



## SUBCONTRACTOR TERMS AND CONDITIONS

“MSS” and “Contractor” shall both mean the MSS entity named on the face of the Subcontract which is buying the goods and/or services. “Subcontractor” means the person or entity who accepted Contractor’s offer or is named on the face of the Subcontract.

**1. CONTRACT DOCUMENTS & AGREEMENT:** (a) The term “Contract Documents” as used herein refers to the contract agreement between the Owner (“Owner”) on this Project (“Project”) and MSS Solutions, LLC (“MSS” and/or “Contractor”), (“Prime Contract”) including all plans, specifications, general or supplementary conditions, addenda, amendments, modifications, including but not limited to purchase orders, change orders, project schedule and all other documents forming, or by reference, made a part of such contract agreement. Subcontractor agrees that all of the Contract Documents are available upon request and shall be deemed to be incorporated herein by reference and made a part hereof, and the Subcontractor agrees to be bound to MSS by all of the terms and provisions thereof, insofar as they apply to the Work hereinafter described (“Work”). (b) The term “Agreement” as used herein shall mean this Subcontract or Purchase Order including its exhibits & addenda, along with the aforementioned Contract Documents, comprises the full and entire agreement between the parties affecting the Work described herein (collectively referred to as the “Agreement”). No other agreements or understandings of any nature concerning the same has been entered into, or will be recognized. MSS has made no inducements or representations to Subcontractor whatsoever except as expressly stated in this Subcontract. No oral modification of this Subcontract shall have any force or effect.

**2. THE WORK:** Subcontractor shall furnish all licenses, supervision, labor, tools, equipment, services, materials and supplies necessary to perform the Work specified herein. Subcontractor shall perform the Work in accordance with the Contract Documents, the provisions of this Subcontract, and that which is reasonable and inferable therefrom. Subcontractor shall assume all responsibilities of MSS to Owner in relation to performance of the Work. The Subcontractor represents and agrees that it has carefully examined and understands the Subcontract and the other Subcontract Documents, that has investigated the nature, locality, and site of the work and the conditions and difficulties under which the work is to be performed, and that enters into this Subcontract on the basis of its own examination, investigation, and evaluation of such matters and not in reliance upon any opinions or representations of MSS or the Owner, or any of their respective officers, agents, or employees.

**3. PAYMENT:** (a) MSS will pay Subcontractor the Subcontract Price as set forth herein, which includes all costs for the Work, including any taxes. As conditions precedent to its entitlement to payment from MSS, MSS must preapprove Subcontractor’s invoices and Subcontractor must submit with its invoice, O&M manuals, partial and final lien waivers releases and a sales tax affidavit on the forms attached hereto and incorporated by reference herein, and any other documentation required by the Prime Contract or as requested by MSS evidencing the Work has been completed or that payment is due. (b) As a condition precedent to payment, Subcontractor must provide a mutually agreeable schedule of values ten (10) days after signing the Subcontract. Except for ten percent retainage, paid at the end of the job, MSS will pay Subcontractor for its satisfactory and timely Work using the approved schedule of values. (c) Less retainage, MSS will pay Subcontractor for satisfactory Work net sixty (60) days after receiving an approved invoice. (d) Subcontractor agrees to pay all its sub-subcontractors and suppliers for all Work in place within seven (7) days of receipt of payment from MSS for said Work. In the event Subcontractor fails to remit payment to any sub-subcontractor or supplier or fails to provide appropriate partial lien waivers and releases from any sub-subcontractor or supplier, Subcontractor agrees that MSS, at its sole discretion, shall be authorized to withhold payment and either issue payment by joint-checks or issue direct payment to the sub-subcontractor or supplier. If direct payment is made, no contractual relationship is created between MSS and the sub-subcontractor or supplier by virtue of the direct payment. (e) In the event Subcontractor refuses or fails to fulfill any obligation of the Agreement on any project, MSS shall be entitled to withhold payment of monies due Subcontractor pending corrective action or completion to the satisfaction of MSS and/or set off Contractor’s losses, costs and expenses attributable to Subcontractor’s refusal or failure, against any monies due Subcontractor under the Agreement or under any other contract between MSS and Subcontractor, including attorneys’ fees. (f) The acceptance of final payment shall constitute a waiver of all claims by the Subcontractor arising out of or relating to this Subcontract for the work provided herein. However, final payment by MSS shall not be construed as acceptance of defective, faulty, or improper Work or materials, nor shall it release Subcontractor from any of its obligations under this Subcontract.

**4. CHANGE ORDER & EXTRAS:** (a) If MSS changes the Work, MSS will give Subcontractor a written Change Order explaining changes to the Work and the schedule. Within five (5) days, Subcontractor must give MSS a written proposal for the change. MSS will accept or negotiate the proposal, and confirm agreement in a written Change Order, which Subcontractor will perform under the terms of the Agreement. Without a signed Change Order, the Work remains unchanged. (b) Work Directive: In the event that MSS and Subcontractor cannot agree on the time or price for a Change Order, or in the event that MSS and Subcontractor disagree regarding whether certain work is subject to a Change Order, MSS shall have the right to direct Subcontractor to perform the work by issuing a written Work Directive. Subcontractor, without waiving its right to pursue additional time and/or money for the work under the dispute resolution section set forth below, shall then be obligated to perform the work covered by the Work Directive. Failure of a Subcontractor to perform work subject to the Work Directive shall be a material breach of this Subcontract. (c) Subcontractor must give MSS written notice of all claims for extra compensation. If Subcontractor does not give notice within seven (7) days of learning facts supporting the claim, Subcontractor waives any and all rights it had, has or may have in the future to seek adjustment or recovery of any nature arising out of the circumstance at issue the claim.

**5. SCHEDULE:** (a) **Time is of the essence of this Subcontract.** Subcontractor must perform the Work by Contractor’s schedule, and Subcontractor delay of the schedule is a material breach of the Subcontract. If Owner or MSS delays or disrupts Subcontractor’s Work, Subcontractor must claim it in writing within ten (10) days of learning the cause. Subcontractor can only claim critical path delays. If Owner pays for delay or disruption to Subcontractor, MSS will pay that amount to Subcontractor. MSS can delay, suspend, or reschedule Subcontractor’s Work by extending Subcontractor’s schedule, without pay. An extension of time granted to Subcontractor is its exclusive remedy for delay. (b) If the Prime Contract allows Owner to assess delay damages, liquidated or actual, MSS, in addition to its own damages, may assess those damages against Subcontractor in proportion to Subcontractor’s responsibility for delay. (c) Force Majeure: These delays are non-compensable, but MSS will grant Subcontractor a time extension for them. They include declarations of Force Majeure by Owner under the Prime Contract, Acts of God, sovereign acts, insurrections, epidemics, natural disasters, and other actions not reasonably within Subcontractor’s control and that Subcontractor could not have avoided with diligence. Subcontractor must immediately notify MSS of a Force Majeure event and its probable duration.

**6. WARRANTY:** In addition to any other express or implied warranties provided by law or otherwise, Subcontractor warrants with respect to the Work provided hereunder that Subcontractor (i) shall provide all material, labor and product warranties for a minimum of twelve (12) months from substantial completion of the entire Project; (ii) all goods (including without limitation hardware, software, firmware, and systems consisting of goods working together) and services are new and in strict conformance with the specifications, drawings, samples, designs, or other descriptions furnished to or by MSS, and shall be merchantable, of good quality and workmanship, free from defects in material, design, and workmanship, and fit for Contractor’s particular purpose; (iii) all services shall be performed in a competent manner in accordance with the requirements of the Statement of Work and shall fulfill the particular purpose intended.

**7. INDEMNITIES:** Subcontractor Group means Subcontractor, its employees, and subcontractors of all tiers. Contractor Group means MSS, its employees, and subcontractors of all tiers. To the fullest extent permitted by law, Subcontractor shall defend, indemnify, and hold Contractor Group and Owner harmless from and against any and all claims, liabilities, losses, damages, actions, and expenses (including attorney’s fees) in connection with (a) any breach by Subcontractor Group of its warranties, covenants, or obligations hereunder; (b) any injury (including death), property damage, or economic loss arising out of or related to (i) defective or nonconforming goods or services supplied by Subcontractor Group under the Statement of Work, or (ii) acts or omissions of Subcontractor Group in providing goods to or performing work, including work at Contractor’s or a customer’s premises or using Contractor’s property, unless resulting from the sole negligence of Contractor; (c) any failure to comply with laws, regardless whether (a) through (c) arise in tort (including negligence), contract, warranty, strict liability, or otherwise.

**8. INSURANCE:** Subcontractor shall purchase and maintain insurance that will protect Subcontractor from claims arising out of Subcontractor operations under this Subcontract, whether the operations are by Subcontractor, or any of Subcontractor’s consultants or subcontractors or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be



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liable. (a) Subcontractor shall purchase from and maintain, in a company or companies lawfully authorized to do business in the jurisdictions in which the Subcontractor will perform any of its obligations related to the Work hereunder: (i) Commercial General Liability: including, without limitation, Premises and Operations Liability; Contractual Liability; Products Liability and Completed Operations Liability for a minimum of five (5) years after completion of the Work hereunder; written on an "occurrence" form with minimum limits of \$1,000,000 per occurrence and \$2,000,000 General Aggregate; (ii) Automobile Liability: covering all owned, non-owned, and hired vehicles with minimum limits of \$1,000,000 combined single limit or applicable statutory limits; (iii) Workers Compensation and Employers' Liability: provide statutory workers' compensation insurance wherever Work is done and Employers' Liability minimum limits of \$1,000,000; (iv) Umbrella Liability: minimum limits of \$2,000,000; (v) If applicable, Professional or Errors and Omissions Liability: with minimum limits of \$2,000,000 ea. occurrence/\$2,000,000 aggregate. (b) All of the above policies will be written to provide a waiver of subrogation in favor of MSS and shall be primary and noncontributory, contain a separation of insureds clause and must provide additional insured status on behalf of MSS. The Subcontractor shall provide a certificate of insurance or other documentation as MSS may reasonably require evidencing the existence of such insurance.

**9. TERMINATION:** (a) MSS may terminate all or any part of its Work, without liability to MSS, if Subcontractor (i) fails to deliver goods or perform services within the time and in the quantities and of the quality required by MSS or to give adequate assurances requested by MSS; (ii) breaches the terms of the Agreement (including Subcontractor's warranties and covenants); (iii) fails to make progress so as to endanger timely and proper performance of the Statement of Work, and such failure, if curable, is not cured within five calendar (5) days (or any shorter period that is commercially reasonable under the circumstances) after notice from MSS; or (iv) ceases to conduct its operations in the normal course of business, including inability to meet its obligations as they mature, or if any proceeding under the bankruptcy or insolvency laws is brought by or against Subcontractor or a receiver for Subcontractor is appointed or applied for, or an assignment for the benefit of creditors is made by Subcontractor. In addition to obtaining a refund or credit and any other remedies provided herein or available at law or in equity, MSS may, upon such termination, purchase substitute goods or services elsewhere, on such terms as MSS deems appropriate, and charge Subcontractor with any excess costs and losses incurred by MSS. (b) MSS may terminate all or any part of the Work for convenience, in which case (i) Subcontractor shall, as directed by MSS, cease work and deliver to MSS all satisfactorily completed goods or materials and work in process; and (ii) MSS shall pay to Subcontractor reasonable termination charges solely limited to the costs of materials, goods, and labor that are incurred prior to Subcontractor's knowledge of such termination, provided that Subcontractor takes reasonable steps to mitigate its damages. (c) To the extent not terminated by MSS, Subcontractor shall continue performance under the Statement of Work. (d) Any termination under Section 9(a) adjudged to be wrongful shall be deemed to then be a termination for convenience under Section 9(b), but with MSS having the right to avail itself of all of its remedies under the terms of this Subcontract, at law or in equity.

**10. ASSIGNMENT:** Subcontractor will not assign this Subcontract without Contractor's consent. If the Owner terminates the Prime Contract, Subcontractor will assign the Subcontract if the Prime Contract requires it.

**11. WAIVER:** The failure of MSS to insist, in any one or more instances, on the performance of any of the terms, covenants, or conditions of this Subcontract, or to exercise any of its rights, shall not be construed as a waiver or relinquishment of such term, covenant, condition, or right with respect to further performance.

**12. INDEPENDENT SUBCONTRACTOR:** Each party shall act solely as an independent contractor, and nothing in this Subcontract shall be construed to give either party the power or authority to act for, bind, or commit the other party in any way. Nothing herein shall be construed to create the relationship of partners, principal and agent, or joint-venture partners between the Parties. Subcontractor has the duty to control its Work and MSS has hired Subcontractor to get the result of its Work.

**13. LIMITATION OF LIABILITY:** EXCEPT WITH RESPECT TO ANY SUBCONTRACTOR INDEMNIFICATION OBLIGATIONS, NEITHER PARTY SHALL BE LIABLE BY REASON OF ANY BREACH OF CONTRACT OR OF STATUTORY DUTY OR BY REASON OF TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE), FOR ANY SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THIS SUBCONTRACT, INCLUDING ANY

TERMINATION, REJECTION, OR REVOCATION OF ACCEPTANCE OF ALL OR ANY PART OF THE SUBCONTRACT.

**14. SAFETY REQUIREMENTS:** As part of the Work, Subcontractor must complete all Safety Orientations, Safety Testing (Drug Alcohol, or other), and Safety Training required by MSS or Owner. Subcontractor must supply all safety equipment MSS requires for the Work. The Subcontractor must provide the following items for every day, crew change, or significant changing event: Gas Monitoring, Safety Meetings, Jobsite Safety Analysis, Equipment Safety Checklists, Vehicle Safety Checklists, Excavation Safety Checklists. Subcontractor must give these documents daily to Contractor's Project Safety Leader. Each jobsite location must be drug, alcohol, and weapon-free. MSS can remove violators from the jobsite. Subcontractor will provide dedicated safety personnel and enforce Safety Policies, as required by and with qualifications satisfying MSS and Owner.

**15. AUDIT:** Subcontractor agrees to keep all paper and electronic invoices, supporting documents, and DOT or OSHA records for the Work for three years after its completion. Subcontractor will allow MSS to copy and access the records at reasonable times, and will cooperate to resolve any adverse audit findings. Any party owing money after the audit will pay it in thirty (30) days. MSS can use its own or contract auditors, and Subcontractor will also comply with audit requirements in the Prime Contract.

**17. CONFIDENTIALITY:** Subcontractor Group agrees to keep all information related to this Subcontract confidential, and to use it only for the Work. Subcontractor Group will get Contractor's prior written approval of publicity releases about, or photographs of, the Work. Subcontractor will require each member of Subcontractor Group to comply. The terms of this paragraph last for five (5) years after the Work is complete. On request, Subcontractor will return all confidential information to MSS or destroy it.

**18. ARBITRATION AND GOVERNING LAW:** At Contractor's sole discretion, any dispute, claim or controversy arising out of or relating to the Subcontract, or any breach, termination, enforcement, interpretation or validity of this Subcontract, shall be interpreted and governed by the laws of the State of North Carolina, (and excluding its conflicts of law and choice of law principles) and shall be resolved by binding arbitration through the American Arbitration Association ("AAA") conducted by arbitrator(s) selected in accordance with the Construction Industry Arbitration Rules currently in effect as of the date of filing a demand for arbitration ("Arbitrator"). This Subcontract is made pursuant to a transaction in interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C.A § 1, without regard to conflict with local applicable laws. The arbitration will be conducted in Charlotte, North Carolina at an office to be determined by the Arbitrator. The prevailing party (as determined by the Arbitrator) shall be entitled to recover the cost and expense of the arbitration, including reimbursement of all reasonable attorneys' fees, expert witness fees, costs of appeal and costs to enforce the arbitration provision contained in this Subcontract.

**19. SEVERABILITY:** If any term or provision of this Subcontract is found to be illegal or unenforceable, the same shall not invalidate this Subcontract, but the offending term or provision shall be modified to the extent necessary to render such term or provision enforceable, or the offending term or provision shall be stricken.

**20. WORK CONTINUATION:** Subcontractor will continue the Work during any dispute resolution proceedings, formal or informal, if so directed by MSS.

**21. SURVIVAL:** All rights, obligations, and duties hereunder, which by their nature whether express or implied, extend beyond the expiration or termination of the Subcontract, including but not limited to warranties, and indemnifications, shall survive the expiration or termination of the Subcontract.

**22. JOINT DRAFTING:** Both parties had opportunity to negotiate terms and to seek counsel prior to signature; no rule of interpretation should favor either party.

**23. EO CONTRACT CLAUSE:** Contractor and Subcontractor agree to abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.