**THE TIMES THEY ARE A CHANGING!**

**TERMS & CONDITIONS**

**NEGOTIATION TRAINING**

**(SAMPLE PROVISIONS)**

**WWEMA F&CA Council Meeting**

**May 15-17, 2018**

**Indianapolis, IN**

**LIMITATION OF LIABILITY &**

**WAIVER OF CONSEQUENTIAL DAMAGES**

Neither party shall be liable to the other party for any special, indirect, incidental, consequential or punitive damages, including lost profits or loss of use, under, arising from or relating to this Contract. In no event shall Seller’s aggregate liability to Buyer exceed the amount paid for the equipment and services on which such liability is based, regardless of when or how many claims are made. The above limitations apply whether such damages are based upon breach of contract, breach of warranty, tort, strict liability or otherwise.

**INDEMNITY #1**

To the extent and proportion of its negligence, Seller will indemnify and hold Buyer harmless for any damages, suits, or losses from tort claims asserted by third parties against Buyer, and paid by Buyer to such third parties based on a final court order, for death, bodily injury, or damage to tangible property (other than to the equipment itself) directly caused by Seller’s negligence. Seller’s indemnity obligation does not imply an obligation to defend any person or entity other than Seller. However, Seller has the right to defend the action and the Buyer to the extent Seller so requests. This indemnification provision does not apply to any settlement unless such settlement is approved in writing by Seller.

**Notes:**

1. Indemnity is proportionate to Seller’s negligence – Seller is not assuming liability for the negligence of any other person or party.
2. This is an indemnity and limited release only – no defense obligation or general release.
3. Indemnity is only for tort-based claims made by and paid to third parties (which are generally insurable) – no indemnity for first-party losses Buyer incurs on its own behalf.
4. Seller expressly disclaims an obligation to defend (necessary in California and Florida), but still reserves the right to do so if it wants.
5. Seller only indemnifies in cases in which it has an opportunity to be part of the proceedings.

**INDEMNITY #2 (KNOCK-FOR-KNOCK)**

**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).**

**(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, DESTRUCTION, AND/OR WRECK AND DEBRIS REMOVAL 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 LIABIUTY, 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.

**WARRANTY**

The equipment shall materially conform to the description contained in the Proposal and be free from defects in material and workmanship for a period of one (1) year from the date the equipment is ready for or initially placed in operation or eighteen (18) months from the date the equipment is delivered, whichever occurs first. Upon Seller’s receipt of written notice within thirty (30) days of discovery of any defect, and a determination by Seller that such defect is covered under this warranty, Seller shall, at its option, repair or replace the defective part or parts, f.o.b. factory. Seller’s warranty does not cover normal wear and tear or failure or damage due to storage, installation, operation, or maintenance not in conformance with Seller’s written instructions and requirements or due to accident, misuse, abuse, neglect, or corrosion or force majeure. In addition, Seller’s warranty does not cover labor or labor costs for gaining access, removal, or installation, temporary power, or any other expenses that may be incurred with repair or replacement. Seller is not responsible for field touch-up painting of the equipment. Correction of non-conformities in the manner and for the period of time provided above shall constitute Seller’s sole liability and Buyer’s exclusive remedy for Seller’s failure to meet its warranty obligations, whether Buyer’s claims are based in contract, tort (including negligence or strict liability), or otherwise. Notwithstanding anything in this Contract to the contrary, the warranties herein are the exclusive warranties under this Contract, and in lieu of all other warranties of any kind, express or implied, including any implied warranty of merchantability or fitness for a particular purpose.

(Note: If you have to give an extended warranty, clearly state that the time period applies only to the repaired/replaced part, not the whole system. Also, state that in no event will the extended warrant extend beyond \_\_\_\_\_\_ months from the expiration of the original warranty period. Both of these are to guard against evergreen warranties.)

**PAYMENT TERMS**

Payments shall be net 30 days in accordance with the milestone payment schedule set forth in the Proposal. The purchase price does not include any federal, state, provincial, or local sales, value-added, use or other taxes or any import fees or duties (collectively, “Taxes”). Taxes shall be listed separately, and Buyer shall be responsible for payment of all such Taxes to Seller. If Buyer fails to pay any amount under this Contract when due, Seller shall be entitled to interest at the highest legal rate on the unpaid balance, and Buyer shall promptly reimburse Seller for all attorney’s fees and costs related to collection of past due amounts.

**LIQUIDATED DAMAGES**

The Parties recognize that adherence to the Contractor’s schedule is extremely important to this Project and that failure to meet this schedule will result in damages to Contractor that are difficult or impossible to calculate. Accordingly, in lieu of calculating and proving these damages, and not as a penalty, Supplier agrees to pay Contractor as Liquidated Damages $ \_\_\_\_\_\_ per day for every day that major pieces of equipment are not delivered in accordance with the agreed upon Project schedule. However, no Liquidated Damages will be assessed against Supplier unless Supplier is actually late in delivering equipment according to the mutually agreed upon delivery schedule, Supplier’s late delivery adversely impacts Contractor’s overall Project critical path schedule and is the sole and direct cause of such impact, and Contractor is assessed liquidated damages under its prime contract with the Owner. Payment of Liquidated Damages shall be Supplier’s sole liability and Contractor’s sole remedy for late delivery. In no event shall the total Liquidated Damages amount exceed ten percent (10%) of the Total Contract Price.

**INCORPORATION OF PRIME CONTRACT/SPECIFICATIONS**

Option #1: Strike all references to incorporation of the prime contract/specifications.

Option #2: If Buyer insists on incorporating the 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. (NO CHANGE).

(b) Seller agrees to be bound to Contractor by the technical portions of the specifications only so far as they apply to the Work, but only to the extent such technical portions are consistent with Seller’s proposal. [alternatively, the parties could refer to a scope of work matrix in Exhibit \_\_\_\_\_]

**DISPUTE RESOLUTION**

This Contract shall be governed by the laws of the state of the jobsite, without regard to any conflicts of law principles thereof. [Note: Consider if this is still acceptable to your company if the project is in Louisiana or Quebec – in such case, you may want to consider using the law applicable to Houston, TX and Toronto, ON, respectively] Any dispute that cannot be resolved amicably by the Parties shall be referred to the federal or state courts where the jobsite is located. The Parties irrevocably waive the right to request trial by jury.

**FORCE MAJEURE**

Neither party shall be liable for any delay in performance or failure to perform due to any cause beyond it’s reasonable control including, fire, flood, or any other act of God, strike or other labor difficulty, any act, instructions, directions or omission to act of any civil or military authority, change in laws, acts of war, any insurrection, riot, embargo, unavailability or delays in transportation or car shortages. In the event a party’s performance is delayed by any of the foregoing causes, that party’s schedule for performance shall be extended accordingly without penalty. The parties recognize that an extension of time may not be the only appropriate remedy in the case of a force majeure event.

**LIENS**

Option #1: Upon Buyer’s request, Seller shall provide lien waivers on Seller’s standard lien waiver forms. [At the very least, negotiate the language in all lien waiver forms in advance and attach them as exhibits to the Contract.]

Option #2: Seller shall promptly pay when due, all of its undisputed wages and bills for labor and materials used in, or specifically fabricated for, the prosecution of this Work. If and when requested by the Buyer, the Seller shall promptly provide affidavits that all of the Seller's suppliers have been paid, and release of all liens either by the Seller or Seller's supplier and claims executed by the Seller to the Buyer in a form acceptable to the Seller, Buyer, and Owner. Acceptance of such form shall not be withheld without reasonable cause. Such releases or waivers of lien may be conditioned upon payment. In no event shall the Seller be required to sign an unconditional waiver of lien or claim, either partial or final, prior to receiving payment or in an amount in excess of what it has been paid. Prior to final payment, the Seller shall provide to the Buyer copies of warranties, applicable manuals, and all other close-out documents required for the materials or equipment by this Agreement.

**INSURANCE, BONDING, & LETTERS OF CREDIT**

Upon Buyer’s request, Seller will provide insurance certificates and/or bonds on the standard forms used by Seller’s carrier/surety.

**INCORPORATION CLAUSE**

The Terms and Conditions of Sale set forth herein, and any supplements which may be attached hereto, constitute the full and final expression of the contract (the “Contract”) for the sale of equipment or services (hereinafter referred to as “Equipment”) to Buyer, and supersedes the terms and conditions of any request for proposal or request for quotations, specifications, quotations, purchase orders, correspondence or communications whether written or oral between the Buyer and Seller. No amendment or modification hereto nor any statement, representation or warranty not contained herein shall be binding unless made in writing and signed by an authorized representative of both parties. Prior dealings, usage of the trade or a course of performance shall not be relevant to determine the meaning of this Contract.

**TERMINATION**

DEFAULT BY BUYER.In the event of any default by Buyer (including where the project is suspended or delayed for more than 120 cumulative days), Seller shall give written notice of default to Buyer. Buyer shall remedy the default within thirty (30) days of receipt of such written notice, or, if such default cannot reasonably be remedied within such thirty (30) day period, Buyer shall promptly begin to remedy the default within the thirty (30) day period and thereafter diligently prosecute to conclusion all acts necessary to remedy the default. In the event of a Buyer default, Buyer shall pay Seller for all work initiated prior to termination/suspension, including all costs and other amounts related to the termination/suspension.

DEFAULT BY SELLER.In the event of any default by Seller, Buyer shall give written notice of default to Seller. Seller shall remedy the default within thirty (30) days of receipt of such written notice or, if such default cannot reasonably be remedied within such thirty (30) day period, Seller shall promptly begin to remedy the default within the thirty (30) day period and thereafter diligently prosecute to conclusion all acts necessary to remedy the default. Buyer shall have no right to terminate this Contract so long as Seller timely remedies such default.

TERMINATION FOR CONVENIENCE.If Buyer terminates this Contract or refuses to accept delivery of the equipment, Buyer shall be liable to Seller for all costs and other amounts incurred by Seller, including cancellation charges, administrative costs, and commissions to sales representatives for all work initiated or in process up to the time of cancellation or refusal to accept delivery.

**Special Clauses/Compromise Language**

**Indemnity – Intellectual Property Infringement**

Seller shall defend and have sole control over any action or proceeding brought against Buyer based on any claim that the equipment infringes any United States patent or copyright, provided the equipment is used in the manner specified and is not modified, altered, or combined with any other equipment without Seller’s prior written permission. Buyer shall give prompt written notice to Seller of any such action or proceeding and will reasonably provide authority, information and assistance (at Buyer’s expense) in the defense of same. If Buyer is enjoined from the operation or use of the equipment, Seller shall use commercially reasonable efforts to procure the right to operate or use the equipment. If Seller cannot so procure such right within a reasonable time, Seller shall promptly, at Seller’s option and expense, (i) modify the equipment so as to avoid infringement of any such patent or copyright, (ii) replace the equipment with equipment that does not infringe or violate any such patent or copyright, or (iii) as a last resort, remove the equipment and refund a pro rata portion of the purchase price, based on the expected life span of the equipment. The above represents Seller’s sole liability and Buyer’s sole remedy in connection with an infringement for which Seller is responsible (and Seller is only responsible to the extent and under the circumstances described above in this paragraph [\_\_\_\_]).

**Indemnity – Compromise if Defense Required**

Seller’s indemnity, defense and hold harmless obligation, or portions or applications thereof, shall be limited to the proportionate level of fault or negligence, whether active or passive, that is ultimately determined to be attributable to the Seller, and notwithstanding any waiver of subrogation rights contained elsewhere in this Agreement, Seller and/or its insurer(s) providing such indemnification and defense to any Indemnified Party claiming indemnification hereunder shall be reimbursed by Buyer for the costs of providing such indemnity and defense over and above the Seller’s proportionate fault or negligence.

**Warranty – Removal/Reinstallation Costs**

In addition, Seller’s warranty does not cover labor or labor costs for gaining access, temporary power, or any other expenses that may be incurred with repair or replacement, except that Seller’s warranty does cover the labor and labor costs (i.e., equipment rental, travel expenses, and freight) associated with repair or replacement of defective parts themselves up to an aggregate maximum cost of two percent (2%) of the Contract price. [Note: This example shows a maximum amount for removal/reinstallation costs. As an alternative, you could put in a “deductible,” where small amounts (i.e., where the travel costs far exceed the actual repair costs) are covered by the Buyer. You could also do a combination of a maximum and a deductible, just like insurance.]

**Payment Terms – Pay When/If Paid Compromise**

Buyer shall be under no obligation to make any payment to Seller except to the extent that Buyer has received funds from the Owner, such payment from the Owner being a condition precedent to any obligation of Buyer to Seller. Notwithstanding anything to the contrary herein, if Seller has not been paid undisputed amounts by Buyer within 60 days of monies being due to Seller, Buyer agrees that its non-payment by Owner under this article will not be used as a reason for not paying Seller, and all such undisputed amounts shall be paid immediately to Seller. However, nothing in the previous sentence shall change Buyer's normal payment obligations in the event that Owner timely pays Buyer. In addition, notwithstanding anything to the contrary herein, in the event that there is a dispute concerning Seller's performance by either Owner or Buyer, and that dispute is the basis for non-payment by Owner and/or Buyer, the underlying dispute shall be resolved without regard to the condition precedent above. Seller shall have all rights and remedies available at law and/or equity in the event of such non-payment, and Buyer shall not use the fact of non-payment by Owner as a basis for blocking Seller's exercise of its rights. and remedies. Furthermore, in the event Owner's non-payment to Buyer is due to Owner's bankruptcy or insolvency, the condition precedent shall apply. In such event, Buyer will take reasonable steps to prosecute any claims by Seller for payment.