the Town pursuant to Article VIII of these General Conditions of the Contract which allocates the Contract Price to the various portions of the Work and is used as a basis for payments to the Contractor.

**Shop Drawings:** Drawings, diagrams, details, schedules, and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier, or distributor to illustrate a portion of the Work.

**Site:** The land and, if any, building(s) or space within any such building(s) on which or in which the Contractor is to perform the Work.

**Specifications:** The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, construction systems, standards, and workmanship for the Work and performance of related services.

**Subcontractor:** Person or entity with whom the Contractor contracts in order to perform the Work, except as otherwise specifically provided or required herein or by Law.

**Substantial Completion:** For work subject to M.G.L. c. 30 s. 39K, "substantial completion" shall occur when (1) the Contractor fully completes the Work or substantially completes the Work so that the value of the Work remaining to be done is, in the estimate of the Town, less than one percent of the original contract price, or (2) the Contractor substantially completes the work and the Town takes possession for occupancy, whichever occurs first. For work subject to M.G.L. c. 30 s. 39G "substantial completion" shall mean either that the work required by the Contract has been fully completed, completed except for work having a Contract Price of less than one percent of the then adjusted total Contract Price, or substantially all of the Work has been completed and opened to public use except for minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the Work.

**Superintendent:** The licensed construction supervisor who is an employee of the Contractor designated to be in full-time attendance at the Site throughout the prosecution and progress of the Work and who shall have complete authority to act for the Contractor.

**Town:** The Town of Andover.

**Work:** The Work defined in Article 1 of the Contract, Article II, Section 2 of these General Conditions of the Contract and otherwise in the Contract Documents.

**Working Hours:** 7:00 a.m. to 5:00 p.m., but not more than eight hours per day, Monday through Friday, unless otherwise specified by applicable Laws.

All terms that this Contract defines may be used with or without initial capital letters. Other terms, abbreviations and references are defined as they appear herein. Words and abbreviations that are not defined in the Contract Documents but which have recognized technical or trade meanings are used in accordance with those meanings. For additional definitions of terms, abbreviations and references refer to the *Specifications*.

## ARTICLE II: EXECUTION OF THE CONTRACT, SCOPE OF WORK, INTERPRETATION OF CONTRACT DOCUMENTS

### 1. Execution.

The execution of the Contract by the Contractor is a representation that the Contractor has visited the Site, has become familiar with local conditions under which the Work is to be performed and has correlated personal observations with requirements of the Contract Documents.

### 2. Scope of Work.

The Work consists of the Work identified in the Contract Documents. The Work comprises the completed construction required by the Contract Documents and includes all labor, tools, materials, supplies, equipment, permits, approvals, paperwork, calculations, submittals, and certificates necessary to develop, construct and complete the Work in accordance with all Laws, and all construction and other services required to be supervised, overseen, performed or furnished by Contractor or that the Contract Documents require the Contractor to cause to be supervised, overseen, performed or furnished. The Contractor shall provide and perform for the Contract Price all of the duties and obligations set forth in the Contract Documents.

### 3. Interpretation.

A. The Plans and Specifications and other Contract Documents are to be considered together and are intended to be mutually complementary, so that any work shown on the Plans though not specified in the Specifications, and any work specified in the Specifications though not shown on the Plans, is to be executed by the Contractor as a part of this Contract.

B. All things that in the opinion of the Designer may be reasonably inferred from the Plans, Specifications and other Contract Documents are to be executed by the Contractor. The Designer shall determine whether the detail Plans conform to the general Plans and Contract Documents, except as may be otherwise determined by the Town.

C. The tables of contents, titles, headings and marginal notes or sub-scripts contained herein are solely to facilitate references, are not intended to be construed as provisions of the Contract, and in no way affect the interpretation of the provisions to which they refer.

D. Where reference is made in the Contract Documents to publications, standards, or codes issued by associations or societies, such reference shall be interpreted to mean the current edition of such publications, standards, or codes, including revisions in effect on the date of the Advertisement, notwithstanding any reference to a particular date. The foregoing sentence shall not apply to the dates, if any, specified with respect to insurance policy endorsement forms.

E. In case of any conflict among the Contract Documents, unless the context clearly otherwise requires, the Contract Documents shall be construed according to the following priorities:

- First Priority: Contract Modifications
- Second Priority: Owner - Contractor Agreement
- Third Priority: General Conditions of the Contract
- Fourth Priority: Drawings -- Schedules take precedence over enlarged detail Drawings, and enlarged Detail Drawings take precedence over reduced scale Drawings; figured dimensions shall prevail over scale.
- Fifth Priority: Specifications

The Town's interpretation of specifications and other approvals shall be subject to M.G.L. c. 30 s. 39D.

### 4. Distribution of Work.

The distribution of the Work is intended to be described under the appropriate trades and, except for filed sub-bid work, may be redistributed, except as directed herein, provided that such redistribution shall cause no controversy among the trades and no delay in the progress of the Work.

### 5. Contract Price.

The Contract Price constitutes full compensation to the Contractor for everything to be performed and furnished in connection with the Work and for all damages arising out of the performance of the Work and/or the action of the elements, and constitutes the

maximum compensation regardless of any difficulty incurred by the Contractor in connection with the Work or in consequence of any suspension or discontinuance of the Work.

### **ARTICLE III: CONTROL OF WORK / ADMINISTRATION OF THE CONTRACT**

#### **1. Designer.**

Notwithstanding anything to the contrary expressed or implied in this Contract, any of the powers, rights, and duties of the Designer may be exercised by the Town, provided that the Town shall be under no obligation to do so. The Town may rely on the Designer for the performance and exercise of its rights and obligations hereunder and shall be presumed to so rely on the Designer in the absence of an explicit written assumption by the Town of any such rights and obligations, except that any Approval required to be obtained from the Town hereunder shall not be valid without the signature of the Town. The Town may explicitly overrule in writing any action, determination or decision of the Designer should the Town choose to do so, except to the extent that the same would violate applicable law. Subject to the foregoing, the Designer shall be responsible for the general administration of the Contract and shall perform the duties and exercise the rights herein conferred on the Designer. Except as otherwise specifically provided herein, the Designer shall decide all questions which may arise as to the conduct, quantity, quality, equality, acceptability, fitness, and rate of progress of the several kinds of work and materials to be performed and furnished under this Contract, and shall decide all questions which may arise as to the interpretation of the Plans and Specifications and as to the fulfillment of this Contract on the part of the Contractor. In the case of the death, resignation, inability or refusal of the Designer to act, or the termination of his or her or its employment, the Town may appoint another person to act as Designer for the purposes of this Contract. The Town shall give written notice to the Contractor of any such appointment.

#### **2. Right of Access to Work.**

The Town and the Designer (and persons designated by them) may for any purpose enter upon the Work, the Site, and premises used by the Contractor, and the Contractor shall provide safe facilities therefor. Other contractors of the Town may also enter upon the same for the purposes which may be required by their contracts or work. Any differences or conflicts which may arise between the Contractor and other contractors of the Town with respect to their work shall be initially resolved by the Designer.

#### **3. Inspection No Waiver.**

No inspection by the Town or the Designer or employees or agents of either of them, and no order, measurement, certificate, approval, payment order, payment, acceptance or any other action or inaction of any of them, shall operate as a waiver by the Town of any provision of this Contract.

### **ARTICLE IV: GENERAL PERFORMANCE OBLIGATIONS OF THE CONTRACTOR**

The Contractor shall complete for the Contract Price all of the Work in a proper, thorough, and workmanlike manner in accordance with the Contract Documents. Without limiting the foregoing and without limiting the Contractor's obligations under any other provision of the Contract Documents, the Contractor shall for the Contract Price perform the following general obligations:

#### **1. Review of Contract Documents and Field Conditions.**

A. Before commencing the Work, the Contractor shall carefully study the Contract Documents and carefully compare all Specifications, Plans, Drawings, figures, dimensions, lines, marks, scales, directions of the Designer, and any other information provided by the Town and shall at once report to the Designer any questions, errors, inconsistencies, or omissions. The Town expressly disclaims any express or implied warranties regarding the sufficiency of the Specifications, Plans, Drawings, figures, dimension lines, marks, scales and directions of the Designer.

B. Before commencing the Work, the Contractor shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the Contractor with the Contract Documents and shall at once report to the Designer any questions, errors, inconsistencies, or omissions.

#### **2. Supervision and Construction Procedures; Coordination; Cutting, and Patching.**

A. The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and shall have control over, construction means, methods, techniques, sequences and procedures, and shall be responsible for coordinating all portions of the Work under the Contract.

B. The Contractor shall be responsible for the proper fitting of all Work and the coordination of the operations of all trades, Subcontractors, and materialmen engaged upon the Work. The Contractor shall guarantee to each of its Subcontractors all dimensions which they may require for the fitting of their work to all surrounding work.

C. All necessary cutting, coring, drilling, grouting, and patching required to fit together the several parts of the Work shall be done by the Contractor, except as may be specifically noted otherwise under any particular filed sub-bid section of the Specifications.

D. The Contractor shall be responsible to the Town for the acts and omissions of the Contractor's employees, agents and Subcontractors, and their agents and respective contractors, employees, and other persons performing portions of the Work or supplying materials therefor.

E. The Contractor shall be responsible for the inspection of portions of the Work already performed under this Contract to determine that such portions are in proper condition to receive subsequent Work.

F. The Contractor shall employ a registered land surveyor to perform any engineering required for establishing grades, lines, levels, dimensions, layouts, and reference points for the trades. The Contractor shall be responsible for maintaining benchmarks and other survey marks and shall replace any benchmarks or survey marks that may have become disturbed or destroyed. The Contractor shall verify the materials shown on the Drawings before laying out the Work and shall be responsible for any error resulting from its failure to exercise this precaution.

G. Unless otherwise required by the Plans and Specifications, or directed in writing by the Designer, Work shall be performed during regular Working Hours. However, if the Contractor desires to carry on the Work outside of regular Working Hours or on Saturdays, Sundays, or Massachusetts or federal holidays then the Contractor shall allow ample time to allow satisfactory arrangements to be made for inspecting Work in progress and shall bear the costs of such inspection. The Town shall bill the Contractor directly for such costs.

H. Work performed outside of regular Working Hours without the consent or knowledge of the Designer and/or the Town shall be subject to additional inspection and testing as directed by the Designer. The cost of this inspection and testing shall be borne by the

Contractor whether the Work is found to be acceptable or not. The Town at its election shall be entitled either to issue a credit Change Order to cover such cost or to withhold such cost from any further payments due the Contractor and/or to receive a payment from the Contractor of the amount of such cost.

### **3. Superintendent.**

**A.** The Contractor shall employ a Superintendent whose appointment shall be subject to the Approval of the Town. The Superintendent shall be in attendance at the Site full-time during the performance of the Work. The Superintendent shall represent the Contractor. Communications given to and from the Superintendent shall be deemed given to and from the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed upon written request in each case. The Superintendent shall attend each job meeting. The Superintendent shall be responsible for coordinating all of the Work of the Contractor and the Subcontractors.

**B.** The Superintendent shall be a competent employee regularly employed by the Contractor. The Superintendent shall be licensed in accordance with the Building Code and shall have satisfactorily performed similar duties on previous construction projects similar in type, complexity and scale to the Project. The Superintendent's resume shall be submitted to the Town prior to commencement of construction together with such other information as the Town may reasonably require in order to determine whether or not to approve of his or her appointment. Any change in the Superintendent shall require the prior consent of the Town. The Contractor shall establish an emergency telephone line by which the Town, the Designer, or their respective agents may contact the Superintendent during non-working hours.

### **4. Labor.**

**A.** The Contractor shall employ only competent workers. The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall certify and insure that all employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration at the time the employee begins work and the Contractor and each of its subcontractors and others working on the Project shall furnish documentation of successful completion of said course by employees working with the first certified payroll report for each employee. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. Whenever the Designer shall notify the Contractor in writing that any worker is, in the Designer's opinion, incompetent, unfaithful, disorderly, or otherwise unsatisfactory, such employee shall be discharged from the Work and shall not again be employed on the Project except with the consent of the Designer.

**B.** The Contractor shall employ a sufficient number of workers to carry on the Work with all proper speed in accordance with Laws, the requirements of the Contract Documents, and the Progress Schedule.

**C.** The Contractor shall procure materials from such sources and shall manage its own forces and the forces of its Subcontractors and any sub-subcontractors in such a manner as will result in harmonious labor relations on the Project Site. The Contractor shall cause persons to be employed in the Work who will work in harmony with others so employed. Should the Work be stopped or materially delayed in the Town's reasonable judgment due to a labor dispute, the Town shall have the right to require the Contractor to employ substitutes acceptable to the Town.

### **5. Notices and Permits.**

**A.** The Contractor at its sole cost shall take out and pay for all approvals, permits, certificates and licenses required by Laws, pay all charges and fees, and pay for (or cause the appropriate Subcontractor to pay for) all utilities required for the proper execution of the Work.

**B.** The Contractor shall comply with all Laws and shall give all notices required thereby.

**C.** The Contractor shall keep itself fully informed of all existing and future State and National Laws and Municipal By-laws and Regulations and of all orders and decrees of any bodies or tribunals having jurisdiction in any manner affecting those engaged or employed in the work, of the materials used in the work or in any way affecting the conduct of the work. If any discrepancy or inconsistency is discovered in the Drawings, Specifications, Scope of Business or Contract for this work in violation of any such law, by-law, regulation, order or decree, the Contractor shall forthwith report the same in writing to the Town. The Contractor shall, at all times, itself observe and comply with all such existing and future laws, by-laws, regulations, orders and decrees; and shall protect and indemnify the Town of Andover, and its duly appointed agents against any claim or liability arising from or based on any violation whether by it or its agents, employees or subcontractors of any such law, by-law, regulation or decree.

**D.** If the Contractor performs Work knowing it to be contrary to Laws without giving such notice to the Designer and Town, the Contractor shall bear full responsibility for such Work and all costs attributable thereto, including, without limitation, corrections to the Work.

### **6. Lines, Marks etc.**

The Contractor shall furnish batter boards and stakes and shall cause to be placed and maintained thereon so as to be easily read, such lines, marks and directions relating to the Work as the Designer shall from time to time direct. The Designer shall establish base lines and benchmarks on the Drawings for the locations of the Work but all other lines and grades shall be determined by the Contractor.

### **7. Excavation.**

The Contractor shall prevent by sheeting and shoring or bracing, if necessary, any caving or bulging of the sides of any excavation made by the Contractor, leaving sheeting and shoring in place, or if any is removed, filling solid the spaces left thereby.

### **8. Dewatering/Hoisting/Staging.**

The Contractor shall provide pumping, drainage, and disposal of all water and other flows so that no puddle, nuisance, or damage will be caused by water or flooding. The Contractor shall provide all hoisting equipment and machinery required for the proper execution of the Work. The Contractor shall provide all exterior and interior staging required, except as may be otherwise provided in the Contract Documents.

### **9. Corrections to the Work; Inspection No Bar to Subsequent Corrections.**

The Designer's inspection of the Work shall not relieve the Contractor of its responsibilities to fulfill the Contract obligations. Defective work may be rejected by the Designer whether or not such work and/or materials have been previously overlooked or misjudged by the Designer and accepted for payment. If the Work or any part thereof shall be found defective at any time before the Final Acceptance of the whole Work, the Contractor shall forthwith cease the performance of any defective work in progress and, whether or not such work is still in progress, shall forthwith correct such defect in a manner satisfactory to the Designer. If any material brought upon the Site for use in the Work, or selected for the same, shall be rejected by the Designer as unsuitable or not in conformity with the Contract Documents,

or as damaged by casualty or deteriorated due to improper storage at the Site or to any other factor, the Contractor shall forthwith remove such materials from the Site. The Contractor shall pay for the cost of making good all work or property of other contractors or of the Town destroyed or damaged by such removal or replacement; repair any injury, defect, omission or mistake in the Work as soon as it is discovered; finish and immediately make good any defect, omission or mistake in the Work; and complete and leave the Work in perfect condition.

#### **10. Sanitary Facilities.**

The Contractor shall provide and maintain sanitary facilities for all persons employed on the Work, beginning with the first worker at the Site. Said facilities shall meet the following requirements unless otherwise specified in the Specifications.

A. There shall be no fewer facilities than the number required by applicable Laws;

B. Facilities shall be kept in a clean sanitary condition at all times and shall be adequately screened to be inaccessible to flies.

(Note: If existing sanitary facilities at the Site are to be used by the Contractor, this requirement will be modified accordingly in the Specifications.)

#### **11. Temporary Offices.**

A. Except as otherwise specified in the Specifications, the Contractor shall erect the following temporary offices near the Site as directed by the Designer and adequately furnish and maintain them in a clean, orderly condition:

(1) A Contractor's field office at which Contractor's authorized representative shall be present at all times while work is in progress. Instructions, notices, and other communications delivered there by the Designer or the Town shall be deemed delivered to the Contractor. The Contractor shall provide a separate conference room space with a conference table and chairs sufficient to accommodate 12 persons at one time.

(2) Office for the Resident Engineer, either a separate building or trailer. Such office shall be in close proximity to the Contractor's field office, shall be at least 475 square feet in area, and shall be equipped with partitions to separate it from public access, electric lights, heat, air conditioning, window screens, secure locking devices, and a toilet room with a working chemical toilet. Such office shall be equipped with the following furniture and equipment in good condition: 2 lockable steel desks, word processor, 2 swivel chairs, two stools, 2 metal plan racks, plan table at least 32 by 84 inches, 2 metal filing cabinets with locks, 12 feet of 10 inch deep shelving, one accurate Fahrenheit thermometer, one electric water cooler with disposable cups and water supply service, one hard hat for each project representative and 6 visitor hard hats, one dry plain paper copy machine with a legal and standard paper tray, and one calculator with paper print out, all of which shall become the property of the Contractor at the conclusion of the Work. (Note: If office space can be assigned in existing buildings at the Project Site, this requirement will be modified accordingly in the Supplementary General Conditions or Specifications.)

B. The Contractor shall relocate the Resident Engineer's trailer at no additional cost to the Owner if the need for relocation arises as determined by the Designer.

#### **12. Contract Documents and Samples at the Site.**

A reasonable number of sets of Contract Documents will be furnished to the Contractor by the Town immediately after signing of the Contract, one of which shall be maintained at the Site for reference by authorized representatives of the Town. The Contractor shall maintain at the Site for the use and information of the Town one record copy of the Drawings, Specifications, Addenda, Change Orders, Approved Shop Drawings, Product Data, Samples, updated Progress Schedule, and all other submittals, all in good order and marked currently to record changes and selections made during construction. These shall be available to the Designer and the Town and shall be delivered to the Designer for submittal to the Town upon completion of the Work.

#### **13. Telephones.**

The Contractor shall provide and maintain separate individual telephone service and pay for all calls relating to the Work. Service and equipment shall meet the requirements, if any, of the Specifications and shall include provisions for incoming and outgoing calls: (1) in the Contractor's field office for the use of its authorized agents and (2) in the Resident Engineer's office for the use of the Designer and authorized agents of the Owner.

#### **14. Health, Safety, and Accident Prevention**

A. In performing the Work, the Contractor shall:

(1) Ensure that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his/her health and/or safety as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor by regulation;

(2) Protect the lives, health, and safety of other persons; and

(3) Prevent damage to property, materials, supplies, and equipment.

B. For these purposes, the Contractor shall:

(1) Comply with 84 Stat. 1590, the "Occupational Safety and Health Act of 1970" (OSHA) and with regulations and standards issued by the U.S. Secretary of Labor at 29 CFR Part 1926, comply with the provisions of M.G.L. c. 30, section 39S and provide an Affidavit of Compliance as provided in said section; and

(2) Comply with the Trench Safety Law set forth in M.G.L. c. 82A and regulations promulgated by the Departments of Public Safety (DPS) and Occupational Safety (DOS) in 520 CMR 14.00 et. seq.; the Contractor shall execute a Trench Application and Permit form with the execution of its contract.

(3) Include the terms of this Section 14 in every subcontract so that such terms will be binding on each subcontractor.

(4) Designate by notice to the Town a responsible member of its organization at the Site whose duties shall include ensuring safety, implementation of Contractor's Safety Plan referenced below and preventing accidents.

C. The Contractor shall maintain an accurate record of exposure data on all accidents incident to the Work resulting in death, traumatic injury, occupational disease, or damage to property, materials, supplies, or equipment, and shall report this data in the manner prescribed by 29 CFR Part 1904. Without limiting the foregoing, the Contractor shall submit to the Town without delay verbal and written reports of all accidents involving bodily injury or property damage arising in connection with the Work.

D. In any emergency affecting the safety of persons or property the Contractor shall immediately act in the exercise of reasonable judgment to prevent threatened damage, injury, or loss. The Contractor shall immediately notify the Town of such emergency.

E. The Contractor shall be responsible for its Subcontractors' compliance with the provisions of this Section 14.

F. Before commencing any portion of the Work the Contractor shall submit a written Project-specific plan for implementing this Section 14. The plan shall include an analysis of the significant hazards to life, limb and property inherent in the performance of the

Work and a plan for controlling these hazards.

G. Without limiting the foregoing provisions of this Section 14, the Contractor shall comply with all health and safety Laws applicable to the Work. Without limitation,

- (1) If the Contractor uses, stores or encounters toxic or hazardous substances it shall comply with M.G.L. c. 111F, s. 2, the "Right to Know" law and regulations promulgated by the Department of Public Health, 105 CMR 670, the Department of Environmental Protection, 310 CMR 33, and the Department of Labor and Workforce Development, 441 CMR 21; and shall post a Workplace Notice obtainable from the Department of Labor and Workforce Development.
- (2) The Contractor shall comply with the Federal Resource Conservation and Recovery Act, the Federal Comprehensive Environmental Response, Compensation and Liability Act, M.G.L. c. 21C, M.G. L. c. 21E, and any other Laws affecting toxic or hazardous materials, solid, special or hazardous waste (collectively "Hazardous Materials Laws"). Should the Contractor discover unforeseen materials subject to Hazardous Materials Laws at the Site, the Contractor shall immediately comply with any and all requirements for dealing with such materials and notify all required governmental authorities and the Town of such discovery.
- (3) The Contractor shall be responsible for the location of all utilities in connection with the Work. Without limiting the foregoing, the Contractor shall comply with Dig-Safe Laws. Dig-Safe is the Utility Underground Plant Damage Prevention System, 331 Montvale Road, Woburn, MA, 01801, 1-888-344-7233. The Contractor shall notify Dig-Safe of contemplated excavation, demolition, or explosive work in public or private ways, and in any utility company right of way or easement, by certified mail, with a copy to Department of Environmental Protection (DEP). This notice shall be given at least 72 hours prior to the work, but not more than sixty days before the work is to be done. Such notice shall state the name of the street or the route number of the way and shall include an accurate description of the location and nature of the proposed work. Dig-Safe is required to respond to the notice within 72 hours of receipt by designating the location of pipes, mains, wires or conduits at the Site. The Contractor shall not commence work until Dig-Safe has responded. The work shall be performed in such manner and with reasonable precautions taken to avoid damage to utilities under the surface at the work location. The Contractor shall provide the Superintendent with current Dig-Safe regulations, and a copy of M.G.L. c. 82, s. 40. Any costs related to the services performed by Dig-Safe shall be borne by the Contractor.
- (4) The Contractor shall comply with M.G.L. c. 149, s. 129A, relative to shoring and bracing of trenches.

H. Without limiting the Contractor's responsibilities described above, the Contractor shall take all reasonable precautions for the safety of, and the prevention of injury or damage to (1) all agents and employees and contractors on the Work and all other persons who may be affected thereby including the general public, (2) all the Work and all materials and equipment to be incorporated therein, whether in storage on or off the Site, under the care custody or control of the Contractor or any of its Subcontractors or any contractors directly or indirectly contracting through any of them, and (3) other property at the Site or adjacent thereto, including but not limited to trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of the Work. The Contractor shall promptly remedy all damage or loss to any such property caused in whole or in part by the Contractor, any Subcontractor, or anyone directly or indirectly contracted or employed by any of them or by anyone for whose acts any of them may be liable. Without limiting the foregoing, the Contractor shall:

- (1) post and maintain adequate danger signs and other warnings against hazards;
- (2) promulgate safety regulations and give appropriate notices to the Town and users of adjacent utilities and property;
- (3) insure the adequate strength and safety of all scaffolding, staging and hoisting equipment, temporary shoring, bracing and tying;
- (4) protect adjoining private or public property;
- (5) provide barricades, temporary fences, and covered walkways required by prudent construction practices, Laws and/or the Contract Documents;
- (6) furnish approved hard hats and other personal protective equipment, furnish approved first aid supplies, furnish the name of the first aid attendant, and maintain a posted list of emergency facilities;
- (7) provide proper means of access to property where the existing access is cut off by the Contractor;
- (8) maintain from the beginning of any darkness or twilight through the whole of every night sufficient lights on or near any obstruction so as to guard and protect travelers from injury from such obstruction;
- (9) maintain adequate security at the Site so as not to expose the Work and surrounding property to vandalism or malicious mischief;
- (10) provide adequate fire protection procedures during the use of cutting torches, welding equipment, plumbers' torches and other flame and spark producing apparatus;
- (11) take prompt action to correct any dangerous or hazardous conditions.

I. The Contractor shall not use or store explosives in the performance of the Work unless the Contractor first obtains the Town's prior written specific Approval. If the Town approves the use or storage of explosives during the performance of the Work, the Contractor shall first comply with all Laws and obtain all permits, approvals, and certificates required in connection with the same and shall exercise best efforts, including but not limited to the employment and supervision of properly qualified personnel, to prevent damage, injuries, and accidents involving said explosives.

J. The Contractor shall not permit cutting or welding in or immediately adjacent to existing property of the Town or of anyone else without the Town's prior Approval in each instance.

#### **15. Debris and Chemical Waste.**

A. The Contractor shall not permit the accumulation of interior or exterior debris. The Contractor shall keep the Work area clean at all times. Without limitation, garbage shall be removed daily.

B. The Contractor shall properly classify and remove debris and waste from the Site and transport and dispose of it, all in accordance with Laws, employing a qualified and properly licensed transporter, at any landfill, disposal or recycling facility licensed under applicable Laws, including without limitation, hazardous materials laws. The Contractor shall make all arrangements and give and obtain all notices, communications, documentation, permits, certificates, and approvals necessary for said disposal from the owner or officials in charge of such landfills, disposal or recycling facilities. The Contractor shall bear all fees and costs in connection with such classification, removal, transportation, disposal and storage. The Contractor shall not permit any storage of debris or waste except in accordance with Laws.

C. The Contractor shall not permit any open fire on the Site.

D. Chemical Waste: Chemical waste shall be stored in corrosion resistant containers, removed from the Site, and disposed of not less frequently than monthly unless more frequently required by Laws, including without limitation hazardous materials laws, or by the Supplementary General Conditions or Specifications. Disposal of chemical waste shall be performed in accordance with requirements of the

U.S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection (DEP). Fueling and lubricating of vehicles and equipment shall be conducted in a manner that affords the maximum protection against spills and evaporation. Lubricants shall be disposed of in accordance with procedures meeting all applicable Laws. The Contractor shall immediately notify the Designer of any hazardous materials release large enough to require reporting under applicable Laws. The Contractor shall be responsible for immediately cleaning up in accordance with Laws any oil or hazardous materials releases resulting from its operations. Any costs incurred in cleaning up any such releases shall be borne by the Contractor.

**16. Weather Protection (M.G.L. c. 149, s. 44G and 44F(1)).**

The Contractor shall furnish and install "weather protection," which means temporary protection of that Work adversely affected by moisture, wind and cold. Weather protection shall be achieved by covering, enclosing and/or heating working areas such that a minimum temperature of 40 degrees Fahrenheit is maintained at the working surface during the months of November through March in order to permit construction to be carried on during such period in accordance with the Progress Schedule. After the building or portion thereof is completely enclosed by either permanent construction or substantial temporary materials having a resistance comparable to the specified permanent construction, the Contractor shall provide heat therein of not less than 55 degrees F. nor more than 75 degrees F. The foregoing provisions do not supersede any specific requirements for methods of construction, curing of materials and the like. Such weather protection shall be consistent with the Progress Schedule, shall permit the continuous progress of the Work necessary to maintain an orderly and efficient sequence of construction operations, shall include one thermometer for every 2,000 square feet of floor space or fraction thereof, shall be subject to the Approval of the Town, and shall meet such additional requirements as may be specified by DCAMM and by the Specifications.

**17. Furnishings and Equipment.**

When, in the opinion of the Designer, any portion of the Work is in a reasonable condition to receive fittings, furniture, or other property of the Town not covered by this Contract, the Contractor shall allow the Town to bring such fittings, furniture, and/or other property into such portions of the Work and shall provide all reasonable facilities and protection thereof. No such occupancy shall be construed as interfering with the provisions relating to time of completion, or as constituting an acceptance of the whole or any part of the Work. Any furniture or fittings so installed shall be placed in the Work at the risk of the Town except that the Contractor shall be liable for damages or losses to such furniture or fittings to the extent such damages or losses arise in whole or in part from the negligence or intentional misconduct of Contractor, Subcontractors, their agents and/or employees, or anyone for whose acts Contractor is responsible.

**18. Form for Sub-contract.**

The Contractor when subcontracting with sub-bidders filed pursuant to M.G.L. c. 149, s.44F shall use the form for sub-Contract in M.G.L. c. 149, s. 44F(4) (c). The Contractor shall not interpret paragraph 3 of the statutory form of Subcontract to require such sub-bidders to provide insurance with limits higher than the limits that are required by Article XIII of these General Conditions of the Contract assuming that the term "Contractor" refers to the sub-bidder and that the term "Contract Price" refers to the sub-bidder's price stated in paragraph 1 of the statutory form of Subcontract.

**19. Sales Tax Exemption and Other Taxes.**

All building materials and supplies as well as the rental charges for construction vehicles, equipment and machinery rented exclusively for use on the Site, or while being used exclusively for the transportation of materials for the Work are entitled to an exemption from sales taxes under M.G.L. c. 64H, s. 6(f). The Contractor shall take all action required to obtain the benefit of such sales tax exemption. The Contractor shall bear the cost of any sales taxes that Contractor incurs in connection with the Work and the Town shall not reimburse the Contractor for any such taxes. The exemption number assigned to the Contractor as an exempt purchaser shall be provided to the Contractor by the Town upon the written request of the Contractor.

**20. Final Cleaning.**

At the completion of the Work, the Contractor shall remove all waste materials, rubbish, tools, equipment, machinery and surplus materials, and professionally clean all sight-exposed surfaces so that the Work is clean and ready for occupancy. Subsequent to installation of Town furniture, telephones, and equipment, the Contractor shall provide such additional cleaning as may be necessary to remove any soil resulting from installation of such furniture, telephones and equipment.

**21. Maintenance Data.**

Subject to such additional requirements as may be provided in the Specifications, the Contractor shall compile 3 complete and identical binders of operating and maintenance data for the entire Work. The Contractor shall submit record maintenance data to the Designer for approval, shall submit approved maintenance data to the Town, and shall instruct and train the Town's personnel in proper inspection and maintenance procedures.

**22. Closeout Procedures.**

The Contractor shall take all actions and submit all items required for the issuance of the Certificate of Final Acceptance as specified in the Contract Documents.

**23. Risk of Loss.**

The Contractor shall bear all risk of loss to the Work during the term of the Contract until Final Acceptance. Nothing herein shall limit the Contractor's responsibilities under Article IX or XIV of these General Conditions of the Contract.

**24. LEED Requirements**

LEED Requirements shall be as provided in the Specifications.

**ARTICLE V: MATERIALS AND EQUIPMENT**

**1. Materials Generally.**

A. Unless otherwise specifically provided in the Contract Documents, the Contractor shall provide and pay for materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the

Work.

**B.** Materials and equipment to be installed as part of the Work (both or either of which are hereinafter referred to as "materials") shall be new, unused, of recent manufacture, assembled, and used in accordance with the best construction practices. The Contractor shall inform himself as to, and shall comply with, the provisions of M.G.L. c. 7, s. 23A, as amended, and shall abide by the same and all applicable rules, regulations and orders made thereunder in relation to the purchase of supplies and materials in the execution of the Work, including the provisions of M.G.L. c.7, s. 22, paragraph 17 which provides that there be *"a preference in the purchase of supplies and materials, other considerations being equal, in favor, first, of supplies and materials manufactured and sold within the Commonwealth, and, second, of supplies and materials manufactured and sold elsewhere within the United States."*

## **2. Shop Drawings, Product Data, and Samples.**

**A.** The Contractor shall furnish to the Designer all samples of the materials to be used in the execution of the Work as required by the Contract Documents. The Contractor shall furnish to the Designer in a timely manner all coordination Drawings, shop details, Shop Drawings, and setting diagrams which may be necessary for acquiring and installing materials. These shall be reviewed as required by the Designer. A minimum of four (4) copies shall be submitted for final approval, one of which shall be returned to the Contractor, one to the Resident Engineer, one to the Town and one filed with the Designer. The inspection and approval by the Designer of Shop Drawings, etc. shall be general and shall in no way relieve the Contractor from responsibility for proper fitting, coordinating, construction, and construction sequencing. The Contractor shall furnish to the Designer such information and vouchers relative to the Work, the materials therefor, and the persons employed thereon, as the Designer shall from time to time request.

**B.** Shop Drawings, Product Data, Samples, and similar submittals are not Contract Documents. The purpose of their submission is to demonstrate for those portions of the Work for which submittals are required the way the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents.

**C.** The Contractor shall review, approve, and submit to the Designer, Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Town or of separate contractors. Submittals made by the Contractor which are not required by the Contract Documents or which do not comply with the Contract Documents may be returned without action. The Contractor's attention is directed to the provisions of Section 4 of this Article V and to the Specifications.

**D.** The Contractor shall prepare and keep current for the Designer's approval a schedule of submittals which is coordinated with the Progress Schedule and allows the Designer reasonable time to review submittals.

**E.** The Contractor shall perform no portion of the Work requiring submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Designer. Such Work shall be in accordance with Approved submittals.

**F.** By submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements, and field construction criteria related thereto and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

**G.** The Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Designer's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Designer in writing of such deviation at the time of submittal and the Town has given explicit written approval to the specific deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar submittals by the Designer's or the Town's actions.

**H.** The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Designer on previous submittals.

**I.** Informational submittals upon which the Designer is not expected to take responsive action may be so identified in the Contract Documents.

**J.** When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, such certification must be stamped by a registered Massachusetts professional in the discipline required. The Designer shall be entitled to rely upon the accuracy and completeness of such calculations and certifications.

**K.** Materials furnished or used or employed under the Contract must be equal in quality to the samples furnished and be satisfactory to the Designer.

## **3. Tests.**

**A.** Any material to be used in the Work may be tested or inspected at any time by the Designer with the prior Approval of the Town and may be rejected if it fails to comply with specified tests. Unless otherwise provided in the Specifications, the Town shall pay for all testing of specified material. If the Contractor requests permission to use a material that was not specified, then the Contractor shall pay for such testing. The cost of testing of materials that fail the testing criteria shall be borne by the Contractor

**B.** The Contractor shall notify the Designer and the Town of the proposed sources of materials in time to permit all required testing and inspection before the material is needed for incorporation into the Work. The Contractor shall have no claim arising from Contractor's failure to designate the proposed source or to order the material in time for adequate testing and inspection. Necessary arrangements shall be made to permit the Designer to make factory, shop or other inspection of materials or equipment ordered for the Work in process of manufacture or fabrication, or in storage elsewhere than the Site.

## **4. "Or Equal" Submissions.**

**A.** Where products or materials are prescribed by manufacturer name, trade name, or catalog reference, the words "or Approved equal" shall be understood to follow. An item shall be considered equal to the item so named or described if in the opinion of the Town (a) it is at least equal in quality, durability, appearance, strength and design, (b) it performs at least equally the function imposed in the general design for the Work, and (c) it conforms substantially, even with deviations, to the detailed requirements for the items as indicated by the Specifications. Any structural or mechanical changes made necessary to accommodate products or materials substituted as an "or equal" shall be at the expense of the Contractor. "Approved equal" shall mean an item with respect to which the Town shall have issued a written statement to the Contractor to the effect that the item is, in the Town's opinion, equal within the meaning of this paragraph to that prescribed in the Contract Documents.

**B.** The Contractor shall be responsible for providing the Designer with any information and test results that the Designer reasonably requires to determine whether or not a material is equal to a material named or described in the Contract Documents.

**C.** Whenever the Contractor submits a material for approval as a substitute for a material named or described in the Contract Documents, such submission shall be made at least one hundred twenty (120) days prior to the date the materials will be used in the Work. In no event shall the Contractor maintain a claim for delays based upon the Designer's review of such substituted materials if the

Contractor has failed to comply with the one hundred twenty (120) day submission requirement.

D. The Contractor shall save the written calculations, pricing information, and other data that the Contractor used to calculate the General Bid (the "Bid Pricing Materials") for at least six years after the Town makes Final Payment under this Contract. No increase in the Contract Price shall be allowed for any material later found to have been improperly rejected as not being equal unless the Contractor can show persuasive evidence that the rejection increased the Contractor's costs over those provided for in the Bid Pricing Materials, net of all savings the Contractor obtained by substituting other "or-equal" items. Without limiting the foregoing, if the Town rejects a proposed substitution on the basis that the item is not equal and if after the Contractor complies with the appeal procedures required by law, and by the Contract Documents, the appropriate authority finds that the proposed substitution was equal, the Contract Price may be increased only to the extent that (1) the item that the Contract Documents specifically require costs more than the item later approved as equal, (2) the Bid Pricing Materials prove that the Contractor calculated its bid using the cost of the item later found as equal, (3) any increase is reduced by any cost that the Contractor would have incurred for structural or mechanical changes necessary to accommodate the substitute item, (4) the Contractor shall not be entitled to any adjustment for overhead and profit, (5) any increase must exceed the aggregate amount that the Contractor saved using products or materials that the Town approved as equal under this Contract. In calculating the Contractor's aggregate saving under the preceding clause (5), the Contractor shall provide the Town with the Bid Pricing Materials and a calculation based on the Bid Pricing Materials that compare the price (stated in the Bid Pricing Materials) of each item replaced with an "or equal" item, with the cost of the approved equal item, specifically describes all costs that Contractor would have incurred making structural or mechanical changes to include within the Work the item later found to have been improperly rejected and copies of all plans, specifications, shop Drawings, and other design documents that the Town deems necessary or desirable.

##### **5. Delivery and Storage of Materials; Inspection.**

A. Materials and equipment shall be progressively delivered to the Site so that there will be neither delay in the progress of the Work nor an undue accumulation of materials that are not to be used within a reasonable time and so that their security, quality, and fitness of the materials for the Work is preserved.

B. Materials stored off Site shall be insured and stored at the expense of the Contractor so as to guarantee the preservation of their security, quality and fitness for the Work. Without derogating from the Contractor's responsibilities in the previous sentence, when necessary to avoid deterioration or damage, material (on or off Site) shall be placed on wooden platforms or other hard clean surfaces and not on the ground and shall be properly protected.

C. Expenses for inspection of material by the Designer and/or the Town personnel including travel, quarters, and subsistence shall be borne by the Contractor requesting the inspection of material stored outside the Commonwealth of Massachusetts as part of the Contract Price. The Town shall not pay for the inspection of material stored outside the boundaries of Massachusetts except in extremely limited circumstances with the express written consent of the Town. If the Contractor requests an inspection of material stored outside the Commonwealth of Massachusetts, the Town will initially pay for all expenses of inspecting the material incurred by the Designer and/or Town's personnel including travel, quarters, and subsistence. The Town will then give Contractor an invoice for those costs and the Contractor shall submit a credit Change Order for the amount of those expenses.

D. Stored materials either at the Site or at some other location agreed upon in writing shall be so located as to facilitate prompt inspection and even though approved before storage, may again be inspected prior to their use in the Work.

E. All storage sites shall be restored to their original condition by the Contractor at the Contractor's expense.

F. The Contractor shall take charge of and be liable for any loss of or injury to the materials for his use delivered to or in the vicinity of the place where the Work is being done, whether furnished by the Owner or otherwise; the Contractor shall notify the Designer as soon as any such materials are so delivered, allow them to be examined by the Designer, and furnish workers to assist therewith.

##### **6. Defective, Damaged, or Deteriorated Materials and Rejection Thereof.**

The Designer may reject materials if the Designer reasonably determines that such materials do not conform to the Contract Documents in any manner, including but not limited to materials that have become damaged or deteriorated from improper storage whether or not such materials have previously been accepted. The Contractor at its own expense shall remove rejected materials from the Work. No rejected material, the defects of which have been subsequently corrected, shall be used except with the written permission of the Designer. Should the Contractor fail to remove rejected material within a reasonable time, the Designer and/or Town may, in addition to any other available remedies, remove and/or replace the rejected material, and to deduct the cost of such removal and/or replacement from any moneys due or to become due the Contractor. No extra time shall be allowed for completion of Work by reason of such rejection. The inspection of the Work shall not relieve the Contractor of any of its obligations herein prescribed, and any defective Work shall be corrected. Work not conforming to the Contract Documents may be rejected notwithstanding that such Work and materials have been previously overlooked or misjudged by the Designer and accepted for payment. If the Work or any part thereof shall be found defective at any time before Final Acceptance of the whole Work, the Contractor shall forthwith make good such defect in a manner satisfactory to the Designer. Nothing in the Contract shall be construed as vesting in the Contractor any property rights in the materials used after they have been attached or affixed to the Work or the Site; but all such materials shall upon being so attached or affixed become a property of the Town.

#### **ARTICLE VI: PROSECUTION AND PROGRESS**

##### **1. Beginning, Progress Schedule, and Completion of Work.**

A. The Contract time shall commence upon the date specified in the Notice to Proceed. The Contractor shall begin Work at the Site within ten days of said date unless otherwise ordered in writing by the Town.

B. Within ten days after the Work has commenced, the Contractor shall submit to the Designer and to the Town, a progress schedule for the term of the Contract as required by the Contract Documents, showing in detail its proposed progress for the construction of the various parts of the Work and the proposed times for receiving required materials. Upon Approval by the Town, said schedule shall constitute the Progress Schedule. The Contractor shall at the end of each month, or more often if required, furnish to the Designer and to the Town a schedule meeting the requirements of the Specifications showing the actual progress of the parts of the Work in comparison with the Progress Schedule.

C. Time is of the essence of this Contract. The Work shall be completed within the time specified in Article 2 of the Owner - Contractor Agreement. Should the Contractor require additional time to complete the Work, the Contractor shall document the reasons therefor and submit a written request for an extension of time within 20 days of the occurrence of the event alleged to be the cause of the delay, as provided in this Article and in Article VII of these General Conditions of the Contract. Failure to submit said written

request within the time required by the preceding sentence shall preclude the Contractor from subsequently claiming any time extension due to said delay.

D. If, in the opinion of the Designer or the Town, the Contractor fails to comply with the Progress Schedule, the Town may give the Contractor a notice specifying the time limits and performance standards that the Contractor is failing to meet whereupon (1) the Contractor shall, if the notice requires, discontinue all or any portion of the Work (which discontinuance shall neither terminate the Contract nor give the Contractor any claim for an increase in the Contract Price, damages, or an extension of any completion deadlines); or (2) at Contractor's sole cost increase the work force, equipment and plant, or any of them, employed on the whole or any part of the Work, to the extent required by such notice, and employ the same from day to day until the completion of the Work or such part thereof, or until the failure regarding the rate of progress, in the opinion of the Designer or the Town, shall have been sufficiently corrected.

E. If, in the opinion of the Town, the Contractor fails to comply with the Progress Schedule, and whether or not the Town shall have given the Contractor a notice described in D above, the Town may (but shall not be required to) give the Contractor notice of such failure and five days to cure the same. Unless the Contractor shall within that five days take all necessary steps to do so (including, if the Town requires, increasing its forces, equipment and plant) and continue to do so until in the opinion of the Town the failure is corrected, the Town may at the Contractor's expense and without terminating this Contract take exclusive or joint possession of all or a portion of the Site and employ and direct the labors of existing or such additional forces, equipment and plant as may in the Designer's or Town's opinion be necessary to insure the completion of the Work or such part thereof within the time specified in the Contract Documents or at the earliest possible date thereafter. The Town may exercise its rights under this Article at any time and from time to time without waiving any of its rights under this Contract, at law or in equity, including, without limitation, the right to deem this Contract terminated or to order the Contractor to discontinue the Work at any time thereafter. The Contractor shall continue to perform the remaining Work under this Contract even if the Town elects to have another contractor perform a portion of the Work under this Article.

F. The Town shall deduct the cost of any actions the Town takes under this Article from any amount then due or which might have become due to the Contractor under this Contract had the Contractor performed as required. On demand, the Contractor shall pay the Town any amount by which the cost of completing all or any portion of the Work exceeds the amount attributable to that Work under the Contract Documents. The Town's sole goal will be to complete the Work that it elects to complete within the time limits stated in the Contract or at the earliest possible date thereafter. Consequently, the Town shall have no obligation to obtain competitive bids or the lowest cost for completing the Work or any part thereof. The Town's election to complete all or part of the Work shall not release the Contractor from any liability for failure to complete the Work as the Contract Documents require, and shall not entitle the Contractor to a claim for an increase in the Contract Price or an extension of the time for completing the Work. If the cost that the Town incurs in completing all or any portion of the Work is less than the amount that the Contract Documents attribute to that Work, the Town will pay or credit the difference to the Contractor, less any other costs and expenses that the Town incurs, including the cost of supervision, and the Designer's and attorneys' fees and costs.

## **2. Failure to Complete Work on Time - Liquidated Damages.**

A. If liquidated damages are specified in the Owner - Contractor Agreement, the Town and the Contractor have determined that damages as a result of Contractor's failure to complete the Work to the point at which it qualifies for the issuance of a Certificate of Final Acceptance will be difficult or impracticable to ascertain. Accordingly, if the Work is not completed to such point by the date specified in this Contract, the Contractor shall pay to the Town the sum designated as liquidated damages in the Contract for each and every calendar day that the Contractor is in default in completing the Work to such point. Such moneys shall be paid as liquidated damages, not as a penalty, to cover losses and expenses to the Town resulting solely from the fact that the Work is not completed on time.

B. Similarly, if the Contract states that by a specified date a designated portion of the Work shall be prosecuted to the point at which it qualifies for the issuance of a Certificate of Use and Occupancy, and if such portion has not been prosecuted to such point by said date, the Contractor shall pay to the Town the sum designated in the Contract for each calendar day that the Contractor is in default in completing such portion of the Work to such point. Such moneys shall also be paid as liquidated damages not as a penalty, to cover losses and expenses to the Owner resulting solely from the fact that the Work is not completed on time.

C. The Town may recover such liquidated damages by deducting the amount thereof from any moneys due or that might become due the Contractor, and if such moneys shall be insufficient to cover the liquidated damages, then the Contractor or the Surety shall pay to the Town the amount due.

D. Permitting the Contractor to continue and finish the Work or any portion of it after the time fixed in the Contract for its completion shall not be deemed as a waiver of any of the Owner's rights hereunder, at law or in equity.

E. Liquidated damages or a portion thereof may be waived by the Town if the Contractor submits evidence satisfactory to the Town that the delay was caused solely by conditions beyond the control of the Contractor and that the Town has not suffered any damages as a result of said delay.

F. Failure by the Town to specify a sum as liquidated damages in the Owner - Contractor Agreement, or the insertion of "N/A" or "none" in the space provided therein for liquidated damages, shall not be deemed a waiver of the Town's right to recover actual damages arising from the Contractor's failure to complete the Work on time.

## **3. Delays; Statutory Provisions (M.G.L. c. 30, s. 39O).**

A. Notwithstanding any provision of this Contract to the contrary, except as otherwise provided by law as set forth in paragraph B below, the Contractor shall not be entitled to increase the Contract Price or to receive damages on account of any hindrances or delays, avoidable or unavoidable; but if any delay is caused in the opinion of the Designer by the Town, the Contractor shall be entitled to an extension of time. The length of the extension shall be sufficient in the opinion of the Designer for the Contractor to complete the Work. Although no delay shall increase the Contract Price, the Town may require that any change in the date by which the Contractor must complete all or any part of the Work be processed on a standard Change Order form.

B. If a suspension, delay, interruption or failure to act of the Town increases the cost of performance to any Subcontractor, that Subcontractor shall have the same rights against the Contractor with respect to such increase as the Contractor shall have against the Town by virtue of M.G.L. c. 30, s. 39O which is printed below, but nothing in said section shall alter any other rights which the Contractor or the subcontractor may have against each other.

M.G.L. c. 30, s. 39O:

*Section 39O. Every contract subject to the provisions of section thirty nine M of this chapter or subject to section forty four A of chapter one hundred forty nine shall contain the following provisions (a) and (b) in their entirety and, in the event a suspension, delay, interruption or failure to act of the awarding authority increases the cost of performance to any subcontractor, that subcontractor shall have the same rights against the general contractor for payment for an increase in the cost of his performance as*

provisions (a) and (b) give the general contractor against the awarding authority, but nothing in provisions (a) and (b) shall in any way change, modify or alter any other rights which the general contractor or the subcontractor may have against each other.

(a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions.

(b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

#### **4. Use and Occupancy Prior to Final Acceptance.**

A. The Contractor agrees to the use and occupancy of the Project or any portion thereof before Final Acceptance of the Work by the Town.

B. The Town will cooperate with the Contractor with respect to the completion of the Work by taking such reasonable steps as may be possible to avoid interference with the Contractor's Work provided that they do not interfere with the proper functioning of the facility.

C. The Contractor shall not be responsible for wear and tear or damage resulting solely from temporary occupancy.

D. Use and occupancy of any part of the Work prior to Final Acceptance by the Town shall not relieve the Contractor from maintaining the required payment and performance bonds and insurance (to the extent that insurance is required to be maintained after Substantial Completion) required by this Contract.

#### **5. Certificate of Use and Occupancy.**

A. When the Work, or portion thereof which the Town agrees to accept separately has reached the state of Substantial Completion as shown on an approved payment request, the Contractor shall develop, with the participation of the Designer and the Town, the Punch List identifying those items of unfinished or unacceptable Work that remain to be performed or corrected under the Contract.

B. Before the Work shall be deemed completed to the point where it is ready for the issuance of a Certificate of Use and Occupancy, the Contractor shall:

- (1) Provide Contractor's proposed Punch List containing a statement of the reason for each item listed thereon;
- (2) Advise the Town of proposed changes in insurance in accordance with the provisions of this Contract, and provide to the Town evidence of Contractor's Completed Operations insurance coverage to the extent required by the Contract Documents;
- (3) Execute and submit a notarized warranty on a form provided by the Town meeting the requirements of Article IX of these General Conditions of the Contract, to commence upon the date of the issuance of the Certificate of Use and Occupancy for the Work or the designated portion thereof, unless otherwise provided in the Certificate of Use and Occupancy;
- (4) Submit signed special warranties and warranties of longer than one year as required by the Contract Documents;
- (5) Submit signed maintenance agreements for all portions of the Work specified to receive maintenance after the issuance of the Certificate of Use and Occupancy;
- (6) Submit Operation and Maintenance Manuals and record drawings for review by the Designer and deliver the same to the Town with corrections required by the Designer;
- (7) Complete all items required to be completed to obtain a Certificate of Occupancy from the building department and similar releases which permit the Town full and unrestricted use of the areas claimed to be ready for occupancy;
- (8) Deliver specified maintenance stocks of materials, required spare parts, and all special tools furnished by manufacturers to persons designated by the Town and obtain written receipts for same;
- (9) Make final changes of lock cylinders or cores and advise the Town of the change of project security responsibility;
- (10) Complete start-up of equipment and systems and instruct Town personnel on proper operation and routine maintenance of all systems and equipment; obtain and submit to the Town that start-up and instruction have been completed;
- (11) Remove all remaining temporary facilities that are no longer needed, surplus materials, and debris; (the Contractor shall not remove construction offices and trailers without the prior Approval of the Town);
- (12) Submit final utility meter readings and similar information and advise the Town of the change of responsibility for utility charges and payments upon the issuance of the Certificate of Agency Use and Occupancy;
- (13) Complete final clean-up of all Work, restoration of damaged finishes, and replacement of all damaged and broken glass not listed on the Contractor's Punch List.
- (14) Complete such other items as may be called for in the Supplementary General Conditions, if any, or in the Specifications.

C. After completing the items specified in subsection B above, the Contractor shall make a written request for the Designer's inspection for a Certificate of Use and Occupancy in accordance with the Contract Documents. The Designer shall review the submittals and the Work and shall either 1) sign a Certificate of Use and Occupancy or 2) notify the Contractor of incomplete and/or incorrect Work that must be completed and corrected prior to the issuance of the Certificate of Use and Occupancy. The Designer shall notify the Contractor of any additions to the Punch List. In connection with the execution of the Certificate of Use and Occupancy the Designer shall assign dollar values to each item on the Punch List. Failure to include any incomplete or defective item on the Punch List shall not relieve the Contractor of the obligation to complete all Work in accordance with the Contract Documents.

#### **6. Final Acceptance of the Work.**

A. Prerequisites for Final Acceptance. After the issuance of a Certificate of Use and Occupancy for the entire Work, and after the Contractor has completed all of the Work required by this Contract, including Change Orders and Punch List Items, the Contractor shall submit the following completed items to the Town together with such additional items as may be specified in the Contract Documents:

- (1) A completed Final Application for Payment showing a final accounting of all changes in the Work, on the form provided by the Town.
- (2) Certification and satisfactory evidence that all taxes, fees, and similar obligations have been paid.

- (3) Consent of the Surety to Final Payment executed by applicable bonding companies.
- (4) Certified copy of the Punch List stating that the Contractor has completed or corrected every item listed.
- (5) Evidence of Contractor's continuing Completed Operations Insurance coverage to the extent required by the Contract Documents.
- (6) All final record Drawings and documents in the forms specified by the Contract Documents.
- (7) A notarized certification that all purchases made under the tax exemption certificate were legitimate and entitled to exemption.
- (8) Written certifications from the building department and the Designer to the effect that: a) the Work has been inspected for compliance with the Contract Documents and has satisfied the building department; b) all equipment and systems included in the Work have been tested in the presence of the Designer and are operational and satisfactory; c) the Work is completed and ready for final inspection.
- (9) Such other items as may be required by the Contract Documents.

**B. Reinspection; Final Acceptance.** After notification from the Contractor that all remaining contract exceptions, omissions and incompleteness have been completed (with the exception of Contractor's continuing warranty, insurance, indemnification, and such other obligations as are intended by the terms of the Contract Documents to extend beyond the date of Final Acceptance), the Town and the Designer shall inspect the Work to verify the completion of the same. If the Work is satisfactory, the Town shall prepare a Certificate of Final Acceptance or shall notify Contractor of items which remain to be completed prior to Final Acceptance.

### **7. Warranty Repair List and Inspection.**

Approximately 30 days prior to the expiration of the comprehensive one-year warranty period, the Contractor shall schedule an appointment with the Town for a re-inspection of the Work with the Town, and shall thereafter inspect the work at the time scheduled. Based on this inspection and on prior inspections, the Town shall issue a "Warranty Repair List" of items to be corrected by the Contractor. The Contractor shall make the repairs and/or replacements listed within 30 days of the issuance of the Warranty Repair List unless otherwise agreed by the Town in writing.

## **ARTICLE VII: CHANGES IN THE WORK**

### **1. Change Orders Generally.**

**A.** No changes in the Work shall be made in absence of a Change Order defined in Article I of these General Conditions of the Contract, directing the Contractor to perform such changes. A request for a change in the provisions of this Contract may be submitted to the Town by the Contractor, Designer, Project Manager, or Resident Engineer. The request must be made in writing and in accordance with the provisions of this Contract, Laws, and the procedures of the Town. The Contractor shall comply with the provisions of Massachusetts General Laws Chapter 30, Section 39I and the Town shall not be obligated to pay for any changes in the work not approved in writing in accordance with said Section.

**B.** A Change Order may be issued by the Town for changes in the Work within the scope of the Contract, including but not limited to, changes in: (1) the Plans and Specifications; (2) the method or manner of performance of the Work; (3) the Owner-furnished facilities, equipment, materials, services or Site; (4) the schedule for performance of the Work.

**C.** The Contractor shall immediately perform any Change Order work that is ordered by the Town.

**D.** Whenever a Change Order is issued and said Change Order will cause a change in the Contractor's cost, the Contractor or the Town may request an equitable adjustment in the Contract Price. A request for such an adjustment shall be in writing and shall be submitted by the party making such claim to the other party before commencement of the pertinent work or as soon thereafter as possible.

**E.** The Town and the Contractor shall negotiate in good faith an agreement on an equitable adjustment in the Contract Price, and/or time if appropriate, before commencement of the pertinent work or as soon thereafter as is possible. In the absence of an agreement for an equitable adjustment, the Town shall unilaterally determine the costs attributable to the change and provide the Contractor with a written notice to that effect.

**F.** During the negotiation of an equitable adjustment in the Contract Price, the Contractor shall, if requested, provide the Town with all cost and pricing data used by it in computing the amount of the equitable adjustment, and the Contractor shall certify that the pricing data used was accurate, complete and current. If the Town subsequently determines that the data submitted by the Contractor was incomplete, incorrect or not current, the Town may exclude such data from consideration under the equitable adjustment request.

### **2. Methods of Computing Equitable Adjustments.**

**A.** Equitable adjustments in the Contract Price shall be determined according to one of the following methods, or a combination thereof, as determined by the Town:

- (1) fixed price basis, provided that the fixed price shall be inclusive of items listed in (3)(a) through (d) below and shall be computed in accordance with those provisions;
- (2) estimated lump sum basis to be adjusted in accordance with Contract unit prices or other agreed upon unit prices, provided that the unit prices shall be inclusive of all costs related to such equitable adjustment;
- (3) time and materials basis to be subsequently adjusted on the basis of actual costs (but subject to a predetermined "not to exceed limit") calculated as follows:
  - (a) the direct cost (or credit) for labor at the prevailing wage rates established for this Contract pursuant to M.G.L. c. 149, s. 26-27H, and the direct cost for material and use of equipment;
  - (b) plus (or minus) the cost of Workmen's Compensation Insurance, Liability Insurance, Federal Social Security and Massachusetts Unemployment Compensation;
  - (c) plus an allowance equal to 10% of the amount of (a) above for overhead, superintendence, fee and profit. In the case of Item 1 work, which is the work of the Contractor and all his non-filed Subcontractors, said 15% allowance shall be paid to the Contractor and the Contractor and said non-filed Subcontractors shall agree upon the distribution of this amount as a matter of contract between them. In the case of Item 2 work, which is work performed by a Subcontractor filed pursuant to M.G.L. c. 149, s. 44F, said 15% allowance shall be paid to the filed Subcontractor, it being understood that this provision does not apply to other Subcontractors including sub-Subcontractors listed under paragraph E of the form for sub-Bid;
  - (d) plus, for work performed by a Subcontractor filed pursuant to M.G.L. c. 149, s. 44F, an additional allowance equal to 7% of the sum of (a) through (c) above as full compensation to the Contractor for processing forms and assuming full responsibility

for the faithful performance of such work by said filed Subcontractor(s), provided that there shall be no additional allowance to a General Contractor if the General Contractor self performs the subcontract work pursuant to M.G.L. c. 149, s. 44F(5); (e) plus (or minus) the actual direct premium cost of payment and performance bonds required of CM and Trade Subcontractors for this Contract.

**B.** If the net change is an addition to the Contract Price, it shall include the Contractor's overhead, superintendence and profit. For any change that does not include labor performed or materials installed in the project, there will be no markup for the Contractor's or Subcontractor's overhead, superintendence, and profit, even though there may be a net increase in the Contract Price. Charges for small tools known as "tools of the trade" are not to be computed in the amount of any change in the Contract Price.

**C.** Statutory Contract adjustments made under the provisions of M.G.L. c. 149, s.44F shall not be considered Change Orders and shall not entitle the Contractor to any adjustments for overhead, profit, and superintendence, although the Town may require that such Contract adjustments be processed on standard Change Order and equitable adjustment forms.

### **3. Work Performed Under Protest.**

The Contractor agrees to perform all Work as directed by the Town, and if the Project Manager determines that certain Work that the Contractor believes to be or to warrant a Change Order under this Article does not represent a change in the Work, the Contractor shall perform said Work. The Contractor shall be deemed to have concurred with the Project Manager's determination as aforesaid unless the Contractor shall perform Work under protest in compliance with the following sub-paragraphs (1) and (2) below:

(1) If the Contractor claims compensation for a change in the Work that is not deemed by the Project Manager to be a change or to warrant additional compensation as claimed by the Contractor, the Contractor shall on or before the first working day following the commencement of any such work or the sustaining of any such damage submit to the Designer, Resident Engineer and the Town a written statement of the nature of such work or claim. The Contractor shall not be entitled to additional compensation for any work performed or damage sustained for which written notice is not given within the time limit specified in the preceding sentence, even though similar in character to work or damage with respect to which notice is timely given.

(2) On or before the second working day after the commencement of such work or the sustaining of such damage, and daily

thereafter, the Contractor shall file to the extent possible with the Resident Engineer, the Designer, and the Town, itemized

statements of the details and costs of such work performed or damage sustained. If the Contractor shall fail to make such

statements to the extent possible, then the Contractor shall not be entitled to additional compensation for any such work or

damages.

### **4. False Claims, Statutory Provisions Regarding Changes.**

**A. Criminal Penalties:** The Contractor's attention is directed to M.G.L. c. 30, s. 39I which provides criminal penalties for unauthorized deviations from the Plans and Specifications, and to M.G.L. c. 30, s. 39J and M.G.L. c. 7, s. 42E-42I. The Contractor's attention is also directed to M.G.L. 266, s. 67B which provides criminal penalties for false claims by Contractor under this Contract: *"Whoever makes or presents to any employee, department, agency or public instrumentality of the commonwealth, or of any political subdivision thereof, any claim upon or against any department, agency, or public instrumentality of the commonwealth, or any political subdivision thereof, knowing such claim to be false, fictitious, or fraudulent, shall be punished by a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than five years, or in the house of correction for not more than two and one-half years, or both."*

**B.** The Contractor's attention is directed to M.G.L. ch. 30, s.39N, which provides for differing site conditions, which provides as follows:

**Section 39N. Construction contracts; equitable adjustment in contract price for differing subsurface or latent physical conditions.**

[Text of section applicable as provided by 2009, 30, Secs. 15 and 46.]

*Section 39N. Every contract subject to section forty four A of chapter one hundred and forty nine or subject to section thirty nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:*

*If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly.*

**C.** The Contractor's attention is directed to M.G.L. ch. 30, s.390 with regard to timely decisions by the Town, which provides as follows:

**Section 39O. Contracts for construction and materials; suspension, delay or interruption due to order of awarding authority; adjustment in contract price; written claim.**

*Every contract subject to the provisions of section thirty nine M of this chapter or subject to section forty four A of chapter one hundred forty nine shall contain the following provisions (a) and (b) in their entirety and, in the event a suspension, delay, interruption or failure to act of the awarding authority increases the cost of performance to any subcontractor, that subcontractor*

shall have the same rights against the general contractor for payment for an increase in the cost of his performance as provisions (a) and (b) give the general contractor against the awarding authority, but nothing in provisions (a) and (b) shall in any way change, modify or alter any other rights which the general contractor or the subcontractor may have against each other.

(a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to :any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions.

(b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

## ARTICLE VIII: PAYMENT PROVISIONS

### 1. Schedule of Values.

Before the first application for payment the Contractor shall submit to the Designer and the Town a schedule of values allocated to various portions of the Work in sufficient detail to reflect the various major components of each trade (with filed Subcontractors as well as MBE/WBE noted), including quantities when requested, aggregating the total Contract Price and divided so as to facilitate payments for work under each section of the Specifications. The schedule shall be prepared in such form and supported by such data to substantiate its accuracy as the Designer or the Town may require. Each item in the schedule shall include its proper share of overhead and profit. When Approved by the Designer and the Town, it shall constitute the Schedule of Values and shall be used only as a basis for the Contractor's requests for payments.

### 2. Payment Liabilities of Contractor.

A. The Contractor shall pay to the Town all expenses, losses and damages, as determined by the Town or the Designer, incurred in consequence of any default, defect, omission or mistake of the Contractor or his employees or Subcontractors or the making good thereof.

B. If the Work (or a portion thereof) is not completed to Substantial Completion and the Contractor has not satisfied the requirements for the issuance of a Certificate of Use and Occupancy by the date specified in Article 2 of the Owner - Contractor Agreement, the Contractor shall pay to the Town liquidated damages as provided in Article VI, Section 2 of these General Conditions of the Contract.

### 3. Retention of Moneys by Town.

A. The Town may keep any moneys which would otherwise be payable at any time hereunder, and apply the same, or so much as may be necessary therefor, to (1) the Town's expenditures for the Contractor's account, (2) to secure the Town's remedies against the Contractor for the Contractor's breach of its obligations under this Contract or the breach of any person performing any part of the Work and (3) the payment of any expenses, losses or damages incurred by the Town as a result of the failure of the Contractor to perform its obligations hereunder. The Town may retain, until all claims are settled, such moneys as the Town estimates to be the fair value of the Town's claims against the Contractor, and of all claims for labor performed or furnished and for materials used or employed in or in connection with the Work and for the rental of vehicles, appliances and equipment employed and for the employment of substitute contractors and labor in connection with the Work filed in accordance with M.G.L. c. 30, s. 39A and s. 39F. The Town may make such settlements and apply thereto any moneys retained under this Contract.

B. The Contractor shall each week examine all claims so filed, and if the same are in any respect incorrect or do not correctly show the amount due from the Contractor to the claimant for such labor and materials, the Contractor shall forthwith file with the Town a separate written statement of all inaccuracies in each claim and of the correct amount due from the Contractor to each claimant therefor, and shall immediately file a statement of all payments thereafter made to such claimants. Each such statement shall be sworn to and contain a detailed breakdown required by M.G.L. c. 30 s. 39F (d) and (e). Unless such statements are so filed by the Contractor the amount shown by the claims filed shall at the option of the Town be conclusively deemed to be the accurate amount due from the Contractor therefor in all accounting with the Town. If the moneys retained under this Contract are insufficient to pay the sums found by the Town to be due under the claims for labor and materials filed as aforesaid, the Town may, at its discretion, pay the same, and the Contractor shall repay to the Town all sums paid out. The Town may also at its discretion use any moneys retained, due or to become due under this Contract, for the purpose of paying for both labor and materials used or employed in the Work for which claims have not been filed with the Town.

C. No moneys retained under the provisions of this Article shall be held to be statutory security for the payment of claims filed in accordance with the provisions of M.G.L. c. 149, s. 29, as amended, for which security is provided by bond.

### 4. Applications for Payment.

A. The Contractor shall, once in each month on the day of the month corresponding to the day of the month specified in the Notice to Proceed referenced in Article 2 of the Owner - Contractor Agreement, on forms provided and in the manner prescribed by the Town, submit to the Town a statement showing the total amount of Work done to the time of such estimate and the value thereof as approved by the Resident Engineer and the Designer. It shall be the sole responsibility of the Contractor to deliver or cause to be delivered to the Resident Engineer (the "designee" as provided by M.G.L. c. 30, s. 39K), said periodic estimate in proper form, approved as provided above and arithmetically correct. All periodic estimates shall contain such certifications and other evidence supporting the Contractor's right to payment as the Town may require, including without limitation, lien waivers and other evidence, on such forms as the Town may require, establishing that title to the equipment or materials is unencumbered and has been transferred to the Town. If there is no Resident Engineer assigned to the Contract, the Designer shall be the designee. If there is neither a Resident Engineer nor a Designer the designee shall be a person designated by the Town at the project field office or alternatively the home

office of the Town. The Contractor shall include in such periodic estimate only such materials as are incorporated in the Work, except as provided in paragraph C below. The Town shall retain five percent of such estimated value as part security for the completion of the Work and shall pay to the Contractor while carrying on the Work the balance not retained as aforesaid, subject to the Approval of the Town after deducting therefrom all previous payments and all sums to be kept under the provisions of this Contract.

**B.** Each periodic estimate shall constitute the Contractor's representation that (1) the payment then requested to be disbursed has been incurred by the Contractor on account of the Work and is justly due to Subcontractors or, to the Contractor in the case of other Work performed by the Contractor on account thereof, (2) the materials, supplies and equipment for which Application for Payment is being submitted have been installed or incorporated into the Work or have been stored at the Site or at such off Site storage locations as the Town shall have Approved, (3) the materials, supplies and equipment are insured in accordance with the provisions of this Contract, (4) the materials, supplies and equipment are owned by the Town and are not subject to any liens or encumbrances, (5) the Work which is the subject of such periodic estimate has been performed in accordance with the Contract Documents and (6) that all due and payable bills with respect to the Work have been paid to date or shall be paid from the proceeds of such periodic estimate.

**C.** The Contractor may include in a periodic estimate the value of materials or equipment delivered at the Site (or at some location agreed to in writing) only upon delivery to the Town of: (1) an acceptable transfer of title on the form provided by the Town; (2) written certification by the Contractor (or applicable subcontractor) on the form provided by the Town that the Contractor (or the Subcontractor which executed the transfer of title) is the lawful owner and that the materials or equipment are free from all encumbrances, accompanied by receipted invoices or other acceptable proof of prior payment for such materials; (3) a stored materials insurance binder that covers the materials for which payment is requested, that names the Town as an insured party should the stored materials be subjected to any casualty, loss, or theft prior to their inclusion in the Work. The material(s) or equipment must, in the judgment of the Designer (1) meet the requirements of the Contract, including prior shop drawing, product data, and sample approval, (2) be ready for use, and (3) be properly stored by the Contractor and be adequately protected until incorporated into the Work. See also Article V.5.C of these General Conditions of the Contract concerning the cost of inspections.

**D.** The Town may make changes in any periodic estimate submitted by the Contractor in accordance with M.G.L. c.30, s. 39K (see below) and the payment due shall be computed in accordance with the changes so made. The provisions of said section 39K shall govern payments on which the Town has made changes.

**E.** No certificate for payment and no progress payment shall constitute acceptance of Work that is not in accordance with the Contract Documents.

**F.** The Contractor and all Subcontractors furnishing labor on this Contract agree to furnish certified payroll reports if requested to do so, at no additional expense to the Town. The Town may at all reasonable times audit such reports.

#### **5. Statutory Provisions Regarding Payments.**

The Contractor's attention is directed to the following statutory provisions, which are attached hereto and incorporated herein by reference:

- A. Periodic Payments (M.G.L. c. 30, §39K)
- B. Payment of Subcontractors (M.G.L. c. 30, §39F)
- C. Contracts for Public Works (M.G.L. c. 30, §39G)

#### **6. Final Payment; Release of Claims by Contractor.**

Upon Final Acceptance of the Work the Contractor shall be entitled to payment of the balance of the Contract Price. Final payment shall be as provided in this Article. The Contractor agrees to execute a Certificate of Final Inspection, Release (with Contractor's own exceptions listed thereon) and Acceptance as a condition precedent to Final Payment. The acceptance by the Contractor of the Final Payment made as aforesaid, or the execution of the Certificate of Final Acceptance by the Contractor, shall constitute a release of the Town, the Designer, and every member and agent of any of them, from all claims of and liability to the Contractor for anything done or furnished for or relating to the Work, or for any act or neglect of the Town, the Designer, or of any person relating to or affecting the Work, except the claim against the Town or the Designer for the remainder, if any there be, of the amounts set forth by the Contractor in the Certificate of Final Inspection, Release and Acceptance. Final Acceptance shall not relieve Contractor of the requirements of Articles IX, XIII, XIV, and XV of these General Conditions of the Contract, or of other provisions of this Contract, to the extent that the same are intended to survive Final Acceptance.

### **ARTICLE IX. GUARANTEES AND WARRANTIES**

#### **1. General Warranty.**

If at any time during the period of one (1) year from the date of the issuance of the Certificate of Use and Occupancy by the Town or the date of Final Acceptance, whichever occurs first, any part of such Work shall in the reasonable opinion of the Town be defective or require replacing or repairing, or damage to other property of the Town is caused by any defect in the Work, the Town shall notify the Contractor in writing to make the required repairs or replacements and repair such damage. If the Contractor shall neglect to commence such repairs or replacements to the satisfaction to the Town within ten (10) days from the date of the giving of such notice, then the Town may employ other persons to make the same. The Contractor agrees, upon demand, to pay to the Town all amounts which the Town expends for such repairs, replacements, and/or damages. During this one-year guarantee period any corrective work shall be performed under all the applicable terms of this Contract, and if Change Orders are issued in accordance with the

terms of this Contract, the Contractor shall be entitled to compensation for special insurance, as required. This one-year guarantee shall not limit any express guaranty or warranty provided elsewhere in the Contract.

#### **2. Special Guarantees and Warranties.**

**A.** The Contractor's obligation to correct Work as set forth in paragraph 1 above is in addition to, and not in substitution of, such guarantees or warranties as may be required in the various sections of the Specifications.

**B.** Guarantees and warranties required in the various sections of the Specifications must be delivered to the Designer before final payment to the Contractor may be made, or in the case of guarantees and warranties which originate with a subcontractor's section of the Work, before final payment for the amount of that subtrade or for the phase of Work to which the guarantee or warranty relates.

**C.** The failure to deliver a required guarantee or warranty shall constitute a failure to fully complete the Work in accordance with the Contract Documents.

**ARTICLE X: MISCELLANEOUS LEGAL REQUIREMENTS.****1. Contractor to be Informed.**

The Contractor shall inform itself of all existing and future Laws in any manner affecting those engaged or employed in the Work, or the materials used or employed in the Work, or in any way affecting the conduct of the Work, and of all orders and decrees of bodies or tribunals having any applicable jurisdiction or authority over the Work.

**2. Compliance with all Laws.**

The Contractor shall cause all persons employed in the performance of the Work to comply with, all existing and future Laws, including but not limited to those set forth below:

**A. Corporate Disclosures.** The Contractor, if a foreign corporation, shall comply with M.G.L. c. 181, s.3 and s. 5, and M.G.L. c. 30, s.39L.

**A ½. Workforce Certification: Certification of Compliance with Workforce Related Legal Requirements.** The Contractor shall comply with the following legal requirements for any and all employees to be employed in the Project who are required to be listed in the certified payroll reports for the Project: 1) Federal Department of Homeland Security Requirements in hiring such employees including, but not limited to, the faithful completion of the Federal Department of Homeland Security Form I-9 process by CM; 2) proper classification of individuals employed on the project; 3) all laws concerning workers' compensation insurance coverage, unemployment insurance, social security taxes, and income taxes; and 4) all laws concerning hospitalization and medical benefits that meet the minimum requirements of the Connector Board established in Chapter 176Q of the General Laws. The Contractor shall execute a Workforce Certification form with the execution of its contract. The Contractor shall require each Subcontractor and sub subcontractor working on the Project to execute and provide to Contractor such Workforce Certification form with the execution of each subcontract, and Contractor shall immediately provide a copy to the Town. Contractor acknowledges that with the weekly workforce reports that must be submitted on a weekly basis, in the form and format required by the Town, including but not limited to, by electronic reporting, Contractor and all subcontractors on the project are required to certify that the Form I-9 process was faithfully completed and that all other legal requirements related to its workforce referenced above were followed for all employees listed on each certified payroll report when submitted. The Contractor and all subcontractors must: comply with the legal requirements of this section; must not knowingly use undocumented workers in connection with the performance of this contract; pursuant to federal requirements must verify the immigration status of all workers assigned to the contract without engaging in unlawful discrimination; and must not knowingly or recklessly alter, falsify, or accept altered or falsified documents from any such worker. Breach of any of the terms of the Workforce Certification legal requirements during the period of the Contract may be regarded as a material breach, subjecting the Contractor and subcontractors to sanctions, including but not limited to monetary penalties, withholding of payments, contract suspension or termination. Contractor must require each subcontractor working on the Project to execute and provide to Contractor a Workforce Certification form with the execution of each subcontract, and Contractor must require each subcontractor to forward a copy of each such Workforce Certification to the Contractor for filing with the Town.

**B. Veterans Preference.** In the employment of mechanics and apprentices, teamsters, chauffeurs, and laborers in the performance of Work in the Commonwealth, preference shall first be given to citizens of the Commonwealth who have been residents of the Commonwealth for at least six months at the commencement of their employment and who are veterans as defined in M.G.L. c.4, s.7 (34), and who are qualified to perform the work to which the employment relates and, within such preference, preference shall be given to service-disabled veterans; and secondly, to citizens of the Commonwealth generally who have been residents of the Commonwealth for at least six months at the commencement of their employment, and if they cannot be obtained in sufficient numbers, then to citizens of the United States.

**C. Prevailing Wages.** The Contractor shall comply with M.G.L. c. 149, s. 26-27H (Prevailing Wage Law). The prevailing wage schedule is found in the Instructions to Bidders, listing the prevailing minimum wage rates that must be paid to all workers employed in the Work. The Town is not responsible for any errors, omissions, or misprints in the said schedule. Such Schedule shall continue to be the minimum rate wages payable to workers employed in the Work throughout the term of this Contract, subject to the exceptions provided in M.G.L.c.149, s. 26-27H. The Contractor shall not have any claim for extra compensation from the Town if the actual wages paid to workers employed in the Work exceeds the rates listed on the schedule or as otherwise provided by law. The Contractor shall cause a copy of said Schedule to be kept in a conspicuous place at the Site during the term of the Contract. If reserve police officers are employed by the Contractor, they shall be paid the prevailing wage of regular police officers. (See M.G.L.c.149, s.34B). Mass General Laws c. 149, §27, as amended on August 8, 2008 requires annual updates to prevailing wage schedules for all public construction projects lasting longer than one year. The Contractor is required to obtain the wage schedules from awarding authorities, and to pay no less than these rates to covered workers. The Contractor and all Subcontractors are required to anticipate such annual updated prevailing wage schedules and neither the Contractor nor any Subcontractors shall be entitled to claim additional compensation for base contract work due to updated prevailing wage schedules.

**D. Payroll Records and Statement of Compliance.** The Contractor shall comply and shall cause its Subcontractors to comply with Massachusetts General Law c. 149, s. 27B, which requires that a true and accurate record be kept of all persons employed on a project for which the prevailing wage rates have been provided. The Contractor and all Subcontractors shall keep these records and preserve them for a period of three years from the date of completion of the Contract. Such records shall be open to inspection by any authorized representative of the Town at any reasonable time, and as often as may be necessary. The Contractor shall, and shall cause its subcontractors to, submit weekly copies of their weekly payroll records as provided by the Prevailing Wage Law. In addition to any other submission required by the Prevailing Wage Law, the Contractor shall submit weekly payrolls to the Town with the information described in M.G.L. c. 149, s. 27B. In addition, the Contractor and each Subcontractor shall furnish to the Executive Department of Labor within fifteen days after completion of its portion of the Work a signed statement in the form required by the Town.

**E. Vehicle operators.** If the Director of the Department of Labor and Workforce Development has established a Schedule of wage rates to be paid to the operators of trucks, vehicles or equipment for the Work, the Contractor shall be obligated to pay such operators at least the minimum wage rate contained on such Schedule. (See M.G.L. c.149, s.26-27H).

**F. Eight Hour Day.** The Contractor shall comply with M.G.L. c. 149, s. 30, 34 and 34A which provide that no laborer, workman, mechanic, foreman or inspector working within the Commonwealth in the employ of the Contractor, subcontractor or other

person doing or contracting to do the whole or part of the Work shall be required or permitted to work more than eight hours in any one day or more than forty-eight hours in any one week, or more than six days in any one week, except in cases of extraordinary emergency.

**G. Timely Payment of Wages.** The Contractor shall comply with, and shall cause its Subcontractors to comply with M.G.L. c. 149, s. 148 which requires the weekly or biweekly payment of employees within six days of the end of the pay period during which wages were earned if employed for five or six days of a calendar week, and within other periods of time under certain circumstances as set forth therein.

**H. Lodging, etc.** The Contractor shall comply with, and shall cause its Subcontractors to comply with, M.G.L. c. 149, s. 25 which provides that every employee under this Contract shall lodge, board and trade where and with whom he elects, and neither the Contractor nor his agents or employees shall, either directly or indirectly, require as a condition of the employment of any person that the employee shall lodge, board or trade at a particular place or with a particular person.

**I. Truck Rates.** The use by the Contractor of trucks or other motor vehicles hired from either common or contract motor carriers in the course of performance of this Contract is subject to such minimum rates and charges, and rules and regulations as may from time to time be promulgated by the Department of Public Utilities of the Commonwealth of Massachusetts or other agency of the State of Federal government which may be authorized by law to set rates or otherwise regulate the use of such vehicles. The Contractor expressly assumes the risk of any additional expense that may arise by reason of any change in such minimum rates and charges, and rules and regulations, and shall be entitled to no additional compensation or reimbursement by reason thereof.

**J. Access to Contractor's Records.** The Town shall have the right at reasonable times and upon reasonable notice to examine the books, records and other compilations of data of the Contractor which pertain to the performance and requirements of this Contract.

## ARTICLE XI: CONTRACTOR'S ACCOUNTING METHOD REQUIREMENTS (M.G.L. c. 30, s. 39R)

### 1. Definitions.

The words defined herein shall have the meaning stated below whenever they appear in this Article XI:

--"Contractor" means any person, corporation, partnership, joint venture, sole proprietorship, or other entity awarded a Contract pursuant to M.G.L. c. 30, s. 39M, M.G.L. c. 149, s. 44A-J, and M.G.L. c. 7, s. 30B-P.

--"Contract" means any Contract awarded or executed pursuant to M.G.L. c. 30, s. 39M, M.G.L. c. 149, s.44A-J, and M.G.L. c. 7, s. 30B-P.

-- "Independent Certified Public Accountant" means a person duly registered in good standing and entitled to practice as a certified public accountant under the laws of the place of his/her residence or principal office and who is in fact independent. In determining whether an accountant is independent with aspect to a particular person, appropriate consideration should be given to all relationships between the accountant and that person or any affiliate thereof. Determination of an accountant's independence shall not be confined to the relationships existing in connection with the filing of reports with the Town.

-- "Records" means books of original entry, accounts, checks, bank statements and all other banking documents, correspondence, memoranda, invoices, computer printouts, tapes, discs, papers and other documents or transcribed information of any type, whether expressed in ordinary or machine language.

-- "Audit", when used in regard to financial statements, means an examination of records by an independent certified public accountant in accordance with generally accepted accounting principles and auditing standards for the purpose of expressing a certified opinion thereon, or, in the alternative, a qualified opinion or a declination to express an opinion for stated reasons. -- "Accountant's Report", when used in regard to financial statements, means a document in which an independent certified public accountant indicates the scope of the audit which has been made and sets forth his opinion regarding the financial statements taken as a whole with a listing of noted exceptions and qualifications, or an assertion to the effect that an overall opinion cannot be expressed. When an overall opinion cannot be expressed the reason therefor shall be stated. An accountant's report shall include as part thereof a signed statement by the responsible corporate officer attesting that management has fully disclosed all material facts to the independent certified public accountant, and that the audited financial statement is a true and complete statement of the financial condition of the contractor.

"Management," when used herein, means the chief executive officers, partners, principals or other person or persons primarily responsible for the financial and operational policies and practices of the Contractor.

Accounting terms, unless otherwise defined herein, shall have a meaning in accordance with generally accepted accounting principles and auditing standards.

### 2. Record Keeping.

**A.** The Contractor shall make, and keep for at least six years after final payment, books, records, and accounts that in reasonable detail accurately and fairly reflect the transactions and dispositions of the Contractor.

**B.** Until the expiration of six years after final payment, the Inspector General, the Commissioner of Capital Asset Management and Maintenance, and Town shall have the right to examine any books, documents, papers or records of the Contractor and Subcontractors that directly pertain to, and involve transactions relating to the Contractor and Subcontractors.

**C.** The Contractor shall describe any change in the method of maintaining records or recording transactions which materially affects any statements filed with the Town including the date of the change and reasons therefor, and shall accompany said description with a letter from the Contractor's independent certified public accountant approving or otherwise commenting on the changes.

**D.** The Contractor represents that it has, prior to the execution of the Contract, filed a statement of management on internal accounting controls as set forth in Section 3 below.

**E.** The Contractor represents that it has, prior to the execution of the Contract, filed an audited financial statement for the most recent completed fiscal year as set forth in section 4 below and will continue to file such statement annually during the term of the Contract.

### 3. Statement of Management Controls.

**A.** The Contractor shall file with the Town a statement of management as to whether the system of internal accounting controls of the Contractor and its subsidiaries reasonably assures that:

(1) transactions are executed in accordance with management's general and specific authorization;

(2) transactions are recorded as necessary to: (a) to permit preparation of financial statements in conformity with generally accepted accounting principles, and (b) to maintain accountability for assets;

- (3) access to assets is permitted only in accordance with management's general or specific authorization; and  
 (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action was taken with respect to any difference.

B. The Contractor shall file with the Town a statement prepared and signed by an independent certified public accountant, stating that the accountant has examined the statement of management on internal accounting controls, and expressing an opinion as to:

- (1) whether the representations of management in response to subparagraph 3 above are consistent with the results of management's evaluation of the system of internal accounting controls; and  
 (2) whether such representations of management are reasonable with respect to transactions and assets in amounts which would be material when measured in relation to the applicant's financial statement.

#### **4. Annual Financial Statement.**

A. Every Contractor awarded a contract shall annually file with DCAMM and the Town during the term of the Contract a financial statement prepared by an independent certified public accountant on the basis of an audit by such accountant. The final statement filed shall include the date of final payment. All statements shall be accompanied by an accountant's report.

B. The office of Inspector General, the Town and DCAMM shall have the right to enforce the provisions of this Article. A Contractor's failure to satisfy any of the requirements of this section may be grounds for debarment pursuant to M.G.L. c. 149, s. 44C.

#### **5. Bid Pricing Materials.**

The Contractor shall save the written calculations, pricing information, and other data that the Contractor used to calculate the bid that induced the Town to enter into this Contract (the "Bid Pricing Materials") for at least six years after the Town makes final payment under this Contract.

### **ARTICLE XII: GOALS FOR PARTICIPATION BY MINORITY BUSINESS ENTERPRISES AND WOMEN BUSINESS ENTERPRISES**

The Specifications include the provisions of the Town's program relating to Goals for Participation by Minority Business Enterprises and Women Business Enterprises if any are applicable to this Contract and are incorporated herein by reference.

### **ARTICLE XIII: INSURANCE REQUIREMENTS**

#### **1. Insurance Generally.**

A. The Contractor shall purchase and maintain insurance of the type and limits listed in this Article with respect to the operations as well as the completed operations of this Contract. This insurance shall be provided at the Contractor's expense and shall be in full force and effect for the full term of the Contract or for such longer period as this Article requires.

B. All policies shall be written on an occurrence basis and be issued by companies lawfully authorized to write that type of insurance under the laws of the Commonwealth with a financial strength rating of A- or better as assigned by AM Best Company, or an equivalent rating assigned by a similar rating agency acceptable to the Town, or otherwise acceptable to the Town.

C. Contractor shall submit the original of each certificate of insurance, acceptable to the Town, simultaneously with the execution of this Contract. Certificates shall show each type of insurance, insurance company, policy number, amount of insurance, deductibles and/or self-insured retentions, and policy effective and expiration dates. Certificates shall show the Town and anyone else the Town requests as an additional insured as to all policies of liability insurance. Certificates shall specifically note the following:

- that the general liability automobile liability, umbrella liability and pollution liability policies include the Town as an additional insured;
- that all policies include the coverage and endorsements in accordance with the terms and conditions as required by this construction contract;
- that the Builders' Risk or Installation Floater is on an all risk basis including earthquake and flood, and includes the Town as a named insured or loss payee as their interests may appear; and
- that none of the coverages shall be cancelled, terminated, or materially modified unless and until 30 days prior notice is given in writing to the Town.

Properly executed certificates and endorsements signifying adequate coverage in effect for the duration of the Contract must be submitted to the Town prior to the execution of this Agreement by the Town with renewal certificates issued not less than 30 days prior to the expiration of a policy period.

Contractor shall submit updated certificates prior to the expiration of any of the policies referenced in the certificates so that the Town shall at all times possess certificates indicating current coverage.

D. The Contractor shall file one certified complete copy of all endorsements with the Town upon execution of the Contract, and shall submit certified copies of all policies to the Town upon request. If the Town is damaged by the Contractor's failure to maintain such insurance and to comply with the terms of this Article, then the Contractor shall be responsible for all costs and damages to the Town attributable thereto.

E. Termination, cancellation, or material modification of any insurance required by this Contract, whether by the insurer or the insured, shall not be valid unless written notice thereof is given to the Town at least thirty days prior to the effective date thereof, which shall be expressed in said notice.

F. The Contractor is responsible for the payment of any and all deductibles under all of the insurance required below. The Town shall not in any instance be responsible for the payment of deductibles, self-insured retentions, or any portion thereof.

#### **2. Contractor's Commercial General Liability.**

A. The Contractor shall purchase and maintain general liability coverage on the ISO form CG 00 01 or equivalent, including products and completed operations, on an occurrence basis. The form must be amended to state that the aggregate limit applies on a per location/project basis. The policy shall provide the following minimum coverage to protect the Contractor from claims with respect to the operations performed by Contractor and any employee, subcontractor, or supplier, or by anyone for whose acts they may be liable unless a higher coverage is specified in Exhibit A to the Owner - Contractor Agreement, in which case the Contractor shall provide the additional coverage:

Bodily Injury &

\$1,000,000 each occurrence

Property Damage	\$2,000,000 general aggregate per project
Products & Completed Operations	\$1,000,000 annual aggregate
Personal Injury	\$1,000,000 each occurrence
Medical Expenses	\$5,000
Excess Liability (Umbrella)	\$5,000,000
Excess Liability (Umbrella)	\$1,000,000 or 1.5 times the value of the subcontract, (Subcontractors) whichever is higher

B. This policy shall include coverage relating to explosion, collapse, and underground property damage.

C. This policy shall include contractual liability coverage.

D. The completed operations coverage shall be maintained for a period of three (3) years after Substantial Completion and acceptance by the Town. The Contractor shall provide renewal certificates of insurance to the Town as evidence that this coverage is being maintained.

E. If the Work includes work to be performed within 50 feet of a railroad, any exclusion for liability assumed under contract for work within 50 feet of a railroad shall be deleted.

F. This policy shall include the Town, and anyone else requested by the Town as an additional insured via endorsements CG 20 10 for ongoing operations and CG 20 37 for completed operations. This policy shall be primary and non-contributory with respect to any other insurance available to additional insureds.

G. The policy shall contain, a Waiver of Subrogation in favor of the Town.

### **3. Automobile Liability.**

A. The Contractor shall purchase and maintain the following minimum coverage with respect to the operations of any owned, non-owned, and hired vehicles including trailers used in the performance of the work, unless a higher coverage is specified in Exhibit A to the Owner - Contractor Agreement, in which case the Contractor shall provide the additional coverage:

Bodily Injury & Property Damage	\$1,000,000 combined single limit
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B. The policy shall include a CA 99 48 Broadened Pollution Endorsement. If specified in Exhibit A to the Owner – Contractor Agreement, the Contractor, if hauling contaminants and/or pollutants, must adhere to Sections 29 and 30 of the Motor Carrier Act of 1980, which shall include coverage Form MCS-90.

C. The policy shall name the Town as additional insured.

D. The policy shall contain a Waiver of Subrogation in favor of the Town.

### **4. Contractor's Pollution Liability.**

The Contractor shall purchase and maintain coverage for bodily injury and property damage resulting from liability arising out of pollution related exposures such as asbestos abatement, lead paint abatement, tank removal, removal of contaminated soil, etc. The insurance policy shall cover the liability of the Contractor during the process of removal, storage, transport and disposal of hazardous waste and contaminated soil and/or asbestos abatement. The policy shall include coverage for on-Site and off-Site bodily injury and loss of, damage to, or loss of use of property, directly or indirectly arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gas, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, whether it be gradual or sudden and accidental. The policy shall also include defense and clean-up costs. The Town shall be named as an additional insured and coverage must be on an occurrence basis. The amount of coverage shall be as follows unless a higher amount is specified

in Exhibit A to the Owner - Contractor Agreement, in which case the Contractor shall provide the additional coverage:

Limit of liability	\$1,000,000 per occurrence
	\$3,000,000 aggregate

### **5. Worker's Compensation.**

A. The Contractor shall provide the following coverage in accordance with M.G.L. c.149 §34A and c.152 as amended, unless a higher coverage is specified in Exhibit A to the Owner - Contractor Agreement, in which case the Contractor shall provide the higher coverage:

Worker's Compensation	Statutory limits
Employer's Liability	\$ 500,000 each accident
	\$ 500,000 disease per employee
	\$ 500,000 disease policy aggregate

B. The policy shall contain a Waiver of Subrogation in favor of the Town.

### **6. Builder's Risk/ Installation Floater/Stored Materials.**

A. The Contractor shall purchase and maintain coverage against loss or damage on all Work included in this Contract in an amount equal to the Contract Price. Such coverage shall be written on an all risks basis or equivalent form and shall include, without limitation, insurance against perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, terrorism ("certified" and "non-certified"), collapse, earthquake, flood (if the project is not in an "A" or a "V" flood Zone), windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss. Unless otherwise specified in this Contract, the limits for earthquake and flood shall be the lesser of the Contract Price or \$10,000,000. This policy and/or installation floater shall include transportation and Stored Materials coverage in an amount equal to the value of the stored materials as required in C. below.

B. When Work will be completed on existing buildings owned by the Town, the Contractor shall provide an installation floater, in the full amount of the Contract Price. Such coverage shall be written on an all risks basis or equivalent form and shall include, without limitation, insurance against perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood (if the project is not in an "A" or a "V" flood Zone),

windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss. Unless otherwise specified in this Contract, the limits for earthquake and flood shall be the lesser of the Contract Price or \$10,000,000. This policy and/or installation floater shall include transportation and Stored Materials coverage in an amount equal to the value of the stored materials as required in C. below.

C. The Contractor shall maintain insurance on delivered and/or stored material designated to be incorporated in the Work against fire, theft or other hazards. Any loss or damage of whatever nature to such material while stored at an off Site location shall be forthwith replaced by the Contractor at no expense to the Town.

D. The policy or policies shall specifically state that they are for the benefit of and payable to the Town, the Contractor, and all persons furnishing labor or labor and materials for the Contract Work, as their interests may appear. The policy or policies shall list the Town, the Contractor, and Subcontractors of any tier as named insureds.

E. Coverage shall include any costs for work performed by the Designer or any consultant as the result of a loss experienced during the term of this Contract.

F. Coverage shall include permission for temporary occupancy and a Waiver of Subrogation in favor of the Town.

G. Coverage shall be maintained until final acceptance by the Town of the Contract and final payment has been made.

H. A loss under the property insurance shall be adjusted by the Contractor as fiduciary and made payable to the Contractor as fiduciary for the insureds. The Contractor shall pay the subcontractors their just shares of insurance proceeds received by the Contractor and shall require subcontractors to make payments to their sub-subcontractors in similar manner.

**7. Umbrella Coverage.**

The Contractor shall provide Umbrella Coverage in a form at least as broad as primary coverages required by Sections 2, 3 and 5 of this Article in the following amount unless a higher amount is specified in Exhibit A to the Owner - Contractor Agreement, in which case the Contractor shall provide the higher amount:

<u>Contract Price:</u>	<u>Limit of Liability:</u>
Under \$1,000,000	\$2,000,000 per occurrence
\$1,000,001 -- \$5,000,000	\$5,000,000 per occurrence
\$5,000,001-- \$10,000,000	\$10,000,000 per occurrence
\$10,000,001 and over	\$25,000,000 per occurrence

**8. Additional Types of Insurance.**

The Contractor shall provide such other types of insurance as may be required by Exhibit A to the Owner - Contractor Agreement.

**ARTICLE XIV: INDEMNIFICATION**

**1. Generally.**

The Contractor shall indemnify, defend and save harmless the Town, its officers, agents and employees from and against any and all damages, liabilities, actions, suits, proceedings, claims, demands, losses, recoveries and judgments of every nature and description (including reasonable attorneys' fees) brought or recovered against them that may arise in whole or in part out of or in connection with the work being performed or to be performed, or out of any act or omission by the Contractor, its employees, agents, subcontractors, material men, and anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by any party indemnified hereunder. The Contractor further agrees to reimburse the Town for damage to its property caused by Contractor, its employees, agents, subcontractors or material men, and anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, including damages caused by his, its or their use of faulty, defective or unsuitable material or equipment, unless the damage is caused by the Town's gross negligence or willful misconduct. The existence of insurance shall in no way limit the scope of the Contractor's indemnification under this Contract.

In any and all claims against the Town or any of their agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under Workmen's Compensation Acts, disability benefit acts or other employee benefit acts.

The duty to defend shall immediately accrue and be owing upon the utterance of such a claim by any person or entity regardless of merit and shall not be dependent upon a finding of negligence or any other finding of fact at trial. The duty to defend shall be absolute and shall not be defeated or in any way undermined by the utterance of claims not covered by this Contract.

The intent of the Specifications regarding insurance is to specify minimum coverage and minimum limits of liability acceptable under the Contract. However, it shall be the Contractor's responsibility to purchase and maintain insurance of such character and in such amounts as will adequately protect it and the Town from and against all claims, damages, losses and expenses resulting from exposure to any casualty liability in the performance of the Work.

**2. Survival.**

The provisions of this Article XIV are intended to survive Final Acceptance and/or any termination of this Contract.

**ARTICLE XV: PERFORMANCE AND PAYMENT BONDS**

**1. Contractor Bonds.**

A. The Contractor shall provide performance and payment (labor and materials) bonds in the form provided by the Town, executed by a surety licensed by the Commonwealth of Massachusetts Division of Insurance. Each such bond shall be in the amount of the Contract

Price.

**B.** If at any time prior to final payment to the Contractor, the Surety:

- is adjudged bankrupt or has made a general assignment for the benefit of its creditors;
- has liquidated all assets and/or has made a general assignment for the benefit of its creditors;
- is placed in receivership;
- otherwise petitions a state or federal court for protection from its creditors; or
- allows its license to do business in Massachusetts to lapse or be revoked;

then the Contractor shall, within 21 days of any such action listed above, provide the Town with new performance and payment bonds as described in Paragraph A above. Such bonds shall be provided solely at the Contractor's expense.

## **2. Subcontractor Bonds.**

**A.** If the Contractor provided in its General Bid that any or all filed subcontractors shall provide the Contractor with payment and performance bonds for the full amount of their respective Subcontracts, then the costs for said bonds shall be the responsibility of the Contractor.

**B.** If the Contractor provided in its General Bid that filed Subcontractors shall provide bonds, and subsequently waives the requirement, the Contractor shall give the Town a written certification that the Contractor understands that if the filed Subcontractor defaults or is terminated, the Contractor shall have full responsibility for all costs and expenses related to said default or termination and shall not be entitled to a credit adjustment to the Contract Price in an amount equal to the bond premium Contractor would have paid had Contractor required the filed Subcontractor to provide such bonds.

## **ARTICLE XVI: TERMINATION OF CONTRACT**

### **1. Termination for Cause.**

**A.** The Town may without prejudice to any other right or remedy deem this Contract terminated for cause if any of the following defaults shall occur and not be cured within three (3) days after the giving of notice thereof by the Town to the Contractor and any surety that has given bonds in connection with this Contract:

- (1) The Contractor has filed a petition, or a petition has been filed against the Contractor with its consent, under any federal or state law concerning bankruptcy, reorganization, insolvency or relief from creditors, or if such a petition is filed against the Contractor without its consent and is not dismissed within sixty (60) days; or if the Contractor is generally not paying its debts as they become due; or if the Contractor becomes insolvent; or if the Contractor consents to the appointment of a receiver, trustee, liquidator, custodian or the like of the Contractor or of all or any substantial portion of its assets and such appointment or possession is not terminated within sixty (60) days; or if the Contractor makes an assignment for the benefit of creditors;
- (2) The Contractor refuses or fails, except in cases for which extension of time is provided under this Contract's express terms, to supply enough properly skilled workers or proper materials to perform its obligations under this Contract, or the Designer has determined that the rate of progress required for the timely completion of the Work is not being met;
- (3) The Contractor fails to make prompt payment to Subcontractors or for materials, equipment, or labor;
- (4) All or a part of the Work has been abandoned;
- (5) The Contractor has sublet or assigned all or any portion of the Work, the Contract, or claims thereunder, without the prior written consent of the Owner, except as expressly permitted in this Contract;
- (6) The Contractor has failed to comply with Laws and regulations and lawful directives of the Town;
- (7) The Contractor fails to maintain, or provide to the Town evidence of the insurance or bonds required by this Contract;
- (8) The Contractor has made any material misrepresentation to the Town;
- (9) The Contractor has failed to perform any of its obligations under this Contract;
- (10) The Contractor has failed to commence performance of this Contract at the time specified herein;
- (11) The Contractor has failed to perform this Contract in a manner reasonably satisfactory to the Town;
- (12) The Contractor has failed to promptly re-perform within a reasonable time the services that were rejected by the Town as unsatisfactory or erroneous;
- (13) The Contractor has failed to comply with a material term of this Contract;
- (14) The Contractor has failed to prosecute the Work or any portion thereof to the standards required under this Contract or has otherwise breached any material provision of this Contract.

**B.** The Town shall give the Contractor and any surety notice of such termination for cause, but the giving of notice of such termination shall not be a condition precedent or subsequent to the termination's effectiveness. In the event of such termination, and without limiting any other available remedies, the Town may, at its option:

- (1) hold the Contractor and its sureties liable in damages for a breach of Contract;
- (2) notify the Contractor to discontinue all work, or any part thereof, and the Contractor shall discontinue all work, or any part thereof, as the Owner may designate;
- (3) complete the Work, or any part thereof, and charge the expense of completing the Work or part thereof, to the Contractor;
- (4) require the surety or sureties to complete the Work and perform all of the Contractor's obligations under this Contract.

If the Town elects to complete all or any portion of the Work as specified in (3) above, it may take possession of all materials, equipment, tools, machinery, implements at or near the Site owned by the Contractor and finish the Work at the Contractor's expense by whatever means the Town may deem expedient; and the Contractor shall cooperate at its expense in the orderly transfer of the same to a new contractor or to the Town as directed by the Town. In such case the Town shall not make any further payments to the Contractor until the Work is completely finished. The Town shall not be liable for any depreciation, loss or damage to said materials, machinery, implements or tools during said use and the Contractor shall be solely responsible for their removal from the Site after the Town has no further use for them. Unless so removed within fifteen days after notice to the Contractor to do so, they may be sold at public auction, after publication of notice thereof at least twice in any newspaper published in the county where the Work is being performed, and the proceeds credited to the Contractor's account; or they may, at the option of the Town, be stored at the Contractor's expense subject to a lien for the storage charges.

**C.** Damages and expenses incurred under paragraph B above shall include, but not be limited to, costs for the Designer's extra services and Project Representative services required, in the opinion of the Town, to successfully inspect and administer the construction contract through final completion of the Work.

**D.** Expenses charged under paragraph B above may be deducted and paid by the Town out of any moneys then due or to become due the Contractor under this Contract.

E. All sums damages, and expenses incurred by the Town to complete the Work shall be charged to the Contractor. In case the damages and expenses charged are less than the sum that would have been payable under this Contract if the same had been completed by the Contractor, the Contractor shall be entitled to receive the difference. In case such expenses shall exceed the said sum, the Contractor shall pay the amount of the excess to the Town.

**2. Termination For Convenience.**

A. The Town may terminate this Contract for convenience even though the Contractor is not in default by giving notice to the Contractor specifying in said notice the date of termination.

B. In case of such termination without cause, the Contractor shall be paid:  
(1) all sums due and owing under this Contract through the date of termination, including any retainage withheld to the date of termination, less any amount which the Town determines is necessary to correct or complete the Work performed to the date of termination; plus (2) a reasonable sum to cover the expenses which Contractor would not have incurred but for the early termination of the Contract, such as demobilization of the work force, restocking charges, termination fees payable to Subcontractors.

C. The payment provided in paragraph B above shall be considered to fully compensate the Contractor for all claims and expenses and those of any consultants, Subcontractors, and suppliers, directly or indirectly attributable to the termination, including any claims for lost profits.

**3. Contractor's Duties Upon Termination For Convenience.**

Upon termination of this Contract for convenience as provided in Section 2 of this Article, the Contractor shall: (1) stop the Work; (2) stop placing orders and Subcontracts in connection with this Contract; (3) cancel all existing orders and Subcontracts; (4) surrender the Site to the Town in a safe condition; (5) transfer to the Town all materials, supplies, work in process, appliances, facilities, equipment and machinery of this Contract, and all plans, Drawings, specifications and other information and documents used in connection with this Contract.

**ARTICLE XVII: MISCELLANEOUS PROVISIONS**

**1. No Assignment by Contractor.**

The Contractor shall not assign by power of attorney or otherwise, or sublet or subcontract, the Work or any part thereof, without the previous written consent of the Town and shall not, either legally or equitably, assign any of the moneys payable under this Contract, or Contractor's claims hereunder, unless with the like consent of the Town, whether said assignment is made before, at the time of, or after the execution of the Contract. The Contractor shall remain responsible for satisfactory performance of all Work sublet or assigned. Consent of the Town shall not be deemed to constitute a representation or waiver of any right hereunder by the Town as to the qualifications or the responsibility of the Contractor or Subcontractor(s).

**2. Non-Appropriation.**

Notwithstanding anything in the Contract Documents to the contrary, any and all payments which the Town is required to make under this Contract shall be subject to appropriation or other availability of funds as certified by the Town Accountant. The Town may immediately terminate or suspend this Contract without liability on the part of the Town for damages, penalties or other charges in the event the appropriation(s) funding this Agreement is terminated or reduced to an amount which will be insufficient to support anticipated future obligations under this Agreement.

**3. Claims by Others Not Valid.**

No person other than the Contractor shall acquire any interest in this Contract or claim against the Town hereunder, and no claim by any other person shall be valid except as provided in M.G.L. c. 30, s. 39F of the General Laws.

**4. No Personal Liability of Public Officials.**

No public official, employee, or agent of the Town shall have any personal liability for the obligations of the Town set forth in this Contract.

**5. Severability.**

The provisions of this Contract are severable, and if any of these provisions shall be held unconstitutional or unenforceable by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the other provisions of this Contract.

**6. Choice of Laws.**

This Contract shall be governed by the laws of the Commonwealth of Massachusetts for all purposes, without regard to its laws on choice of law. All proceedings under this Contract or related to the Project shall be brought in the courts of the Commonwealth of Massachusetts.

**7. No Waiver of Subsequent Breach.**

No waiver of any breach or obligation of this Contract shall constitute a waiver of any other or subsequent breach or obligation.

**8. Remedies Cumulative.**

All remedies of the Town provided in this Contract shall be construed as cumulative and may be exercised simultaneously or in any order as determined by the Town in its sole discretion. The Town shall also be entitled as of right to specific performance and equitable relief including the right to an injunction against any breach of any of the provisions of this Contract

**9. Notices.**

Notices to the Contractor shall be deemed given when hand delivered to the Contractor's temporary field office at or near the Site, or when deposited in the U.S. mail addressed to the Contractor at the Contractor's address specified in the Owner - Contractor Agreement, or when delivered by courier to either location. Unless otherwise specified in writing by the Town, notices and deliveries to the Town shall be effective only when delivered to the Town at the address specified in the Owner - Contractor Agreement and date-stamped at the reception desk or for which a receipt has been signed by the agent or employee designated by the Town to receive official notices.

**10. Statutory Compliance.**

A. This Contract will be construed and governed by the provisions of applicable federal, state and local laws and regulations; and wherever any provision of the Contract or Contract documents shall conflict with any provision or requirement of federal, state or local law or regulation, then the provisions of law and regulation shall control. Where applicable to the Contract, the provisions of the General Laws are incorporated by reference into this Contract, including, but not limited to, the following:

General Laws Chapter 30B – Procurement of Goods and Services.

General Laws Chapter 30, Sec. 39, *et seq.* - Public Works Contracts.

General Laws Chapter 149, Section 44A, *et seq.* Public Buildings Contracts.

B. Wherever applicable law mandates the inclusion of any term and provision into a municipal contract, this Section shall be understood to import such term or provision into this Contract. To whatever extent any provision of this Contract shall be inconsistent with any law or regulation limiting the power or liability of cities and towns, such law or regulation shall control.

C. The Contractor shall give all notices and comply with all laws and regulations bearing on the performance of the Contract. If the Contractor performs the Contract in violation of any applicable law or regulation, the Contractor shall bear all costs arising therefrom.

D. The Contractor shall keep itself fully informed of all existing and future State and National Laws and Municipal By-laws and Regulations and of all orders and decrees of any bodies or tribunals having jurisdiction in any manner affecting those engaged or employed in the work, of the materials used in the work or in any way affecting the conduct of the work. If any discrepancy or inconsistency is discovered in the Drawings, Specifications, Scope of Business or Contract for this work in violation of any such law, by-law, regulation, order or decree, it shall forthwith report the same in writing to the Town. It shall, at all times, itself observe and comply with all such existing and future laws, by-laws, regulations, orders and decrees; and shall protect and indemnify the Town of Andover, and its duly appointed agents against any claim or liability arising from or based on any violation whether by him or its agents, employees or subcontractors of any such law, by-law, regulation or decree.

APPENDIX A

## Statutory Provisions

Section 39K. Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building by the commonwealth, or by any county, city, town, district, board, commission or other public body, when the amount is more than five thousand dollars in the case of the commonwealth and more than two thousand dollars in the case of any county, city, town, district, board, commission or other public body, shall contain the following paragraph:- Within fifteen days (30 days in the case of the commonwealth, including local housing authorities) after receipt from the contractor, at the place designated by the awarding authority if such a place is so designated, of a periodic estimate requesting payment of the amount due for the preceding month, the awarding authority will make a periodic payment to the contractor for the work performed during the preceding month and for the materials not incorporated in the work but delivered and suitably stored at the site (or at some location agreed upon in writing) to which the contractor has title or to which a subcontractor has title and has authorized the contractor to transfer title to the awarding authority, upon certification by the contractor that he is the lawful owner and that the materials are free from all encumbrances, but less (1) a retention based on its estimate of the fair value of its claims against the contractor and less (2) a retention for direct payments to subcontractors based on demands for same in accordance with the provisions of section thirty nine F, and less (3) a retention not exceeding five per cent of the approved amount of the periodic payment. After the receipt of a periodic estimate requesting final payment and within sixty five days after (a) the contractor fully completes the work or substantially completes the work so that the value of the work remaining to be done is, in the estimate of the awarding authority, less than one per cent of the original contract price, or (b) the contractor substantially completes the work and the awarding authority takes possession for occupancy, whichever occurs first, the awarding authority shall pay the contractor the entire balance due on the contract less (1) a retention based on its estimate of the fair value of its claims against the contractor and of the cost of completing the incomplete and unsatisfactory items of work and less (2) a retention for direct payments to subcontractors based on demands for same in accordance with the provisions of section thirty nine F, or based on the record of payments by the contractor to the subcontractors under this contract if such record of payment indicates that the contractor has not paid subcontractors as provided in section thirty nine F. If the awarding authority fails to make payment as herein provided, there shall be added to each such payment daily interest at the rate of three percentage points above the rediscount rate than charged by the Federal Reserve Bank of Boston commencing on the first day after said payment is due and continuing until the payment is delivered or mailed to the contractor; provided, that no interest shall be due, in any event, on the amount due on a periodic estimate for final payment until fifteen days (twenty four days in the) case of the commonwealth) after receipt of such a periodic estimate from the contractor, at the place designated by the awarding authority if such a place is so designated. The contractor agrees to pay to each subcontractor a portion of any such interest paid in accordance with the amount due each subcontractor.

The awarding authority may make changes in any periodic estimate submitted by the contractor and the payment due on said periodic estimate shall be computed in accordance with the changes so made, but such changes or any requirement for a corrected periodic estimate shall not affect the due date for the periodic payment or the date for the commencement of interest charges on the amount of the periodic payment computed in accordance with the changes made, as provided herein; provided, that the awarding authority may, within seven days after receipt, return to the contractor for correction, any periodic estimate which is not in the required form or which contains computations not arithmetically correct and, in that event, the date of receipt of such periodic estimate shall be the date of receipt of the corrected periodic estimate in proper form and with arithmetically correct computations. The date of receipt of a periodic estimate received on a Saturday shall be the first working day thereafter. The provisions of section thirty nine G shall not apply to any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building to which this section applies.

All periodic estimates shall be submitted to the awarding authority, or to its designee as set forth in writing to the contractor, and the date of receipt by the awarding authority or its designee shall be marked on the estimate. All periodic estimates shall contain a separate item for each filed subtrade and each sub-subtrade listed in sub bid form as required by specifications and a column listing the amount paid to each subcontractor and sub subcontractor as of the date the periodic estimate is filed. The person making payment for the awarding authority shall add the daily interest provided for herein to each payment for each day beyond the due date based on the date of receipt marked on the estimate.

A certificate of the architect to the effect that the contractor has fully or substantially completed the work shall, subject to the provisions of section thirty nine J, be conclusive for the purposes of this section.

Notwithstanding the provisions of this section, at any time after the value of the work remaining to be done is, in the estimation of the awarding authority, less than 1 per cent of the adjusted contract price, or the awarding authority has determined that the contractor has substantially completed the work and the awarding authority has taken possession for occupancy, the awarding authority may send to the general contractor by certified mail, return receipt requested, a complete and final list of all incomplete and unsatisfactory work items, including, for each item on the list, a good faith estimate of the fair and reasonable cost of completing such item. The general contractor shall then complete all such work items within 30 days of receipt of such list or before the contract completion date, whichever is later. If the general contractor fails to complete all incomplete and unsatisfactory work items within 45 days after receipt of such items furnished by the awarding authority or before the contract completion date, whichever is later, subsequent to an additional 14 days' written notice to the general contractor by certified mail, return receipt requested, the awarding authority may terminate the contract and complete the incomplete and unsatisfactory work items and charge the cost of same to the general contractor and such termination shall be without prejudice to any other rights or remedies the awarding authority may have under the contract. The awarding authority shall note any such termination in the evaluation form to be filed by the awarding authority pursuant to the provisions of section 44D of chapter 149.

Section 39F. (1) Every contract awarded pursuant to sections forty four A to L, inclusive, of chapter one hundred and forty nine shall contain the following subparagraphs (a) through (i) and every contract awarded pursuant to section thirty nine M of chapter thirty shall contain the following subparagraphs (a) through (h) and in each case those subparagraphs shall be binding between the general contractor and each subcontractor.

(a) Forthwith after the general contractor receives payment on account of a periodic estimate, the general contractor shall pay to each subcontractor the amount paid for the labor performed and the materials furnished by that subcontractor, less any amount specified in any court proceedings barring such; payment and also less any amount claimed due from the subcontractor by the general contractor.

(b) Not later than the sixty fifth day after each subcontractor substantially completes his work in accordance with the plans and specifications, the entire balance due under the subcontract less amounts retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, shall be due the subcontractor; and the awarding authority shall pay that amount to the general contractor. The general contractor shall forthwith pay to the subcontractor the full amount received from the awarding authority less any amount specified in any court proceedings barring such payment and also less any amount claimed due from the subcontractor by the general contractor.

(c) Each payment made by the awarding authority to the general contractor pursuant to subparagraphs (a) and (b) of this paragraph for the labor performed and the materials furnished by a subcontractor shall be made to the general contractor for the account of that subcontractor; and the awarding authority shall take reasonable steps to compel the general contractor to make each such payment to each such subcontractor. If the awarding authority has received a demand for direct payment from a subcontractor for any amount which has already been included in a payment to the general contractor or which is to be included in a payment to the general contractor for payment to the subcontractor as provided in subparagraphs (a) and (b), the awarding authority shall act upon the demand as provided in this section.

(d) If, within seventy days after the subcontractor has substantially completed the subcontract work, the subcontractor has not received from the general contractor the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, the subcontractor may demand direct payment of that balance from the awarding authority. The demand shall be by a sworn statement delivered to or sent by certified mail to the awarding authority, and a copy shall be delivered to or sent by certified mail to the general contractor at the same time. The demand shall contain a detailed breakdown of the balance due under the subcontract and also a statement of the status of completion of the subcontract work. Any demand made after substantial completion of the subcontract work shall be valid even if delivered or mailed prior to the seventieth day after the subcontractor has substantially completed the subcontract work. Within ten days after the subcontractor has delivered or so mailed the demand to the awarding authority and delivered or so mailed a copy to the general contractor, the general contractor may reply to the demand. The reply shall be by a sworn statement delivered to or sent by certified mail to the awarding authority and a copy shall be delivered to or sent by certified mail to the subcontractor at the same time. The reply shall contain a detailed breakdown of the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor and of the amount due for each claim made by the general contractor against the subcontractor.

(e) Within fifteen days after receipt of the demand by the awarding authority, but in no event prior to the seventieth day after substantial completion of the subcontract work, the awarding authority shall make direct payment to the subcontractor of the balance due under the subcontract including any amount due for extra labor and materials furnished to the general contractor, less any amount (i) retained by the awarding authority as the estimated cost of completing the incomplete or unsatisfactory items of work, (ii) specified in any court proceedings barring such payment, or (iii) disputed by the general contractor in the sworn reply; provided, that the awarding authority shall not deduct from a direct payment any amount as provided in part (iii) if the reply is not sworn to, or for which the sworn reply does not contain the detailed breakdown required by subparagraph (d). The awarding authority shall make further direct payments to the subcontractor forthwith after the removal of the basis for deductions from direct payments made as provided in parts (i) and (ii) of this subparagraph.

(f) The awarding authority shall forthwith deposit the amount deducted from a direct payment as provided in part (iii) of subparagraph (e) in an interest-bearing joint account in the names of the general contractor and the subcontractor in a bank in Massachusetts selected by the awarding authority or agreed upon by the general contractor and the subcontractor and shall notify the general contractor and the subcontractor of the date of the deposit and the bank receiving the deposit. The bank shall pay the amount in the account, including accrued interest, as provided in an agreement between the general Contractor and the subcontractor or as determined by decree of a court of competent jurisdiction.

(g) All direct payments and all deductions from demands for direct payments deposited in an interest bearing account or accounts in a bank pursuant to subparagraph (f) shall be made out of amount payable to the general contractor at the time of receipt of a demand for direct payment from a subcontractor and out of amounts which later become payable to the general contractor and in the order of receipt of such demands from subcontractors. All direct payments shall discharge the obligation of the awarding authority to the general contractor to the extent of such payment.

(h) The awarding authority shall deduct from payments to a general contractor amounts which, together with the deposits in interest bearing accounts pursuant to subparagraph (f), are sufficient to satisfy all unpaid balances of demands for direct payment received from subcontractors. All such amounts shall be earmarked for such direct payments, and the subcontractors shall have a right in such deductions prior to any claims against such amounts by creditors of the general contractor.

(i) If the subcontractor does not receive payment as provided in subparagraph (a) or if the general contractor does not submit a periodic estimate for the value of the labor or materials performed or furnished by the subcontractor and the subcontractor does not receive payment for same when due less the deductions provided for in subparagraph (a), the subcontractor may demand direct payment by following the procedure in subparagraph (d) and the general contractor may file a sworn reply as provided in that same subparagraph. A demand made after the first day of the month following that for which the subcontractor performed or furnished labor and materials for which the subcontractor seeks payment shall be valid even if delivered or mailed prior to the time payment was due on a periodic estimate from the general contractor. Thereafter the awarding authority shall proceed as provided in subparagraph (e), (f), (g) and (h).

Section 39G. Upon substantial completion of the work required by a contract with the commonwealth, or any agency or political subdivision thereof, for the construction, reconstruction, alteration, remodeling, repair or improvement of public ways, including bridges and other highway structures, sewers and, water mains, airports and other public works, the contractor shall present in writing to the awarding authority its certification that the work has been substantially completed. Within twenty-one days thereafter, the awarding authority shall present to the contractor either a written declaration that the work has been substantially completed or an itemized list of incomplete or unsatisfactory work items required by the contract sufficient to demonstrate that the work has not been substantially completed. The awarding authority may include with such list a notice setting forth a reasonable time, which shall not in any event be prior to the contract completion date, within which the contractor must achieve substantial completion of the work. In the event that the awarding authority fails to respond, by presentation of a written declaration or itemized list as aforesaid, to the contractor's certification within the twenty-one day period, the contractor's certification shall take effect as the awarding authority's declaration that the work has been

substantially completed.

Within sixty-five days after the effective date of a declaration of a substantial completion, the awarding authority shall prepare and forthwith send to the contractor for acceptance a substantial completion estimate for the quantity and price of the work done and all but one percent retainage, if held by the awarding authority, on that work, including the quantity, price and all but one percent retainage, if held by the awarding authority, for the undisputed part of each work item and extra work item in dispute but excluding the disputed part thereof, less the estimated cost of completing all incomplete and unsatisfactory work items and less the total periodic payments made to date for the work. The awarding authority also shall deduct from the substantial completion estimate an amount equal to the sum of all demands for direct payment filed by subcontractors and not yet paid to subcontractors or deposited in joint accounts pursuant to section thirty-nine F, but no contract subject to said section thirty-nine F shall contain any other provision authorizing the awarding authority to deduct any amount by virtue of claims asserted against the contract by subcontractors, material suppliers or others.

If the awarding authority fails to prepare and send to the contractor any substantial completion estimate required by this section on or before the date herein above set forth, the awarding authority shall pay to the contractor interest on the amount which would have been due to the contractor pursuant to such substantial completion estimate at the rate of three percentage points above the rediscount rate then charged by the Federal Reserve Bank of Boston from such date to the date on which the awarding authority sends that substantial completion estimate to the contractor for acceptance or to the date of payment therefor, whichever occurs first. The awarding authority shall include the amount of such interest in the substantial completion estimate.

Within fifteen days after the effective date of the declaration of substantial completion, the awarding authority shall send to the contractor by certified mail, return receipt requested, a complete list of all incomplete or unsatisfactory work items, and, unless delayed by causes beyond his control the contractor shall complete all such work items within forty-five days after the receipt of such list or before the then contract completion date, whichever is later. If the contractor fails to complete such work within such time the awarding authority may, subsequent to seven days' written notice to the contractor by certified mail return receipt requested, terminate the contract and complete the incomplete or unsatisfactory work items and charge the cost of same to the contractor.

Within thirty days after receipt by the awarding authority of a notice from the contractor stating that all of the work required by the contract has been completed, the awarding authority shall prepare and forthwith send to the contractor for acceptance a final estimate for the quantity and price of the work done and all retainage, if held by the awarding authority, on that work less all payments made to date unless the awarding authority's inspection shows that work items required by the contract remain incomplete or unsatisfactory, or that documentation required by the contract has not been completed. If the awarding authority fails to prepare and send to the contractor the final estimate within thirty days after receipt of notice of completion, the awarding authority shall pay to the contractor interest on the amount which would have been due to the contractor pursuant to such final estimate at the rate hereinabove provided from the thirtieth day after such completion until the date on which the awarding authority sends the final estimate to the contractor for acceptance or the date of payment therefor, whichever occurs first, provided that the awarding authority's inspection shows that no work items required by the contract remain incomplete or unsatisfactory. Interest shall not be paid hereunder on amounts for which interest is required to be paid in connection with the substantial completion estimate as hereinabove provided. The awarding authority shall include the amount of the interest required to be paid hereunder in the final estimate.

The awarding authority shall pay the amount due pursuant to any substantial completion or final estimate within thirty-five days after receipt of written acceptance for such estimate from the contractor and shall pay interest on the amount due pursuant to such estimate at the rate hereinabove provided from that thirty-fifth day to the date of payment. Within 15 days, 30 days in the case of the commonwealth after receipt from the contractor, at the place designated by the awarding authority, if such place is so designated of a periodic estimate requesting payment of the amount due for the preceding periodic estimate period the awarding authority shall make a periodic payment to the contractor for the work performed during the preceding periodic estimate period and for the materials not incorporated in the work but delivered and suitably stored at the site, or at some location agreed upon in writing, to which the contractor has title or to which a subcontractor has title and has authorized the contractor to transfer title to the awarding authority upon certification by the contractor that he is the lawful owner and that the materials are free from all encumbrances. The awarding authority shall include with each such payment interest on the amount due pursuant to such periodic estimate at the rate herein above provided from the due date. In the case of periodic payments, the contracting authority may deduct from its payment a retention based on its estimate or the fair value of its claims against the contractor, a retention for direct payments to subcontractors based on demands for same in accordance with the provisions of section thirty-nine F and a retention to secure satisfactory performance of the contractual work not exceeding five per cent of the approved amount of any periodic payment, and the same right to retention shall apply to bonded subcontractors entitled to direct payment under section thirty-nine F of chapter thirty; provided, that a five per cent value of all items that are planted in the ground shall be deducted from the periodic payments until final acceptance.

No periodic, substantial completion or final estimate or acceptance or payment thereof shall bar a contractor from reserving all rights to dispute the quantity and amount of, or the failure of the awarding authority to approve a quantity and amount of, all or part of any work item or extra work item.

Substantial completion, for the purposes of this section, shall mean either that the work required by the contract has been completed except for work having a contract price of less than one per cent of the then adjusted total contract price, or substantially all of the work has been completed and opened to public use except for minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the work required by the contract.



CORPORATE VOTE

At a duly authorized meeting of the Board of Directors of Heimlich Landscaping Construction <sup>Corp.</sup> held on June 1, 2020 at which all the Directors were present or waived notice, it was voted that Mark Heimlich, Secretary/Treasurer of this company, be and he/she hereby is authorized to execute contracts and bonds in the name and behalf of said company, and affix its Corporate Seal thereto, and such execution of any contract or obligation in this company's name on its behalf by Mark Heimlich, shall be binding upon this company.

A TRUE COPY ATTEST:

Linda D Heimlich, clerk  
Clerk,

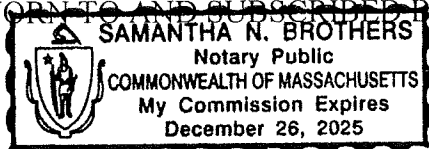
Date of this Contract

9/9/20

I hereby certify that I am the Clerk of Heimlich Landscaping Construction <sup>Corp.</sup> that Mark Heimlich is duly elected Secretary/Treasurer of said company, and the above vote has not been amended or rescinded and remains in full force and effect as of the date of this contract.

Linda D Heimlich, clerk  
Clerk Corporate Seal

SWORN TO AND SUBSCRIBED BEFORE ME THIS 9th DAY OF September



Samantha N. Brothers  
Notary Public

If a corporation, complete above or attach to each signed copy of the bid/written request/quotation, a notarized copy of vote of corporation authorizing the signatory to sign this bid/written request/quotation form. If attesting clerk is the same person as the individual executing this contract, have signature notarized above.

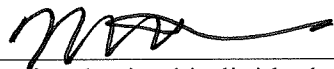
SECRET  
U.S. GOVERNMENT PRINTING OFFICE  
1964 O - 348-000

**CERTIFICATION OF GOOD FAITH & NON-COLLUSION**

The undersigned certifies under pains and penalties of perjury that this bid has been made and submitted in good faith and without collusion or fraud with any other person. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals.

**CERTIFICATE OF STATE TAX COMPLIANCE**

Pursuant to M.G.L. c. 62C, §49A, I certify under the penalties of perjury that, to the best of my knowledge and belief, I am in compliance with all laws of the Commonwealth relating to taxes, reporting of employees and contractors, and withholding and remitting child support.



\_\_\_\_\_  
Signature of authorized individual submitting bid/proposal

Mark Heimlich

\_\_\_\_\_  
Printed Name

Heimlich Landscaping & Construction Corp.

\_\_\_\_\_  
Name of Business (if applicable)

04. 2870415

\_\_\_\_\_  
Social Security or Federal Tax Identification Number



## AFFIDAVIT OF OSHA COMPLIANCE

The undersigned agrees that if he is selected as the contractor, he will comply with the provisions of M.G.L. Chapter 30, Section 39S.

The undersigned certifies, under penalties of perjury, that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work; that all employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration at the time the employee begins work and who shall furnish documentation of successful completion of said course with the first certified payroll report for each employee; and that all employees to be employed in the work subject to this bid have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration.

Date 9/9/20

Heinlich Landscaping & Construction  
(Name of Bidder) *coll.*

By [Signature], Secretary/Treasurer  
(Name of person Signing Bid and Title)  
Signature is required

65 Burlington St.  
(Business Address)

Woburn, MA 01801  
(City and State)

781.938.8988  
(Telephone Number)

