

# City of Plainwell



“The Island City”

Brad Keeler, Mayor  
Lori Steele, Mayor Pro-Tem  
Todd Overhuel, Council Member  
Roger Keeney, Council Member  
Randy Wisnaski, Council Member

Department of Administration Services  
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## AGENDA

### Plainwell City Council

### Special Meeting

### City Hall Council Chambers

### Monday, July 6, 2020

### 5:00PM

**For the purpose of reviewing the proposed Mill Demolition Contract and any other related matters.**

1. **Call to Order**
2. **Roll Call**
3. **New Business:**

**A. Mill Demolition Contract – Melching, Inc.**

Council will consider approving a contract with Melching, Inc. for demolition work on the Mill Site.

**B. Engineering Change Order – GHD**

Council will consider approving a change order for engineering services with GHD related to the Mill Demolition.

4. **Public Comments**
5. **Council Comments**
6. **Adjournment**

Note: All public comment limited to two minutes, when recognized please rise and give your name and address

# PRIMARY AGREEMENT

THIS PRIMARY AGREEMENT (“*Agreement*”) is made and effective as of the date this Agreement is signed by the last of the parties below, by and between the City of Plainwell, a Michigan municipal corporation located in Allegan County (the “*City*”), and Melching Inc., a Michigan corporation (the “*Contractor*”).

## Background

- A. The City of Plainwell owns the former Plainwell, Inc. Mill Site located at 200 Allegan Street, Plainwell, Michigan 49080.
- B. The City has been awarded a State of Michigan Community Development Block Grant (“*CDBG*”) (MSC 2018017-ESB) to assist in the demolition of approximately 220,000 square feet of blighted building and equipment of the former Plainwell Paper Mill located on the Plainwell, Inc. Mill Site.
- C. The City has awarded the contract for the aforesaid work to the Contractor as more fully described in the Project Manual and other documents incorporated into this Agreement.

## Agreement

NOW THEREFORE, for good and valuable consideration the sufficiency of which is acknowledged, the parties agree as follows:

### I. Scope of Services and Contract Documents

- 1. The Contractor shall furnish all supervision, technical personnel, labor, materials, machinery, tools, equipment and services, including utility and transportation services, and perform and complete all work required for the activities embraced in the *Project* (defined below); namely the decommissioning and demolition of the former Plainwell, Inc. Mill Site and required supplemental work more fully described in the Agreement Documents (defined below). *Project* means the project for which the services of the Contractor have been retained pursuant to the Agreement Documents which are funded, in whole or in part, with the CDBG funds. The Contractor is responsible to timely secure all permits, licenses, etc. necessary for the Project.
- 2. The Secondary Agreement is fully integrated and adopted as part of this Agreement (together the “*Agreement Documents*”). The *Secondary Agreement* is defined to include the Contract Documents referenced therein or its, attachments, exhibits, etc. In the event that any provision of the Secondary Agreement conflicts with any provision of this Agreement, the provision contained within this Agreement will govern unless otherwise specifically stated herein.

## II. Liability

1. The Contractor is an independent contractor and as such will not assert in any legal action by claim or defense nor take the position in any administrative or legal procedures that he is an agent or employee of the City.

2. The City shall not be liable for failure on the part of the Contractor, subcontractor or any other party under the control of the Contractor to perform all work on the Project in accordance with all applicable laws and regulations. The Contractor will defend and indemnify the City to the extent it has any liability to the State of federal government for the failure of such parties to perform all work in accordance with all applicable laws and regulations. Contractor's obligation of indemnity shall not be limited or extinguished by the availability of insurance coverage for the indemnified losses, it being the intention of the parties that: (1) Contractor will indemnify the City to the broadest extent possible; and (2) the City need not seek coverage for indemnified losses under any insurance policy or self-insurance that the City maintains. If the City receives payment from Contractor's insurance for indemnified losses, the Contractor will nevertheless remain liable for the indemnified losses in the event the payment received by the City is less than the amount of such indemnified losses. The City may draw upon the Contractor's performance bond to the extent necessary should the Contractor not timely comply with the requirements of this paragraph. Contractor's obligations pursuant to this paragraph will survive any expiration or termination of this agreement. Contractor reserves the right to contest what are considered to be "indemnified losses" and whether it has complied on a timely basis.

3. The Contractor agrees to defend, indemnify, and hold harmless the City from and against all claims, demands, judgments, damages, actions, causes of actions, injuries, administrative orders, consent agreement and orders, liabilities, penalties, costs, and expenses of any kind whatsoever, including, without limitation, claims arising out of loss of life, injury to persons, property, or business or damage to natural resources, historical structures, or violation of any State of Michigan (the "State"), defined to include the Michigan Strategic Fund (the "MSF") or any other agency, department, or agent or Federal rule or statute in connection with the Project. Contractor's obligation of indemnity shall not be limited or extinguished by the availability of insurance coverage for the indemnified losses, it being the intention of the parties that: (1) Contractor will indemnify the City to the broadest extent possible; and (2) the City need not seek coverage for indemnified losses under any insurance policy or self-insurance that the City maintains. If the City receives payment from Contractor's insurance for indemnified losses, the Contractor will nevertheless remain liable for the indemnified losses in the event the payment received by the City is less than the amount of such indemnified losses. The City may draw upon the Contractor's performance bond to the extent necessary should the Contractor not timely comply with the requirements of this paragraph. Contractor's obligations pursuant to this paragraph will survive any expiration or termination of this agreement. Contractor reserves the right to contest what are considered to be "indemnified losses" and whether it has complied on a timely basis.

## III. General Conditions

1. Prime Contractor Responsibilities: The Contractor will assume sole responsibility for the complete effort and enforcement of laws and regulations under the Agreement Documents in

regard to its agents, employees, subcontractors, etc. The City will consider the Contractor to be the sole point of contact with regard to contractual matters. All contractors, including subcontractors must be registered in the Federal System for Award Management (the “SAM”) and eligible to receive federal contracts.

## 2. Subcontracts

- a. The Contractor shall not execute an agreement with any subcontractor or permit any subcontractor to perform any work included in this Agreement until such subcontractor submitted a Non-Collusion Affidavit from the subcontractor on a substantially similar form provided by the MSF and has received written approval of such subcontractor from the City.
  - b. The Contractor shall be as fully responsible to the City for the acts and omissions of subcontractors, and of persons either directly or indirectly employed by the Contractor, in the same manner as if such subcontractors or persons were direct employees of the Contractor.
  - c. The Contractor shall cause appropriate provision to be inserted in all subcontracts relative to the work to require compliance by each subcontractor with CDBG requirements and the applicable provisions of the Agreement Documents. At a minimum, those provisions include, but are not limited to, non-discrimination and Copeland Anti-kickback.
  - d. Nothing contained the Agreement Documents shall create any contractual relation between any subcontractor and the City.
  - e. The Contractor shall not award work to subcontractor(s) in excess of 50 percent of the contract price without prior written approval of the City.
3. Ownership: Ownership of all real or personal property, acquired in whole or in part with CDBG funds for use on this Project, shall be vested in the City, unless otherwise authorized by the State.
  4. Reporting Requirements: The Contractor agrees to complete and submit all reports, in such form and according to such schedule, as may be required by the City, the State of Michigan, or the Department of Housing and Urban Development (the “HUD”). Further, the Contractor agrees to require any subcontractors to submit reports that may be required and to incorporate such language in its agreements.
  5. Access to Records: All records with respect to all matters covered by the Agreement Documents shall be made available at any time for audit and inspection by the City, the State of Michigan, the HUD, or their representatives upon their request.
  6. Maintenance of Records: The Contractor will maintain records which allow assessment of the extent of the performance related to the Project and which will allow for the comparison of actual outlays with the budgeted amounts. The Contractor’s overall financial management system must ensure effective control over, and accountability for, all funds received. Accounting records must be supported by source documentation such as time sheets and invoices.

7. Retention of Records: The Contractor will retain all financial records, supporting documentation, statistical records, and all other pertinent records until notified by the City or the State of Michigan. If such notification is not received within a period of sixty (60) months from the date of completion of the Project, Contractor shall have no further obligation to retain such records.
8. Confidential Information: Any reports, information, data, etc., given to, prepared by, or assembled by the Contractor under the Agreement Documents, which the City or the State of Michigan requests to be kept confidential, will not be made available to any individual or organization by the Contractor without prior written approval of the City or the State of Michigan, as applicable.
9. Reporting of Fraudulent Activity: If at any time during the term of the Agreement Documents any party has reason to believe by whatever means that, under this or any other program administered by the State of Michigan, a recipient of funds has improperly or fraudulently applied for or received benefits, monies or services pursuant to the Agreement Documents or any other contract, such information shall be reported immediately to the appropriate authorities.
10. Conflicts of Interest and Ethical Standards: The following provisions regarding “conflicts of interest” apply to the use and expenditure of CDBG funds by the City, Contractor, and their subrecipients
  - a. Except for eligible administrative or personnel costs, the general rule is that no person who is an employee, agent, consultant, officer, or elected or appointed official of the State or a unit of general local government or any designated public agencies or subrecipient which are receiving CDBG funds who exercise or have exercised any function or responsibilities with respect to CDBG activities assisted herein or are in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from the activity, or have an interest in any contract, subcontract or agreement with respect thereto, or the proceeds thereunder either for themselves or those with whom they have family or business ties during their tenure or for one year thereafter. Exceptions may be granted by the State of Michigan on a case by case basis as requested upon full disclosure in writing.
  - b. Should the City, Contractor, subcontractor, employee or official know or perceive any breach of ethical standards or conflict of interest under the CDBG grant awarded to the City, they shall immediately notify the MSF in writing.
11. If work on the Project is stopped at the direction of any governmental entity other than the City, the City will not be responsible for any costs regarding equipment left at the Project site or any other costs incurred by the work stoppage. Notwithstanding the foregoing, or any other provisions of the Agreement Documents, failure of Contractor to complete the work contracted for in the manner specified in such documents, due to Contractor's reasonable adherence to any further Executive Orders issued by the Governor in response to the coronavirus (COVID-19) emergency, shall **not** constitute a breach of any of the terms of such documents.

12. **Applicable Law:** In addition to the applicable Federal laws and regulations, Agreement Documents are also made under and shall be construed in accordance with the laws of the State of Michigan.
13. **Legal Services:** No attorney-at-law shall be engaged through the use of any funds provided under the Agreement Documents in any legal action or proceeding against the State of Michigan or the City.
14. **Copyright:** Except as otherwise provided in the terms and conditions of the Agreement Documents, the Contractor paid through the Agreement Documents is free to copyright any books, publications or other copyrightable materials developed in the course of the Project and under this Agreement. However, HUD and the State reserve a royalty-free, non-exclusive and irrevocable license to reproduce, publish or otherwise use and to authorize others to use, for Federal government and State purposes:
  - a. the copyright in any work developed under the Agreement Documents; and
  - b. any rights of copyright to which a subcontractor purchases ownership with grant support.

The Federal government's rights and the State's rights identified above must be conveyed to the publisher and the language of the publisher's release form must insure the preservation of these rights.

15. **Publicity:** At the request of the City and at the expense of the State of Michigan, the Contractor will cooperate with the City to promote the project through one or more of the placement of a sign, plaque, media coverage or other public presentation at the project or other location acceptable to the parties.
16. **Criminal or Civil Matters:** Contractor affirms that to the best of its knowledge that it or its affiliates, subsidiaries, offices, directors, managerial employees, and any person who directly or indirectly holds a pecuniary interest in the Contractor of 20% or more: (i) do not have any criminal convictions incident to the application for or the performance of a State of Michigan contract or subcontract; and (ii) do not have any criminal convictions or have not been held liable in a civil proceeding, that negatively reflects on the person's business integrity, based on a finding of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or violation of any State of Michigan or Federal antitrust statutes.
17. **Contract:** If any provision of the Agreement Documents is held to be invalid or unenforceable, the remaining portions shall remain in effect. In the event such invalid or unenforceable provision is considered an essential element of the Agreement Documents, the parties shall promptly negotiate a replacement provision, which addresses the intent of such provision.
18. **Amendments:** Any changes to the Agreement Documents affecting the scope of work of the Project must be approved, in writing, by the City and shall be incorporated in writing into the Agreement Documents.

19. Sanctions: If the Contractor fails or refuses to comply with the term of the Agreement Documents, the City may take any or all of the following actions: cancel, terminate, or suspend in whole or in any part the Agreement Documents, or refrain from extending any further funds to the Contractor until such time as the Contractor is in full compliance. The Contractor will be permitted to cure such violations in a manner consistent with the terms of the Secondary Agreement.
20. The headings in this Agreement are for convenience of reference only and do not limit or otherwise affect the meaning of the terms of this Agreement.
21. The signatories to this Agreement affirm that they are authorized to bind their respective parties.
22. This Agreement may be executed in multiple counterparts, each of which will be deemed to be an original, but all of which together constitute but one document. This Agreement may not be amended unless in writing and signed by each party. Each party has actively participated in the negotiation and drafting of this Agreement, and no inference in interpreting this Agreement will be made in favor of one or the other party regardless of which party may be shown as the preparer of this Agreement. Each party will be entitled to recover from the other party its court costs, litigation expenses and reasonable attorneys' fee in connection with the successful enforcement of its rights or remedies under this Agreement, or the successful defense against a claim to enforce any perceived rights or remedies.

#### IV. State of Michigan Requirements

1. State Laws: Regardless of whether they are referenced herein, the parties agree to comply with all CDBG requirements as well as other State laws, regulations, or Executive Orders, Executive Directives, etc. The City reserves the right to add or delete terms and conditions of the Agreement Documents as may be required by revisions and additions or changes in the requirements, regulations, and laws governing the CDBG Program.
2. Applicability of State Regulations: In the event that State laws, rules or regulations related to MSF or CDBG funding requires a change to the Agreement Documents, the Agreement Documents will be immediately interpreted, modified, applied and enforced consistent with those changes as though they were in the original Agreement. Those changes will be incorporated into the Agreement Documents in writing soon as possible without unnecessary delay.
3. Nondiscrimination and Unfair Labor Practices: In connection with the Agreement Documents, the Contractor will not discriminate against any employee or applicant for employment with respect to their hire, tenure, terms, conditions, or privileges of employment on any matter directly or indirectly related to employment because of race, color, religion, national origin, ancestry, age, sex (including sexual orientation and gender identity or expression as defined in Executive Directive 2019-09) height, weight, marital status, partisan considerations, physical or mental disability, or genetic information (as defined in Executive Directive 2019-09) that is unrelated to the individuals ability to perform the duties of the particular job or position. The Contractor further agrees that every subcontract or sub-recipient agreement entered into for performance of the Agreement Documents will contain a provision require nondiscrimination in employment as specified in the Agreement Documents, binding upon each subcontractor. This covenant is required as applicable under the Elliot Larsen Civil Rights Act, 1976 PA 453, MCL 37.2101 et

seq., and the Persons with Disability Civil Rights Act, 1976 PA 220, MCL 37.1101 et seq., and is consistent with Executive Directive 2019-09, and any breach thereof may be regarded as a material breach of this Agreement.

## V. Federal Requirements

1. **Federal Laws:** Regardless of whether they are referenced herein, the parties agree to comply with all CDBG requirements as well as other federal laws, regulations, or Executive Orders, Executive Directives, etc. The City reserves the right to add or delete terms and conditions of the Agreement Documents as may be required by revisions and additions or changes in the requirements, regulations, and laws governing the CDBG Program.
2. **Applicability of Federal Regulations:** In the event that federal laws, rules or regulations related to HUD or CDBG funding requires a change to the Agreement Documents, the Agreement Documents will be immediately interpreted, modified, applied and enforced consistent with those changes as though they were in the original Agreement Documents. Notwithstanding the foregoing, the changes in such regulations shall not affect the amounts payable to Contractor or the terms of payment to Contractor as provided in the Agreement Documents. Those changes will be incorporated into the Agreement Documents in writing soon as possible without unnecessary delay.
3. **Procurement and Contracting:** In accordance with 2 CFR Part 200, the cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used. This provision shall supersede any conflicting provision in an executed contract document or agreement funded in whole or in part with CDBG funds.
4. **Debarment Certification:** The Contractor must comply with Executive Orders 12549 and 12689 regarding Federal debarment and suspension regulations prior to entering into a financial agreement for any transaction as outlined below.
  - a. Any procurement contract for goods and services, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold.
  - b. Any procurement contract for goods and services, regardless of amount, under which the Contractor will have a critical influence on or substantive control over the transaction.

In addition, no contract may be awarded to any subcontractors who are ineligible to receive contracts under any applicable regulations of the State.

5. **Termination for Convenience:** The Agreement Documents may be terminated for convenience in accordance with 2 CFR Part 200.



6. Equal Employment Opportunity: As applicable, the Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the State.
  - a. In carrying out the Project, the Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor must take affirmative action to ensure that applicants for employment are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices to be provided by the State setting forth the provisions of this non-discrimination clause. The Contractor shall state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin. The Contractor will, in all solicitations or advertisements for employees by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin. The Contractor shall incorporate the foregoing requirements of this paragraph in all of its subcontracts for the Project unless exempted by rules, regulations, or orders of the State issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor.
  - b. The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the State advising the said labor union or workers' representatives of the Contractor's commitment under this Section and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
  - c. The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the State, or pursuant thereto, and will permit access to its books, records, and accounts by HUD and the State for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
  - d. In the event of the Contractor's noncompliance with the non-discrimination clauses of this Agreement or with any of such rules, regulations, or orders, this Agreement may be canceled, terminated or suspended in whole or in part and the Contractor may be declared ineligible for further State government contracts or federally assisted construction contract procedures authorized in Executive Order 11246 of September 24, 1965, or by rules, regulations, or orders of the State, or as otherwise provided by law.

7. Age Discrimination: As applicable, in accordance with 45 CFR, Parts 90 and 91, the Contractor agrees there shall be no bias or age discrimination as to benefits and participation under the Agreement Documents.
8. Housing and Community Development Act of 1974: As applicable, the Contractor will comply with all applicable portions of Title I of the Housing and Community Development act of 1974, as amended. No person in the United States shall on the grounds of race, color, national origin or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the CDBG program.
9. Section 504 of the Rehabilitation Act of 1973, as amended: As applicable, the Contractor agrees that no otherwise qualified individual with disabilities shall, solely by reason of his disability, be denied the benefits, or be subjected to discrimination including discrimination in employment, any program or activity that receives the benefits from CDBG program.
10. Section 3, Compliance and Provision of Training, Employment and Business Opportunities: As applicable, the Contractor will comply with the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, (12 USC § 1701u). The purpose of Section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD-assisted projects covered by Section 3 shall, to the greatest extent feasible be directed to low and very low-income persons, particularly persons who are recipients of HUD assistance for housing.
  - e. The parties to this Agreement will comply with HUD's regulations in 24 CFR Part 135, which implement Section 3. As evidenced by their execution of this Agreement, the parties to this Agreement certify that they are under no contractual or other impediment that would prevent them from complying with the 24 CFR Part 135 regulations.
  - f. The Contractor agrees to send to each labor organization or representative of workers with which the Contractor has a collective bargaining agreement or other understanding, if any, a notice advising the organization or workers' representative of the contractor's commitments under this Section 3 clause, and will post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment positions can see the notice. The notice shall describe the Section 3 preference, shall set forth minimum number and job titles subject to hire, availability of apprenticeship and training positions; the qualifications for each; and the name and location of person(s) taking applications for each of the positions; and the anticipated date the work shall begin. The Contractor agrees to include this Section 3 clause in every subcontract subject to compliance with regulations in 24 CFR Part 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this Section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 CFR Part 135. The Contractor will not subcontract with any subcontractor where the Contractor has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 CFR

Part 135. It is understood that Contractor's employees are not represented by a labor union or any other organization.

- g. The Contractor will certify that any vacant employment positions including training positions, that are filled (1) after the Contractor is selected but before this Contract has been executed, and (2) with persons other than those to whom the regulations of 24 CFR Part 135 require employment opportunities to be directed, were not filled to circumvent the Contractor's obligations under 24 CFR Part 135.
- h. The Contractor agrees to submit such reports as required to document compliance with 24 CFR Part 135. Noncompliance with the regulations in 24 CFR Part 135 may result in sanctions, termination of this Contract for default, and debarment or suspension from future HUD assisted contracts.

11. Compliance with Air and Water Acts: As applicable, the Contractor will adhere to the requirements of the Clean Air Act, as amended, 42 USC § 7401 et seq., the Federal Water Pollution Control Act (Clean Water Act), as amended, 33 USC § 1251 et seq., and the regulations of the Environmental Protection Agency with respect to 40 CFR Part 15, as amended from time to time. In particular, the following are required:

- i. A stipulation by the Contractor or subcontractor that any facility to be utilized in the performance of any nonexempt contract or subcontract is not listed on the List of Violating Facilities, issued by the Environmental Protection Agency (the "EPA") pursuant to 40 CFR § 15.20.
- j. Agreement by the Contractor to comply with all the requirements of Section 114 of the Clean Air Act, as amended (42 USC § 7414) and Section 308 of the Federal Water Pollution Control Act, as amended (33 USC § 1318) relating to inspection, monitoring, entry, reports and information, as well as all other requirements specified in said Sections 114 and 308, and all regulations and guidelines issued thereunder.
- k. A stipulation that as a condition of award of contract prompt notice will be given of any notification received from the Director, Office of Federal Activities, EPA, indicating that a facility utilized or to be utilized for the contract under consideration is to be listed on the EPA list of Violating Facilities.
- l. Agreement by the Contractor that the Contractor will include or cause to be included the criteria and requirements in these subparagraphs (1) through (4), in every nonexempt subcontract and requiring that the Contractor will take such action as the State may direct as a means of enforcing such provisions.

In no event shall any amount of the CDBG funds be utilized with respect to a facility which has given rise to a conviction under section 113(c)(1) of the Clean Air Act or Section 309(c) of the Federal Water Pollution Control Act.

12. Federal Labor Standards Provisions: Contractor will abide by the Federal Labor Standards Provisions as required by the HUD.

13. Whenever possible, the Contractor will make positive efforts to utilize small businesses, minority owned firms, and women’s business enterprises in procuring services as stated in 2 CFR Part 200, as applicable.

IN WITNESS WHEREOF, the parties execute this Agreement.

CITY OF PLAINWELL

\_\_\_\_\_  
\_\_\_\_\_

By: Brad Keeler  
Its: Mayor

STATE OF MICHIGAN    )  
  ) ss.  
COUNTY OF ALLEGAN    )

Acknowledged before me in Allegan County, Michigan, on \_\_\_\_\_, 2020, by Brad Keeler, the Mayor of the City of Plainwell, a Michigan municipal corporation, on behalf of the corporation, who is personally known to me or who produced his driver’s license as identification.

\_\_\_\_\_  
\* \_\_\_\_\_

Notary Public, Allegan County,  
Michigan Acting in Allegan County  
My commission expires: \_\_\_\_\_

MELCHING, INC.

\_\_\_\_\_  
\_\_\_\_\_

By: Doug Melching  
Its: President

STATE OF MICHIGAN    )  
                                  ) ss.  
COUNTY OF \_\_\_\_\_ )

Acknowledged before me in \_\_\_\_\_ County, Michigan, on \_\_\_\_\_, 2020, by Doug Melching  
\_\_\_\_\_, the  
President of Melching, Inc., a Michigan corporation, on behalf of the corporation, who is personally  
known to me or who produced his driver’s license as identification.

\_\_\_\_\_  
\* \_\_\_\_\_

Notary Public, \_\_\_\_\_ County, Michigan  
Acting in \_\_\_\_\_ County  
My commission expires: \_\_\_\_\_

12. Federal Labor Standards Provisions: Contractor will abide by the Federal Labor Standards Provisions as required by the HUD.

13. Whenever possible, the Contractor will make positive efforts to utilize small businesses, minority owned firms, and women's business enterprises in procuring services as stated in 2 CFR Part 200, as applicable.

IN WITNESS WHEREOF, the parties execute this Agreement.

CITY OF PLAINWELL

\_\_\_\_\_  
\_\_\_\_\_

By: Brad Keeler  
Its: Mayor

STATE OF MICHIGAN    )  
                                  ) ss.  
COUNTY OF ALLEGAN    )

Acknowledged before me in Allegan County, Michigan, on \_\_\_\_\_, 2020, by Brad Keeler, the Mayor of the City of Plainwell, a Michigan municipal corporation, on behalf of the corporation, who is personally known to me or who produced his driver's license as identification.

\_\_\_\_\_  
\*

Notary Public, Allegan County,  
Michigan Acting in Allegan County  
My commission expires: \_\_\_\_\_

MELCHING, INC.

Doug Melching

By: Doug Melching  
Its: President

STATE OF MICHIGAN )  
 ) ss.  
COUNTY OF Muskegon )

Acknowledged before me in Muskegon County, Michigan, on 30<sup>th</sup>, 2020, by Doug Melching President, the President of Melching, Inc., a Michigan corporation, on behalf of the corporation, who is personally known to me or who produced his driver's license as identification.

Janet Woodring  
NOTARY PUBLIC - STATE OF MICHIGAN  
County of Muskegon  
My Commission Expires 5/14/2025  
Acting in the County of Muskegon

Janet Woodring  
\*Janet Woodring

Notary Public, Muskegon County, Michigan  
Acting in Muskegon County  
My commission expires: 5.14.25



Secondary Agreement

THIS AGREEMENT (the "Contract") , entered into this 30<sup>th</sup> Day of June, 2020

for

Phase III Decommissioning and Demolition of the Former Plainwell, Inc.  
Plainwell, Michigan

by and between

City of Plainwell

hereinafter referred to as "OWNER",

and

Melching Inc

---

A Michigan Corporation

hereinafter called "CONTRACTOR",

NOW THEREFORE, OWNER and CONTRACTOR, for the consideration hereinafter named,  
agree as follows:



## ARTICLE 1 THE UNDERTAKING

### 1.1 Work To Be Done

#### A. CONTRACTOR shall:

1. furnish all supervision, labor, services, materials, equipment, transportation, temporary facilities, and incidentals of every kind necessary, and perform and complete in the most substantial, timely, and workmanlike manner, the Works specified or indicated in the Contract Documents entitled "Phase III Decommissioning and Demolition of the Former Plainwell, Inc."

and

2. do and fulfill everything required by and in complete accordance with the Contract (the Contract Documents) as defined herein.

B. CONTRACTOR's duties and obligations under the Contract shall be performed in a safe and workmanlike manner, and in full compliance with Laws and Regulations.

## ARTICLE 2 CONTRACT DOCUMENTS

### 2.1 Documents Forming the Contract

A. The Contract and the Contract Documents shall be one and the same. The Contract Documents establish the rights and obligations of the parties and shall be deemed to include: the executed Agreement; the executed Performance and Payment Bonds; the General Conditions; the Special Conditions; the Project Specifications; the Drawings; the Schedule of Information, the Schedule of Prices, the Schedule of Additional Unit Prices approved by ENGINEER, and the Schedule of Equipment Rental Rates approved by ENGINEER; any Addenda; all provisions required by Laws and Regulations to be inserted in the Contract whether actually inserted or not; all Written Amendments, Change Orders, Work Change Directives, Field Orders, and ENGINEER's written interpretations and clarifications issued on or after the date of Notice of Award; and all appendices, attachments, and exhibits to any of the foregoing.

### 2.2 Reporting and Resolving Discrepancies

A. CONTRACTOR shall be fully responsible for thoroughly reviewing the Contract Documents.

B. Should conflict appear between the various Contract Documents, priority shall be given in order of appearance in the following list:

1. Primary Agreement
2. Secondary Agreement;
3. Special Conditions;
4. General Conditions;
5. Project Specifications;
6. Drawings:
  1. General,
  2. Details; and
7. Schedules.
8. Project Manual

C. If, during the performance of the Works, CONTRACTOR discovers any conflict, discrepancy, ambiguity, error, or omission within the Contract Documents or between the Contract Documents and any provision of any Law or Regulation applicable to the performance of the Works, or of any standard, specification, manual, or code, or of any instruction of any Supplier, CONTRACTOR shall notify ENGINEER thereof in writing within 24 hours after discovery, for resolution by ENGINEER. CONTRACTOR shall not proceed with the Works affected thereby (except in an emergency) until an amendment or supplement to the Contract Documents has been issued by one of the methods indicated in Paragraph 7.2 or ENGINEER determines that no such conflict exists. Any work affected by such conflict, discrepancy, ambiguity, error, or omission which is performed prior to ENGINEER's decision shall be at CONTRACTOR's risk and expense and at no additional cost to OWNER.

D. Except as may be otherwise specifically stated in the Contract Documents, the provisions of the Contract Documents shall take precedence in resolving any conflict, discrepancy, ambiguity, error, or omission between the provisions of the Contract Documents and: (i) the provisions of any standard, specification, manual, code, or instruction (whether or not specifically incorporated by reference in the Contract Documents); or (ii) the provisions of any Laws or Regulations applicable to the performance of the Works (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Law or Regulation).

## ARTICLE 3 REPRESENTATIONS

### 3.1 CONTRACTOR's Representations

A. CONTRACTOR hereby represents and warrants to OWNER, with the intention that OWNER rely thereon in entering the Contract, that:

1. CONTRACTOR has, and at all times during the performance of the Works, will have the capability, special experience in the type of work to be performed, registrations, licenses, permits, governmental approvals, bonds, and insurance coverage necessary to timely perform the Works;

2. CONTRACTOR shall assign personnel to perform the Works that are fit, qualified (by education and/or experience), and competent to properly perform their assigned tasks and CONTRACTOR shall properly supervise such personnel. CONTRACTOR shall promptly remove and replace any person not so fit, competent, or qualified;
3. CONTRACTOR shall perform the Works in a skillful and workmanlike manner in compliance with the Contract Documents, and all federal, state, and local Laws and Regulations including, but not limited to, the provisions of all applicable federal, state, and local health, safety, and environmental laws and regulations, including 29 CFR 1910.120;
4. the completed Works will not be *defective*;
5. CONTRACTOR shall ensure that any construction or rehabilitation implemented pursuant to the terms and conditions of this Agreement shall meet all applicable state and local building codes.
6. CONTRACTOR has the authority to enter into the Contract and to perform the Works;
7. upon execution of the Contract, the Contract will be a legal, valid, and binding obligation of CONTRACTOR, enforceable against CONTRACTOR in accordance with its terms; and
8. CONTRACTOR is licensed and authorized to conduct business in the state where the Site is located.

### 3.2 No Collusion Or Fraud

A. CONTRACTOR hereby represents that the only person or persons interested as principal or principals in the Contract are named herein, and that only those persons mentioned therein have any interest in the Contract, and that the Contract has been secured without any connection with any person or persons other than those named, and was secured without collusion or fraud, and that no officer or employee of OWNER has or shall have a financial interest in the performance of the Contract or in the supplies, work, or business to which it relates, or in any portion of the profits thereof.

### 3.3 Non-Discrimination and Unfair Labor Practices

A. CONTRACTOR hereby agrees not to discriminate against any employee or applicant for employment, with respect to their hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment, because of race, color, religion, national origin, ancestry, age, sex (including sexual orientation and gender identity or expression as defined in Executive

Directive 2019-09), height, weight, marital status partisan considerations, physical or mental disability, or genetic information (as defined in Executive Directive 2019-09) that is unrelated to the individual's ability to perform the duties of the particular job or position.

B. The CONTRACTOR further agrees that every subcontract entered into for performance of this Agreement will contain a provision requiring nondiscrimination in employment, as specified in this Agreement, binding upon each subcontractor.

### 3.4 OWNER's Representations

- A. OWNER acknowledges that both the City and the Contractor are relying on engineering reports prepared by the engineering firm hired by the City.
- B. That it has previously furnished to Contractor all available environmental reports concerning the Mill Site and surrounding territory, and the City acknowledges that it is not aware of orders of any kind concerning the Project which would prevent Contractor from completing its Work.

## ARTICLE 4 CONTRACT PRICE

### 4.1 Contract Price

A. In consideration of the payments to be made by OWNER to CONTRACTOR as hereinafter mentioned, CONTRACTOR shall perform and complete the Works in accordance with the provisions of the Contract Documents.

B. In consideration of the performance and completion of the Works in accordance with the provisions of the Contract Documents, OWNER shall pay the Contract Price to CONTRACTOR at the time and in the manner prescribed in the Contract Documents.

C. The Contract Price shall consist of:

- 1. the unit prices and lump sums named in the attached Schedule of Prices having a total (based on quantities entered in the Schedule of Prices in the case of unit price items) of \_Three Million Eight Hundred Five Thousand Two Hundred Fifty dollars (\$3,805,250); and
- 2. plus or minus any adjustments made in accordance with the Contract.

## ARTICLE 5 CONTRACT TIMES

### 5.1 Notice to Proceed

A. CONTRACTOR shall begin the Works on the day indicated in the Notice to Proceed and shall prosecute the Works or any specified part thereof so that the Works or any specified part thereof is substantially completed, and completed and ready for final payment within the number of days, or alternatively, on or before the dates set forth in the Project Specifications. The issuance of the Notice to Proceed by ENGINEER on behalf of OWNER will fix the date on which the Contract Times (or Milestones) will commence to run. A

Notice to Proceed may be given on, or at any time within 30 days after, the date of the Notice of Award.

B. CONTRACTOR shall perform all of its duties under the Contract in a timely manner, time being of the essence with respect to such performance.

## ARTICLE 6 EXAMINATION AND INSPECTION

### 6.1 Documents and Site Conditions

A. CONTRACTOR represents and warrants to OWNER that before making its bid it carefully examined the bid documents, including Addenda, and it carefully examined, inspected, investigated, explored, tested, and studied the Site, as well as its surrounding territory, and is fully informed regarding all of the risks, contingencies, and other circumstances and conditions affecting or influencing the work to be done and labor and materials to be furnished for the completion of the Contract, including, without limiting the generality of the foregoing, Laws and Regulations, the nature and location of the Works, the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads, uncertainties of weather, physical conditions at the Site, the location and condition of facilities and structures (including utilities and the like), whether above or below the ground or underwater, the conformation and conditions of the ground, the character of equipment and facilities needed prior to and during the prosecution of the Works, and all other matters which can in any way affect the progress, performance, or furnishing of the Works, or the cost thereof under the Contract.

B. CONTRACTOR acknowledges that such information was secured by personal investigation and research, which it has been freely allowed to undertake, its knowledge of the Site, and its expertise as a specialized contractor of the kind and for the specific work to be undertaken, and not solely from the estimates or records or information provided by OWNER or ENGINEER, and CONTRACTOR requires no additional information to make its bid or enter into this Agreement.

C. CONTRACTOR acknowledges that the Site may contain Hazardous Substances, Pollutants or Contaminants, or Solid Wastes, the actual extent, location, and physical and chemical characteristics of which may differ from that indicated by previous Site investigations.

D. CONTRACTOR acknowledges that it has reviewed or had adequate opportunity to review various documents concerning investigations at the Site. CONTRACTOR has fully discussed its concerns about the Site with OWNER and ENGINEER. CONTRACTOR has inspected the Site and is fully aware of work, which has been performed at the Site. CONTRACTOR has undertaken whatever investigation it feels necessary concerning the Site, and the cost, method, and schedule of its performance under the Contract. Except as provided in Gc.12 and Gc.13 of the General Conditions, CONTRACTOR assumes the risk of all surface, subsurface, submerged, or any other conditions at the Site, whether known or unknown, which may affect its performance under the Contract, but not otherwise, and shall not attempt to seek a change in the Contract Price or the Contract Times (or Milestones) or to excuse any inadequacy, failure, or lack of performance of its obligations under the Contract on grounds of such conditions regardless of any inaccuracy or incompleteness of information which CONTRACTOR has acquired from OWNER or any other source. CONTRACTOR acknowledges that such information from OWNER or any other source is not intended as a representation or warranty with respect to conditions to be encountered at the Site and is only provided for informational purposes. If the CONTRACTOR directly or indirectly causes a

release of any hazardous materials on the site, or if the Site becomes designated as a facility under applicable environmental law and regulations, the CONTRACTOR shall be solely responsible for the remediation required. However, to the extent that state and/ or federal authorities do not permit the CONTRACTOR to proceed with the Works and such delay causes a delay in the Contract Times (or milestones) the CONTRACTOR will not be penalized for such delay.

E. CONTRACTOR shall make no claim against OWNER or ENGINEER by reason of estimates, tests, or representations of any representative or agent of OWNER, including ENGINEER, and shall not claim that there was any misunderstanding of the terms and conditions of the Contract or the required Works relating to the Site conditions, including but not limited to any matters described in this Paragraph 6.1.

F. CONTRACTOR acknowledges that neither OWNER nor ENGINEER will be responsible for any deduction, interpretation, or conclusion drawn by CONTRACTOR from any information furnished or available to CONTRACTOR.

## 6.2 Continuing Duty

A. CONTRACTOR has a continuing duty during the course of the Works to make reasonable inquiry for and inspection of information relevant to the Site and the Works. CONTRACTOR shall make reasonable inquiry, based on CONTRACTOR's best professional knowledge and judgment, as to the reasonableness of any data it is provided for its use in performing the Works. CONTRACTOR shall be fully responsible for the accuracy of the data it generates and all interpretations and recommendations it makes, based on data CONTRACTOR has generated or otherwise relied upon.

## ARTICLE 7 ALTERATIONS AND OMISSIONS

### 7.1 OWNER's Right to Make Changes

A. The Works shall be performed in accordance with the intent and meaning of the Contract Documents without any expense of any nature whatsoever to OWNER other than the consideration named in the Contract.

B. OWNER reserves the right, at any time during the progress of the Works, to alter the Drawings or the Project Specifications, add to the Works, or omit any portion of the Works as OWNER may deem reasonably necessary; and to make allowances for additions and deductions in the Contract Price in accordance with the Contract.

### 7.2 Amending and Supplementing Contract Documents

A. The Contract Documents may be amended to provide for-additions, deletions, and revisions in the Works or to modify the terms and conditions thereof in one or more of the following ways: (i) Written Amendment; (ii) Change Order; or (iii) a Work Change Directive.

B. The requirements of the Contract Documents may be supplemented, and minor variations and deviations in the Works may be authorized, by one or more of the following ways: (i) a Field Order;  
(ii) ENGINEER's approval of a Shop Drawing or Sample; or  
(iii) ENGINEER's written interpretation or clarification.

## ARTICLE 8 PROGRESS PAYMENTS

### 8.1 Applications for Payments

A. Applications for Payment shall be based on the Schedule of Prices attached hereto and made a part hereof. The Schedule of Prices shall be incorporated into an Application for Payment. The Schedule of Prices shall be the full inclusive cost of the Works described including all costs, expenses, profit, overhead, and taxes (as provided in Article 13 of the Agreement) which may be required in and for the performance of the Works described, together with all general risks, liabilities, and obligations set forth or implied in the Contract Documents. The Schedule of Prices is to be used as a basis of payment only and shall not be used as a description of the full extent of the Works to be completed under the Contract. Any work required to properly complete the Works, but not specifically listed as a separate pay item, must be provided for and the cost of such work will be deemed included in the appropriate items listed in the Schedule of Prices. If requested by ENGINEER, CONTRACTOR shall submit a price breakdown for any lump sum items contained in such Schedule of Prices. No progress payment shall be made to CONTRACTOR until an acceptable Application for Payment is submitted to ENGINEER.

B. Within 10 days following the first day of each month, CONTRACTOR shall submit to ENGINEER for review an Application for Payment filled out and signed by CONTRACTOR covering the Works completed during the preceding month and accompanied by sworn statements and waivers of lien as set forth in Article 10 and such other supporting documentation as is required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Works but delivered and suitably stored at the Site or at another location agreed to in writing and provided such payment is expressly allowed in accordance with the Special Conditions, the Application for Payment shall also be accompanied by a bill of sale, invoice, or other documentation warranting that OWNER has received the materials and equipment free and clear of all Liens and evidence that the materials and equipment are covered by appropriate property insurance or other arrangements to protect OWNER's interest therein, all of which must be satisfactory to OWNER.

C.  
As the work progresses in accordance with the Contract, OWNER will make progress payments on account of the Contract Price to CONTRACTOR in the manner set forth in the Special Conditions, against Applications for Payment recommended by ENGINEER of CONTRACTOR's performance of portions of the Works to the satisfaction of ENGINEER. OWNER shall have no responsibility to pay or reimburse CONTRACTOR with respect to any matters stated in the Contract to be at the cost or expense of CONTRACTOR or to be at no extra or additional cost or expense to OWNER, however OWNER shall make all payments recommended by the ENGINEER. OWNER shall have no obligation to pay CONTRACTOR for work which is not done in accordance with the Contract as determined by the ENGINEER, however if an issue arises in an Application for Payment, OWNER is obligated to make timely payment to CONTRACTOR of

work completed which is satisfactory to the ENGINEER. OWNER shall have no obligation to pay CONTRACTOR for work which is not done in accordance with the Contract.

D. Payment in the case of unit price work will be based on actual quantities of completed work, determined by ENGINEER by the methods specified in the Project Specifications, and in accordance with Paragraph 32.2 A of the General Conditions, at the prices entered in the Schedule of Prices, except that in no event shall CONTRACTOR be paid for the quantity of unit price work which is in excess of the approximate quantities set forth in the Schedule of Prices without the express advance written approval of ENGINEER prior to any such work being initiated by CONTRACTOR. Payment in the case of lump sum work will be based on the percentage of work completed, as determined by ENGINEER, times the lump sum price entered in the Schedule of Prices.

E. OWNER will retain a percentage of all progress payments due to CONTRACTOR under the Contract. The amount retained shall be referred to as the holdback and the percentage retained and the time at which the holdback shall be released shall be as specified in the Special Conditions. In event CONTRACTOR withholds an amount greater than 10 percent retention from a Subcontractor, OWNER shall increase the Contract retention by the same amount.

## 8.2 Review of Applications

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

B. ENGINEER's recommendation of any payment requested in an Application for Payment will constitute a representation by ENGINEER to OWNER, based on ENGINEER's on-Site observations of the executed Works as an experienced and qualified design professional and on ENGINEER's review of the Application for Payment and the accompanying data and schedules, that to the best of ENGINEER's knowledge, information, and belief: (i) the Works has progressed to the point indicated; (ii) the quality of the Works is generally in accordance with the Contract Documents (subject to an evaluation of the Works as a functioning whole prior to or upon Substantial Completion, to the results of any subsequent tests called for in the Contract Documents, to a final determination of quantities and classifications for unit price work under Paragraph 32.2 A of the General Conditions, and to any other qualifications stated in the recommendation); and (iii) the conditions precedent to CONTRACTOR's being entitled to such payment appear to have been fulfilled in so far as it is ENGINEER's responsibility to observe the Works.

C. By recommending any such payment ENGINEER will not thereby be deemed to have represented that: (i) inspections made to check the quality or the quantity of the Works as it has been performed have been exhaustive, extended to every aspect of the Works in progress, or involved detailed inspections of the Works beyond the responsibilities specifically assigned to ENGINEER in the Contract Documents; or (ii) that there may not be other matters or issues between the parties that might entitle CONTRACTOR to be paid additionally by OWNER or entitle OWNER to withhold payment to CONTRACTOR.



D. Neither ENGINEER's review of CONTRACTOR's Works for the purposes of recommending payments nor ENGINEER's recommendation of any payment, including final payment, will impose responsibility on ENGINEER to supervise, direct, or control the Works, or for the means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for CONTRACTOR's failure to comply with Laws and Regulations applicable to CONTRACTOR's performance of the Works. Additionally, said review or recommendation will not impose responsibility on ENGINEER to make any examination to ascertain how or for what purposes CONTRACTOR has used the monies paid on account of the Contract Price, or to determine that title to any of the Works, materials, or equipment has passed to OWNER free and clear of any Liens.

E. ENGINEER may refuse to recommend the whole or any part of any payment if, in ENGINEER's opinion, it would be incorrect to make the representations to OWNER referred to in Paragraph 8.2 B. ENGINEER may also refuse to recommend any such payment, or, because of subsequently discovered evidence or the results of subsequent inspections or tests, revise or revoke any such payment recommendation previously made, to such extent as may be necessary in ENGINEER's opinion to protect OWNER from loss because:

1. the Works is *defective*, or completed Works has been damaged,  
requiring correction or replacement;
2. the Contract Price has been reduced by Written Amendments or Change Orders;
3. OWNER has been required to correct *defective* Works or complete Works in accordance with Paragraph 19.8 of the General Conditions; or
4. ENGINEER has actual knowledge of the occurrence of any of the events enumerated in Paragraph 16.1 A.

### 8.3 Progress Payment Becomes Due

A. Forty-five days after presentation of the Application for Payment to OWNER with ENGINEER's recommendation, the amount recommended for progress payment will (subject to the provisions of Paragraph 8.4) become due, and when due will be paid by OWNER to CONTRACTOR.

B. Progress payments, however, shall not constitute acceptance of CONTRACTOR's work by OWNER, nor be construed as a waiver of any right or claim by OWNER.

### 8.4 Reduction in Payment

- A. OWNER may refuse to make payment of the full amount recommended by ENGINEER in accordance with Article 9.
- B. If OWNER refuses to make payment of the full amount recommended by ENGINEER, OWNER will give CONTRACTOR written notice (with

a copy to ENGINEER) stating the reasons for such action and pay CONTRACTOR any amount remaining after deduction of the amount so withheld. OWNER shall pay CONTRACTOR the amount so withheld, or any adjustment thereto agreed to by OWNER and CONTRACTOR, when CONTRACTOR corrects to OWNER's satisfaction the reasons for such action.

- C. If it is subsequently determined that OWNER's refusal of payment was not justified, the amount wrongfully withheld shall be treated as an amount due as determined by Paragraph 8.3 A.

#### 8.5 Correction or Modification

A. ENGINEER may in any Application for Payment give effect to any correction or modification that should properly be made in respect of any previous progress payment.

#### 8.6 CONTRACTOR's Warranty of Title

A. Upon the making of progress payments by OWNER, all work, materials, and equipment covered thereby shall become the sole property of OWNER. CONTRACTOR warrants and guarantees that title to all Works, materials, and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to OWNER no later than the time of payment free and clear of all Liens.

#### 8.7 Timely Payment

- A. [THIS PARAGRAPH IS INTENTIONALLY OMITTED.]

#### 8.8 Payment to Subcontractors and Suppliers

A. CONTRACTOR shall pay each Subcontractor and Supplier including, but not limited to, firms providing transportation, utility and other services, construction equipment and machinery, tools, materials, and supplies, the full amount paid by OWNER for its proportionate share of work, not later than 5 days after receipt of payment from OWNER. If requested by OWNER or ENGINEER, CONTRACTOR shall furnish evidence of compliance with the foregoing. If there is reasonable belief by OWNER or ENGINEER that any such Subcontractor or Supplier has not been paid any monies due, OWNER shall have the right, without any duty, to issue joint checks for amounts due or to become due to such Subcontractor or Supplier in the name of CONTRACTOR and such non-paid Subcontractor or Supplier.

B. CONTRACTOR agrees that all funds requested in its Applications for Payment for the benefit of Subcontractors, Suppliers, and laborers as evidenced by CONTRACTOR's sworn statement shall be paid from the funds received from OWNER for each Application for Payment. OWNER reserves the right to furnish to any Subcontractor or Supplier evidence of the amounts certified on their respective account for payment to CONTRACTOR.

### ARTICLE 9 WITHHOLDING PAYMENTS

#### 9.1 OWNER's Right to Withhold or Reduce Payment

- A. Notwithstanding anything to the contrary herein contained, OWNER shall have the right, without any duty, to withhold or reduce any payments due or to become due CONTRACTOR, by reason of (i) any indebtedness owed by CONTRACTOR to OWNER; (ii) any *defective* work not remedied or any *defective* materials not removed and replaced; (iii) any third-party claims filed or reasonable evidence indicating probable filing of any such claims; (iv) any Liens in favor of any workers, Subcontractors, Suppliers, or laborers; (v) a claimed failure of CONTRACTOR to make any payments to its Subcontractors, Suppliers, or laborers; (vi) reasonable doubt that the Works can be completed for the unpaid balance of the Contract Price; (vii) reasonable indication that the Works will not be completed within the Contract Times (or Milestones); (viii) unsatisfactory or untimely prosecution of the Works by CONTRACTOR; (ix) any failure of CONTRACTOR to comply with the Contract Documents; (x) any loss, penalty, damage, or attorney's fees associated with CONTRACTOR or the Works; (xi) the negligence or willful misconduct of CONTRACTOR or any Representative; and/or (xii) any set-off to which OWNER may be legally entitled.
- B. Failure of CONTRACTOR to file a dispute with ENGINEER and OWNER within 10 days of receiving notice of any withholding of payment or other deductions, or of CONTRACTOR's obligation to reimburse or pay OWNER, pursuant to any provision of the Contract Documents shall result in a waiver by CONTRACTOR of any right to dispute same.

9.2 No Estimate on CONTRACTOR's Non-Compliance

A. So long as CONTRACTOR has not fully complied with any lawful or proper direction concerning the work or material given by OWNER or ENGINEER, CONTRACTOR shall not be entitled to have any estimate made for the purpose of payment, nor shall any estimate be rendered on account of work done or material furnished until such lawful or proper direction aforesaid has been fully and satisfactorily complied with.

ARTICLE 10 WORK TO BE FREE FROM ALL ENCUMBRANCES

10.1 Releases; Waivers; Sworn Statements

A. Before making progress payments or final payment or releasing any holdback, OWNER will require CONTRACTOR to furnish evidence that all work performed and materials supplied and all structures built for which payment is being made are free and clear from all lawful Liens under any Laws or Regulations, including, without limiting the generality of the foregoing, legal provisions relating to Liens in favor of workers, builders, architects, Subcontractors, or Suppliers, and such other evidence as may be necessary to satisfy OWNER that CONTRACTOR has fulfilled CONTRACTOR's obligations under the Contract.

B. CONTRACTOR's Applications for Payment shall be accompanied by CONTRACTOR's Notarized Sworn Statement (Exhibit C) indicating the status of payments to laborers, and setting forth the amounts due each Subcontractor and Supplier, both as of the end date of the work period covered by the Applications for Payment. With the next Application

for Payment or within 15 days after the date of each payment to CONTRACTOR, CONTRACTOR shall submit a Partial Waiver of Lien (Exhibit A) signed by CONTRACTOR and a Partial Waiver of Lien (Exhibit A) signed by each Subcontractor and Supplier acknowledging payment of the amounts set forth on the sworn statement which accompanied CONTRACTOR's previous Application for Payment. Subsequent Applications for Payment will not be paid until all necessary waivers of lien, in satisfactory form, have been received covering each previously paid Application for Payment.

C. CONTRACTOR's final Application for Payment shall be accompanied by CONTRACTOR's Notarized Sworn Statement (Exhibit C), CONTRACTOR's Final Waiver of Lien and Release of All Claims (Exhibit B), and a Final Waiver of Lien and Release of All Claims (Exhibit B) from all Subcontractors and Suppliers who have not previously submitted a Final Waiver of Lien and Release of All Claims.

D. For partial release of holdback CONTRACTOR shall furnish:

1. Final Waiver of Lien and Release of All Claims (Exhibit B) applicable to the services completed or materials furnished up to the date of CONTRACTOR's application for release of holdback, signed by each Subcontractor and Supplier who has a right to file a Lien against the premises; and
2. Partial Waiver of Lien (Exhibit A), signed by CONTRACTOR.

E. Releases and waivers of all Lien arising out of or which may arise out of or filed in connection with the Works, and sworn statements shall be complete and legally effective. Sample copies of the required sworn statement and waiver of lien forms are provided by OWNER. Such suggested forms are intended to cover only OWNER's minimum requirements under the Contract. CONTRACTOR shall be responsible for supplementing these forms and supplying to OWNER any other information, forms, and documents which may be required by applicable laws of the State where the work is being performed.

F. CONTRACTOR shall immediately notify OWNER in the event CONTRACTOR obtains information that a Lien has been or may be asserted against the Site or in relation to the Works. CONTRACTOR shall immediately pay, satisfy, and discharge any and all obligations and liabilities (including settlement costs, court costs, and reasonable attorneys' fees) arising from or related to any such Liens. If any Lien remains unsatisfied after all payments are made, CONTRACTOR shall promptly refund to OWNER all moneys that the latter may pay in discharging a Lien, including all settlement costs, court costs, and reasonable attorneys' fees.

G. In the event a Lien or claim thereof is registered in connection with the Works, CONTRACTOR shall be liable to OWNER for any amount previously paid by OWNER to CONTRACTOR which is required to be paid by OWNER (or the owner(s) of the premises where the Site is located if other than OWNER) in order to discharge such a Lien, and OWNER may deduct such amount from any monies due or to become due CONTRACTOR or otherwise available therefor or, at OWNER's option, CONTRACTOR shall promptly reimburse OWNER for such costs (or such remaining costs after such deduction). OWNER shall have no duty to undertake any such action, and no such action taken by OWNER shall relieve CONTRACTOR from any obligations under the Contract or otherwise. CONTRACTOR's

obligations under this Paragraph 10.1 G shall survive final payment, completion, and acceptance of the Works, or termination or completion of the Contract.

## ARTICLE 11 SUBSTANTIAL COMPLETION

### 11.1 Inspection for Substantial Completion

A. When CONTRACTOR considers the entire Works ready for its intended use CONTRACTOR shall notify OWNER and ENGINEER in writing that the entire Works is substantially complete (except for items specifically listed by CONTRACTOR as incomplete) and request that ENGINEER issue a certificate of Substantial Completion. Promptly thereafter, OWNER, CONTRACTOR, and ENGINEER shall make an inspection of the Works to determine the status of completion. If ENGINEER does not consider the Works substantially complete, ENGINEER will notify CONTRACTOR in writing giving the reasons therefor. If ENGINEER considers the Works substantially complete, ENGINEER will prepare and deliver to OWNER a tentative certificate of Substantial Completion which shall fix the date of Substantial Completion. There shall be attached to the certificate a tentative list of items to be completed or corrected before final payment. OWNER shall have 7 days after receipt of the tentative certificate during which to make written objection to ENGINEER as to any provisions of the certificate or attached list. If, after considering such objections, ENGINEER concludes that the Works is not substantially complete, ENGINEER will within 14 days after submission of the tentative certificate to OWNER notify CONTRACTOR in writing, stating the reasons therefor. If, after consideration of OWNER's objections, ENGINEER considers the Works substantially complete, ENGINEER will within said 14 days execute and deliver to OWNER and CONTRACTOR a definitive certificate of Substantial Completion (with a revised tentative list of items to be completed or corrected) reflecting such changes from the tentative certificate as ENGINEER believes justified after consideration of any objections from OWNER. At the time of delivery of the tentative certificate of Substantial Completion, ENGINEER will deliver to OWNER and CONTRACTOR a written recommendation as to division of responsibilities pending final payment between OWNER and CONTRACTOR with respect to security, operation, safety, and protection of the Works, maintenance, heat, utilities, insurance, and warranties and guarantees. Unless OWNER and CONTRACTOR agree otherwise in writing and so inform ENGINEER in writing prior to ENGINEER's issuing the definitive certificate of Substantial Completion, ENGINEER's aforesaid recommendation will be binding on OWNER and CONTRACTOR until final payment.

B. OWNER shall have the right to exclude CONTRACTOR from the Site after the date of Substantial Completion, but OWNER shall allow CONTRACTOR reasonable access to complete or correct items on the tentative list and/or to remove its equipment.

### 11.2 Partial Utilization

A. Use by OWNER at OWNER's option of any substantially completed part of the Works which has specifically been identified in the Contract Documents, or which OWNER, ENGINEER, and CONTRACTOR agree constitutes a separately functioning and usable part of the Works that can be used by OWNER for its intended purpose without significant interference with CONTRACTOR's performance of the remainder of the Works, may be accomplished prior to Substantial Completion of all the Works subject to the following conditions:

1. OWNER at any time may request CONTRACTOR in writing to permit OWNER to use any such part of the Works which OWNER believes to be ready for its intended use and substantially complete. If CONTRACTOR agrees that such part of the Works is substantially complete, CONTRACTOR shall certify to OWNER and ENGINEER that such part of the Works is substantially complete and request ENGINEER to issue a certificate of Substantial Completion for that part of the Works. CONTRACTOR at any time may notify OWNER and ENGINEER in writing that CONTRACTOR considers any such part of the Works ready for its intended use and substantially complete and request ENGINEER to issue a certificate of Substantial Completion for that part of the Works. Within a reasonable time after either such request, OWNER, CONTRACTOR, and ENGINEER shall make an inspection of that part of the Works to determine its status of completion. If ENGINEER does not consider that part of the Works to be substantially complete, ENGINEER will notify OWNER and CONTRACTOR in writing giving the reasons therefor. If ENGINEER considers that part of the Works to be substantially complete, the provisions of Paragraph 11.1 will apply with respect to certification of Substantial Completion of that part of the Works and the division of responsibility in respect thereof and access thereto; and

2. No occupancy or separate operation of part of the Works may occur prior to compliance with the requirements of Paragraph 1.7 D of the Special Conditions regarding property insurance.

## ARTICLE 12 FINAL INSPECTION AND PAYMENT

### 12.1 Final Inspection

- A. Upon written notice from CONTRACTOR that the entire Works or an agreed portion thereof is complete, ENGINEER will make a final inspection with OWNER and CONTRACTOR and will notify CONTRACTOR in writing of all particulars in which this inspection reveals that the Works is incomplete or *defective*. CONTRACTOR shall immediately without cost or inconvenience to OWNER, and in accordance with ENGINEER's written instructions (i) take such measures as are necessary to complete such Works; (ii) correct all *defective* Works identified by ENGINEER, or, if any work is rejected by ENGINEER, remove it from the Site and replace it with work that is not *defective*; and (iii) correct or remove and replace any damage to other Works or the work of others resulting from *defective* or rejected Works all to the satisfaction of ENGINEER.
- B. If CONTRACTOR does not adequately respond or promptly comply with the terms of such instructions and after notice thereof to CONTRACTOR, or without any notice in an emergency, OWNER may have the incomplete Works completed or *defective* Works corrected, or the rejected Works removed and replaced, and all costs of such completion, correction, or removal and replacement (including but not limited to all costs of repair, removal, and replacement of other Works and work of others) shall be deducted from any monies due or to become due CONTRACTOR or otherwise available therefor or, at OWNER's option, such costs shall be paid promptly by CONTRACTOR (or such remaining costs after such deduction). OWNER shall have no duty to undertake any such action, and no

such action taken by OWNER shall relieve CONTRACTOR from any obligations under the Contract or otherwise.

## 12.2 Final Application for Payment

A. After CONTRACTOR has, in the opinion of ENGINEER, satisfactorily completed all corrections identified during the final inspection and has delivered, in accordance with the Contract Documents, all maintenance and operating instructions, certificates of disposal/destruction, schedules, guarantees, warranties, bonds, certificates or other evidence of insurance, certificates of inspection, marked-up record documents (as provided in Gc.21 of the General Conditions), and other documents, CONTRACTOR may make application for final payment following the procedure for progress payments.

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

1. all documentation called for in the Contract Documents, including, but not limited to, the evidence of continuation of insurance required by Paragraph 1.3 E.6 of the Special Conditions;
2. a written statement from CONTRACTOR that CONTRACTOR has no further claims or demands for additional monies or extra work in connection with the Contract;
3. CONTRACTOR's affidavit that all federal, state, and local taxes applicable to the Works, including, but not limited to, sales, consumer, use, excise, and disposal taxes have been paid (Exhibit D);
4. releases and waivers of Lien and sworn statements as set forth in Article 10;
5. Asset titles and inventories; and
6. any and all other documents reasonably required by ENGINEER OR OWNER.

C. In lieu of the releases and waivers of Lien specified in Paragraph 12.2 B and as approved by OWNER, CONTRACTOR may furnish receipts or releases in full, and an affidavit of CONTRACTOR that the releases and receipts include all labor, services, equipment, and material for which a Lien could be filed, and all payrolls, material and equipment bills, and other indebtedness connected with the Works for which OWNER (or the owner(s) of the premises where the Site is located if other than OWNER) or property at the Site might in any way be responsible have been paid or otherwise satisfied. If any Subcontractor or Supplier refuses to furnish a release or receipt in full, CONTRACTOR shall furnish a bond or other collateral satisfactory to OWNER to indemnify OWNER and ENGINEER, and their respective representatives and agents against any Liens.

## 12.3 Review of Application and Acceptance

A. If, on the basis of ENGINEER's observation of the Works during construction and final inspection, and ENGINEER's review of the final Application for Payment and accompanying documentation as required by the Contract Documents, ENGINEER is satisfied that the Works has been completed and CONTRACTOR's other obligations under the Contract Documents have been fulfilled, ENGINEER will, within 10 days after receipt of the final Application for Payment, indicate in writing ENGINEER's recommendation of payment and present the Application for Payment to OWNER for payment. At the same time ENGINEER will also give written notice to OWNER and CONTRACTOR that the Works is acceptable subject to the provisions of Paragraph 12.5. Otherwise, ENGINEER will return the Application for Payment to CONTRACTOR, indicating in writing the reasons for refusing to recommend final payment, in which case CONTRACTOR shall make the necessary corrections and resubmit the Application for Payment.

#### 12.4 Final Payment Becomes Due

- A. Forty-five days after presentation to OWNER of the Application for Payment and accompanying documentation, the amount recommended for final payment by ENGINEER will (subject to the provisions of Paragraph 12.4 B) become due and, when due, will be paid by OWNER to CONTRACTOR.
- B. In accordance with Paragraph 3.3 of the Special Conditions, OWNER shall pay the remainder of the Contract Price as recommended by ENGINEER.

#### 12.5 Waiver of Claims

A. CONTRACTOR's acceptance of payment upon final completion and acceptance of the Works shall constitute a waiver of all claims by CONTRACTOR against OWNER.

### ARTICLE 13 TAXES

#### 13.1 Proof of Payment

A. The Contract Price shall include all taxes required by Laws and Regulations, including, but not limited to, sales, consumer, use, excise, disposal, or any other applicable taxes.

B. If requested by OWNER, CONTRACTOR shall furnish proof of payment of sales, consumer, use, excise, and other similar taxes required to be paid by CONTRACTOR in accordance with Laws and Regulations, which are applicable during the performance of the Works.

#### 13.2 Affidavit of All Taxes Paid

A. Prior to final payment, CONTRACTOR shall submit an affidavit (Exhibit D) that all such taxes have been paid. Said affidavit is a condition precedent to OWNER's obligation to pay.

### ARTICLE 14 DELAY

#### 14.1



A. CONTRACTOR expressly understands that one of the material terms of the Contract, for which it has received substantial consideration, is to shift to CONTRACTOR, except as stated otherwise herein, any and all risks CONTRACTOR may suffer as a result of delays, including, but not limited to, a traditional force majeure event, during the term of the Contract. Except as stated otherwise herein, in no event shall any delay result in a change to the Contract Times (or Milestones), and no delay shall result in a change to the Contract Price or any claim by CONTRACTOR for additional compensation, and OWNER shall not be held responsible for any loss or damage suffered by CONTRACTOR by reason of any such delay.

E. CONTRACTOR shall include in the Contract Price the cost of doing the work under the Contract caused by the non-compensatory delays described above.

F. CONTRACTOR shall use all means available, including overtime at CONTRACTOR's expense and at no additional cost to OWNER, to complete the Works in accordance with the Contract Times (or Milestones), time being of the essence.

#### 14.2 Delay by OWNER

A. If CONTRACTOR's performance under the Contract is materially delayed due solely to the negligence, reckless or willful misconduct, or breach of the Contract on the part of OWNER or those for whom OWNER is responsible, then, provided that CONTRACTOR fully meets all notice and claim filing requirements set forth in Gc.05 of the General Conditions, CONTRACTOR as its sole remedy shall be entitled to: (i) an extension to the Contract Times (or Milestones) by Change Order or Written Amendment equal to the duration of such material delay, and (ii) an increase in the Contract Price by Change Order or Written Amendment so as to properly compensate CONTRACTOR for any increased cost reasonably and actually incurred as a direct result of such material delay.

### ARTICLE 15 RIGHT TO SUSPEND WORK

#### 15.1 OWNER May

##### Suspend

A. Notwithstanding any provision in the Contract Documents to the contrary, at any time and without any cause whatsoever, OWNER may suspend the execution of the Works by CONTRACTOR or any portion thereof for the period of time that OWNER determines appropriate for the convenience of OWNER by notice in writing to CONTRACTOR and ENGINEER. This right of OWNER to suspend the Works shall not give rise to any duty on the part of OWNER to exercise this right for the benefit of CONTRACTOR or any other person or entity.

B. Except as provided in Paragraphs 15.1 C and 15.1 D below, in the event of a suspension under this Article 15 and provided that CONTRACTOR fully meets all notice and claim filing requirements

set forth in Gc.05 of the General Conditions, CONTRACTOR, as its sole remedy and full compensation for such suspension, shall be entitled to (i) an extension to the Contract Times (or Milestones) by Change Order or Written Amendment equal to the duration of the suspension; and (ii) an increase in the Contract Price by Change Order or Written Amendment only for the following costs, reasonably and actually incurred, without duplication of any item, to the extent that such costs directly result from such suspension: (i) all reasonable costs associated with the necessary demobilization, standby, and remobilization of Equipment, and forces during the period of suspension; (ii) an equitable amount to reimburse CONTRACTOR for the cost of maintaining and protecting that portion of the Works upon which activities have been suspended; and (iii) if, as a result of the suspension, the cost to CONTRACTOR of performing the remainder of the Works is increased, an equitable adjustment in the cost of performing such remaining portion of the Works, with the understanding that if such cost is decreased, an equitable adjustment in the cost of the remaining Works will be made in favor of OWNER and, notwithstanding the foregoing, if the suspension shall exceed 30 days, CONTRACTOR shall have the right to terminate the Contract, in which case CONTRACTOR shall be entitled to payment of all amounts due to it, together with any holdbacks under Section 8.1 E.

- C. No adjustment of the Contract Price or the Contract Times (or Milestones) shall be made under Paragraph 15.1 B for any suspension in the event that CONTRACTOR's performance is being suspended due to any negligence, reckless or willful conduct, material breach of the Contract, or act or omission on the part of CONTRACTOR or any Representative, or that such an adjustment is excluded under any other term or condition of the Contract.
- D. No adjustment shall be made for any claim under Paragraph 15.1 B unless CONTRACTOR files notice of such claim in writing with ENGINEER and OWNER within 10 days after the suspension of the Works or any portion thereof and fully meets the other notice and claim filing requirements of the Contract.
- E. Upon receipt of any such notice of suspension, CONTRACTOR shall, unless the notice requires otherwise, (i) immediately discontinue work on the date and to the extent specified in the notice; (ii) place no further orders for subcontractors, materials, services, or facilities with respect to suspended work other than to the extent required in the notice; (iii) promptly make every reasonable effort to obtain suspension, upon terms satisfactory to OWNER, of all orders, subcontracts, and rental agreements to the extent they relate to the performance of work suspended; and (iv) unless otherwise specifically stated in the notice, continue to protect and maintain the Works theretofore completed, including those portions on which the Works has been suspended.
- F. Upon receipt of notice that the suspension has been lifted,

CONTRACTOR shall within a reasonable time resume the performance of the suspended Works on the date so fixed in any notice of resumption or as otherwise specified by OWNER.

ARTICLE 16

TERMINATION

16.1

OWNER May Terminate for Cause

A.  
termination for cause:

The occurrence of any one or more of the following events will justify

1. CONTRACTOR's failure to perform the Works in accordance with the Contract Documents (including, but not limited to, refusal or failure to timely supply sufficient skilled workers, suitable materials or equipment, or Equipment, or failure to adhere to the progress schedule established under Paragraph 8.1 C of the General Conditions as adjusted from time to time pursuant to Paragraph 8.1 D of the General Conditions, or failure to make prompt payments to Subcontractors or Suppliers;
  2. CONTRACTOR's disregard of Laws or Regulations of any public body having jurisdiction;
  3. CONTRACTOR's disregard of the authority or instructions of ENGINEER;
  4. CONTRACTOR's violation in any material way of any provisions of the Contract Documents.
- B. In addition to OWNER's rights as set forth in Article 15 and without prejudice to any other right or remedy to which OWNER might be entitled, OWNER may immediately terminate the services of CONTRACTOR upon written notice to CONTRACTOR (and the surety, if any) if one or more of the events identified in Paragraph 16.1 A occur which goes unremedied by CONTRACTOR for 10 days after CONTRACTOR has received written notice, with sufficient detail so that CONTRACTOR can remediate the issue, thereof from OWNER, or in the event it comes to the attention of OWNER that CONTRACTOR has made a material misrepresentation to OWNER as an inducement for OWNER to enter into or continue the Contract.
- C. Unless OWNER agrees otherwise, the Contract shall be automatically terminated upon CONTRACTOR becoming insolvent or subject to receivership, bankruptcy, or other insolvency proceedings, whether or not under Court supervision.
- D. Should OWNER lawfully terminate CONTRACTOR's services, as provided in Paragraph 16.1 B, OWNER may exclude CONTRACTOR from the Site, and take possession of the whole of the Works and of all temporary works, and of all Equipment at the

Site (excluding Equipment owned by the CONTRACTOR), and use the same to the full extent they could be used by CONTRACTOR (without liability to CONTRACTOR for trespass or conversion), incorporate in the Works all materials and equipment stored at the Site or for which OWNER has paid CONTRACTOR but which are stored elsewhere, and OWNER may finish the Works by whatever method OWNER may deem expedient, including but not limited to, by contract negotiated or publicly let, by the use of its own forces, by calling upon CONTRACTOR's surety to complete the Works, or by a combination of any such methods. In any such case, CONTRACTOR shall not be entitled to receive any further payment until the Works is finished. OWNER shall only be responsible to CONTRACTOR for work performed prior to the effective date of termination under this Paragraph 16.1, in accordance with the Contract Documents, subject to any set-off to which OWNER may be legally entitled. If the unpaid balance of the Contract Price exceeds all claims, costs, expenses, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs to which it has been determined OWNER is entitled to receive) sustained by OWNER arising out of or relating to completing the Works, such excess shall, subject to Article 9, be paid to CONTRACTOR. If such claims, costs, expenses, losses, and damages exceed such unpaid balance, CONTRACTOR shall pay the difference to OWNER within 30 days of OWNER's written demand for payment or commence an action against OWNER disputing the termination or any of the items claimed by OWNER in its unpaid balance. Such claims, costs, expenses, losses, and damages incurred by OWNER due to CONTRACTOR's default will be incorporated in a Change Order or Written Amendment, provided that when exercising any rights or remedies under this Paragraph 16.1 D OWNER shall not be required to obtain the lowest price for the Works performed.

- E. If, in the case of CONTRACTOR's failure or refusal to supply additional workers, Equipment, or supervisory personnel, it is in the interest of OWNER to do so, OWNER may without prejudice to any other right or remedy, continue CONTRACTOR's services on some of the Works and take possession of other parts of the Works and some or all of the temporary works, premises, Equipment, and materials and equipment at the Site for such other parts of the Works and finish such other parts of the Works by whatever method OWNER may deem expedient. If CONTRACTOR's services are not terminated, CONTRACTOR shall not be entitled to receive any further payment on account of the parts of the Works of which OWNER has taken possession until the whole of the Works is finished.
- F. Where CONTRACTOR's services have been so terminated by OWNER, the termination will not affect any rights or remedies of OWNER against CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of monies due CONTRACTOR by OWNER will not release CONTRACTOR from

liability. Further, if CONTRACTOR's services are wrongfully terminated by OWNER, the termination will not affect any rights or remedies of CONTRACTOR against OWNER and that any payment of monies due to CONTRACTOR by OWNER will not release OWNER from liability.

- G. Immediately upon termination, whether pursuant to this Paragraph 16.1 or otherwise, and without the need for demand by OWNER, CONTRACTOR shall return to OWNER all documents and other property of OWNER which are in the possession, custody, or control of CONTRACTOR.
- H. After any notice of termination, whether pursuant to this Paragraph 16.1 or otherwise, and extending past the termination date, CONTRACTOR shall cooperate in meeting any requests for information or other assistance made by OWNER to CONTRACTOR with respect to the Site, CONTRACTOR's work with respect thereto, and any other subject matter of the Contract provided that OWNER shall reasonably compensate and reimburse CONTRACTOR for such cooperation.
- I. In no event shall CONTRACTOR be paid by OWNER for loss of anticipated profits or revenue or other economic loss arising out of or resulting from termination for cause, unless the termination was wrongful.

## 16.2 OWNER May Terminate for Convenience

A. Notwithstanding any other provision in the Contract Documents to the contrary and without prejudice to any other right or remedy of OWNER, OWNER may, at any time, terminate the Contract, or any work to be performed hereunder, in whole or in part, for convenience and without any cause whatsoever upon 10 days advance written notice to CONTRACTOR ("Notice"). The Notice shall specify the extent of termination and the effective date. In such event, the Contract shall terminate on the date and in the manner set forth in such Notice and, unless the Notice provides otherwise, CONTRACTOR shall be obligated to perform the following duties on the effective date of termination:

1. cease operations as specified in the Notice;
2. terminate all subcontracts (if any) and orders (if any) to the extent they relate to termination;
3. continue any work not terminated; and
4. take any other actions as directed by ENGINEER.

B. In the event of termination under this Paragraph 16.2, CONTRACTOR shall, subject to Article 9, be entitled to receive, as its sole remedy, payment (without duplication of any items) for: (i) completed and acceptable Works executed in accordance with the Contract Documents prior to the effective date of such termination; (ii) expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Contract Documents in connection with uncompleted Works, plus fair and reasonable sums for overhead and profit on such expenses; (iii) reasonable expenses incurred

in settlement of terminated contracts with Subcontractors, Suppliers, or others; (iv) reasonable expenses directly attributable to termination; and (v) any retainage then held by OWNER, less any amounts owed by CONTRACTOR to OWNER.

- C. For the purpose of this Paragraph 16.2, "expenses sustained" includes all materials ordered by CONTRACTOR prior to the date of receipt of such Notice, whether or not they have been delivered to the Site. The amount of payment for all such materials under this Paragraph 16.2 shall be their actual necessary cost to CONTRACTOR up to the date of receipt of such Notice. Upon the receipt of such Notice, all CONTRACTOR's right, title, and interest in and to the materials mentioned in this Paragraph 16.2 shall be vested in OWNER, and CONTRACTOR shall upon demand of OWNER execute and deliver to OWNER all requisite bills of sale, assignments, and other documents of transfer that may be necessary to give effect to the intention of this Paragraph 16.2.
- D. CONTRACTOR acknowledges that the aforesaid amount adequately and completely compensates CONTRACTOR for its work and services under the Contract. CONTRACTOR acknowledges that no other sums shall be due, except as specifically provided in this Paragraph 16.2, and that CONTRACTOR shall make no claims, whether in law, equity, or otherwise as a result of such termination and shall be deemed to have waived all claims for consequential damages, lost profits, or otherwise in connection with a termination by OWNER for convenience. The decision by OWNER to terminate the Contract for convenience shall be final and binding and not subject to any proceedings whatsoever, whether in the nature of litigation or otherwise.
- E. In the event that OWNER terminates the Contract in a manner which is subsequently determined to be wrongful or unjustified, such termination shall be deemed a termination for convenience of OWNER under this Paragraph 16.2.

### 16.3 CONTRACTOR May Terminate

A. If through no act or fault of CONTRACTOR, ENGINEER fails to act on any Application for Payment within 30 days after it is submitted, or OWNER fails for 60 days to pay CONTRACTOR any sum finally determined to be due, then CONTRACTOR may, upon 10 days written notice to OWNER and ENGINEER, and provided OWNER or ENGINEER do not remedy such failure within that time, terminate the Contract and recover payment from OWNER on the same terms as provided in Paragraph 16.2

## ARTICLE 17 WARRANTY AND GUARANTEE

### 17.1 CONTRACTOR's General Warranty and Guarantee

A. CONTRACTOR expressly warrants and guarantees to OWNER and ENGINEER that all materials and equipment furnished shall be new unless otherwise specified, and that all Works under the Contract shall be in conformance with the Contract Documents and will not be *defective*. CONTRACTOR shall promptly make good, without cost to OWNER, any and all Works that is *defective*.

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

1. observations by ENGINEER;
2. recommendation by ENGINEER or payment by OWNER of any progress or final payment;
3. the issuance of a certificate of Substantial Completion by ENGINEER or any payment related thereto by OWNER;
4. use or occupancy of the Works or any part thereof by OWNER;
5. any acceptance by OWNER or any failure to do so;
6. any review and approval of a Shop Drawing or Sample submittal or the issuance of a notice of acceptability by ENGINEER;
7. any inspection, test, or approval by others; or
8. any correction of *defective* Works by OWNER.

C. CONTRACTOR shall execute any special warranties and guarantees as provided by the Contract Documents or required by Laws or Regulations.

D. CONTRACTOR shall require terms identical to the above warranties from Suppliers and Subcontractors as they apply in connection with the Supplier's or Subcontractor's portion of the Works. Notwithstanding any such warranties or guarantees from Suppliers or Subcontractors, CONTRACTOR shall be primarily responsible to OWNER for the performance of its Subcontractors and Suppliers as if such performance were rendered directly by CONTRACTOR.

E. CONTRACTOR shall also ensure that all technical specifications, owners' manuals, operating instructions, or other information relating to materials or equipment that are covered by warranties are compiled, bound, indexed, and delivered to OWNER prior to final payment.

## ARTICLE 18 SUCCESSORS AND ASSIGNS

### 18.1 No Assignment

A. Due to the unique qualifications of CONTRACTOR upon which OWNER is relying in entering the Contract, CONTRACTOR shall not assign or otherwise transfer or alienate any of its benefits or obligations under the Contract without the advance written approval of OWNER, and any purported assignment, transfer, or alienation by CONTRACTOR of such benefits or obligations without such approval shall be null and void. This provision shall not prevent CONTRACTOR from hiring Subcontractors to complete portions of the Work.

- B. The Contract shall inure to the benefit of and be binding upon, the parties and their respective successors and assigns.

## ARTICLE 20 INDEMNIFICATION

### 20.1 CONTRACTOR's Indemnification

- A. CONTRACTOR shall assume entire responsibility and liability, to the fullest extent permitted by Laws and Regulations, for all damages or injury to all persons (including, but not limited to, sickness, disease, or death), whether employees or otherwise, and to all property including, without limiting the generality of the foregoing, loss of use, or contamination of or adverse effects on the environment or any natural resources, arising out of, resulting from, or in any manner connected with, the execution of the Works provided for in the Contract or occurring or resulting from the use by CONTRACTOR, or any Subcontractor, Supplier, or Representative, of materials, equipment, instrumentalities, or other property, whether the same be owned by OWNER, CONTRACTOR, or third parties, and CONTRACTOR, to the fullest extent permitted by Laws and Regulations, agrees to indemnify and save harmless OWNER, and the present and future officers, shareholders, directors, officials, employees, representatives, agents, partners, affiliates, parents, and subsidiaries of each and any of them from and against all such claims including, without limiting the generality of the foregoing, claims for which OWNER may be or may be claimed to be liable and legal fees and disbursements paid or incurred to enforce the provisions of this Paragraph 20.1, and CONTRACTOR further agrees to obtain, maintain, and pay for such insurance coverage and endorsements as will insure the provisions of this Paragraph 20.1.
- B. The indemnification obligations under this Article 20 shall not be limited in any way by the amount or type of damages, compensation, or benefits payable under worker's compensation acts, disability benefit acts, other employment benefit acts, or the amount of insurance carried or recovered.
- C. The provisions of this Article 20 shall survive final payment, completion, and acceptance of the Works, or termination or completion of the Contract.
- D. CONTRACTOR is not required to indemnify Owner from any of its obligations concerning preexisting environmental contamination of the site that is not otherwise aggravated or increased by the CONTRACTOR.

## ARTICLE 21 CONTRACTOR's ENGAGEMENT BY OWNER

### 21.1 Independent Contractor



A. CONTRACTOR shall be an independent contractor, maintaining control over its own employees and operations, and neither CONTRACTOR nor anyone employed by CONTRACTOR shall be deemed to be a servant, employee, or agent of OWNER. CONTRACTOR shall be fully responsible for and shall withhold or pay, or both, as may be required by Laws and Regulations, all federal, state, and local taxes and contributions with respect to, measured by, or based upon compensation paid to or earned by CONTRACTOR's employees.

B. CONTRACTOR, in accordance with its status as an independent contractor, (i) shall conduct itself consistent with such status; (ii) shall neither hold itself out as, nor claim to be an officer or employee of OWNER by reason hereof; and (iii) shall not, by reason hereof, make any claim, demand, or application to or for any right or privilege applicable to an officer or employee of OWNER including but not limited to workers' compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit.

C. CONTRACTOR shall not take any action or allow any omission inconsistent with its sole status as an independent contractor under the Contract.

#### 21.2 No Authority to Act for OWNER

A. CONTRACTOR and its employees shall have no authority to act for OWNER unless specifically authorized by the Contract. CONTRACTOR shall not enter into any contract, commitment, or agreement, make any representation or warranty, incur any other obligation or any debt or liability of any nature in the name of or on behalf of OWNER, or subcontract or delegate any of its duties under the Contract, without the express prior written authorization of OWNER.

B. CONTRACTOR shall be fully responsible to OWNER for any act or omission of any of CONTRACTOR's officers, directors, shareholders, employees, agents, Representatives, subcontractees or delegates which relates to CONTRACTOR's obligations or performance under the Contract. CONTRACTOR shall, at its expense and at no additional cost to OWNER, fully and immediately reimburse OWNER for the cost of undertaking any measures associated with actual or threatened adverse effects resulting from any such act or omission.

C. CONTRACTOR shall not undertake other employment or engagement, or, except as required by any Laws or Regulations, perform any act or allow any omission, which is inconsistent with the interests of OWNER under the Contract. In the event that CONTRACTOR is called upon under a purported requirement of any Laws or Regulations to do or omit anything which may violate the duty set forth in the preceding sentence, CONTRACTOR shall give OWNER sufficient advance written notice thereof to allow OWNER to contest the matter.

D. CONTRACTOR shall be solely responsible for, and OWNER shall have no obligation or other liability for, the management of CONTRACTOR's own internal affairs, including without limitation as to its compliance with Laws and Regulations and rules governing its formation, preservation, and functioning as a corporation, its subcontractees and delegates, and its management, shareholder, and labor relations, for purposes of CONTRACTOR's performance under the Contract or otherwise.

#### 21.3 CONTRACTOR's Responsibility to Assist OWNER

A. CONTRACTOR shall provide such assistance as OWNER may reasonably request in connection with any litigation with respect to the Site in which OWNER may become involved, and OWNER shall equitably adjust CONTRACTOR's compensation in accordance with the terms of the Contract Documents for such assistance.

#### 21.5 Survival

A. The provisions of this Article 21 shall survive final payment, completion, and acceptance of the Works, or termination or completion of the Contract.

### ARTICLE 22 GOVERNMENTAL AGENCY COMMUNICATION

#### 22.1 Responsibility of CONTRACTOR to Furnish Notice

- A. CONTRACTOR shall immediately notify OWNER in writing if (i) notice is received of violation of any governmental enactment, requirement, or authorization which relates to CONTRACTOR's performance or non-performance under the Contract; (ii) proceedings are commenced or threatened which could lead to revocation of permits, licenses, or other governmental authorizations which relate to such performance; (iii) permits, licenses, or other governmental authorizations relating to such performance are revoked; (iv) litigation is commenced or threatened which could affect such performance; (v) there has been, except as is inherent in the proper performance of the Works, a release or further release into the environment of any Hazardous Substance, Pollutant or Contaminant, or Solid Waste, whether pre-existing or otherwise; or (vi) any other condition occurs or is threatened to occur which CONTRACTOR reasonably believes or should reasonably believe may have a material adverse effect on the timely performance of any of CONTRACTOR's duties under the Contract.
- B. Unless specified otherwise, CONTRACTOR shall draft and submit to OWNER all notifications, reports, and other documents which relate to its work and which are required to be submitted by OWNER to the U.S. EPA or any other governmental agency, or otherwise in connection with the Site, on a schedule and in such a manner as to allow the meeting of any applicable submission deadline, and in any event, at least 5 business days before any such deadline.

### ARTICLE 23 [THIS ARTICLE IS INTENTIONALLY OMITTED.]

### ARTICLE 24 CONTRACT SECURITY

#### 24.1 Performance and Payment Bonds

A. CONTRACTOR shall furnish, in accordance with the requirements of the Contract Documents, a Performance Bond and a Payment Bond that are each in the amount of the

Contract Price and name City of Plainwell as Obligee, with respect to the execution of the Works by CONTRACTOR, which bonds shall operate according to their tenor. Such bonds must be posted with the city prior to the beginning of any Work.

## ARTICLE 25 MISCELLANEOUS

### 25.1 Governing Law and Venue

- A. The formation, validity, performance, and breach of the Contract and any matter relating thereto, and all claims, disputes, or actions whatsoever of any nature between the parties, shall be construed, enforced, and determined in accordance with the laws of the State of Michigan except to the extent such laws provide for a choice of law other than the laws of the State of Michigan.
- B. The parties expressly agree that any lawsuit or court action arising out of or relating to the Contract or the performance of the Works shall be filed and heard only in a court of competent subject matter jurisdiction within the State of Michigan and no party to the Contract shall contest the personal jurisdiction of such court over it for purposes of such an action. The parties waive any right they may have to demand trial or hearing by jury in any lawsuit or action hereunder, regardless of whether such lawsuit or action sounds in tort or contract.

### 25.2 Complete Agreement

A. This Contract combined with the Primary Agreement contains the entire agreement of the parties, and cancels and supersedes all prior negotiations and agreements of the parties, with respect to its subject matter. There has been no promise or representation made by either party to induce the other party to enter into the Contract which is not set forth in the Contract. The fact that a deletion from or addition to the Contract has been made during its negotiation shall not be used for any purpose, including without limitation for the purpose of interpreting the Contract. No principle providing for the construction or interpretation of an agreement adverse to its drafter shall apply to the Contract. The Contract shall not be set aside, modified, amended, or augmented, in whole or in part, except in writing signed by a duly authorized representative of each party.

### 25.3 Severability

A. Every paragraph, part, term, or provision of the Contract is severable from the others. If any paragraph, part, term, or provision of the Contract is construed or held to be void, invalid, or unenforceable by order, decree, or judgment of a court of competent jurisdiction, the remaining paragraphs, parts, terms, and provisions of the Contract shall not be affected thereby but shall remain in full force and effect.

### 25.4 Voluntary Contract

A. Each of the parties to the Contract has carefully read and fully understands the Contract; has had full opportunity to consult with counsel regarding its meaning and effect; has taken all actions necessary to enter into the Contract to effect a binding and valid obligation of the party; and is entering into the Contract freely and voluntarily, through a representative who is fully authorized and empowered to sign on its behalf.

### 25.5 Survival of Obligations

A. All representations, releases, waivers, indemnifications, warranties, guarantees, and similar agreements made in, required by, or given in accordance with the Contract Documents, as well as all obligations of the Contract Documents which are expressly or implicitly continuing obligations, shall survive final payment, completion, and acceptance of the Works, or termination or completion of the Contract.

#### 25.6 Cumulative and Non-Exclusive Rights and Remedies

A. The individual rights and remedies of OWNER and CONTRACTOR under the Contract Documents shall be cumulative and in addition to, not in lieu of, any other rights and remedies of OWNER and CONTRACTOR provided at law or in equity.

#### 25.7 Third Party Beneficiaries

A. Except as expressly set forth in the Contract there are no third party beneficiaries to the Contract intended by the parties.

#### 25.8 Waiver

A. A waiver of any provision of the Contract Documents shall be binding and effective only if the same shall be in writing signed by both parties hereto. A waiver of any breach of the Contract Documents shall be for that one time only and shall not apply to any subsequent breach, unless otherwise agreed to in writing by both parties hereto. OWNER's acceptance of a late or otherwise non-conforming performance by CONTRACTOR shall not be deemed a waiver of OWNER's right to hold CONTRACTOR liable for any damage resulting therefrom nor OWNER's right to terminate the Contract for cause related to the same, however it shall not excuse payment to CONTRACTOR for services satisfactorily performed prior to the termination . The failure of either party to insist in one or more instances upon the terms of the Contract, or to exercise any right hereunder, shall not be construed as a waiver of the future performance of any such term or the future exercise of such right, and the obligation of each party with respect to such future performances shall continue in full force and effect.

#### 25.9 Specific Performance

A. Failure of CONTRACTOR to comply strictly with the provisions of the Contract, as amended by all Written Amendments and Change Orders, shall entitle OWNER to all rights and remedies for breach of contract.

CONTRACTOR and OWNER hereby agree to the full performance of the covenants herein contained and

IN WITNESS WHEREOF:

have signed this Agreement as of the day and year first written. This Agreement bears the formal date aforementioned and shall be for all purposes retroactive to such date even though signed and acknowledged on the dates mentioned below,

SIGNED IN THE PRESENCE OF:

\_\_\_\_\_  
OWNER

\_\_\_\_\_  
CONTRACTOR

BY \_\_\_\_\_  
(Authorized Signature)

BY \_\_\_\_\_  
(Authorized Signature)

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Print Title)

\_\_\_\_\_  
(Print Title)

This \_\_\_\_ day of \_\_\_\_\_, 2020

This \_\_\_\_ day of \_\_\_\_\_, 2020

at \_\_\_\_\_  
(Location)

at \_\_\_\_\_  
(Location)

WITNESS \_\_\_\_\_

WITNESS \_\_\_\_\_

Note: If CONTRACTOR is a corporation or partnership, attach evidence of authority to sign.

END OF SECONDARY AGREEMENT



CONTRACTOR and OWNER hereby agree to the full performance of the covenants herein contained and

IN WITNESS WHEREOF:

have signed this Agreement as of the day and year first written. This Agreement bears the formal date aforementioned and shall be for all purposes retroactive to such date even though signed and acknowledged on the dates mentioned below,

SIGNED IN THE PRESENCE OF:

\_\_\_\_\_  
OWNER  
BY \_\_\_\_\_  
(Authorized Signature)  
\_\_\_\_\_  
(Print Name)  
\_\_\_\_\_  
(Print Title)

Melching Inc  
CONTRACTOR  
BY Douglas Melching  
(Authorized Signature)  
Douglas Melching  
(Print Name)  
owner  
(Print Title)

This \_\_\_\_ day of \_\_\_\_\_, 2020  
at \_\_\_\_\_  
(Location)

This 30 day of June, 2020  
at 3662 Airline Rd, Norton Shores  
(Location)

WITNESS \_\_\_\_\_

WITNESS Ken Callow

Note: If CONTRACTOR is a corporation or partnership, attach evidence of authority to sign.

END OF SECONDARY AGREEMENT