

# Exhibit A - CM Adviser Standard Terms and Conditions

## State of Ohio Professional Services Agreements for Public Facility Construction

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### ARTICLE 1 - CM'S RESPONSIBILITIES

#### 1.1 Nondiscrimination

1.1.1 The CM shall comply with Applicable Law regarding equal employment opportunity, including ORC Section 153.59 and all Executive Orders issued by the Governor of the state of Ohio.

1.1.1.1 As required under ORC Section 153.59, the CM agrees to both of the following:

- .1 "in the hiring of employees for the performance of work under the contract or any subcontract, no contractor, subcontractor, or any person acting on a contractor's or subcontractor's behalf, by reason of race, creed, sex, disability or military status as defined in section 4112.01 of the Revised Code, or color, shall discriminate against any citizen of the state in the employment of labor or workers who is qualified and available to perform the work to which the employment relates; and"
- .2 "no contractor, subcontractor, or any person on a contractor's or subcontractor's behalf, in any manner, shall discriminate against or intimidate any employee hired for the performance of work under the contract on account of race, creed, sex, disability or military status as defined in section 4112.01 of the Revised Code, or color."

1.1.1.2 The CM shall cooperate fully with the State Equal Opportunity Coordinator ("EOC"), with any other official or agency of the state or federal government that seeks to eliminate unlawful employment discrimination, and with all other state and federal efforts to assure equal employment practices under the Agreement.

1.1.1.3 In the event the CM fails to comply with these nondiscrimination clauses, the Contracting Authority shall deduct from the amount payable to the CM a forfeiture of the statutory penalty pursuant to ORC 153.60 for each person who is discriminated against or intimidated in violation of this **Section 1.1.1**.

1.1.1.4 The Agreement may be terminated or suspended in whole or in part by the Contracting Authority and all money to become due hereunder may be forfeited in the event of a subsequent violation of this **Section 1.1.1**.

#### 1.2 Royalties and Patents

1.2.1 The CM shall inform the Contracting Authority if the CM is aware that a particular invention, design, process, or device specified in the Contract Documents is subject to patent rights or copyrights calling for the payment of a license fee or royalty.

#### 1.3 Assignment of Antitrust Claims

1.3.1 Each party to this Agreement recognizes that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the ultimate purchaser of goods and services; in this instance the ultimate purchaser is the Owner. Therefore, the following assignment is made:

1.3.1.1 The CM hereby assigns, sells, conveys and transfers to the Owner any and all rights, title, and interest in and to any and all claims and causes of action which the CM may now have or hereafter acquire under the antitrust laws

of the United States of America or the state of Ohio, provided that the claims or causes of action relate to the particular goods, products, commodities, intangibles, or services purchased, procured, or acquired by, or rendered to, the Owner pursuant to this Agreement, and except as to any claims or causes of action which result from antitrust violations commencing after the compensation is established under this Agreement, which are not passed on to the Owner by any means. In addition, the CM warrants and represents that it will require any and all of its Consultants and suppliers to assign any and all federal and state antitrust claims and causes of action to the Owner, subject to the proviso and exception stated above.

#### 1.4 Use of Domestic Steel

1.4.1 The CM shall comply with ORC Section 153.011 ~~the Ohio Facility Construction Commission's policy~~ regarding the specification and use of domestically produced steel products, ~~including furnishing the required certifications. Copies of ORC Section 153.011 may be obtained from the Ohio Facilities Construction Commission. This policy is available on the Commission's website at <http://ofcc.ohio.gov>.~~

#### 1.5 Drug Free Safety Program

1.5.1 The CM shall comply with Applicable Law regarding smoke-free and drug-free workplaces and shall make a good-faith effort to ensure that none of its or its Consultant's employees engaged in the Services purchase, transfer, use, or possess illegal drugs or alcohol, or abuse prescription drugs in any way while on, or about, the Project.

#### 1.6 Use of the State's Web-based Project Management Software

1.6.1 If the Contracting Authority decides, in its sole discretion, to utilize the State's web-based project management software for the Project, the CM shall use such software for all compatible Services required under this Agreement.

1.6.2 All costs for the CM's use of the State's web-based project management software for the Project shall be included in its Basic Services Fee. If the CM's staff or its Consultants are unfamiliar with the proper use of such software, the CM shall provide its staff and Consultants for training without additional compensation.

#### 1.7 EDGE Business Development Program Participation

1.7.1 The CM shall participate in the "Encouraging Diversity Growth and Equity" Program ("EDGE") by contracting with and using one or more businesses certified as an EDGE Business Enterprise ("EDGE-certified Business") by the EOC.

1.7.1.1 If the CM is an EDGE-certified Business, the CM may include this Agreement amount in the reporting.

1.7.1.2 The amount of EDGE participation cannot exceed 100 percent of the amount of this Agreement.

~~4.7.4.21.~~ 1.7.1.3 The CM shall include in the reporting only those expenditures to EDGE-certified Businesses that perform a commercially useful function as described in OAC Section 123:2-16-15.

1.7.2 The CM shall provide an EDGE Participation Report with each CM Adviser Payment Request.

1.7.2.1 The CM shall provide status reports, produced by the CM and each applicable EDGE-certified Business for this Agreement, indicating:

- .1 the name of each EDGE-certified Business;
- .2 the federal tax identification number of each EDGE-certified Business;
- .3 the date of the EDGE-certified Business contract, subcontract, or purchase order;
- .4 the projected and actual start and end dates of the EDGE-certified Business contract, subcontract, or purchase order;
- .5 the original amount of the EDGE-certified Business contract or purchase order with the CM;
- .6 the current amount of the EDGE-certified Business contract or purchase order;
- .7 the amount invoiced to date;
- .8 the amount paid to date;
- .9 the status of the EDGE-certified Business contract or purchase order (active, complete, or void); and
- .10 a statement describing any substantive product or performance deficiencies.

1.7.2.2 The CM shall provide reports for each EDGE-certified Business; however, the reports may be consolidated and submitted as one document.

1.7.3 The CM shall provide an EDGE Participation Final Report simultaneously with its final Payment Request.

**1.7.3.1** The CM and each EDGE-certified Business shall provide in the report certification that the submitted document is a true and accurate accounting of the original contract amount paid to, and received by, each EDGE-certified Business.

**1.7.4** The CM shall provide EDGE Participation Reports in detail and form acceptable to the Contracting Authority.

**1.7.4.1** Failure to timely submit EDGE Participation Reports may result in withholding payment from the CM.

**1.7.5** If the Project is administered using the State's web-based project management software, the CM shall submit its EDGE Participation Reports, using the "Professional Services Pay Request" (~~Agency/Higher Education~~)-or "Applications for Payment" (~~School Facilities~~)-business process.

**1.7.6** The CM shall cooperate fully with requests for additional EDGE information and documentation from the EOC or Contracting Authority.

## 1.8 CM's Services

**1.8.1** The CM shall provide Services for the Project, customarily furnished in accordance with generally accepted construction management practice, consistent with the terms of this Agreement.

**1.8.2** The CM shall provide the Services in accordance with Applicable Law, the applicable announcement issued pursuant to ORC Section 153.67 ("Announcement"), and the Owner's Standards of Design, if any.

**1.8.3** The CM shall not be responsible for and shall not have control or charge of construction means, methods, techniques, sequences, procedures, or scheduling used by a Contractor to comply with the Contractor's obligations under its Contract for the Project or for safety precautions and programs in connection with the Contractor's Work on the Project.

**1.8.4** The CM shall not be responsible for or have control or charge over the acts or omissions of Contractors or Subcontractors, any of their agents or employees, or any other persons performing any Work on the Project.

**1.8.5** The CM shall assist the A/E to render decisions in connection with a Contractor's responsibilities under the Contract Documents and submit recommendations to the Contracting Authority for enforcement of the Contractor's contract as necessary.

~~1.8.6~~**1.8.5.1** The A/E is the initial interpreter of all requirements of the Contract Documents.

~~1.8.7~~**1.8.5.2** All of the A/E's decisions are subject to final determination by the Contracting Authority.

## 1.9 Standard of Care

**1.9.1** Notwithstanding any other provision of this Agreement to the contrary, the CM shall perform its services consistent with the skill and care ordinarily provided by construction managers practicing in the same or similar locality under the same or similar circumstances.

**1.9.2** The CM shall perform its services as expeditiously as is consistent with such skill and care and the orderly progress of the Project.

## 1.10 Construction Budget

**1.10.1** The Owner shall provide written notice to the Contracting Authority, A/E, and CM of any change in the Construction Budget.

**1.10.2** The CM shall perform its Services so that the Project is completed within the Construction Budget.

**1.10.3** The CM, A/E, Contracting Authority, and Owner do not have control over the cost of labor, materials, or equipment, over Contractors' methods of determining prices, or over competitive bidding, market, or negotiating conditions. Accordingly, the CM does not warrant or represent that competitively bid or negotiated prices will not vary from the Construction Budget or from any estimate of cost or evaluation prepared, or agreed to, by the CM.

## 1.11 Cooperation

**1.11.1** The CM shall perform the Services so as not to interfere with, disturb, hinder, or delay the services of Separate Consultants or Work of the Contractors. The CM shall cooperate and coordinate fully with all Separate Consultants and Contractors and shall freely share all of the CM's Project-related information with them to facilitate the timely and proper performance of the Services and of the services and work of Separate Consultants and Contractors.

**1.11.2** If the CM damages the property or work of any Separate Consultant or Contractor, or by failure to perform the Services with due diligence, delays, interferes with, hinders, or disrupts the services of any Separate Consultant or the work of any Contractor who suffers additional expense and damage as a result, the CM is responsible for that damage, injury, or expense.

**1.11.3** If the proper execution or results of any part of the Services depends upon work performed or services provided by the Owner, a Separate Consultant, or a Contractor, the CM shall inspect that other work and appropriate instruments of service, and promptly report to the Contracting Authority in writing any defects or deficiencies in that other work or services that render it unavailable or unsuitable for the proper execution and results of the Services. The CM's failure so to report will constitute an acceptance of the other work and services as fit and proper for integration with the CM's Services except for defects and deficiencies in the other work or services that were not reasonably discoverable at the time of the CM's inspection.

**1.11.4** The CM shall not delay the Services on account of any claim, dispute, or action between the CM and a Separate Consultant or Contractor.

### **1.12 Records**

**1.12.1** The records of all of the CM's Direct Personnel Expenses, Reimbursable Expenses, and payments to Consultants pertaining to the Project shall be kept on a generally recognized accounting basis and shall be available to the Contracting Authority and Owner at all times and shall be maintained for 7 years after Substantial Completion of all Work.

**1.12.2** All other records kept by the CM related to the Project shall be available to the Contracting Authority and Owner at all times and shall be maintained for 6 years after Substantial Completion of all Work.

## **ARTICLE 2 - STATE'S RIGHTS AND RESPONSIBILITIES**

### **2.1 Contracting Authority**

**2.1.1** The Contracting Authority shall designate a Project Manager for the Project. The Project Manager is authorized to act on behalf of the Contracting Authority to perform specific responsibilities under the Agreement.

**2.1.2** The Contracting Authority shall furnish information and services required of it in a timely manner.

### **2.2 Required Actions**

**2.2.1** The Contracting Authority and Owner shall review, approve, or take such actions as are required of them by this Agreement, the Contract Documents, and Applicable Law in a reasonable and timely manner.

### **2.3 Owner's Requirements**

**2.3.1** The Owner shall provide, to the CM, full information regarding its requirements for the Project including the Program of Requirements, design and construction standards, and work rules, which shall set forth the Owner's use, design, time, and financial objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability, time constraints imposed by fiscal and budgetary considerations, special equipment, and systems and Site requirements.

**2.3.2** The Owner shall furnish information and services required of it in a timely manner.

### **2.4 Owner's Representative**

**2.4.1** The Owner shall designate an Owner's Representative authorized to act on behalf of the Owner with respect to the Project to the extent provided in the Contract Documents.

### **2.5 Site Description**

**2.5.1** If reasonably requested by the CM as necessary for the Project, the Owner shall furnish a legal description and a certified land survey of the Site, giving, as applicable, grades and lines of streets, alleys, pavements and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the Site; locations, dimensions, and complete data pertaining to existing buildings, other improvements, and trees; and full information concerning available service and utility lines, both public and private, above and below grade, including inverts and depths.

## 2.6 Provided Information

**2.6.1** The Contracting Authority and Owner do not warrant or guarantee the accuracy of Project-related information they provide to the CM, but the CM may rely upon that information to the extent consistent with the standard of care described under **Section 1.9**.

## 2.7 Notice to CM

**2.7.1** If the Owner or Contracting Authority observes or otherwise becomes aware of any Defective Work or other fault or defect in the Project, prompt written notice thereof shall be given to the CM, A/E, and CxA if applicable.

## 2.8 Legal Representation

**2.8.1** The Owner and Contracting Authority shall not be responsible to provide or pay for any legal representation of the CM.

## 2.9 Limitation of Authority

**2.9.1** The CM shall not have any authority to bind the Contracting Authority or Owner for the payment of any costs or expenses without the prior express written approval of the Contracting Authority or Owner, as applicable.

**2.9.2** The CM shall have authority to act on behalf of the Contracting Authority and Owner only to the extent provided in this Agreement and the Contract Documents.

**2.9.3** The CM's authority to act on behalf of the Contracting Authority and Owner may be modified only by an amendment to this Agreement in accordance with **Section 4.3**.

## 2.10 Approval or Disapproval of CM's Services

**2.10.1** The Contracting Authority and Owner may disapprove any portion of the Services.

**2.10.2** If the Contracting Authority or Owner disapproves of the Services at any Stage, the CM shall proceed, when requested by the Contracting Authority, to re-perform those Services to satisfy the objections without additional compensation to the CM or its Consultants.

**2.10.3** The CM acknowledges that any review or approval by the Contracting Authority and Owner of any Services shall not relieve the CM of the CM's responsibility to properly and timely perform the Services.

## 2.11 Performance Evaluations

**2.11.1** The Contracting Authority may evaluate the CM during performance of the Services, at completion of a phase of the Project, completion of the Project, or any or all of the foregoing. The Contracting Authority shall retain the evaluation(s).

**2.11.1.1** The CM may request a copy of the completed evaluation(s). If the CM wishes to comment or take exception to any rating or remark, the CM must send a response in writing to the Contracting Authority within 30 days of receiving the evaluation(s).

**2.11.1.2** The Contracting Authority may use the evaluation(s) in determining the qualifications of the CM for future contracts.

**2.11.1.3** The Contracting Authority may request information from the CM for use in evaluating the Contractor, A/E, or Contracting Authority's performance. If such information is requested, the CM must comply in a timely and responsive manner.

# ARTICLE 3 - CONSULTANTS

## 3.1 Consultant Services

**3.1.1** The CM may provide a portion of the Services through one or more Consultants, provided, however, that the CM shall remain responsible for all of the CM's duties and obligations under this Agreement.

**3.1.2** By appropriate written agreement, the CM shall require each Consultant, to the extent of the Consultant's portion of the Services, to be bound to the CM by the terms of this Agreement, and to assume toward the CM all of the obligations and responsibilities that the CM assumes toward the Contracting Authority and Owner.

**3.1.2.1** The CM shall not retain any Consultant on terms inconsistent with this Agreement.



**3.1.2.2** All agreements between the CM and a Consultant shall identify the Contracting Authority and Owner as the agreement's intended third-party beneficiaries.

**3.1.2.3** Upon the request of the Contracting Authority or Owner, the CM shall submit to the Contracting Authority and Owner a copy of the agreement between the CM and each Consultant.

**3.1.3** The CM shall obtain the Contracting Authority's written approval before engaging any Consultant not named in the Agreement. The CM shall not employ any Consultant against whom the Contracting Authority has a reasonable objection. The Contracting Authority's approval or disapproval of any Consultant, however, will not relieve the CM of the CM's full responsibility for the performance of the services.

**3.1.4** The CM shall not remove any Consultant from the Project or reduce the extent of any Consultant's participation in providing the Services without the Contracting Authority's prior written consent. The CM shall not permit any Consultant to replace any previously identified team member except with the Contracting Authority's prior written consent unless the Consultant ceases to employ that person. On notice from the Contracting Authority, the CM shall immediately and permanently remove from the Project any Consultant or person under a Consultant's control whose performance is not satisfactory to the Contracting Authority.

**3.1.5** The Contracting Authority may communicate with any Consultant either through the CM or directly with the Consultant, but the Contracting Authority may not modify the agreement between the CM and any Consultant. The Contracting Authority will advise the CM of direct communication with any Consultant with reasonable promptness.

**3.1.6** The CM hereby assigns to the Contracting Authority each Consultant's agreement provided that the assignment is effective only after the Contracting Authority terminates this Agreement and only for those agreements that the Contracting Authority accepts by notifying the Consultant and CM in writing. The Contracting Authority may re-assign accepted agreements.

### **3.2 Payments by CM**

**3.2.1** Within 10 business days of receipt of payment made pursuant to this Agreement, the CM shall pay all portions thereof due to Consultants and to persons who provided items, the expenses of which are Reimbursable Expenses.

**3.2.2** The Owner has no obligation to pay or see to the payment of money to any Consultant except as otherwise required under Applicable Law.

## **ARTICLE 4 - MODIFICATIONS**

### **4.1 Compensation for Extension of Project Time**

**4.1.1** If the CM notifies the Owner and the Contracting Authority not less than 30 days before the date for completion of the Project set in the approved Project Schedule, that the time for completion is reasonably expected to be exceeded by more than 10 percent through no fault of the CM, the CM's compensation for Services to be rendered during such extended period, shall be negotiated to the mutual reasonable satisfaction of the Contracting Authority, Owner and CM.

**4.1.2** If, through such negotiation, the Contracting Authority and Owner agree that the CM shall be paid additional compensation, an amendment to that effect shall be executed in accordance with **Section 4.3**.

**4.1.3** Such amendment shall be executed before the CM renders any Services made necessary by such extension of the time of completion, unless otherwise agreed in writing by the Contracting Authority and Owner.

### **4.2 Compensation for Change of Scope of Project or Construction Budget**

**4.2.1** The Project Scope is defined by the Approved Program of Requirements, as provided in **Exhibit B**.

**4.2.2** The Construction Budget is defined in the **Agreement Form**.

**4.2.3** If the Contracting Authority and Owner, through no fault of the CM, materially change the Project Scope after the Schematic Design Stage or materially change the Construction Budget at any time after the execution of this Agreement, any necessary adjustment in the CM's compensation shall be negotiated to the mutual reasonable satisfaction of the Contracting Authority, Owner, and CM.

**4.2.4** If, through such negotiation, the Contracting Authority and Owner agree that the CM shall be paid additional compensation, an amendment to that effect shall be executed in accordance with **Section 4.3**.

**4.2.5** Such amendment shall be executed before the CM renders any Services made necessary by such change in the Project Scope or the Construction Budget, unless otherwise agreed in writing by the Contracting Authority and Owner.

### 4.3 Amendments

**4.3.1** This Agreement may be modified only by an amendment prepared by the Contracting Authority and signed by both the CM and Contracting Authority, with concurrence of the Owner.

**4.3.2** If the Project is administered using the State's web-based project management software, the CM shall submit its request for an amendment to the Contracting Authority through the "Professional Services Amendments" (~~Agency/Higher Education~~) or "Contract Modifications" (~~School Facilities~~) business process.

### 4.4 Allocation Adjustments

**4.4.1** Without exceeding the total compensation for this Agreement, the allocation of costs, as described in the **Agreement Form**, may be adjusted upon request of the CM and approval by the Contracting Authority without a formal signed amendment.

**4.4.2** If the Project is administered using the State's web-based project management software, the CM shall submit its request for an allocation adjustment to the Contracting Authority through the "Professional Services Amendments" (~~Agency/Higher Education~~) or "Contract Modifications" (~~School Facilities~~) business process.

## ARTICLE 5 - DISPUTE RESOLUTION

### 5.1 Mediation

**5.1.1** The Contracting Authority, Owner, and CM may by written agreement submit any claims, requests, disputes, or matters in question between or among them to mediation as shall be mutually agreeable.

### 5.2 Notice and Filing of Requests

**5.2.1** Any request by the CM for additional fees or expenses shall be made in writing to the Contracting Authority and filed prior to payment of the final 5 percent of the Basic Fee. The CM's failure to comply with the requirements of this Section 5.2.1 shall constitute an irrevocable waiver by the CM of any request for such fees and expenses.

### 5.3 Substantiation of Request

**5.3.1** In every written request filed pursuant to **Section 5.2**, the CM shall provide the nature and amount of the request; identification of persons, entities and events responsible for the request; activities on the Project Schedule affected by the request or new activities created by any delay and the relationship with existing activities; anticipated duration of any delay; and recommended action to avoid or minimize any future delay.

### 5.4 Mutual Waiver of Consequential Damages

**5.4.1** Except as provided under **Section 5.4.2**, the Owner and CM each waive against the other all claims for consequential damages that may arise out of or relate to this Agreement.

**5.4.1.1** The Owner's waiver includes claims for loss of use, income, profit, revenue, financing, cost of capital, business and reputation, management and employee productivity, and consequential damages arising from termination of the Agreement or related to insolvency.

**5.4.1.2** The CM's waiver includes claims for overhead; delay damages except as otherwise specifically provided for in the Agreement; increased cost of funds for the Project; lost opportunity to work on other projects; losses of financing, business, and reputation; loss of profit except anticipated profit arising directly from properly performed Services; and consequential damages arising from termination of the Agreement or related to insolvency.

**5.4.2** Notwithstanding **Section 5.4.1**, this **Section 5.4**:

**5.4.2.1** does not apply to any damages that would be covered by insurance required or provided in connection with the Project if the Agreement did not include **Section 5.4.1**;

**5.4.2.2** does not apply to the CM's indemnity obligations for third-party claims against the Indemnified Parties even if those claims are for damages that **Section 5.4.1** would otherwise preclude; and

**5.4.2.3** does not apply to Claims for damages arising from the Owner or CM's gross negligence or willful misconduct.

**5.4.3** This **Section 5.4** shall survive termination of the Agreement.

## 5.5 Meeting with the Project Manager

**5.5.1** Within 30 days after receipt of the request filed with the Contracting Authority pursuant to **Section 5.2**, or other period mutually agreed by the parties, the Project Manager shall schedule a meeting to resolve the request and render a decision on the request promptly thereafter or render a decision on the request without a meeting.

**5.5.2** The meeting scheduled by the Project Manager shall be attended by persons expressly and fully authorized to resolve the request on behalf of the CM.

## 5.6 Appeal to Commission / Institutional Designee

**5.6.1** If the efforts of the Project Manager do not lead to resolution of the request, the CM may request review of the Project Manager's decision by written notice delivered by certified mail within 14 days of the Project Manager's decision.

**5.6.1.1** If the Project is administered by the Commission, jointly administered by a School District Board in conjunction with the Commission, or locally administered by authority granted to an agency of the state of Ohio by the Commission, the written notice shall be delivered to the Executive Director of the Commission.

**5.6.1.2** If the Project is administered by an Institution of Higher Education, the written notice shall be delivered to the Institutional Designee who will review the Project Manager's decision instead of the Commission.

**5.6.2** Within 30 days after receipt of notice or other period mutually agreed by the parties, the Commission or Institutional Designee shall schedule a meeting to resolve the dispute and render a decision on the appeal promptly thereafter or render a decision on the appeal without a meeting.

**5.6.3** The meeting shall be attended by persons expressly and fully authorized to resolve the matters on behalf of the CM.

**5.6.4** ORC Chapter 119 shall not be applicable to any proceedings of the Commission or Institutional Designee under this **Section 5.6**.

**5.6.5** The decision of the Commission or Institutional Designee, if applicable, shall serve as the Contracting Authority's final and conclusive determination.

## 5.7 Delegation

**5.7.1** No provision of this **Article 5** shall prevent the Executive Director from delegating the duties or authorities of the Commission to any other person selected at the Executive Director's sole discretion.

## 5.8 Performance

**5.8.1** The CM shall proceed with performance of this Agreement during any dispute resolution process, unless otherwise agreed by the CM and Contracting Authority in writing.

**5.8.2** The Contracting Authority shall continue to make payment, in accordance with this Agreement, of any amounts not in dispute pending final resolution of any dispute.

# ARTICLE 6 - COMPENSATION AND PAYMENT

## 6.1 Basic Fee

**6.1.1** For Basic Services provided by the CM and all Consultants, the Owner shall pay the CM a Basic Fee in accordance with the amount identified in the **Agreement Form**.

**6.1.2** A change in the Basic Fee may be made only by an amendment to this Agreement in accordance with **Section 4.3**.

**6.1.3** Exclusive of Direct Personnel Expense, the CM's Basic Fee includes all compensation for Basic Services, including, but not limited to, markup on salaries or other compensation of the CM's employees at the principal office, branch offices, and the field office, general operating expenses of the CM's principal office, branch offices, and the field office, any part of the CM's capital expenses, including interest on the CM's capital employed for the Project, overhead or expenses of any kind including travel expenses, except Reimbursable Expenses, any costs incurred due to the CM's negligence, the CM's general advertising, federal, state or local income, sales or other taxes, state franchise taxes and qualification fees, and membership in trade, business or professional organizations.



## 6.2 Direct Personnel Expense

**6.2.1** For Direct Personnel Expense provided by the CM and all Consultants, the Owner shall pay the CM a negotiated amount.

**6.2.2** Direct Personnel Expense for the CM's employees for such hours of their time as are devoted to performing Basic Services to the Project shall be determined in accordance with the CM's Staffing Plan. Such Direct Personnel Expense shall be evidenced by time records certified by the CM.

**6.2.3** The CM shall use all reasonable means to minimize Direct Personnel Expense.

## 6.3 Reimbursable Expenses

**6.3.1** The CM shall use its best efforts to minimize Reimbursable Expenses.

**6.3.2** In all events, total Reimbursable Expenses shall not exceed the amount identified in the **Agreement Form**, without the prior written approval of the Contracting Authority and Owner and an amendment to this Agreement in accordance with **Section 4.3**.

**6.3.3** Reimbursable Expenses shall only be permitted for the items identified in the **Agreement Form** and shall not exceed the respective amounts.

**6.3.4** No CM or Consultant mark-up shall be permitted on Reimbursable Expenses.

**6.3.5** Limits on Transportation and Living Expenses: The cost for all travel expenses in connection with the Project shall be included in the Basic Fee.

**6.3.6** Limits on Tangible Property: The determination of whether to purchase or rent tangible property as Reimbursable Expenses must be approved in advance by the Contracting Authority. The CM shall maintain a current inventory of all such property and any such property, which has been purchased and has a useful life after Project Closeout shall be delivered to the Owner.

## 6.4 Method and Terms of Payment

### 6.4.1 Basic Fee.

**6.4.1.1** Payment of the Basic Fee shall be made monthly in proportion to Basic Services performed in each Stage, in accordance with **Section 6.1**, and the percentages of the Basic Fee described in the **Agreement Form**.

**6.4.1.2** Any balance of the final 5 percent of the Basic Fee shall be paid upon Project Closeout as follows: one-half after preparation of all Punch-Lists and one-half after completion of all Punch-List items to the reasonable satisfaction of the Contracting Authority and the Owner and receipt of Project Record Submittals by the Owner, as provided in this Agreement.

**6.4.1.3** The Contracting Authority may, in its sole discretion, waive the withholding of any final balance or part thereof if the CM has performed to the satisfaction of the Contracting Authority and Owner.

**6.4.1.4** Payment of the last 5 percent of the Basic Fee for any Stage of the Services shall be made only after all deliverables required for the Stage have been submitted by the CM to the Contracting Authority or Owner, as applicable, in form and substance reasonably satisfactory to the Contracting Authority and Owner.

**6.4.1.5** The entire Basic Fee is subject to all setoffs for claims against the CM in favor of the State.

**6.4.1.6** Payments for Basic Services shall be based upon a properly completed CM Adviser Payment Request and shall be made within the applicable time limits provided by ORC Section 126.30, which requires payment of interest on overdue payments. The interest rate shall be at the rate per calendar month, which equals one-twelfth of the rate per annum, prescribed by ORC Section 5703.47.

### 6.4.2 Direct Personnel Expense.

**6.4.2.1** Payments of Direct Personnel Expense in accordance with **Section 6.2**, shall be made monthly based upon services performed, and as shown by a properly completed CM Adviser Payment Request.

**6.4.2.2** Direct Personnel Expense shall be identified as Preconstruction Services or Construction Services.

### 6.4.3 Reimbursable Expenses.

**6.4.3.1** Payments for Reimbursable Expenses in accordance with **Section 6.3** shall be made monthly based upon expenses incurred as shown by a properly completed CM Adviser Payment Request.

**6.4.4** If the Project is administered using the State's web-based project management software, the CM shall submit its CM Adviser Payment Request to the Owner, through the Contracting Authority, for approval and payment through the "Professional Services Pay Request" (~~Agency/Higher Education~~) or "Applications for Payment" (~~School Facilities~~) business process.

## ARTICLE 7 - INSURANCE AND INDEMNIFICATION

### 7.1 CM's General Insurance Requirements

**7.1.1** Throughout the performance of the Services or longer as may be described below, the CM shall obtain, pay for, and keep in force, the minimum insurance coverage described in this **Article 7**.

**7.1.1.1** Each requirement of this **Article 7** applies to Consultants just as it applies to the CM.

**7.1.1.2** If a Consultant's usual insurance coverage does not meet the minimum coverage requirements, before entering into an agreement with that Consultant, the CM shall submit to the Contracting Authority **(1)** a certificate of insurance evidencing the insurance the Consultant will carry without additional compensation and **(2)** if the Contracting Authority requests, a written proposal from the Consultant to provide coverage that meets the minimum coverage requirements. The Contracting Authority will decide whether to accept the non-conforming insurance coverage or the proposal to provide conforming coverage.

**7.1.1.3** On a case-by-case basis, the Contracting Authority and CM may agree to adjust the below requirements for any particular Consultant.

**7.1.2** Before starting the Services, upon renewal of any policy, and upon a change of any insurance carrier, the CM shall deliver to the Contracting Authority certificates evidencing that the required insurance is in force.

**7.1.3** With the exception of government-controlled workers compensation coverage:

**7.1.3.1** the CM shall place the insurance with companies that **(1)** are satisfactory to the Contracting Authority, **(2)** hold an A.M. Best Rating of A-, X, or higher, and **(3)** are authorized to conduct business in Ohio;

**7.1.3.2** the policies shall be endorsed to require the CM's insurance carrier to **(1)** provide at least 30-days' written notice to the Contracting Authority (as certificate holder) of the cancellation or non-renewal of the insurance and **(2)** provide at least 10-days' written notice to the Contracting Authority (as certificate holder) of the cancellation of the insurance for non-payment of premium; and

**7.1.3.3** within 30 days of the Contracting Authority's request, the CM shall submit insurance-company certified copies of the policies, the policy endorsements, or both from which the CM may redact the premium amount.

**7.1.4** The CM shall pay all deductibles, or self-insured retentions, or both contained in the CM's policies of insurance required or provided in connection with the Project. The Contracting Authority reserves the right to approve or reject all levels of self-insured retention, captive insurance programs, or other alternative risk financing the CM may use to comply with any insurance requirement.

**7.1.5** The CM shall pay a proportionate share of the deductibles, or self-insured retentions, or both contained in any insurance policy the Contracting Authority purchases for the Project. The CM's proportionate share will derive from the percentage of the associated claim or loss attributable to the negligence of the CM or a Consultant.

**7.1.6** The Contracting Authority and Owner do not represent that required coverage or limits are adequate to protect the CM.

**7.1.7** Failure of the Contracting Authority to demand a certificate or other evidence of full compliance with the insurance requirements or failure of Contracting Authority to identify a deficiency from evidence that is provided shall not be construed as a waiver of the CM's obligation to maintain the required insurance.

**7.1.8** The Contracting Authority may terminate the Agreement for cause on account of the CM's failure to maintain the required insurance.

### 7.2 CM's Minimum Coverage Requirements

**7.2.1** Workers Compensation. The CM shall maintain workers compensation coverage meeting the requirements of Applicable Law.

**7.2.2** Employers Liability Coverage. The CM shall maintain employers liability coverage with **(1)** an each-accident limit of not less than \$1,000,000, **(2)** a disease each-employee limit of not less than \$1,000,000, and **(3)** a disease policy limit of not less than \$1,000,000.

**7.2.3 Commercial General Liability.** The CM shall maintain commercial general liability (“CGL”) coverage that provides **(1)** an each-occurrence limit of not less than \$1,000,000, **(2)** a general-aggregate limit of not less than \$2,000,000, and **(3)** a products and completed-operations aggregate limit of not less than \$2,000,000.

**7.2.3.1** The CGL insurance shall be written on ISO occurrence form CG 00 01 10 01 or a substitute form, providing at least equivalent coverage for liability arising from premises, operations, independent contractors, products/completed-operations, personal and advertising injury, and liability assumed under an insured contract.

**7.2.3.2** The CM shall include the State, Contracting Authority, and Owner as additional insureds under the CGL policy using ISO endorsement CG 20 10 07 04 and ISO endorsement CG 20 37 07 04 or a substitute form(s) providing equivalent coverage.

**7.2.3.3** The CGL policy shall be endorsed using ISO endorsement CG 25 03 or a substitute form providing equivalent coverage to provide that the general aggregate limit applies separately to each of the insured’s projects.

**7.2.3.4** The CGL insurance shall apply as primary and non-contributory insurance with respect to any other insurance or self-insurance programs that cover the additional insured(s).

**7.2.3.5** The CGL policy shall not exclude coverage to the additional insured(s) for bodily injury or property damage arising out of the products/completed-operations hazard.

**7.2.3.6** The CM shall maintain the CGL insurance in effect for no less than five years after the earlier of the termination of the Agreement or Substantial Completion of all Work.

**7.2.4 Business Automobile Liability.** The CM shall maintain business automobile (“BA”) coverage written on ISO form CA 00 01 10 01 or a substitute form, providing at least equivalent coverage with a limit of not less than \$1,000,000 each accident.

**7.2.4.1** The coverage shall extend to any auto: owned (if any), non-owned, leased, rented, hired, or borrowed.

**7.2.4.2** The CM shall include the State, Contracting Authority, and Owner as additional insureds under the BA policy.

**7.2.5 Umbrella/Excess Liability.** The CM may employ an umbrella/excess liability policy to achieve the above-required minimum coverage.

**7.2.6 Professional Liability.** The CM shall maintain professional liability (“PL”) insurance with limits not less than as identified in the following table:

Construction Budget	Each Claim	Annual Aggregate
Up to \$50,000,000	\$1,000,000	\$2,000,000
More than \$50,000,000	\$2,000,000	\$4,000,000

**7.2.6.1** The PL policy shall have an effective date on or before the date that the CM first started to provide any Project-related Services.

**7.2.6.2** Upon submission of the associated certificate of insurance and at each policy renewal, the CM shall advise the Contracting Authority in writing of any actual or alleged claims that may erode the PL policy’s limits.

**7.2.6.3** The CM shall maintain the PL insurance in effect for no less than five years after the earlier of the termination of the Agreement or Substantial Completion of all Work.

**7.2.6.4** If the CM is not authorized under Applicable Law to directly provide professional design services, the CM may satisfy the requirements of this **Section 7.2.6** by providing a contractor’s professional liability insurance policy.

**7.2.6.5** If the CM is a joint venture;:-

- .1** the CM may meet the requirements of this **Section 7.2.6** by providing a PL policy under which each joint venturer is the insured; or
- .2** each joint venturer shall individually meet the requirements of this **Section 7.2.6** by providing a PL policy **(1)** under which the individual joint venturer is the insured and **(2)** that covers that joint venturer’s interests in the joint venture by endorsement or otherwise. The certificate of insurance shall reflect that the PL policy covers the joint venturer’s interest in the joint venture.

*Example: Assume that the CM **(1)** is the “XY joint venture” of company “X” and company “Y”; and **(2)** is required under **Section 7.2.6** to maintain PL insurance limits of \$1M/\$2M. In order to comply with **Section 7.2.6.5.2**, “X” must maintain PL insurance limits of \$1M/\$2M and “Y” must maintain PL insurance limits of \$1M/\$2M.*

**7.2.6.6** If the CM is a limited-liability company, which members consist of two or more separate firms;:-

.1 the CM may meet the requirements of this Section 7.2.6 by providing a PL policy under which the limited-liability company is the insured; or

7.2.6.5.2 each member of the limited-liability company shall individually meet the requirements of this Section 7.2.6 by providing a PL policy (1) under which the individual member is the insured and (2) that covers that member's interests in the limited-liability company by endorsement or otherwise. The certificate of insurance shall reflect that the PL policy covers the member's interest in the limited-liability company.

Example: Assume that the CM (1) is the "XY limited-liability company," the members of which are "X" and "Y"; and (2) is required under Section 7.2.6 to maintain PL insurance limits of \$1M/\$2M. In order to comply with Section 7.2.6.6.2, "X" must maintain PL insurance limits of \$1M/\$2M and "Y" must maintain PL insurance limits of \$1M/\$2M.

**7.2.7 Pollution Liability.** If the Services include environmentally sensitive, hazardous types of activities (such as demolition, exterior insulation finish systems, Asbestos abatement, storage-tank removal, or similar activities), or involves Hazardous Materials, the CM shall maintain a contractor's pollution liability ("Pollution") policy with (1) a per-claim limit of not less than \$1,000,000 and (2) an annual-aggregate limit of not less than \$1,000,000, covering the acts, errors and/or omissions of the CM for damages (including from mold) sustained by the Owner by reason of the CM's performance of the Services.

**7.2.7.1** The Pollution policy shall have an effective date on or before the date that the CM first started to perform any Project-related Services.

**7.2.7.2** Upon submission of the associated certificate of insurance and at each policy renewal, the CM shall advise the Contracting Authority in writing of any actual or alleged claims that may erode the Pollution policy's limits.

**7.2.7.3** The CM shall maintain the Pollution insurance in effect for no less than 5 years after the earlier of the termination of the Agreement or Substantial Completion of all Work.

**7.2.7.4** The CM may achieve the Pollution insurance requirement through a PL policy, which provides the required pollution coverage.

### 7.3 Waivers of Subrogation

**7.3.1** To the fullest extent permitted by Applicable Law, the CM waives all rights against the Owner, Contracting Authority, and their agents and employees for damages to the extent covered by any insurance (not including professional liability insurance), except rights to the proceeds of that insurance. All policies shall accomplish the waiver of subrogation by endorsement or otherwise.

**7.3.2** To the fullest extent permitted by Applicable Law, the CM waives all rights against the Owner, Contracting Authority, and their employees for damages to the extent covered by any professional liability insurance, except rights to the proceeds of that insurance. All policies shall accomplish the waiver of subrogation by endorsement or otherwise.

**7.3.3** The Owner, Contracting Authority, and CM waive all rights against each other for damages caused by fire or other perils to the extent of actual recovery of any insurance proceeds under any property insurance, inland marine insurance, or builder's risk insurance applicable to the Work.

### 7.4 Indemnification for Injury or Damage

**7.4.1 Liability Other than Professional Liability.** To the fullest extent permitted by Applicable Law and with respect to liability other than professional liability claims, the CM shall indemnify, defend, and hold harmless the Indemnified Parties from and against all claims, costs, damages, losses, fines, penalties, and expenses (including but not limited to all fees and charges of attorneys and other professionals and all court, arbitration, or other dispute-resolution costs) arising out of or in connection with the Project, provided that any such claim, cost, damage, loss, fine, penalty, or expense is attributable to:

**7.4.1.1** bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property but only to the extent caused by the negligent acts, errors, or omissions of the CM or a Person for whom the CM may be liable;

**7.4.1.2** infringement of patent rights or copyrights by the CM or a Person for whom the CM may be liable; or

**7.4.1.3** a violation of Applicable Law but only to the extent attributable to the CM or a Person for whom the CM may be liable.

**7.4.2 Professional Liability.** To the fullest extent permitted by Applicable Law and with respect to professional liability claims, the CM shall indemnify and hold harmless the State, Contracting Authority, Owner, and their respective officers, officials, and employees from and against all claims, costs, damages, losses, fines, penalties, and expenses (including but

not limited to all fees and charges of attorneys and other professionals, and all court, arbitration, or other dispute-resolution costs) arising out of or in connection with (1) the failure of the CM or Person for whom the CM is legally liable to ~~comply the extent consistent~~ with the standard of care described under **Section 1.9**; and (2) infringement of patent rights or copyrights by the CM or a Person for whom the CM may be liable.

**7.4.3** The CM's indemnification obligation under **Section 7.4** exists regardless of whether or not and the extent to which the claim, damage, loss, fine, penalty, or expense is caused in part by a Person indemnified under **Section 7.4**. But nothing in **Section 7.4** obligates the CM to indemnify any individual or entity from and against the consequences of that Person's own negligence.

**7.4.4** The CM's obligations under **Section 7.4** shall not extend to the liability of the A/E, the A/E's consultants, agents, representatives, or employees for negligent preparation or approval of Drawings, Specifications, Change Orders, opinions, and any other responsibility of the A/E, except to the extent covered by the CM's insurance.

**7.4.5** In claims against an A Person indemnified under **Section 7.4** by any direct or indirect employee (or the survivor or personal representative of that employee) of the CM or a Person for whom the CM may be liable, the indemnification obligation under **Section 7.4** will not be limited by a limitation on the amount or type of damages, compensation, or benefits payable under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**7.4.6** The CM's indemnification obligation under **Section 7.4** will not be limited by any insurance policy provided or required in connection with the Project.

**7.4.7** The CM's obligations under **Section 7.4** shall not negate, abridge, or reduce other rights or obligations of indemnity, which would otherwise exist as to a Person indemnified under **Section 7.4**.

**7.4.8** The CM's indemnification obligation under **Section 7.4** will survive termination of the Agreement and Final Acceptance of the Work.

**7.4.9** The Contracting Authority may deduct from amounts due to the CM the claims, damages, losses, fines, penalties, and expenses for which the CM is liable under **Section 7.4**. If those claims, damages, losses, fines, penalties, and expenses exceed the unpaid balance of the amounts due to the CM, the CM shall immediately pay the difference to the Owner.

## ARTICLE 8 - SUSPENSION AND TERMINATION

### 8.1 Suspension of the Services

**8.1.1** The Contracting Authority, without cause and without prejudice to any other right or remedy it may have, may order the CM in writing to suspend, delay, or interrupt the performance of the Services in whole or in part for such period as the Contracting Authority may determine.

**8.1.1.1** If the Contracting Authority suspends the Services under this **Section 8.1.1** and the CM complies with **Article 4**, the Basic Fee, Additional Services Fees, and Reimbursable Expenses shall be adjusted for increases in the cost and time caused by the suspension, delay, or interruption.

**8.1.1.2** Notwithstanding the foregoing, no adjustment shall be made to the Direct Personnel Expense, Basic Fee, Additional Services Fees, or Reimbursable Expenses to the extent that:

- .1 performance was, or could have been, suspended, delayed, or interrupted by a cause for which the CM is responsible; or
- .2 an equitable adjustment is made or denied under another provision of the Agreement.

**8.1.1.3** If the Contracting Authority suspends the Services under this **Section 8.1.1** and the CM submits a proper Professional Services Payment Request, but subject to all other provisions of the Agreement, the CM shall be entitled to payment of compensation due under the Agreement for Services performed before the suspension.

**8.1.2** The Contracting Authority, without prejudice to any other right or remedy it may have, may order the CM in writing to suspend, delay, or interrupt the performance of the Services in whole or in part for such period as the Contracting Authority may determine on account of the CM's failure to properly or timely perform the Services.

**8.1.2.1** The Contracting Authority's exercise of its right to suspend the Services under this **Section 8.1.2** shall not entitle the CM to any adjustment of the Direct Personnel Expense, Basic Fee, Additional Services Fees, or Reimbursable Expenses.

**8.1.2.2** If the Contracting Authority is adjudged to have improperly suspended the Services under this **Section 8.1.2**, the suspension shall be deemed to have been a suspension under **Section 8.1.1**.



**8.1.3** Upon receipt of notice of suspension under this **Section 8.1**, the CM shall cease providing the suspended Services and take all necessary or appropriate steps to limit disbursements and minimize respective costs. The CM shall furnish a report to the Contracting Authority, within 5 days of receiving the notice of suspension, describing the status of the Services, including results accomplished, resulting conclusions, and other information as the Contracting Authority may require.

**8.1.4** The Contracting Authority's right to stop the Services shall not give rise to any duty to exercise the right for the benefit of the CM or any other party, and the Contracting Authority's exercise or failure to exercise the right shall not prejudice any of the Contracting Authority's other rights.

## 8.2 Termination for Convenience

**8.2.1** The Contracting Authority may terminate the Agreement in whole or in part for the Owner's convenience and without cause, at any time upon written notice to the CM.

**8.2.2** Upon receipt of the notice of termination for convenience, the CM shall immediately proceed with performance of the following duties in accordance with instructions from the Contracting Authority:

**8.2.2.1** cease operation as specified in the notice;

**8.2.2.2** not enter into further Consultant agreements except as necessary to complete continued portions of the Project;

**8.2.2.3** terminate all Consultant agreements to the extent they relate to the Services terminated; and

**8.2.2.4** proceed with Services not terminated.

**8.2.3** The Owner shall pay the CM for Services rendered before the date of termination in accordance with the allocations the Agreement, including any Reimbursable Expenses incurred, but not in excess of the allocations and caps otherwise provide in the **Agreement Form**.

**8.2.3.1** In no event shall the CM be entitled to overhead and profit associated with Services the CM did not perform on account of the termination or otherwise.

**8.2.4** If the Contracting Authority terminates the Services under this **Section 8.2**, the termination shall not affect the rights or remedies of the State against the CM then existing or which may thereafter accrue for Services performed in full before the termination.

**8.2.5** Notwithstanding **Section 8.2.3**, if the Contracting Authority terminates the Services under this **Section 8.2**, but there exists an event of the CM's default, the CM shall be entitled to receive only such sums as it would be entitled to receive following the occurrence of an event of default as provided in **Section 8.3**.

## 8.3 Contracting Authority's Termination for Cause

**8.3.1** The Contracting Authority may terminate all or a portion of the Agreement if the CM commits a material breach of the Agreement including but not limited to:

**8.3.1.1** failure to prosecute the Services with the necessary force or in a timely manner;

**8.3.1.2** refusal to remedy disapproved Services;

**8.3.1.3** failure to properly make payment to Consultants;

**8.3.1.4** performance of any of the Services outside of the United States;

**8.3.1.5** permitting Consultants to perform any of the Services outside of the United States; or

**8.3.1.6** disregarding laws, ordinances, or rules, regulations, or orders of a public authority with jurisdiction over the Project.

**8.3.2** If the Contracting Authority intends to exercise its termination rights under this **Section 8.3**, the Contracting Authority shall notify the CM in writing of the Contracting Authority's intent to terminate this Agreement and the cause(s) for that termination.

**8.3.3** If the CM fails to cure the identified cause(s) for termination within 7 days after receiving the notice described under **Section 8.3.2**, the Contracting Authority may terminate the Agreement by giving written notice of the termination to the CM.

**8.3.4** If the Agreement is terminated, the Contracting Authority may complete the Services by any means the Contracting Authority determines appropriate. The Contracting Authority may take immediate possession of all of the CM's Documents.

**8.3.5** If the Agreement is terminated, the CM shall not be entitled to further payment.

**8.3.5.1** If the unpaid balance of the sum of the Basic Fee plus Additional Services Fees plus Reimbursable Expenses is exceeded by the costs of finishing the Services, including without limitation the fees and charges of contractors, engineers, architects, attorneys, and other professionals and court costs, and other damages incurred by the Owner and not expressly waived, the CM shall immediately pay the amount of the insufficiency to the Owner. This obligation for payment shall survive termination of the Agreement.

**8.3.6** If the Contracting Authority terminates the Services under this **Section 8.3**, the termination shall not affect any rights or remedies of the State against the CM then existing or which may thereafter accrue. The Contracting Authority's retention or payment of funds due the CM shall not release the CM or the CM's Surety (if any) from liability for performance of the Services in accordance with the requirements of the Contract Documents.

**8.3.7** If the Contracting Authority is adjudged to have improperly terminated the Services under this **Section 8.3**, the termination will be deemed to have been a termination under **Section 8.2**.

## 8.4 CM Insolvency

### 8.4.1 Bankruptcy of CM.

**8.4.1.1** If the CM files a voluntary petition in bankruptcy or has an involuntary petition in bankruptcy filed against it, the CM, the CM as the debtor-in-possession, or the trustee of the CM's bankruptcy estate shall file a motion to assume or reject the Agreement under Bankruptcy Code §365, 11 U.S.C. §365, within 20 days after the filing of the voluntary petition or involuntary petition and shall diligently prosecute that motion to conclusion so as to obtain an order granting or denying that motion within 45 days after the filing of the voluntary or involuntary petition. The failure to file and prosecute that motion within the time limits provided by this **Section 8.4** shall constitute a material breach of the Agreement as time is of the essence with respect to CM's performance of all terms of this Agreement. CM agrees to the granting of relief from the automatic stay of the Bankruptcy Code, 11 U.S.C. §362(a), to permit the Contracting Authority to terminate the Agreement for cause in such instance and issue and serve all notices necessary to terminate the Agreement or arising out of the termination of the Agreement and to take any and all other action necessary to terminate the Agreement.

### 8.4.2 Receivership or Assignment for the Benefit of Creditors.

**8.4.2.1** If the CM makes a general assignment for the benefit of creditors or if a receiver is appointed for all or a substantial part of the CM's business or property, the Contracting Authority shall serve written notice on the CM and the CM's Surety (if any) stating that any failure of the CM to provide adequate assurance of continued performance shall be considered a rejection of the Agreement, which shall result in termination of the Agreement for cause. Such termination of the Agreement need not be evidenced by an order of any court.

## 8.5 CM's Termination for Cause

**8.5.1** The CM may terminate this Agreement for cause if the Owner fails to pay undisputed amounts owed to the CM when required under this Agreement.

**8.5.2** If the CM elects to terminate this Agreement for cause, the CM must give the Contracting Authority and Owner written notice of **(1)** the CM's intention to terminate the Agreement and **(2)** an accounting of the undisputed amounts owed to the CM and the date(s) on which the CM believes payment of those amounts was due. If the Owner does not cure the cause for termination by initiating the process to pay the undisputed amounts owed to the CM within 10 days after receiving the notice, the termination will take effect upon the Owner's receipt of the CM's written notice of termination, which is in addition to the CM's notice of intention to terminate.

**8.5.3** If the CM properly terminates this Agreement for cause, but subject to other provisions of this Agreement, the Owner must pay the CM for Services performed by the CM before the date of termination. In no event will the Owner be obligated to pay anything on account of Services the CM does not perform.

**8.5.4** If the CM improperly terminates this Agreement under this **Section 8.5**, the CM shall be obligated to the Owner as described under **Section 8.3.5.1**.

## ARTICLE 9 - GENERAL PROVISIONS

### 9.1 CM's Documents and Contract Documents

**9.1.1** Except as provided under **Section 9.1.2** and subject to **Section 9.1.6**, the Owner alone owns the CM's Documents and the Contract Documents and every right, title, and interest in the CM's Documents and the Contract Documents.

**9.1.2 Section 9.1.1** does not apply to standard details and specifications regularly used by the CM or any of its Consultants in its normal course of business that are included in the CM's Documents. The CM grants to the Owner an irrevocable, non-exclusive, perpetual, freely assignable, and royalty-free license to copy, reproduce, distribute, and otherwise use those standard details and specifications for all Project-related purposes such as but not limited to owning, financing, constructing, testing, commissioning, decommissioning, using, operating, maintaining, repairing, modifying, selling, obtaining insurance for, and obtaining permits for the Project before, during, and after termination or completion of this Agreement.

**9.1.3** The CM must execute and deliver and cause its employees and agents and all Consultants to execute and deliver, to the Owner any transfers, assignments, documents, or other instruments (if any) necessary to vest in the Owner complete right, title, interest in and ownership of all of the CM's Documents under **Section 9.1.1** and the license described under **Section 9.1.2**.

**9.1.4** The CM may retain copies, including reproducible copies of the CM's Documents and the Contract Documents for information, reference, and the performance of the Services. The Owner grants to the CM and its Consultants a non-exclusive, royalty-free license to copy, reproduce, distribute, and otherwise use the CM's Documents and the Contract Documents in relation to the performance of the Services, including any Additional Services.

**9.1.5** The submission or distribution of the CM's Documents and the Contract Documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the Owner's reserved rights in the CM's Documents and the Contract Documents. Any unauthorized use of the CM's Documents and the Contract Documents will be at the sole risk of the entity making the unauthorized use of the CM's Documents and the Contract Documents.

**9.1.6** Should the Owner desire to use any of the CM's Documents for an addition to, remodeling or rehabilitation of, or change to any one or more of the Project improvements built on the basis of the CM's Documents, the Owner shall engage one or more suitable professionals under terms that require each of those professionals to independently evaluate any construction engineering or related features in the CM's Documents without reliance on any information in the CM's Documents that would be inconsistent with the standard of care applicable to that professional.

**9.1.7** The CM shall provide Electronic Files (in native format) to the A/E, Contractor, Subcontractors, and Separate Consultants for their use in connection with the Project. The CM shall provide the Electronic Files **(1)** at no additional cost to the Contractor, Subcontractors, Separate Consultants, A/E, or Owner and **(2)** without requiring the Contractor, Subcontractors, Separate Consultants, A/E, or Owner to agree to any terms or conditions concerning the provision, receipt, or use of the Electronic Files that differ in any material respect from the Contract.

**9.1.8 Use of Electronic Files.**

**9.1.8.1** The Owner, Contracting Authority, A/E, CM, and Contractor reasonably expect that they will provide Electronic Files to each other to facilitate the design and construction of the Project consistent with current practices and customs in the construction industry.

**9.1.8.2** The Owner, Contracting Authority, A/E, CM, and Contractor acknowledge that the use of Electronic Files involves risks not generally associated with the use of paper documents. Those risks include alteration (inadvertent or intentional) and deterioration, which may not be readily apparent through casual observation.

**9.1.8.3** The Owner, Contracting Authority, A/E, CM, and Contractor do not warrant to each other that any Electronic File they provide **(1)** was not altered through transmission; **(2)** is compatible with the recipient's computer system or software; **(3)** will not be altered through degradation of the recipient's storage media; or **(4)** is suitable for conversion/translation to and subsequent use in a system or format other than the Electronic File's original system or format.

**9.1.8.4** Before relying on any Electronic File it receives, the recipient is responsible for verifying that the Electronic File was not altered through transmission, degradation of the recipient's own storage media, or other causes.

**9.1.8.5** If the recipient of an Electronic File converts/translates the Electronic File from its original system or format to an alternate system or format, the recipient assumes the risk that the conversion/translation created errors in the converted/translated file.

**9.1.8.6** The Owner, Contracting Authority, A/E, CM, and Contractor shall each maintain and operate its own computer systems and storage media in a commercially reasonable way and take reasonable steps to prevent errors in and deterioration of the Electronic Files it creates, provides, and receives.

**9.1.8.7** In the event of a discrepancy between information contained in a paper version of a document and the Electronic File of that document, the paper version will govern.

**9.1.8.8** This **Section 9.1.8** does not relieve the CM of its responsibility for the preparation, completeness, or accuracy of the CM's Documents.

## **9.2 Confidentiality of Documents used in Selection of an Architect/Engineer**

**9.2.1** All documents submitted to the Owner, Contracting Authority, or CM in response to a request for qualifications in the qualifications-based selection of an Architect/Engineer are public and will be available for inspection at the conclusion of the selection process; provided, however, that the following information shall be considered Confidential Information for the purposes of this **Section 9.2** and shall not be disclosed by the CM except as provided below:

(1) financial capacity; and (2) insurance.

**9.2.2** The CM must restrict circulation of Confidential Information within its organization and then only to people in the CM's organization that have a need to know the Confidential Information to perform the Services. The CM may disclose Confidential Information to its Consultants on a need-to-know basis, but the CM first must obligate the Consultant to the requirements of this **Section 9.2**. The CM shall be solely liable for the disclosure of the Confidential Information, whether the disclosure is intentional, negligent, or accidental, unless otherwise provided below. Without limiting the generality of the foregoing, if the CM experiences any breach of data security that exposes the Confidential Information to disclosure or unauthorized use, the CM shall bear all costs to notify every Person whose Confidential Information may have been compromised and in cases where the CM experiences that breach of data, the CM shall also hold the Contracting Authority and Owner harmless from any claim arising from or related to that breach.

**9.2.2.1** The CM may be liable for any unintentional disclosure of Confidential Information that results despite the CM's exercise of at least the same degree of care as it normally takes to safeguard its own secrets.

**9.2.3** The CM's obligation to maintain the confidentiality of the Confidential Information will not apply where the information:

**9.2.3.1** was already in the CM's possession without an obligation of confidence before the CM's receipt of the Confidential Information under this Agreement;

**9.2.3.2** is independently developed by the CM;

**9.2.3.3** is or becomes publicly available without breach of this Agreement;

**9.2.3.4** is rightfully received by the CM from a third party without an obligation of confidence;

**9.2.3.5** is disclosed by the CM with the written consent of the Contracting Authority;

**9.2.3.6** is released in accordance with a valid order of a court or governmental agency, provided that the CM:

.1 notifies the Contracting Authority of such order promptly, but in no event more than two business days following receipt of the order and

.2 allows the Contracting Authority to give the owner of the Confidential Information an opportunity to make an effort to obtain a protective order from the issuing court or agency limiting disclosure and use of the Confidential Information solely for the purposes intended to be served by the original order of production;

**9.2.3.7** is limited to Residual Information ("Residual Information" means ideas, concepts, and know-how retained in the unaided memories of employees).

**9.2.4** The CM shall return all originals of any Confidential Information and destroy any copies it has made on termination or expiration of this Agreement or the request of the Contracting Authority.

**9.2.5** The CM must notify the Contracting Authority in writing as soon as the CM learns that the CM or its Consultants or agents have disclosed any of the Confidential Information in a manner that is inconsistent with the requirements of this **Section 9.2**.

**9.2.6** The CM may use Confidential Information only as necessary for the CM's performance under or pursuant to rights granted in this Agreement and for no other purpose. The CM's limited right to use Confidential Information expires upon expiration or termination of this Agreement for any reason. The CM's obligations of confidentiality and non-disclosure survive termination for any reason or expiration of this Agreement.

## **9.3 Public Relations**

**9.3.1** Publicity prior to completion of the Project. Prior to completion of the Project, public relations or publicity about the Project shall be solely within the control, and with the consent of, the Owner.

**9.3.2** Publicity after completion of the Project. After completion of the Project, the CM may exercise reasonable public relations and marketing efforts related to the Project, provided the CM properly identifies the Owner and Contracting Authority, and their participation in the Project.

**9.3.3** Professional Photography. If the CM commissions photography of the completed Project, the CM shall include in its photography agreements a release for unrestricted and unlimited use of photographs by the Owner and Contracting Authority, and shall provide the Owner and Contracting Authority with a reasonable quantity of photographs for use in the Owner's and Contracting Authority's marketing and awareness activities, including, but not limited to, profiles of the Project on their respective websites.

**9.3.4** Craft Awards and Other Recognition.

**9.3.4.1** If the CM submits the Project for craft awards or other similar venues for recognition of the Project, the CM shall properly identify the Owner and Contracting Authority, and their participation in the Project.

**9.3.4.2** In addition, if the Project receives any craft award or other recognition, the CM shall provide duplicate copies of the award plaque or other memento of the award to the Owner and Contracting Authority.

## 9.4 Application and Governing Law

**9.4.1** This Agreement and the rights of the parties hereunder shall be governed by the laws of the state of Ohio and only Ohio courts shall have jurisdiction over any action or proceeding hereunder or related to the Project. The CM irrevocably consents to such jurisdiction.

**9.4.2** The parties to the Agreement shall comply with Applicable Law.

**9.4.3** Other rights and responsibilities of the Contractor, CM, A/E, Contracting Authority, and Owner are set forth throughout the Contract Documents and included under different titles, articles, and paragraphs for convenience.

## 9.5 Written Notice

**9.5.1** Notice under this Agreement shall be validly given if:

**9.5.1.1** delivered personally to a member of the organization for whom the notice is intended;

**9.5.1.2** delivered, or sent by registered or certified mail, to the last known business address of the organization; or

**9.5.1.3** sent by facsimile, email, or web-based project management software, provided the original, signed document is delivered within 3 business days after the date of the electronic transmission.

**9.5.2** When the Owner, Contracting Authority, CM, A/E, or Contractor gives notice to one of the other 4, it shall also simultaneously send a copy of that notice to the others.

**9.5.3** A copy of all notices, certificates, requests, or other communications to the Contracting Authority shall be sent to the Project Manager.

**9.5.4** In the event of an emergency involving the Project, including a fatality, serious injury, fire, collapse, flood, utility, or power loss to occupied facilities, explosion, or environmental damage, the CM shall immediately notify the Contracting Authority and Owner by telephone.

**9.5.5** The Contracting Authority, Owner, or CM may, by written notice given hereunder, designate addresses, telephone numbers, email addresses, or facsimile numbers to which notices, certificates, requests, or communications shall be sent.

## 9.6 Computing Time

**9.6.1** When this Agreement refers to a period of time by a number of days, the period shall be computed to exclude the first and include the last day of the period. If the last day of the period falls on a Saturday, Sunday, or a legal holiday, that day shall be omitted from the computation and the period shall end on the next succeeding day that is not a Saturday, Sunday, or legal holiday.

**9.6.2** Except as excluded under **Section 9.6.1**, all periods referred to in this Agreement include Saturdays, Sundays, and legal holidays.

**9.6.3** The standard workdays for State projects are Monday through Friday, excluding legal holidays.

## 9.7 Time of the Essence

**9.7.1** Time limits stated in the Agreement are of the essence of the Agreement and all obligations under the Agreement. By signing the Agreement, the CM acknowledges that those time limits are reasonable.



**9.7.1.1** The CM acknowledges that the Contracting Authority and Owner have entered into, or may enter into, other contracts based upon the CM properly providing the Services in a timely manner.

**9.7.1.2** The CM shall perform the Work in a reasonable, efficient, and economical sequence, and in the order and time as provided in the Project Schedule.

**9.7.1.3** The CM acknowledges that it may be subject to interference, disruption, hindrance, or delay in the progress of the Services from any cause including without limitation acts of Nature or the public enemy, acts of the government not arising from the CM's failure to comply with Applicable Law, fires, floods, epidemics, weather, and labor disputes beyond the CM's control. The sole remedy for such interference, disruption, hindrance, or delay shall be an extension of the time for performance of the Services, unless otherwise required by ORC Section 4113.62.

## 9.8 Successors and Assigns

**9.8.1** The Contracting Authority and CM, each bind themselves, their successors, assigns, and legal representatives, to the other party to this Agreement and to the successors, assigns, and legal representatives of the other party with respect to all terms of this Agreement.

**9.8.2** The Contracting Authority and CM each acknowledge that the Owner is an intended third-party beneficiary of this Agreement.

**9.8.3** The CM shall not assign, or transfer any right, title, or interest in this Agreement without the Contracting Authority's prior written consent.

## 9.9 Extent of Agreement

**9.9.1 Entire Agreement.** This Agreement, including the attached documents, and the Contract Documents represent the entire and integrated agreement between the Contracting Authority and CM and supersede all prior negotiations, representations, or agreements, either written or oral.

**9.9.2 Multiple Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be regarded as an original and all of which shall constitute but one and the same instrument.

**9.9.3 Captions.** The captions and headings in this Agreement are for convenience only and in no way define, limit, or describe the scope or intent of any provisions or sections hereof.

**9.9.4 Precedence.** If there are any inconsistencies between the provisions of the Contract Documents and the provisions of the Announcement or this Agreement, the provisions of this Agreement shall prevail.

## 9.10 Severability

**9.10.1** If any term or provision of this Agreement, or the application thereof to any Person or circumstance, is finally determined to be invalid or unenforceable by a court of competent jurisdiction, the remainder of this Agreement or the application of such term or provision to other Persons or circumstances, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by Applicable Law.

## 9.11 **Electronic and Facsimile Signatures**

**9.11.1** Any party hereto may deliver a copy of its counterpart signature page to this Agreement via electronic signature software, fax, e-mail, or web-based project management software. Each party hereto shall be entitled to rely upon an electronic, scanned, or facsimile signature of any other party delivered in such a manner as if such signature were an original.

## 9.12 No Third-Party Interest

**9.12.1** Except as expressly provided under **Sections 3.13-1.6** and **9.8.2, (1)** no person or entity, other than the Contracting Authority and CM, will have any right or interest under the Agreement, and **(2)** the Agreement does not create a contractual relationship of any kind between any people or entities other than the Contracting Authority and CM.

## 9.1 Ohio Retirement System

**9.1.1** All individuals employed by the CM that provide personal services to the Contracting Authority or Owner are not public employees for the purposes of ORC Chapter 145, as amended.

**9.1.2** If the CM is a PERS retirant, as defined by ORC Section 145.38, the CM shall notify the Contracting Authority of such status in writing prior to commencement of Work. The Contracting Authority, Owner, or State is not responsible for changes to the CM's retirement benefits resulting from entering into this Contract.

## 9.2 No Waiver

9.2.1 The failure of the Contracting Authority or CM to insist in any one or more instances upon the strict performance of any one or more of the provisions of the Agreement or to exercise any rights under the Agreement or provided by law will not be construed as a waiver or relinquishment of that provision or right or of the right to subsequently demand strict performance or exercise the right and the rights will continue unchanged and remain in full force and effect.

## 9.3 Rights and Remedies

9.3.1 The duties, obligations, rights, and remedies under the Agreement are in addition to and not a limitation of the duties, obligations, rights, and remedies otherwise imposed by or available under Laws and Regulations.

## 9.4 Survival of Obligations

9.4.1 All representations, indemnity obligations, warranties, guarantees, and necessarily continuing obligations under the Agreement, will survive final payment, completion and acceptance of the Work, and termination or completion of the Agreement.

## ARTICLE 10 - DEFINED TERMS AND ABBREVIATIONS

10.1 For the purposes of this Agreement, the words, terms, and abbreviations set forth below have the following meanings:

10.1.1 “CM’s Documents” means all Project-related documents, including those in electronic form, prepared by the CM or Consultants.

10.1.2 “Consultant” means a Person engaged by the CM to provide or perform a portion of the Services.

10.1.3 “Direct Personnel Expense” means the portion of direct salaries and wages of all personnel of the CM or any Consultants, as applicable, including professional, technical, management, administrative and clerical employees, and principals engaged on the Project related to their time devoted to the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto such as employment taxes and other statutory employee benefits, social security contributions, insurance, sick leave, holidays, vacations, pensions, profit sharing, and similar benefits related to their time devoted to the Project.

10.1.4 “Equal Opportunity Coordinator” means the public official who exercises the duties and responsibilities of the position of the equal employment opportunity coordinator identified in ORC Section 121.04, including issuing certificates of compliance with the State’s affirmative action and EDGE programs.

10.1.5 “Fee” (as in “Basic Fee” and otherwise) means all of the compensation to be paid by the Owner to the CM on account of the proper, timely, and complete performance of the associated Services by the CM or its Consultants, including salaries or other compensation of the CM’s employees at the principal office, branch offices, and the field office, general operating expenses of the CM’s principal office, branch offices, and the field office, any part of the CM’s capital expenses, including interest on the CM’s capital employed for the Project, overhead or expenses of any kind, except Direct Personnel Expense and Reimbursable Expenses, any costs incurred due to the CM’s negligence, the CM’s general advertising, federal, state or local income, sales or other taxes, state franchise taxes and qualification fees, and membership in trade, business or professional organizations.

10.1.6 “Indemnified Parties” means the State, Contracting Authority, Owner, and their respective officials, officers, consultants, agents, representatives, and employees, in both individual and official capacities.

10.1.7 “Life Cycle Cost” means the sum of present values of investment costs, capital costs, installation costs, energy costs, operating costs, maintenance costs, and disposal costs over the lifetime of the Project, product, or measure.

10.1.8 “Life Cycle Cost Analysis” means an economic method for assessing the total cost of facility ownership, taking into account all costs of acquiring, owning, maintaining, and disposing of a building or building system. Life Cycle Cost Analysis is also utilized to compare design alternatives that fulfill the same performance requirements, but differ with respect to initial costs and operating costs, in order to select the one that maximizes net savings.

10.1.9 “Project Schedule” means a document that, with respect to each Phase of the Project, identifies, coordinates and integrates the anticipated design and construction schedules, the Contracting Authority’s and Owner’s responsibilities, government authority reviews and other activities as are necessary for the timely completion of the Work.

10.1.10 “Reimbursable Expenses” means actual expenditures incurred by the CM or its Consultants in the interest of the Project, approved by the Contracting Authority for field office supplies, postage and courier services, safety equipment, printing, and advertising.

~~10.1.10~~**10.1.11** “Services” includes all of the CM’s obligations, individually or collectively, under the Agreement including all items reasonably inferable from the Agreement, whether provided or to be provided by the CM, a Consultant, or any other entity for whom the CM is responsible. The Services include Basic Services as defined in the Agreement.

~~10.1.11~~**10.1.12** “Submittals” means Shop Drawings, Product Data, Samples, and other items for the A/E’s review and action provided by a Contractor for any item required by the Contract Documents, but not fully described in the Contract Documents.

**END OF DOCUMENT**

Version Control Document