

Miller Diversified Construction

Construction Agreement Terms & Conditions

1.6 Work. As used in this Contract, "Work" means all construction and services required to be performed by the Contractor to fully and completely construct the portion of the Project described on Exhibit B in strict compliance with the Contract Documents, and includes all labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations under the Contract Documents, and all labor and materials reasonably inferable therefrom.

1.7 Plans and Specifications. A description of the Plans and Specifications is set forth on Exhibit C. The Plans and Specifications are final Plans and Specifications, subject to change only by appropriate Change Order. Contractor represents that the Contractor has reviewed the Plans and Specifications and that they are adequate to complete the Work.

1.8 Commencement Date. The Commencement Date for the Work shall be the date specified on page 2 of the Construction Agreement. If the Commencement Date is changed or altered by the Construction Manager or Owner, the Contractor shall commence Work within 3 days notification. For Work that may involve phasing, the Contractor shall commence Work on each phase or portion of Work on the date set forth in the attached Exhibit D ("Project Schedule") or within 3 calendar days notification from the Construction Manager if the Project Schedule has been altered or revised.

1.9 Completion Dates

1.9.1. The Substantial Completion Date for the Project is the date specified on page 2 of the Construction Agreement. The Scheduled Completion Date for the Work or portions thereof shall be set forth in the attached Project Schedule. In the event that the Project Schedule is advanced or delayed by the Construction Manager, the Contractor shall complete each portion of their Work in accordance to the scheduled duration of each portion of Work as identified in the Project Schedule. Such durations shall not change unless agreed to by the Construction Manager in writing. Manpower is to be scheduled accordingly.

1.9.2. "Substantially Complete," "Substantial Completion" and similar words and phrases mean that the Work as set forth in the Plans and Specifications can be (i) used and occupied by the Owner for its intended purpose and that all required final inspections thereof have been completed and approved.

1.9.3. "Scheduled Completion Date(s)" and similar words and phrases shall mean that phase or portion of the Work that is scheduled in accordance with the Project Schedule (or as may otherwise be agreed to between Construction Manager and Contractor in writing) in order for other contractors to complete their work or other portions of the project work to be completed timely.

1.9.4. The Final Completion Date of the Work is the date specified on page 2 of the Construction Agreement.

1.9.5. "Finally Complete," "Final Completion" and similar words and phrases mean that the Work, including all punchlist items, is fully completed and usable by the Owner and that all corrective action required in connection with any final inspection has been completed.

1.10. Contract Documents

1.10.1 The Contract Documents consist of the following: (i) this Contract; (ii) the Plans and Specifications; (iii) Change Orders; (iv) the Project Schedule attached hereto as Exhibit D and (v) Conditions of the Contract; (vii) Addenda issued prior to execution of this Contract; and (viii) the Proposal(s) attached as Exhibit E (However, the Proposal shall be used for references purposes and this terms of this Contract shall take precedence over the Proposal). If there is any conflict among the Contract Documents, any Change Orders shall have precedence over this Contract; this Contract shall have precedence over the Plans and Specifications; the Plans and Specifications shall have precedence over the Project Schedule.

1.10.2 The Contract Documents represent the entire and integrated agreement between the parties and supersede all prior negotiations, representations or agreements, either written or oral, including, but not limited to, the bid documents and the Contractor's proposal.

1.11 Subcontractors. As used in this Contract, "Subcontractor" means a subcontractor, material supplier or laborer of the Contractor or any subcontractor, material supplier or laborer of any lower tier, and includes all of their officers, employees, agents and representatives.

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1.12 Contract Time. The Contract Time is the period from the Commencement Date to the date of Substantial Completion.

1.13 Contract Sum. The Contract Sum is set forth on Exhibit B. The Contract Sum includes all sales, use and other taxes and charges applicable to the Work, all of which shall be paid by the Contractor, whether enacted before or after the Effective Date. Unit Prices and hourly rates, if any, are set forth on attached Exhibit F.

1.14 Change Order. A Change Order is a written modification or amendment in the Contract Documents prepared by the Construction Manager and signed by the Owner and the Contractor. No amendment, modification or change in the Contract Documents shall be effective unless and until a Change Order has been executed by the Owner.

1. THE WORK

1.1 General

1.1.1. The Contractor shall complete all of the Work as the same is set forth in the Contract Documents. Without limiting the foregoing, the Contractor shall arrange for and/or furnish all labor and material necessary to fulfill the terms of this Contract and complete the Work in strict accordance with the Contract Documents. Contractor shall supervise and control and be fully liable for all Subcontractors that perform any Work or furnish any labor or materials for the Work. Contractor shall provide sufficient work force to complete the work within the prescribed period of time. If the Construction Manager determines that the Work cannot be completed by the Substantial Completion Date or Schedule Completion Dates at any point during construction of the Project, the Contractor (at Construction Manager's request and notification) shall add additional crews or work overtime (including weekends and holidays) without additional cost to the Owner. In the event that the Contractor fails to add additional crews when requested then the CM or Owner may: (i) hire additional personnel or other another contractor to assist Contractor; (ii) terminate this Contract and hire another contractor to complete the Work and/or (iii) charge the Contractor the amount specified in the liquidated

damages provision identified in Section 3.3 for each day the Contractor fails to add additional crews. In each instance the Contractor shall be subject to the provisions of Section 8.1.2. In the event the Contractor fails to complete the Work on or before the Substantial Completion Date, Scheduled Completion Dates or the Final Completion Date as a result of their failure to add crews or work overtime, then the liquidated damages shall be triple the amount specified in Section 3.3.

1.1.2. The Contractor shall apply for and obtain, at the Contractor's expense, all necessary permits, approvals, inspections, connection or tap-in fees, consents, licenses and certificates that may be required in connection with the Work. The Contractor shall provide the Owner with copies of all of the foregoing within five (5) days after receipt thereof by the Contractor. Notwithstanding the foregoing, the Owner will secure the building permit and zoning permit for the Project.

1.1.3. The Contractor shall supervise the Work at all times. Contractor shall immediately report to the Owner and Construction Manager any error, inconsistency or omission that the Contractor becomes aware of or should have become aware of using the standard of care of prudent contractors who are licensed in Ohio and who are experienced in performing work similar in scope and size as the Work.

1.1.4. Unless otherwise specified, all materials shall be new. All workmanship and materials shall be of the best quality available that is consistent with the Plans and Specifications. The Contractor, shall if required, furnish satisfactory evidence as to the kind and quality of materials.

1.1.5. The Work shall include any and all cutting and patching. Notwithstanding the foregoing, any patching that needs to be completed as a result of defects in the Work or improper sequencing of the Work caused by the failure of the Contractor to complete the Work as scheduled shall: (i) be completed by the appropriate contractor that has been hired for the Project and (ii) must notify CM and obtain CM's approval prior to cutting and patching. Any costs associated therewith shall be charged to the Contractor.

1.1.6. All shop drawings that are prepared by the Contractor or any Subcontractor or samples furnished by the Contractor shall be submitted to the Construction Manager for its approval. No portion of the Work requiring a shop drawing

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or sample submission shall be started until the submission has been approved by the Construction Manager. Shop drawings are for the purpose of demonstrating the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Plans, Specifications, and Contract Documents. The CM and Architects review and approval are not conducted to determine accuracy, completeness, checking dimensions or quantities, safety precautions or to approve substitutions that are not specifically approved in an executed change order. The Contractor shall be liable for all mistakes or errors in shop drawings or samples. Shop drawings shall be submitted in conformance with the Project Schedule, but in no event later than two weeks for review and return to the Contractor. Failure to provide on time may result in liquidated damages as provided in Section 3.3.

1.1.7. The Contractor shall at all times keep the Project Site free from accumulation of waste materials. The Contractor shall leave its Work in a "broom clean" condition. Cost for this cleanup is included in the Contract Sum. If the Contractor fails to keep the Project Site clean and free of waste materials, then the Owner or CM may cause such Work to be performed and the Contractor shall pay the costs thereof immediately upon demand by the Owner, or the Owner may reduce the Contract Sum by the amount of such costs.

1.1.8. Owner shall not be obligated to pay any sums due any Subcontractors, but may contact Subcontractors and pay them directly or by joint check if a default occurs as provided in Section 7.1 or if Owner or Construction Manager reasonably determines that it is necessary to do so for the protection of the Owner. Contractor shall pay each Subcontractor, promptly upon receipt of payment from the Owner, an amount equal to the percentage of completion allowed to the Contractor on account of each Subcontractor's work.

1.2 Standard of Care. The Contractor shall complete the Work in a good and workmanlike manner in accordance with the Plans and Specifications and all applicable laws and regulations, including all building codes. By starting Work the Contractor acknowledges acceptance for the responsibility of current conditions and meeting all laws, regulations and codes and shall not be permitted to seek additional compensation for changes required by to meet the laws, regulations, or codes.

1.3 Owner's Access and Occupancy. Owner and Construction Manager shall have access to the Work and

Project Site at all times during the performance of the Work, and Contractor shall make reasonable accommodations for any separate contractors to complete their work without undue interference or unreasonable delay. Owner may occupy the Project at any time after Substantial Completion with the consent of all insurers. Owner shall not delay or hinder the Contractor's ability to complete all punch list items after the Substantial Completion Date.

1.4 Safety

1.4.1. The Contractor shall be liable for the safety of, and shall provide all necessary or desirable protection to prevent damage, injury or loss to, any persons performing or affected by the Work and materials and equipment to be incorporated therein and any other property at the Project Site or adjacent thereto. The Contractor shall give all notices and comply with all applicable laws and regulations relating to safety of persons or property. The Contractor shall install and maintain all necessary or desirable, safeguards for safety and protection. The Contractor shall indemnify and hold harmless Construction Manager and Owner for any safety violations and shall be responsible for any fines, penalties or citations levied against Construction Manager or Owner as a result of the Contractor's safety violations.

1.5 Regulated Materials

1.5.1. If the Contractor discovers any violation of any laws or regulations relating to human health and safety, wetlands, underground storage tanks or the environment or discovers any Regulated Materials on the Project Site or reasonably believes that any Hazardous Materials are present on the Project Site, the Contractor shall immediately stop the Work and report the violation or condition to the Owner and Construction Manager. When the violation has been corrected or the Hazardous Material or condition has been properly removed or remediated, the Contractor shall immediately resume performance of the Work. If the violation was caused by the Contractor, or if the Hazardous Materials were used, generated, stored, released, disposed of or otherwise introduced to the Project Site by the Contractor or any Subcontractor, then such violation shall be corrected or such Hazardous Materials shall be removed or remediated at the cost of the Contractor. If the violation was caused by the Owner or the Hazardous Materials were not used, stored, generated, released or otherwise introduced to the Project Site by the Contractor or one of its Subcontractors, then the Owner shall pay the cost of remediating or cleaning up the Hazardous Material and the Contract Time shall be equitably extended.

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1.5.2. "Regulated Materials" means any substance, material or waste: (i) that is or becomes regulated under any Laws; (ii) that is or becomes defined as a solid waste, hazardous waste, hazardous substance, hazardous material, toxic waste, toxic substance, pollutant, or contaminate under any Laws; (iii) the presence of which causes or threatens to cause a nuisance or poses or threatens to pose a hazard to the health or safety of persons; (iv) that is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, mutagenic or otherwise hazardous or dangerous; (v) without limitation, that contains petroleum, including crude oil or any fraction thereof; or (vi) without limitation, that contains polychlorinated biphenyls, asbestos or urea formaldehyde.

1.5.3. The Project may be subject to the regulations of the Ohio EPA requiring a so called NPDES permit and Storm Water Pollution Prevention Plan (SWP3). By execution of this Contract, the Contractor (i) acknowledges that they reviewed and understand the conditions and responsibilities of the SWP3; (ii) agrees to execute any documentation necessary required by EPA to provide proof of such acknowledgment and (iii) shall abide by and assist with implementing the requirements of the SWP3.

1.6 **Payment and Performance Bond.** At the request of the Owner, the Contractor shall deliver to the Owner before the Commencement Date a payment and performance bond in a form and from a surety acceptable to the Owner and Construction Manager in the amount of the Contract Sum. If the payment and performance bond was not required prior to the execution of this Contract, then a Change Order for the actual cost of the payment and performance bond shall be executed. Under no circumstances shall payment be made by the Owner to the Contractor prior to receipt of the payment and performance bond.

1.7 **Contractors Books.** Contractor shall permit the Owner, Construction Manager, or any accountant or agent engaged by the Owner to have access to all records, correspondence, subcontracts, purchase orders, account books, invoices, receipts, canceled checks and payrolls pertaining to the Project or the Work upon reasonable notice to the Contractor at all reasonable times. In addition, the Contractor shall preserve all records relating to the Project for a period of three (3) years after final payment.

1.8 **Notice of Commencement.** The Owner or Construction Manager shall prepare and record a Notice of Commencement for the Project. The Contractor shall not prepare or record a Notice of Commencement and waives its right to do so. Upon preparation of the Notice of Commencement, the Owner or Construction Manager shall

deliver a copy thereof to the Contractor and this Notice shall be attached as Exhibit G, and the Contractor shall deliver the Notice of Commencement by certified mail to all Subcontractors. If the Contractor receives any Notices of Furnishing, Contractor shall immediately deliver copies of the same to the Owner and Construction Manager.

1.9 **Special Tests.** The Owner or Construction Manager may stop the Work for the purpose of performing special inspections or tests. If any Work is determined to be defective or non-conforming as a result of any special inspections or tests, the Contractor shall correct the Work immediately and pay the costs of such inspections and tests, but no adjustment in the Contract Time shall be made. If the Work is found to be satisfactory and conforming to the Contract Documents, the Owner or Construction Manager shall pay the cost of such inspections or tests and the Contract Time shall be equitably extended.

2. CONTRACT TIME

2.1 Commencement & Completion

2.1.1. The Contractor shall commence the Work no later than the Commencement Date and shall Substantially Complete the Work no later than the Substantial Completion Date or Scheduled Completion Dates. Should the Commencement Date be changed, the Contractor shall commence work within (3) days of notification and the Work durations per the Schedule shall not change.

2.1.2. On or before the Substantial Completion Date, the Owner, the Construction Manager and the Contractor shall prepare and sign a punch list setting forth portions of the Work that are known to be incomplete or defective. The Contractor shall fully complete all of the Work, including all punchlist items, shall be completed by the Final Completion Date.

2.2. **Extensions.** The Contract Time and the Final Completion Date shall be equitably extended if the Contractor is not able to perform any Work on the Project as a result of adverse weather that Contractor could not reasonably anticipate, acts of God, strikes of general applicability (and not against Contractor only), civil disturbances and other circumstances that Contractor could not reasonably have anticipated on the Effective Date and that are beyond Contractor's reasonable control. If Contractor intends to make a Claim (hereinafter defined) for extension of the Contract Time, Contractor must notify Owner and Construction Manager within three (3) business days after

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the occurrence of the event giving rise to the Claim. If Contractor fails to make any claim for extension of the Contract Time within 3 business days after the occurrence of the event giving rise to the Claim, Contractor shall be deemed to have irrevocably waived its Claim for such an extension. Any extension in the Contract Time shall be evidenced by a Change Order.

2.3. Liquidated Damages. If the Work is not completed by the Substantial Completion Date or Scheduled Completion Date or the punchlist items are not completed by the Final Completion Date, then the Contractor shall pay to the Owner as liquidated damages ("Liquidated Damages") for such delay the sum of \$1,000 per day for each day after the Substantial Completion Date or Final Completion Date, as applicable, that such Work is not completed. Contractor and Owner acknowledge that the actual amount of the damages that the Owner would suffer as a result of any delay in completion are difficult to determine, and that the Liquidated Damages set forth in this section are a reasonable estimate of the damages that Owner would suffer as the result of a delay. The amount of Liquidated Damages set forth in this section relates only to Owner's damages for a delay in the completion of the Work, and does not limit the amount of damages to which the Owner may be entitled as a result of any other failure on the part of the Contractor to perform the Work in accordance with the Contract Documents.

3. PAYMENTS

3.1 Contract Sum

3.1.1. Owner shall pay Contractor the Contract Sum for the Work.

3.1.2. The Contract Sum may only be increased or decreased by the amount set forth in a Change Order.

3.2 Payment Procedures

3.2.1. Within 14 days of execution of this Contract, Contractor shall provide to CM a schedule of values for the Work that is to be performed on AIA form G703 or equal

3.2.2. The Contract Sum shall be paid as provided in this Section 4.2.

3.2.3. Within five (5) days after the end of each calendar month, Contractor shall submit to the Construction

Manager an application for payment ("Application for Payment") on the current AIA form G732 and G703 for all Work performed through and including the last day of that preceding calendar month. The Application for Payment shall include only labor and equipment used or furnished through the last day of the preceding month; materials used, furnished or installed through the last day of the preceding month; and materials delivered to and suitably secured at the Project Site (with the Construction Manager's permission); provided, however, that in no event shall the Application for Payment be for an amount that exceeds the product of the Contract Sum and the percentage of the Work that has been completed through the period of the Application for Payment, as reasonably determined by the Construction Manager. By the 15th of each month, Construction Manager will group all approved Applications for Payment and submit them to the Owner.

3.2.4. Subject to Owner's right to withhold payment as provided in Section 4.2.8, Owner shall pay the amount set forth in the Application for Payment, less retainage as set forth in Section 4.2.5, to the Construction Manager for distribution to the Contractor within ten (10) days after the CM's submission of the Application for Payment to the Owner and all other documentation required by this Contract.

3.2.5. Within ten (10) business days after CM receives bank confirmation of receipt of Owner's funds, the CM shall issue payments to the Contractor's

3.2.6. The Contractor shall submit with each Application for Payment, (i) an affidavit of contractor setting forth the names of all Subcontractors furnishing labor or materials to the Project; (ii) lien waivers for payments previously made to Subcontractors; (iii) a comparison of actual expenditures with the Project budget; and (iv) such other documents as the Owner or the Construction Manager may reasonably request, including, but not limited to, affidavits, sworn statements and receipts for materials.

3.2.7. Owner shall withhold retainage of ten percent (10%) of the amount of each Application for Payment.

3.2.8. The entire remaining balance of the Contract Sum, including any retainage, shall be paid on the later of (i) thirty (30) days after the last of the Final Completion Date

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and (ii) the submission of an Application for Payment for final payment by the Contractor and the submission of all documents set forth in Section 4.2.4 or Section 5.2, except that all such lien waivers shall be final, unconditional lien waivers.

Title to all Work covered by an Application for Payment shall pass to the Owner on the earlier of the date of installation or the date that the Contractor receives payment.

Notwithstanding anything to the contrary contained herein, payments may be withheld without interest by Owner on account of (i) Claims made or filed by the Contractor, a Subcontractor or any third party; (ii) defective Work not remedied; (iii) failure of the Contractor or Subcontractor to make payments properly to any of their Subcontractors; (iv) damage to another contractor; (v) unsatisfactory prosecution of the Work by the Contractor or any Subcontractor; (vi) reasonable belief of the Owner or Construction Manager that the Work cannot be completed for the Contract Sum; or (vii) failure of the Contractor to perform the Work in a manner acceptable to the Construction Manager. The Contractor shall not have the right to stop Work, slow down the Work or terminate the Agreement as a result of portions of payments withheld for any of the foregoing reasons. Owner shall have the right to pay by joint check if Owner reasonably believes that a Claim exists with respect to any Work. The right to withhold payment or pay by joint check is in addition to any other rights or remedies that Owner may have at law or in equity.

3.2.9. Title to all Work covered by an Application for Payment shall pass to the Owner on the earlier of the date of installation or the date that the Contractor receives payment.

3.2.10. Notwithstanding anything to the contrary contained herein, payments may be withheld without interest by Owner on account of (i) Claims made or filed by the Contractor, a Subcontractor or any third party; (ii) defective Work not remedied; (iii) failure of the Contractor or Subcontractor to make payments properly to any of their Subcontractors; (iv) damage to another contractor; (v) unsatisfactory prosecution of the Work by the Contractor or any Subcontractor; (vi) reasonable belief of the Owner or Construction Manager that the Work cannot be completed for the Contract Sum; or (vii) failure of the Contractor to perform the Work in a manner acceptable to the Construction Manager. The Contractor shall not have the right to stop Work, slow down the Work or terminate

the Agreement as a result of portions of payments withheld for any of the foregoing reasons. Owner shall have the right to pay by joint check if Owner reasonably believes that a Claim exists with respect to any Work. The right to withhold payment or pay by joint check is in addition to any other rights or remedies that Owner may have at law or in equity.

3.3. Failure to Timely Pay. If Owner fails to make any payment when due, the unpaid amount shall earn interest at the prime rate as set forth in *The Wall Street Journal* on the date such payment is due.

3.4. Liens. If Owner makes payments in accordance with the terms of this Contract, the Contractor shall keep the Project Site free of all liens by the Contractor or any Subcontractor. If any lien is filed, the Contractor shall take such action as may be necessary to cause such lien to be released, discharged or bonded off within 30 days after the filing thereof and shall indemnify, defend and hold Owner and the Construction Manager harmless from and against any and all Claims caused by or arising out of the filing thereof.

3.5. Change Orders.

3.5.1. All modifications or amendments of the Contract Documents shall be evidenced by a written Change Order signed by the Owner and the Contractor. Owner shall not be obligated to pay any amount for any Work not specifically described in the Plans and Specifications, pay any amount in excess of the Contract Sum or grant any extension in the Contract Time unless such change is evidenced by a written Change Order executed by Owner and the Contractor.

3.5.2. The Owner may order changes in the Work within the general scope of the Contract Documents provided that any adjustments in the Contract Sum and Contract Time resulting from such change are equitably adjusted. The change and any adjustment to the Contract Sum and Contract Time shall be set forth in a Change Order. In no event shall Owner be liable for any increase in the Contract Sum or Contract Time unless the change is set forth in a Change Order.

4. WARRANTIES

4.1. Contractor's Warranty. Contractor warrants that: (i) the Work shall be performed in a good, complete, workmanlike and professional manner, and in accordance with all applicable local, state and federal laws and regulations and the Plans and Specifications; (ii) all materials and equipment

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furnished under the Contract Documents will be of the quality required by the Contract Documents and new; (iii) the Work will be free from defects, including defects in material and workmanship, and will conform to the requirements of the Contract Documents; and (iv) the Contractor has full power to enter into and fully perform this Contract without conflict with any other agreements and no Work or service by the Contractor will in any way infringe upon or violate any rights of any third person, including, without limitation, rights of patent, trade secret, trademark, trade dress or copyright. If required by the Owner or Construction Manager, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. Contractor shall, at its cost, remedy any defective or non-conforming Work that is discovered within one (1) year from Final Completion Date or the date that is identified elsewhere in the Plans, Specifications or Contract Documents, whichever is the longest period of time. Nothing contained in this Section 5.1, including the obligation of Contractor to remedy any defective or non-conforming Work discovered within one (1) year from the Final Completion Date, shall establish a period of limitation with respect to any obligations that the Contractor may have under the Contract Documents. Establishment of the one (1) year period for correction of Work relates only to the specific obligation of the Contractor to correct the Work, but the obligation to comply with the Contract Documents may be enforced at any time (up to the maximum time allowed by law) or commence at any time, proceedings to establish the Contractor's liability.

4.2 Manufacturer's Warranties. Contractor shall collect and index all warranties and guarantees of all third parties and shall assign and deliver to Owner on the Substantial Completion Date all guarantees and warranties with respect to any work, materials or equipment given by any third party. Without limiting the foregoing, the Contractor shall provide to the Owner, as applicable (i) all warranties and guarantees for the mechanical and electrical equipment; (ii) a certificate certifying that the sub-base, base and surface preparation and paving of all parking areas has been properly installed and completed; (iii) an engineer's inspection report certifying that all concrete work, including the mixing and reinforcing, has been properly installed and completed; (iv) a certification relating to all plate and safety glass; (v) an HVAC balancing and testing report; and (vi) a certification of any other items or materials deemed reasonably necessary by the Owner. Owner shall not be obligated to make the final payment until all such documents have been delivered to the Owner.

5. RISK ALLOCATION

5.1 Contractor's Indemnity. Contractor shall indemnify, defend and hold harmless the Owner and the Construction Manager, and their respective officers, members, managers, agents and employees from and against any and all injuries, claims, damages, liabilities, losses, fines, penalties, demands, causes of action, suits, costs or expenses, including, but not limited to, attorneys' and professional fees and court costs (collectively, "Claims"), arising out of, relating to or resulting from (i) the performance of the Work by, or any act or omission of, the Contractor, a Subcontractor or anyone directly or indirectly employed by them or anyone for whose acts they may be liable; (ii) any breach of the terms of this Contract; or (iii) the Contractor, any Subcontractor or anyone directly or indirectly employed by either of them or anyone for whose acts they may be liable, bringing Hazardous Materials onto or near the Project Site or adjacent sites. In Claims against any person or entity indemnified under this section, the indemnification obligation shall not be limited by a limitation on amount or type of damages, compensation or other benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts or other employee benefits acts.

6. INSURANCE

6.1 Property Insurance

6.1.1. The Owner shall purchase and maintain in a company lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance on a "special forms – causes of loss" policy form, including builder's risk, in the amount of the contract sums for all contractors involved with the Project on a replacement cost basis. Such property insurance shall be maintained until final payment for the Project has been made.

6.1.2. A loss under the Owner's property insurance shall be adjusted by the Owner and made payable to the Owner.

6.2 General Liability Insurance

6.2.1. The Contractor shall purchase from and maintain in a company lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from (i) Claims under workers' compensation acts and

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other employee benefit acts that are applicable in statutory amounts; (ii) Claims for damages because of bodily injury, including death; (iii) Claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations are by the Contractor or by a Subcontractor; (iv) Claims under employer's liability insurance in the following amounts: \$1,000,000 bodily injury by accident/bodily injury by disease each employee/bodily injury by disease policy limit; and (v) Claims commonly covered under automobile liability insurance (including non-ownership and hired car coverage) with minimum amounts of \$1,000,000 each person/each occurrence. The Contractor's commercial general liability insurance shall have a combined single limit of not less than \$1,000,000.00/\$2,000,000 Aggregate; shall include endorsements or coverage for contractual liability, products liability, completed operations liability and liability for acts of Subcontractors, policy shall be primary and non-contributory to any other insurance; umbrella/excess policy of not less than \$2,000,000; all coverage shall be maintained without interruption from the Effective Date until at least two (2) years after the Final Completion Date. The Owner and the Construction Manager shall be named as an additional insured on such policies and such policies shall require that it will not be modified or cancelled without 30 days' prior written notice to the Owner and the Construction Manager. Additional Insured form shall include Completed Operations. Contractor shall provide a certificate of insurance acceptable to the Owner and the Construction Manager evidencing such insurance prior to commencement of the Work and at least five (5) business days prior to the expiration of the existing policy.

6.2.2. The Owner shall purchase from and maintain in a company lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from (i) Claims for damages because of bodily injury, including death, and (ii) Claims for damages, other than to the Work itself, to property. Such insurance shall have a combined single limit of not less than \$1,000,000.00.

6.3. Waivers of Subrogation

6.3.1. The Owner and the Contractor waive all rights against each other and any of their Subcontractors, members, officers and employees for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to Section 7.1 or other property insurance applicable to the Work. The insurance policies shall provide such waivers of subrogation by endorsement or otherwise. A

waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person had an insurable interest in the property damaged.

7. TERMINATION RIGHTS

7.1 Termination by Owner for Cause

7.1.1. The Owner may terminate the Contract if:

(i) the Contractor fails to perform or observe any term or condition of the Contract Documents required to be performed or observed by the Contractor and such failure continues for 48 hours after written notice from the Owner;

(ii) the Contractor files a voluntary petition in bankruptcy or the commencement of a bankruptcy or similar proceeding by the Contractor;

(iii) the Contractor fails, within 30 days, to dismiss any involuntary bankruptcy petition or other commencement of a bankruptcy or similar proceeding against the Contractor or to lift a stay of any execution, garnishment or attachment of such consequence as will impair its ability to perform the Contract with the Owner;

(iv) the Contractor is adjudicated a bankrupt or insolvent, admits in writing that it is insolvent, or is generally unable to pay its debts when due

(v) the Contractor makes an assignment for the benefit of its creditors;

(vi) the Contractor enters into an agreement of composition with its creditors; receives the approval by a court of competent jurisdiction of a petition applicable to the Contractor in any proceeding for its reorganization instituted under the provisions of any state or federal bankruptcy or similar law;

(vii) the Contractor has appointed by final order, judgment or decree of a court of competent jurisdiction of a receiver of the whole or any substantial part of the properties of the Contractor;

(viii) the Contractor dissolves or is liquidated;

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(ix) Any representation or warranty made by the Contractor in the Contract or in any report, certificate, application, financial statement or other instrument furnished by the Contractor pursuant thereto shall prove to be false, misleading or incorrect in any material respect as of the date made;

(x) The Contractor ceases work on the Project for a period of five (5) days, abandons the Project or ceases to do business for any reason whatsoever;

(xi) Any lien arising out of the Work is filed against the Project (other than liens resulting from Owner's failure to pay amounts due) or a claim is made or lien filed against funds held by the Owner by any creditor of the Contractor and is not discharged or bonded off by the Contractor within thirty (30) days; or

(xii) The Contractor fails to promptly pay any Subcontractors or otherwise to pay or perform any obligations under the Contract Documents or other agreements entered into in connection with the Project, unless a bona fide dispute exists and is being resolved through appropriate proceedings timely instituted and diligently pursued.

7.1.2. If the Owner terminates this Contract for cause as provided in this section, then the Owner may (i) take possession of the Project and all materials, equipment, tools, construction equipment and machinery thereon; (ii) finish the Work by whatever reasonable method the Owner may deem appropriate; (iii) withhold any further payment to the Contractor; (iv) take an assignment of any subcontracts or purchase orders, which assignment(s) the Contractor is obligated to make; and (v) pursue any and all other remedies available at law or in equity.

7.2 Termination by Owner for Convenience

7.2.1. The Owner shall have the right to terminate the Contract for convenience upon written notice to the Contractor.

7.2.2. If the Owner terminates for the Owner's convenience before the Commencement Date then the Contractor shall not be entitled to any payment unless Owner has specifically authorized the Contractor in writing to order certain materials, in which case Owner shall pay to the Contractor the cost of such materials to the extent the order cannot be cancelled and the cost of delivering such materials to a location specified by the Owner. If the Owner terminates for the Owner's convenience after the Commencement Date, then

the Contractor shall be entitled to receive an amount equal to a percentage of the Contract Sum equal to the percentage of the Work completed.

8. AUTHORITY OF CONSTRUCTION MANAGER

8.1 The Owner has appointed the Construction Manager as the Owner's agent for purposes of performing part of the Owner's agreements and obligations under the Contract Documents. In no event shall the Construction Manager have any personal liability for any failure of the Owner to perform any agreement or obligation under the Contract Documents. The Construction Manager is not taking any action with respect to the Work in its own name or on its own behalf. While the Construction Manager may be coordinating the delivery of payments from the Owner to the Contractor, the Contractor acknowledges that the Construction Manager is not personally liable for any of the Owner's obligations hereunder and that there is no privity of contract between the Construction Manager and the Contractor.

8.2 CM has the authority to monitor the Work of the Contractor and is authorized to reject any Work and require any additional testing to make sure that the Contractor is in conformance with the Contract Documents. Any additional testing, inspections and corrective action required shall be at the cost of the Contractor if the Work is found to be not in conformance with the Contract Documents.

9. ARBITRATION. All Claims or disputes between the Contractor and the Owner arising out of or relating to the Contract Documents or the Work shall be decided by arbitration with the American Arbitration Association in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, unless (i) the parties mutually agree otherwise (ii) the Claim or dispute involves the filing or discharge of a mechanic's lien. Notice of the demand for arbitration shall be filed in writing with the other party to this Contract and with the American Arbitration Association shall be made within a reasonable time after the Claim has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof. The agreement among the parties to this Contract shall be specifically enforceable under the applicable in any court having jurisdiction thereof.

Miller Diversified Construction

Construction Agreement Terms & Conditions

10. GENERAL PROVISIONS

10.1 Notices. All notices or communications shall be in writing and shall be sent by personal delivery; nationally recognized overnight courier; or certified mail, return receipt requested. All notices shall be deemed to be given on the date actually received. Either party may change its address by notice given as provided in this Contract.

10.2 Severability. If an arbitrator or court of competent jurisdiction holds any portion of any Contract Document invalid or unenforceable, such holding shall not affect the remainder of the Contract Document and all other Contract Documents, and the remainder of the Contract Documents and all other Contract Documents shall remain in full force or effect.

10.3 Assignment. Contractor shall not assign any Contract Document or any interest therein without the prior written consent of the Owner. Owner may assign its interest hereunder.

10.4 Binding Effect. This Contract shall be binding upon the parties hereto and their respective heirs, personal and legal representatives, successors, and assigns. The Construction Manager shall be deemed to be a third party beneficiary of this Agreement. Each party represents and warrants that this Contract is the legal, valid and binding obligation of that party, enforceable against that party in accordance with its terms.

10.5 Governing Law. The Contract Documents shall be governed by and construed in accordance with the laws of the State of Ohio.

10.6 Amendment. No amendment or modification of this Contract shall be effective unless it is in writing signed by the Contractor and Owner.

10.7 Counterparts. This Contract may be executed in one or more counterparts, each of which may be deemed to be an original, but all of which shall constitute but one and the same document.

10.8 Essence of Time. Time is of the essence in the performance of all agreements and obligations hereunder.