

# Exhibit A - A/E Standard Terms and Conditions

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

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### ARTICLE 1 - A/E'S RESPONSIBILITIES

#### 1.1 Nondiscrimination

1.1.1 The A/E 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 A/E 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 A/E 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 A/E fails to comply with these nondiscrimination clauses, the Contracting Authority shall deduct from the amount payable to the A/E a forfeiture of the statutory penalty pursuant to ORC Section 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 A/E shall inform the Contracting Authority if the A/E 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 A/E 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 A/E 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 A/E 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 A/E shall comply with ORC Section 153.011 regarding the specification and use of domestically produced steel products. Copies of ORC Section 153.011 may be obtained from the Ohio Facilities Construction Commission or downloaded at <http://codes.ohio.gov/orc/153.011v1>.

#### **1.5 Drug Free Safety Program**

**1.5.1** The A/E 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 Consultants' 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 A/E shall use such software for all compatible Services required under this Agreement.

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

#### **1.7 EDGE Business Development Program Participation**

**1.7.1** The A/E 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 A/E is an EDGE-certified Business, the A/E 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.

**1.7.1.3** The A/E 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 A/E shall provide an EDGE Participation Report with each Professional Services Pay Request.

**1.7.2.1** The A/E shall provide status reports, produced by the A/E 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 A/E;
- .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 A/E shall provide reports for each EDGE-certified Business; however, the reports may be consolidated and submitted as one document.

**1.7.3** The A/E shall provide an EDGE Participation Final Report simultaneously with its final Payment Request.

**1.7.3.1** The A/E 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 A/E 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 A/E.

**1.7.5** If the Project is administered using the State's web-based project management software, the A/E shall submit its EDGE Participation Reports, using the "Professional Services Pay Request" or "Applications for Payment" business process.

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

## **1.8 A/E's Services**

**1.8.1** The A/E shall provide Services for the Project, customarily furnished in accordance with generally accepted architectural or engineering practice, consistent with the terms of this Agreement.

**1.8.2** The A/E 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 A/E 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 A/E 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 A/E shall render interpretations and 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.

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

**1.8.5.2** All of the A/E's interpretations and 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 A/E shall perform its Services consistent with the professional skill and care ordinarily provided by registered architects, landscape architects, professional engineers, and professional surveyors in the same or similar locality under the same or similar circumstances.

**1.9.2** The A/E shall perform its Services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

**1.9.3** The A/E shall perform its Services in accordance with the applicable rules established by its respective state board of registration, including the following codes of conduct and/or ethics pursuant to the OAC:

**1.9.3.1** Registered architects: OAC Section 4703-3-07

**1.9.3.2** Landscape architects: OAC Section 4703:1-3-04

**1.9.3.3** Professional engineers and professional surveyors: OAC Section 4733-35

## **1.10 Construction Budget**

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

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

**1.10.3** The 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 A/E 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 A/E.

### 1.11 Cooperation

**1.11.1** The A/E 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 A/E shall cooperate and coordinate fully with all Separate Consultants and Contractors and shall freely share all of the A/E'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 A/E 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 A/E 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 A/E shall review 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 A/E's failure so to report will constitute an acceptance of the other work and services as fit and proper for integration with the A/E's Services except for defects and deficiencies in the other work or services that were not reasonably discoverable at the time of the A/E's inspection.

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

### 1.12 Records

**1.12.1** The records of all of the A/E'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 seven years after Substantial Completion of all Work.

**1.12.2** All other records kept by the A/E related to the Project shall be available to the Contracting Authority and Owner at all times and shall be maintained for six 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 A/E full information regarding the Owner's 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 A/E 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 A/E, but the A/E may rely upon that information to the extent consistent with the standard of care described under **Section 1.9**.

## 2.7 Notice to A/E

**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 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 A/E.

## 2.9 Limitation of Authority

**2.9.1** The A/E 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 A/E 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 A/E'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 A/E'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 A/E shall proceed, when requested by the Contracting Authority, to re-perform the Services to satisfy the objections without additional compensation to the A/E or its Consultants.

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

## 2.11 Performance Evaluations

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

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

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

## ARTICLE 3 - CONSULTANTS

### 3.1 Consultant Services

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

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

**3.1.2.1** The A/E shall not retain any Consultant on terms inconsistent with this Agreement.

**3.1.2.2** All agreements between the A/E 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 A/E shall submit to the Contracting Authority and Owner a copy of the agreement between the A/E and each Consultant.

**3.1.3** The A/E shall obtain the Contracting Authority's written approval before engaging any Consultant not named in the Agreement. The A/E 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 A/E of the A/E's full responsibility for performance of the Services.

**3.1.4** The A/E 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 A/E 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 A/E 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 A/E or directly with the Consultant, but the Contracting Authority may not modify the agreement between the A/E and any Consultant. The Contracting Authority will advise the A/E with reasonable promptness of direct communication with any Consultant.

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

**3.1.6.1** If the Contracting Authority terminates this Agreement in part, the Contracting Authority may **(1)** take assignment of any entire Consultant's agreement affected by the termination or **(2)** take partial assignment of only the portion of any Consultant's agreement associated with the terminated part of this Agreement.

### 3.2 Payments by A/E

**3.2.1** Within ten business days after receipt of payment made pursuant to this Agreement, the A/E 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 A/E notifies the Owner and Contracting Authority not less than 30 days before the date for completion of the Project identified in the approved Project Schedule, that the time for completion is reasonably expected to be exceeded by more than ten percent through no fault of the A/E, the A/E'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 A/E.

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

**4.1.3** That amendment shall be executed before the A/E renders any Services made necessary by the 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 A/E, 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 A/E's compensation shall be negotiated to the mutual reasonable satisfaction of the Contracting Authority, Owner, and A/E.
- 4.2.4** If, through such negotiation, the Contracting Authority and Owner agree that the A/E shall be paid additional compensation, an amendment to that effect shall be executed in accordance with **Section 4.3**.
- 4.2.5** That amendment shall be executed before the A/E renders any Services made necessary by the 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 A/E and Contracting Authority, with concurrence of the Owner.
- 4.3.2** Amendments involving changes to the legal terms and conditions of this Agreement shall require approval by the Attorney General of the state of Ohio.
- 4.3.2.1** Changes to the legal terms and conditions do not include amendments to the scope or cost of the Services governed by this Agreement, which include changes to **Exhibit B**.
- 4.3.3** If the Project is administered using the State's web-based project management software, the A/E shall submit its request for an amendment to the Contracting Authority through the "Professional Services Amendments" or "Contract Modifications" 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 A/E 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 A/E shall submit its request for an allocation adjustment to the Contracting Authority through the "Professional Services Amendments" or "Contract Modifications" business process.

# ARTICLE 5 - DISPUTE RESOLUTION

## 5.1 Notice and Filing of Requests

- 5.1.1** Any request by the A/E for additional fees or expenses shall be made in writing to the Contracting Authority and filed prior to payment of the final five percent of the Basic Fee. The A/E's failure to comply with the requirements of this **Section 5.1.1** shall constitute an irrevocable waiver by the A/E of any request for such fees and expenses.

## 5.2 Substantiation of Request

- 5.2.1** In every written request filed pursuant to **Section 5.1**, the A/E 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.

## 5.3 Mutual Waiver of Consequential Damages

- 5.3.1** Except as provided under **Section 5.3.2**, the Owner and A/E each waive against the other all claims for consequential damages that may arise out of or relate to this Agreement.

- 5.3.1.1** 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.

**5.3.1.2** The A/E'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.

**5.3.2** Notwithstanding **Section 5.3.1**, this **Section 5.3**:

**5.3.2.1** 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 5.3.1**;

**5.3.2.2** does not apply to the A/E's indemnity obligations for third-party claims against the Indemnified Parties even if those claims are for damages that **Section 5.3.1** would otherwise preclude; and

**5.3.2.3** does not apply to Claims for damages arising from the Owner or A/E's gross negligence or willful misconduct.

**5.3.3** This **Section 5.3** shall survive termination of the Agreement.

#### **5.4 Meeting with the Project Manager**

**5.4.1** Within 30 days after receipt of the request filed with the Contracting Authority pursuant to **Section 5.1**, 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.

**5.4.2** The meeting scheduled by the Project Manager shall be attended by persons expressly and fully authorized to resolve the request on behalf of the A/E.

#### **5.5 Appeal to Commission or Institutional Designee**

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

**5.5.1.1** If the Project is administered by the Commission, jointly administered by 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.

**5.5.1.2** 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.

**5.5.2** 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.

**5.5.3** The meeting shall be attended by persons expressly and fully authorized to resolve the matters on behalf of the A/E.

**5.5.4** ORC Chapter 119 shall not be applicable to any proceedings of the Commission or Institutional Designee under this **Section 5.5**.

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

#### **5.6 Delegation**

**5.6.1** 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.

#### **5.7 Alternative Dispute Resolution**

**5.7.1** At any point in Claims and dispute resolution processes, the Project's key stakeholders may agree to enter into non-binding ADR including progressive negotiation, Dispute Review Board, mediation, or another non-binding ADR procedure accepted by all of the Project's key stakeholders.

#### **5.8 Performance**

**5.8.1** The A/E shall proceed with performance of this Agreement during any dispute resolution process, unless otherwise agreed by the A/E 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 A/E and all Consultants, the Owner shall pay the A/E 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**.

### 6.2 Additional Services Fees

**6.2.1** The Owner shall pay the A/E the Additional Services Fees for the associated Additional Services, when those Services are performed in accordance with the Agreement.

**6.2.1.1** For Additional Services performed by a Consultant, the Additional Services Fees shall be based on the Consultant's associated invoices to the A/E and may include an A/E mark-up negotiated between the Contracting Authority and A/E.

**6.2.2** Except for the Additional Services and Additional Services Fees listed above, Additional Services and any Additional Services Fees shall be approved only by an amendment to this Agreement in accordance with **Section 4.3**.

**6.2.2.1** For Additional Services not included in the original **Agreement Form** that are provided by the A/E and any Consultants in accordance with **Section 4.3**, the Owner shall pay the A/E Additional Services Fees in an amount negotiated to the mutual reasonable satisfaction of the Contracting Authority, Owner and A/E, but in all events, such Additional Services Fees shall not exceed two-and-one-half times the Direct Personnel Expense incurred by the A/E and any applicable Consultant in providing those Additional Services.

### 6.3 Reimbursable Expenses

**6.3.1** The A/E 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 A/E or Consultant mark-up shall be permitted on Reimbursable Expenses.

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

**6.4.1.3** Payment of the last five 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 A/E to the Contracting Authority or Owner, as applicable, in form and substance reasonably satisfactory to the Contracting Authority and Owner.

**6.4.1.4** The entire Basic Fee is subject to all setoffs for claims against the A/E in favor of the State.

**6.4.1.5** Payments for Basic Services shall be based upon a properly completed Professional Services Pay 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 Additional Services Fees and Reimbursable Expenses.

**6.4.2.1** Payments of Additional Services Fees in accordance with **Section 6.2** and for Reimbursable Expenses in accordance with **Section 6.3** shall be made monthly based upon Additional Services performed or expenses incurred, as applicable, and as shown by a properly completed Professional Services Pay Request.

**6.4.3** If the Project is administered using the State's web-based project management software, the A/E shall submit its Professional Services Pay Request to the Owner, through the Contracting Authority, for approval and payment through the "Professional Services Pay Request" or "Applications for Payment" business process.

## ARTICLE 7 - INSURANCE AND INDEMNIFICATION

### 7.1 A/E's General Insurance Requirements

**7.1.1** Throughout the performance of the Services or longer as may be described below, the A/E 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 A/E.

**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 A/E 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** Notwithstanding any other provision of this Agreement to the contrary, the A/E will not be entitled to any Fee increase on account of the Contracting Authority's refusal to accept a Consultant's nonconforming insurance coverage.

**7.1.1.4** On a case-by-case basis, the Contracting Authority and A/E 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 A/E shall deliver to the Contracting Authority certificates evidencing that the required insurance is in force.

**7.1.2.1** Certificates of insurance for other than government-controlled workers' compensation insurance must identify **(1)** all below-required additional insureds and **(2)** the Project name.

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

**7.1.3.1** the A/E 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 A/E'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 ten-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 after the Contracting Authority's request, the A/E shall submit insurance-company certified copies of the policies, the policy endorsements, or both from which the A/E may redact the premium amount.

**7.1.4** The A/E shall pay all deductibles, or self-insured retentions, or both contained in the A/E'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 A/E may use to comply with any insurance requirement.

**7.1.5** The A/E 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 A/E's proportionate share will derive from the percentage of the associated claim or loss attributable to the negligence of the A/E or a Consultant.

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

**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 the Contracting Authority to identify a deficiency from evidence that is provided shall not be construed as a waiver of the A/E's obligation to maintain the required insurance.

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

**7.2 A/E’s Minimum Coverage Requirements**

**7.2.1 Workers Compensation.** The A/E shall maintain workers’ compensation coverage meeting the requirements of Applicable Law.

**7.2.2 Employers’ Liability Coverage.** The A/E 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 A/E 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 04 13 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 A/E 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 not exclude coverage for property damage to electronic data.

**7.2.3.5** 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).

**7.2.3.6** 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.

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

**7.2.4 Business Automobile Liability.** The A/E shall maintain business automobile (“BA”) coverage written on ISO form CA 00 01 04 13 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 A/E shall include the State, Contracting Authority, and Owner as additional insureds under the BA policy.

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

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

<b>Construction Budget</b>	<b>Each Claim</b>	<b>Annual Aggregate</b>
Up to \$25,000,000	\$1,000,000	\$2,000,000
From \$25,000,000.01 to \$50,000,000	\$2,000,000	\$4,000,000
From \$50,000,000.01 to \$100,000,000	\$5,000,000	\$5,000,000
More than \$100,000,000	\$10,000,000	\$10,000,000

**7.2.6.1** The PL policy shall have an effective date on or before the date that the A/E 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 A/E 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 A/E 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 Project is using the design-build project delivery system, the PL policy shall not contain any design-build exclusions.

**7.2.6.5** If the A/E is a joint venture:

- .1 the A/E 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 A/E **(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 A/E is a limited-liability company, which members consist of two or more separate firms:

- .1 the A/E 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
- .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 A/E **(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 A/E shall maintain a 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 A/E for damages (including from mold) sustained by the Owner by reason of the A/E's performance of the Services.

**7.2.7.1** The Pollution policy shall have an effective date, which is on or before the date that the A/E 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 A/E 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 A/E shall maintain the Pollution insurance in effect for no less than five years after the earlier of the termination of the Agreement or Substantial Completion of all Work.

**7.2.7.4** The A/E may achieve the Pollution insurance requirement through a PL policy, which provides the required pollution coverage or through a contractor's pollution liability policy.

**7.3 Waivers of Subrogation**

**7.3.1** To the fullest extent permitted by Applicable Law, the A/E 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 A/E 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 A/E 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 A/E 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 A/E or a Person for whom the A/E may be liable;

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

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

**7.4.2 Professional Liability.** To the fullest extent permitted by Applicable Law and with respect to professional liability claims, the A/E 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 A/E or a Person for whom the A/E is legally liable to comply with the standard of care described under **Section 1.9**; and **(2)** infringement of patent rights or copyrights by the A/E or a Person for whom the A/E may be liable.

**7.4.3** The A/E'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 A/E to indemnify any individual or entity from and against the consequences of that Person's own negligence.

**7.4.4** 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 A/E or a Person for whom the A/E 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.

**7.4.5** [Intentionally omitted]

**7.4.6** The A/E'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 A/E'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 A/E'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 the Fee the claims, damages, losses, fines, penalties, and expenses for which the A/E is liable under **Section 7.4**. If those claims, damages, losses, fines, penalties, and expenses exceed the unpaid balance of the Fee, the A/E 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 A/E 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 A/E complies with **Article 4**, the Basic Fee, Additional Services Fee, 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 Basic Fee, Additional Services Fee, or Reimbursable Expenses to the extent that:

- .1** performance was or could have been suspended, delayed, or interrupted by a cause for which the A/E 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 A/E submits a proper Professional Services Payment Request, but subject to all other provisions of the Agreement, the A/E 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 A/E 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 A/E'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 A/E to any adjustment of the Basic Fee, Additional Services Fees, or Reimbursable Expenses.

**8.1.2.2** If the Contracting Authority is adjudged to have improperly or unjustifiably 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 A/E shall cease providing the suspended Services and take all necessary or appropriate steps to limit disbursements and minimize respective costs. The A/E shall furnish a report to the Contracting Authority, within five days after 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 A/E 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 at any time terminate the Agreement in whole or in part for the Owner's convenience and without cause, upon written notice to the A/E.

**8.2.2** Upon receipt of the notice of termination for convenience, the A/E 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 A/E for Services rendered before the date of termination in accordance with the allocations in the Agreement, including any Reimbursable Expenses incurred, but not in excess of the allocations and caps otherwise provided in the **Agreement Form**.

**8.2.3.1** In no event shall the A/E be entitled to overhead and profit associated with Services the A/E 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 A/E then existing or which may thereafter accrue for Services performed 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 A/E's default, the A/E 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 the Agreement in whole or in part if the A/E 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 Applicable Law, 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 A/E in writing of the Contracting Authority's intent to terminate this Agreement and the cause(s) for that termination.

**8.3.3** If the A/E fails to cure the identified cause(s) for termination within seven 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 A/E.

**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 A/E's Documents.

**8.3.5** If the Agreement is terminated, the A/E 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 A/E 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 A/E then existing or which may thereafter accrue. The Contracting Authority's retention or payment of funds due the A/E shall not release the A/E from liability for performance of the Services.

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

## **8.4 A/E Insolvency**

**8.4.1** The Contracting Authority may immediately terminate this Agreement for cause if:

**8.4.1.1** the A/E commences a voluntary case under Title 11 of the United States Code or the corresponding provisions of any successor laws; or

**8.4.1.2** any legal entity commences an involuntary case against the A/E under Title 11 of the United States Code or the corresponding provisions of any successor laws and **(1)** the case is not dismissed within 60 days after its commencement; or **(2)** the court before which the case is pending issues an order for relief or similar order approving the case; or

**8.4.1.3** a court of competent jurisdiction appoints, or the A/E makes an assignment of all or substantially all of its assets to, a receiver, trustee, liquidator, or other similar custodian for the A/E or all or substantially all of the A/E's assets; or

**8.4.1.4** any attachment, execution, or other judicial seizure is levied against all or substantially all of the A/E's assets; or

**8.4.1.5** the A/E takes any action toward the dissolution or winding up of its business; or

**8.4.1.6** the A/E fails generally to pay its debts as they become due (unless those debts are subject to a good-faith dispute as to liability or amount) or it acknowledges in writing that it is unable to do so.

**8.4.2** If the A/E files a voluntary petition in bankruptcy or has an involuntary petition in bankruptcy filed against it, the A/E, the A/E as the debtor-in-possession, or the trustee of the A/E'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.

**8.4.3** If the Contracting Authority intends to exercise its termination rights under this **Section 8.4**, the Contracting Authority shall notify the A/E in writing of the Contracting Authority's termination of this Agreement and the cause(s) for that termination.

**8.4.4** The A/E 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.

## 8.5 A/E's Termination for Cause

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

**8.5.2** If the A/E elects to terminate this Agreement for cause, the A/E must give the Contracting Authority and Owner written notice of **(1)** the A/E's intention to terminate the Agreement and **(2)** an accounting of the undisputed amounts owed to the A/E and the date(s) on which the A/E 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 A/E within ten days after receiving the notice, the termination will take effect upon the Owner's receipt of the A/E's written notice of termination, which is in addition to the A/E's notice of intention to terminate.

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

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

## ARTICLE 9 - GENERAL PROVISIONS

### 9.1 A/E'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 A/E's Documents and the Contract Documents and every right, title, and interest in the A/E'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 A/E or any of its Consultants in its normal course of business that are included in the A/E's Documents. The A/E 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 A/E 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 A/E's Documents under **Section 9.1.1** and the license described under **Section 9.1.2**.

**9.1.4** The A/E may retain copies, including reproducible copies of the A/E's Documents and the Contract Documents for information, reference, and the performance of the Services. The Owner grants to the A/E and its Consultants a non-exclusive, royalty-free license to copy, reproduce, distribute, and otherwise use the A/E'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 A/E'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 A/E's Documents and the Contract Documents. Any unauthorized use of the A/E's Documents and the Contract Documents will be at the sole risk of the entity making the unauthorized use of the A/E's Documents and the Contract Documents.

**9.1.6** Should the Owner desire to use any of the A/E'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 A/E's Documents, the Owner shall engage one or more suitably licensed design professionals under terms that require each of those design professionals to independently evaluate any design or related features in the A/E's Documents without reliance on any information in the A/E's Documents that would be inconsistent with the standard of care applicable to that design professional.

**9.1.6.1** Unless the Project is a prototype, neither the Contracting Authority nor the Owner is entitled to use the A/E's Documents on other projects except by prior written agreement with, including mutually acceptable compensation to, the A/E or Consultant, as applicable. The term "other projects" as used in this section does not include additions to, remodeling or rehabilitation of, or change to any one or more of the improvements built on the basis of the A/E's Documents for this Project.

**9.1.7** The A/E shall provide Electronic Files (in native format) to the Contractor, Subcontractors, and Separate Consultants for their use in connection with the Project. The A/E shall provide the Electronic Files **(1)** at no additional



cost to the Contractor, Subcontractors, Separate Consultants, or Owner and **(2)** without requiring the Contractor, Subcontractors, Separate Consultants, 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, 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, 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, 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, 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 A/E of its responsibility for the preparation, completeness, or accuracy of the A/E's Documents.

## **9.2 Confidentiality of Documents used in Selection of a CM at Risk or Design-Builder**

**9.2.1** All documents submitted to the Owner, Contracting Authority, or A/E in response to a request for qualifications or a request for proposals in the best value selection of a Construction Manager at Risk or Design-Builder 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 A/E except as provided below: **(1)** proposal form(s), except for subtotals for cost categories, which will be transferred to the best value rating form; **(2)** financial capacity; and **(3)** bonding/insurance.

**9.2.2** The A/E must restrict circulation of Confidential Information within its organization and then only to people in the A/E's organization that have a need to know the Confidential Information to perform the Services. The A/E may disclose Confidential Information to its Consultants on a need-to-know basis, but the A/E first must obligate the Consultant to the requirements of this **Section 9.2**. The A/E 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 A/E experiences any breach of data security that exposes the Confidential Information to disclosure or unauthorized use, the A/E shall bear all costs to notify every Person whose Confidential Information may have been compromised and in cases where the A/E experiences that breach of data, the A/E shall also hold the Contracting Authority and Owner harmless from any claim arising from or related to that breach.

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

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

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

**9.2.3.2** is independently developed by the A/E;

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

- 9.2.3.4** is rightfully received by the A/E from a third party without an obligation of confidence;
- 9.2.3.5** is disclosed by the A/E 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 A/E:
- .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 A/E 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 A/E must notify the Contracting Authority in writing as soon as the A/E learns that the A/E 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 A/E may use Confidential Information only as necessary for the A/E’s performance under or pursuant to rights granted in this Agreement and for no other purpose. The A/E’s limited right to use Confidential Information expires upon expiration or termination of this Agreement for any reason. The A/E’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 A/E may exercise reasonable public relations and marketing efforts related to the Project, provided the A/E properly identifies the Owner and Contracting Authority, and their participation in the Project.

**9.3.3 Professional Photography.** If the A/E commissions photography of the completed Project, the A/E 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 Design Awards and Other Recognition.** If the A/E submits the Project for design awards or other similar venues for recognition of the Project, the A/E shall properly identify the Owner and Contracting Authority, and their participation in the Project. In addition, if the Project receives any design award or other recognition, the A/E 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 A/E 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, 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 by trackable delivery service, 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 three business days after the date of the electronic transmission.

**9.5.2** When the Owner, Contracting Authority, A/E, or a Contractor gives notice to one of the other three, 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 A/E shall immediately notify the Contracting Authority and Owner by the most expedient means available.

**9.5.5** The Contracting Authority, Owner, or A/E 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 A/E acknowledges that those time limits are reasonable.

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

**9.7.1.2** The A/E shall perform the Services in a reasonable, efficient, and economical sequence, and in the order and time as provided in the Project Schedule.

**9.7.1.3** The A/E 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 A/E's failure to comply with Applicable Law, fires, floods, epidemics, weather, and labor disputes beyond the A/E'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 A/E 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 A/E each acknowledge that the Owner is an intended third-party beneficiary of this Agreement.

**9.8.3** The A/E 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 A/E and supersede all prior negotiations, representations, or agreements, either written or oral.

**9.9.1** 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.

**9.9.2** 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.

**9.9.3** Precedence. If there are any inconsistencies between the provisions of the Contract Documents and the provisions of 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 3.1** and **9.8.2**, **(1)** no person or entity, other than the Contracting Authority, Owner, and A/E, 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, Owner, and A/E.

### 9.13 Ohio Retirement System

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

9.13.2 If the A/E is a PERS retirant, as defined by ORC Section 145.38, the A/E 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 A/E's retirement benefits resulting from entering into this Agreement.

### 9.14 No Waiver

9.14.1 The failure of the Contracting Authority or A/E 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.

### 9.15 Rights and Remedies

9.15.1 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 Applicable Law.

### 9.16 Survival of Obligations

9.16.1 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 "Architect/Engineer" or "A/E" means the Person identified in the Agreement responsible for providing professional design services and construction contract administration for the Project. The A/E shall be **(1)** a registered architect holding a license and certificate of authorization issued by the Ohio Architects Board pursuant to ORC Chapter 4703, **(2)** a landscape architect holding a license and certificate of authorization issued by the Ohio Landscape Architects Board pursuant to ORC Chapter 4703, or **(3)** a professional engineer or professional surveyor holding a license and certificate of authorization issued by the Ohio Engineers and Surveyors Board pursuant to ORC Chapter 4733. As used in the Agreement, the term A/E may include a criteria architect or engineer for a Design-Build project.

10.1.2 "A/E's Documents" means all Project-related documents, including those in electronic form, prepared by the A/E or Consultants.

10.1.3 "Consultant" means a Person engaged by the A/E to provide or perform a portion of the Services.

**10.1.4** “Contractor” means a Person, which is party to a contract for the performance of Work on the Project in cooperation with Separate Contractors and Persons, and in accordance with the Contract Documents. As used in the Agreement, the term Contractor may include a Construction Manager at Risk or a Design-Builder.

**10.1.5** “Direct Personnel Expense” means the portion of direct salaries and wages of all personnel of the A/E 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.

**10.1.6** “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.

**10.1.7** “Fee” (as in “Basic Fee,” “Additional Services Fees,” and otherwise) means all of the compensation to be paid by the Owner to the A/E on account of the proper, timely, and complete performance of the associated Services by the A/E or its Consultants, including salaries or other compensation of the A/E’s employees at the principal office, branch offices, and the field office, general operating expenses of the A/E’s principal office, branch offices, and the field office, any part of the A/E’s capital expenses, including interest on the A/E’s capital employed for the Project, overhead or expenses of any kind, except Reimbursable Expenses, any costs incurred due to the A/E’s negligence, the A/E’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.

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

**10.1.9** “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.

**10.1.10** “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.

**10.1.11** “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.

**10.1.12** “Reimbursable Expenses” means actual expenditures incurred by the A/E or its Consultants in the interest of the Project, approved by the Contracting Authority for reproduction of Contract Documents for distribution to Bidders, plan approval fees, building permits, and, if requested by the Owner or Contracting Authority, reformatting Project Record Submittals to a computer medium different than the computer medium used by the A/E.

**10.1.13** “Services” includes all of the A/E’s obligations, individually or collectively, under the Agreement including all items reasonably inferable from the Agreement, whether provided or to be provided by the A/E, a Consultant, or any other entity for whom the A/E is responsible. The Services include both Basic Services and Additional Services as defined in the Agreement.

**10.1.14** “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**