

Contract & General Conditions for

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This Contract is entered into on, or as of, this \_\_\_\_\_ day of \_\_\_\_\_, 2016 by and between the Town of Hamilton, a Massachusetts municipal corporation with a mailing address of \_\_\_\_\_, acting by and through its \_\_\_\_\_ (the "Owner"), and \_\_\_\_\_, a \_\_\_\_\_, with a usual place of business at \_\_\_\_\_ (the "Contractor").

1. This is a Contract for the procurement of the following: \_\_\_\_\_ (the "Project").

The Contractor shall, pursuant to the terms of this Contract, provide all the supplies, materials and equipment, and perform all the labor, services and supervision necessary and proper to the performance of the Contract and to accomplish any and all work incidental thereto. All workmanship shall be first class and by persons qualified in their respective trades.

2. The contract price to be paid to the Contractor by the Owner is: \$\_\_\_\_\_.

3. Payments

3.1 Payments made to Contractor shall be in full, less 5% retainage for furnishing all materials, supplies, labor, services, supervision, tools and equipment and use thereof, and less retentions based on the Owner's estimate of the fair value of its claims against the Contractor and for direct payments to subcontractors based on demands for same. Payment to the Contractor shall be made by the Owner in accordance with M.G.L. c. 30, § 39K, which provides:

"Within fifteen days 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 percent 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 percent 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 then 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 after receipt of such period 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 change 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 column listing the amount paid to each filed subcontractor as of the date of 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 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.”

3.2 Except with the Owner’s prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

- .1 The payment shall be in full for furnishing all materials, supplies, labor, services, supervision, tools and equipment and the use thereof. Acceptance of periodic payments by the Contractor shall constitute a waiver of claims known or knowable at the time by the payee except those previously made in writing and identified by the payee as unsettled at the time of periodic payment.
- .2 The payment of any periodic estimate or of any retained percentage shall in no way constitute an acceptance of the work or in no way prejudice or affect the obligation of the Contractor at its own cost or expense to repair, correct, renew, or replace any defects or imperfections in the work as well as all damages due or attributable to such defects, nor shall any such payments for any current estimate or of any retained percentages prejudice or affect the rights of the Owner to hold the Contractor liable for breach of contract or avail itself of other remedies under this Contract.
- .3 If at any time there shall be evidence of any lien or other claim for which, if established, the Owner may become liable, directly or indirectly, and which is chargeable to the Contractor, the Owner may retain out of the payment then due or thereafter to become due, an amount sufficient to completely indemnify it against any such claim. If there proves to be any such claims after all the payments are made, the Contractor shall refund to the Owner all moneys that the Owner pays in discharging such claim in consequence of the Contractor’s default.

4. Definitions:

- 4.1 Acceptance: All contracts require proper acceptance of the described goods or services by the Owner. Proper acceptance shall be understood to include inspection of goods and certification of acceptable performance of services by authorized representatives of the Owner to insure that the goods or services are complete and are as specified in the Contract.

- 4.2 Contract Documents: All documents relative to the Contract, including (where used) the Invitation for Bids; Bid Forms; Construction Forms including Bond Forms, Form for Subcontract, Certificate of Vote and Statement of Tax Compliance; Special Conditions; Notice of Intent to Award Contract; Notice to Proceed; Change Orders; Proposal Forms, Specifications, and all Addenda issued during the bidding period. The Contract Documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the documents is to include all labor and materials, equipment and transportation necessary for the proper performance of the Contract. In the event of any conflict between any provision or language of the Contract and any provision or language of the Contract Documents, the provision or language of the Contract shall control.
- 4.3 The Contractor: The “other party” to any Contract with the Owner. This term shall (as the sense of a particular Contract so requires) include Vendor, Contractor, Engineer or other label used to identify the other party in the particular Contract. Use of the term “Contractor” shall be understood to refer to any other such label used.
- 4.4 Substantial Completion: The term “substantial completion” as used in the Contract shall mean the point at which the work is at a level of completion in strict compliance with this Contract such that the Owner or its designee can enjoy beneficial use and can use or operate it in all respects, for its intended purpose. Partial use shall not result in the work being deemed substantially complete.
- 4.5 Services: Shall mean the furnishing of labor, time, or effort by the Contractor. This term shall not include employment agreements, collective bargaining agreements, or grant agreements.
- 4.6 Subcontractor: Those having a direct contract with the Contractor. The term includes one who furnished material worked to a special design according to the Drawings or Specifications of this work, but does not include one who merely furnishes material not so worked.
- 4.7 Work: The construction and services required by the Contract Documents, whether completed or partially completed, including all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations. The Work may constitute the whole or a part of the Project.
5. Term of Contract and Time for Performance: This Contract shall be substantially complete by the Contractor on or before [REDACTED], 2016 unless extended pursuant to a provision for extension contained in the Contract Documents at the sole discretion of the Owner, and not subject to assent by the Contractor, and subject to the availability and appropriation of funds. The time stated in the Contract Documents are of the essence of the Contract. By executing this Contract, the Contractor confirms that the contract time is a reasonable period of time for performing the work and achieving substantial completion.

- 6. Change Orders: All changes in the Work shall be in accordance with provisions of the M.G.L. c. 30, § 39I.
- 7. Performance and Payment Bonds: The Contractor shall obtain and deposit with the Owner the following bond(s) in the amount of:

PERFORMANCE BOND: (\$ \_\_\_\_\_)  
 PAYMENT BOND: (\$ \_\_\_\_\_)

with sureties satisfactory to the Owner to (a) guarantee the faithful performance by the Contractor of all its obligations under this Contract and (b) constitute the security required by M.G.L. c. 149, § 29 and Chapter 30, § 39A, as amended, for payment by the Contractor of its subcontractors used or employed in connection with the Contract. Each bond shall incorporate by reference the terms of this Contract. The bonds shall be executed by a surety or sureties, acceptable to the Owner.

8. Employment:

- 8.1 Competence: The Contractor shall employ workers competent to perform the work required by this Contract and if notified by the Owner in writing that any person engaged upon the work is incompetent, unfaithful, disorderly or otherwise unsatisfactory, then such worker shall be discharged for the work.
- 8.2 Restriction on Hours: No laborer, worker, mechanic, foremen or inspector working within the Commonwealth of Massachusetts in the employ of the Contractor, subcontractors or other persons doing or contracting to do the whole or part of the work contemplated by this Contract, shall be required or permitted to work more than eight (8) hours in any one calendar day; or more than forty-eight (48) hours in one week, or more than six (6) days in any one week in full compliance with the provisions of M.G.L. c. 149, § 34, except in cases of emergency.
- 8.3 Weekly Wages: M.G.L. c. 149, § 148, requires the weekly payment of employees.
- 8.4 Workers Compensation: The Contractor shall, before commencing the work, provide by insurance for the payment of compensation and the furnishing of other benefits under M.G.L. c. 152 to all persons employed under the Contract, and it shall continue such insurance in force and effect during the term thereof. The Owner may require the Contractor to deliver Certificates of Insurance as sufficient proof of compliance with the foregoing. Failure to provide and continue in force such insurance as aforesaid shall be deemed a material breach of the Contract and shall entitle the Owner to terminate the Contract without in any way being liable in damages therefor.

- 8.5 Register of Employees: The Contractor shall keep a true and accurate register of all mechanics, teamsters, chauffeurs and laborers employed upon the work contemplated by this Contract showing the name, address and occupational classification of each such employee, the hours worked by and the wages paid to each such employee, and shall furnish the Massachusetts Department of Labor and Industries upon its request a true statement thereof.
- 8.6 Wage Rates (M.G.L. c. 149, §26, et. seq.): In conformity with the provisions of the laws of the Commonwealth of Massachusetts, the minimum wages paid to craftsmen, teamsters, mechanics, laborers and apprentices shall not be less than those established by a schedule which has been prepared by the Department of Labor and Industries. Payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers shall be included for the purpose of establishing minimum wage rates as herein provided.
- 8.7 “Right To Know” Law: If the Contractor uses or stores toxic or hazardous substances it is subject to M.G.L. c.111F, §2, the “Right To Know” law, and regulations promulgated by the Department of Public Health, the Department of Environmental Protection and the Department of Labor and Industries; and must post a Workplace Notice obtainable from the Department of Labor and Industries.
- 8.8 Preference To Veterans and Citizens In Public Works: M.G.L. c. 149, §26 is incorporated by reference herein.
- 8.9 CORI Checks: No person shall be given access to the site without first passing a Criminal Offender Record Information (CORI) check. Contractor shall provide Owner with proof, satisfactory to Owner, that each employee, agent, contractor, subcontractor and invitee (“Contractor Worker(s)”) that visits the site has passed a CORI check. The Contractor shall see to it that no Contractor Worker shall perform any Work at the site if the Owner has objected to such person being at the site based upon information contained in the CORI check. The Contractor shall not allow any Contractor Worker on the site until the Owner has reviewed such worker’s CORI check and has not objected within ten (10) days after the receipt of the CORI check to such worker being at the site on account of the CORI check, unless the Owner waives such requirement for advance review of a Contractor Worker’s CORI check prior to that worker entering the site (which waiver shall only be effective as to the Contractor Worker(s) that the Contractor requests the Owner to provide such waiver in each instance). Notwithstanding the foregoing, the Contractor shall remain liable for the conduct of its workers, employees, subcontractors, agents and invitees on site.
9. Payment of Subcontractors: The Contractor shall make payment to subcontractors in accordance with M.G.L. c. 30, § 39F, which is quoted in this section below. For purposes of this

Agreement, the word “forthwith” appearing in paragraph (1)(a) of the quoted provision shall be deemed to mean “within five (5) business days.” The Contractor shall, at the Owner’s request, furnish satisfactory evidence that all such obligations have been paid, discharged, or waived. M.G.L. c. 30, § 39F provides:

“1(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 (1) and (2) 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 reply 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 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 deduction 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 (5) 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 (6) shall be made out of amounts 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 (6) 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 (1) 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 (1), the subcontractor may demand direct payment by following the procedure in subparagraph (4) 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 the 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).

(2) Any assignment by a subcontractor of the rights under this section to a surety company furnishing a bond under the provisions of section twenty-nine of chapter one hundred forty-nine shall be invalid. The assignment and subrogation rights of the surety to amounts included in a demand for direct payment which are in the possession of the awarding authority or which are on



deposit pursuant to subparagraph (6) shall be subordinate to the rights of all subcontractors who are entitled to be paid under this section and who have not been paid in full.

(3) “subcontractor” as used in this section (I) for contracts awarded as provided in sections forty-four A to forty-four L, inclusive, of chapter one hundred forty-nine shall mean a person who files a sub-bid and received a subcontract as a result of that filed sub-bid or who is approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor, (ii) for contracts awarded as provided in paragraph (1) of section thirty-nine M of chapter thirty shall mean a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor, and (iii) for contracts with the commonwealth not awarded as provided in sections forty-four A to forty-four L, inclusive, of chapter one hundred forty-nine shall also mean a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars.

(4) A general contractor or a subcontractor shall enforce a claim to any portion of the amount of a demand for direct payment deposit as provided in subparagraph (6) by a petition in equity in the superior court against the other and the bank shall not be a necessary party. A subcontractor shall enforce a claim for direct payment or a right to require a deposit as provided in subparagraph (6) by a petition in equity in the superior court against the awarding authority and the general contractor shall not be a necessary party. Upon motion of any party the court shall advance for speedy trial any petition filed as provided in this paragraph. Sections fifty-nine and fifty-nine B of chapter two hundred thirty-one shall apply to such petitions. The court shall enter an interlocutory decree upon which execution shall issue for any part of a claim found due pursuant to sections fifty-nine and fifty-nine B and, upon motion of any party, shall advance for speedy trial the petition to collect the remainder of the claim. Any party aggrieved by such interlocutory decree shall have the right to appeal therefrom as from a final decree. The court shall not consolidate for trial the petition of any subcontractor with the petition of one or more subcontractors or the same general Contract unless the court finds that a substantial portion of the evidence of the same events during the course of construction (other than the fact that the claims sought to be consolidated arise under the same general contract) is applicable to the petitions sought to be consolidated and that such consolidation will prevent unnecessary duplication of evidence. A decree in any such proceeding shall not include interest on the disputed amount deposited in excess of the interest earned for the period of any such deposit. No person except a subcontractor filing a demand for direct payment for which no funds due the general contractor are available for direct payment shall have a right to file a petition in court of equity against the awarding authority claiming a demand for direct payment is premature and such subcontractor must file the petition before the awarding authority has made a direct payment to the subcontractor and has made a deposit of the disputed portion as provided in part (iii) of subparagraph (5) and in subparagraph (6).

(5) In any petition to collect any claim for which a subcontractor has filed a demand for direct payment the court shall, upon motion of the general contractor, reduce by the amount of any deposit of a disputed amount by the awarding authority as provided in part (iii) of subparagraph (5) and in subparagraph (6) any amount held under a trustee writ or pursuant to a restraining order or injunction.”

#### 10. Additional Work:

- 10.1. The Contractor agrees to perform any work related to the subject matter of the Contract and its specifications, upon written order of the Owner, the payment for such extra work to be made in accordance with the following:

Where the value of work performed directly by the Contractor under a Change Order or a Construction Change Directive is determined by either a lump sum proposal or by the actual cost of work as it progresses, the Contractor will be allowed an additional amount of five percent (5%) of the total cost of material and labor, as combined overhead, superintendence, and profit. Cost of the work shall include the cost at prevailing rates for direct labor, material and use of equipment, plus the cost of workmen's compensation insurance, liability insurance, federal social security and Massachusetts unemployment compensation. Mark-up for overhead, superintendence and profit shall include (and no additional payment shall be made for) general conditions, management, supervision, coordination, insurance, bonds, mobilization, record drawings, engineering layout, small tools/computers, "tools of the trade", transit, staging/scaffolding, lifting, hoisting, dumpster, handling, clean-up, temporary weather protection, temporary heat and utilities, shipping/receiving, administration, accounting, punch list, O & M manuals, estimator time, schedule updating, safety protection, certified payrolls, street sweeping, police, barricades, signs, construction fences, and the like. Surcharges for subcontracted work, where required or permitted, shall be calculated as follows:

1. To the subcontractor or sub-subcontractor performing the work, five percent (5%) of the total cost of labor and materials.
  2. To payments made to a sub-subcontractor, the subcontractor will be allowed an additional five percent (5%).
  3. To the total payment made to the subcontractor, the Contractor will be allowed an additional five percent (5%) to cover increased overhead and profit.
  4. No additional costs will be allowed for any lower tier of subcontractors.
- 10.2. The Owner may make alterations in the line, grade, plan, form, dimensions or materials, of the subject matter of the Contract, or any part thereof, either before or after commencement of construction. Where such alterations increase the quantity or standard of the work to be done, payment for such increase shall be made in the same way that payment is made for extra work under (a) above. Where such alterations diminish the quantity or standard of the work to be done, an adjustment shall be made to the benefit of the Owner based upon the unit prices where used or, where unit prices are not used, as the Owner shall determine.

11. Performance

- 11.1. Prosecution of Work; Responsibility for Employees and Agents: The Contractor shall give attention constantly to the faithful prosecution of the work and shall keep the same under its personal control. It shall be responsible for all the acts and omissions of its employees, subcontractors and of all persons directly or indirectly employed by it in connection with the prosecution of this work.
- 11.2. Inspection of Work: At all times relevant to the Contract, the Contractor shall permit the Owner to review or inspect the work without formality or other procedure. The Contractor shall provide sufficient and proper facilities at all times for the inspection of the work by the Owner.
- 11.3. Defective Work: The Contractor shall, after receiving written notice that certain work or construction is improper, unsafe or defective or that such construction in any way fails to conform to the Contract, forthwith remove such unsafe or defective construction and reconstruct the same in a manner remedying the construction after being so notified, the Owner may cause such defective work to be remedied or replaced and the Owner may deduct the cost thereof from any moneys due or to become due the Contractor.
- 11.4. Suspension of Work - Contractor's Failure(s): The Owner shall have the authority to suspend the work wholly or any part thereof for such period as the Owner shall deem necessary due to failure of the Contractor to carry out orders given or to perform any provisions of the Contract. Upon receipt of written order from the Owner, the Contractor shall immediately suspend the work or such part thereof in accordance with the order. No work shall be resumed when conditions so warrant or deficiencies have been corrected and the condition of the Owner as ordered or approved in writing by the Owner. No allowance of any kind will be made for suspension of work by order of the Owner.
- 11.5. Suspension of Work - Act of Nature: Should the Contractor be obstructed or delayed in the prosecution of the work as a result of damage which may be caused by lightning, earthquake, rain, storm or cyclone or similar act of nature, then the time fixed for completion may be extended for a period equivalent to the time lost by reason of any of the forgoing causes. No such extension shall be made unless a claim therefor is presented in writing to the Owner within forty-eight (48) hours of the occurrence of any such delay. The Contractor shall have no claim against the Owner for damages on account of such delay. The duration of the extension itself must be certified to by the Owner.
- 11.6. Delay or Suspension of Work - All Other Circumstances: The Contractor agrees that it shall have no claim for damages of any kind on account of any delay in commencement of the work. Post commencement, the Contractor shall have no claim for damages of any kind on account of any delay or suspension of any

portion of the work except as hereinafter provided. Adjustments, if any, in the contract price due to the suspension, delay, interruption or failure to act by the Owner shall be governed by the provisions of M.G.L. c. 30, §39O, which is incorporated by reference herein. Provided, further, that no adjustment shall be made if the performance of the Contractor would have been prevented by other causes, even if the work had not been so suspended, delayed or interrupted by the Owner. Provided, further, that a subcontractor shall have the same rights against the Contractor for payment for an increase in the cost of its performance as the provisions of this Article gives the Contractor against the Owner, but nothing herein shall in any way change, modify or alter any other rights which the Contractor and subcontractor may have against each other.

- 11.7. Differing Site Conditions (M.G.L. c. 30, § 39N): “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 a 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.”
- 11.8. Additional Work and Contractors: The Owner may award other contracts for additional work. The Contractor shall cooperate fully with other contractors and carefully fit its own work to that of other contracts as may be directed by the Owner. The Contractor shall not commit or permit any acts which will interfere with the performance of work by any other contractor.
- 11.9. Compliance With Laws: The Contractor shall keep itself fully informed of and comply with all existing and future federal, state and municipal laws and regulations and all orders and decrees of any governmental bodies or tribunals (hereinafter also referred to as “laws”) having jurisdiction in any manner which affect this Contract or construction, including but not limited to such laws affecting those engaged or employed in the work, the materials used in the work or in any way affecting the conduct of the work. If any clause in this Contract

does not conform to such law, then such clause shall be void and the law operative shall be inserted in lieu thereof. If any discrepancy or inconsistency is discovered in the specifications, drawings, or contract documents in violation of the law, the Contractor shall forthwith report the same in writing to the Owner. The Contractor shall cause its employees, agents and subcontractors to also observe and comply with all such laws. It shall protect and indemnify the Owner and its officials, employees and duly appointed agents against any claim or liability arising from or based on any violation, whether by the Contractor or its officials, employees or subcontractors, of any such law.

11.10. Explosives: When the use of explosives is necessary for the prosecution of the work, the Contractor shall take the utmost care not to endanger life and property. Whenever directed, the number and size of the charges shall be reduced. All explosives shall be stored in a secure manner. All such storage places shall be marked clearly "DANGEROUS-EXPLOSIVES", and shall be in the care of competent watchmen at all times. The method of storage and handling of explosives and highly inflammable materials shall conform with all State Laws and Regulations, as well as any local requirements.

11.11. Dig Safe Laws: The Contractor shall fully comply with the Dig Safe Laws.

11.12. Weather Protection and Adequate Heat: The Contractor shall install weather protection and furnish adequate heat in the protected area from November 1 to March 31 as required by M.G.L. c.149, §44F.

## 12. Insurance:

12.1. The Contractor shall purchase and maintain such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by itself or by any subcontractor or by anyone directly or indirectly employed by any of them or by anyone for whose acts any of them may be liable.

1. Claims under Worker's Compensation, disability benefit and other similar employee benefit acts;
2. Claims for damages because of bodily injury, occupational sickness or disease, or death of its employees, and claims insured by usual personal injury liability coverage;
3. Claims for damage because of bodily injury, sickness or disease, or death of any person other than its employees, and claims insured by usual personal injury liability coverage;

4. Claims for damages because of injury to or destruction of tangible property, including loss of use resulting therefrom.
- 12.2. The Insurance required by the above shall be written for not less than the following minimum limits of liability:
1. Worker's Compensation: As required by law.
  2. Broad form Commercial General Liability written on a "per occurrence" basis with an aggregate cap no less than three (3) times the required limit: \$1,000,000 C.S.L. Products/Completed Operations insurance shall be maintained for a minimum period of three (3) years after final payment, and the Contractor shall continue to provide evidence of such coverage to Owner on an annual basis during the aforementioned period. Property Damage Liability shall include coverage for X-C-U hazards of explosion, collapse, and damage to underground property.
  3. Umbrella Excess Liability following form of underlying General, Automobile and Employers' Liability Coverage: Minimum Insurance Limit of \$2,000,000 C.S.L. over primary insurance. No more than \$10,000 Retention
  4. Comprehensive Automobile Liability and Property Damage covering owned, non-owned, and hired vehicles: \$1,000,000 C.S.L.
- 12.3. The above insurance policies shall also be subject to the following requirements:
1. Wherever applicable, including, but not limited to Contractor's Comprehensive General Liability Insurance, all insurance coverage shall be on an "occurrence basis" and not a "claims-made basis."
  2. Certificates of Insurance and copies of policies acceptable to the Owner shall be addressed to and filed with the Owner prior to commencement of the work. Renewal certificates shall be filed with the Owner at least thirty (30) days prior to the expiration date of required policies.
  3. No insurance coverage shall be subject to cancellation or non-renewal without at least thirty (30) days prior written notice forwarded by registered or certified mail to the Owner. The Owner shall also be notified of the attachment of any restrictive amendments, material changes or impairment to the policies.
  4. All premium costs shall be included in the Contractor's bid. The Contractor shall be responsible for the cost of any and all deductibles.

5. The Owner (including its officials, employees agents and representatives) shall be named as an additional insured on the Contractor's General Liability, Automobile Liability and Umbrella Liability insurance policies.

13. Other Statutory Requirements:

- 13.1 Record Keeping and Management Controls: The Contractor shall comply with M.G.L. c.30, §39R.
- 13.2 Non-Discrimination: The Contractor shall not discriminate on grounds of race, color, religious creed, national origin, age or sex in employment practices, in the selection or retention of subcontractors, the procurement of material and rental of equipment, employment decisions or in any aspect of the performance of this Contract. The Contractor shall also comply with all applicable laws and regulations pertaining to non-discrimination. In all solicitations either by competitive bidding or negotiation made by the Contractor for work to be performed under a subcontract, each potential subcontractor shall be notified by the Contractor of the Contractor's obligations under this Contract relative to non-discrimination and it shall be a term of each contract with a subcontractor in connection with the performance of this work under this Agreement, that the subcontractor be bound to non-discrimination and equal opportunity requirements equivalent to the obligations of the Contractor hereunder.
- 13.4 Reserve Police Officer: In accordance with M.G.L. c.149, §34B, the Contractor shall pay to any reserve police officer employed by it the prevailing wage paid to regular police officers.
- 13.5 This Contract will be constructed and governed by the provisions of applicable federal, state and local laws and regulations and wherever any provision of this 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.
- 13.6 Wherever applicable law mandates the inclusion of any term or 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.
- 13.7 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 laws or regulation, the Contractor shall bear all costs arising therefrom.

14. Subject to Appropriation: Notwithstanding anything in the Contract Documents to the contrary, any and all payments that the Owner is required to make under this Contract shall be subject to appropriation or other availability of funds as certified by the Owner's Accountant.
15. The Contractor's Breach and the Owner's Remedies: Failure of the Contractor to comply with any of the terms or conditions of this Contract shall be deemed a material breach of this Contract, and the Owner shall have all the rights and remedies provided in the Contract and Contract Documents, including, but not limited to, the right to cancel, terminate, or suspend the Contract in whole or in part, the right to maintain any and all actions at law or in equity, or other proceedings with respect to a breach of this Contract, including damages and specific performance, and the right to select among the remedies available to it by all of the above.
16. Claims by Contractor and Liability of Owner:
  - 16.1 All claims by the Contractor against the Owner shall, unless otherwise provided by law, be initiated by a written claim submitted to the Owner no later than seven (7) calendar days after the event or the first appearance of the circumstances causing the claim. The claim shall set forth in detail all known facts and circumstances supporting the claim. The Contractor shall continue its performance under this Contract regardless of the submission or existence of any claims.
  - 16.2 The liability of the Owner under this Agreement is limited to the compensation provided herein for work actually performed to the extent that such compensation is permitted by law. The Owner's liability shall in no event include liability for incidental, special or consequential damages or lost profits or for damages of loss from causes beyond the Owner's reasonable control.
17. Conflict of Interest: Both the Owner and the Contractor stipulate to the applicability of the State Conflict of Interest Law (M.G.L. c.268A), and this Contract expressly prohibits any activity which shall constitute a violation of that law. The Contractor shall be deemed to have investigated the law's applicability to the performance of this Contract, and, by executing the Contract, the Contractor certifies to the Owner that neither it nor its agents, employees, or Subcontractors, are in violation of M.G.L. c.268A.
18. Certification of Tax Compliance: This Contract must include a certification of tax compliance by the Contractor.
19. Indemnification:
  - 19.1. To the fullest extent permitted by law the Contractor shall indemnify and defend and save harmless the Owner and all of its officers, agents and employees, against all suits, demands, claims, judgments or liability of every name, nature, and description arising out of, relating to, or in consequence of the acts or omissions



of the Contractor, or any subcontractor, in the performance of the work covered by the Contract or the failure to comply with the terms and conditions thereof; and the Contractor shall at its own cost and expense defend any and all such suits and actions.

- 19.2. The Contractor shall bear all losses resulting from the use or storage of explosives and highly inflammable materials and shall indemnify, defend and save harmless the Owner and all of its officers, agents, and employees from all suits, demands, claims, liabilities or judgments for bodily injuries or death to any person and for property damage or destruction arising out of the use or storage of explosives and highly inflammable materials.
- 19.3. The Contractor further covenants to indemnify, defend and hold harmless the Owner, its officers, agents, and employees from and against each and every demand, claim, judgment or liability for or on account of the use of any patented invention, article or appliance included in the materials and equipment agreed to be furnished, supplied or used under this Contract.

## 20. Guarantees:

- 20.1. The Contractor guarantees and warrants to the Owner that all labor furnished under this Contract will be competent to perform the tasks undertaken, that the product of such labor will yield only first-class results, that materials and equipment furnished will be of good quality and new unless otherwise permitted by this Contract, and that the work will be of good quality, free from faults and defects and in strict conformance with this Contract. All work not conforming to these requirements may be considered defective.
- 20.2. If at any time any part of the work constructed under the terms of this Contract shall in the opinion of the Owner require repairing due to defective work or materials furnished by the Contractor, the Owner may notify the Contractor in writing to make the required repairs. If the Contractor shall neglect to start such repairs within ten (10) days of the date of giving it notice thereof and to complete the same to the satisfaction of the Owner with reasonable dispatch, then the latter may employ other persons to make such repairs. The Owner shall charge the expense thereof to the Contractor and may use any moneys still to pay for the same, and if such sum is insufficient, the Contractor shall be obligated to pay the balance thereof.
- 20.3. All guarantees and warranties required in the various sections of the Specifications which originate with a subcontractor or manufacturer must be delivered to the Owner before final payment to the Contractor may be made for the amount of that sub-trade or for the phase of work to which the guarantee or warranty relates. The failure to deliver a required guarantee or warranty shall be held to constitute a failure of the subcontractor to fully complete its work in

accordance with the Contract Documents. The Contractor's obligation to correct work is in addition to, and not in substitution of, such guarantees or warranties as may be required in the various Sections of the Specifications.

21. Liquidated Damages: Because both parties recognize (1) that the time for completion of this Contract is of the essence, (2) that the Owner will suffer loss if the work is not completed within the contract time specified, plus any extension thereof allowed in accordance with the provisions of this Contract, and (3) the delays, expense and difficulties involved in a legal proceeding to determine the actual loss suffered by the Owner if the work is not completed in time, it is agreed that the Contractor will pay the Owner as liquidated damages the sum of One Thousand Dollars (\$1,000.00) per day for each and every day thereafter that it fails to deliver such work completed according to the requirements of the Contract. Such liquidated damages shall be paid not as a penalty, but to cover losses and expenses to the Owner, including intangible costs and losses that are or may be impracticable to ascertain. Allowing the Contractor to continue to finish the work (or any portion of the work) after the time specified for completion of the work shall not operate as a waiver on the part of the Owner of any of its rights under the Contract or otherwise under law or equity.

22. Termination:

22.1. If the Contractor shall be adjudged as bankrupt, or if it shall make a general assignment for the benefit of its creditors, or if a receiver of its property shall be appointed, or if the work to be done under the Contract shall be abandoned, or if the Contract or any part thereof shall be sublet without the previous written consent of the Owner or if the Contract or any claim thereunder shall be assigned by the Contractor otherwise than as herein specified, or if at any time the Owner shall be of the opinion that the work, or any part thereof, is unnecessarily or unreasonably delayed, or that the Contractor has violated any of the provisions of the Contract, the Owner may notify the Contractor to discontinue all work, or any part thereof; and thereupon the Contractor shall discontinue such work or such part thereof as the Owner may designate, as the Owner directs, and the Owner may thereupon, by contract or otherwise, as it may determine, complete the work, or such part thereof, and charge the entire expense of so completing the work or any part thereof to the Contractor. In such case, the Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work, including compensation for additional architectural, managerial, legal and administrative services, such excess shall be paid to the Contractor. If such expenses shall exceed such unpaid balances, the Contractor shall pay the difference to the Owner. The obligation for payment shall survive the termination of the Contract.

22.2. If the Owner shall certify by written notice to the Contractor that the rate of progress is not satisfactory, the Owner may, instead of notifying the Contractor to discontinue all of the work or any part thereof, notify it from time to time to

increase the force, equipment and plant, or any of them, employed on the whole or any part of the work, stating the amount of increase required. Unless the Contractor shall, within five (5) days after such notice, increase its force, equipment and plant to the extent required therein, and maintain and employ the same from day to day until the completion of the work or such part thereof or until the conditions as to the rate of progress shall, in the opinion of the Owner, be fulfilled, the Owner may employ and direct the labors of such additional force, equipment and plant as may, in the opinion of the Owner, be necessary to insure the completion of the work or such part thereof within the time specified or at the earliest possible date thereafter, and charge the expense thereof to the Contractor. Neither the notice from the Owner to the Contractor to increase its force, equipment or plant nor the employment of additional force, equipment or plant by the Owner shall be held to prevent a subsequent notice to the Contractor from the Owner to discontinue the work under the provisions of the preceding portion of this article.

- 22.3. All expenses charged under this article shall be deducted by the Owner out of moneys then due or to become due the Contractor under this Contract, or any part thereof. In such accounting the Owner shall not be obligated to obtain the lowest figures for the work of completing the Contract or any part thereof, or for insuring its proper completion, and all sums actually paid by the Owner shall be charged to the Contractor. If the expense so charged is greater than the sum which would have been payable under the Contract if the same had been completed by the Contractor, then the Contractor shall pay the amount of the excess to the Owner upon completion of the work and without further demand being made therefor.
- 22.4. The Contractor shall not be relieved of liability to the Owner by virtue of any termination of this Contract, and any claim for damages against the Contractor relating to the Contractor's performance under this Contract shall survive any termination hereunder.
- 22.5. Notwithstanding any other provision of this Agreement, the Owner reserves the right at any time in its absolute discretion to suspend or terminate this Agreement in whole or in part for its convenience upon seven (7) days written notice to the Contractor. The Owner shall incur no liability by reason of such termination except for the obligation to pay compensation for all work performed by the Contractor and accepted by the Owner to the termination date.

23. Assignment: Assignment of this Contract is prohibited, unless assignment is provided for expressly in the Contract Documents.

24. Contract Execution and Administration:

- 24.1. Clerk's Certificate – Corporation: If the Contractor is a corporation, it shall endorse upon the Contract (or attach hereto) its Clerk's Certificate certifying the

corporate capacity and authority of the party signing this Contract for the corporation. Such certificate shall be accompanied by a letter or other instrument stating that such authority continues in full force and effect as of the date the Contract is executed by the Contractor.

24.2. Foreign Corporation: The Contractor, if a foreign corporation, shall comply with M.G.L. c.30, §39L.

24.3. Municipal Prerequisites: This Contract shall not be enforceable against the Owner unless and until the Contractor complies with this section. This Contract is only binding upon, and enforceable against the Owner if:

1. the Contract is signed by the Owner or its designee; and
2. endorsed with approval by the Owner Accountant as to appropriation or availability of funds.

25. Liability of Public Officials: To the full extent permitted by law, no official, employee, agent or representative of the Owner shall be individually or personally liable on any obligation of the Owner under this Contract.

26. Notices: Any notice permitted or required under the provisions of this Contract to be given or served by either of the parties hereto upon the other party hereto shall be in writing and signed in the name or on the behalf of the party giving or serving the same. Notice shall be deemed to have been received at the time of actual service or three (3) business days after the date of a certified or registered mailing properly addressed. Notice to the Contractor shall be deemed sufficient if sent to the address set forth in the Contract. Notice to the Owner shall be deemed sufficient if sent to:

Robert LeLacheur  
Town Manager

With a copy to:

J. Raymond Miyares  
Miyares and Harrington LLP  
40 Grove Street—Suite 190  
Wellesley, MA 02482

27. Binding on Successors: This contract shall be binding upon the Contractors, its assigns, transferees, and/or successors in interest and, where not corporate, the heirs and estate of the Contractor.

28. Complete Contract: This instrument, together with its endorsed supplements, and the other components of the Contract Documents, constitutes the entire Contract between the parties, with no agreements other than those incorporated herein.

29. Severability: If any provision of this contract shall be found invalid for any reason, such invalidity shall be construed as narrowly as possible and the balance of the contract shall be deemed to be amended to the minimum extent necessary to provide to the parties substantially the benefits set forth in this contract.
30. Certification of Non-Debarment or Suspension: By execution of this Contract, the Contractor, pursuant to M.G.L. c. 29, § 29F, certifies under the penalties of perjury that it is not presently debarred or suspended from doing public construction work in the Commonwealth pursuant to said section, or any applicable debarment or suspension provisions of any other chapter of the Massachusetts General Laws or any rule or regulation promulgated thereunder.
31. Amendments: This Contract may be amended or modified only by written instrument duly executed by the parties.
32. Independent Contractor: The Contractor is not an employee or agent of the Owner, but is an independent contractor.
33. No Privity of Contract Between Owner and Other Parties: Nothing contained in this Contract shall create, or be interpreted to create, privity or any other contractual agreement between the Owner and any person or entity other than the Contractor.

**[Signatures appear on the following page]**

**Owner  
Town of Reading**

**Contractor**

\_\_\_\_\_  
Robert LeLacheur, Town Manager

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

Its:

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

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

Approved as to availability of funds:

\_\_\_\_\_

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

Title: \_\_\_\_\_