

COMMONWEALTH of MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT  
BUSINESS LITIGATION SESSION  
C.A. NO.

\_\_\_\_\_) )  
 LMH-LANE CABOT YARD JOINT VENTURE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MASS. ELECTRIC CONSTRUCTION CO., )  
 )  
 Defendant. )  
 \_\_\_\_\_)

**9/3/2021**

**VERIFIED COMPLAINT and APPLICATION FOR STAY OF ARBITRATION  
PURSUANT TO G.L. c. 251, § 2(b)**

Plaintiff, LMH-Lane Cabot Yard Joint Venture, pursuant to G.L. c. 251, § 2(b), moves to stay the pending arbitration filed by Defendant, Mass. Electric Construction Co., in American Arbitration Association Case No. 01-20-0005-0889 on the grounds that there is no agreement to arbitrate the claims sought to be arbitrated.

**INTRODUCTION**

LMH-Lane Cabot Yard Joint Venture (“LMH-Lane”) is the general contractor on the publicly-bid construction project known as MBTA Contract No. R44CN02, Cabot Yard and Maintenance Facility Improvements, Boston, Massachusetts (“Project”). The Massachusetts Bay Transportation Authority (“MBTA” or “Owner”) is the owner of the Project. LMH-Lane and the MBTA executed a contract for the project on or about August 2, 2018, in the amount of \$213,817,000.00 (the “Prime Contract”). The Prime Contract does not contain any agreement to arbitrate any claims or disputes. LMH-Lane and Mass. Electric Construction Co. (“MEC”)

entered into a subcontract in the sum of \$65,762,000.00 for the electrical scope of work on the Project on October 4, 2018 (“Subcontract”).

As a result of delays and issues on the Project, which LMH-Lane did not cause, MEC submitted seven (7) requests for equitable adjustment on the Project. MEC also filed a demand for arbitration on or about March 12, 2020, against LMH-Lane et al. in American Arbitration Association Case No. 01-20-0005-0889 seeking to arbitrate claims that it agreed under the plain terms of the Subcontract are not subject to arbitration because the terms of the Prime Contract do not allow arbitration as the means for dispute resolution and because the Owner’s decision on those claims is binding upon MEC. To date, the MBTA has yet to make a final decision on MEC’s claims and those claims have not been fully adjudicated as contemplated by the Prime Contract.

### **PARTIES and JURISDICTION**

1. Plaintiff, LMH-Lane, is a joint venture comprised of LM Heavy Civil Construction, LLC (“LMH”), with a principal place of business at 100 Hancock Street, Suite 901, Quincy, Massachusetts 02171, Cooperativa Muratori & Cementisti -C.M.C. Di Ravenna Societa Cooperativa (“CMC”), with a principal place of business in Ravenna, Italy, and The Lane Construction Corporation (“Lane”), with a principal place of business at 90 Fieldstone Court, Cheshire, Connecticut 06410.

2. MEC is a Nebraska corporation and is wholly owned by Kiewit Infrastructure Co. f/k/a Kiewit Construction Company with a principal office located at 1550 Mike Fahey Street, Omaha, NE 68102.

3. The claims set forth in this Complaint are within the specific jurisdiction of the Superior Court pursuant to G.L. c. 251, § 2(b), The Uniform Arbitration Act.

4. Venue is proper in Suffolk County in that the subject-matter construction Project concerning this litigation is located in Suffolk County.

5. Pursuant to Superior Court Administrative Directive 17-1, venue is also proper in the Business Litigation Section of the Superior Court and venue is otherwise proper in Suffolk County pursuant to G.L. c. 223, § 1.

### **PROJECT BACKGROUND**

6. LMH-Lane is the general contractor on the publicly-bid construction project known as MBTA Contract No. R44CN02, Cabot Yard and Maintenance Facility Improvements, Boston, Massachusetts.

7. The MBTA is the owner of the Project.

8. On or about April 13, 2018, the MBTA solicited electronic public bids for the project entitled “MBTA Contract No. R44CN02, Cabot Yard & Maintenance Facility Improvements, South Boston, Massachusetts”.

9. The work of the Project includes the rebuilding of the existing multi-acre storage and maintenance area at the Cabot Yard campus in South Boston that supports the operations of the MBTA’s Red Line Heavy Rail Rapid Transit System and Bus System.

10. The work of the Project includes, *inter alia*, site work, track work, structural work, electrical work, traction power work, signal work, communications work, architectural work, building systems work, and new equipment to be installed at the Cabot Yard Maintenance Facility.

11. The Project site is to remain operational during the work of the Project requiring the contractor to coordinate with Red Line operations and with the MBTA.

12. The Project was to achieve Substantial Completion no later than 1,251 calendar days after issuance of a notice to proceed.

13. LMH-Lane was the lowest eligible, responsive, and responsible bidder for the Project with a bid price of \$213,817,000.00.

14. On or about August 2, 2018, LMH-Lane and the MBTA entered into the Prime Contract in the sum of \$213,817,000 for the Project. Attached as Exhibit A hereto is a true and accurate copy of the Prime Contract and relevant portions of the general conditions between LMH-Lane and the MBTA.<sup>1</sup>

15. The Prime Contract between LMH-Lane and the MBTA does not allow arbitration as the dispute resolution procedure.

16. In accordance with the notice to proceed issued by the MBTA, LMH-Lane began its work on the Project on or about August 12, 2018.

17. LMH-Lane and MEC entered into a subcontract for the electrical scope of work on the Project on October 4, 2018 ("Subcontract") in the sum of \$65,762,000.00. Attached as Exhibit B is a true and accurate copy of the Subcontract (without exhibits).

18. Page 1 of the Subcontract states in relevant part:

WHEREAS, General Contractor has entered into General Contracts with the Massachusetts Bay Transportation Authority (MBTA), hereinafter called the "Owner," for work described herein to be performed in accordance with all the terms and conditions of the General Contract Documents which term, as herein used, shall include, without limitation, said General Contract and general provisions, special provisions, specifications, plans, addenda, notices, instructions, bids, forms, and all other provisions or documents therein contained or incorporated by reference including, without limitation, the documents listed in Schedule A insofar as applicable to Subcontractor's scope of work as set forth herein.

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<sup>1</sup> Where the Prime Contract is over 2000 pages long and the Subcontract includes over twenty (20) pages of irrelevant exhibits, LMH-Lane did not append the entirety of the Prime Contract or the Subcontract.

WHEREAS the Subcontractor having examined the said General Contract Documents and the readily observable conditions at the site or sites of operations to be conducted thereunder, is desirous of entering into a Subcontract with the General Contractor on the basis of the terms and conditions hereinafter set forth.

Exhibit B: Subcontract, Page 1, (emphasis added).

19. Article 1.3 of the Subcontract states in relevant part that:

1.3 Subcontractor does further agree to be bound to the General Contractor by the aforementioned General Contract Documents and all other instruments herein referred to and further to assume toward the General Contractor all the obligations and responsibilities pertaining to the performance of Subcontractors work for the Project...With respect to Owner issues, the Subcontractor further agrees that the General Contractor shall in connection with the work called for by this Subcontract have all rights, privileges, and immunities which the owner has in connection with its contract with the General Contractor.

Exhibit B: Subcontract, Pages 1-2.

20. Article 11 of the Subcontract states in relevant part that:

ARTICLE 11 - CLAIM OF SUBCONTRACTOR.

11.1 The Subcontractor shall have no claim for extra or additional compensation for any Owner initiated damage allegedly sustained or for any Owner initiated changes or modifications to its work unless it shall have first complied with all the applicable terms and provisions in the General Contract Documents pertaining to submission of claims, changes, modifications, and damages. The Subcontractor shall pay an equitable share of all expenses including attorney fees incurred by the General Contractor to prosecute Subcontractor claims. In no event shall the General Contractor become or be liable to the Subcontractor on account of any such claims in excess of the amount actually received by the General Contractor from the Owner on account of such claim provided General Contractor prosecutes such Subcontractor claims in good faith and does not settle any such claim without Subcontractors written approval.

Exhibit B: Subcontract, Pages 7-8, (emphasis added).

21. Article 20 of the Subcontract states in relevant part that:

ARTICLE 20 - DISPUTE RESOLUTION

20.1 With respect to Owner pass-through claims, Subcontractor agrees to strictly adhere to the requirements of any provisions in the General Contract Documents relating to notice (provided Contractor informs Subcontractor regarding the issue requiring notice or if Subcontractor knows or reasonably should have known about the issue requiring notice), submission, processing, and resolution of claims

or disputes. Any and all claims or disputes arising out of or relating to this Agreement or breach thereof shall be decided, by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association; provided however, the determination by the Owner, the Engineer or any court, Board of Arbitration, or other tribunal pursuant to the provisions of the General Contract Documents with respect to any dispute or claim relating to this Subcontract or the Work performed or to be performed hereunder shall be binding upon Subcontractor to the same extent they are binding on Contractor, and Subcontractor agrees to accept such determination, provided Subcontractor shall have been given reasonable notice of such dispute, proceeding, or litigation and opportunity to defend or present claims. At the sole discretion of the Contractor, any arbitration with Subcontractor shall be consolidated with any other arbitration proceeding relating to the work under the General Contract. The parties agree to waive their rights to trial by jury since the subject matter of such disputes would, in most instances, be too complex for presentation to a jury and would best be served by a jury-waived proceeding.

Exhibit B: Subcontract, Page 11, (emphasis added).

#### **MEC SUBMITS CLAIMS TO LMH-LANE**

22. As a result of delays on the Project, MEC has submitted to LMH-Lane seven (7) Requests for Equitable Adjustment (“REA”) and one Time Impact Analysis. In its REA 1 through REA 7, MEC asserts a total claimed loss of \$11,469,563.69.

23. LMH-Lane has also submitted to the MBTA REA Nos. 1-4, which correspond to and incorporate MEC’s REA Nos. 1 through 5, for the time period consisting of Notice to Proceed through November 1, 2020.

24. LMH-Lane is working to submit its REA No. 5, which will incorporate MEC’s REA Nos. 6-7.

25. In LMH-Lane’s REA Nos. 1-4, LMH-Lane has passed through \$7,307,393.94 in MEC’s alleged additional costs during the same period of time.

#### **MEC REA NO. 1**

26. MEC submitted its REA and TIA No. 1 to LMH-Lane on November 14, 2019, and a revised submission on February 20, 2020, seeking additional costs of \$4,264,147.27.

27. On or about June 15, 2020, LMH-Lane submitted its REA No. 2 to the MBTA, which incorporated the vetted portion MEC REA No. 1 and attached MEC REA No. 1 as an exhibit to LMH-Lane REA No. 2.

28. The MBTA has made an initial decision on LMH-Lane REA Nos. 1-3 denying LMH-Lane's requests for compensation and granting extensions of time.

29. LMH-Lane disputes the initial decision of the MBTA and the disputed claims can only be litigated because LMH-Lane does not have an agreement to arbitrate claims submitted to the MBTA.

30. As of the date of this Verified Complaint, neither the MBTA nor a court has made a final determination on LMH-Lane's REA Nos. 1-3, and the MBTA has yet to respond at all to LMH-Lane's REA No. 4. As such, there is not a determination by the MBTA or a court on MEC's REA No. 1.

### **MEC REA NO. 2**

31. MEC submitted its REA No. 2 to LMH-Lane on March 11, 2020, seeking additional costs of \$1,238,485.90 for alleged impacts from October 27, 2019 through January 25, 2020.

32. LMH-Lane incorporated MEC REA No. 2 in LMH-Lane REA No. 3, which LMH-Lane submitted to the MBTA on November 2, 2020.

33. As of the date of this Verified Complaint, the MBTA has not made a formal decision on LMH-Lane's REA No. 3 and in turn, the MBTA has not made a determination on MEC's REA No. 2.

34. The MBTA has made an initial decision on LMH-Lane REA Nos. 1-3 denying LMH-Lane's requests for compensation and granting extensions of time.

35. LMH-Lane disputes the initial decision of the MBTA on LMH-Lane REA No. 3 and the disputed claims can only be litigated because LMH-Lane does not have an agreement to arbitrate claims submitted to the MBTA.

36. As of the date of this Verified Complaint, neither the MBTA nor a court has made a final determination on LMH-Lane's REA Nos. 1-3, and the MBTA has yet to respond at all to LMH-Lane's REA No. 4. As such, there is not a determination by the MBTA or a court on MEC's REA No. 2.

**MEC REA NO. 3**

37. MEC submitted its REA No. 3 to LMH-Lane on June 1, 2020, seeking additional costs of \$1,436,071.49 for alleged impacts from January 26, 2020 through April 25, 2020.

38. LMH-Lane incorporated MEC REA No. 3 in LMH-Lane REA No. 3 and No. 4, which LMH-Lane submitted to the MBTA on November 2, 2020, and June 2, 2021, respectively.

39. The MBTA has made an initial decision on LMH-Lane REA Nos. 1-3 denying LMH-Lane's requests for compensation and granting extensions of time.

40. LMH-Lane disputes the initial decision of the MBTA on LMH-Lane REA No. 3 and the disputed claims can only be litigated because LMH-Lane does not have an agreement to arbitrate claims submitted to the MBTA.

41. As of the date of this Verified Complaint, neither the MBTA nor a court has made a final determination on LMH-Lane's REA No. 3, and the MBTA has yet to respond at all to LMH-Lane's REA No. 4. As such, there is not a determination by the MBTA or a court on MEC's REA No. 3.



**MEC REA NO. 4**

42. MEC submitted its REA No. 4 to LMH-Lane on October 8, 2020, seeking additional costs of \$1,078,617.31 for alleged impacts from the April 26, 2020 through July 25, 2020.

43. LMH-Lane incorporated MEC REA No. 4 in LMH-Lane REA No. 4, which LMH-Lane submitted to the MBTA on June 2, 2021.

44. As of the date of this Verified Complaint, the MBTA has not responded to LMH-Lane's REA No. 4 and therefore neither the MBTA nor a court has made a determination on MEC's REA No. 4.

**MEC REA NO. 5**

45. MEC submitted its REA No. 5 to LMH-Lane on January 25, 2021, seeking additional costs of \$1,121,160.72 for alleged impacts from July 26, 2020 through October 31, 2020.

46. LMH-Lane incorporated MEC REA No. 5 in LMH-Lane REA No. 4, which LMH-Lane submitted to the MBTA on June 2, 2021.

47. As of the date of this Verified Complaint, the MBTA has not responded to LMH-Lane's REA No. 4 and therefore neither the MBTA nor a court has made a determination on MEC's REA No. 5.

**MEC REA NOs. 6 and 7**

48. MEC submitted its REA No. 6 to LMH-Lane on April 26, 2021, seeking additional costs of \$1,312,010.00 for alleged impacts on the project from November 1, 2020 to January 30, 2021.

49. MEC submitted its REA No. 7 to LMH-Lane on July 1, 2021, seeking additional costs of \$1,019,072.00 for alleged impacts on the project from January 31, 2021 to April 24, 2021.

50. LMH-Lane is in the process of incorporating MEC REA Nos. 6 and 7 in LMH-Lane REA No. 5, which LMH-Lane will submit to the MBTA shortly.

51. MEC has claimed a total amount of damages of \$11,469,563.69 in MEC's REA Nos. 1 through 7.

52. LMH-Lane has an obligation at law and by contract to review any claims submitted to the MBTA for accuracy and legitimacy.

53. LMH-Lane has spent a great deal of time and money analyzing MEC's REAs to segregate out the time and money claimed before passing them through to the MBTA.

54. To date, LMH-Lane has passed through \$7,307,393.94 in MEC's alleged additional costs set forth in MEC REA Nos. 1-5.

#### **MEC FILES A DEMAND FOR ARBITRATION WHILE WORK IS STILL ONGOING**

55. The Project is on-going and, as of August 31, 2021, it is estimated to be 28-29% complete.

56. Per the last submitted schedule, substantial completion is scheduled for July 1, 2024.

57. MEC filed a demand for arbitration on or about March 12, 2020, against LMH-Lane, Lane, LMH-CMC, JV, LMH, and CMC in American Arbitration Association Case No. 01-20-0005-0889 when the Project was approximately fourteen (14%) percent complete.

58. MEC filed a First Amended Arbitration Demand on or about October 14, 2020, requesting declaratory relief and asserting claims for Breach of Contract, Quantum Meruit, Cardinal Change, Breach of the Implied Covenant of Good Faith and Fair Dealing, and violation

of G.L. c. 93A. A true and accurate copy of the First Amended Arbitration is Demand is attached hereto as Exhibit C (without exhibits).

59. The Breach of Contract and Quantum Meruit counts allege damages related to, *inter alia*, the amounts claimed in MEC's REA Nos. 1-4 (now 7).

60. MEC has not further amended its demand for arbitration but is claiming all amounts owed through MEC REA Nos. 1-7.

**COUNT I**  
**Application for Stay of Arbitration Pursuant to G.L. c. 251, § 2(b)**

61. LMH-Lane incorporates by reference the allegations in Paragraphs 1 through 60 above as though fully set forth herein.

62. According to G.L. c. 251, § 2(b), upon application, "the superior court may stay an arbitration proceeding commenced or threatened if it finds that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily determined, and if the court finds for the applicant it shall order a stay of arbitration; otherwise, the court shall order the parties to proceed to arbitration."

63. Subcontract § 20 states "[w]ith respect to Owner pass-through claims, Subcontractor agrees to strictly adhere to the provisions in the General Contract Documents relating to notice...submission, processing, and resolution of claims or disputes."

64. The claims resolution procedures in the Prime Contract do not provide for arbitration, and the Parties to the Subcontract did not agree to arbitrate any pass-through claims.

65. Pursuant to the terms of the Subcontract and the Prime Contract as incorporated, the claims submitted by MEC regarding delay are not arbitrable unless and until the claims go through the Prime Contract dispute resolution process and it is determined that the claims do not involve the MBTA.

66. Pursuant to its contractual obligations, LMH-Lane has submitted or will submit MEC's vetted requests for equitable adjustment through to the MBTA.

67. Pursuant to the terms of the Subcontract, and the Prime Contract by incorporation, any final decision by the MBTA on those claims must be litigated and cannot be adjudicated in the arbitration.

68. To date, MEC has claimed a total amount of damages of \$11,469,563.69 in MEC's REA Nos. 1 through 7.

69. LMH-Lane has passed through at least \$7,307,393.94 of MEC's alleged additional costs after an extensive and expensive analysis of those claims and intends to pass through approximately an additional \$2,331,082.00 for a total intended pass-through amount of \$9,638,475.94.

70. LMH-Lane is in the process of submitting REA No. 5, which will cover the time frame current through MEC's REA No. 7, and will therefore include all or portions of MEC's REAs submitted to date.

71. Prior to submission of its REAs, LMH-Lane worked with MEC to substantiate MEC's REAs to ensure that they have the appropriate back-up to support the claims to the MBTA.

72. As substantially all of MEC's claims are pass-through claims that have been or will be submitted to the MBTA, those claims are not subject to the arbitration clause in the Subcontract.

73. The claims are subject to the Prime Contract claims procedure, which does not contain an agreement to arbitrate.

74. The claims set forth by MEC in the arbitration must therefore be stayed.

75. LMH-Lane has complied with all conditions precedent necessary to maintain this action against MEC.

WHEREFORE, LMH-Lane Cabot Yard Joint Venture demands the following relief:

- a. Pursuant to Count I, that this Court issue a Short Order of Notice ordering Mass. Electric Construction Co. to appear before the Court and to show cause why this Court should not stay the arbitration in American Arbitration Association Case No. 01-20-0005-0889;
- b. After notice and hearing, that this Court issue an order staying the Arbitration in American Arbitration Association Case No. 01-20-0005-0889, in accordance with G.L. c. 251, § 2(b); and
- c. That this Court grant such other and further relief as is just and appropriate.

**VERIFICATION**

I, Dennis Luzier, Vice President-Operations of The Lane Construction Corporation, and the Managing Director and Chairman of the Joint Venture Committee for the LMH-Lane Cabot Yard Joint Venture, state under oath that the statements of fact and exhibits attached to this Verified Complaint are true and accurate to the best of my knowledge and belief.

Dennis A.  
Luzier



Digitally signed by  
Dennis A. Luzier  
Date: 2021.09.02  
16:12:35 -04'00'

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Dennis Luzier, Vice President – Operations

Respectfully submitted,

**LMH-LANE CABOT YARD JOINT  
VENTURE,**

By its attorneys,

/s/ John J. McNamara

John J. McNamara

BBO No. 557882

Elise M. Kuehn

BBO No. 688829

LANE McNAMARA LLP

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[ekuehn@lanemcnamara.com](mailto:ekuehn@lanemcnamara.com)

Dated: September 2, 2021

# EXHIBIT A

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

CONTRACT

Clause 1. - This agreement, made this 2<sup>nd</sup> day of August, in the year two thousand Eighteen, between the Massachusetts Bay Transportation Authority, and LMH-Lane Cabot Yard JV herein called the Contractor.

Clause 2. - Witnesseth, that the parties to this agreement, each in consideration of the agreement on the part of the other herein contained, do hereby agree, the Massachusetts Bay Transportation Authority for itself, and said Contractor for itself and its successors and assigns, as follows:

The Contractor agrees to furnish all equipment, machinery, tools and labor, to furnish and deliver all materials required to be furnished and delivered in and about the improvement and to do and perform all work under **MBTA Contract No. R44CN02 Cabot Yard and Maintenance Facility Improvements, South Boston**

in a sum not to exceed **Two Hundred Thirteen Million, Eight Hundred Seventeen Thousand Dollars (\$ 213,817,000 )** based upon a schedule of unit, lump sum and allowance bid prices, in strict conformity with the provisions herein contained and of the Notice to Bidders, Bid Form, Supplementary Conditions, Addenda, and Specifications hereto attached, and with the plans referred to therein. All plans, Specifications, Supplementary Conditions, Notice to Bidders, Addenda, and Bid Form are hereby specifically made a part of this contract as fully and to the same effect as if the same had been set forth at length herein.

Clause 3. - In consideration of the foregoing premises the Massachusetts Bay Transportation Authority agrees to pay and the Contractor agrees to receive as full compensation for everything furnished and done by the Contractor under this contract, including all work required but not shown on the plans for the items herein mentioned, and also for all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements (except as excluded in the Standard Specifications, Section 00700, Article 5.19 or the Supplementary Conditions thereto) or from any delay or from an unforeseen obstruction or any difficulty encountered in the prosecution of the work, and for all risks of every description connected with the work, and for all expenses incurred by or in consequence of the suspension or discontinuance of the work as herein specified, and for well and faithfully completing the work, and the whole thereof, as herein provided, such prices as are set out in the accompanying Bid Form, and for all work required, for which there is no item in the Bid Form, such compensation as is provided for in the aforesaid Specifications.



In witness whereof, the said Contractor has caused these presents to be signed in its name and behalf and its corporate seal to be hereto affixed by

\_\_\_\_\_ MASSIMO MARINO Its Managing Director and Chairman of the Committee of the Joint Venture

and \_\_\_\_\_ its \_\_\_\_\_

thereto duly authorized, and the said Massachusetts Bay Transportation Authority has executed these presents by its authorized representatives on the year and day above written.

By: \_\_\_\_\_

\_\_\_\_\_ LMH-LANE CABOT YARD JOINT VENTURE Contractor

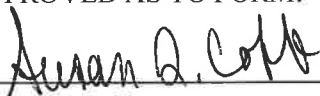
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

BY

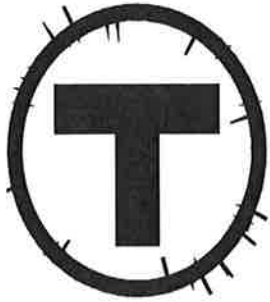


\_\_\_\_\_  
Luis Manuel Ramirez  
General Manager & CEO

APPROVED AS TO FORM:



\_\_\_\_\_  
Susan D. Cobb  
Deputy General Counsel, MBTA  
Contracts and Procurement



**MASSACHUSETTS  
BAY  
TRANSPORTATION  
AUTHORITY**

**CONTRACT SPECIFICATIONS  
for  
MBTA Contract No. R44CN02**

**CABOT YARD  
&  
MAINTENANCE FACILITY IMPROVEMENTS  
BOSTON, MASSACHUSETTS**

**CONFORMED SPECIFICATIONS  
VOLUME 1 OF 3 – Divisions 0-1**

**June, 2018**

**HNTB CORPORATION  
300 Apollo Drive  
Chelmsford, MA 01824**

**JACOBS ENGINEERING GROUP, INC.  
120 Saint James Avenue, 5th Floor  
Boston, MA 02116**

**MASSACHUSETTS BAY TRANSPORTATION AUTHORITY**

**MASSACHUSETTS DEPARTMENT OF TRANSPORTATION**

Stephanie Pollack  
Secretary and Chief Executive Officer

**BOARD OF DIRECTORS**

Ruth Bonsignore, Chair

Dominic Blue

Lisa Calise

Timothy King

Brian Lang

Dean Mazzarella

Robert Moylan, Jr.

Steve Poflak

Joseph Sullivan

Betsy Taylor

Monica Tibbits-Nutt

**GENERAL MANAGER AND CEO OF THE MBTA**

Luis Manuel Ramirez

**ASSISTANT GENERAL MANAGER FOR CAPITAL DELIVERY**

Beth J. Larkin, P.E.

GENERAL TABLE OF CONTENTS

**VOLUME 1 OF 3**

**BIDDING AND CONTRACT REQUIREMENTS AND  
DIVISION 1 - GENERAL REQUIREMENTS**

<b>NOTICE TO BIDDERS</b>	<b>00100-1 TO 00100-2</b>
<b>INSTRUCTIONS TO BIDDERS</b>	<b>00200-1 TO 00200-12</b>
<b>BID FORMS AND SUPPLEMENTS</b>	<b>00410-1 TO 00410-18</b>
<b>CONTRACT AND BOND FORMS</b>	<b>00510-1 TO 00510-20</b>
<b>GENERAL CONDITIONS</b>	<b>00700-1 TO 00700-59</b>
<b>SUPPLEMENTARY CONDITIONS</b>	<b>00800-1 TO 00800-52</b>
<b>DIVISION 1 GENERAL REQUIREMENTS</b>	<b>SECTIONS 01000 TO 01700</b>

**VOLUME 2 OF 3**

<b>CONSTRUCTION SPECIFICATIONS – CABOT YARD REBUILD</b>	<b>SECTIONS 02052 TO 16899</b>
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**VOLUME 3 OF 3**

<b>CONSTRUCTION SPECIFICATIONS - CABOT MAINTENANCE FACILITY</b>	<b>SECTIONS 02060 TO 16950</b>
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TO: ALL PROSPECTIVE BIDDERS

FROM: CONTRACT ADMINISTRATION DEPARTMENT  
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

NOTE WELL:

PLEASE BE ADVISED THAT AN INFORMATIONAL BID FORM IS INCLUDED IN THE FRONT SECTION OF THE CONTRACT SPECIFICATIONS AND MUST NOT BE USED FOR BIDDING PURPOSES. BIDDERS MUST SUBMIT ALL BIDS ELECTRONICALLY USING EXPEDITE SOFTWARE AVAILABLE AT [WWW.BIDX.COM](http://WWW.BIDX.COM).

Prior to submitting an electronic bid over the Internet, each bidder must have a Digital Identification (ID) issued by the Authority, on file with Info Tech, Inc., and enabled by Info Tech, Inc. Using this Digital ID shall constitute the Bidder's signature for proper execution of the Proposal

ALL BIDS MUST BE SUBMITTED ELECTRONICALLY AT [WWW.BIDX.COM](http://WWW.BIDX.COM)

Interested parties can subscribe to the BidExpress on-line bidding exchange by following the instructions provided at [www.bidx.com](http://www.bidx.com) or by contacting:

Info Tech Inc.  
5700 SW 34th Street, Suite 1235  
Gainesville, FL 32608-5371  
email: [customer.support@bidx.com](mailto:customer.support@bidx.com)

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY  
10 PARK PLAZA, SUITE 5170  
BOSTON, MA 02116

NOTICE TO BIDDERS

Electronic proposals for the following project will be received through the internet using Bid Express until the date and time stated below, and will be posted on [www.bidx.com](http://www.bidx.com) forthwith after the bid submission deadline. No paper copies of bids will be accepted. Bidders must have a valid digital ID issued by the Authority in order to bid on projects. Bidders need to apply for a digital ID with Bid Express at least 14 days prior to a scheduled bid opening date.

Electronic bids for MBTA Contract No. R44CN02, **CABOT YARD & MAINTENANCE FACILITY IMPROVEMENTS, SOUTH BOSTON, MASSACHUSETTS, CLASS 1 – GENERAL TRANSIT CONSTRUCTION - \$50,000,000.00, CLASS 3 – TRACKWORK - \$35,000,000.00, CLASS 5 – ELECTRICAL - \$50,000,000.00, CLASS 7 – BUILDINGS - \$30,000,000.00, & PROJECT VALUE - \$216,811,000.00**, can be submitted at [www.bidx.com](http://www.bidx.com) until two o'clock (2:00 p.m.) on **June 12, 2018**. Immediately thereafter, in a designated room, the Bids will be opened and read publicly.

Work under this contract consists of:

The rebuilding of the existing multi-acre Cabot Yard and improvements to the existing Cabot Maintenance Facility in South Boston, Massachusetts, in order to receive the new Red Line Fleet and to bring the yard and facilities to a state of good repair. The Work includes Sitework, Trackwork, Structural Work, Electrical Work, Traction Power Work, Signal Work, Communications Work, Architectural Work, Building Systems Work, and New Equipment.

*Each prospective bidder proposing to bid on this project must be prequalified in accordance with the Authority's "Procedures Governing Classification and Rating of Prospective Bidders." Copies may be obtained at [www.mbta.com](http://www.mbta.com). Requests for prequalification for this Project will not be accepted by the Authority after the tenth (10th) day preceding the date set for the opening of bids.*

*Prequalified bidders may obtain from the Contract Administration Office a "Request for Bid Form" which must be properly filled out and submitted for approval. Potential bidders must download and submit a completed "Request for Proposal Form" for approval to: [plans&specifications@mbta.com](mailto:plans&specifications@mbta.com). Please refer to Section, 00200 - Instruction to Bidders, Section, 1.12, Competency of Bidders, for additional prequalification requirements.*

Bidding documents may be downloaded from the MBTA FTP site, or delivered on CD via Fed Ex. Documents will be available starting at 9:00 AM on April 18, 2018. Contract Specifications and Drawings shall be available in portable data file (.pdf) format. Interested parties may request FTP site credentials or Fed Ex delivery of the project documents on CD by completing the request form on the project page at:  
[http://www.mbta.com/business\\_center/bidding\\_solicitations/current\\_solicitations/](http://www.mbta.com/business_center/bidding_solicitations/current_solicitations/)

Bidders attention is directed to Appendix 1, Notice of Requirement for Affirmative Action to Insure Equal Employment Opportunity; and to Appendix 2, Supplemental Equal Employment Opportunity, Anti-Discrimination, and Affirmative Action Program in the specifications. While there is no DBE goal associated with this contract, the Authority strongly encourages the use of Minority, Women and Disadvantaged Business Enterprises as prime contractors, subcontractors and suppliers in all of its contracting opportunities.

Bidders will affirmatively ensure that in regard to any contract entered into pursuant to this solicitation, minority and female construction contractors will be afforded full opportunity to submit Bids and will not be discriminated against on the grounds of race, color, religion, sex, age, or national origin in consideration for an award.

Bidders will be required to comply with Federal Equal Employment Opportunity Regulations and the President's Executive Order No. 11246 and any amendments or supplements thereto. Bidders will also be required to comply with the Governor's Executive Order No. 481, prohibiting the use of undocumented workers on State Contracts and any amendments and supplements thereto.

The Authority will conduct a site tour on **April 23, 2018**. Bidders are requested to be present in front of the **Cabot Maintenance Facility at 275 Dorchester Avenue, South Boston, Massachusetts**, at 10:00 a.m. to participate in the tour. Bidders are advised that they should have representation and identify who will be attending at this tour as no extra visits are planned. Please contact Project Manager, **Mr. Michael K. Fitzgerald, 20 Winthrop Square, 4<sup>th</sup> floor, Boston, Massachusetts 02110**, [MFITZGERALD@MBTA.com](mailto:MFITZGERALD@MBTA.com) to provide proper names of who will be attending the site tour.

A pre-bid conference will be held on **April 23, 2018** at 10:00 a.m. at **Cabot Maintenance Facility at 275 Dorchester Avenue, South Boston, Massachusetts**. Any request for interpretation of the Plans and Specifications should be submitted in writing at the same time. All questions during the bid phase should be directed to the MBTA Project Manager in writing or emailed to the contact information above. Questions are to be submitted no later than ten (10) days prior to the date set forth for the opening of the bids.

Bidders will be required to certify as part of their bids that they are able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.

This Contract is subject to minimum State wage rates as well as all other applicable labor laws.

Bid Guaranty shall consist of a bid deposit in the amount of five (5) percent of the value of the bid, in the form of a bid bond, cash, certified check, treasurer's or cashier's check.

The successful Bidder shall be required to furnish a Performance Bond and a Labor and Materials Payment Bond each for the full amount of the Contract price.

The Authority reserves the right to reject any or all Bids, to waive informalities, to advertise for new Bids or proceed to do the work otherwise, as may be deemed to be in the best interests of the Authority.

This information may be viewed at the MBTA website:

[http://www.mbt.com/business\\_center/bidding\\_solicitations/current\\_solicitations/](http://www.mbt.com/business_center/bidding_solicitations/current_solicitations/)

## MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

Date: **April 13, 2018**

By: Stephanie Pollack  
Secretary and Chief  
Executive Officer of  
MassDOT

Luis Manuel Ramirez  
General Manager and  
CEO of the MBTA

## GENERAL CONDITIONS

### TABLE OF CONTENTS

<u>Paragraph</u>	<u>Title</u>	<u>Page</u>
1.	ARTICLE 1 - DEFINITION OF TERMS	
A.	Article 1.1 – Definitions of Terms	00700 - 1
2.	ARTICLE 2 - SCOPE OF WORK	
A.	Article 2.1 – Intent of Contract	00700 - 4
B.	Article 2.2 – Changes in the Work	00700 - 5
C.	Article 2.3 – Extra Work	00700 - 5
D.	Article 2.4 – Contractor Cost Reduction Proposals Value Engineering	00700 - 5
E.	Article 2.5 – Increased or Decreased Contract Quantities	00700 - 7
F.	Article 2.6 – Rights in the Use of the Materials Found on the Work	00700 - 7
G.	Article 2.7 – Archaeological and Paleontological Salvage	00700 - 7
H.	Article 2.8 – Warranty of Work	00700 - 8
I.	Article 2.9 – Changed Conditions	00700 - 8
J.	Article 2.10 – Contractor Proposed Changes	00700 - 9
K.	Article 2.11 – Community Relations	00700 - 9
3.	ARTICLE 3 - CONTROL OF WORK	
A.	Article 3.1 – Authority of the Engineer	00700 - 10
B.	Article 3.2 – Contract Drawings	00700 - 11
C.	Article 3.3 – Conformity with Drawings and Specifications	00700 - 11
D.	Article 3.4 – Coordination of Contract Drawings and Specifications	00700 - 12
E.	Article 3.5 – Cooperation by Contractor	00700 - 12
F.	Article 3.6 – Adjacent Contracts	00700 - 13
G.	Article 3.7 – Line and Grade	00700 - 13
H.	Article 3.8 – Authority and Duties of Engineer’s Assistants	00700 - 14
I.	Article 3.9 – Inspection of the Work	00700 - 14
J.	Article 3.10 – Removal of Defective or Unauthorized Work	00700 - 15
K.	Article 3.11 – Final Acceptance	00700 - 15



4. ARTICLE 4 - CONTROL OF MATERIALS	
A. Article 4.1 – Trade Names and Alternatives	00700 - 16
B. Article 4.2 – Certificates of Compliance	00700 - 17
C. Article 4.3 – Authority Furnished Materials	00700 - 17
D. Article 4.4 – Defective Materials	00700 - 18
E. Article 4.5 – Asbestos Materials	00700 - 18
F. Article 4.6 – Banned Materials	00700 - 18
5. ARTICLE 5 - LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC	
A. Article 5.1 – Laws to be Observed	00700 - 18
B. Article 5.2 – Permits and Licenses	00700 - 19
C. Article 5.3 – Motor Vehicles	00700 - 19
D. Article 5.4 – Insurance Requirements	00700 - 19
E. Article 5.5 – Patented Devices, Materials and Processes	00700 - 22
F. Article 5.6 – Restoration of Surfaces Opened by Permit	00700 - 22
G. Article 5.7 – Federal Participation	00700 - 22
H. Article 5.8 – Relations with Railroad and Responsibility for Damage to Railroad	00700 - 23
I. Article 5.9 – Use of Explosives	00700 - 23
J. Article 5.10 – Protection and Restoration of Property	00700 - 24
K. Article 5.11 – Forest Protection - Not Used	00700 - 26
L. Article 5.12 – Protection of Fences	00700 - 26
M. Article 5.13 – Safeguarding of Excavations	00700 - 26
N. Article 5.14 – Disposal of Materials Outside the Work Site	00700 - 26
O. Article 5.15 – Safety and First Aid Requirements	00700 - 27
P. Article 5.16 – Responsibility for Damage Claims	00700 - 30
Q. Article 5.17 – Claims Against Contractor for Payment of Labor and Materials	00700 - 31
R. Article 5.18 – Payment of Taxes	00700 - 33
S. Article 5.19 – Claims of Contractor for Compensation	00700 - 33
T. Article 5.20 – Opening Portions of Contract for Operations	00700 - 34
U. Article 5.21 – Contractor Responsibility for the Work	00700 - 34
V. Article 5.22 – Conflict of Interest	00700 - 35
W. Article 5.23 – Personal Liability of Authority Officials	00700 - 35
X. Article 5.24 – No Waiver of Legal Rights	00700 - 35
Y. Article 5.25 – Labor, Lodging, Board, Maximum Hours of Employment, Keeping of Payroll Records	00700 - 36

Z. Article 5.26 – Equal Opportunity Clause	00700 - 36
AA. Article 5.27 – Requirements of Chapter 30, Section 39R of General Laws of the Commonwealth of Massachusetts	00700 - 37

6. ARTICLE 6 - PROSECUTION AND PROGRESS

A. Article 6.1 – Subletting or Assignment of Contract	00700 - 40
B. Article 6.2 – Prosecution of Work	00700 - 41
C. Article 6.3 – Removal or Demolition of Buildings and Land Takings	00700 - 43
D. Article 6.4 – Limitations of Operations	00700 - 43
E. Article 6.5 – Character of Workmen, Methods and Equipment	00700 - 53
F. Article 6.6 – Delay and Suspension of Work	00700 - 54
G. Article 6.7 – Claim for Delay and Suspension of Work	00700 - 54
H. Article 6.8 – Determination and Extension of Contract Time for Completion	00700 - 55
I. Article 6.9 – Failure to Complete Work on Time	00700 - 56
J. Article 6.10 – Termination of Contract	00700 - 56
K. Article 6.11 – Termination for Convenience	00700 - 57

## SECTION 00700

### GENERAL CONDITIONS

#### PART 1 - DEFINITION OF TERMS

##### 1.1 DEFINITION OF TERMS

- A. Wherever in the Bid or Contract Documents the following terms, or pronouns in place of them, are used, the intent and meaning shall be as follows:
1. Acceptance - Formal written acceptance by the Authority of the completed Work.
  2. Addenda - Written interpretations of and/or revisions to the Bid Documents issued by the Authority prior to opening of Bids.
  3. Alteration - A change or substitution in the form, character, or detail of the Work done or to be done within the original scope of the Contract.
  4. Authority - Massachusetts Bay Transportation Authority, created by Chapter 563, Section 18 of the Acts of 1964, of the Commonwealth, the Party of the First Part to the Contract.
  5. Award - Award by the Authority of a Contract.
  6. Bid - Offer of the Bidder for the Work when submitted on the prescribed Bid Form, properly signed, dated, and guaranteed, and which includes the schedule of bid items.
  7. Bid Documents - Documents provided by the Authority for the purpose of soliciting Bids for the Work. Bid Documents will include, as applicable, Standard Specifications, Contract Specifications, Contract Drawings, MBTA Geotechnical Data Reports, Bid Form, and Addenda.
  8. Bid Form - Forms issued by the Authority requesting bids for a specific Contract and includes the Notice to Bidders, Instructions to Bidders, and Form for Bid.
  9. Bid Security (Bid Guaranty) - The cash, cashier's or treasurer's check, certified check, or Bidder's Bond accompanying the Bid submitted by the Bidder, as a guaranty that the Bidder will enter into a Contract with the Authority for the performance of the Work and furnish acceptable bonds and insurance if the Contract is awarded to the Bidder.
  10. Bidder - An individual, firm, partnership, corporation, or combination thereof, submitting a Bid for the Work on the prescribed Bid Form.
  11. Chairman of the Board of Directors of the Authority - Chief Executive Officer or designee, such designee acting within the scope of the particular duties entrusted to him.
  12. Change Order - A document executed and issued to the Contractor by the Authority amending the Contract.
  13. Commonwealth - Commonwealth of Massachusetts.
  14. Contract Documents - The Standard Specifications, Contract Specifications, Bid, and Contract Drawings revised to incorporate all changes made during the Bid period by

Addenda and to incorporate information included in the Bid accepted by the Authority and all authorized changes to the Contract issued subsequent to the execution of the Contract in accordance with the most recent MBTA Change Order Guidelines.

15. Contract - The written agreement executed by the Authority and the Contractor, setting forth the obligations of the Parties there under. Further, any and all executed changes made in accordance with the MBTA Change Order Guidelines.
16. Contract Administrator - Manager of the Office of Contract Administration or his designee.
17. Contract Bonds –
  - a. Performance Bond - A bond executed by the Contractor and the Contractor's Sureties in the full amount of the contract to ensure the faithful performance of the contract.
  - b. Labor and Materials Payment Bond - A bond executed by the Contractor and the Contractor's Sureties in the full amount of the Contract to ensure the payment of labor, materials, and rental of equipment.
18. Contract Drawings - Plans, profiles, typical cross sections, general cross sections, elevations, and details list as referenced on the Drawing Index, or amendments thereto, and working drawings and shop drawings approved by the Engineer, all of which show locations, character, dimensions, and details of the Work.
19. Contract Item - A specifically described unit of work for which a price is provided in the Contract.
20. Contract Specifications - A set of documents issued by the Authority for the intended Work which includes the Notice to Bidders, Instructions to Bidders, Bid Form, Contract Forms, Contract Bond Forms, Supplementary Conditions, technical provisions, and other requirements, forms and exhibits identified therein.
21. Contract Time - Number of calendar days allowed or specified date(s) for completion of the Contract.
22. Contractor - The individual, firm, partnership, corporation, or combination thereof, private, municipal or public, including joint ventures, which, as an independent contractor, has entered into Contract with the Authority, as Party or Parties of the Second Part, and who is referred to throughout the Contract Documents by singular number.
23. Days - Every day shown on the calendar, Saturdays, Sundays and holidays included.
24. Engineer - The General Manager of the Authority or designee acting within the scope of the particular duties entrusted to this person.
  - a. Design Engineer and/or Consultant HNTB, Corp. has been retained by the Authority as engineering consultant during the construction of the Cabot Yard Rebuild Work. The terms "Design Engineer" and "Consultant" are at times interchangeable.
  - b. Design Engineer and/or Consultant Jacobs Engineering Group, Inc.. has been retained by the Authority as engineering consultant during the construction of the Cabot Carhouse Improvements Work. The terms "Design Engineer" and "Consultant" are at times interchangeable.
25. Engineer's Estimate of Quantities - List of quantities of work estimated to be performed as contained in the Bid.

26. Extra Work - Work which is not included in the Contract as awarded but found to be necessary for the satisfactory completion of the Contract within its intended scope, and bears a reasonable subsidiary relation to the full execution of the Work originally described in the Contract.
27. Extra Work Order - An order in writing issued by the Engineer to the Contractor prior to performing the Extra Work, setting forth the Extra Work to be done, the basis of payment and time adjustments, if any. Following the issuance of an Extra Work Order, a Change Order will be executed to amend the Contract Documents.
28. Force Majeure – Acts of God, strikes, lockouts, riots, acts of war, epidemics, governmental regulations imposed after the fact, fire, communication line failures, power failures, earthquakes or other disasters.
29. Form for Bid - see Bid Form.
30. General Manager - Shall be the Chief Executive Officer of the Authority, and shall have general direction, supervision and control of the conduct of the business, property, personnel and affairs of the Authority except as may be otherwise prescribed by law or by the regulations of the Board of Directors.
31. General Terms - Wherever the words "required," "determined," "directed," "specified," "authorized," "ordered," "given," "designated," "considered necessary," "deemed necessary," "Permitted," "reserved," "suspended," "established approval," "approved," "disapproved," "acceptable," "unacceptable," "suitable," "accepted," "satisfactory," "unsatisfactory," "sufficient," "insufficient," "rejected," "condemned," or words of like import are used, they shall be understood to imply "by the Engineer" or "to the Engineer," unless the context clearly indicates a different meaning.
32. Indicated - A term meaning as shown on the Contract Drawings, as described in the Specifications, or as required by other Contract Documents.
33. Manager of Contract Administration – the Manager of the Office of Contract Administration for the Massachusetts Bay Transportation Authority or his designee.
34. MBTA Transit System - Authority Transit System, including right-of-way, pavement, tracks, facilities, structures, equipment, appurtenances, and other property of the Authority.
35. Non-System facilities - Facilities which are not a part of the MBTA Transit System.
36. Notice to Bidders - That portion of the Bid which advertises for Bids for a specific Contract. Notice to Bidders will indicate time and place for submitting and for opening of Bids, location of the Work, a brief description of the Work to be provided, and bid security required.
37. Notice to Proceed - Written notice from the Authority to the Contractor to proceed with the Work.
38. Project - That specific portion of MBTA Transit System indicated in the Contract Documents.
39. Provide - In reference to work to be performed by the Contractor, "provide" means furnish, install, and (as applicable) test complete in place.

40. Reference Utility Standards - Drawings and specifications, published by municipalities, utility companies, and railroads which are included or referenced in the Contract Documents.
41. Specifications - Directions, provisions, and requirements contained in the Contract Specifications.
42. Subcontractor - The individual, firm, partnership, corporation, vendor, supplier, or combination thereof to whom the Contractor, with written approval of the Authority, sublets any part of the contract.
43. Supplementary Conditions - Supplements and additions to the General Conditions.
44. Surety - Corporate body bound with and for the Contractor for the full and complete performance of the Contract and for the payment of all legal debts pertaining to the Work, and who executed the Contract Bonds.
45. U.S. Department of Transportation (DOT) - Secretary of the U.S. Department of Transportation, and other person authorized to perform the functions of that office, including representatives of the Federal Transportation Administration (FTA).
46. Value Engineering - The systematic application of recognized techniques which identify the function of a product or service, and provide the necessary function or service reliably at lower overall cost.
47. Work - All the construction, materials, equipment, and contractual requirements as specified, shown, or indicated in the Contract Documents, including all alterations, amendments, or extensions thereto made by authorized changes.
48. Working Drawings and Shop Drawings - Any supplementary drawings or similar data which the Contractor is required to submit to the Engineer for approval, including but not necessarily limited to erection, falsework, and formwork drawings; dewatering; bending diagrams and bar schedules for reinforcing steel; calculations; and manufacturers' catalog information and data.

## **PART 2 - SCOPE OF WORK**

### **2.1 INTENT OF THE CONTRACT**

- A.** Intent of the Contract is to provide for the construction and completion in every detail of the Work. The Contractor shall complete the Work to the satisfaction of the Engineer at the prices set forth and agreed upon. Where portions of the Work are described in general terms, but not in complete detail, the best general practice shall be followed. Only materials and workmanship of best standard quality shall be used. The Contractor shall, unless otherwise specified, furnish all labor, superintendence, materials, tools, equipment and incidentals necessary to complete the Work in a proper, thorough, and workmanlike manner.
- B.** Work consists of the rebuilding of the Cabot Yard including but not limited to Sitework, Trackwork, Structural Work, Traction Power Work, Signal Work, and Communications Work and upgrades and improvements to the Cabot Maintenance Facility. The Work is further described in Section 01010 SUMMARY OF THE WORK.

## **2.2 CHANGES IN THE WORK**

- A.** The Authority reserves the right at any time during the progress of the Work to make alterations to, deviations from, additions, to, and deletions from the Contract Drawings and Specifications. Such changes shall not invalidate the Contract nor release the surety. The Contractor agrees to accept the Work as changed, the same as if it had been a part of the original Contract. Such changes will be authorized in writing by the Engineer. The Contractor shall accept as full compensation for Work, except as specified in Paragraphs B. and C., the Contract unit prices stipulated in the Contract for the actual quantity of work provided in an acceptable manner. Such changes shall not invalidate the Contract, nor any part thereof.
- B.** Wherever an alteration, deviation, addition, or deletion involves a change in the nature of design or in the type of construction which increases or decreases the cost of performance of the Work or requires the Contractor to furnish materials or provide work of a kind not susceptible of classification for payment under any of the items scheduled in the Bid, the Authority and the Contractor may enter into Supplementary Agreements covering the work to be done and -the manner and method of payment therefor. If the Contractor and the Authority disagree on increased or decreased costs, the changes shall be by a Change Order.
- C.** If the changes, in the opinion of the Engineer, are of sufficient magnitude as to require additional time to complete the Contract, such time adjustment may be made in accordance with the provisions of Article 6.8.

## **2.3 EXTRA WORK**

- A.** The Contractor shall do any work not herein provided for when and as ordered in writing by the Engineer, such written order to contain particular preference to this Article and to designate the work to be done as Extra Work.
- B.** Unless specifically noted in the Change Order, Extra Work will not extend the time of completion of the Contract as stipulated in Article 6.8 A.6.
- C.** Determination of the Engineer will be final upon all questions concerning the amount and value of Extra Work (except as provided in Article 5.19).
- D.** Payment for Extra Work will be as specified in Section 01151 - MEASUREMENT AND PAYMENT.

## **2.4 CONTRACTOR COST REDUCTION PROPOSALS VALUE ENGINEERING**

- A.** The Contractor may submit cost reduction Proposals for changing the Contract requirements. The Proposals shall be based upon a sound study made by the Contractor indicating that the Proposal:
  - 1. Will result in a net reduction in the total Contract cost to the Authority;
  - 2. Will not impair any essential form, fit, function, or characteristic of the Work, such as safety, service life, reliability, economy of operation, ease of maintenance, and necessary standardized features;
  - 3. Will not require an unacceptable extension of the Contract completion time; and
  - 4. Will require a Change Order to the Contract.
- B.** Cost reduction or Value Engineering Proposals shall be processed in the same manner as prescribed for any Contract initiated Proposal which would necessitate issuance of a Change Order. The

paleontological significance shall be carefully protected in accordance with the above referenced manual and shall not be disturbed by the Contractor until so directed by the Engineer.

- C. Contractor shall receive no extra compensation for such special care, unless said compensation is authorized in writing by the Engineer as specified under Section 01151 - MEASUREMENT AND PAYMENT, Part 1 "Payment for Extra Work" Article. Material from such areas shall be carefully protected, and if necessary to remove specimens, the Contractor shall do so only at the Engineer's direction, and after an authorized agent has witnessed or otherwise referenced their locations.

## 2.8 WARRANTY OF WORK

- A. Neither final acceptance, final payment nor any provision in the Contract Documents nor partial or entire use or occupancy of the premises by the Authority shall constitute an acceptance of work not done in accordance with the Contract Documents or relieve the Contractor of liability with respect to any express warranties or responsibility for faulty materials or workmanship.
- B. Except where longer periods of warranty are specified for certain items, the Contractor warrants all work done under the Contract to be free from faulty materials and workmanship for a period of one year from date of acceptance thereof.
- C. Upon receiving notification from the Authority, the Contractor shall immediately make the required repairs or replacements to any work found defective. If repairs or replacements are not started within 10 days from the date of notification and prosecuted to completion, the Authority reserves the right to employ others to complete the Work. The Contractor agrees, upon demand, to pay the Authority all amounts which it expends for such repairs or replacements.
- D. All remedied Work shall carry the same warranty as the original work starting with the date of acceptable replacement or repair.

## 2.9 CHANGED CONDITIONS

In accordance with Chapter 30, Section 39N of the General Laws of the Commonwealth, as amended, the following paragraph shall apply to the Contract:

- A. If during the progress of the Work, the Contractor or the Awarding Authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those indicated in the Contract Documents either the Contractor or the 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 Authority will make an investigation of such physical conditions, and, if they differ substantially or materially from those indicated in the Contract Documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the 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 Authority will make an equitable adjustment in the Contract price and the Contract will be modified in writing accordingly.
  - 1. Filing, investigation, and settlement of all claims made under said Chapter and Section shall be as follows:
    - a. The Contractor shall promptly and before such conditions are disturbed, notify the Engineer in writing describing in full detail the subsurface or latent physical conditions at the site where it is maintained, that conditions differ substantially or



materially from those conditions indicated in the Contract Documents. The Engineer will promptly investigate the conditions and will promptly submit a written report of its findings and determinations to the Contractor, and if it is found that such conditions as have been described in detail by the Contractor do exist and in fact do so differ materially or substantially, an equitable adjustment will be made and the Contract modified in writing accordingly. No such claim of the Contractor will be allowed unless the Contractor has given the detailed notice specified, or shall it be allowed if such conditions are disturbed prior their investigation by the Engineer.

- b. No adjustment or allowance of any kind except as provided in Article 6.8 will be made to the Contractor due to delay or suspension of the Work or any portion thereof where the actual subsurface or latent physical conditions encountered at the site differ substantially and materially from those indicated in the Contract Documents.
- c. No claim will be approved and no adjustment or allowance made when encountering subsurface or latent physical conditions at the site that differ substantially and materially from those indicated in the Contract Documents unless such conditions were in existence at the time of the Award of the Contract.
- d. Any dispute concerning a question of fact under the Subsection which is not disposed of by agreement shall be decided by the engineer.
- e. If as provided in (a) of this Subsection an equitable adjustment is to be made or contemplated, the Contractor shall submit promptly in writing to the Engineer an itemized statement of the details and amount of work together with his estimated costs for the same and the Engineer shall require the Contractor to keep actual costs and certify the same to the Authority in writing.

- B. If the Contractor and the Authority fail to agree on an equitable adjustment to be made under this Article, then the Contractor shall accept as full payment for the Work in dispute an amount determined in accordance with Section 01151 - MEASUREMENT AND PAYMENT.

## **2.10 CONTRACTOR PROPOSED CHANGES**

- A. Contractor may at any time submit to the Engineer for the Engineer's review and approval or denial, proposed changes to the Contract Documents which will benefit the Authority. Upon acceptance of the proposed changes, the provisions of Article 2.2 and 2.4 (as applicable) shall apply. Denial of a proposed change shall neither provide the Contractor with any basis for claim for damages nor release the Contractor from contractual responsibilities.

## **2.11 COMMUNITY RELATIONS**

- A. The Contractor shall establish and maintain a continuing liaison with persons residing or doing business in the vicinity of the Project site, for the purpose of minimizing inconveniences resulting from construction, and shall appoint a representative, acceptable to the Engineer, for community relations. The representative shall have the authority to act directly, or through the Contractor's approved Superintendent, regarding all valid requests or complaints. Information as to their disposition by the Contractor, shall be furnished to the Engineer. The name and telephone number of the Contractor's community relations representative shall be furnished to those residents or businessmen in the community who might reasonably be expected to be affected by the construction.

## **5.18 PAYMENT OF TAXES**

- A.** Contract prices paid for the Work shall include full compensation for all taxes which the Contractor is required to pay whether imposed by federal, state, or local government, including, without being limited to, federal excise tax.
- B.** However, attention is directed to the Massachusetts Sales Tax, Chapter 64H, Section 6 and the Massachusetts Use Tax, Chapter 64I, Section 7, which state that these taxes are not applicable to the sales of construction materials and supplies incorporated, consumed, employed or expended in construction projects of the Authority. This exemption is also applicable to rental charges for construction vehicles, equipment, and machinery rented, specifically for use on the site of the Authority's construction projects. Bidders are directed to exclude any allowance for Sales or Use Tax from their Bid Form as said tax would relate to the foregoing specific categories. The MBTA Sales Tax Exemption Number is E-042-323-989.

## **5.19 CLAIMS OF CONTRACTOR FOR COMPENSATION**

- A.** No person or corporation, other than the signer of the Contract as Contractor, now has any interest hereunder, and no claim shall be made or be valid; and neither the Authority nor any member, agent, or employee thereof, shall be liable for, or be held to pay, any money except as provided in Article 2.2, 2.3, 2.4, 2.5, and Section 01150 - MEASUREMENT AND PAYMENT, of these Standard Specifications and Clause 3 of the Contract.
- B.** All claims of the Contractor for compensation other than as provided for in the Contract due to any act of omission or commission by the Authority or its agents must be made in writing to the Engineer within 10 days after the beginning of any work or the sustaining of any damage due to such act. Such written statement shall contain a description of the nature of the Work provided or damage sustained; and the Contractor, shall on or before the fifteenth day of the month succeeding that in which such Work is performed or damage sustained file with the Engineer an itemized statement of the details and amount of such work or damage. Unless such statement shall be made as required, the claim for compensation shall be forfeited and invalidated, and the Contractor shall not be entitled to payment due to any such work or damage. Such notice by the Contractor and the keeping of costs by the Engineer shall not in any way be construed as proving the validity of the claim. The provisions of this paragraph shall not apply to changes in quantities as provided under Article 2.5 or to Extra Work ordered by the Engineer in writing.
- C.** On the basis of information provided in writing by the Contractor's own employees, servants, or agents, the Contractor shall certify, in writing, that the Work for which he is claiming payment, other than as provided for in the Contract, is work actually performed, and the costs as shown are the amounts legally due for providing such Work for which payment is claimed.
- D.** The Engineer will determine all questions as to the amount and value of such Work, and the fact and extent of such damage and will notify the Contractor in writing of this determination.
- E.** Acceptance by the Contractor of the final payment made under the provisions of Section 01150 - MEASUREMENT AND PAYMENT shall operate as and shall be a release to the Authority and every member, agent, and employee thereof, from all claim and liability to the Contractor for anything done or furnished for, or relating to, the Work, or for any act or neglect of the Authority or of any person relating to or affecting the Work except the claim against the Authority for the remainder, if any there be, of the amounts kept or retained as provided in Article 5.17. For claims for extensions of time, see Article 6.8.

## **5.20 OPENING PORTIONS OF CONTRACT FOR OPERATION**

- A.** Any portion of the Work which is in acceptable condition for operation may be opened for MBTA Transit System operation as directed in writing by the Engineer, but such opening for operation shall not be construed as an acceptance of the Work or part thereof, nor shall it act as a waiver of any of the provisions of the Contract Specifications or of the Contract; provided, however, that on such portions of the Contract as are opened for such use, the Contractor shall not be required to assume any expense entailed in maintaining the MBTA Transit System for operation. The Authority will be responsible for maintenance and any damage to the Work caused solely by MBTA Transit System operation on any portion of the Contract which has been opened to operation as stipulated above, and it may order the Contractor to repair or replace such damage, where upon the Contractor shall make such repairs at Contract unit prices so far as the same are applicable, or as Extra Work under the provisions of Article 2.3, if there are no applicable items in the Contract.
- B.** If the Contractor is dilatory in completing shoulders, drainage structures, or other features of the nontransit system portion of the Work, the Engineer may order all or a portion of the nontransit system portion of the Work open to traffic, but in such event the Contractor shall not be relieved of his liability and responsibility during the period the Work is so opened prior to final acceptance. The Contractor shall conduct the remainder of his construction operations so as to cause the least obstruction to traffic.

## **5.21 CONTRACTOR'S RESPONSIBILITY FOR THE WORK**

- A.** Until final written acceptance of the Work, the Contractor shall have the charge and care of the Work. The Contractor shall take every necessary precaution against injury or damage to the Work by action of the elements, or from any other cause, whether arising from the execution or the nonexecution of the Work, and especially when blasting is to be done.
- B.** Except as provided in Article 2.9, the Contractor shall bear all losses resulting from or due to the amount or the character of the work or because the nature of the land in or on which the Work is done is different from that which was estimated or expected, or due to bad weather or other causes.
- C.** The Contractor shall rebuild, repair, restore, and make good all injuries or damages to any portion of the Work occasioned by any cause before its completion and final acceptance, and shall bear the expense thereof, except damage to the Work due to war, whether or not declared civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing, to "Acts of God" (limited to hurricane, tornado, cyclone and earthquake as classified by the United States Weather Bureau for the particular locality and for the particular season of the year and in addition thereto, damages resulting directly from flooding from any of the aforementioned "Acts of God"). The repair of such damages shall be done by the Contractor and paid for at the respective Contract unit prices for the quantity and items of Work involved. In any case in which the estimate for replacing such Work or repairing such damage caused by war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to the foregoing, or an "Act of God" combined with any previously authorized Extra Work results in a change of such magnitude as to be incompatible with competitive bid status, the Authority reserves the right to terminate the Contract and to call for new bids and award a new Contract for such Work. In the event a Contract is terminated for such reason, the Authority will pay the Contractor such sum as may be due for Work performed up to the date of the "Act of God", or of damage directly due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing and will also take over and pay for any material stored at the site of the Work provided said material was intended to be and could have been incorporated into the Work; the Authority will also take over and pay for any material which was being especially fabricated for incorporation into the Work, provided, however, that as a condition precedent to the

1. Commonwealth of Massachusetts Department of Public Safety License for Construction Supervisor without any restrictions.
2. A minimum of 10 years of related construction experience.

The above requirements may only be waived by the Director of Construction.

## **6.6 DELAY AND SUSPENSION OF WORK**

- A. The Engineer has the authority to delay the commencement of the Work and delay or suspend any portion thereof, for such period or periods as it may be deemed necessary, because of conditions beyond the control of the Authority or the Contractor, for the failure of the Contractor to correct conditions unsafe for the general public; for failure to carry out provisions of the Contract; for failure to carry out orders; for causes and conditions considered unsuitable for the prosecution of the Work; for acts of third persons not a party to the Contract; or for any other cause, condition, or reason deemed to be in the public interest.
- B. Upon receipt of written order of the Engineer, the Contractor shall immediately delay the commencement of the Work or delay or suspend any portion thereof in accordance with said order. Work shall not be suspended or delayed without prior written approval or order of the Engineer. The work shall be resumed when conditions warrant or deficiencies have been corrected and the conditions of the Contract satisfied as ordered or approved in writing by the Engineer. The Contractor's attention is also directed to the requirements of Section 01560 - TEMPORARY CONTROLS, Part 1 "Laws to be Observed" Article, and Article 5.21 herein which shall govern during any period of temporary or partial suspension of work.

## **6.7 CLAIM FOR DELAY OR SUSPENSION OF WORK**

- A. The Contractor shall have no claim for damages of any kind due to any delay in commencement of the Work or any delay or suspension of any portion thereof, except as hereinafter provided.
  1. Attention is directed to Section 39.0 of Chapter 30 which requires that every contract subject to the provisions of Section 39M of Chapter 30 contain the following provisions a. and b. in their entirety and, in the event a suspension, delay, interruption, or failure to act by the Authority increases the cost of performance to any subcontractor, that subcontractor shall have the same rights against the Contractor for payment for an increase in the cost of his performance as provisions a. and b. give the Contractor against the Authority, but nothing in provisions a. and b. shall in any way change, modify, or alter any other rights which the Contractor or the subcontractor may have against each other.
    - a. The Authority may order the 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 Authority; provided, however, that if there is a suspension, delay, or interruption for 15 days or more or due to a failure of the Authority to act within the time specified in the Contract, the Authority will make an adjustment in the Contract price for any increase in the cost of the Contract but shall not include any profit to the Contractor on such increases; and provided further, that the Authority will 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 provision.
    - b. The Contractor shall submit the amount of a claim under provision a. to the Authority 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 the Contract and, except for costs due to a suspension order, the

Authority shall not approve any costs in the claim incurred more than 20 days before the Contractor notified the Authority in writing of the act or failure to act involved in the claim.

## **6.8 DETERMINATION AND EXTENSION OF CONTRACT TIME FOR COMPLETION**

- A.** The Contractor shall complete, entirely, and in an acceptable manner, the Work required under the Contract within the time stated in the Bid Form, except that the Contract time for completion shall be adjusted as follows:
1. If the Contract is not awarded as contemplated by Section 00100 of the Contract Specifications, then the number of days allowed for the completion of the Work will be computed from the date of receipt of the Contract by the Contractor or the date on which the Contractor was ordered to commence work whichever is later. For the purpose of this paragraph, the Contractor will be presumed to have received the Contract on the day following the mailing of the executed Contract to the Contractor by the Authority. If the Contract specifies a specific calendar date for completion and the Contract is not awarded as contemplated by Section 00100, of the Contract Specifications then the Contractor will be entitled to an extension of time equivalent to the number of days elapsed from 60 days (45 days if Federal funds are involved) after the opening of bids up to and including the day of receipt of the executed Contract by the Contractor or the date on which the Contractor was ordered to commence Work whichever is later.
  2. In case commencement of work is delayed or any part thereof is delayed or suspended by the Authority (except for unsuitable weather, winter months, or reasons caused by the fault or neglect of the Contractor), the Contractor will be granted an extension of time in which to complete the Work or any portion of the Work required under the Contract equivalent to the duration of the delay less a reasonable period of time within which the Contractor could have done necessary preliminary work.
  3. When delay occurs due to Force Majeure , the time for completion of the Work shall be extended as determined by the Engineer to be equitable.
  4. An "Act of God" as used in this Article is understood to imply an earthquake, flood, cyclone, or other cataclysmic phenomenon of nature beyond the power of the Contractor to foresee or make preparation in defense of. A rain, windstorm or other natural phenomenon of normal intensity, based on United States Weather Bureau reports, for the particular locality and for the particular season of the year in which the Work is being prosecuted, shall not be construed as an "Act of God" and no extension of time will be granted for delays resulting therefrom. Within the scope of acts of the Government, consideration will be given to properly documented evidence that the Contractor has been delayed in obtaining any material or class of labor because of any assignment of preference ratings by the Federal Government or its agencies to other defense contracts.
  5. In case the Work is delayed by public or private utility owners or municipal agencies, see Article 3.5.
  6. Each Extra Work Order or Change Order as issued will include a statement of additional time, if any, that is agreed upon by the Contractor and the Engineer required for the completion of the Contract by reason of this Extra Work Order or Change Order, and no other time allowance due to the performance of the Work covered by such Extra Work Order or Change Order will be allowed.
- B.** An extension of time will not be granted for any delay or any suspension of the Work due to the fault of the Contractor, nor if a written request for an extension of time on account of delay due to any of the aforesaid causes is not filed within 15 days of the date of the commencement of the delay nor if the request is based on any claim that the Contract period as originally established was inadequate.

- C. Contract period has been carefully considered and has been established for reasons of importance to the Authority. This time limit will be enforced.
- D. The probable slow-down or curtailment of Work during inclement weather and winter months has been taken into consideration in determining the total time required to complete the Contract- hence no extension of time will be allowed due to this reason.

#### **6.9 FAILURE TO COMPLETE WORK ON TIME**

- A. On or before the date stated in the Contract Specification for completion, or the date to which the time of completion will have been extended under the provisions of Article 6.8, the Work shall have been performed in accordance with the terms of the Contract. The time in which the various portions and the whole of the Contract are to be Provided and the Work is to be completed is an essential part of the Contract.
- B. See Section 6.2D Liquidated Damages.
- C. Whatever sum of money may become due and payable to the Authority by the Contractor under this Article may be retained out of money belonging to the Contractor in the hands and possession of the Authority. This Article shall be construed and treated by the parties to the Contract not as imposing a penalty upon the Contractor for failing fully to complete the Work as agreed on or before the time specified in the Contract Specification (as it may have been extended in accordance with Article 6.8), but as liquidated damages to compensate the Authority for all additional costs incurred by the Authority because of the failure of the Contractor fully to complete said Work on or before the date of completion specified in the Contract Specification (as it may have been extended).
- D. Permitting the Contractor to continue and finish the Work or any part of it after the time fixed for its completion, or after the date to which the time for completion may have been extended, shall not operate as a waiver on the part of the Authority of any of its rights under the Contract.

#### **6.10 TERMINATION OF CONTRACT**

- A. If the Contractor shall be adjudged bankrupt, or make a general assignment for the benefit of creditors, or if a receiver shall be appointed of the Contractor's property, or if the work to be done under the Contract shall be abandoned, or if the Contract or any part thereof shall be sublet without the previous written consent of the Authority, or if the Contract or any claim there under shall be assigned by the Contractor otherwise than as herein specified, or at any time the Engineer certifies in writing to the Authority that the Work, or any part thereof, is unnecessarily or unreasonably delayed, or that the Contractor has violated any of the provisions of the Contract, the Authority may, by written notice, instruct the Contractor to discontinue the Work, or any part thereof, and thereupon the Contractor shall discontinue such Work or such part thereof, as the Authority may designate, and the Authority will require the surety or sureties to complete the Contract.
- B. If the Engineer determines that the rate of progress as reflected by the Contractor's CPM submitted and approved in accordance with the requirements of Section 01300 - SUBMITTALS, is not satisfactory, the Authority, instead of notifying the Contractor to discontinue the Work or any part thereof, may notify the Contractor from time to time to increase the force, equipment, and plant, or any of them, employed on the whole or any part of the Work, stating the amount of increase required; and unless the Contractor shall, within five working days after any such notice, increase such force, equipment, and plant to the extent required therein, and maintain and employ the same from day to day until the completion of the Work or such part thereof or until the conditions as to the rate of progress shall, in the Engineer's judgment, be fulfilled; or unless the Contractor submits and receives approval of a revised CPM indicating the Work being completed on time, the Authority

may employ and direct the labors of such additional force, equipment, and plant as may, in the Engineer's judgment, be necessary to insure the completion of the Work or such part thereof within the time specified, or at the earliest possible date thereafter, and charge the expense thereof to the Contractor. Neither the notice from the Authority to the Contractor, to increase the force, equipment, or plant, nor the employment of additional force, equipment, or plant by the Authority shall be held to prevent a subsequent notice from the Authority to the Contractor to discontinue Work under the provisions of the preceding portion of this Article.

- C. The Engineer may exercise the rights under this paragraph to rectify adverse conditions described in Article 3.10, Removal of Defective or Unauthorized Work, and Article 4.4, Defective Material, and notify the Contractor's bonding company to take the necessary appropriate action to remedy the situation. It shall be understood that when the Authority exercises its rights hereinbefore described, the breach of Contract by the Contractor does not itself constitute termination unless stipulated by the Authority. The Contractor shall, as directed by the Engineer, continue other works of the Contract.
- D. All expenses charged under this Article will be deducted and paid by the Authority out of any moneys then due or to become due the Contractor under the Contract, or any part thereof, and in such accounting, the Authority will not be held to obtain the lowest figures for the Work of completing the Contract or any part thereof, or for insuring its proper completion, but all sums actually paid therefore shall be charged to the Contractor. In case the expenses so charged are less than the sum which would have been payable under the Contract if the same had been completed by the Contractor, the Contractor will be entitled to receive the difference; and in case such expenses shall exceed the said sum, the Contractor shall pay the amount of the excess to the Authority upon completion of the Work without further demand being made therefor.

#### **6.11 TERMINATION FOR CONVENIENCE**

- A. If the Engineer determines that it is in the public interest to do so, the Engineer may notify the Contractor to discontinue all work, or any part thereof, such notice shall be given to the Contractor in writing and thereupon the Contractor shall discontinue such work, or such part thereof, as the Engineer may designate.
- B. If the Engineer notifies the Contractor to discontinue all work, or any part thereof, the Engineer shall pay and the Contractor shall accept, as full payment for all work done and materials provided, the following sums:
  - 1. For all completed items of work for which there are unit prices provided in the contract.
    - a. The original contract unit prices.
  - 2. For all work on partially completed items.
    - a. A sum agreed to by the Contractor and the Engineer or:
      - 1) The actual costs for direct labor, materials (less salvage value, if any) and use of equipment, plus 10% of this total for overhead; and
      - 2) the actual cost for Workmen's Compensation and Employer's Liability, Insurance, Health, Welfare and Pension benefits, Social Security deductions, and Employment Security Benefits; and
      - 3) 6 percent of the total of (a) and (b) for profit and;
      - 4) the estimated proportionate cost of surety bonds; and
      - 5) the actual cost to the Contractor for work performed by a Subcontractor, plus 10 percent of such cost. No allowance shall be made for general superintendence and the use of small tools and manual equipment,

3. For costs of settlement as:
  - a. Reasonable and necessary accounting, legal, clerical and other costs of work discontinuance; and reasonable and necessary storage, transportation and other costs incurred for the preservation, protection or disposition of the discontinued work.
  - b. When requested by the Engineer, the Contractor shall furnish itemized statements of the cost of the work performed and shall give the Engineer access to all accounts, bills and vouchers, relating thereto and unless the Contractor, when requested, shall furnish such itemized statements and access to all accounts, bills and vouchers, he shall not be entitled to payment for the work for which such information is sought by the Engineer.
  - c. The Contractor shall not be paid and the Contractor shall not have any claims for loss of anticipated profits, for loss of expected reimbursement or for any increased expenses resulting directly or indirectly from the discontinuance of any or all, work or from unbalanced allocation, among the contract item, of overhead expense on the part of the bidder and subsequent loss of expected reimbursement therefor or for any other cause. The Contractor shall incorporate the provisions of this section as provisions in its contracts with each of its subcontractors.



# SUPPLEMENTARY CONDITIONS

## FOREWORD

Further Supplementing the Authority's Standard Specifications, Section 00700 - General Conditions, the following Supplementary Conditions will apply.

References to Article Numbers in the following Supplementary Conditions unless otherwise stated are to be the aforesaid Standard Specifications, Section 00700 - General Conditions. In case of conflict between these Supplementary Conditions and the aforesaid Standard Specifications, Section 00700 - General Conditions, these Supplementary Conditions will take precedence and shall govern.

The Supplementary Conditions are included herein to augment the Standard Specifications, Section 00700 - General Conditions, with additional information which is applicable to this project.

The enforcement of the requirements of any of the following Supplementary Conditions of the General Conditions shall not be construed as waiving any of the rights of the Authority contained in any of the other conditions of the Contract.

## SUPPLEMENTARY CONDITIONS TABLE OF CONTENTS

<u>Paragraph</u>	<u>Title</u>	<u>Page</u>
1.	ARTICLE 4 - CONTROL OF MATERIALS	
	A. Article 4.02 - Certificates of Compliance	00800 - 2
2.	Minimum State Wage Rates	00800 - 3
	AA.EQUAL EMPLOYMENT OPPORTUNITY (EEO) STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATION	00800 - 4
	APPENDIX NO. 1 - Goals and Timetables for Female and Minority Participation in the Construction Industry	00800 - 10
	APPENDIX NO. 2 - The Commonwealth of Massachusetts Supplemental Equal Employment Opportunity Anti-Discrimination and Affirmative Action Program	00800 - 11

## SECTION 01322

### CONSTRUCTION SCHEDULE

#### PART 1 - GENERAL

##### 1.1 DESCRIPTION

- A. This Section specifies the general requirements and procedures for preparing and submitting Contract Schedules to the Authority for review and acceptance.
- B. Refer to Section 01151 regarding payment requirements associated with the schedule.
- C. Refer to Section 00700 Article 6.6, 6.7, and 6.8 for requirements associated with Delay, Suspension of Work and Extension of time.
- D. Refer to Section III Project Schedule of the MBTA Project Controls Manual.

##### 1.2 SCHEDULE GLOSSARY

- A. The following terms used in this Section or elsewhere in the Contract Documents shall have these meanings:
  - 1. Acceleration – Occurs when an owner (MBTA) directs a contractor to complete work earlier than the contract substantial completion date (or milestone) or earlier than substantial completion date as modified in accordance with an approved time extension.
  - 2. Activity – An element in the schedule highlighting or depicting a part of the Work and establishing the time and resources required for completing that part of the Work.
  - 3. Artificial Activity Durations – Inflated activity durations in the schedule consume float and influence the critical path.
  - 4. As-Built Schedule- A schedule showing all activities complete including Final Completion.
  - 5. As-Planned Schedule/Baseline Schedule - Construction Schedule Revision 0 (Rev. 0) Submittal returned by the Authority to the Contractor as “Accepted as Submitted” or “Accepted as Noted,” with or without comments or objections noted, showing the contractor’s plan to complete the Work within the Contract Time. As-Planned and Baseline may be used interchangeably and shall have the same meaning.
  - 6. Construction Schedule - Schedule which shows the Contractor’s approach to planning, scheduling, and execution of the Work. Includes the Revision 0 and monthly Progress Schedule Submittal(s).
  - 7. Contract Float - Number of Calendar Days between the Contractor’s anticipated date for early completion of all or part of the Work and the corresponding Contract Time or

4. The Contractor shall submit a Draft Schedule and Narrative to the Authority and the Consultant in order to review the proposed changes to the remaining work. The Authority will schedule a workshop to discuss at a minimum: the impacts, recovery plan, change order schedules (fragnets), plan vs. current performance, manpower, etc. The required attendance for the Draft Schedule Workshop is as follows:
  - a. Project Managers (Authority and Contractor);
  - b. Resident Engineer (Authority);
  - c. Schedulers (Consultant, Authority, and Contractor);
  - d. Owner's Representative, if applicable; and
  - e. Key Subcontractors, as determined by the Authority.
5. The review of the Draft Schedule Submittal by the Authority does not assess ownership of delays. A separate Time Impact Analysis (TIA) shall be submitted as specified in Section 1.11 D to identify ownership of delays.
6. The accepted Draft Schedule Submittal shall become the new As-Planned Schedule for future monthly progress schedule.

**C. SCHEDULE RECOVERY**

Should the progress fall behind the contractual milestones for reasons other than those that are excusable within the terms of the contract, the Contractor shall implement a plan to recover the schedule. The plan must detail how impact will be mitigated through the use of activity re-sequencing, adding additional crews, longer work hours, extra work days, etc., at no cost to the Authority.

**D. TIME IMPACT ANALYSIS SUBMITTAL**

Any Contractor request for adjustment in Contract Time and Contract Price will not be evaluated unless (a) the Contractor, using the procedures in this Section and the Contract, shows that conditions justifying adjustments in Contract Time and/or Contract Price have arisen, and (b) the Contractor's analysis is verifiable through an independent review of the Time Impact Analysis (TIA) by the Authority.

Determination and extension of the Contract Time will be in accordance with Section 00700 Article 6.8. In order for the impact to be considered, the Contractor shall demonstrate that the critical path was adversely affected.

1. The Contractor shall submit to the Authority a TIA illustrating the influence of each change or impact to the current contractual Milestones.
2. Each TIA shall include a 'fragnet' demonstrating how the change issue or event impacts the last accepted Progress Schedule Update and critical path. This fragnet shall be resource loaded.
3. A meeting between the contractor, Authority project staff, and MBTA Project Controls shall be held to thoroughly review, analyze, and resolve each alleged impact.
4. The TIA shall include:
  - a. A detailed narrative which clearly describes the events causing the impact;

- b. Documentation substantiating and supporting the impact;
  - c. Detailed CPM Schedules (both electronic and hard copies) clearly delineating the impact to the critical path;
  - d. A matrix showing impacts caused by any third party and any force majeure; and
  - e. Any additional information reasonably requested by the Authority that is needed to perform the review of the Contractor submitted TIA.
5. The extension of Contract Time shall be considered only if the Contractor is able to demonstrate merit of the impact to the critical path using Window Analysis Methodology (as defined in AACE Recommended Practices #29R-03, Forensic Schedule Analysis), or other similar methodology acceptable to the Authority.
6. The Contractor's failure, refusal or neglect to comply with the requirements specified in this Section shall be reasonable evidence that the Contractor is not prosecuting the Work with due diligence. If faced with such a situation, the Authority may:
- a. Direct alternate schedule recovery - if in the judgment of the Authority it appears that the Contractor cannot complete his Work within the scheduled time, then the Contractor shall work overtime, additional shifts or adopt such other procedures as may be necessary to restore adherence to the schedule. The full cost of any such recovery – Work efforts shall be borne by the Contractor, and/or
  - b. The Authority can withhold liquidated damages, as provided in Section 00700 Article 6.9.

**E. SCHEDULE ACCELERATION**

Acceleration occurs when an owner (MBTA) directs a contractor to complete work earlier than a contractual milestone date or as modified in accordance with an approved time extension (See Section 1.11 D). The Contractor shall adhere to the following procedure.

Ten (10) business days prior to negotiations with the Authority, the Contractor shall provide a schedule for acceleration of remaining work and all supporting documents including, but not limited to the following:

- a. Identify activities to be accelerated
- b. Identify proposed calendar(s)
- c. Identify proposed crew(s)
- d. Identify proposed duration changes
- e. Identify proposed logic changes
- f. Provide narrative with basis of assumption
- g. Identify cost for acceleration

**F. MEETINGS**

1. Schedule Planning Session - Within fifteen (15) days after Contract award, and prior to submission of the baseline construction schedule, the Contractor shall attend a schedule planning session. At the meeting, the Authority shall discuss procedures associated with schedule and costs as described in the Project Controls Manual, Exhibit A, Contractor Schedule Submittal Review Workflow; Exhibit B, Schedule Planning Session; Exhibit C, Uniform Schedule (P6) Settings for MBTA Projects; Exhibit D,

# EXHIBIT B



LMH-LANE CABOT YARD JOINT VENTURE  
100 HANCOCK STREET, SUITE 901, QUINCY MASSACHUSETTS 02171  
P: 617-845-8000 • F: 617-845-8001  
AN EQUAL OPPORTUNITY EMPLOYER

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

**AGREEMENT** made and effective at Quincy, Massachusetts, as of this 1st day of August 2018 **BY AND BETWEEN LMH-Lane Cabot Yard Joint Venture**, a duly organized Massachusetts company with a usual place of business at 100 Hancock Street, Quincy, MA 02171 hereinafter called the "General Contractor" or "Contractor," and **MASS. ELECTRIC CONSTRUCTION CO.** with a usual place of business at 400 Totten Pond Road, Suite 400, Waltham, MA 02451 hereinafter called the "Subcontractor."

WHEREAS, General Contractor has entered into General Contracts with the **Massachusetts Bay Transportation Authority (MBTA)**, hereinafter called the "Owner," for work described herein to be performed in accordance with all the terms and conditions of the General Contract Documents which term, as herein used, shall include, without limitation, said General Contract and general provisions, special provisions, specifications, plans, addenda, notices, instructions, bids, forms, and all other provisions or documents therein contained or incorporated by reference including, without limitation, the documents listed in Schedule A insofar as applicable to Subcontractor's scope of work as set forth herein.

WHEREAS the Subcontractor having examined the said General Contract Documents and the readily observable conditions at the site or sites of operations to be conducted thereunder, is desirous of entering into a Subcontract with the General Contractor on the basis of the terms and conditions hereinafter set forth.

WITNESSETH that the General Contractor and Subcontractor for the consideration hereinafter named agree as follows:

ARTICLE I- WORK TO BE PERFORMED

- 1.1 The Subcontractor shall furnish and pay for all work, labor, materials, equipment, tools, light, power, details, computations, drawings, schedules, and all other facilities and shall assume, perform, and furnish everything necessary for the prompt execution and proper completion of the work described herein, all in complete accordance with the General Contract Documents as hereinabove defined which, together with the following additional documents, are specifically incorporated herein and made a part hereof by reference, a list of which is attached hereto as Schedule A.
- 1.2 Subcontractor shall at all times, without extra charge, clear the premises of debris and excess material caused by its operations as the work progresses.
- 1.3 Subcontractor does further agree to be bound to the General Contractor by the aforementioned General Contract Documents and all other instruments herein referred to and further to assume toward the General Contractor all the obligations and responsibilities pertaining to the performance of Subcontractors work for the Project that the General Contractor by the aforesaid General Contract Documents has assumed to the owner, including the furnishing of such warranties and guarantees as are required in the General Contract Documents insofar as applicable to Subcontractors scope of work as set forth herein. The Subcontractor shall comply with all rulings, orders, instructions, and operating procedures issued or promulgated by the General Contractor with respect to said work described below, subject to Subcontractor's rights to



LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

assert a claim hereunder. With respect to Owner issues, the Subcontractor further agrees that the General Contractor shall in connection with the work called for by this Subcontract have all rights, privileges, and immunities which the owner has in connection with its contract with the General Contractor. Subcontractor shall require, in all its Contracts with Sub-Subcontractors and Suppliers, that each of them be bound by all of the General Contract Documents and assume toward the Subcontractor all the obligations and responsibilities that the Subcontractor has assumed toward the General Contractor to the extent applicable to said Sub-Subcontractors or Supplier's scope of work.

- 1.4 Said work to be performed and prices thereto are set out on the schedule attached hereto as Schedule B.

**ARTICLE 2 - TIME OF PERFORMANCE**

- 2.1 Time is of the essence of this Agreement. Accordingly, the Subcontractor shall commence work upon notice from the General Contractor and shall promptly and expeditiously perform said work in accordance with the instructions of the General Contractor utilizing union labor, which can work in harmony with General Contractor, approved materials, equipment, and tools in such quantities and of such types as the General Contractor may from time to time deem necessary and shall work overtime or extra shifts as may be ordered in writing by General Contractor it being understood that subcontractor shall be entitled to request an equitable adjustment to the subcontract price and schedule for cost and time impacts arising from such orders to the extent such orders differ from the approved baseline schedule and to the extent such orders do not arise from a failure by Subcontractor to comply with its obligations under this Agreement.
- 2.2 The Subcontractor shall complete its work in accordance with the approved baseline schedule and further updates approved by the owner. If requested by the General Contractor, Subcontractor shall furnish a progress schedule to the General Contractor in such detail as the General Contractor requires.
- 2.3 In the event any delay in the completion of the General Contract is caused or occasioned by the Subcontractor's breach of this Agreement, which causes or results in damages being incurred by the General Contractor including, but not limited to, liquidated damages as assessed by the Owner against the General Contractor under the provisions of the General Contract, a sum equal to all such damages or expenses including such liquidated damages as assessed shall be chargeable to and paid by the Subcontractor to the General Contractor up to a cap of 50% of the Subcontract price.
- 2.4 The Subcontractor agrees to attend mandatory weekly subcontractor coordination meetings if required by the General Contractor. The attendee shall be authorized to make decisions regarding the project on behalf of the Subcontractor or an employee approved by the General Contractor.

**ARTICLE 3 - INSURANCE**

- 3.1 The Subcontractor shall maintain and pay for all insurance of the type and with the limits as set forth in the General Contract Documents and as set forth on the attached Exhibit entitled "Insurance Requirements" attached hereto as Schedule D, and all such insurance shall provide that it will not be reduced or canceled except on thirty (30) days (ten days for non-payment) written notice from the insurer to Contractor. The General Contractor shall be named as an "additional insured" on the Subcontractor's general liability policies, and the general liability insurance policy shall provide that it affords primary insurance and that the insurance company's liability shall not be reduced by the existence of other insurance carried by the General Contractor applicable to the loss.

Initialed for LMH-LANE Cabot Yard Joint Venture

Initialed for Subcontractor

dated: 10/4/2018

dated: 10/1/18

Page 2 of 22





LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

- 3.2 The Subcontractor agrees to furnish insurance which shall insure all its equipment and tools, and any tools and equipment rented to the General Contractor for its use on other portions of the contract or elsewhere which also lists the Contractor as an additional insured. General Contractor will be responsible for any deductible if loss is determined pursuant to the Disputes provision to be at their fault.
- 3.3 The Subcontractor shall discharge and release the Contractor, to the extent of the Subcontractor's insurance coverage, for and on account of any and all claims and liabilities arising out of any loss or damage to any property caused by such risks as are covered by insurance and shall notify its insurance carrier that it has waived subrogation rights against the Contractor.
- 3.4 If Subcontractor shall default hereunder, Contractor may elect to take out said prescribed insurance in the name and at the expense of Subcontractor without limitation of any other rights which Contractor may have.
- 3.5 Subcontractor shall at its own expense before Subcontractor begins work here under, procure and deliver to Contractor performance and payment, and bonds in an amount equal to 100% of the Subcontract Sum and in form and from corporate sureties satisfactory to Contractor.

**ARTICLE 4 - INDEMNIFICATION**

- 4.1 To the fullest extent permitted by law, the Subcontractor hereby agrees that it shall indemnify, hold harmless and defend the General Contractor, its surety and the Owner, and each of their officers, directors, members, employees, agents, affiliates, subsidiaries and partners from (the "Indemnitees") and against all claims, damages, judgments, settlements, losses and expenses, including but not limited to, attorney's fees to the extent, arising out of or resulting from the negligent performance of the Subcontractor's Work.
- 4.2 To the fullest extent permitted by law, the Subcontractor hereby agrees to defend the Indemnitees (1) from any complaint against any of them for injury or damage that is alleged in the complaint to the extent arising out of the subcontractor's negligence and/or (2) from any complaint against any of them alleging bodily injury or tangible property damage to an employee of the Subcontractor.
- 4.3 To the fullest extent permitted by law, the Subcontractor further agrees to indemnify, defend and hold harmless the indemnitees from any and all claims, liabilities, liens, demands, and causes of action by any party to the extent arising out of or related to the failure of Subcontractors work to comply with the requirements of this Subcontract.
- 4.4 To the fullest extent permitted by law, the Subcontractor agrees to defend, indemnify, and hold harmless the Indemnitees from the imposition of any payments, fines and/or penalties by OSHA or any other government agency to the extent arising out of the errors or omissions of Subcontractor and the Contractor shall have the right to deduct from the next periodic payment due the Subcontractor all OSHA or other governmental payments, fines and/or penalties levied against the Indemnitees and all expenses relating thereto to the extent arising out of or in consequence of the errors or omissions of the Subcontractor or any of its sub-subcontractors.
- 4.5 In the event that Subcontractor provides defense under any aspect of this paragraph or the Subcontract, the party defended hereunder shall have the right to reasonable approval of defense counsel to be

Initialed for LMH-LANE Cabot Yard Joint Venture

Initialed for Subcontractor

dated: 10/4/2018

dated: 10/1/18

Page 3 of 22





LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

paid for by the Subcontractor.

**ARTICLE 5 - TAXES, LICENSES, PERMITS, COMPLIANCE WITH PUBLIC LAWS, AND AUDIT RIGHTS**

- 5.1 Subcontractor shall pay the amount of any and all taxes whatsoever levied against the Subcontractor as a consequence of any operations conducted under this Agreement or any of the work performed hereunder.
- 5.2 The Subcontractor shall at its own cost and expense apply for and obtain all permits and licenses which may be required by law or any governmental, public, or private authority for the performance of the subcontract work or any portion thereof. The Subcontractor shall further, at its own cost and expense, comply with all federal, state, municipal, and other laws, regulations, and rulings unless not enacted at the time this Subcontract was executed in prosecuting the subcontract work, or any portion thereof, and shall further indemnify the contractor against Subcontractor's patent and trademark infringements.
- 5.3 Subcontractor further warrants that it is familiar with and shall fully comply with, at its own expense, all provisions of the applicable Federal Occupational Safety & Health Act, Equal Employment Opportunity Programs, all Fair Employment Practices Laws, Affirmative Action Programs, Minority Manpower Programs as set forth in the Contract Documents. Subcontractor agrees, upon request by General Contractor, to produce within five (5) days whatever documents or information is required by the General Contractor to establish Subcontractor's compliance with any applicable federal, state, municipal, or other regulatory laws, ordinances, or regulations.
- 5.4 Subcontractor is obligated to provide for the safety of its employees at the jobsite. Subcontractor agrees to perform the work in a safe manner, to provide a safe place to work, and to abide by and enforce all applicable federal, state, and local safety laws, rules or regulations governing the performance of the work. Subcontractor shall furnish all apparel, materials, equipment, tools, labor, instruction, and supervision necessary for the safety of its employees and its compliance with the applicable safety laws, rules or regulations. Subcontractor further agrees to cooperate with any other safety programs in effect on the job site. The General Contractor reserves the right to suspend the Subcontractor's work if, in the Contractor's reasonable opinion, a safety violation exists.
- 5.5 If the Subcontractor is performing work as a Disadvantaged Business Enterprise, Women Business Enterprise, or Minority Business Enterprise and (1) Subcontractor is decertified for any reason or (2) all or part of the amounts paid to Subcontractor are disallowed by the Owner, then the General Contractor may immediately terminate this Agreement under Paragraph 16.1.
- 5.6 With respect to any Time and Material Change Order or unsettled claim for extra compensation, or any work performed on a time and materials basis, the Subcontractor shall keep separate and accurate records of accounts in a manner acceptable to the Contractor with respect to all of its costs directly allocable to such Work and shall, upon request by the Contractor, make such records, invoices and other information pertaining to the cost of such Work available for inspection and audit by the Owner and Contractor or other designee for the purpose of verifying requests for payment when costs are the basis of such payment and for evaluating the reasonableness of proposed Subcontract price adjustments and claims. Such records shall be maintained in such a manner as to permit all costs incurred in connection with the performance of this such additional work to be specifically identified until a lump sum price can be agreed upon. In the event the Owner requires costs to be tracked with respect to a lump sum change order, those costs will be tracked in accordance with this paragraph.

Initialed for LMH-LANE Cabot Yard Joint Venture  
Initialed for Subcontractor

dated: 10/4/2018  
dated: 10-1-18



LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

To the extent required by law or the Contract Documents, payrolls and other records for all laborers and mechanics employed in the construction of the Project shall be maintained during the course of the Work and preserved for a period of three (3) years following Final Acceptance. Payroll records shall contain the name, address, partial social security number, hourly wage, daily and weekly number of hours work, gross wages earned, deductions made, actual wages paid and benefits, if any, paid. To the extent required by law or the Contract Documents, the Subcontractor and all sub-subcontractors shall, on a weekly basis, provide copies of such payroll records to the Contractor. To the extent required by law or the Contract Documents, the Subcontractor and all sub-subcontractors shall provide the Contractor with monthly reports in a form and manner acceptable to the Contractor which shall set forth the total number of workmen employed on the Project, as well as the total number of minority and female workers and apprentices, and any other such records required by the Contract Documents, all such totals itemized by trade classifications.

**ARTICLE 6 - PROSECUTION OF THE WORK**

- 6.1 The Subcontractor shall supply a sufficient number of skilled workmen and ample quantities of approved material and equipment to perform the subcontract in accordance with the baseline schedule and any further mutually agreed upon schedule updates. Subcontractor shall promptly replace and dismiss any workman or workmen on said project to which the General Contractor, Owner, Engineer, or Architect reasonably objects. The Subcontractor shall immediately commence work and/or procurement of materials upon notice from the General Contractor and the provision access to the work site to Subcontractor and shall at all times prosecute said work in complete harmony with the operations and forces of the General Contractor including other Subcontractors as directed by General Contractor and to the reasonable satisfaction of the General Contractor and the Owner which shall be achieved with compliance to this Subcontract.
- 6.2 In addition to shop drawings, catalogs, calculations, samples, etc., specified, the Subcontractor shall prepare at his own expense and furnish promptly whenever requested by the General Contractor any number of prints of his shop drawings, manufacturer's data, templates, schedules, reports, or any other data that may be necessary in the reasonable opinion of the General Contractor for distribution among other Subcontractors and to the General Contractor for the proper prosecution of the Work. The Subcontractor shall lay out its own work and is responsible for the accuracy of same. The Subcontractor shall exercise the utmost diligence to obtain all drawings, details, and information necessary to perform its work, and, if at any time drawings or information have not been furnished, the Subcontractor shall promptly inform the Contractor in writing as to what drawings or information may be required to expeditiously complete the work. The Subcontractor shall, before proceeding with any affected part of the Work, call to the General Contractor's attention in writing any errors in or inconsistencies between or in any of the Contract Documents and any other condition which will adversely affect its work to the extent known or reasonably should have been known by Subcontractor.
- 6.3 Subcontractor shall promptly furnish all shop drawings, samples, certificates, and the like as required which will meet the approval of the Engineer, Architect, General Contractor, and Owner as necessary.
- 6.4 Suspension of available work hereunder, for any otherwise unexcused cause, by the Subcontractor for a period of more than forty-eight (48) hours, Sundays and Holidays excepted, without prior written permission of the General Contractor, shall be deemed an abandonment of performance and shall be grounds for termination by the General Contractor upon twenty-four (24) hours notice.

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Initialed for Subcontractor

dated: 10/4/2018  
dated: 10-17-18



LMH, LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

- 6.5 The Subcontractor shall co-operate fully with other Subcontractors employed on the Work and shall so plan and conduct the Work to be performed hereunder as directed by General Contractor as not to interfere with their operations or with those of the General Contractor. To the extent any such direction differs from the agreed upon baseline schedule, Subcontractor will be entitled to request an equitable adjustment to the Subcontract price and an extension of time.
- 6.6 The General Contractor expressly reserves the right to determine the order and sequence of all work and phases thereof as herein provided for. Subcontractor agrees that it shall make no claim whatsoever against the General Contractor on account of the order and sequence which is directed by the General Contractor.
- 6.7 Subcontractor acknowledges that the failure to provide labor, materials, or equipment contemplated by this Agreement may cause irreparable injury to the General Contractor. As a result, Subcontractor agrees that the General Contractor, in addition to all other remedies provided herein and under the law, may seek specific performance of the obligations and responsibilities under this Subcontract through a complaint seeking preliminary injunctive relief.
- 6.8 Whenever the Contract Documents specifically require the Subcontractor to furnish, as part of its Work, design or engineering services or certifications of any kind, the Subcontractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other Submittals prepared by such professional and requiring such seal. The Contractor shall be entitled to rely upon the adequacy, accuracy, and completeness of such services. The Subcontractor shall furnish a certificate of insurance from each design professional certifying to professional liability insurance coverage for such design profession in an amount not less than \$1.0 million or such greater amount as required by the Contract Documents. The Subcontractor shall defend, indemnify and hold the Contractor harmless from all claims, damages or losses, including reasonable attorneys fees, to the extent arising out of or related to any errors or omissions in such design, or to any claim for infringement or misappropriation of any other person's intellectual property arising out of such design, in addition to any other claims for which indemnification is required hereunder.
- 6.9 In the event of a claim, dispute or any other matter in question arising out of or related to this Subcontract or the breach thereof, the Subcontractor shall carry on the Work and maintain the job progress schedule as directed by the Contractor during any proceedings to settle the dispute, unless otherwise directed by the Contractor in writing. In no event shall delay in the resolution of any dispute excuse the prompt performance of the Work. Subcontractor's sole remedy shall be to perform any disputed work under protest and make claim as provided herein. Subcontractor's obligation to proceed under protest is a material provision of this Subcontract and its failure to proceed under protest upon direction by Contractor in writing shall constitute a default hereunder regardless of the ultimate outcome of the merits of such dispute.

**ARTICLE 7 - PROTECTION OF PUBLIC AND OF PROPERTY**

- 7.1 The Subcontractor shall, at its own expense, preserve and protect from injury all property and persons which may be affected by its operations hereunder and shall be responsible for all damage or expense to any person or any property to the extent arising from or in consequence of any negligent act or omission of the Subcontractor under this Agreement.
- 7.2 The Subcontractor shall, at its own expense, protect work performed by it hereunder and the areas where

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Initialed for Subcontractor

*[Signature]* dated: 10/11/2018  
*[Signature]* dated: 10/11/18





LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

said work is performed with such lights, barricades, and warning signs as are reasonably necessary for that purpose or may be reasonably required by the General Contractor.

7.3 Until approval and acceptance of the Subcontractor's work by the General Contractor and Owner, the Subcontractor shall remain fully responsible for all damage or injury to its equipment and to said work or materials whether incorporated or not into the work to the extent caused by Subcontractor.

**ARTICLE 8 - CONTRACT PRICE**

The General Contractor agrees to pay the Subcontractor as full payment for the complete performance of all work and other matters to be done, performed, furnished, and provided by the Subcontractor, the amount or amounts described in Article 1. Such payments are to be made in the manner and at the time hereinafter provided in Article 9.

**ARTICLE 9 - MEASUREMENT AND PAYMENT**

9.1 When the General Contractor receives payment from the Owner on account of the Subcontractor's work, it shall pay said sum to the Subcontractor, less an amount of five percent (5%) which shall be held as retainage by Owner, within 10 calendar days of receipt of such payment.

9.2 The amounts to be retained by the Owner shall become due and payable by Contractor within 10 days of Contractor's receipt of payment of the retainage from the Owner; and, as a further condition precedent to payment of any retainage, Subcontractor must furnish evidence that the Subcontract work has been fully performed and all lower tier charges and claims satisfied and all bills paid in full for labor, materials, equipment and supplies.

9.3 The payment of any current estimates or of any retained percentage hereunder shall not be construed as an acceptance of defective or improper materials or workmanship.



9.4 No invoices shall be submitted to main office. All Subcontractor Payment Requisitions shall be submitted to the Project Office on the form supplied by the General Contractor, complete in all respects, with all supporting backup as required by General Contractor and/or the Owner, by the closing date as specified by the Project Office. Required documents to be submitted with the requisition include, but are not limited to those specified in Article 13. Failure to submit the requisite documents will cause the Subcontractor's Payment Requisition to be returned for correction and resubmitted when complete for the next scheduled estimate with the Owner.

**ARTICLE 10 - DELAY**

In case of delays, hindrances, or obstructions not due in any part to the Subcontractor's fault, Subcontractor shall be entitled to request such extension of time for performance and an increase to the subcontract price as equitably required provided that Subcontractor has given written notice within ten (10) days of the commencement of the delay to Subcontractor's work and can substantiate the delay in the form and substance to the reasonable satisfaction of the General Contractor and/or Owner as applicable. In the event of a concurrent delay, Subcontractor shall be entitled to request an extension of time only.

**ARTICLE 11 - CLAIM OF SUBCONTRACTOR**

11.1 The Subcontractor shall have no claim for extra or additional compensation for any Owner initiated damage allegedly sustained or for any Owner initiated changes or modifications to its work unless it shall have first complied with all the applicable terms and provisions in the General Contract Documents pertaining to submission of claims, changes, modifications, and damages. The Subcontractor shall pay an equitable share of all expenses including attorney fees incurred by the General Contractor to prosecute Subcontractor claims. In no event shall the General Contractor become or be liable to the Subcontractor on account of any such claims in excess of the amount actually received by the General Contractor from the Owner on

Initialed for LMH-LANE Cabot Yard Joint Venture  dated: 10/4/2018  
Initialed for Subcontractor  dated: 10-1-18  
Page 7 of 22



LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

account of such claim provided General Contractor prosecutes such Subcontractor claims in good faith and does not settle any such claim without Subcontractors written approval.

11.2 In the event that Contractor orders Subcontractor in writing to perform changed or additional Work which does not arise out of an Owner request or issue, Subcontractor shall be entitled to an equitable adjustment of both the time of performance of this Agreement and the Agreement price notwithstanding General Contractor's inability to recover any portion of such equitable adjustment from the Owner.

**ARTICLE 12 - CLAIMS AGAINST SUBCONTRACTOR/Lien Discharge Bonds**

The Subcontractor shall promptly pay or discharge all bills, obligations, and charges incurred in connection with the prosecution of any of its work hereunder upon receipt of payment for same from Contractor and shall promptly take all necessary steps to hold the General Contractor fully harmless and indemnified from any cost, attorneys' fees, loss, or damage arising therefrom. Any such costs not paid by the Subcontractor as aforesaid may be deducted from sums due the Subcontractor hereunder. Provided Subcontractor has been paid undisputed amounts due, Subcontractor hereby agrees to defend, indemnify and hold harmless Contractor, Owner and any applicable sureties from and against any laborer's, materialmen's, supplier's, or other similar lien or bond claim filed or asserted by Subcontractor or any of its sub-subcontractors, materialmen or suppliers (of any tier) in connection with the Work. In the event that such lien or bond claim is filed, Subcontractor shall, upon forty-eight (48) hours' written notice, cause such lien or bond claim to be released and discharged, or file a bond to secure discharge of such lien or bond claim. In the event that Subcontractor shall fail to do so, Contractor shall have the right to pay all sums necessary to file a bond in lieu of such lien (including reasonable attorneys' fees, bond or other premiums and costs). Contractor shall have the right to deduct all amounts so incurred from the Subcontract Amount.

**ARTICLE 13 - DOCUMENTATION, REPORTS, AND CERTIFICATES**

The Subcontractor shall, on request of the General Contractor, furnish certified payrolls, certified materials certificates, test reports, information, data, reports, etc., required by Equal Employment Opportunity and Affirmative Action programs of the federal and state government or such further documentation as may be required by the General Contractor to establish that Subcontractor has kept current in its payments to subcontractors, material suppliers, workmen, governmental agencies, or labor organizations and otherwise complied with all General Contract requirements. Any payments due to Subcontractor may be retained by the Contractor in an amount reasonably sufficient to assure Subcontractor's compliance with the provisions of this Article.

**ARTICLE 14 - GIFTS AND TRANSFERS**

Each Party hereby warrants to the other that its employees and representatives, to the best of its knowledge, have not and shall not accept, provide, give, gift, transfer, or deliver anything of value to or from any employee or representative of the other Party as a *quid pro quo* for the benefit of the Party making the payment with respect to the Project as it is agreed that such practice would be unfair and deceptive practice in violation of M.G.L. Chapter 93A Section 11.

**ARTICLE 15 - ASSIGNMENT**

Neither this Subcontract nor any of the funds due or becoming due hereunder may be assigned or sublet by the Subcontractor without the prior written consent of the General Contractor.

**ARTICLE 16 - REMEDIES OF GENERAL CONTRACTOR**

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Initialed for Subcontractor

*[Signature]* dated: 10/2/2018  
*[Signature]* dated: 10-1-18



LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

In the event of any material breach by the Subcontractor of any material condition of this Agreement or of the General Contract Documents herein incorporated by reference, then, and in that event, the General Contractor may:

- A. Deduct from any payment otherwise due or becoming due all sums chargeable to Subcontractor and damages due from said breach; and,
- B. Terminate the Subcontract for default in the following manner: The General Contractor shall give to the Subcontractor written notice of the breach or breaches, and, unless said breach or breaches are cured within four (4) days from the date of the notice, or if said breach cannot be cured within 4 days of notice, Contractor and Subcontractor agree within said four days upon a plan to cure such breach the Subcontract shall be deemed terminated for default, except for cessation of work in which case termination shall be upon twenty-four (24) hours notice as provided in Article 6.

16.1 Upon such termination for default, the General Contractor may take immediate possession of all, materials at the site or sites of the Subcontract work and may complete said work either with its own forces or by the employment or any other person, firm, or corporation. No further payment shall be or become due the Subcontractor following such termination for default subject to Article 25. When the work is wholly completed, the Subcontractor shall pay General Contractor all costs of completing the work and all damages of every kind or nature caused by said termination less the amount of any remaining subcontract balance at the time of termination.

16.2 Subject to Article 25, in the event that Subcontractor is terminated for default in accordance with this Article 16, the Subcontractor shall be liable to the Contractor for all direct costs the Contractor incurs as a result of the Subcontractor's failure to perform this Subcontract in accordance with its terms. The Subcontractor's failure to perform shall include the failure of its suppliers and/or sub-subcontractors of any tier to perform. Subject to Article 25, in the event that Subcontractor is terminated for default in accordance with this Article 16, the Subcontractor's liabilities shall include, but not be limited to (a) damages and other delay costs payable by the Contractor to the Owner; (b) the Contractor's increased costs of performance, such as extended general conditions and increased performance costs resulting from Subcontractor-caused delays subject to Article 2.3 or improper Work (c) warranty and re-work costs arising out of Subcontractors breach of this Agreement ;(d) liability to third parties to the extent arising out of Subcontractor's breach of this Agreement; (e) attorneys fees and related costs incurred by the Contractor in any proceeding against the Subcontractor or its sureties to enforce any of the Contractor's rights as provided herein; and (f) costs of compliance, expense and damages, including but not limited to fines and penalties assessed against the Contractor to the extent incurred as a result of violations of safety or any other laws rules, codes or relations by the Subcontractor. The Subcontractor acknowledges that the Contractor's surety or sureties, and any of its assignees, if any, shall have the benefit of each and every contractual, common law, and statutory defense of the Contractor hereunder.

16.3 Any sum or sums chargeable to the Subcontractor under any provision of this Subcontract (except to the extent of personal injury or other damages covered by Subcontractor's insurance where Subcontractor's insurer acknowledges coverage and assumes all liability), may, at the election of the Contractor, be deducted from any payments otherwise due or to become due to the Subcontractor under this subcontract.

16.4 This Agreement may be terminated by the Contractor if the Subcontractor is not approved by the Owner as the Subcontractor for the work described herein if such approval is required by the Owner. Subcontractor shall not be entitled to any payments in the event of such termination for work performed after notice is provided to Subcontractor of owners failure to approve subcontractor.

Initialed for LMH-LANE Cabot Yard Joint Venture  dated: 10/4/2018  
Initialed for Subcontractor  dated: 10-1-18  
Page 9 of 22





LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

**ARTICLE 17 - INSOLVENCY OF SUBCONTRACTOR**

In the event that the Subcontractor becomes insolvent, or is adjudged a bankrupt, or files for protection under Chapter 11 of the Bankruptcy Act, or makes an assignment for the benefit of creditors or if a Receiver is appointed to administer its affairs or it becomes otherwise disabled from performing this Agreement in accordance with its terms, the General Contractor may immediately terminate this Subcontract by written notice to the Subcontractor.

**ARTICLE 18 - NON-COMMENCEMENT, SUSPENSION OR DELAY**

If for any reason the work of the General Contract is not commenced or, subsequent to such commencement, is disrupted, hindered, suspended, delayed, or permanently stopped or, for any reason, is not performed by the General Contractor due solely to Owner-caused issues, Subcontractor shall only be entitled to receive from the General Contractor the amount of compensation actually received by the General Contractor from the Owner on account of any loss, costs, or damage to Subcontractor subject to any claims of the General Contractor against the Subcontractor and subject to General Contractor's obligation to pursue Subcontractor's pass-through claim in good faith and to not settle any such claim without Subcontractor's written approval, which approval will not be unreasonably withheld. *DH. 10-7-18*

**ARTICLE 19 - CONVENIENCE TERMINATION**

- 19.1 The Contractor may notify the Subcontractor to discontinue all work or any part thereof. Such notice shall be given to the Subcontractor in writing, and, thereupon, the Subcontractor shall discontinue such work or such part thereof as the Contractor so designates.
- 19.2 If, following notification from the Owner, the Contractor notifies the Subcontractor to discontinue work, or any part thereof, the Contractor shall pay and the Subcontractor shall accept, as full payment for all work done and materials provided, the amount of compensation actually received by the General Contractor from the Owner on account of the work actually completed by the Subcontractor subject to any claims of the General Contractor against the Subcontractor.
- 19.3 If, in the absence of notice from the Owner, the Contractor notifies the Subcontractor to discontinue all work, or any part thereof, the Contractor shall pay, and the Subcontractor shall accept as full payment for all work done and materials provided, the following sums:
  - A. For all completed items of work for which there are unit prices provided in the Contract, the Contract unit prices as specified in Article 1 or in Schedules to this Agreement.
  - B. For all work on partially-completed items, a sum agreed to by the Contractor and the Subcontractor, or: (1) The actual costs for direct labor, materials (less salvage value, if any) and use of equipment, plus 10% of this total for overhead; and (2) the actual cost for workmen's compensation and liability insurance; health, welfare, and pension benefits; social security deductions; and employment security benefits; and (3) Five percent (5%) of the total of (1) and (2) for profit; and (4) the estimated proportionate cost of surety bonds if applicable; and (5) the actual cost to the Subcontractor for work performed by a Sub-Subcontractor or material supplier plus ten percent (10%) of such cost. No allowance shall be made for general superintendence and the use of small tools and manual equipment.
  - C. For costs of settlement as: Reasonable and necessary storage, transportation, and other costs incurred for the preservation, protection, or disposition of the discontinued work.



LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.

**SUBCONTRACT AGREEMENT**

- 19.4 When requested by the Contractor with respect to such termination costs, the Subcontractor shall furnish itemized statements of the cost of the work performed and shall give the Contractor access to all accounts, bills, and vouchers relating thereto.
- 19.5 The Subcontractor shall not be paid, and neither the Subcontractor nor any entity claiming through the Subcontractor, shall have any claim for loss of anticipated profits, for loss of expected reimbursement, or for any increased expenses resulting directly or indirectly from the discontinuance of any or all work or from unbalanced allocation, among any items of this Agreement relating to overhead expense on the part of the Subcontractor or for any other cause.

**ARTICLE 20 - DISPUTE RESOLUTION**

- 20.1 With respect to Owner pass-through claims, Subcontractor agrees to strictly adhere to the requirements of any provisions in the General Contract Documents relating to notice (provided Contractor informs Subcontractor regarding the issue requiring notice or if Subcontractor knows or reasonably should have known about the issue requiring notice), submission, processing, and resolution of claims or disputes. Any and all claims or disputes arising out of or relating to this Agreement or breach thereof shall be decided, by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association; provided however, the determination by the Owner, the Engineer or any court, Board of Arbitration, or other tribunal pursuant to the provisions of the General Contract Documents with respect to any dispute or claim relating to this Subcontract or the Work performed or to be performed hereunder shall be binding upon Subcontractor to the same extent they are binding on Contractor, and Subcontractor agrees to accept such determination, provided Subcontractor shall have been given reasonable notice of such dispute, proceeding, or litigation and opportunity to defend or present claims. At the sole discretion of the Contractor, any arbitration with Subcontractor shall be consolidated with any other arbitration proceeding relating to the work under the General Contract. The parties agree to waive their rights to trial by jury since the subject matter of such disputes would, in most instances, be too complex for presentation to a jury and would best be served by a jury-waived proceeding.
- 20.2 The parties further agree that, as a condition precedent to instituting legal action against each other or their sureties they shall participate in non-binding mediation pursuant to the Mediation Rules of the American Arbitration Association.

**ARTICLE 21 - PROVISIONS REQUIRED BY LAW**

This Agreement is intended to incorporate by reference all applicable provisions of law, which by law are required to be incorporated in this Subcontract.

**ARTICLE 22 - WARRANTY**

The Subcontractor warrants to the Contractor, Architect and Owner that all materials and equipment furnished under this Subcontract shall be new unless otherwise specified in the Contract Documents, applicable state statutes, and that all of the Work shall be of good quality, free from fault and other defects and in conformance with the Contract Documents. All work not conforming to these requirements, including substitutions not properly approved, may be considered defective. The Subcontractor shall execute a written guaranty and warranty applicable to all phases of the Work in accordance with this Subcontract and all other applicable provisions of the Contract Documents pertaining to warranties and guarantees.

Warranties shall commence as of the date of the Final Completion of all Subcontract work at the Project and shall continue for a period one (1) year unless a longer period is otherwise provided in the Contract Documents or unless the manufacturer provides a longer warranty. All guarantees shall be enforceable directly by the Owner if the Owner so elects. The Subcontractor warrants and guarantees that title to all work, materials and equipment

Initialed for LMH-LANE Cabot Yard Joint Venture  
Initialed for Subcontractor

*[Handwritten signatures and initials]*  
dated: 10/4/2018  
dated: 10-17-18





LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

covered by a Requisition shall vest with the Contractor upon receipt of payment by the Subcontractor, free and clear of all liens, claims, security interests or encumbrances (hereinafter referred to as "liens").

The Subcontractor further warrants that the materials and equipment furnished under this Subcontract shall not infringe any valid patent, copyright or trademark and that the Subcontractor shall indemnify and hold harmless the Contractor, Owner and Architect from and against any loss or damage, including attorneys' fees, which results directly or indirectly from any such infringement, or any action or claim of such infringement.

**ARTICLE 23 - ENTIRE CONTRACT**

This Agreement and the attached schedules shall constitute the entire contract between the parties and shall supersede any proposals or agreements and may not be altered or amended in any respect except by writing duly executed at the point of change by the parties hereto.

**ARTICLE 24 - SEVERABILITY**

Any article or provision of this contract which may be deemed in violation of law shall not affect in any manner the remaining provisions of this Contract.


**ARTICLE 25 - LIMIT OF LIABILITY**

Subcontractor's maximum liability to Contractor with respect to this Subcontract, Subcontractor's work hereunder or the Project, whether arising in contract, tort, strict liability or any other theory of recovery, shall be limited to 50% of the Subcontract price.

**ARTICLE 26 - MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES**

Each party waives the recovery against the other party of special, incidental, consequential, indirect or punitive damages of any kind arising out of or related to, directly or indirectly, the Project or performance or non-performance of this Agreement, regardless of whether such losses, damages or liability arise from breach of contract or warranty, tort (including negligence), strict liability or any other theory of recovery.

Initialed for LMH-LANE Cabot Yard Joint Venture  
Initialed for Subcontractor

 dated: 10/4/2018  
dated: 10-1-18



LMH-LANE CABOT YARD JOINT VENTURE

MASS ELECTRIC CONSTRUCTION CO.  
**SUBCONTRACT AGREEMENT**

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

LMH-LANE Cabot Yard Joint Venture

By: LMH-C.M.C. di Ravenna Joint Venture  
Its: Managing Partner  
By: LM Heavy Civil Construction, LLC  
Its: Managing Partner  
By: Massimo A. Marino  
Its: Chief Executive Officer

  
Witness By:

SUBCONTRACTOR

  
Gene Van Wagner President  
Witness By:

Initialed for LMH-LANE Cabot Yard Joint Venture  
Initialed for Subcontractor

  
dated: 10/4/2018  
dated: 10-1-18

# EXHIBIT C

**AMERICAN ARBITRATION ASSOCIATION**

MASS. ELECTRIC CONSTRUCTION CO.,

Claimant,

v.

LMH-LANE CABOT YARD JOINT  
VENTURE,

and

THE LANE CONSTRUCTION  
CORPORATION,

and

LMH-CMC, JV,

and

LM HEAVY CIVIL CONSTRUCTION, LLC,

and

COOPERATIVA MURATORI &  
CEMENTISTI – C.M.C. DI RAVENNA  
SOCIETA COOPERATIVA,

Respondents.

CASE NO. 01-20-0003-7097

**FIRST AMENDED ARBITRATION DEMAND**

Pursuant to Rule R-6(b) of the Construction Industry Arbitration Rules, Claimant Mass. Electric Construction Co. hereby amends its Arbitration Demand originally filed with the American Arbitration Association on March 12, 2020.

**PARTIES**

1. Mass. Electric Construction Co. (“MEC”) is a Delaware corporation with a principal place of business at 400 Totten Pond Road, Suite 400, in Waltham, Massachusetts.

2. LMH-Lane Cabot Yard Joint Venture (the “Joint Venture”) is a joint venture between The Lane Construction Corporation and LMH-CMC, JV, with a principal place of business at 100 Hancock Street, Suite 901 in Quincy, Massachusetts. A copy of the Prebid and Joint Venture Agreement dated June 11, 2018 (the “Joint Venture Agreement”) is attached as Exhibit A.

3. The Lane Construction Corporation (“Lane”) is a Connecticut corporation with a principal place of business at 90 Fieldstone Court in Cheshire, Connecticut.

4. LMH-CMC, JV is, upon information and belief, a joint venture between LM Heavy Civil Construction, LLC and Cooperativa Muratori & Cementisi – C.M.C. di Ravenna Societa Cooperativa, with a principal place of business at 100 Hancock Street, Suite 901 in Quincy, Massachusetts.

5. LM Heavy Civil Construction, LLC (“LMH”) is a Massachusetts corporation with a principal place of business at 100 Hancock Street, Suite 901 in Quincy, Massachusetts.

6. Cooperativa Muratori & Cementisi – C.M.C. di Ravenna Societa Cooperativa (“CMC”) is a foreign corporation with a principal place of business at Via Trieste, N. 76, 48122 in Ravenna, Italy.

7. The Subcontract Agreement between MEC and the Joint Venture (the “Subcontract”) was prepared by the Joint Venture and represents that the Joint Venture is “a duly organized Massachusetts company ...” A copy is attached as Exhibit B. Upon information and belief, and contrary to the Subcontract, the Joint Venture is not duly organized with the Secretary of the Commonwealth of Massachusetts.

8. The Subcontract is executed on-behalf of the Joint Venture by “LMH-C.M.C. di Ravenna Joint Venture,” as “Managing Partner” of the “LMH-Lane Cabot Yard Joint Venture.” See Exhibit B, p. 13. In that regard, the signature page of the Subcontract is not consistent with the Joint Venture Agreement which identifies the Managing Member of the Joint Venture as “LMH-CMC, JV.” See Exhibit A, p. 3. Upon information and belief, neither “LMH-C.M.C. di Ravenna Joint Venture” nor “LMH-CMC, JV” are duly organized with the Secretary of the Commonwealth of Massachusetts.

9. Upon information and belief, LMH is insolvent and no longer in operation.

10. Similarly, CMC is engaged in a restructuring/bankruptcy proceeding in Italy comparable to a reorganization pursuant to Chapter 11 of the United States Bankruptcy Code.

11. MEC is informed that Lane is now the Joint Venture’s Managing Partner, but the Joint Venture has not provided any confirmation of that representation.

### **JURISDICTION**

12. On April 13, 2018, the Massachusetts Bay Transportation Authority (“MBTA”) issued a Notice to Bidders in connection with the rebuilding of Cabot Yard and improvements to the existing Cabot Maintenance Facility in South Boston, Massachusetts (the “Project”).

13. On or about June 18, 2018, the Joint Venture entered into Contract No. R44CN02 (the “Prime Contract”) with the MBTA in the amount of \$213,817,000 for the Project.

14. Effective August 1, 2018, the Joint Venture and MEC entered into the Subcontract in the amount of \$65,762,000 for performance of the Project systems and electrical work identified therein (the “Subcontract Work”).

15. MEC’s Subcontract Work is summarized as follows:

- Yard signals – equipment/cable replacement.
- Yard traction power – equipment/cable replacement.
- Yard electrical and lighting – equipment/cable modifications and enhancements.
- Yard communications – equipment/devices modifications and enhancements.
- CMF electrical – building electrical equipment/cable replacement and modifications.
- CMF communications – building communications equipment/cable replacement and modifications.
- CMF traction power – building traction power equipment/cable replacement and modifications.

16. Through Article 20 (Dispute Resolution), § 20.1 of the Subcontract, MEC and the Joint Venture agreed to arbitrate any and all claims or disputes arising out of or relating to the Subcontract in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (“AAA”).

### **FACTS COMMON TO ALL COUNTS**

#### **The Subcontract Entitles MEC to Equitable Adjustments and Time Extensions**

17. On August 2, 2018, the MBTA issued the Notice to Proceed. A copy is attached as Exhibit C.

18. On August 10, 2018, the Joint Venture directed MEC in writing to “commence with your work immediately” including MEC’s “procurement process and submittals.” A copy is attached as Exhibit D.

19. The Subcontract (Article 2, §2.1 – Time for Performance) provides that:

Time is of the essence of this Agreement. Accordingly, [MEC] shall commence work upon notice from the [Joint Venture] and shall promptly and expeditiously perform said work ...

20. The Subcontract (Article 2, §2.2 – Time for Performance) provides that:

[MEC] shall complete its work in accordance with the approved baseline schedule and further updates approved by the owner ...

21. The Subcontract (Article 6, § 6.1 – Prosecution of the Work) provides that:

[MEC] shall supply a sufficient number of skilled workmen and ample quantities of approved material and equipment to perform the subcontract in accordance with the baseline schedule and any further mutually agreed upon schedule updates ... [t]he Subcontractor shall immediately commence work and/or procurement of materials upon notice from the [Joint Venture] ...

22. The Subcontract (Article 6, § 6.5 – Prosecution of the Work) provides that (emphasis added):

[MEC] shall co-operate fully with other Subcontractors employed on the Work and shall so plan and conduct the Work to be performed hereunder as directed by [the Joint Venture] as not to interfere with their operations or with those of the [Joint Venture]. *To the extent any such direction differs from the agreed upon baseline schedule, [MEC] will be entitled to request an equitable adjustment to the Subcontract price and an extension of time.*

### **MEC Has Been and Remains Ready to Perform the Subcontract Work**

23. Pursuant to the Prime Contract (Construction Specifications § 01322.1.10(C)), the Joint Venture was required to submit a Baseline Schedule for MBTA approval within 45 days from the Notice to Proceed.

24. MEC was uniformly responsive to all requests for information the Joint Venture deemed necessary to develop the Baseline Schedule.

25. The Joint Venture's Baseline Schedule was approved by the MBTA on January 24, 2019. A copy is attached as Exhibit E.

26. Pursuant to the Prime Contract (Construction Specifications § 01322.1.11), the Joint Venture is required to submit monthly Progress Schedule Updates.

27. The Prime Contract (General Conditions § 00700, Article 6.2(B)) provides for seven Milestones resulting in Final Completion no later than April 4, 2022:

Milestone Summary				Baseline Schedule		
Contract						
Milestone No.	Days from NTP	MS Date	LDs/Day	Description	Baseline Schedule Date	BL Float
NOA		6/18/2018		Notice of Award		
NTP		8/2/2018		Notice to Proceed	8/2/2018	0
AR 1		11/1/2020		Access Restraint #1: Construction Work in Cabot Maintenance Facility Zone Q cannot start until November 2020	11/1/2020	0
1	415	9/21/2019	\$ 2,600	Milestone #1 (MS #1) - Complete 15-ton Crane Installation for turnover to the MBTA	9/20/2019	1
2	632	4/25/2020	\$ 7,550	Milestone #2 (MS #2)-Complete all Work in Cabot Yard Rebuild Zones CYR-A, CYR-B, and CYR-C for turnover to the MBTA	4/6/2020	19
3	643	5/6/2020	\$ 1,550	Milestone #3 (MS #3) - Complete Work in Cabot Maintenance Facility Zone M for turnover to the MBTA	11/26/2019	162
4	858	12/7/2020	\$ 7,550	Milestone #4 (MS #4) - Complete all Work in Cabot Yard Rebuild Zone CYR-F Phases 53, 54, and 55 for turnover to the MBTA	11/16/2020	21
5	1212	11/26/2021	\$ 8,050	Milestone #5 (MS #5) - Complete all Work in Cabot Yard Rebuild Zone CYR-D, CYR-E, and remaining CYR-F Phases for turnover to the MBTA	11/26/2021	0
6	1251	1/4/2022	\$ 13,950	Milestone #6 (MS #6) - Substantial Completion of the Cabot Yard & Maintenance Facility Improvements Work	1/4/2022	0
7	1341	4/4/2022	\$ -	Milestone #7 (MS #7) - Final Completion of the Cabot Yard & Maintenance Facility Improvements	4/4/2022	0

28. The Prime Contract (General Conditions § 00700, Article 6.2(D)) provides for the MBTA's assessment of liquidated damages in the event Milestones 1 through 6 are not timely completed as follows:

Milestone 1: \$2,600 per calendar day  
Milestone 2: \$7,550 per calendar day  
Milestone 3: \$1,550 per calendar day  
Milestone 4: \$7,550 per calendar day  
Milestone 5: \$8,050 per calendar day  
Milestone 6: \$13,950 per calendar day

29. Since August of 2018, MEC has been prepared to promptly and expeditiously perform the Subcontract Work in accordance with the Baseline Schedule and the Progress Schedule Updates as required by the Subcontract.



### **The CYR and CMF Work Areas**

30. The Project has two distinct work areas: (1) the Cabot Yard (“CYR”) and (2) the Cabot Maintenance Facility (“CMF”). Both areas are active and operating MBTA facilities. Pursuant to the Prime Contract, the Joint Venture is required to sequence the work in both areas to allow the MBTA to maintain its daily operations.

31. The CYR area is broken into 6 zones (A through F). Each zone is further broken into phases. The CYR area has 55 phases. With the exception of several phases in Zones D and E where work can be coordinated with the CMF outages and five phases with prescribed longer outages, the majority of the track work in the CYR must be performed during weekend outages as required by Prime Contract General Conditions Section 00700, Article 6.4(B)(5) which provides, among other things, that “[t]he staging plans for this Contract are predicated on a significant amount of the work being performed on weekends when the MBTA can minimize the need for vehicle movements into and out of the Yard for revenue service ...”

32. As set forth in the approved Baseline Schedule, MEC planned to perform its work related to installation of duct bank and signal conduit in conjunction with the track work during these scheduled CYR outages. Work other than track work and work not requiring extensive shutdowns would be performed during normal working hours.

33. The CYR area is further restricted as a result of two critical requirements of the Prime Contract: (a) work can only be performed during construction season (April 1- November 30); and (b) the MBTA has the right to deny access for up to eight weekends per construction season.

34. The CMF area is broken into 19 zones (A1 through R). Pursuant to the Prime Contract, the Joint Venture is allowed to work in up to two zones simultaneously, provided the zones are not adjacent to each other, are not on the same track, and do not have similar hatching per drawing CYR-G-002.

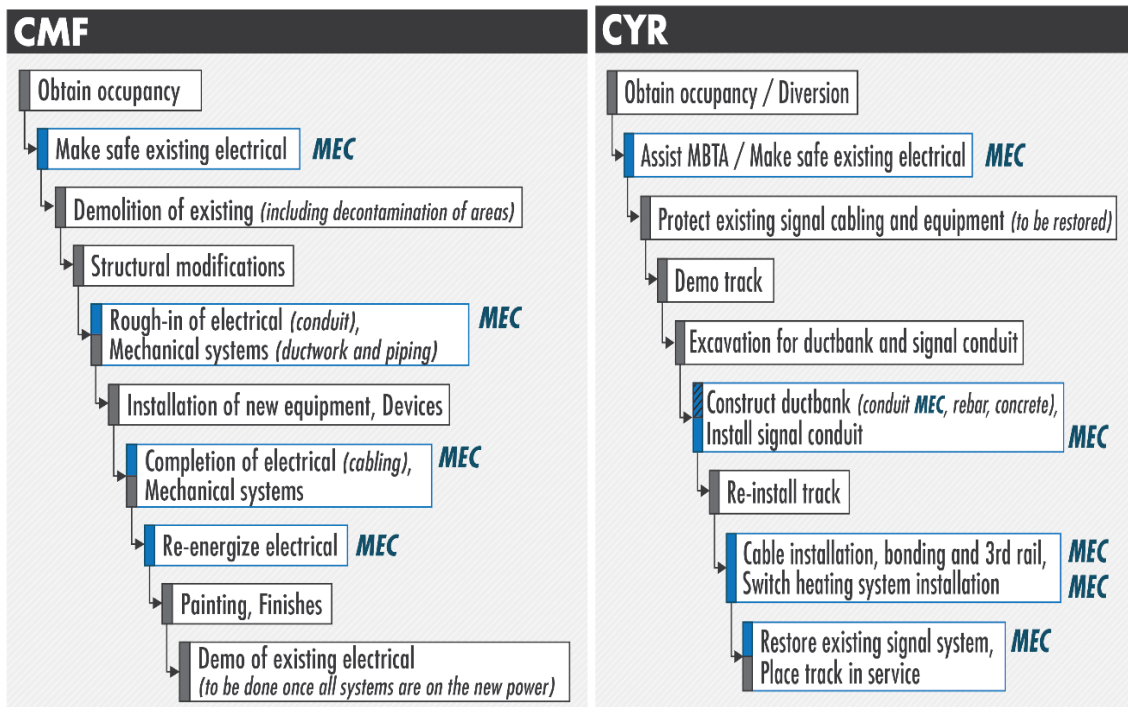
35. The CMF work zones have uninterrupted outages spanning multiple months. Work in Pit Track Zones G through L is limited to being performed from April 1 to November 1, and work in Zone R is limited to being performed from December 1 to March 15. The majority of the work in the CMF area can be performed during regular working hours Monday through Friday (with exception of Zones O, N and M which would be performed during the 2<sup>nd</sup> and 3<sup>rd</sup> shift while maintaining access to the wheel truing machine).

### **The Planned Sequence of Operations**

36. The Joint Venture and MEC jointly developed a planned sequence of operations to meet the Prime Contract Milestones as well as the restrictions set forth in General Conditions Section 00700, Article 6.4 (Limitations of Operations). That sequence of operations is reflected in the Baseline Schedule.

37. Performance of MEC’s Work depends extensively on the Joint Venture performing predecessor work and coordinating the work of others for whom the Joint Venture is responsible in order to make work areas available for MEC and to ensure continuous sequence of work and timely completion of the Project.

38. The Baseline Schedule provided that MEC’s field operations would start on or about October 31, 2018, with MEC having access to CMF Zones C and F. From there, the approved sequence of operations in the Baseline Schedule provided that MEC would progress its work in a logical and continuous manner throughout the various zones and phases of the CMF and CYR as illustrated here:



39. The Subcontract price was based on MEC’s ability to perform the Work in accordance with the planned sequence and timing of operations as reflected in the Baseline Schedule. Performance of MEC’s Work depends extensively on the Joint Venture timely and accurately completing predecessor work, timely and efficiently coordinating the work of others, and timely making work areas available to MEC and ensuring that MEC has continuous access to such areas.

**The Joint Venture Has Consistently Failed to Provide Access to the Subcontract Work and Meet the Schedule Obligations**

40. The Joint Venture failed to provide MEC any access to CMF Zones C and F until April 6, 2019, approximately five months later than set forth in the Baseline Schedule. Other MEC critical work activities were similarly delayed.

41. Delays to the start of MEC's work were caused by multiple issues beyond MEC's control, including, but not limited to, permitting issues, Joint Venture procurement and coordination failures, the Joint Venture's failure to have a meaningful and realistic Progress Schedule, and other trades not completing predecessor work.

42. In certain areas, MEC ultimately started work but could not complete it given delays by others for whom the Joint Venture is responsible. And even where access was ultimately provided, it was severely limited and did not permit MEC to advance its Work in any efficient manner consistent with the planned sequence of operations or the Baseline Schedule.

43. To date, MEC's work in CMF Zones C, F and I continues to be impacted by the Joint Venture's failure to provide access and complete its own predecessor scope of work, including, but not limited to:

#### ZONE C

- Garage doors not replaced;
- Mechanical equipment not installed;
- Prefabricated building not installed;
- Stinger structural steel not relocated;
- MBTA took over most of Zone C for beneficial occupancy.

#### ZONE F

- North Building construction not started;
- MBTA took over part of Zone F for beneficial occupancy;
- Mechanical equipment not installed.

#### ZONE I

- Civil work incomplete to allow for conduit and equipment installation;
- Garage doors not installed;
- Mechanical equipment not installed;
- MEC is running out of available work.

44. MEC has similarly been denied access to the CYR which has prevented MEC from performing its scope of work in that location. Such lack of access has effectively delayed MEC's work in the CYR by eighteen months. Until July of 2020, MEC was largely limited to performing standby support of the Joint Venture's work in the CYR. That work is excluded from the Subcontract and MEC is entitled to change orders.

45. The first meaningful CYR outage Subcontract Work was performed over two weekends in late July of 2020. Absent the Joint Venture's delays, the Baseline Schedule provided for MEC to have already performed thirty-eight weekend outages and completed six multi-week zones by that point in the Project.

**MEC Has Timely Communicated to the Joint Venture its Concerns Regarding Lack of Access to the Subcontract Work**

46. On a continuing basis, MEC has communicated its concerns to the Joint Venture regarding the absence of both access and a plan to support future scheduled operations, including, but not limited to:

- MEC-LMHL-LTR-005 dated December 7, 2018
- MEC-LMHL-LTR-012 dated March 15, 2019
- MEC-LMHL-LTR-013 dated March 15, 2019
- MEC-LMHL-LTR-023 dated May 22, 2019
- MEC-LMHL-LTR-028 dated June 19, 2019
- MEC-LMHL-LTR-043 dated August 5, 2019
- MEC-LMHL-LTR-081 dated November 6, 2019
- MEC-LMHL-LTR-086 dated November 15, 2019
- MEC-LMHL-LTR-103 dated December 27, 2019
- MEC-LMHL-LTR-113 dated January 21, 2020
- MEC-LMHL-LTR-117 dated February 7, 2020
- MEC-LMHL-LTR-118 dated February 7, 2020
- MEC email to LMH dated February 24, 2020
- MEC-LMHL-LTR-122 dated March 5, 2020
- MEC-LMHL-LTR-142 dated April 6, 2020
- MEC-LMHL-LTR-164 dated June 3, 2020
- MEC-LMHL-LTR-165 dated July 1, 2020
- MEC-LMHL-LTR-169 dated July 23, 2020
- MEC-LMHL-LTR-174 dated August 4, 2020
- MEC email to LMH dated September 11, 2020

See copies of the foregoing attached as Exhibit F.

**MEC Has Incurred Significant Cost and Time Impacts Resulting from the Joint Venture's Failure to Meet the Subcontract Obligations**

47. Since the outset of the Project, the Joint Venture has prevented MEC from performing its scope of work in violation of the Subcontract. See MEC Letter dated December 7, 2018, attached as Exhibit G. Nonetheless, the Joint Venture has consistently required that MEC maintain supervision, foreman and craft resources ready to execute the Subcontract Work if the opportunity arises to do so.

48. Continuous slippage of the Baseline Schedule has caused MEC to incur the additional cost of maintaining a full Project staff, as well as hiring and training the required craft, only to have them on standby waiting for the Joint Venture to provide access to Subcontract Work.

49. MEC has consistently adjusted and resequenced its operations to mitigate the Joint Venture's delays and associated impacts, while shouldering the cost associated with a staff-to-craft ratio significantly higher than reasonably anticipated.

50. At the same time, the Joint Venture has experienced significant turnover in executive management and key superintendents without an effective hand-off process for critical Project knowledge. The Joint Venture's new management blames past failures on prior management, and new superintendents require MEC to re-plan work already reviewed by prior superintendents.

51. Further, as required by the Subcontract and directed by the Joint Venture, MEC proceeded with submittals and the procurement of equipment and materials even though the Project was not ready to receive them, causing MEC to ultimately incur the cost of storage, double handling, and maintenance – costs that will continue to accrue until the Project is ready to receive such equipment and materials. The Joint Venture's delays have also exposed MEC to the risk of warranty lapse.

52. Based on the sequence of work and the Baseline Schedule approved by the Joint Venture, through September of 2020, MEC anticipated completing 94,452 man hours in base Subcontract Work. Ultimately, MEC was only provided access sufficient to perform 8,107 man hours of its base Subcontract Work. Though the Baseline Schedule provided for 74% of the Subcontract Work to have been completed, MEC has been limited to advancing only 6% of its base scope of work.

53. By comparison, through September MEC has performed approximately 10,435 man hours of directed extra work and standby support outside the Subcontract – the vast majority of which the Joint Venture has refused to pay for in material breach of the Subcontract.

**The Joint Venture Has Materially Breached the Subcontract by Failing to Compensate  
MEC for its Costs Incurred to Date**

54. The Subcontract provides that MEC is to be compensated on the basis of percentage completion for work actually performed. The Subcontract does not allow MEC to bill for costs incurred unless tied to completed work. Because MEC has not been provided access or been allowed to complete work items, it is not able to bill to recover either its direct costs (which are limited due to how little work has been completed) or, more significantly, its indirect costs of its staff, support, overhead and equipment which continue to accrue.

55. MEC's actual costs (without profit) through September of 2020 are \$24,395,595. Of that amount, MEC has been limited by the terms of the Subcontract and the Joint Venture's delays to invoicing only \$13,521,312. The Joint Venture's acts and omissions have prevented MEC from invoicing almost \$11 million in costs incurred (exclusive of MEC's overhead and profit), comprised primarily of: (1) equitable adjustments for indirect costs; (2) permanent materials in storage; (3) unpaid extra/change work; and (4) G&A cost on the extra/change work and total materials in storage.

**MEC's TIA-1 AND REAs 1, 2, 3 & 4: \$8,017,321**

**The Joint Venture Has Ignored Article 10 in Material Breach of the Subcontract**

56. The Subcontract (Article 10 - Delay) provides that:

In case of delays, hindrances, or obstructions not due in any part to [MEC's] fault, [MEC] shall be entitled to request such extension of time for performance and an increase to the subcontract price as equitably required provided that Subcontractor has given written notice within ten (10) days of the commencement of the delay to [MEC's] work and can substantiate the delay in the form and substance to the reasonable satisfaction of the [Joint Venture] and/or [MBTA] as applicable.

57. In compliance with Article 10 of the Subcontract, MEC has issued, and continues to issue, notices to the Joint Venture of the continuous delays, hindrances and obstructions to MEC's Subcontract Work. See Paragraph 46 above.

**Request for Equitable Adjustment No. 1: \$4,182,025**

58. On November 14, 2019, MEC submitted a Request for Equitable Adjustment ("REA-1") and Time Impact Analysis ("TIA-1") (collectively, "REA/TIA-1") to the Joint Venture substantiating the schedule impacts incurred by MEC through June 30, 2019, and the cost impacts incurred by MEC through October 26, 2019. A copy is attached as Exhibit H.

59. Through REA-1, MEC requested that the Joint Venture issue an interim change order for an increase in the Subcontract price in the amount of \$4,182,025. TIA-1 further demonstrates a critical path delay to MEC's Subcontract Work, through June 30, 2019, of three hundred sixty-five (365) days, and that MEC is not responsible for the subject delays.

60. MEC further reserved the right to request time extensions to all Project Milestones, and to supplement REA/TIA-1 to recover schedule impacts (since June 30, 2019) and cost impacts (since October 26, 2019) as further incurred by MEC.

**Request for Equitable Adjustment No. 1 (revised): \$4,264,147**

61. On February 20, 2020, MEC submitted a revised version of REA/TIA-1, substantiating cost impacts incurred through October 26, 2019 in the amount of \$4,264,147 ("REA/TIA-1 (rev)"). A copy is attached as Exhibit I. The Joint Venture has not granted any relief to MEC in response to REA/TIA-1 (rev) as required by the Subcontract.

**Request for Equitable Adjustment No. 2: \$1,238,485**

62. On March 11, 2020, MEC submitted its REA-2 substantiating cost impacts incurred by MEC between October 27, 2019 and January 25, 2020 in the amount of \$1,238,485 ("REA-2"). A copy is attached as Exhibit J. The Joint Venture has not granted any relief to MEC in response

to REA-2 as required by the Subcontract. In fact, the Joint Venture has not responded to REA-2 in any manner during the seven months since it was submitted.

**Request for Equitable Adjustment No. 3: \$1,436,072**

63. On June 1, 2020, MEC submitted its REA-3 substantiating cost impacts incurred by MEC between January 26, 2020 and April 25, 2020 in the amount of \$1,436,072 (“REA-3”). A copy is attached as Exhibit K. The Joint Venture has not granted any relief to MEC in response to REA-3 as required by the Subcontract. In fact, the Joint Venture has not responded to REA-3 in any manner during the four months since it was submitted.

**Request for Equitable Adjustment No. 4: \$1,078,618**

64. On October 9, 2020, MEC submitted its REA-4 substantiating cost impacts incurred by MEC between April 26, 2020 and July 25, 2020 in the amount of \$1,078,618 (“REA-4”). A copy is attached as Exhibit L.

65. For impacts incurred by MEC through July 25, 2020, the Joint Venture is obligated to equitably adjust the Subcontract price in the total amount of \$8,017,322:

<b>MEC’s REQUESTS FOR EQUITABLE ADJUSTMENT – THROUGH JULY 25, 2020</b>				
	<b>Amount</b>	<b>Impact Period</b>	<b>Submitted</b>	<b>JV Response</b>
REA/TIA-1	\$4,182,025	10/31/18 – 10/26/19	11/14/19	
REA-1 (rev)	\$4,264,147	10/31/18 – 10/26/19	2/20/20	8/14/20 “preliminary”
REA-2	\$1,238,485	10/27/19 – 1/25/20	3/11/20	None
REA-3	\$1,436,072	1/26/20 – 4/25/20	6/1/20	None
REA-4	\$1,078,618	4/26/20 – 7/25/20	10/9/20	N/A
<b>TOTAL</b>	<b>\$8,017,322</b>	10/31/18 – 7/25/20		

**The Joint Venture Has Refused to Equitably Adjust the Subcontract in any Manner**

66. MEC has incurred in excess of eight million dollars in cost impacts resulting from the Joint Venture’s delays over the course of the past twenty-three months.

67. The Project delays and impacts to MEC continue unabated, costing MEC approximately \$400,000 per month, despite MEC’s reasonable and good faith efforts to mitigate.

68. Pursuant to Article 10 of the Subcontract, MEC is entitled to an equitable adjustment to the Subcontract price and a time extension arising from the Joint Venture’s requirement that MEC perform the Subcontract Work in a manner drastically different than provided in the Baseline Schedule.

69. MEC submitted REA/TIA-1 eleven months ago yet the Joint Venture has not equitably adjusted the Subcontract in *any* manner as required by Article 10 of the Subcontract.

70. In the meantime, MEC has immediately and comprehensively responded to every Joint Venture request to substantiate, supplement, or clarify its Article 10 claims, including

participation in a meeting with the Joint Venture and its schedule consultant on March 3, 2020 and a mediation on July 28, 2020, both required by the Joint Venture.

71. On July 8, the Joint Venture provided MEC with copies of the Joint Venture's own REA/TIA-1 dated December 17, 2019 for time only (58 CDs) and REA/TIA-2 dated June 15, 2020 for time (additional 168 CDs) and cost (\$6,553,498.82) to the MBTA (collectively, the "Joint Venture REAs").

72. Despite not responding to MEC's REAs in any manner, the Joint Venture unilaterally decided to include in its REAs to the MBTA only \$1,686,079 of MEC's costs of \$4,264,147 substantiated in REA/TIA-1 (rev). Similarly, of the 365 CD extension sought by MEC through TIA-1, the Joint Venture is seeking only 36 CD of compensable delay through its REA/TIAs to the MBTA, and has not identified that MEC is responsible for any delay.

73. On August 14, 2020, the Joint Venture provided a "preliminary" response to MEC's REA/TIA-1. A copy is attached as Exhibit M.

74. As detailed in MEC's letter in reply (MEC-LMHL-LTR-181), the Joint Venture's analysis of REA/TIA-1 was not based on an accurate Project record, the Joint Venture misconstrued the impacts detailed in MEC's REA/TIA-1, and the Joint Venture's response is nothing more than an attempt to shift blame away from the Joint Venture's delays. A copy is attached as Exhibit N.

75. MEC disputes any assertion by the Joint Venture that it is entitled to withhold payment from MEC until the MBTA resolves the Joint Venture REAs, or that MEC will be limited to the compensation granted by the MBTA. While Article 18 of the Subcontract provides that, under certain circumstances, MEC may only recover the amount of compensation actually received from the MBTA, Article 18 does not apply to MEC's REAs as the subject impacts were not due "solely to [MBTA] caused issues." In that regard, the Joint Venture's own REAs/TIAs to the MBTA fail to attribute most of the delay asserted therein to the MBTA.

76. The Joint Venture has failed to demonstrate any reason why MEC is not entitled to an equitable adjustment of the Subcontract.

77. The Joint Venture has failed to resolve MEC's TIA-1 and REAs 1 through 4 in good faith as required by the Subcontract.

78. As the delays, impacts and MEC's damages continue to accrue, MEC will seek recovery of all amounts due from the Joint Venture through the arbitral hearing, and will update the amount of its claim as provided by Rule R-6(a) of the AAA Construction Industry Arbitration Rules prior to the hearing.



**SUBCONTRACT PAYMENTS OWED TO MEC: \$4,670,938**

79. In addition to the equitable adjustments and time extension owed to MEC pursuant to Article 10 of the Subcontract, MEC is further entitled to payment from the Joint Venture of approximately \$4,670,938 for work performed through September of 2020, including retainage.

80. The Subcontract (Article 8 – Contract Price) provides that:

The [Joint Venture] agrees to pay [MEC] as full payment for the complete performance of all work and other matters to be done, performed, furnished, and provided by the Subcontractor, the amount or amounts described in Article 1. Such payments are to be made in the manner and at the time hereinafter provided in Article 9.

81. The Subcontract (Article 9.1 – Measurement and Payment) provides that:

When the [Joint Venture] receives payment from the Owner on account of [MEC's] work, it shall pay said sum to [MEC], less an amount of five percent (5%) which shall be held as retainage by [MBTA], within 10 calendar days of receipt of such payment.

82. The Contract (Specification Section 01151 – Measurement and Payment, Article 1.7 – Partial Payment) provides that the MBTA will make monthly payments to the Joint Venture.

83. To date, MEC has submitted twenty-two Requisitions to the Joint Venture totaling \$13,521,312 for Subcontract Work performed by MEC through September of 2020.

84. The Joint Venture has remitted payment to MEC in response to Requisitions 1 through 19 in the amount of \$9,478,655.

85. For payments made, MEC has been forced to wait an average of 150 days between the date it invoiced the Joint Venture and receipt of payment.

86. In addition to not remitting timely payment, the Joint Venture has also failed to consistently make payment to MEC in the full amount due as reflected in the Requisitions, resulting in substantial deficiencies in payments to MEC.

87. As recently as July of 2020, approximately 10 months of rolling deficiencies in the Joint Venture's payments to MEC exceeded \$3.5 million (exclusive of pending/unpaid requisitions and the REAs). Although recent Joint Venture payments have tempered those deficiencies, the Joint Venture's failure to remit payments due under the Subcontract in the full amount and on time remains a material and ongoing breach of the Subcontract.

## **The Joint Venture Directed MEC to Perform Extra Work but Refused to Make Payment**

88. In addition to the Subcontract Work invoiced through Requisitions 1 through 22 and the REAs/TIA, MEC is further entitled to compensation in the approximate value of \$628,281 for extra work performed beyond the Subcontract Work through September of 2020.

89. The Joint Venture has consistently ignored MEC's efforts to resolve this extra work and issue change orders.

90. Instead, the Joint Venture has resorted to directing MEC to perform the work under protest amid threats of default and without stating the Joint Venture's contractual position on the merit of change orders.

91. To date, the Joint Venture has directed MEC to perform but has failed and refused to issue change orders to MEC for this extra work contrary to the express requirements of the Subcontract. In this regard, the Joint Venture has largely failed to even submit change order requests to the MBTA for the subject extra work.

### **MEC CONTINUES TO INCUR DAMAGES**

92. Through September of 2020, MEC has invested \$24,395,595 in the Project, billed the Joint Venture for \$13,521,312 as allowed by the Subcontract, and been paid only \$9,478,655.

93. MEC has almost 11 million dollars in costs (exclusive of MEC's overhead and profit) incurred which it cannot invoice because of the Joint Venture's failure to provide MEC access to progress the Subcontract Work per the approved Baseline Schedule.

94. The Joint Venture has materially breached its Subcontract obligations pertaining to schedule, coordination, payment, and equitable adjustments.

95. As a result of the Joint Venture's material breaches of the Subcontract, the delays to MEC's Subcontract Work continue to accrue every day, the Subcontract Work is being performed completely out of sequence, the schedule continues to be unreliable, and the cost and schedule impacts to MEC are never-ending.

### **CAUSES OF ACTION**

#### **COUNT I**

#### **DECLARATORY RELIEF – MATERIAL BREACH**

96. MEC repeats and realleges Paragraphs 1 through 95 above as if expressly set forth herein.

97. MEC seeks a declaration that the Joint Venture's actions and omissions as alleged herein, including but not limited to: (1) the Joint Venture's repeated and ongoing failure to remit payment to MEC as required by the Subcontract; and (2) the Joint Venture's repeated and ongoing

failure to timely and properly coordinate, sequence, and perform predecessor work, make the Subcontract Work available to MEC, and otherwise abide by its obligations pertaining to the schedule, constitute material breaches of essential and inducing features of the Subcontract and therefore the Subcontract is terminated and MEC is discharged and excused from further performance under the Subcontract as a matter of law.

98. An actual controversy has arisen and now exists between MEC and the Joint Venture concerning the Parties' respective rights and obligations arising under the Subcontract.

99. As the Project and the Joint Venture's material breaches of the Subcontract are ongoing, a declaration by the Arbitrators of the Parties' respective rights and duties is necessary to protect MEC's rights.

## **COUNT II**

### **DECLARATORY RELIEF - CARDINAL CHANGE**

100. MEC repeats and realleges Paragraphs 1 through 99 above as if expressly set forth herein.

101. The Subcontract provides that time is of the essence, that the Subcontract Work will be performed pursuant to the approved Baseline Schedule, and that MEC is entitled to payment for work performed and to equitable adjustments to the Subcontract price and time in the event of delays, hindrances or obstructions not caused by MEC.

102. The Joint Venture has consistently failed to meet those obligations, which has directly precluded MEC from performing the Subcontract Work in a manner that even resembles the Baseline Schedule.

103. The Baseline Schedule provides for the Project to reach final completion on or before April 4, 2022, a duration of approximately forty-four months from the Notice to Proceed.

104. Through September of 2020, twenty-six months into the Project, the Joint Venture has limited MEC to completing only 6% of the Subcontract Work. The approved Baseline Schedule provided for 74% of MEC's work to be complete by this point. MEC's Work is materially and substantially different than contemplated in the Subcontract in that MEC is not able to perform work as planned, is not compensated consistent with the terms of the Subcontract, and much of the Work performed to date is not base Subcontract Work but is change work which the Joint Venture has directed and rarely paid for on a timely basis.

105. MEC has only been provided access sufficient to perform 8,107 man hours of base Subcontract Work. MEC based its schedule and staffing plan on the Baseline Schedule and planned sequence of work which provided that MEC would perform 94,452 man hours through September of 2020.

106. Despite consistently preventing MEC from performing its Subcontract Work, the Joint Venture has required that MEC provide materials and equipment, and maintain supervision,

foreman and craft resources ready to execute the Subcontract Work if the opportunity arises to do so.

107. The Joint Venture has also insisted that MEC perform under protest pursuant to Article 6.9 of the Subcontract thereby forcing MEC to fund work for which it is not getting paid.

108. MEC has incurred cost and schedule impacts resulting directly from the Joint Venture's acts and omissions exceeding eight million dollars as detailed in REAs 1 through 4 and TIA-1.

109. MEC has also spent approximately three million additional dollars which it cannot presently bill for given the Joint Venture's breaches of the Subcontract.

110. The delays, hindrances and obstructions to MEC's work are ongoing, and the associated impacts cost MEC approximately \$400,000 every month in continuing costs.

111. Article 10 of the Subcontract expressly provides for MEC to receive equitable adjustments under the circumstances presented, MEC submitted a TIA and multiple REAs compliant with the Subcontract substantiating in excess of eight million dollars and a full year in impacts, and the Joint Venture has not granted MEC with a single dollar or day of compensation.

112. The Joint Venture has required MEC to perform its work in a manner drastically different than provided in the Subcontract on which it bid, bargained for, and executed.

113. At the same time, the Joint Venture has outright refused to compensate MEC in the manner expressly provided for in Article 10 of the Subcontract.

114. In doing so, the Joint Venture has forced MEC to bear alone the substantial risk and financial impact of the Joint Venture's failure to make the Subcontract Work available as scheduled.

115. Further, the Joint Venture has failed to address the delays, hindrances and obstructions to the Subcontract Work, the associated impacts continue unabated, and the Joint Venture has put MEC in the position of shouldering millions of dollars in annual costs without redress.

116. MEC seeks a declaration that the Joint Venture's actions and omissions as alleged herein constitute cardinal changes, as these substantial deviations from the Subcontract cost and duration have fundamentally altered the nature of MEC's bargain, increased its burden, and represent a materially different undertaking.

117. MEC seeks a further declaration that the Joint Venture's cardinal changes are an abandonment of the Subcontract, constitute material breaches, excuse MEC from further performance, and entitle MEC to the reasonable value of all labor, materials and equipment provided to the Project, including overhead and profit.

118. An actual controversy has arisen and now exists between MEC and the Joint Venture concerning the Parties' respective rights and obligations arising under the Subcontract.

119. As the Joint Venture's cardinal changes to the Subcontract are ongoing, a declaration by the Arbitrators of the Parties' respective rights and duties is necessary to protect MEC's rights.

**COUNT III**  
**BREACH OF CONTRACT**

120. MEC repeats and realleges Paragraphs 1 through 119 above as if expressly set forth herein.

121. Pursuant to the Subcontract, the Joint Venture was obligated to, among other things:

- (a) Timely remit payment to MEC for Subcontract Work performed in response to requisitions;
- (b) Arrange for the timely performance of work preceding MEC's Subcontract Work and properly coordinate the work of others to ensure continuous sequence of the work and timely completion of the Project; and
- (c) Compensate MEC for substantiated impacts to the Subcontract price and time for performance as equitably required by delays, hindrances and obstructions not due in any part to the fault of MEC.

122. The Joint Venture materially breached the Subcontract by, among other things:

- (a) Repeatedly failing to remit payments to MEC, on time and in the amount properly due;
- (b) Requiring MEC to provide supervision, staff and materials to the Project while the Joint Venture simultaneously failed to comply with its own obligations to timely and properly coordinate, sequence and perform predecessor work, make the Subcontract Work available to MEC, and otherwise abide by its obligations pertaining to the schedule;
- (c) Repeatedly failing to issue change orders compensating MEC for extra work performed at the Joint Venture's request and direction; and
- (d) Repeatedly failing to substantively respond to, resolve, or otherwise compensate MEC for the impacts caused by the Joint Venture as substantiated in REAs 1 through 4 and TIA-1.

123. As a direct result of the Joint Venture's material breaches of the Subcontract, MEC has incurred, and continues to incur, damages including, but not limited to:

- (a) Earned yet unpaid amounts due for Subcontract Work performed by MEC in the amount of \$4,670,938;
- (b) Impacts to MEC's cost and time for performance of the Subcontract Work resulting from the Joint Venture's delays as reflected in REAs 1 through 4 and TIA-1 in the approximate amount of \$8,017,322; and
- (c) Ongoing impacts to MEC's cost and time for performance of the Subcontract Work resulting from the Joint Venture's delays in an amount to be substantiated in subsequent REAs/TIAs and proven during the arbitral hearing; and
- (d) Attorneys' fees, expenses, arbitration costs and accrued interest.

#### **COUNT IV**

#### **BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

124. MEC repeats and realleges Paragraphs 1 through 123 above as if expressly set forth herein.

125. The Joint Venture has an ongoing duty to act in good faith and to diligently perform its obligations under the Subcontract.

126. The Joint Venture materially breached its covenant of good faith and fair dealing.

127. The Joint Venture repeatedly failed to remit payment to MEC, on time and in the amount properly due.

128. The Joint Venture required MEC to provide supervision, staff and materials to the Project while the Joint Venture simultaneously failed to comply with its own obligations to timely and properly coordinate, sequence and perform predecessor work, make the Subcontract Work available to MEC, and otherwise abide by its obligations pertaining to the Baseline Schedule.

129. The Joint Venture repeatedly failed to issue change orders compensating MEC for extra work performed at the Joint Venture's request and direction.

130. The Joint Venture repeatedly failed to substantively respond to, resolve, or otherwise compensate MEC for the impacts caused by the Joint Venture as substantiated in REAs 1 through 4 and TIA-1.

131. The Joint Venture repeatedly failed to meet its obligations arising under Article 20 (Dispute Resolution) of the Subcontract. In the seven months since MEC filed its original Demand for Arbitration, the Joint Venture has consistently refused to advance this proceeding. Most notably, Respondent CMC has not yet entered an appearance, no Joint Venture Respondent filed an Answering Statement, and the Joint Venture insisted that MEC participate in a hopeless mediation proceeding that the Joint Venture delayed for approximately four months. And even then, MEC maintains that the Joint Venture did not attempt in good faith to resolve any of MEC's substantial claims. Rather, the Joint Venture has simply ignored and delayed MEC's entitlement to relief as set forth in the Subcontract.

132. Most recently, it has come to MEC's attention that the Joint Venture is not constituted in the manner represented in the Subcontract – which the Joint Venture prepared. Upon information and belief, the Joint Venture is not “a duly organized Massachusetts company” as stated in the Subcontract. Exhibit B, p. 1. Moreover, there is no indication that the entity that executed the Subcontract on the Joint Venture's behalf exists. The signature line in the Subcontract identifies “LMH-C.M.C. di Ravenna Joint Venture,” as “Managing Partner” of the LMH-Lane Cabot Yard Joint Venture (Exhibit B, p. 13), but the Joint Venture Agreement identifies no such entity, instead indicating that Lane's partner in the Joint Venture is “LMH-CMC, JV” (Exhibit A, p. 3). Upon information and belief, neither entity is registered with the Secretary of the Commonwealth of Massachusetts.

133. MEC requested a copy of the Joint Venture Agreement shortly after filing the original Arbitration Demand on March 12, 2020, but did not receive it until October 6, 2020. As noted above, there are material discrepancies in the Joint Venture's representations set forth in the Subcontract and the Joint Venture Agreement, which go to the core of who precisely MEC subcontracted with, which entity is responsible for managing the Joint Venture in the midst of this ongoing and troubled construction project, and ultimately who is liable to MEC for the breaches detailed in this Amended Arbitration Demand. The Joint Venture's misrepresentations set forth in the Subcontract, and consistent lack of transparency, are further examples of the Joint Venture's failure to meet its obligations of good faith and fair dealing towards MEC.

134. Consistent with the foregoing, the Joint Venture did not remain faithful to the intended and agreed upon expectations of the Subcontract and destroyed MEC's right to receive the benefits of the Subcontract for which it bargained.

135. As a direct result of the Joint Venture's material breaches of its covenant of good faith and fair dealing, MEC has incurred, and continues to incur, damages as specified herein.

## **COUNT V**

### **QUANTUM MERUIT / UNJUST ENRICHMENT**

136. MEC repeats and realleges Paragraphs 1 through 135 above as if expressly set forth herein.

137. Through September of 2020, at the request of and with the Joint Venture's actual or constructive knowledge, MEC has provided labor, materials and equipment to the Joint Venture having a reasonable value of \$24,395,595.

138. MEC provided said labor, materials and equipment with the reasonable expectation it would be fully and fairly compensated for its efforts as known to the Joint Venture.

139. To date, the Joint Venture has paid for only \$9,478,655 of the labor, materials and equipment provided by MEC, resulting in the Joint Venture having received labor, materials and equipment, through September of 2020, approaching \$15 million (exclusive of MEC's overhead and profit) for which MEC has not been compensated.

140. MEC is entitled to compensation for the labor, materials and equipment it provided to the Project, the Joint Venture received the benefit of such work and has been unjustly enriched at MEC's expense, and the Joint Venture is thus obligated to fully and fairly compensate MEC.

### **COUNT VI**

#### **VIOLATION OF M.G.L. c. 93A, § 11 – UNFAIR & DECEPTIVE BUSINESS PRACTICES**

141. MEC repeats and realleges Paragraphs 1 through 140 above as if expressly set forth herein.

142. At all times relevant to this matter, the Joint Venture has been engaged in the conduct of trade and commerce within the Commonwealth of Massachusetts.

143. Since the outset of the Project the Joint Venture has delayed, hindered and obstructed MEC from performing its Subcontract Work, while requiring that MEC provide materials and equipment, and maintain supervision, foreman and craft resources ready to execute the Subcontract Work if the opportunity arises to do so.

144. The Joint Venture has forced MEC to incur millions of dollars in impacts, while ignoring MEC's requests for equitable adjustments as provided for by the Subcontract.

145. The Joint Venture has done nothing to mitigate or resolve the delays, hindrances and obstructions to MEC's Subcontract Work, while the substantial impacts borne alone by MEC continue unabated.

146. The Joint Venture has refused to remit timely or full payment to MEC for Subcontract Work performed, while insisting that MEC continue to adhere to the Subcontract under protest.

147. The Joint Venture has repeatedly directed MEC to perform extra work beyond the scope of the Subcontract under threat of default, while refusing to issue change orders.

148. The Joint Venture has required MEC to perform its work in a manner drastically different than provided in the Subcontract, while outright refusing to compensate MEC in the



manner expressly provided for by the Subcontract, and forcing MEC to bear alone the substantial risk and financial impact of the Joint Venture's failure to make the Subcontract Work available as scheduled.

149. The Joint Venture has intentionally refused to meet its obligations arising under Article 20 (Dispute Resolution) of the Subcontract. In the seven months since MEC filed its Demand for Arbitration, the Joint Venture has consistently hindered this proceeding. Most notably, Respondent CMC has not yet entered an appearance, no Joint Venture Respondent filed an Answering Statement, and the Joint Venture insisted that MEC participate in a hopeless mediation proceeding that the Joint Venture delayed for approximately four months. And even then, MEC maintains that the Joint Venture did not attempt in good faith to resolve any of MEC's substantial claims. Rather, the Joint Venture has simply ignored and delayed MEC's entitlement to relief as set forth in the Subcontract.

150. Most recently, it has come to MEC's attention that the Joint Venture is not constituted in the manner represented in the Subcontract – which the Joint Venture prepared. Upon information and belief, the Joint Venture is not “a duly organized Massachusetts company” as stated in the Subcontract. Exhibit B, p. 1. Moreover, there is no indication that the entity that executed the Subcontract on the Joint Venture's behalf exists. The signature line in the Subcontract identifies “LMH-C.M.C. di Ravenna Joint Venture,” as “Managing Partner” of the LMH-Lane Cabot Yard Joint Venture (Exhibit B, p. 13), but the Joint Venture Agreement identifies no such entity, instead indicating that Lane's partner in the Joint Venture is “LMH-CMC, JV” (Exhibit A, p. 3). Upon information and belief, neither entity is registered with the Secretary of the Commonwealth of Massachusetts.

151. MEC requested a copy of the Joint Venture Agreement shortly after filing the original Arbitration Demand on March 12, 2020, but did not receive it until October 6, 2020. As noted above, there are material discrepancies in the Joint Venture's representations set forth in the Subcontract and the Joint Venture Agreement, which go to the core of who precisely MEC subcontracted with, which entity is responsible for managing the Joint Venture in the midst of this ongoing and troubled construction project, and ultimately who is liable to MEC for the breaches detailed in this Amended Arbitration Demand. The Joint Venture's misrepresentations set forth in the Subcontract, and consistent lack of transparency, are further examples of the unfair and deceptive manner in which the Joint Venture has acted towards MEC.

152. The Joint Venture's acts and omissions constitute an unfair method of competition and an unfair or deceptive act or practice in violation of M.G.L. c. 93A, §§2, 11.

153. The Joint Venture's unfair and deceptive acts and practices were knowing and willful.

154. The Respondents are experienced and sophisticated construction contractors, and are fully aware of the financial peril imposed on MEC by forcing it to finance the Joint Venture's delays, hindrances and obstructions to the Subcontract Work without compensation.

155. As a result of the Joint Venture's violation of M.G.L. c. 93A, MEC has sustained,

and continues to sustain, damages and MEC is entitled to recover such damages, including treble damages and attorneys' fees.

### **PRAYER FOR RELIEF**

WHEREFORE, Claimant Mass. Electric Construction Co. respectfully requests that an award be entered rendering the following relief in favor of MEC and against the Respondents:

1. A declaration that the Joint Venture materially breached essential and inducing features of the Subcontract and therefore the Subcontract is terminated and MEC is discharged and excused from further performance under the Subcontract as a matter of law;

2. A declaration that the Joint Venture's acts and omissions are cardinal changes that constitute material breach and abandonment of the Subcontract, excuse MEC from further performance, and entitle MEC to the reasonable value of all labor, materials and equipment provided to the Project, including overhead and profit;

3. Actual damages in an amount to be proven during the arbitral hearing;
4. Treble damages and attorneys' fees pursuant to M.G.L. c. 93A;
5. Interest on MEC's damages at the maximum legal rate;
6. Attorneys' fees, consultants' fees, experts' fees, and expenses;
7. Costs of arbitration; and
8. Such other and further relief as the Arbitrators may deem just and proper.

Dated: October 14, 2020

**MASS. ELECTRIC CONSTRUCTION CO.**

By Its Attorneys,

By: /s/ Jonathan C. Burwood

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