

## TEXAS SUPPLEMENTAL TERMS AND CONDITIONS

VERSION 1.0, REVISED JULY 1, 2018

### 1. REVISIONS TO THE STANDARD TERMS AND CONDITIONS.

1.1 Replace *Section 3.4 Time for Payment* of the *Standard Terms and Conditions* in its entirety with the following:

“3.3 Partial payments for satisfactory performance, subject to withholdings or off-sets as provided herein, shall be due within seven (7) days following receipt of payment from Owner by Contractor. No partial payment made under this Subcontract Agreement shall be considered an acceptance of the Work, in whole or in part, and Subcontractor agrees that Contractor’s receipt of payment from Owner is a condition precedent to Subcontractor’s right to payment from Contractor (unless, and only unless, Owner’s failure to pay Contractor is the result of default by Contractor unrelated to Subcontractor’s performance hereunder, it being expressly understood that any other basis for such non-payment by Owner, including bankruptcy or insolvency of Owner, will not excuse this condition precedent).”

1.2 Replace *Section 3.8 Final Payment* of the *Standard Terms and Conditions* in its entirety with the following:

“3.7 Final payment, subject to withholdings or off-sets permitted hereunder, shall be made after Subcontractor’s Work has been completed and approved by Owner, satisfactory proof of payment of all amounts owed by Subcontractor in connection with this Agreement has been provided, and the entire Work is complete. Receipt of final payment from Owner shall be a condition precedent to any obligation of Contractor to pay Subcontractor (unless, and only unless, Owner’s failure to pay Contractor is the result of default by Contractor unrelated to Subcontractor’s performance hereunder, it being expressly understood that any other basis for such non-payment by Owner, including bankruptcy or insolvency of Owner, will not excuse this condition precedent).”

1.3 Replace *Section 3.9 Partial and Final Releases* of the *Standard Terms and Conditions* in its entirety as with the following:

“3.9 As a condition for each partial payment, and as a condition for final payment, Subcontractor shall execute a release in a form satisfactory to Contractor, waiving and releasing all claims arising from prior work, including, but not limited to, claims against Contractor’s payment bond and mechanic’s liens; certifying that Subcontractor has paid all of its bills, taxes, or other obligations; and indemnifying and holding Contractor harmless from all of the foregoing. Such release (and such further release of claim or lien as may be required by Owner or Contractor) shall satisfy the requirements of TEX. PROP. CODE ANN. § 53.152. If requested by Contractor, as a further condition for each partial payment and as a condition for final payment, Subcontractor shall furnish Contractor such executed releases from all Lower Tier Subcontractors and Lower Tier Suppliers. All requests for payment shall be submitted in a format acceptable to Contractor. Receipt of each partial payment from Owner shall be a condition precedent to any obligation of Contractor to pay Subcontractor (unless, and only unless, Owner’s failure to pay Contractor is the result of default by Contractor unrelated to Subcontractor’s performance hereunder, it being expressly understood that any other basis for such non-payment by Owner, including bankruptcy or insolvency of Owner, will not excuse this condition precedent).

Additionally, as a condition for each partial payment, and as a condition for final payment, Subcontractor shall execute an affidavit of bills paid, as provided by TEX. PROP. CODE ANN. § 53.085(a) and (c).”

### 2. CONTINGENT PAYMENT.

Subcontractor acknowledges that under this Agreement, it is a contingent payee, as defined in TEX. BUS. & COM. CODE ANN. § 35.521, and that Contractor’s obligation of payment to Subcontractor is contingent upon Contractor’s receipt of payment from Owner. Subcontractor agrees that the contingent payment provisions of this Agreement are valid and enforceable and not unconscionable, and such provisions are subject only to Subcontractor’s right of objection under TEX. BUS. & COM. CODE ANN. § 35.521(c). Further, Subcontractor agrees that it has been provided with the information described in TEX. BUS. & COM. CODE ANN. § 35.521(m) and (n), as applicable.

### 3. PUBLIC PROJECTS.

In any contract for the construction, alteration or repair of a public building or for carrying out or completing any public work, the below provisions apply. To the extent that any of the provisions of this Article 3 conflict with other provisions of the Subcontract Agreement, the provisions of this article shall control, but only with respect to public projects.

3.1 **Payment and Interest.** Pursuant to TEX. GOVT. CODE ANN. § 2251.023, Subcontractor shall pay its subcontractors, or any person who supplies goods or a service for which Contractor pays Subcontractor, their appropriate shares of payment not later than the tenth (10<sup>th</sup>) day after the date Subcontractor receives payment from Contractor. If Contractor fails to timely pay Subcontractor, Subcontractor shall be entitled to interest as provided by TEX. GOVT. CODE ANN. § 2251.025.

#### 3.2 Prevailing Wage Rates.

3.2.1 Pursuant to TEX. GOVT. CODE ANN. §§ 2258.021 and 2258.023, a worker employed by Subcontractor shall be paid in accordance with the following: (i) not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the Work is performed; and (ii) not less than the general prevailing rate of per diem wages for legal holiday and over time work. Such general prevailing rate of per diem wages shall be determined under TEX. GOVT. CODE ANN. § 2258.022.

3.2.2 Pursuant to TEX. GOVT. CODE ANN. § 2258.024, Subcontractor shall keep a record showing the name and occupation of each worker employed by Subcontractor in the construction of the Work and the actual per diem wages paid to each worker.

3.2.3 Pursuant to TEX. GOVT. CODE ANN. § 2258.057, Contractor may withhold from Subcontractor sufficient money to cover an amount withheld from Contractor by Owner because of Subcontractor's violation of Chapter 2258 (Prevailing Wage Rates) of the Texas Government Code. If Contractor has already made a payment to Subcontractor, Contractor may withhold money from any future payments owed to Subcontractor or sue Subcontractor or Subcontractor's surety for the amount withheld from Contractor by Owner because of Subcontractor's violation.

3.2.4 When requested, completed evidence of compliance with the Texas Prevailing Wage Law shall be furnished.

3.2.5 *Penalty for Violation* Subcontractor shall pay to the State a penalty of sixty dollars for each worker employed for each calendar day, or portion thereof, that the worker is paid less than the wage rates stipulated in the Prevailing Wage Schedule or any supplement thereto pursuant to § 3.3 of the Standard Terms and Conditions. Subcontractor shall keep, or cause to be kept, an accurate record showing the names and occupations of all workers employed in connection with the Work, and showing the actual per diem wages paid to each worker, which records shall be open at all reasonable hours for the inspection by the Contractor.

3.3 **Performance and Payment Bonds.** This Agreement shall constitute a request, pursuant to TEX. GOVT. CODE ANN. § 2253.024, that Subcontractor provide to Contractor, with each monthly invoice, the following information: (i) the name and last known address of each person from whom Subcontractor purchased public work labor or material (other than public work material from Subcontractor's inventory); (2) the name and last known address of each person to whom Subcontractor provided work labor or material; (3) a statement of whether Subcontractor furnished a bond for the benefit of its subcontractors and materialmen; (4) the name and last known address of the surety on the bond Subcontractor furnished; and (5) a copy of that bond. If Subcontractor fails to provide the information required by this provision, Subcontractor is liable to Contractor for Contractor's reasonable and necessary costs incurred in getting the requested information.

3.4 **Child Support Obligor.** Notwithstanding anything to the contrary within the Contract Documents, it is understood and agreed between the parties that in accordance with the laws of the State of Texas, a child support obligor who is more than thirty (30) days delinquent in paying child support, and a business entity in which an obligor is a sole proprietor, partner, shareholder, or owner with an ownership interest of at least twenty-five percent, is not eligible to receive payments from state funds under a contract to provide property, materials or services until all arrearages have been paid or the obligor is in compliance with a written repayment agreement.

### 4. SCHOOL PROJECTS.

In any contract for the construction, alteration, or repair for a school district, open-enrollment charter school, or shared service arrangement to provide construction services to the district, school, or arrangement, the below provisions apply. To the extent that any of the provisions of this Article 4 conflict with other provisions of the Subcontract Agreement, the provisions of this article shall control, but only with respect to contracts for the construction, alteration, or repair for a school district, open-enrollment charter school, or shared service arrangement to provide construction services to the district, school, or arrangement.

4.1 The Subcontractor or any Lower Tier Subcontractor may not permit an employee that will have continuing duties related to

the Work under this Subcontract Agreement and the opportunity for direct contact with students in connection with the performance of the Work at an instructional facility if the employee, during the preceding thirty (30) years, was convicted of any of the following offenses and the victim was under 18 years of age or was enrolled in a public school: (1) a felony offense under Title 5 of the Texas Penal Code; (2) an offense on conviction of which a defendant is required to register as a sex offender under Chapter 62 of the Texas Code of Criminal Procedure; or (3) an offense of the laws of another state or federal law that is equivalent to an offense under (1) or (2), above.

- 4.2 For purposes of subsection 4.1, above, a person does not have the opportunity for direct contact with students if: (1) the public work does not involve the construction, alteration, or repair of an instructional facility; (2) for a public work that involves construction of a new instructional facility, the person's duties related to the contracted services will be completed not later than the seventh day before the first date the facility will be used for instructional purposes; or (3) for a public work that involves an existing instructional facility: (A) the public work area contains sanitary facilities and is separated from all areas used by students by a secure barrier fence that is not less than six (6) feet in height; and (B) the Subcontractor adopts a policy prohibiting employees, including Lower Tier Subcontractor employees, from interacting with students or entering areas used by students, informs employees of the policy, and enforces the policy at the public work area.
- 4.3 For any Subcontractor or Lower Tier Subcontractor employee that will have continuing duties related to the Work under this Subcontract Agreement and the opportunity for direct contact with students in connection with the performance of the Work at an instructional facility, the Subcontractor shall: (1) send or ensure that the person sends to the department information that is required by the department for obtaining national criminal history record information, which may include fingerprints and photographs; (2) obtain all criminal history record information that relates to the person through the criminal history clearinghouse as provided by TEX. GOVT. CODE ANN. § 411.0845; and (3) certify in writing to the Contractor, as applicable, that the Subcontractor or Lower Tier Subcontractor that employs the person has received all criminal history record information relating to the person.
- 4.4 The department shall obtain the Subcontractor's or Lower Tier Subcontractors' employees' national criminal history record information and report the results through the criminal history clearinghouse as provided by TEX. GOVT. CODE ANN. § 411.0845.
- 4.5 A school district, open-enrollment charter school, or shared services arrangement may directly obtain the criminal history record information of a person to whom Subsection (b) applies through the criminal history clearinghouse as provided by TEX. GOVT. CODE ANN. § 411.0845.
- 4.6 If the Subcontractor or any Lower Tier Subcontractor determines that Subsection 4.1 does not apply to an employee, the Subcontractor shall make a reasonable effort to ensure that the conditions or precautions that resulted in the determination that Subsection 4.1 does not apply to the employee continue to exist throughout the time that the contracted services are provided.
- 4.7 In the event of an emergency, a school district, open-enrollment charter school, or shared services arrangement may allow a person to whom Subsection 4.1 applies to enter an instructional facility if the person is accompanied by an employee of the district, school, or arrangement.

## 5. NOTICE REQUIRED UNDER THE SUBCONTRACT AGREEMENT.

The Parties agree that the Subcontractor's obligations under Article 9 of the *Standard Terms and Conditions* to provide timely notice of a change condition are separate and apart from any notice the Subcontractor may be required to provide concerning damage the Subcontractor may allege to have sustained. Instead, the notice provisions – including the condition precedent language contained in Article 9 – are intended by the Contractor and Subcontractor to give the Owner and Contractor adequate and timely notice of changes that may be necessary to the Work because of a discrepancy in the Contract Documents or a change in the Owner's or Contractor's objectives for the Project. The Parties agree that such adequate and timely notice of a change or changes provides the Contractor and Owner time to consider options to pursue the most effective, if any, adjustments to the Work.

Similarly, the Parties agree that the Subcontractor's obligations under Sections 11.1, 11.2, and 11.4 of the *Standard Terms and Conditions* to provide timely notice of a claim or dispute are separate and apart from any notice the Subcontractor may be required to provide concerning damage the Subcontractor may allege to have sustained. Instead, the notice provisions – including the condition precedent language contained in Sections 11.1, 11.2, and 11.4 – are intended by the Contractor and Subcontractor to give the Owner and Contractor adequate and timely notice of claims and disputes. The Parties agree that such adequate and timely notice of a claim or dispute provides the Contractor and Owner time to consider options to pursue the most effective, if any, adjustments to the Work.

**6. PROVISIONS REQUIRED BY LAW DEEMED INSERTED.**

Each and every provision of laws and clauses required by law to be inserted in this Subcontract Agreement and will be deemed to be inserted herein and incorporated by reference. The Subcontract Agreement will be read and enforced as though it were included and if—through mistake or otherwise—any such provision is not inserted or not correctly inserted, then upon the application of other party the Subcontract Agreement will be amended to make such insertion.