TERMS AND CONDITIONS NEGOTIATIONS

WWEMA F&CA COUNCIL MEETING MAY 16-17, 2018

INDIANAPOLIS, INDIANA

Susan Button – Xylem, Inc.
Jim Brown – Experienced Corporate Counsel
LIMITATION OF LIABILITY

Seller’s maximum liability to Buyer shall be limited to an amount equal to the greater of $5,000,000 or one hundred fifty percent (150%) of the Total Purchase Value for the Work.

Notwithstanding the foregoing, nothing in this provision shall be deemed to limit Seller’s liability to less than the amounts of Seller’s insurance. In addition, this limit of liability shall not include, nor shall it limit, Seller’s indemnity obligations or for liability for physical damage to or loss of property; pollution; discharge of hazardous material; breach of contract or warranty; willful misconduct; violation of laws; infringement of intellectual property rights; or failure to pay taxes.
WAIVER OF CONSEQUENTIAL DAMAGES

Neither Contractor nor Seller will be liable to the other party for any consequential damages, including any damages for failure to pay amounts owed for the equipment, even if advised of the possibility of such damages or if such possibility was reasonably foreseeable, other than with respect to any breach of the contract by Seller that causes harm to Contractor, Owner, or another third party.
INDEMNITY #1

Seller obligates itself to Buyer, Buyer’s surety, Owner, and any other party required to be indemnified under the Prime Contract, and their officers, directors, employees, agents, representatives, invitees, contractors, and subcontractors, jointly and severally, in the same manner and to the extent Buyer is obligated under the Prime Contract.

Seller shall release, defend, indemnify, save, and hold harmless Buyer, Buyer’s surety, Owner and other indemnified parties, and each of their officers, directors, employees, agents, invitees, partners, affiliates, contractors, and subcontractors, against and from, any loss, damage, costs, suits, claims, liabilities, expenses, (including attorneys’ and expert witness’ fees) for damages to property, including loss of use, injuries to persons, including death, liens or encumbrances, violation of laws, infringement of any intellectual property right, and/or breach of any provision or covenant of this agreement, regardless of fault, unless the fault is the sole negligence of the party to be indemnified.
INDEMNITY #2

13. INDEMNITIES

a. **Definitions.** As used in this Contract, the following terms shall have the meanings ascribed to them below unless the context clearly and unambiguously requires that such terms be given a different meaning:

   (i) "Claims" shall mean any claims, demands, complaints, losses, fines, penalties, citations, damages, cause of action, suits, judgments, orders, expenses, or costs, including, without limitation, court costs, reasonable attorneys' fees, and expert witnesses' fees.

   (ii) "Company Group" shall mean Company and its parent, affiliates, and subsidiary companies, its and their respective contractors of any tier (other than Contractor and its subcontractors), co-lessees, co-owners, partners, joint venturers, together with its and all of their respective officers, directors, employees, in-house legal counsel, agents, representatives, and invitees, and the respective successors, spouses, relatives, dependents, heirs, and estate of any of the foregoing.

   (iii) "Contractor Group" shall mean Contractor and its parent, affiliates, and subsidiary companies, its and their respective subcontractors of any tier, together with its and all of their respective officers, directors, employees, in-house legal counsel, agents, representatives, and invitees, and the respective successors, spouses, relatives, dependents, heirs, and estate of any of the foregoing.

   (iv) "Group" shall mean the Company Group, the Contractor Group, or both, as the context requires.
b. GENERAL INDEMNITIES.
(i) SUBJECT ONLY TO SECTION 13(B)(iii) BELOW, CONTRACTOR HEREBY AGREES TO RELEASE, INDEMNIFY, PROTECT, DEFEND, AND HOLD HARMLESS COMPANY GROUP FROM AND AGAINST ANY AND ALL CLAIMS RELATED TO OR ARISING FROM WORK PERFORMED PURSUANT TO THIS CONTRACT FOR (I) THE INJURY, ILLNESS, OR DEATH OF ANY MEMBER OF CONTRACTOR GROUP, OR (2) THE LOSS, DAMAGE, DESTRUCTION, AND/OR WRECK AND DEBRIS REMOVAL OF ANY PROPERTY BELONGING TO ANY MEMBER OF CONTRACTOR GROUP, WITHOUT REGARD TO WHETHER ANY SUCH CLAIM IS CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT; ACTIVE OR PASSIVE), STRICT LIABILITY, STATUTORY LIABILITY, CONTRACTUAL LIABILITY, OR OTHER FAULT (EXCLUDING ONLY THE GROSS NEGLIGENCE AND INTENTIONAL MISCONDUCT) OF ANY MEMBER OF THE COMPANY GROUP OR BY ANY DEFECT OR PRE-EXISTING CONDITION (WHETHER KNOWN OR UNKNOWN; PATENT, LATENT, OR OTHERWISE).
INDEMNITY #2, cont.

(ii) COMPANY HEREBY AGREES TO RELEASE, INDEMNIFY, PROTECT, DEFEND, AND HOLD HARMLESS CONTRACTOR GROUP FROM AND AGAINST ANY AND ALL CLAIMS RELATED TO OR ARISING FROM WORK PERFORMED PURSUANT TO THIS CONTRACT FOR (1) THE INJURY, ILLNESS, OR DEATH OF ANY MEMBER OF COMPANY GROUP, OR (2) THE LOSS, DAMAGE, OR DESTRUCTION OF ANY PROPERTY BELONGING TO ANY MEMBER OF COMPANY GROUP AND WHICH IS SITUATED AT THE SITE AT WHICH THE APPLICABLE WORK IS TO BE PERFORMED HEREUNDER, WITHOUT REGARD TO WHETHER ANY SUCH CLAIM IS CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT; ACTIVE OR PASSIVE), STRICT LIABILITY, STATUTORY LIABILITY, CONTRACTUAL LIABILITY, OR OTHER FAULT (EXCLUDING ONLY THE GROSS NEGLIGENCE AND INTENTIONAL MISCONDUCT) OF ANY MEMBER OF THE CONTRACTOR GROUP OR BY ANY DEFECT OR PRE-EXISTING CONDITION (WHETHER KNOWN OR UNKNOWN; PATENT, LATENT, OR OTHERWISE).
c. Notwithstanding anything contained in Section 13d(b) of this Contract to the contrary, in the event that an injury or accident giving rise to a Claim which is subject to the laws of any jurisdiction that prohibits or limits the Parties' ability to provide the indemnity set forth above, then, if such law must be applied, the indemnifying Party's obligations shall exist to the full extent allowed by the law of such jurisdiction; and such indemnifying Party voluntarily agrees to carry the maximum amount of insurance which may be allowed or required by the law of such jurisdiction for the protection of the indemnified Parties against such loss or liability. The Parties agree that their respective indemnity obligations hereunder are independent of any insurance which such Parties may be required to carry hereunder. The liabilities assumed by Contractor pursuant to this Section 13 shall not be limited to the amounts of any current property or liability insurance carried by Contractor.

d. Any indemnified Party under this Section 13 shall have the right to participate at its own expense, with attorneys of its choice, in the defense of any Claim for which it has rights to indemnity pursuant to this Section without releasing the indemnifying Party from any of its indemnity obligations hereunder; provided, however, that the indemnifying Party shall have the exclusive control of the defense and settlement of any such Claim; provided, further that the indemnifying Party shall not have the right to settle any Claim for any resolution other than the payment of money without the indemnified Party's express, written consent.
INDEMNITY #2

13. INDEMNITIES

a. Definitions. As used in this Contract, the following terms shall have the meanings ascribed to them below unless the context clearly and unambiguously requires that such terms be given a different meaning:

(i) "Claims" shall mean any claims, demands, complaints, losses, fines, penalties, citations, damages, cause of action, suits, judgments, orders, expenses, or costs, including, without limitation, court costs, reasonable attorneys' fees, and expert witnesses' fees.
(ii) "Company Group" shall mean Company and its parent, affiliates, and subsidiary companies, its and their respective contractors of any tier (other than Contractor and its subcontractors), co-lessees, co-owners, partners, joint venturers, together with its and all of their respective officers, directors, employees, in-house legal counsel, agents, representatives, and invitees, and the respective successors, spouses, relatives, dependents, heirs, and estate of any of the foregoing.
(iii) "Contractor Group" shall mean Contractor and its parent, affiliates, and subsidiary companies, its and their respective subcontractors of any tier, together with its and all of their respective officers, directors, employees, in-house legal counsel, agents, representatives, and invitees, and the respective successors, spouses, relatives, dependents, heirs, and estate of any of the foregoing.
(iv) "Group" shall mean the Company Group, the Contractor Group, or both, as the context requires.
WARRANTY

Seller represents and warrants to Buyer that the goods and services shall be free from all defects, of the best quality, be fit and appropriate for the purpose intended, and strictly conform to the provisions, specifications, performance standards, drawings, samples or other descriptions contained herein or in the Prime Contract, or as otherwise set forth. Seller agrees to make good, at its own expense, any defect or damage in goods and services which may occur or develop for a minimum of one year after Buyer's release from responsibility to Owner. If after the date for commencement of warranties, any work is found to be not in accordance with this Agreement, Seller shall correct work promptly after receipt of written notice. The applicable warranty period shall be extended twelve (12) months from the performance of the corrected work. The cost of labor, materials and expenses associated with work required to restore equipment performance to the requirements of this Agreement will be borne solely by the Seller.
PAYMENT TERMS

Requisitions for payment shall be submitted by the 25th day of the month. Buyer shall pay Seller within 60 days of Buyer’s receipt of payment from the Owner, which is an express condition precedent to Buyer’s payment obligations to Seller. 10% retainage shall be withheld upon each progress payment and released upon Final Completion. Buyer may, in addition to any other rights under this Agreement, withhold payment of all or a portion of any Requisition for Payment to the extent, in Buyer’s opinion, necessary to protect Buyer from loss due to any failure of Seller to meet its obligations under this agreement. Buyer may withhold 200% of the estimated value of any punchlist items from the final payment.
LIQUIDATED DAMAGES

The parties’ rights, duties, and obligations with respect to liquidated damages shall be the same as those set forth in the General Contract between the Owner and the Contractor, flowed down to apply equally to this Purchase Order.

The time of Seller’s performance is of the essence. Seller agrees to reimburse Contractor for any and all liquidated and/or actual damages that may be assessed by Owner against Contractor, or that Contractor may otherwise incur that may relate to Seller’s alleged failure to perform the Work required by this Contract within the time fixed or in the manner provided for herein. Seller also agrees to pay Contractor upon demand any increased costs or other damages Contractor may sustain by reason of Seller’s alleged delay or other failure, whether or not liquidated or actual damages are assessed by Owner. The payment of such damages shall not release Seller from its obligations to fully perform this Contract.
INCORPORATION OF PRIME CONTRACT/SPECIFICATIONS

(a) The term “Prime Contract” as used herein refers to all the general, supplementary and special conditions, drawings, specifications, amendments, modifications and all other documents forming or by reference made a part of the contract between Contractor and Owner.

(b) Seller, by signing this Contract, acknowledges that it has independently assured itself that all of the Prime Contract documents have been available to it, and confirms that it has examined all such documents and agrees that all of the aforesaid Prime Contract documents shall be considered a part of this Contract by reference thereto. Seller agrees to be bound to Contractor and Owner by the terms and provisions thereof so far as they apply to the Work, unless otherwise provided herein.
DISPUTE RESOLUTION

(a) In the event of any request or claim by Seller seeking additional time or compensation which arises out of or is related to the acts or omissions of the Owner, changes to or defects in the Prime Contract, or any other claim for which the Owner may have responsibility, Seller agrees to be bound to Contractor to the same extent that Contractor is bound to Owner, both by the terms of the Prime Contract and by any and all decisions or determinations made there under by the party, board or court as authorized in the Prime Contract for resolving such claims. Seller agrees to be bound by any final determination as rendered on its claim, whether pursuant to any such Disputes clause or otherwise, and Seller shall in no event be entitled to receive any greater amount from Contractor than Contractor is entitled to and actually does receive from Owner on account of Seller's claims, less any markups or costs incurred by Contractor and to which Contractor is otherwise entitled, and Seller agrees that it will accept such amount, if any, received by Contractor from Owner as full satisfaction and discharge of such claims. Seller agrees that it will not take any other action with respect to any such claims.

(b) Any dispute between Contractor and Seller which cannot be brought under the Section above shall be decided by Contractor whose decision thereon shall be final and binding. Seller shall proceed diligently with the Work, pending final determination pursuant to this or any other Disputes clause or pursuant to any other action taken with respect to a claim or claims.
FORCE MAJEURE

Unavoidable delays in the prosecution or completion of the Work shall include delays which, in the opinion of the Buyer, result from causes which are beyond the control and without the fault or negligence of the Seller, which could not have been foreseen by the Seller, and which could not have been avoided by the exercise of care, prudence and diligence on the part of the Seller. The Buyer and the Seller anticipate the possibility of such delays in the preparation for or prosecution of the Work, and provision is herein made to compensate the Seller in time only for such delays. Delays due to acts of God or public enemy, war or other national emergency making performance temporarily impossible or illegal, strikes and labor disputes not brought on by any act or omission of the Seller, fires, floods, epidemics, quarantine restrictions, freight embargoes, weather of unusual severity such as cyclones or tornadoes, or excessive adverse weather which is considered abnormal and unforeseeable for this region at the appropriate time of year, will be considered to be unavoidable delays, provided Seller notifies Buyer of such delay within five (5) days of the event causing the delay.
LIENS

Seller shall promptly pay all claims of persons or firms furnishing labor, equipment or materials used in providing the Product. Buyer requires Seller to submit satisfactory evidence of payment and releases of all such claims in accordance with this clause. Seller agrees to waive any and all liens, which might otherwise be asserted in the resolution of disputes arising out of the performance of this Agreement and agrees that no lien shall be filed or maintained against any property where work for the Project is to be performed, or any interest of Owner or Buyer in such property by or in the name of the Seller or any Subsupplier or subcontractor acting or claiming through or under Seller for work performed or materials furnished in connection with this Agreement. Seller further agrees that is will defend, indemnify and hold Buyer, Owner, and the Buyer Parties, their affiliates and authorized assigns harmless against any and all loss, cost, expense (including attorney's fees and cost of defense), liability, or demand arising from any such claim. If a notice of lien or similar notice alleging non-payment is filed or served upon Buyer or its client by a laborer, materialman or subcontractor of Seller, Seller shall remove such lien within two (2) days from notice from Buyer, and Buyer may retain payment to Seller sufficient to completely indemnify Buyer and its client against such potential lien. If such payment amount is not sufficient to fully indemnify Buyer and its client, Seller shall compensate Buyer and its client for the insufficient amount.

Seller further agrees to incorporate the substance of this provision into all of its Agreement with Subsuppliers or subcontractor. Prior to invoicing final payment, Seller and its Subsupplier or subcontractors shall sign a release of Liens in a form prepared by Buyer and furnished to Seller. Seller shall execute such forms and additional documents as required by Buyer or Owner to the extent deemed necessary to affect such waiver.
INSURANCE, BONDING, & LETTERS OF CREDIT

Seller shall maintain insurance in a form and manner, and in such amounts, that Buyer specifies. If Buyer determines that Seller's insurance is inadequate to protect Buyer, or if Buyer determines that additional insurance is required, Seller shall immediately procure such insurance to Buyer's satisfaction. If Seller fails to maintain insurance satisfactory to Buyer, Buyer may purchase such insurance and charge Seller/withhold from payment the associated costs. Seller shall include Buyer as an additional insured on all of its insurance policies and shall waive its right to subrogation.

Within ten (10) Days after the Notice to Proceed and as a condition for payments under this Agreement, Seller shall furnish to Buyer performance and payment bonds, each in an amount at least equal to the Contract Price, as security for the faithful performance and payment of all of Seller's obligations under the Contract Documents. In addition, within ten (10) days after the equipment is installed, Seller shall furnish to Buyer a warranty bond in an amount at least equal to ten percent (10%) of the Contract Price, as security for the faithful performance and payment of Seller’s warranty obligations under the Contract Documents. These bonds shall remain in effect until one (1) year after the date when final payment is made or the date the equipment is placed into operation, whichever is later. Seller shall also furnish such other bonds as are required by the Contract Documents. All bonds shall be in the form prescribed by the Contract Documents and shall be executed by such sureties rated A+ or better. If the surety on any bond furnished by Seller is declared bankrupt or becomes insolvent or its right to do business is terminated in any state where any part of the Project is located or it ceases to meet the requirements of this paragraph, Seller shall promptly notify Buyer and shall, within 20 days after the event giving rise to such notification, provide another bond and surety, both of which shall comply with the requirements of this paragraph.
Within ten (10) Days after the Notice to Proceed and as a condition for payments under this Agreement, Seller shall provide a Performance Letter of Credit to Buyer to secure its obligations under this Agreement. The Performance Letter of Credit shall be in the form of an irrevocable standby Letter of Credit as set forth in the Agreement, in favor of Buyer and from a bank acceptable to Buyer. The value of the Performance Letter of Credit will be in an amount at least equal to ten percent (10%) of the total Agreement Price valid from the date of issuance of Performance Letter of Credit until Final Completion. In the event that Seller has failed to perform some or all of its obligations under the Agreement, Buyer shall have the right to make a draw against the Performance Letter of Credit per the conditions of the same.
INCORPORATION CLAUSE

Buyer assumes no responsibility for any understanding or representation made by any of its officers or agents prior to the execution of this Contract, unless such understanding or representation by Buyer is expressly stated in this Contract. Buyer is entitled to rely on all proposals and representations made by Seller in bidding on this Contract. Unless specifically referenced herein and attached hereto, no acknowledgements of the Contract or terms of any nature submitted by Seller prior to the execution of this Contract shall be of any effect.
TERMINATION

Seller’s performance under this Agreement may be terminated by Buyer for convenience in whole or in part whenever Buyer shall elect. Upon receipt of any such notice, Seller shall, unless the notice requires otherwise, immediately discontinue Work on the date and to the extent specified in the notice, place no further orders for materials other than as may be necessarily required for completion of any portion of the Work that is not terminated, promptly obtain cancellation on terms satisfactory to Buyer of all purchase orders and subcontracts to subsuppliers or assign those purchase orders and subcontracts (including those with intellectual property rights) to Buyer as directed by Buyer, and assist Buyer upon request in the maintenance, protection, and disposition of property acquired by Buyer under this Agreement. Upon termination of this Agreement, payment of all amounts due Seller under this Agreement or any other may be withheld pending completion of the Work, including performance of rework, and may be used to offset liabilities of Seller under this Agreement. Buyer will only pay Seller for work satisfactorily completed prior to the date of termination.
QUESTIONS?
THANK YOU!!!

SUSAN BUTTON – XYLEM, INC.

JIM BROWN – EXPERIENCED CORPORATE COUNSEL