



CITY OF FITCHBURG

CONTRACT BETWEEN CITY AND CONTRACTOR

(MA GENERAL LAW c. 30, 39M PUBLIC CONSTRUCTION)

CONTRACT NO.

CONTRACT TITLE:

CONTRACTING DEPARTMENT:

THIS CONTRACT is made this __ day of [insert date], by and between [insert Contractor name] with a usual place of business at [insert Contractor legal address] (hereinafter called the Contractor), and the City of Fitchburg, a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts, acting through its Mayor, (hereinafter referred to as the City).

WITNESSETH that the Contractor and the City of Fitchburg, for the consideration hereinafter named, agree as follows:

In all respects, this Contract shall be governed by and performed consistently with all laws of the Commonwealth of Massachusetts for public construction Contracts including but not limited to Massachusetts General Law c. 30 §39M. The provisions of the Massachusetts General Laws regarding public construction shall take precedence over any and all other Contract provisions or documents. Any conflicts among provisions and/or between documents shall be resolved and/or interpreted according to the Massachusetts General Laws (MGL). The Contractor warrants that it is familiar with and agrees to abide by all laws of the Commonwealth of Massachusetts.

ARTICLE 1. CONTRACT DOCUMENTS

- a) The City and the Contractor agree that the Contractor's bid, including any related documents, prices, deliverables, or services promised, and the City's Solicitation for Bid, including any purchase description, specifications, submission requirements, scope of work, drawings, and any other related documents are all incorporated and made part of this Contract as if written herein. These documents form the entire Contract between the parties and there are no other Contracts between the parties.

- b) This Contract is only binding upon, and enforceable against the City if the Contract is:
 - i. Signed by the Mayor;
 - ii. Signed by the City Auditor as to appropriation or availability of funds;
 - iii. Endorsed with approval of the City Solicitor as to form and legality;
 - iv. Signed by the Chief Procurement Officer as to compliance with procurement statutes.

ARTICLE 2. SCOPE OF THE WORK

The work comprises the completed construction required by the Contract documents and includes all labor, tools, materials, supplies, equipment, approvals, permits, paperwork, calculations, submittals, and certificates necessary to develop, construct, and complete the work in accordance with all laws, and all construction and other services required to be supervised, overseen, performed, or furnished by the Contract or that Contract documents require. The Contractor agrees to meet or exceed all requirements of this Contract and the Contract documents.

ARTICLE 3. TERM OF CONTRACT

This Contract shall commence [insert start date] and expected completion date will be [insert completion date].

ARTICLE 4. CONTRACT SUM

The Contractor shall provide and perform for the Contract price all of the duties and obligations set forth in the Contract documents.

The City shall pay the Contractor for the performance of this Contract a sum NOT TO EXCEED [enter price in numbers], including all labor and materials, and based upon unit prices on bid form.

The signature of the City Auditor at the time of execution of this Contract certifies that sufficient appropriations exist and shall be encumbered to fund the Contract price. This Contract is subject to appropriation and shall be made only for work performed in accordance with the terms of this Contract.

ARTICLE 5. CONTROL OF WORK AND ADMINISTRATION OF THE CONTRACT

- a) The City shall decide all questions which may arise as to the conduct, quantity, quality, equality, acceptability, fitness, and rate of progress of the work performed and materials furnished under this Contract, and shall decide all questions which may arise as to interpretation of the specifications and drawing, and fulfillment of the Contract.
- b) The City's designee(s) may enter upon the work, the site, and premises, at any time and the Contractor shall provide safe facilities therefore.

ARTICLE 6. WORKING HOURS

- a) Unless otherwise required by the Contract documents, or directed in writing by the Designer or the City, work shall be performed during regular work hours, which, unless prescribed otherwise shall be 7:00 am to 5:00 pm, local time. Should the Contractor want to carry on work outside of regular working hours, the Contractor shall provide at least forty-eight (48) hours' notice to allow satisfactory arrangements to be made and for the City to approve the request.
- b) Work performed outside of regular working hours set forth above, without consent or knowledge of the City, shall be subject to additional inspection, the cost of which shall be borne by the Contractor whether the work is found to be acceptable or not.

ARTICLE 7. PROJECT SUPERVISION

The Contractor shall provide a qualified supervisor to oversee all work in the field. This person shall be an employee of the Contractor. The Contractor shall submit for review and written approval by the Engineer, the qualifications, projects history and references of the proposed Project Supervisor, prior to beginning work. The Project Supervisor shall be on the project site at all times while any work is being performed and shall be responsible for the coordination, quality, timeliness and performance of the work of the Contractor and the sub-Contractor(s). Should the Project Supervisor need to be absent from the work at any time, the Contractor shall provide a pre-approved alternate to assume the duties. The alternate must be approved (in a manner similar to the Project Supervisor) prior to assumption of duties.

ARTICLE 8. EMPLOY COMPETENT PEOPLE

The Contractor shall employ only competent people to do the work. Whenever the City shall notify the Contractor in writing that any person under the Contractor's employ is, in the City's opinion, incompetent, unfaithful, disorderly or otherwise unsatisfactory, or not employed in accordance with the provisions of this Contract, such person shall be discharged from the work and shall not again be employed on the Project, except with the consent of the City.

Contractor shall dismiss from the project any individual employed by the Contractor or any Subcontractor or supplier who is found by the Contractor, the City, or a City designee to be under the influence of drugs or alcohol, or in any other way incompetent, guilty of misconduct, or detrimental to the project.

ARTICLE 9. DEBARMENT

Contractor certifies under the pains and penalties of perjury that it, its agents, Subcontractors, and employees are not presently debarred from entering into a public Contract in the Commonwealth of Massachusetts under the provision of MGL c. 29, §29F, or any other applicable debarment provisions of any other Chapter of MGL or any rule or regulation promulgated thereunder.

ARTICLE 10. UTILITIES, NOTICES, AND PERMITS

- a) It is the Contractor's responsibility to secure, obtain, and pay for all licenses, permits and approvals, and administrative prerequisites to performance of this Contract unless otherwise noted in the Contract documents.
- b) The Contractor shall pay all charges and fees, and cause appropriate Subcontractors to pay for all utilities required for the proper execution of the work.
- c) The Contractor shall comply with all laws and shall give all notices required.

ARTICLE 11. SALES TAX EXEMPTION

The City is exempt from federal excise, state and local taxes, and from Massachusetts sales and use tax. The City's tax exempt number is 046-001-388.

Materials, equipment, and supplies, as well as rental charges for construction vehicles, equipment, and machinery rented exclusively for use on the site or for transportation of materials for the work are entitled to exemption from sales taxes in accordance with MGL c. 64H, §6(d). The Contractor shall take all action required to obtain the benefit of said sales tax exemption.

ARTICLE 12. MATERIALS AND WORKMANSHIP

Unless otherwise specified, all materials and equipment incorporated in the work under the Contract shall be new, unused, of recent manufacture, assembled, and used in accordance with the best construction practices. All workmanship shall be first class and by persons qualified in the respective trades.

ARTICLE 13. OBLIGATIONS AND LIABILITY OF CONTRACTOR

- a) The Contractor shall do all the work and furnish all the materials, tools and appliances, except as otherwise specified and all items necessary for proper performance and completion of the work required by this Contract, in the manner and within the time specified herein. The Contractor shall complete the entire work to the satisfaction of the City, and in accordance with the specifications and drawings, at the prices agreed upon. All work, labor and materials to be furnished under this Contract shall be furnished strictly pursuant to, and in conformance with the specifications, and the instructions of the City's designee as given from time to time during the progress of the work, under the terms of this Contract, and in accordance with Contract Drawings.
- b) The Contractor shall coordinate operations and avoid interference with the operations of any other Contractors who may be employed on other work of the City and shall cooperate in the arrangements for storage of materials. The Contractor shall maintain all utilities and shall be responsible for the coordination of all required utility relocations unless stated otherwise in the Contract Documents.
- c) The Contractor shall conduct work so as to interfere as little as possible with private business and public travel. Contractor shall, wherever necessary or required, maintain fences, provide watchmen, maintain lights, and take such other precautions as may be necessary to protect life and property and shall be liable for all damages occasioned in any way by their act or neglect, or that of their agents, employees or workers.
- d) The Contractor shall take all responsibility for the work done under this Contract; for the protection of the work; and for preventing injuries to persons and damage to property and utilities on or about the work. The Contractor shall in no way be relieved of responsibility by any right of the City's designee to give permission or issue orders relating to any part of the work, nor by any such permission given or orders issued, nor by failure of the City's designee to give such permission or issue such orders.
- e) Any materials, reports, information, data, etc. given to or prepared or assembled by the Contractor under this Contract are to be kept confidential and shall not be made available to any individual or organization by the Contractor (except agents, servants, or employees of the Contractor) without the prior written approval of the City,

except as otherwise required by law. The Contractor shall comply with the provisions Chapter 66A of the General Laws of Massachusetts as it relates to public documents, and all other state and federal laws and regulations relating to confidentiality, security, privacy and use of confidential data.

- f) Any materials produced in whole or in part under this Contract shall not be subject to copyright, except by the City, in the United States or any other country. The City shall have unrestricted authority to, without payment of any royalty, commission, or additional fee of any type or nature, publicly disclose, reproduce, distribute and otherwise use, and authorize others to use, in whole or in part, any reports, data or other materials prepared under this Contract.
- g) All data, reports, programs, software, equipment, furnishings, and any other documentation or product paid for by the City shall vest in the City at the termination of this Contract. The Contractor shall at all times, during or after termination of this Contract, obtain the prior written approval of the City before making any statement bearing on the work performed or data collected under this Contract to the press or issuing any material for publication through any medium.

ARTICLE 14. CITY TO MANAGE CONTRACT

- a) The City's designee shall in all cases determine the amount, quality, acceptability and fitness of the several kinds of work and materials which are to be paid for under this Contract; shall determine all questions in relation to said work and the construction thereof, and shall in all cases decide every question of fact which may arise relative to fulfillment of this Contract on the part of the City and on the part of the Contractor. The City's decision shall be final and conclusive upon both parties to this Contract. Any differences or conflicts arising between the Contractor and other Contractors of the City in regard to their work, shall be adjusted and determined by the City's designee.
- b) The City's designee shall make all necessary explanations as to the meaning and intention of the drawings and specifications, and shall give all necessary orders and directions. The order or sequence of execution of work and the general conduct of the work shall be subject to the approval of the City's designee, who shall have authority to direct the order or sequence where public necessity or welfare shall require. However, such approval or direction shall in no way affect the responsibility of the Contractor in the conduct of the work except for extension of time as necessary and approved in writing.

ARTICLE 15. DISCREPANCIES, ERRORS, AND OMISSIONS

- a) Prior to commencing the work, the Contractor shall carefully examine the Contract documents and compare all specifications, drawings, figures, dimensions, lines, marks, scales, directions of the City, and any other information provided, and shall at once report to the City any questions, comments, errors, inconsistencies, or omissions.
- b) Should any discrepancy appear or any misunderstanding arise as to the significance of any part of the specifications or drawings, the interpretation and decision of the City's designee shall be final and binding on both parties to this Contract.
- c) Any correction of errors or omissions in drawings and specifications may be made by the City's designee when such correction is necessary for the proper fulfillment of the Contract. Where said correction of errors or omissions adds to the amount of work to be done by the Contractor, compensation for said additional work shall be made under a written Change Order except where the additional work may be classed under some item of work for which a unit price is included in the bid submittal.
- d) The fact that specific mention of a fixture, or of any part of the work, is omitted in the specifications, whether intentionally or otherwise, when the same is clearly shown or indicated on the drawings, or is usually and customarily required to fully complete such work as is specified herein, will not entitle the Contractor to consideration in the matter of any claim for extra compensation, but said fixtures or work, or both, must be installed or done the same as if called for by both the drawings and specifications.

All work indicated on the drawings and not mentioned in the specifications, or vice-versa, and all work and material usual and necessary to make the work complete in all its parts, whether or not they are indicated on the drawings or mentioned in the specifications, shall be furnished and executed the same as if they were called for by both the drawings and specifications.

ARTICLE 16. START OF WORK

- a) The Contractor shall commence work, at such points as the City may approve, within 45 days after the date of the Notice to Proceed by the City, or, if no such notice is issued, within 60 days after the execution of this Contract by the City.
- b) The time of starting may be postponed by written agreement between the City and the Contractor because of expected delays in receipt of materials and equipment, or if the season is unsuitable for commencement of the work, or because of other contingencies clearly beyond the control or responsibility of the Contractor.
- c) The City may delay the beginning of all or any part of the work if the necessary lands or rights-of-way for such work have not been obtained, or if materials or equipment to be furnished by the City are not delivered. The Contractor shall have no claim for damages on account of such delay, but shall be entitled to as much additional time in which to perform and complete this Contract on their part as the City shall certify in writing to be equitable.

ARTICLE 17. PROGRESS SCHEDULE

- a) Prior to submission of first progress payment, the Contractor shall submit a progress schedule for the term of the Contract to the City, showing in detail proposed progress for the construction of the parts of the work and proposed time for receiving required materials. Upon approval by the City, said schedule will constitute the Progress Schedule.
- b) Work shall be completed within the time specified in the Contract. Should the Contractor require additional time to complete the work, the Contractor shall document the reasons and submit a written request for extension of time. Failure to submit said written request shall preclude the Contractor from subsequently claiming time extension.
- c) If, in the opinion of the City, the Contractor fails to comply with the Progress Schedule, the City may issue written notice to that effect, or may give the Contractor a notice of failure and a designated time period to cure said failure. Should the Contractor fail to cure, the City may employ and direct labors of existing or additional forces, equipment and plant necessary to ensure the completion of that portion of the work. The City may also exercise its right to deem the Contract terminated or to order the Contractor to discontinue work. Should the City elect to have work performed by others, the Contractor shall continue to perform the remaining work under this Contract.

ARTICLE 18. TIME OF COMPLETION

- a) Time is of the essence for the completion of the Contract.
- b) The rate of progress shall be such that the whole work shall be performed in accordance with the terms of this Contract within the number of calendar days after the date of execution of the Contract as stipulated in the Contract documents, unless and except as any part may be delayed under the provisions of this Contract.
- c) It is agreed the rate of progress herein required has been conservatively adjusted to allow for ordinary delays incidental to construction work of this character. No extension of time will be allowed for ordinary delays, inclement weather and accidents, and the occurrence of such will not relieve the Contractor from the necessity of maintaining this rate of progress. If delays are caused by acts of God, acts of Government or State, strikes, extra work, floods or other contingencies clearly beyond the control or responsibility of the Contractor, the Contractor shall be entitled to as much additional time to perform and complete this Contract as the City shall certify in writing to be equitable.

ARTICLE 19. AMENDMENTS

No officer, official, agent, or employee of the City shall have the authority to amend, modify or alter this Contract or waive any of its provisions or to bind the City by making any promise or representation not contained herein except by amendment,

in writing, executed in the same manner as this Contract is executed. The Contractor may not rely on any conduct, statements, action, inaction or courses of conduct of the employees or officers of the other party as having changed, modified, or amended this Contract. The City shall not be construed as waiving a provision unless the waiver is executed in writing as an amendment to the Contract. No waiver by the City of any default or breach shall constitute a waiver of any subsequent default or breach.

ARTICLE 20. CHANGE ORDERS

Changes to the Contract require a written change order, signed by all parties to the Contract. The Chief Procurement Officer may, by written change order, signed by all parties to the original Contract, make an equitable adjustment in the Contract price if alterations to the project require an increase or decrease to the cost of the project. Changes to the scope of work or project cost which are not confirmed with a written and fully executed Change Order will not be honored and will result in non-payment for such services or work performed.

No changes in the work, Contract price, substantial completion date, final acceptance date, or any other provision of an approval by the City of the Contract documents shall be made in absence of a change order.

ARTICLE 21. DEFECTIVE WORK

- a) The inspection of work shall not relieve the Contractor of any of obligations to fulfill the Contract as prescribed. Any defective work shall be made good and unsuitable materials shall be rejected and replaced, even though such work and materials may have been previously overlooked by the City's designee and accepted or estimated for payment.
- b) If the work or any part thereof shall be found defective any time before the final acceptance of the whole work, the Contractor shall immediately make good such defect, in a manner satisfactory to the City. If any material brought to the site for use in the work or selected for the same, shall be condemned by the City as unsuitable or not in conformance with the specifications, the Contractor shall immediately remove such materials from the vicinity of the work. Any material furnished by the City which is damaged or rendered defective by the handling or improper installation by the Contractor, their agents or employees, shall be made good and replaced at the Contractor's expense.

ARTICLE 22. ABANDONMENT OF WORK

Contractor agrees that abandonment or delay of work or services shall be a violation of this Contract. The City may, by whatever legal remedies are available to it, complete or cause to be completed, the work or provision of services and the Contractor shall bear full responsibility for the entire cost of completing the terms of the Contract, and agrees to be liable to the City for any losses, damages, costs and expenses sustained or incurred by the City by reason of any of the foregoing causes.

ARTICLE 23. FAILURE TO COMPLETE WORK ON TIME

- a) The whole work shall have been performed in accordance with the terms of the Contract on or before the date stated in the specifications for completion or the date to which the time of completion shall have been extended under the provisions of this Contract.
- b) If the work specified in the Contract shall not have been physically completed by the time stipulated therein, or, in the event the Contract has been substantially completed and the project opened for traffic as directed in writing by the Engineer, but physical completion of the work is subject to delay because of minor uncompleted items which do not impair the usefulness of the project, the Contractor shall assume, without reimbursement, the entire cost of all officers and inspectors the City determines to be necessary during the period of overrun of time.
- c) If the Contractor fails to complete the work within the time specified in the Contract, the Contractor shall pay liquidated damages to the City of Fitchburg in the amount of **[insert amount]** for each calendar day of delay until the work is completed or accepted.

ARTICLE 24. NON-PERFORMANCE

In the case of any default on the part of the Contractor with respect to any of the terms of this Contract, the City shall give written notice thereof, and if said default is not made good within such time as the City shall specify in writing, the City shall notify the Contractor in writing that there has been a breach of the Contract and thereafter the City shall have the right to secure the completion of the work remaining to be done on such terms and in such manner as the City shall determine, and the Contractor shall pay for the completion of such work and reimburse the City for all expenses incurred by reason of said breach. The Contractor in case of such breach shall be entitled to receive payment only for work completed satisfactorily prior to said breach, so long as the total paid hereunder does not exceed the Contract sum, and the amount of any balance due the Contractor shall be determined by the City and certified to the Contractor. The City shall be reimbursed by the Contractor for the cost of additional services required by the City in the case of a breach.

ARTICLE 25. TERMINATION

- a) The City may without prejudice to any other right or remedy deem this Contract terminated for cause if any of the following defaults occur and are not cured after giving notice to the Contractor:
 - 1) The Contractor has filed a petition, or a petition has been filed against the Contractor, under any federal or state law concerning bankruptcy, reorganization, insolvency, or relief from creditors, and is not dismissed within sixty (60) days;
 - 2) The Contractor refuses or fails, except where extensions are provided by the City in writing, to supply the necessary skilled workers or materials to perform obligations of this Contract;
 - 3) If the City has determined that the rate of progress required for the timely completion of work is not being made;
 - 4) The Contractor fails to make prompt payment to Subcontractors for materials, equipment, or labor;
 - 5) All or part of the work has been abandoned;
 - 6) The Contractor has sublet or assigned any or all of the work without prior written consent of the City, except as permitted in this Contract;
 - 7) The Contractor has failed to comply with laws;
 - 8) The Contractor has failed to maintain insurance or bonds required by this Contract;
 - 9) The Contractor has breached any material provision of this Contract.
- b) The City may terminate this Contract for convenience if the Contractor is not in default by giving notice specifying date of termination. In such case, the Contractor shall be paid all sums due and owing under the Contract through date of termination, including retainage, plus a reasonable sum to cover expenses which the Contractor would have incurred but for the early termination of the Contract.

ARTICLE 26. SUSPENSION, DELAY, ETC.; ADJUSTMENT IN CONTRACT PRICE; SUBMISSION OF CLAIMS

Pursuant to MGL c. 30, §39O:

- a) The City may order the general Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the City; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the City to act within the time specified in this Contract, the City shall make an adjustment in the Contract price for any increase in the cost of performance of this Contract but shall not include any profit to the general Contractor on such increase; and provided further, that the City shall not make any adjustment in the Contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which this Contract provides for an equitable adjustment of the Contract price under any other Contract provisions.
- b) The general Contractor must submit the amount of a claim under provision (a) to the City in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this Contract and, except for costs due to a suspension order, the City shall not approve any costs in the claim incurred more than twenty days before the general Contractor notified the City in writing of the act or failure to act involved in the claim.

c) In the event a suspension, delay, interruption or failure to act of the City increases the cost of performance to any Subcontractor, the Subcontractor shall have the same rights against the general Contractor for payment for an increase in the cost of performance as provisions (a) and (b) give the general Contractor against the City, but nothing in provisions (a) and (b) shall in any way change, modify or alter any other rights which the general Contractor or the Subcontractor may have against each other.

ARTICLE 27. SUBSTANTIAL COMPLETION

- a) Upon substantial completion of the work required by a Contract with the commonwealth, or any agency or political subdivision thereof, for the construction, reconstruction, alteration, remodeling, repair or improvement of public ways, including bridges and other highway structures, sewers and, water mains, airports and other public works, the Contractor shall present in writing to the awarding authority its certification that the work has been substantially completed. Within twenty-one days thereafter, the awarding authority shall present to the Contractor either a written declaration that the work has been substantially completed or an itemized list of incomplete or unsatisfactory work items required by the Contract sufficient to demonstrate that the work has not been substantially completed. The awarding authority may include with such list a notice setting forth a reasonable time, which shall not in any event be prior to the Contract completion date, within which the Contractor must achieve substantial completion of the work. In the event that the awarding authority fails to respond, by presentation of a written declaration or itemized list as aforesaid, to the Contractor's certification within the twenty-one day period, the Contractor's certification shall take effect as the awarding authority's declaration that the work has been substantially completed.
- b) Within sixty-five days after the effective date of a declaration of a substantial completion, the awarding authority shall prepare and forthwith send to the Contractor for acceptance a substantial completion estimate for the quantity and price of the work done and all but one per cent retainage, if held by the awarding authority, on that work, including the quantity, price and all but one per cent retainage, if held by the awarding authority, for the undisputed part of each work item and extra work item in dispute but excluding the disputed part thereof, less the estimated cost of completing all incomplete and unsatisfactory work items and less the total periodic payments made to date for the work. The awarding authority also shall deduct from the substantial completion estimate an amount equal to the sum of all demands for direct payment filed by Subcontractors and not yet paid to Subcontractors or deposited in joint accounts pursuant to section thirty-nine F, but no Contract subject to said section thirty-nine F shall contain any other provision authorizing the awarding authority to deduct any amount by virtue of claims asserted against the Contract by Subcontractors, material suppliers or others.
- c) If the awarding authority fails to prepare and send to the Contractor any substantial completion estimate required by this section on or before the date herein above set forth, the awarding authority shall pay to the Contractor interest on the amount which would have been due to the Contractor pursuant to such substantial completion estimate at the rate of three percentage points above the rediscount rate then charged by the Federal Reserve Bank of Boston from such date to the date on which the awarding authority sends that substantial completion estimate to the Contractor for acceptance or to the date of payment therefor, whichever occurs first. The awarding authority shall include the amount of such interest in the substantial completion estimate.
- d) Within fifteen days after the effective date of the declaration of substantial completion, the awarding authority shall send to the Contractor by certified mail, return receipt requested, a complete list of all incomplete or unsatisfactory work items, and, unless delayed by causes beyond his control, the Contractor shall complete all such work items within forty-five days after the receipt of such list or before the then Contract completion date, whichever is later. If the Contractor fails to complete such work within such time, the awarding authority may, subsequent to seven days' written notice to the Contractor by certified mail, return receipt requested, terminate the Contract and complete the incomplete or unsatisfactory work items and charge the cost of same to the Contractor.
- e) Within thirty days after receipt by the awarding authority of a notice from the Contractor stating that all of the work required by the Contract has been completed, the awarding authority shall prepare and forthwith send to the Contractor for acceptance a final estimate for the quantity and price of the work done and all retainage, if held by the awarding authority, on that work less all payments made to date, unless the awarding authority's inspection

shows that work items required by the Contract remain incomplete or unsatisfactory, or that documentation required by the Contract has not been completed. If the awarding authority fails to prepare and send to the Contractor the final estimate within thirty days after receipt of notice of completion, the awarding authority shall pay to the Contractor interest on the amount which would have been due to the Contractor pursuant to such final estimate at the rate hereinabove provided from the thirtieth day after such completion until the date on which the awarding authority sends the final estimate to the Contractor for acceptance or the date of payment therefor, whichever occurs first, provided that the awarding authority's inspection shows that no work items required by the Contract remain incomplete or unsatisfactory. Interest shall not be paid hereunder on amounts for which interest is required to be paid in connection with the substantial completion estimate as hereinabove provided. The awarding authority shall include the amount of the interest required to be paid hereunder in the final estimate.

- f) The awarding authority shall pay the amount due pursuant to any substantial completion or final estimate within thirty-five days after receipt of written acceptance for such estimate from the Contractor and shall pay interest on the amount due pursuant to such estimate at the rate hereinabove provided from that thirty-fifth day to the date of payment. Within 15 days, 30 days in the case of the commonwealth, after receipt from the Contractor, at the place designated by the awarding authority, if such place is so designated, of a periodic estimate requesting payment of the amount due for the preceding periodic estimate period, the awarding authority shall make a periodic payment to the Contractor for the work performed during the preceding periodic estimate period and for the materials not incorporated in the work but delivered and suitably stored at the site, or at some location agreed upon in writing, to which the Contractor has title or to which a Subcontractor has title and has authorized the Contractor to transfer title to the awarding authority, upon certification by the Contractor that he is the lawful owner and that the materials are free from all encumbrances. The awarding authority shall include with each such payment interest on the amount due pursuant to such periodic estimate at the rate herein above provided from the due date. In the case of periodic payments, the Contracting authority may deduct from its payment a retention based on its estimate of the fair value of its claims against the Contractor, a retention for direct payments to Subcontractors based on demands for same in accordance with the provisions of section thirty-nine F, and a retention to secure satisfactory performance of the Contractual work not exceeding five per cent of the approved amount of any periodic payment, and the same right to retention shall apply to bonded Subcontractors entitled to direct payment under section thirty-nine F of chapter thirty; provided, that a five per cent value of all items that are planted in the ground shall be deducted from the periodic payments until final acceptance.
- g) No periodic, substantial completion or final estimate or acceptance or payment thereof shall bar a Contractor from reserving all rights to dispute the quantity and amount of, or the failure of the awarding authority to approve a quantity and amount of, all or part of any work item or extra work item.
- h) Substantial completion, for the purposes of this section, shall mean either that the work required by the Contract has been completed except for work having a Contract price of less than one per cent of the then adjusted total Contract price, or substantially all of the work has been completed and opened to public use except for minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the work required by the Contract.

ARTICLE 28. FINAL ACCEPTANCE

- a) After the issuance of a Certificate of Substantial Completion for the entire work, and after the work required by the Contract, including change orders and punch list items, the Contractor shall submit the following items to the City, together with any such additional items as may be required by the Contract documents:
 - 1) Final application for payment showing final accounting of all changes in the work;
 - 2) Certification and evidence that all taxes, fees, and similar obligations have been met;
 - 3) Consent of the Contractor's surety to final payment executed by applicable bonding company(s);
 - 4) Certified copy of the Punch List stating that the Contractor has completed or corrected all items;
 - 5) Final record Drawings and documents in forms specified in the Contract documents;
 - 6) Such other items required by the Contract documents.

ARTICLE 29. ADJUSTMENT OF PRICE WHERE SITE CONDITIONS DIFFER SUBSTANTIALLY OR MATERIALLY

As required by MGL c. 30, §39N, the parties hereby agree:

If, during the progress of the work, the Contractor or the City discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the Contract documents either the Contractor or the Contracting authority may request an equitable adjustment in the Contract price of the Contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a Contractor, or upon its own initiative, the Contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the Contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and Contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the Contracting authority shall make an equitable adjustment in the Contract price and the Contract shall be modified in writing accordingly.

ARTICLE 30. PAYMENT TERMS

- a) Within five (5) calendar days of the end of each month, the Contractor shall provide an itemized request for payment for work completed to date. Upon receipt of request for payment, the City shall, except as hereinafter provided, make an estimate in writing of the total amount of the work done, and the amount earned by the Contractor. The City shall retain five percent of such estimated value, as determined by the Engineer, as part security for fulfillment of this Contract by the Contractor and shall deduct from the balance all previous payments and all sums to be retained under the provisions of this Contract.
- b) With any invoice the Contractor shall submit evidence satisfactory to the City that the work has been completed and that all payrolls, material bills and other indebtedness connected with the work has been paid. The billings shall include, if applicable, all charges for consultants, Subcontractors, plans, equipment, models, renderings, travel, reproductions, postage and delivery, and all other expenses. There shall not be any markup for overhead, administration or profit for any of the above-listed services.
- c) Payment will not be made for any materials not incorporated in the work. Invoices shall not be paid until and unless Certified Payroll Forms have been submitted to the City and accepted.
- d) If for any reason the City makes a payment under this Contract in error, the City may recover the amount overpaid or, if applicable, may apply any overpayment to a future installment payment.
- e) The City is not responsible for payment of invoices sent to an address other than specified in this Contract.

ARTICLE 31. PAYMENT REQUIREMENTS

Forthwith after the Contractor receives payment on account of a periodic estimate, the Contractor shall pay to each Subcontractor the amount paid for the labor performed and the materials furnished by that Subcontractor.

ARTICLE 32. FINAL PAYMENT

Upon Final Acceptance of the work, the Contractor shall be entitled to payment of the balance of the Contract price. Final payment shall be in accordance with the process set forth in the Contract documents.

ARTICLE 33. CONTRACT CONDITIONS SPECIFICALLY REQUIRED BY LAW

- a) Each and every provision of law and clause required by law to be inserted in this Contract shall be deemed to be inserted herein and the Contract shall be read and enforced as though it were included herein and if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party, the Contract shall forthwith be physically amended to make such insertion.

- b) Pursuant to MGL c. 30, §39M, an item shall be considered equal to the item so named or described if, in the opinion of the City: (1) it is at least equal in quality, durability, appearance, strength and design, (2) it will perform at least equally the function imposed by the general design for the public work being Contracted for or the material being purchased, and (3) it conforms substantially, even with deviations, to the detailed requirements for the item in the Project specifications.
- c) Every Contract subject to section forty-four A shall include specifications for the installation of weather protection and shall require that the Contractor shall install the same and that he shall furnish adequate heat in the area so protected during the months of November through March. Standards for such specifications shall be established by the commissioner or his designee.
- d) Pursuant to MGL c. 149, §26, in the employment of mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works by the Commonwealth, or by a county, city, authority or district, or by persons Contracting or subcontracting for such works, preference shall first be given to citizens of the Commonwealth who have been residents of the Commonwealth for at least six months at the commencement of their employment who are veterans as defined in clause Forty-three of section seven of chapter four, and who are qualified to perform the work to which the employment relates; and secondly, to citizens of the Commonwealth generally who have been residents of the Commonwealth for at least six months at the commencement of their employment, and if they cannot be obtained in sufficient numbers, then to citizens of the United States; and preference in employment shall be given to veterans and citizens who are residents of the City of Fitchburg.
- e) Pursuant to MGL c. 149, §34, no laborer, workman, mechanic, foreman or inspector employed under this Contract shall be required or permitted to work more than eight hours in any one day or more than forty-eight hours in any one week, or more than six days in any one week, except in cases of emergency.

ARTICLE 34. WORKFORCE PARTICIPATION GOALS

If funding for this Project is provided by the Commonwealth of Massachusetts, in whole or in part (such as reimbursements, grants, and the like), the Contractor shall be required to meet the current Workforce Participation Goal Requirements in accordance with MGL c. 149 § 44A(2)(G). At any point during the Contract period, the City may require of the Contractor a report of the projected or current makeup of the Contractor's workforce. Failure to submit this report when requested could result in penalties as enumerated in the statute.

ARTICLE 35. WAGE RATES

- a) The Contractor shall comply with MGL c. 149, §§26-27H. The prevailing wage schedule is provided with the Contract Documents.
- b) Where the work under this Contract involves the construction of public works, the Contractor agrees to pay the prevailing wage and comply with MGL c. 149, §§26-27D. Pursuant to MGL c. 149, §§26 & 27B, the Contractor shall file weekly a Compliance Form and Certified Payroll records with the City for all employees who have worked on the project. The City and the Contractor must preserve said records for a period of not less than three years.
- c) The City retains the right to withhold payment to Contractor for non-compliance with certified payroll.

ARTICLE 36. FOREIGN CORPORATIONS

In accordance with MGL c. 30, 30m, §39L, for any work in the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or other public works (1) shall not enter into a Contract for the work with, and shall not approve as a Subcontractor furnishing labor and materials for a part of the work, a foreign corporation which has not filed with the awarding authority a certificate of the state secretary stating that the corporation has complied with requirements of section 15.03 of subdivision A of Part 15 of chapter 156D and the date of compliance, and further has filed all annual

reports required by section 16.22 of subdivision B of Part 16 of said chapter 156D, and (2) shall report to the state secretary and to the department of corporations and taxation any foreign corporation performing work under such Contract or subcontract, and any person, other than a corporation, performing work under such Contract or subcontract, and residing or having a principal place of business outside the commonwealth.

ARTICLE 37. EXAMINATION OF WORK

- a) Performance evaluation is a component of the City's Contract management protocol. Evaluation will be conducted by City personnel and/or the City's representative(s) using direct monitoring, indirect monitoring, survey, interview or milestone reviews.
- b) Evaluations may include written reports and other documents regarding Contractor performance, and any written Contractor responses or documents. All evaluation material and supporting documentation will be maintained in the Contractor's file, and will be considered as a "public record." The evaluation shall be part of the record that the City is required to review, and may be considered in determining future Contract eligibility.
- c) The opinions of the City are not statements of fact, and the Contractor shall not institute suit based on statements of opinion made by the City or its employees, officers or representatives.
- d) The City shall be furnished with every reasonable facility for determining that the work is being performed in accordance with the requirements and intention of this Contract, even to the extent of uncovering or taking down portions of finished work.
- e) Should the work exposed or examined prove satisfactory, the uncovering or taking down, the restoring and replacing of materials and the rebuilding of the part shall be considered extra work, unless the original work was done in the absence of the City or Inspector without written authorization. Should the work exposed or examined prove unsatisfactory, the uncovering, taking down, replacing and making good shall be at the expense of the Contractor.

ARTICLE 38. EXTRA WORK

- a) The Contractor shall do any work incidental to the proper completion of the Contract which may not be otherwise provided for in these specifications when ordered in writing by the City, either at the price agreed upon before the work is commenced, and stated in the order for the work. No extra work will be paid for unless specifically ordered as extra work by the City and made in writing.
- b) The Contractor shall, upon request by the City, furnish itemized statements of the cost of the work ordered and allow the City access to the related accounts, bills and vouchers.
- c) The City shall consider, in the cost of extra work described above, the reasonable cost to the Contractor of all materials used; of all labor, common and skilled; of foremen; and the fair rental of all machinery used for the extra work for the period of such use.
- d) When extra work is ordered near the completion of the Contract, or when extra work is ordered at any time during the progress of the work, which requires, in the opinion of the City's designee, an unavoidable increase of time for the completion of the Contract, a suitable extension of the time of completion shall be made.

ARTICLE 39. RETAINAGE

The City may at any time keep any monies, which would otherwise be payable, and apply the same or as much as may be necessary to the payment of any expenses, losses or damages, incurred by the City and in accordance with provisions of MGL c. 30, §39G, as amended.

ARTICLE 40. INSURANCE

- a) The Contractor shall, at its own expense, obtain and maintain general liability and motor vehicle liability insurance policies protecting the City in connection with any operations included in this Contract, and shall have the City as an additional insured on the policies.
- 1) General liability coverage shall be in the amount of at least \$1,000,000 per occurrence and \$2,000,000 aggregate for bodily injury liability and \$1,000,000 per occurrence and \$2,000,000 aggregate for property damage liability.
- 2) Automobile liability coverage shall include coverage for owned, hired and non-owned vehicles and shall be in the amount of at least \$1,000,000 per person and \$1,000,000 per occurrence for bodily injury liability and \$1,000,000 per occurrence for property damage liability.
- 3) Contractors shall provide Worker's Compensation coverage within the statutory limits and in accordance with MGL c. 149 §34A.
- 4) Contractor shall provide any such other types of insurance as may be additionally required as part of this Contract.
- 5) Companies providing insurance coverage must be licensed to transact business in the Commonwealth of Massachusetts.
- 6) The Contractor shall furnish Certificates of Insurance prior to commencement of this Contract.
- 7) Certificates and any and all renewals substantiating that required insurance coverage is in effect shall be filed with the Contract. Any cancellation of insurance whether by the insurers or by the insured shall not be valid unless written notice thereof is given by the party proposing cancellation to the other party and to the City at least fifteen days prior to the intended effective date thereof, which date should be expressed in said notice.
- 8) The Certificate of Insurance shall be provided to the City in accordance with terms stated. Certificates shall display each type of insurance, insurance company, policy number, amount of insurance and policy effective and expiration dates, and the NA/C number assigned to the insurance company. The Certificate holder shall be listed as The Chief Procurement Officer, City of Fitchburg and shall contain a provision or endorsement that the coverage afforded shall not be cancelled, materially changed, or renewal refused until at least thirty days prior written notice has been provided to the Certificate Holder.
- 9) The City of Fitchburg, its employees, agents and representatives shall be named as additional insured with respect to all coverage, except for Workers Compensation.

ARTICLE 41. LABOR & MATERIALS PAYMENT BOND

- a) The Contractor shall furnish a payment bond from a surety company qualified to do business under the laws of the Commonwealth of Massachusetts and satisfactory to the City, in the amount designated in the bid documents, for payment for labor performed or furnished and materials used or employed therein, when the Contract is executed.
- b) It is distinctly agreed and understood that any changes made in the specifications for this work, whether such changes increase or decrease the amount of work required, or any change in the manner or time of payments made by the City to the Contractor, shall in no way void, release or affect the liability and surety on the bond given by the Contractor.

ARTICLE 42. GUARANTEE

- a) Except as otherwise specified, all work shall be guaranteed by the Contractor against defects resulting from the use of inferior materials, equipment, or workmanship for one year from the date of final completion of the Contract.
- b) If, within any guarantee period, repairs or changes are required in connection with guaranteed work, which in the opinion of the City are rendered necessary as a result of the use of materials, equipment or workmanship which are inferior, defective

or not in accordance with the terms of the Contract, the Contractor shall, promptly upon receipt of notice from the City and at its own expense:

- 1) make goods and services conform to this Contract;
- 2) make good all damage to the City, or equipment or contents thereof, which, in the opinion of the City, is the result of the use of materials, equipment or workmanship which are inferior, defective, or not in accordance with the terms of the Contract; and
- 3) make good any work or material, or the equipment or site, which is disturbed in fulfilling any such guarantee.

ARTICLE 43. INDEPENDENT CONTRACTOR

All of the services to be performed under the terms of this Contract will be rendered by the Contractor as an independent Contractor. None of the terms of this Contract shall create a principle-agent, master-servant or employer-employee relationship between the City and the Contractor.

ARTICLE 44. TIME RECORDS

The Contractor shall cause to be maintained complete, accurate, and detailed records of all time devoted to the project by the Contractor and each consultant or Subcontractor employed by the Contractor. The City may at all reasonable times audit such records. The Contractor shall comply with MGL c. 30, §39R, which requires:

- a) The Contractor shall make, and keep for at least six years after final payment, books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions and dispositions of the Contractor, and
- b) until the expiration of six years after final payment, the office of inspector general, and the commissioner of capital asset management and maintenance shall have the right to examine any books, documents, papers or records of the Contractor or of his Subcontractors that directly pertain to, and involve transactions relating to, the Contractor or his Subcontractors, and
- c) if the agreement is a Contract as defined herein, the Contractor shall describe any change in the method of maintaining records or recording transactions which materially affect any statements filed with the awarding authority, including in his description the date of the change and reasons therefor, and shall accompany said description with a letter from the Contractor's independent certified public accountant approving or otherwise commenting on the changes, and
- d) if the agreement is a Contract as defined herein, the Contractor has filed a statement of management on internal accounting controls as set forth in paragraph (c) below prior to the execution of the Contract, and
- e) if the agreement is a Contract as defined herein, the Contractor has filed prior to the execution of the Contracts and will continue to file annually, an audited financial statement for the most recent completed fiscal year.

ARTICLE 45. SEVERABILITY

If a court declares one or more of the provisions of this Contract invalid, the validity of the remaining provision of this Contract shall not be affected thereby.

ARTICLE 46. DISCRIMINATION

In the performance of this Contract, the Contractor shall provide equal employment opportunities for all persons, regardless of race, color, religion, creed, sex, age, national origin, disability or political affiliation. The Contractor shall comply with provisions of MGL c. 151B and all other applicable anti-discrimination and equal opportunity laws.

ARTICLE 47. CONFLICT OF INTEREST

By execution of this Contract with the City, the Contractor acknowledges that the City is a municipality for the purposes of MGL c. 268A (the Massachusetts conflict of interest statute), and agrees, as circumstances require, to take actions and to

forbear from taking actions so as to be in compliance at all times with the obligations of the Contractor based on said statute. Municipal employees and their family members are not allowed to have a financial interest in a Contract with the City they are employed by. Municipal employees and their family members are also forbidden to solicit or accept gifts, gratuities, or favors from anyone looking to conduct business with the City of Fitchburg. Incidents of this nature will be reported to the appropriate authorities for investigation.

ARTICLE 48. CONFIDENTIALITY

- a) For all Contracts involving the Contractor's access to personal information as defined in MGL c. 93H, and personal data, as defined in MGL c. 66A, or access to systems containing such information or data, the Contractor certifies to protect any and all information and data.
- b) The Contractor shall also protect the physical security and restrict any access to personal or other City data in the Contractor's possession or used by the Contractor in the performance of this Contract, which shall include, but is not limited to the City's public records, employee records, document, digital and electronic files, software, equipment, or systems.

ARTICLE 49. INDEMNIFICATION

To the fullest extent permissible by law, the Contractor hereby agrees to indemnify, defend, and save harmless the City of Fitchburg and all of the City's officers, agents and employees from and against all damages, liabilities, actions, suits, proceedings, demands, losses, costs and expenses (including reasonable attorneys' fees) and claims of liability of every name and nature, including costs of defending any action, for or on account of any injuries to persons or damage to property of the City or any person, firm, corporation or association arising out of or resulting from any act, omission, or negligence of the Contractor, Subcontractors and its and their agents or employees in the performance of the work covered by this Contract and/or failure to comply with terms and conditions of this Contract, but only in respect of such injuries or damages sustained during the performance and prior to the completion and acceptance of the work covered by this Contract. The existence of insurance shall in no way limit the scope of this indemnification. This agreement shall not waive or abrogate the application of MGL c. 258, as the same may be amended from time to time.

ARTICLE 50. MISCELLANEOUS PROVISIONS

- a) This Contract shall be binding upon the City and the Contractor and the partners, successors, heirs, executors, administrators, assigns and legal representatives of the City and the Contractor. Neither the City nor the Contractor shall assign, sublet or transfer any interest in this Contract without the prior written consent of each other, and such consent shall not be unreasonably withheld.
- b) No public official, employee, or agent of the City shall have any personal liability for the obligations of the City set forth in this Contract.

ARTICLE 51. CONSENT TO VENUE

The Contractor agrees that it shall commence and litigate all actions or proceedings arising in connection with this Contract exclusively in the Fitchburg District Court or in the Worcester Superior Court, both of which are located in the County of Worcester, Commonwealth of Massachusetts. The aforementioned choice of venue is intended to be mandatory and not permissive in nature, thereby precluding the possibility of the Contractor commencing or prosecuting any litigation against the City, with respect to or arising out of this Contract, in any court or forum other than those specified in this paragraph. It is further agreed that the parties to this Contract hereby waive their rights to a jury trial.

ARTICLE 52. NOTICE

Notices to the Contractor shall be deemed given when delivered to the Contractor's field office on site, or when delivered by United States Postal Service to the Contractor's address specified in the Contract, or when delivered by courier to either location.

All notices under this Contract shall be given in writing and shall be effective upon receipt by hand delivery or certified mail to the Chief Procurement Officer, City Hall, 718 Main Street, Suite 208, Fitchburg, MA 01420.

IN WITNESS WHEREOF the parties hereto have executed this Contract the day and year first above written.

FOR THE CONTRACTOR

Signature
Printed Name:

FOR THE CONTRACTING DEPARTMENT:

[insert department head name]
[insert title]

FOR THE CITY OF FITCHBURG

Samantha M. Squailia
Mayor

SUFFICIENT AS TO LEGAL FORM:

Lisa L. Mead
City Solicitor

Mary A. Delaney
Chief Procurement Officer who certifies, that to the best of their belief and knowledge, the Contract was, procured pursuant to the procurement laws of the Commonwealth of Massachusetts to the extent such laws apply.

Jacquelyn Cronin
City Auditor who certifies, pursuant to Massachusetts General Law C.44, §31C, that the proposed expenditure is not in excess of the appropriation or the unexpended balance thereof and that the Mayor is authorized to sign this Contract.

Account number: _____

Appropriation: _____