

PROJECT BUILD CONTRACT

This Project Build Contract ("Contract"), effective as of this Tuesday, November 12, 2024, by and between Wendel Energy Services, LLC ("Wendel") and Sweet Home Central School District ("Owner"), collectively herein the "Parties", is for construction services for the following facilities improvement project:

Project Name, Location and Description

Name: Sweet Home Central School District Address: 1741 Sweet Home Road
Amherst, NY 14228

Description: Install three (3) electric bus charging stations.

Estimated Construction Duration

Start Date TBD
Substantial Completion Date* TBD
Final Completion Date TBD

*Pending charger lead time and delivery date

Contractors

Wendel Energy Services, LLC
375 Essjay Road, Suite 200
Williamsville, New York 14221

Contract Documents

Upon signing, this Contract and any documents listed below constitute Contract Documents

- Exhibit A - General Terms and Conditions
- Exhibit B - Supplemental Terms and Conditions (not applicable)
- Exhibit C - Owner Bonding Requirements
- Exhibit D - Certificate Of Substantial Completion
- Exhibit E - Certificate of Final Completion
- Exhibit F – Permit / Construction Documents

Required Approvals

Owner's rights to terminate this Contract in the absence of obtaining Required Approvals are set forth in Section 22.1 of the General Terms and Conditions. Applicable Required Approvals are as follows:

Execution of TIPS-USA Cooperative purchasing agreement that complies with the requirements of New York State law and any Owner specific procurement requirements.

Deliverables

As described in Exhibit F –
Permit / Construction Documents.

Project Build Contract Amount

\$280,000.00

Unless otherwise specifically set forth herein, progress payments shall be made in accordance Section 9 of the General Terms and Conditions.

1. SCOPE OF SERVICES

- 1.1 Wendel shall construct the Work in accordance with the Permit/Construction Documents and as required by the Contract Documents.

2. CERTIFICATE OF SUBSTANTIAL COMPLETION

A Certificate of Substantial Completion (Exhibit D) shall be submitted by Wendel to Owner upon the substantial completion of the Work, or a logical portion thereof if applicable. The Certificate of

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Substantial Completion acknowledges that the applicable Work has been completed such that the benefits of the Work have begun to accrue to the Owner and applicable warranties thereupon have commenced, but does not constitute an acceptance of the Work by the Owner. Owner shall within thirty (30) calendar days of receipt of a Certificate of Substantial Completion either (a) execute the Certificate of Substantial Completion or (b) inform Wendel in writing of any applicable Work issues that would preclude Owner from executing the Certificate of Substantial Completion. In the event Owner fails to exercise either option within the thirty (30) calendar days, the designated Work will be deemed accepted by Owner.

3. CERTIFICATE OF FINAL COMPLETION.

A Certificate of Final Completion (Exhibit E) shall be submitted by Wendel to Owner upon final completion of the Work for the entirety of the project build. Owner shall within thirty (30) calendar days either (a) execute the Certificate of Final Completion or (b) inform Wendel in writing of any Work issues that would preclude Owner from executing the Certificate of Final Completion. In the event Owner fails to exercise either option within the thirty (30) calendar days, the project build Work will be deemed accepted by Owner.

4. BONDING REQUIREMENTS

Wendel shall furnish applicable construction bonding as required by Owner and set forth in Exhibit C.

5. PROJECT CLOSE OUT FEES

Both parties agree to work diligently towards closing out the Project once construction is substantially complete. If decision making by the Owner necessary to close out the Project is not forthcoming through no fault of Wendel or its subcontractors, Owner will be assessed a project management continuation fee of two thousand five hundred dollars (\$2,500) per month.

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Wendel Energy Services, LLC

Owner

Signature

Jason Denué

Printed Name

Vice President Energy Services

Title

[Date]

Date

Signature

Michael V. Ginestre

Printed Name

Superintendent of Schools, Sweet Home
Central School District

Title

[Date]

Date

Acknowledgement taken in New York State

State of New York, County of _____,

ss:

On the ____ day of _____, in the year
20____, before me, the undersigned, personally
appeared

personally known to me or proved to me on the
basis of satisfactory evidence to be the
individual(s) whose name(s) is (are) subscribed
to the within instrument and acknowledged to me
that he/she/they executed the same in
his/her/their capacity(ies), and that by
his/her/their signature(s) on the instrument, the
individual(s) or the person upon behalf of which
the individual(s) acted, executed the instrument.

Notary Public

Acknowledgement taken in New York State

State of New York, County of _____,

ss:

On the ____ day of _____, in the year
20____, before me, the undersigned, personally
appeared

personally known to me or proved to me on the
basis of satisfactory evidence to be the
individual(s) whose name(s) is (are) subscribed
to the within instrument and acknowledged to me
that he/she/they executed the same in
his/her/their capacity(ies), and that by
his/her/their signature(s) on the instrument, the
individual(s) or the person upon behalf of which
the individual(s) acted, executed the instrument.

Notary Public

**PROJECT BUILD CONTRACT
EXHIBIT A – GENERAL TERMS AND CONDITIONS**

(See General Terms and Conditions Section)

**PROJECT BUILD CONTRACT
EXHIBIT B – SUPPLEMENTAL CONDITIONS**

(Not applicable in this Contract)

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EXHIBIT C - OWNER BONDING REQUIREMENTS

Performance and Labor and Material Payment Bonds

Wendel shall furnish a performance bond and a labor and material payment bond in an amount equal to one hundred (100%) of the Contract fee (collectively the "Contract Bonds"). The Contract bonds do not guarantee the performance of any energy guaranty or guaranteed savings under this Contract. The Owner agrees that upon final completion of the Work, the Contract Bonds shall be released and all obligations arising thereunder shall be terminated. The surety supplying the bonds shall be authorized to do business in the state of New York, and reasonably satisfactory to the Owner. The surety must be rated "A" or better by AM Best.

The bonds must be without modifications other than (1) a mandatory statement that the Performance Bond is given as statutory or other legally required bond, (2) a mandatory statement that the Performance Bond includes performance by the Contractor of any correction and warranty obligations in the Contract Documents, including such performance after the dates of Substantial Completion and Final Completion, (3) a mandatory statement in the Payment Bond that it is given as statutory or other legally required bond. The cost of the Contract Bonds is included and will not increase the Contract Sum.

1. The Contractor shall deliver the Contract Bonds to the Owner prior to executing the Contract.
2. The Contractor shall require any attorney-in-fact who executes the Contract Bonds on behalf of the surety to affix to them a certified and current copy of their power of attorney authorizing him or her to sign the Contract Bonds.
3. Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds to them or shall authorize a copy to be furnished by others.

All Contract Bonds shall be maintained in full force for a period of twelve (12) months after the date of the Contractor's acceptance of final payment as guarantee that the Contractor will make good any faults or defects in the Work arising from improper or defective workmanship or materials which may appear during the period.

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EXHIBIT D – CERTIFICATE OF SUBSTANTIAL COMPLETION

Project:	Owner:	Owner's Contract No.:
Contractor: Wendel Energy Services, LLC		Date of Owner Contract:
		Wendel Project No.:

THIS CERTIFICATE OF SUBSTANTIAL COMPLETION APPLIES TO:

All Work under the Contract Documents:
 The following specified portions:

The Work to which this Certificate applies has been inspected by Wendel's Project Manager, and found to be complete and, to the best of Wendel's knowledge, information and belief, the Work has been completed in accordance with the terms and conditions of the Contract Documents, except as stated on any punch list attached hereto. **The Date of Substantial Completion, as defined below, of the Project, or designated portion(s), listed above is [Click here to enter a date.](#)**

Definition: The Date of Substantial Completion of the Project, or designated portion(s), listed above is the date indicated by the Wendel Project Manager when the construction is substantially complete in accordance with the Contract Documents so the Owner can occupy or utilize the Project, or designated portion(s), listed above for the intended use.

Any attached punch list of items to be completed or corrected may not be all-inclusive, and the failure to include any items on such list does not alter the responsibility of Wendel to complete all Work in accordance with the Contract Documents.

Accepted by Wendel
Project Manager: _____ Date

Print Name and Title: _____

The Work to which this Certificate applies has been inspected by an authorized representative of Owner, and found to be complete excepting as stated on any punch list attached hereto, and to the best of Owner's knowledge, information and belief the Work has been completed in accordance with the terms and conditions of the Contract Documents. The Date of Substantial Completion of the Project, or designated portions, listed above is hereby confirmed.

Except as provided otherwise in the Contract Documents, the Owner accepts responsibility for security, operation, safety, maintenance, heat, utilities, insurance and warranties of the Project, or designated portion(s), listed above.

This Certificate does not constitute an acceptance of Work not in accordance with the Contract Documents nor is it a release of Contractor's obligation to complete the Work in accordance with the Contract Documents.

Accepted by Authorized
Owner Representative: _____ Date

Print Name and Title: _____

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EXHIBIT E – CERTIFICATE OF FINAL COMPLETION

Project:	Owner:	Owner's Contract No.:
Contractor: Wendel Energy Services, LLC		Date of Owner Contract:
		Wendel Project No.:

THIS CERTIFICATE OF FINAL COMPLETION APPLIES TO ALL WORK UNDER THE CONTRACT DOCUMENTS:

The Work to which this Certificate applies has been inspected by authorized representatives of Owner and Wendel, and found to be complete based on our inspection. To the best of our knowledge, information and belief the Work has been completed in accordance with the terms and conditions of the Contract Documents.

Failure to identify incomplete work items or requirement of Contract Documents prior to issuance of the Certificate does not alter the responsibility of the Contractor to comply with all provisions of Contract Documents.

Except as provided otherwise in the Contract Documents, the Owner herewith accepts responsibility for security, operation, safety, maintenance, heat, utilities, insurance and warranties that have not been previously transferred from the Contractor.

Accepted by Authorized Wendel Representative: _____ Date _____

Print Name and Title: _____

Accepted by Authorized Owner Representative: _____ Date _____

Print Name and Title: _____

EXHIBIT F – PERMIT / CONSTRUCTION DOCUMENTS

Refer to Permit / Construction Documents dated 4/29/2024 under separate cover.

GENERAL TERMS AND CONDITIONS

1. SCOPE OF AGREEMENT

- 1.1 **Required Approvals.** This Contract is subject to termination by Owner pursuant to Section 21.1 in the event any required approval, clearance, and/or coordination with appropriate governmental or commercial entities as may be mandated by the subject matter of the Contract and/or the proposed financing thereof ("Required Approval") is not obtained.
- 1.2 **Design Professionals.** Any required architectural and engineering services ("Design Services") shall be procured from design professionals licensed to provide Design Services in the geographic location of the Facilities (the "Architect/Engineer"), who shall be retained by Wendel pursuant to a separate agreement between Wendel and the Architect/Engineer. The standard of care for Design Services performed hereunder shall be the care and skill ordinarily used by members of the architectural and engineering professions practicing under similar conditions at the same time in the geographic location of the Facilities. Notwithstanding any clause in this Contract or the Contract Documents to the contrary, Wendel disclaims all express or implied warranties or guarantees with respect to the performance of professional services.
- 1.3 **Non-appropriations Clause.** This Contract shall be deemed executory only to the extent of the monies appropriated and available for the purpose of the Contract, and no liability on account therefore shall be incurred beyond the amount of such monies. It is understood that neither this Contract nor any representation by any public employee or officer creates any legal or moral obligation to request, appropriate, or make available monies for the purpose of the Contract.
- 1.4 **Extent of Contract.** This contract is solely for the benefit of the Parties and supersedes all prior negotiations, representations or agreements, either written or oral, with respect to the subject matter hereof. Owner and Wendel agree to look solely to each other with respect to the performance of the Contract. The Contract and each and every provision is for the exclusive benefit of Owner and Wendel and not for the benefit of any third party nor any third party beneficiary, except to the extent that may be expressly provided for in the Contract Documents.

2. WENDEL'S RESPONSIBILITIES

- 2.1 Wendel shall exercise reasonable skill and judgment in the performance of the Work.
- 2.2 Wendel shall supervise and direct the Work and shall be solely responsible for construction means, methods, techniques, sequences and procedures and for coordinating portions of the Work.
- 2.3 Wendel shall provide labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.
- 2.4 Wendel shall comply with sales, consumer, use, and other similar taxes, as may be required by law, and shall secure building permit(s) and other permits and governmental fees, licenses, and inspections necessary for proper execution, as may be required by law.
- 2.5 Where applicable, Wendel will assist the Owner in securing any necessary approvals, easements, assessments, or zoning changes.
- 2.6 If applicable and to the extent possible, Wendel will utilize Owner's tax-exempt status, but makes no representations regarding the tax implications thereof or Owner's accounting treatment thereof.
- 2.7 Wendel shall keep the premises and the surrounding area free from accumulation of waste materials or rubbish caused by the Work and, upon completion of the Work, Wendel shall remove dismantled and/or uninstalled components and equipment, waste materials, rubbish, tools, construction equipment, machinery, and surplus materials.

3. OWNER'S RESPONSIBILITIES

- 3.1 Owner shall designate an Owner's Facilitator who shall be the primary contact person for Owner during the performance of this Contract, with the responsibility for facilitating communications and

efficient interaction between the Owner and the Wendel project manager, including the timely coordination of Work and Owner internal approvals and processes as may be required for the implementation of the project.

- 3.2 Owner shall provide full information in a timely manner regarding requirements for this Contract, including, but not limited to;

3.2.1 all available information describing the physical characteristics of the site, including surveys, site evaluations, legal descriptions, existing conditions, subsurface and environmental studies, reports and investigations;

3.2.2 unless otherwise provided in the Contract Documents, necessary approvals, site plan review, rezoning, easements and assessments, fees and charges required for the construction, use, occupancy or renovation of permanent structures, including legal and other required services.

- 3.3 Wendel shall be entitled to rely on the completeness and accuracy of the information and services provided by Owner as required by this Section 3.

4. SUBCONTRACTS

- 4.1 **Use of Subcontractors.** Work not performed by Wendel with its own forces shall be performed by subcontractors.

- 4.2 **Retaining Subcontractors.** Wendel shall not retain any subcontractor to whom Owner has a reasonable and timely objection, provided that Owner agrees to compensate Wendel for any additional costs incurred by Wendel as a result of such objection. Owner may propose subcontractors to be considered by Wendel. Wendel shall not be required to retain any subcontractor to whom Wendel has a reasonable objection.

- 4.3 **Management of Subcontractors.** Wendel shall be responsible for the management of the subcontractors in the performance of their work.

- 4.4 **Assignment of Subcontracts.** Wendel shall provide for assignment of subcontracts in the event that Owner terminates this Contract for cause as provided in Section 22.3. Following such termination, Owner shall notify in writing those subcontractors whose assignments will be accepted, subject to the rights of sureties.

- 4.5 **Binding of Subcontractors and Material Suppliers.** Wendel agrees to bind every subcontractor and material supplier (and require every subcontractor to so bind its sub-subcontractors and material suppliers) to all the provisions of this Contract as they apply to the subcontractor's and material supplier's portions of the Work.

5. PROJECT MODIFICATIONS

- 5.1 **Reasonable Estimate Pricing.** The parties agree that at the time of the execution of this Project Build Contract that

5.1.1 Wendel may still be in the process of procuring and finalizing Project pricing, and

5.1.2 the Project Scope of Work may be subject to subsequent modification through the Project Design Agreement or Project Build Contract change orders at the request of Owner, Wendel or regulatory and/or funding entities having jurisdiction.

Subsequently, the parties agree that at the time of Contract signing the Project price and scope of work set forth in the Exhibits attached hereto is a reasonable estimate subject to potential reassessment and modification due to subsequent changes in the Project.

- 5.2 **Final Project Pricing.** When the Project price and scope of work has been finalized, Wendel will timely provide Owner with updated versions of the attached Exhibits to reflect the final Project.

- 5.3 Once the final pricing and scope of work is determined, Wendel will provide Owner with the final pricing and scope of work for all those Measures and Improvements for which the final pricing is in accord with the estimates provided by Wendel. Based on the foregoing, it is agreed by the parties that within fifteen (15) business days of Wendel providing Owner with the final pricing and scope of work described, Owner shall provide Wendel with its final project selection, which shall include all of the Measures and Improvements for which the final pricing is in accord with the estimates provided by Wendel. Thereafter, the parties will undertake good faith efforts to supplement this

Contract within thirty (30) business days by written modification, and thereby incorporate any changes to (1) the Project Scope of Work

6. SECTION NOT USED

7. CHANGE ORDERS

- 7.1 **Change Orders.** Any Change Order(s) that result(s) in exceeding the total Contract amount will be firstly subject to the Owner's approval of and signature on a Contract Change Order increasing the Agreement amount to facilitate the change. Any Change Order(s) will be subject to the mutual consent of the Parties, which consent shall not be unreasonably withheld, and which shall be made in accordance with the following procedure: within ten (10) business days of the submittal of a Change Order, the Parties shall, in writing which sets forth good reason, either object to the Change Order, or request an extension of time necessary to render a decision. If either Party fails to provide a written response within ten (10) business days, then the Change Order as submitted shall be deemed accepted. If the Parties cannot reach agreement under this Section 7, either Party may seek relief in accordance with Section 23 (Dispute Resolution) herein.

8. COMPENSATION

8.1 Price for the Work.

It is understood and agreed to between the Parties that the price for the Work as set forth in the Project Build Contract is for the turn-key construction of the scope of work.

- 8.2 **Adjustment in the Price for or Scope of the Work.** Wendel may submit a Change Order for an adjustment in the price and/or scope of work under the following circumstances, subject to the provisions of Section 7.

8.2.1 If Required Approvals are not obtained by Owner within one hundred twenty (120) business days of final pricing.

8.2.2 If prevailing wage rates for personnel specifically working on this project are at any time revised by the New York State Department of Labor.

8.2.3 For changes in the Work as provided for in Section 7.

For delays in the Work not caused by Wendel or its subcontractors there will be an equitable adjustment in Wendel's Fee to compensate Wendel for documented increased expenses (see Section 18).

8.2.4 If the cost of this Contract exceeds any draw schedule set forth herein, as a result of changes (constructive or actual) which require Wendel to render work or services outside the scope of this Contract, Owner will reimburse Wendel for added management costs.

9. PAYMENT TERMS

- 9.1 **Progress Payments.** Wendel will invoice Owner monthly on a percent complete basis. Unless specifically set forth otherwise elsewhere in the Contract Documents, progress payments (including payment for equipment deposits, materials and equipment delivered either on site or off site) and work and services performed on and off-site shall be made to Wendel as follows:

9.1.1 Wendel will provide pay applications to Owner for payment once per month. The monthly pay application will be presented for all Work completed, and/or material stored on-site or off-site, and Work to be completed by the date of the invoice. The approval of Owner shall not be unreasonably withheld and shall be made in accordance with the following procedure: within fifteen (15) business days of Wendel's submittal of the invoice, Owner shall, in writing which sets forth good reason, either object to specific portions of the invoice or request an extension of time necessary to render a decision with respect to specific portions of the invoice. If Owner fails to provide a written response within fifteen (15) business days, then the invoice, submitted by Wendel shall be deemed approved. If applicable, once a pay application is approved by Owner, Owner shall within twenty-four (24) hours either (i) fax or (ii) send written authorization for the amount of the pay application (or that portion to which Owner fails to provide reasonable objection in accordance with this Section 9.1.1) to any financing institution managing payments. For each

progress payment made prior to when the work is Substantially Complete, the Owner may withhold five percent (5%) from the payment otherwise due as retainage.

9.1.2 Wendel will apply for payment of applicable retainage amounts upon submission of a Certificate of Substantial Completion for (i) a portion of the Work or (ii) the entire Work. The Owner shall make payment of the retainage applying to the Work designated by the Certificate of Substantial Completion, such retainage payment being subject to the withholding by Owner of up to fifty percent (50%) of the value of any Work applicable to the submitted Certificate of Substantial Completion that is incomplete or not in accordance with the requirements of the Contract Documents, with such withholding to be paid upon completion of such incomplete or non-compliant Work.

9.1.3 If Owner fails to remit payment to Wendel in accordance with the times set forth in Section 9.1.2 then after ten (10) days of the receipt of an invoice by Owner, Wendel may provide Owner with an additional eight (8) business days' Notice for payment. Thereafter, if Owner fails to provide Wendel with payment, upon an additional four (4) business days' Notice to Owner, Wendel may stop the Work until payment of the amount owing has been received. Applicable time frames for completion of the Work shall be extended appropriately, and the agreed upon cost of Work shall be increased by the amount of Wendel's reasonable costs of shut down, delay and start-up, plus interest at the prevailing legal rate.

9.1.4 If the Parties cannot reach an agreement with respect to any aspect under this Section 9, either Party may seek relief in accordance with Section 23 (Dispute Resolution). Nothing in the Contract Documents shall afford Owner the right to withhold payment to the extent it fails to comply with the terms of Section 9.

9.2 **Final Payment.** If applicable, final authorization for payment, constituting the entire unpaid balance for the applicable Work, shall be submitted to any financial institution handling payments within ten (10) business days after Owner's acceptance of the Work. Final authorization for payment may be withheld on account of any material breach of this Contract by Wendel and claims by third parties (including Wendel subcontractors and material suppliers), but only to the extent that written Notice has been provided to Wendel, and Wendel has failed within ten (10) business days of the date of receipt of such Notice, to provide adequate security to protect Owner from any loss, cost, or expense related to such claims.

10. WARRANTY

10.1 Wendel warrants that materials and equipment furnished by Wendel will be of good quality and new; that the Work will be free from defects not inherent in the quality required or permitted; and that the Work will conform to the requirements of the Contract Documents.

10.2 Wendel warrants that the Work shall be free from defects in material and workmanship arising from normal usage for a period of one year from the Date of Substantial Completion, or for a longer time if so specified elsewhere in the Contract Documents. Substantial Completion shall mean the stage in the progress of the Work where the Work or a designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

10.3 During the warranty period, upon written notice from Owner, Wendel shall, at its option, re-perform, repair or replace defective Work at no additional cost to Owner.

10.4 These warranties do not extend to any Work that has not been properly and reasonably maintained, or that has been abused, altered, misused, or repaired by Owner or third parties without the supervision of and prior written approval of Wendel; or if equipment serial numbers or warranty date decals have been removed or altered.

10.5 Owner must promptly report any failure of equipment installed to Wendel in writing.

10.6 All replaced equipment, components or parts become Wendel's property.

10.7 Owner understands that Wendel is a provider of services and shall not be considered a merchant or a vendor of goods. If Wendel installs or furnishes a piece of equipment, and that equipment is covered by a warranty from the manufacturer, Wendel will transfer the benefits of that manufacturer's warranty to Owner upon Substantial Completion.

- 10.8 THESE WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THOSE OF MERCHANTABILITY AND FITNESS FOR A SPECIFIC PURPOSE.

11. SUBSTANTIAL/FINAL COMPLETION DATES

Unless the Parties agree otherwise, the Date of Substantial Completion and/or the Date of Final Completion shall be as provided for in this Contract. Owner and Wendel may agree not to establish such dates, or in the alternative to establish one but not the other of the two dates. If such dates are not established upon the execution of a Contract, at such time as final Contract pricing is accepted, a Date of Substantial Completion and/or Date of Final Completion of the Work may be established and the Contract amended accordingly. If final pricing is not yet established and the Parties desire to establish a Date of Substantial Completion and/or Date of Final Completion, it shall be set forth in an amendment to the Contract.

12. OWNERSHIP OF DOCUMENTS

- 12.1 **On Final Payment for Completed Work.** Upon the making of final payment pursuant to this Contract, Owner shall receive ownership of the property rights, except for copyrights, of all documents, drawings, specifications, electronic data and information prepared, provided or procured by Wendel, its Architect/Engineer, Subcontractors and consultants and distributed to Owner under the Contract. ("Build Documents").
- 12.2 **On Termination by Owner for Cause.** If this Contract is terminated by Owner for cause, Owner shall receive ownership of the property rights, except for copyrights, of any Build Documents upon payment for all Work performed in accordance with the Contract, at which time Owner shall have the right to use, reproduce and make derivative works from the Build Documents to complete the Work.
- 12.3 **On Termination by Owner without Cause.** If a Contract is terminated pursuant to Section 22.4 of the General Terms and Conditions, Owner shall receive ownership of the property rights, except for copyrights, of the Build Documents upon payment of all sums provided in Section 22.4 of the General Terms and Conditions, at which time Owner shall have the right to use, reproduce and make derivative works from the Build Documents to complete the Work.
- 12.4 **Section not used.**
- 12.5 **Section not used.**
- 12.6 **Section not used.**

13. WENDEL'S PROPERTY

All materials furnished by and used by Wendel personnel at the installation site and not part of the Work, including documentation, designs, schematics, test equipment, software, and associated media (excluding Build Documents) remain the exclusive property of Wendel. Owner agrees not to use such materials for any purpose at any time. Owner agrees to allow Wendel personnel to retrieve and to remove all such materials remaining after installation or maintenance operations have been completed. Owner acknowledges that any software included is proprietary and will be delivered only under the provisions of an appropriate Software License Agreement that will limit its use to the system purchased under the applicable Contract. Any reuse of the materials without written authorization by Wendel, as appropriate, for the specific purpose intended, will be at Owner's sole risk and without liability or legal exposure to Wendel, or to Wendel's subcontractors. Owner shall indemnify and hold harmless Wendel and its subcontractors from all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the Owner's, Owner's agents or their respective employees' reuse of Wendel materials or property without the written permission of Wendel.

14. ROYALTIES, PATENTS AND COPYRIGHTS

Wendel shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods or systems selected by Wendel and incorporated in the Project, and Wendel shall defend, indemnify and hold Owner harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection. Owner agrees to

defend, indemnify and hold Wendel harmless from all suits or claims of infringement of any patent rights or copyrights arising out of any patented or copyrighted materials, methods or systems specified by Owner.

15. SAFETY OF PERSONS AND PROPERTY

- 15.1 **Precautions and Programs.** Wendel shall have overall responsibility for safety precautions and programs in the performance of the Work. While the provisions of this Section 15.1 establish the responsibility for safety between Owner and Wendel, they do not relieve subcontractors of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with the provisions of applicable laws and regulations. Wendel shall seek to avoid injury, loss or damage to persons or property by taking reasonable steps to protect:
- 15.1.1 its employees and other persons at the worksite;
 - 15.1.2 materials, supplies and equipment stored at the worksite for use in performance of the Work; and
 - 15.1.3 the project and all property located at the worksite and adjacent to work areas, whether or not said property or structures are part of or involved in the Work.
- 15.2 **Safety Representative.** Wendel shall designate an individual at the worksite who shall act as Wendel's designated safety representative with a duty to prevent accidents. Wendel will report immediately in writing all accidents and injuries occurring at the worksite to Owner. When Wendel is required to file an accident report with a public authority, Wendel shall furnish a copy of the report to Owner.
- 15.3 **Legal Compliance.** Wendel shall provide Owner with copies of all notices required of Wendel by law or regulation. Wendel's safety program shall comply with the requirements of governmental and quasi-governmental authorities having jurisdiction over the Work.
- 15.4 **Owner's Rights.** If Owner deems any part of the Work or worksite unsafe, Owner, without assuming responsibility for Wendel's safety program, may require Wendel to stop performance of the Work or take corrective measures satisfactory to Owner, or both.
- 15.5 **Owner's Requirements.** Wendel shall abide by Owner's facility safety requirements, if any, that may be set forth in the Contract Documents.

16. HAZARDOUS MATERIALS.

- 16.1 **Suspension of Services.** If after the commencement of the Work, unanticipated Hazardous Material is discovered at a worksite, Wendel shall be entitled to immediately stop working in the affected area. Wendel shall report the condition to Owner and, if required, any government agency with jurisdiction. Unless specifically set forth in the Contract Documents, Wendel shall not be required to perform any Work relating to or in the area of the unanticipated Hazardous Material without the written mutual agreement of the Parties.
- 16.2 **Wendel's Obligations.** Wendel's obligations expressly exclude any work or services of any nature associated or connected with the identification, abatement, cleanup, control, removal, or disposal of Hazardous Material in or on or around the work site that is not set forth in the Contract Documents, unless specifically set forth in a mutually agreed upon Change Order.
- 16.3 **Owner's Obligations.** Owner shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether it is a Hazardous Material requiring corrective measures and/or remedial action. Such measures shall be the sole responsibility of Owner, and shall be performed in a manner minimizing any adverse effects upon the Work of Wendel. Wendel shall resume Work in the area affected by any unanticipated Hazardous Material only upon (i) written mutual agreement between the Parties or (ii) after the Hazardous Material has been removed or rendered harmless and only after approval, if necessary, of any governmental agencies with jurisdiction.
- 16.4 **Reassessment of Contracts.** Upon the discovery of the presence of unanticipated Hazardous Material, Wendel and Owner shall mutually review and determine appropriate adjustments to any affected Statements of Work with respect to (i) pricing and guarantee(s), (ii) costs of any delays,

additional actions, work and/or services required, (iii) adjustments to Dates of Substantial and Final Completion, and (iv) any other aspect affected by the discovery.

- 16.5 **Option to Terminate.** If, upon the discovery of unanticipated Hazardous Material and review of the potential ramifications on any affected Statements of Work, either Party no longer wishes to proceed with a portion of an affected scope, that Party may, upon written Notice setting forth good reason, terminate that portion of an affected scope that warrants termination as a result of the discovery of Hazardous Material. In the event of the termination of an affected scope, Owner shall reimburse Wendel for all documented loss, cost or expense in connection with the terminated Work, plus any applicable demobilization costs.
- 16.6 **Indemnification.** Provided Wendel, its subcontractors, material suppliers and sub-subcontractors, and the agents, officers, directors and employees of each of them, have not, acting under their own authority, knowingly entered upon any portion of the Work site containing unanticipated Hazardous Material, and to the extent not caused by the negligent acts or omissions of Wendel, its subcontractors, material suppliers and sub-subcontractors, and the agents, officers, directors and employees of each of them, Owner shall defend, indemnify and hold harmless Wendel, its subcontractors, material suppliers and sub-subcontractors, and the agents, officers, directors and employees of each of them, from and against any and all claims, damages, losses, costs and expenses, including but not limited to attorney's fees, costs and expenses incurred in connection with, arising out of or relating to the performance of the Work in any area affected by unanticipated Hazardous Material.
- 16.7 **Material Safety Data Sheets.** Material Safety Data ("MSD") sheets as may be required by law and pertaining to materials or substances used or consumed in the performance of the Work, whether obtained by Wendel, subcontractors, Owner or others, shall be maintained at the worksite by Wendel and made available to Owner and subcontractors.
- 16.8 **Liability.** During Wendel's performance of the Work, Wendel shall be responsible for the proper handling of all materials brought to the worksite by Wendel. Upon the issuance of the Certificate of Substantial Completion, Owner shall be responsible for materials and substances brought to the site by Wendel if such materials or substances are required by the Contract Documents.
- 16.9 **Disagreement.** If the Parties cannot reach agreement with respect to any aspect under this Section 16, either Party may seek relief in accordance with Section 23 (Dispute Resolution).
- 16.10 **Survival.** The terms of this Section 16 shall survive (i) the completion of any Work undertaken pursuant to this Contract and (ii) the termination of this Contract.

17. TIME

- 17.1 **Date of Commencement.** The Date of Commencement is the effective date of this Contract as indicated by, in order of precedence, (i) its terms and conditions or (ii) the date the last Party signs this Contract. The Work shall proceed in general accordance with a schedule of work as such schedule may be amended from time to time, subject, however, to other provisions of the Contract Documents.
- 17.2 **Time is of the Essence.** Time limits stated in this Contract are of the essence.

18. DELAYS IN THE WORK.

- 18.1 Wendel shall not be liable for any delay caused by the failure of Owner to (i) perform its contractual obligations, (ii) cooperate in the timely completion of the Work, or (iii) finalize Work selection in accordance with the provisions set forth in the Contract Documents.
- 18.2 If causes beyond Wendel's or its subcontractors' control delay the progress of the Work, Wendel's Project Implementation Cost and/or the Dates of Substantial and/or Final Completion shall be modified by Change Order as appropriate. Such causes shall include, but not be limited to, force majeure events as defined in Section 25.8, changes ordered in the Work, acts or omissions of Owner or others beyond Wendel's control, Owner preventing Wendel from performing the Work pending dispute resolution, Hazardous Materials or differing site conditions.
- 18.3 Wendel shall give timely written notice to Owner of the existence, extent of, and reason for any material delays, and an equitable adjustment in the Substantial or Final Completion Dates and/or Contract price may be submitted by Wendel pursuant to Sections 6 & 7.

- 18.4 In the event delays are encountered for any reason, the Parties agree to undertake economically reasonable steps to mitigate the effect of such delays.

19. INSURANCE REQUIREMENTS

Wendel shall maintain insurance in full force and effect at all times that Work is being conducted in the minimum amounts and coverages required by Owner as set forth in Attachment 1. Prior to commencing the Work, Wendel shall provide a certificate of insurance to Owner showing its insurance coverage. Owner will be responsible for providing builder's risk insurance.

20. INDEMNITY

- 20.1 **Personal Injury and Property Damage.** To the fullest extent permitted by law, the Contractor shall defend, indemnify, and hold harmless the Owner and its directors, trustees, officers, employees, agents, consultants, interim administrators, authorized volunteers, committee members, student teachers, auxiliary instructors, and members of the Owner's Board of Education (collectively "Indemnitees"), from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the work, when such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself, and including loss of use), but only to the extent caused, in whole or in part, by the negligent acts or omissions, or other culpable conduct, of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by an Indemnitee.
- 20.2 **Employee Personal Injuries.** In claims against any Indemnitee by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under Section 20.1 is not limited by a limitation on amount or type of damages, compensation, or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.
- 20.3 **Claims by Governmental Authorities.** To the fullest extent permitted by law, the Contractor shall defend, indemnify, and hold harmless the Indemnitees from and against claims, damages, losses, and expenses arising out of any claims made against the Indemnitees under the laws of federal, state, or other governmental bodies having jurisdiction over the work, including but not limited to claims arising from violation of public ordinances and other requirements of governing authorities, to the extent due to the Contractor's method of execution of the work or implementation of any of the Contractor's other obligations under the Contract Documents.
- 20.4 **Liens and Security Interests.** To the fullest extent permitted by law and to the extent Contractor has been timely paid amounts due on its invoices by Owner in accordance with this Contract, the Contractor shall defend, indemnify, and hold harmless the Indemnitees from and against any actions, lawsuits, or other proceedings brought against Indemnitees as a result of liens or security interests of any type arising from the work and filed against the work, the site of any of the work, the Project site or any improvements on it, payments due the Contractor, or any property of any of the Indemnitees, all of the foregoing being subject to claims involving public improvement projects under the New York Lien Law.
- 20.5 **Intellectual Property.** The Contractor shall defend, indemnify, and hold harmless the Indemnitees from and against any claims or demands for patent fees, copyright fees, license fees, royalties, damages from infringements, or injunctive relief on account of legal protection of any invention, machine, article, process, patent, copyright, design, or product used by the Contractor in performing the work, unless such use is required by the Contract Documents or directed by the Owner or its representative(s). In the event of any injunction or legal action regarding such claims or demands result in stopping the work in whole or part, the Owner has the right to direct the Contractor to change the manner of performance of the work to avoid such stoppage, all cost and expense occasioned by such direction to be borne solely by the Contractor, unless the work stoppage results solely from the Contractor employing a use required by the Contract Documents or directed by the Owner or its representative(s). However, if the Contractor, prior to any such claims or demands, has reason to believe that a required use infringes a copyright, patent, or other legal protection, or such infringement is discovered by or made to the Contractor, the Contractor must promptly so

advise the Owner, and in the absence of such advice will be liable to the Owner to the extent such advice would have prevented additional costs to the Owner arising from such claims or demands.

- 20.6 **Other Claims.** For any claims not specifically identified elsewhere in this Section 20, and to the fullest extent permitted by law, the Contractor shall defend and indemnify, and hold harmless the Indemnitees from and against liability, claims, damages, losses, suits, demands, costs, charges, attorney's fees, and expenses of whatever kind or nature that the Indemnitees may directly or indirectly incur, suffer, or be required to pay by reason of, or in consequence of, the intentional conduct, negligent acts or omissions, breach of contract, or other fault of the Contractor or its Subcontractors,.
- 20.7 **Enforcement Costs.** The Contractor shall further indemnify and hold harmless the Indemnitees from and against any costs and expenses (including reasonable attorneys' fees) incurred by any of the Indemnitees in enforcing any of the Contractor's defense, indemnity, and hold harmless obligations under this Section 20 or as may otherwise be provided elsewhere in the Contract Documents.
- 20.8 **Full Defense.** Subject to Section 20.10, all obligations of the Contractor under this Section 20 to defend the Indemnitees are obligations to provide full defenses at the sole cost and expense of the Contractor, regardless of any alleged culpability on the part of any Indemnitee or any ultimate determination of relative shares of liability of any Indemnitee and the Contractor.
- 20.9 **Conformance to Law.** To the extent any defense, indemnity, or hold harmless obligations under this Section 20 are made void or otherwise impaired by any law controlling their construction (including but not limited to laws limiting such obligations to the extent of the portion of damages caused by an indemnitor), such obligations are deemed to conform to the greatest rights to defense and indemnity permitted by such law, including but not limited to New York State General Obligations Law Section 5-322.1.
- 20.10 **Subcontractor Indemnification.** The Contractor agrees to include the following indemnity provision in each and every contract it enters into with a subcontractor, and to require that subcontractor to include such provision in each contract it enters into with any lower tier subcontractor: "To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless the Owner, Owner's consultant's, and each of their respective representatives, employees, directors, officers, and agents, from and against any and all claims, suits, actions, debts, damages, fines, penalties, costs, charges and expenses, including attorneys' fees and court costs, arising out of, relating to or resulting from the performance of this Subcontract, including, but not limited to, bodily injury and/or property damage, to the extent caused, in whole or in part, by acts, actions, omissions, negligence, fault or breach of the Subcontractor, its employees, agents, subcontractors, suppliers and/or materialmen, regardless of whether or not such claim is caused in part by a party indemnified hereunder. This clause shall survive any termination or expiration of this Subcontract."
- 20.11 **Survival and Other Bases for Defense and Indemnity Obligations.** All provisions of this Section 20 will survive termination of the Agreement for any reason, or Final Completion. No obligations under this Section 20 negate, abridge, or reduce other rights or obligations to defense and indemnity, including but not limited to common law indemnity, that exist as to a party or person described in this Section 20.

21. LIMITATIONS ON LIABILITY

- 21.1 IN NO EVENT SHALL EITHER WENDEL OR OWNER NOR THEIR RESPECTIVE CONSULTANTS AND SUBCONTRACTORS AT ANY TIER, NOR THE RESPECTIVE OFFICERS, PARTNERS, MEMBERS, EMPLOYEES, OR AGENTS OF ANY OF THEM, BE RESPONSIBLE OR LIABLE IN CONTRACT, TORT, STRICT LIABILITY, WARRANTY OR OTHERWISE FOR ANY INDIRECT, CONSEQUENTIAL, INCIDENTAL, SPECIAL, PUNITIVE OR EXEMPLARY DAMAGES, OR FOR ANY LOSS OF PROFITS OR REVENUE, FOR ANY OCCURENCE, HAPPENING, EVENT, INCIDENT, EPISODE, CIRCUMSTANCE OR CAUSE OF ACTION, INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE, PROFESSIONAL ERRORS AND OMISSIONS, STRICT LIABILITY, BREACH OF CONTRACT OR WARRANTY, EXPRESS OR IMPLIED, ARISING OUT OF OR RELATED TO THIS CONTRACT REGARDLESS OF WHETHER THEY KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES..

- 21.2 SUBSEQUENT TO OWNER'S SIGNATURE ON AN APPLICABLE CERTIFICATE OF SUBSTANTIAL COMPLETION, WENDEL ACCEPTS NO LIABILITY FOR ANY SITUATION, DAMAGE, MALFUNCTION, EQUIPMENT OR SYSTEMS ARISING FROM OR RELATED TO OWNER'S OR OTHER PARTIES' (I) IMPROPER USE OR MISUSE OF EQUIPMENT OR SYSTEMS, (II) ENTRY OF EQUIPMENT OR SYSTEMS DATA OR (III) THE GENERATION OF DATABASES THAT MAY BE REQUIRED BY THE EQUIPMENT OR SYSTEMS.
- 21.3 IF THIS CONTRACT COVERS FIRE SAFETY OR SECURITY EQUIPMENT, OWNER UNDERSTANDS THAT WENDEL IS NOT AN INSURER OF SUCH EQUIPMENT, SYSTEMS OR RELATED SERVICES. WENDEL SHALL NOT BE RESPONSIBLE FOR ANY DAMAGE OR LOSS THAT MAY RESULT FROM FIRE SAFETY OR SECURITY EQUIPMENT, SYSTEMS OR RELATED SERVICES THAT, AFTER EXECUTION OF A CERTIFICATE OF SUBSTANTIAL COMPLETION BY OWNER, FAIL TO PERFORM PROPERLY OR FAIL TO PREVENT A CASUALTY LOSS.
- 21.4 THE PROVISIONS OF THIS SECTION 20.1 SHALL GOVERN IN THE EVENT OF THE TERMINATION OF THIS CONTRACT AND SHALL SURVIVE SUCH TERMINATION.

22. SUSPENSION AND TERMINATION OF THE CONTRACT

22.1 Termination on Failure to Obtain Required Approvals.

22.1.1 Either Party may terminate this Contract on Notice if Owner fails to timely obtain any required approval, clearance, and/or coordination acceptable to Owner with governmental or commercial entities as may be mandated by the subject matter of this Contract, the services to be rendered, and/or the proposed financing thereof. Any applicable Required Approvals shall be enumerated in each contract.

22.1.2 Upon a termination by Wendel or Owner in accordance with this Section 22.1 Wendel shall be entitled to recover from Owner payment for all Work executed up to the date of Notice and for all verifiable loss, cost or expense in connection with the executed Work, plus all demobilization costs.

22.2 Suspension by Owner for Convenience.

22.2.1 Owner may order Wendel in writing to suspend, delay or interrupt all or any part of the Work without cause for such period of time as Owner may determine to be appropriate for its convenience.

22.2.2 Adjustments caused by suspension, delay or interruption shall be made for increases in the Contract price, compensation, Wendel's Project implementation Cost and/or the Date of Substantial Completion and/or the Date of Final Completion. No adjustment shall be made if Wendel is or otherwise would have been responsible for the suspension, delay or interruption of the Work, or if another provision of the Contract Documents is applied to render an equitable adjustment.

22.3 Termination by Owner for Cause and Owner's Right to Perform Wendel's Obligations.

22.3.1 If Wendel fails to perform its material obligations under this Contract, Owner may, after fifteen (15) business days' written Notice, during which period Wendel fails to perform such obligations, undertake to perform such obligations. The Contract price shall be reduced by the cost to Owner of performing such obligations,

22.3.2 Upon an additional fifteen (15) business days' written Notice to Wendel and Wendel's surety, if any, Owner may terminate a Contract for any of the following reasons:

- (a) If Wendel utilizes improper materials and/or inadequately skilled workers;
- (b) If Wendel does not make proper payment to laborers, material suppliers or subcontractors, provided that Owner is making payments to Wendel in accordance with the terms of the Contract;
- (c) If Wendel persistently fails to abide by the orders, regulations, rules, ordinances or laws of governmental authorities having jurisdiction; or
- (d) If Wendel otherwise materially breaches the terms and conditions of the applicable Contract Documents.

If Wendel fails to cure or commence and continue to cure within the fifteen (15) business days, Owner, without prejudice to any other right or remedy, may take possession of/deny Wendel access to the worksite and complete the Work utilizing any reasonable means, with costs to be credited against Wendel's account. In this event, Wendel shall not be paid for Work that Owner performs and shall have no right to further payment for work previously completed until the Work is completed.

22.3.3 In the event Owner exercises its rights under Section 22.3.1 or 22.3.2, upon the request of Wendel, Owner shall provide a detailed accounting of the cost incurred by Owner.

22.4 Termination by Owner Without Cause

22.4.1 If Owner terminates this Contract other than as set forth in Section 22.3, Owner shall pay Wendel for all Work executed up to the date of Notice of Termination and for all verifiable loss, cost or expense in connection with the executed Work, plus all demobilization costs. Owner shall also pay to Wendel fair compensation, either by purchase or rental at the election of Owner, for all equipment retained by Owner. Owner shall assume and become liable for obligations, commitments and unsettled claims that Wendel has previously undertaken or incurred in good faith in connection with the Work or as a result of the termination of this Contract. As a condition of receiving the payments provided under this Section 22.4, Wendel shall cooperate With Owner by taking all steps necessary to accomplish the legal assignment of Wendel's rights and benefits to Owner, including the execution and delivery of required papers.

22.5 Termination by Wendel.

22.5.1 Upon fifteen (15) business days' written Notice to Owner, Wendel may terminate this Contract for any of the following reasons:

- (a) if the Work has been stopped for a sixty (60) calendar day period
 - (1) under court order or order of other governmental authorities having jurisdiction;
or
 - (2) as a result of the declaration of a national emergency or other governmental act during which, through no act or fault of Wendel, materials are not available;
- (b) if the Work is suspended by Owner for sixty (60) calendar days;
- (c) if Owner fails to furnish reasonable evidence that sufficient funds are available and committed for the entire cost of the Contract.

22.5.2 If Owner has for thirty (30) calendar days failed to pay undisputed sums owed Wendel on this Contract, Wendel may give written Notice of its intent to terminate this Contract. If Wendel does not receive payment within five (5) calendar days of giving written Notice to Owner, then upon five (5) calendar days' additional written Notice to Owner, Wendel may terminate this Contract.

22.5.3 Upon termination by Wendel in accordance with this Section 22.5, Wendel shall be entitled to recover from Owner payment for all Work executed up to the date of Notice of Termination and for all verifiable loss, cost or expense in connection with the executed Work, plus all demobilization costs and reasonable damages.

22.6 All Contract terminations or suspensions set forth in this Section 22 shall be given by Notice pursuant to Section 25.11 herein.

23. DISPUTE RESOLUTION

If a dispute arises out of or relates to this Contract or a breach hereof, the Parties shall endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the Parties shall endeavor to settle the dispute by informal, nonbinding mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. The location of the mediation shall be the location of the Project. Once one Party files a Request for Mediation with the other Party, the Parties agree to conclude such mediation within sixty (60) calendar days of filing of the request. Either Party may terminate the mediation at any time after the first session, but the decision to terminate must be delivered in person by the Party's representative to the other Party's representative and the mediator. Each Party shall bear its own expenses and an equal share of the expenses of the mediator and any mediation fees. If the dispute

is not resolved by mediation, the Parties shall have the right to resort to any remedies permitted by law. Defenses based on the passage of time are suspended upon submitting the dispute to the mediator and during the mediation, and the time period during the mediation shall be disregarded in calculating such defenses. Nothing in this clause shall be construed to preclude any Party from seeking injunctive relief in order to protect its rights during mediation. A request by a Party to a court for injunctive relief shall not be deemed a waiver of the obligation to mediate.

24. CONFIDENTIALITY

The Parties shall treat as confidential and not disclose to third persons except as is necessary for the performance of the Work or as required by law, or use for its own benefit, any of the other Party's developments, confidential information, know-how, discoveries, production methods and the like that may be disclosed or acquired in connection with the Work.

25. MISCELLANEOUS PROVISIONS

- 25.1 **Freedom of Information Law ("FOIL").** If a FOIL request for information related to the contract or the Work is received by the Owner, Owner will give Wendel a copy of the request and solicit Wendel's comments as to whether the material sought is confidential. If Wendel wants the Owner to deny disclosure on the grounds that the information is confidential, but the Owner disagrees with Wendel's determination, the Owner will deny the request on the condition that Wendel will bear the costs for all legal proceedings required to respond to a judicial review, if any be commenced by the requester, of the determination to deny disclosure.
- 25.2 **Joint and Several Liability.** If there is more than one Owner named in this Contract, the liability of each shall be joint and several.
- 25.3 **Assignment.** Neither Owner nor Wendel shall assign its interest in this Contract without the written consent of the other, except as to the assignment of proceeds. The terms and conditions of this Contract shall be binding upon both Parties, their partners, successors, assigns and legal representatives. Neither Party to this Contract shall assign this Contract as a whole without written consent of the other, except that Owner may assign this Contract to a wholly-owned subsidiary of Owner when Owner has fully indemnified Wendel or to an institutional lender providing construction financing for the Project as long as the assignment is no less favorable to Wendel than this Contract. In the event of such assignment, Wendel shall execute all consents reasonably required. In such event, the wholly-owned subsidiary or lender shall assume Owner's rights and obligations under the Contract Documents. If either party attempts to make such an assignment, that Party shall nevertheless remain legally responsible for all obligations under this Contract, unless otherwise agreed by the other party.
- 25.4 **Modification.** This Contract may be modified only by a written amendment signed by the Parties.
- 25.5 **179D Energy Tax Deduction.** Upon final acceptance, the Contracting Officer or an Authorized Representative of the Owner, agrees to execute any documents related to Section 179D of the Internal Revenue Code. Wendel will be responsible for preparing these documents, all accompanying documentation and the contents therein. Wendel will be designated the sole Section 179D beneficiary.
- 25.6 **Owner Purchase Orders.** Owner acknowledges and agrees that any purchase order issued by Owner in accordance with this Contract is intended only to establish payment authority for Owner's internal accounting purposes. No purchase order shall be considered to be a counteroffer, amendment, modification, or other revision to the terms of this Contract.
- 25.7 **Costs.** If any formal mediation or arbitration dispute resolution process or action at law or in equity is necessary to enforce or interpret this Contract between the Parties, the prevailing Party shall be entitled to reasonable arbitrator and/or attorneys' fees, administrative and/or legal costs, and necessary disbursements, in addition to any other relief to which it may be entitled.
- 25.8 **Force Majeure.** Neither Party will be responsible to another Party for damages, loss, or injury caused by conditions that are beyond their reasonable control, and without the intentional misconduct or negligence, of that Party. Such conditions include, but are not limited to, acts of God, acts of government agencies, strikes, labor disputes, fire, explosions, thefts, vandalism, riots, terrorism, war, or unavailability of parts, materials or supplies.

- 25.9 **Independent Contractor.** Wendel, in accordance with its status as an independent contractor, covenants and agrees that it will conduct itself consistent with such status, that it will neither hold itself out as, nor claim to be, an officer or employee of Owner by reason hereof, and that it will not, by reason hereof, make any claim, and, or application to or for any right or privilege applicable to an officer or employee of Owner, including, but not limited to, Worker's Compensation coverage, Unemployment Insurance Benefits, Social Security coverage or Retirement Membership or credit.
- 25.10 **Non-Solicitation.** Owner acknowledges that Wendel's employees are a valuable asset to Wendel and agrees not to solicit for the purpose of employment any Wendel employee at any time during such employee's performance of services for Owner and for twelve (12) months thereafter.
- 25.11 **Notice.** Any legal notice ("Notice") which may be or is required to be given shall be written. Notices shall be sent to the address indicated below by registered mail or certified mail, postage prepaid, return receipt requested, or by other prepaid delivery method which is traceable. A fax notice does not constitute Notice. All such Notices shall be deemed to have been given when received. Either Party may change its Notice address by giving Notice to the other Party pursuant to this Section 25.11.

For Wendel:

Jason Denué
Vice President Energy Services
Wendel Energy Services, LLC
375 Essjay Road, Suite 200
Williamsville, NY 14221

For Owner:

Donald G. Feldman
Assistant Superintendent
Sweet Home Central School District
1901 Sweet Home Road
Amherst, NY 14228

- 25.12 **Governing Law.** This Contract shall be governed by the laws of the State of in which the Project site is located, unless specifically stated otherwise elsewhere in the contract documents.
- 25.13 **Severability.** If any provision of this Contract is held to be illegal, unenforceable or void, then the Parties will be relieved of obligations arising under such provision, but only to the extent that such provision is illegal, unenforceable or void, it being the intent and agreement of the Parties that the provision, as applicable, will be deemed amended by modifying such provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is not possible, by substituting therefore another provision which is legal and enforceable and achieves the required objectives of the Parties. This clause applies to all Contract provisions, including Section 16.9, Indemnity.
- 25.14 **No Waiver of Performance.** The failure of either Party to insist, in any one or more instances, on the performance of any of the terms, covenants or conditions of the Contract Documents, or to exercise any of its rights, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right with respect to further performance.
- 25.15 **Joint Drafting.** The Parties to this Contract expressly agree that this Contract was jointly drafted, and that both had opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms prior to execution. Therefore, this Contract shall be construed neither against nor in favor of either Party, but shall be construed in a neutral manner.
- 25.16 **Titles and Groupings.** The titles given to the provisions in the Contract Documents are for ease of reference only and shall not be relied upon or cited for any other purpose. The grouping of the provisions in the Contract Documents under the various headings is solely for the purpose of convenient organization and in no event shall the grouping of provisions, the use of paragraphs or the use of headings be construed to limit or alter the meaning of any provisions.
- 25.17 **Survival.** Sections 9, 13, 16.6, 16.8, 19, 20, 20, 23, 24, 25.1, 25.7 and 25.10 - 25.14 will survive any termination of this Contract.
- 25.18 **Entire Agreement.** This Contract is the full agreement between Wendel and Owner as of its Effective Date. All previous conversations, correspondence, agreements, or representations related to this Contract are not part of this Contract between Wendel and Owner and are superseded by this Contract. No modifications to this Contract are binding on Owner or Wendel unless made in writing and signed by the Parties.
- 25.19 **Contractor Representations and Warranties.** The Contractor represents and warrants to the Owner (in addition to, and not in lieu of, any other representations and warranties in the Contract

Documents or other liability imposed by law with respect to the Contractor's duties, obligations, and performance under this Agreement), to survive execution and delivery of this Agreement, any termination of this Agreement, and final completion of the work, that:

- .1 it and its Subcontractors are financially solvent, able to pay all debts as they mature, and possess sufficient working capital to complete the Work and perform all obligations under this Agreement;
- .2 it is able to furnish the plant, tools, materials, supplies, equipment, and labor required to complete the Work and perform all obligations under this Agreement;
- .3 it is authorized to do business in the State of New York and is properly licensed by all governmental, public, and quasi-public authorities with jurisdiction over it, the work, and the Project;
- .4 its execution of and performance under this Agreement are within its duly authorized powers;
- .5 its duly authorized representative visited the site of the Project, became familiar with the local and special conditions under which the work will be performed, and correlated the observations during such visit(s) with the requirements of the Contract Documents; and
- .6 it possesses the level of experience and expertise in administering, constructing, managing, and superintending projects of the size, complexity, and nature of this Project necessary to perform the work with proper care, skill, and diligence.

ATTACHMENT 1 – INSURANCE REQUIREMENTS

Wendel shall procure and maintain for the duration of the contract, *and for 2 years thereafter*, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Work hereunder by Wendel, its agents, representatives, employees, or subcontractors. No representation is made that the minimum Insurance requirements of this Agreement are sufficient to cover the obligations of Wendel under this agreement.

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL)**, Insurance Services Office (ISO) Form CG 00 01 or equivalent covering CGL on an “occurrence” basis, including products and completed operations, property damage, bodily injury and personal & advertising injury with limits no less than \$1,000,000 per occurrence and \$2,000,000 aggregate. If a general aggregate limit applies, the general aggregate limit shall apply separately to this project/location (ISO CG 25 03). Deductible shall be no greater than \$5,000 per occurrence.

The CGL policy shall not contain an exclusion or restriction of coverage for the following:

- Claims by one insured against another insured, if the exclusion or restriction is based solely on the fact that the claimant is an insured, and there would otherwise be coverage for the claim.
 - Claims for property damage to Wendel’s Work arising out of the products-completed operations hazard where the damaged Work or the Work out of which the damage arises was performed by a subcontractor.
 - Claims for bodily injury other than to employees of the insured.
 - Claims for indemnity under contractual indemnification arising out of injury to employees of the insured
 - Claims or loss excluded under a prior work endorsement or other similar exclusionary language.
 - Claims or loss due to physical damage under a prior injury endorsement or similar exclusionary language.
 - Claims related to roofing, if the Work involves roofing.
 - Claims related to earth subsidence or movement, where the Work involves such hazards.
 - Claims related to explosion, collapse, and underground hazards, where the Work involves such hazards.
2. **Automobile Liability** covering hired and non-owned vehicles used, by Wendel, with policy limits of not less than \$1,000,000 per accident, for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles along with any other statutorily required automobile coverage.
 3. **Umbrella/Excess Liability** providing coverage in excess of the underlying Commercial General Liability, Business Automobile Liability and Employers’ Liability insurance above, with minimum limits of \$5,000,000 per occurrence and \$5,000,000 million general aggregate.
 4. **Workers’ Compensation** insurance as required by the State where the Project is located, with Statutory Limits, and Employers’ Liability insurance with a limit of no less than \$1,000,000 per accident for bodily injury or disease.
 5. **Contractors Professional Liability** (if the Work requires furnishing professional services), with limits no less than \$5,000,000 per occurrence or claim, and \$5,000,000 policy aggregate.
 6. **Pollution Liability** (if Work involves the transport, dissemination, use, or release of pollutants or other hazardous materials) with limits no less than \$5,000,000 per occurrence, and \$5,000,000 policy aggregate.

If Wendel maintains broader coverage and/or higher limits than the minimums shown above Wendel, Owner and Additional Insureds shall be entitled to the broader coverage and/or higher limits maintained by Wendel. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be made available.

Other Insurance Provisions

For any claims related to this project, Wendel's insurance coverage shall be primary insurance coverage at least as broad as ISO CG 20 01 04 13 as respects the entities listed in the Additional Insureds table below, and their respective officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the Additional Insureds, and their respective officers, officials, employees, or volunteers shall be excess of Wendel's insurance and shall not contribute with it.

The entities listed in the Additional Insureds table below, and their respective officers, officials, employees, and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of Wendel including materials, parts, or equipment furnished in connection with such work or operations and automobiles owned, leased, hired, or borrowed by or on behalf of Wendel. To the extent commercially available general liability additional insured coverage can be provided in the form of an endorsement to Wendel's insurance at least as broad as ISO Form CG 20 10 11 85 or both CG 20 10, CG 20 26, CG 20 33, or CG 20 38; and CG 20 37 forms if later revisions used. The additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) form CG 20 38 04 13. With respect to any Owner hired Architect and Architect's consultants working on the project, Additional Insured coverage shall be provided by CG 20 32 04 13.

Wendel shall not self-insure or have a self-insured retention without approval from Owner. Any policy deductible shall be on an "occurrence" basis. Wendel shall be responsible for payment of premiums for all of the insurance coverages required. Wendel further agrees that for each claim, suit or action made against insurance provided hereunder, with respect to all matters for which Wendel is responsible hereunder, Wendel shall be solely responsible for all deductibles without reimbursement by Owner.

Where commercially available, each insurance policy required shall provide that coverage shall not be canceled except with thirty (30) days advance notice to the Owner.

Umbrella/Excess Insurance

Any Umbrella or Excess liability policy shall provide substantially the same coverage, and in no event narrower coverage, as the underlying Commercial General Liability (including Owner as an additional insured), Business Automobile Liability or Employers' Liability insurance, and shall expressly provide that the umbrella or excess policy will drop down over a reduced or exhausted aggregate limit of the underlying insurance. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

Property Insurance

Wendel shall pay for and maintain property insurance necessary for protection against any and all loss to owned, borrowed or rented property, including capital equipment, all tools, including any tools owned by employees, and any tools, equipment, staging, scaffolding, towers, and forms owned, borrowed or rented by Wendel. The requirement to secure and maintain such insurance is solely for the benefit of Wendel. Failure of Wendel to secure such insurance or to maintain adequate levels of coverage shall not obligate Owner or its agents or employees for any such property losses and Owner and its agents and employees shall have no liability therefor.

Waiver of Subrogation

Wendel hereby agrees to waive rights of subrogation which any insurer of Wendel may acquire from Wendel by virtue of the payment of any loss. Wendel agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the Owner for all Work performed by Wendel, its employees, agents and subcontractors.

Acceptability of Insurers

Insurance is to be placed with insurers authorized to conduct business in the state where the project is located with a current A.M. Best rating of no less than A/VII, unless otherwise acceptable to the Owner.

Verification of Coverage

Wendel shall furnish the entities listed in the Certificate Holder’s table below with original Certificates of Insurance including all required amendatory endorsements before Work begins. However, failure to obtain the required documents prior to the Work beginning shall not waive Wendel’s obligation to provide them. Owner reserves the right to require complete, certified copies of all required insurance policies, including endorsements, required by these specifications, at any time.

Subcontractors

Wendel shall require and verify that each of its subcontractors shall maintain insurance meeting the requirements stated herein, with levels of coverage appropriate for the Work to be performed by the subcontractor. To the extent commercially available, the subcontractor’s additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 38 04 13 and, with respect to any Architect and Architect’s consultants, CG 20 32 07 04.

Special Risks or Circumstances

Owner reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage or other circumstances.

ADDITIONAL INSURED

Sweet Home Central School District	
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CERTIFICATE HOLDERS

Sweet Home Central School District	
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