

**TERMS AND CONDITIONS OF PURCHASE OF GOODS AND/OR SERVICES
BY SUMMIT METRO PARKS**

(Rev. Jan. 15, 2014)

1. **Entire Contract.** The terms and conditions set forth in this Purchase Order (“Order” or “Contract”) constitute the complete and exclusive statement of the terms of this transaction. All representations, promises, warranties or statements by any agent or employee of Summit Metro Parks (“Buyer”) that differ in any way from the terms and conditions hereof are of no force or effect. By acknowledging receipt of this Order or by shipping the goods or performing the services called for by this Order, Seller agrees to these terms and conditions. **Any additional or contradictory terms contained in any initial or subsequent order or communication from Seller pertaining to the Goods or Services purchased are hereby rejected.** No course of prior dealings between the parties and no usage of the trade are relevant to this transaction. All Orders are subject to the approval by Buyer at its offices in Akron, Ohio. **No waiver or alteration of terms herein are binding unless in writing signed by an executive officer of the Buyer.**

2. **Prices.** The prices for the Goods and/or Services that have been quoted to Buyer by a representative or agent of Seller or as set forth on the face of this Order, are the prices of the Goods and/or Services. Seller warrants that the price(s) for the Goods and/or Services are not less favorable than those currently extended to any other customer for the same or like Goods and/or Services in equal or less quantities. In the event Seller establishes or offers a lower price for the sale of such Goods and/or Services in such quantities, either generally or for any one sale to any other customer, from the date of acceptance of this Order to the date the Goods and/or Services are invoiced to Buyer, Seller agrees to reduce the prices correspondingly.

3. **Extra Charges; Taxes.** No additional charges of any kind, including charges for boxing, packaging or cartage, taxes, import or export duties, excises or other extras, will be allowed unless specifically agreed to in writing in advance by Buyer. Buyer has furnished to Seller tax exempt certificates or other evidence of exemption and no sales, use or excise taxes are chargeable to Buyer where appropriate.

4. **Delivery; Transportation and Packaging.** Deliveries of Goods are to be made both in quantities and at times specified herein FOB at destination. Time is of the essence.

The Goods will be packaged, marked, shipped and routed in accordance with Buyer’s direction and the instructions set out in this Order.

5. **Title and Risk of Loss.** Except as otherwise expressly provided herein, title to and the risk of loss on all the Goods shipped by Seller to Buyer does not pass to Buyer until Buyer’s inspection and acceptance of such Goods by the Buyer at destination.

6. **Acceptance of the Goods and Inspection.** Acceptance of the Goods and/or Services takes place at the time when such Goods and/or Services have been delivered to Buyer and have passed Buyer’s inspection and test at Buyer’s option at Seller’s plant and/or the point of destination. Acceptance of all or any part of the Goods and/or Services by Buyer does not relieve Seller from any of its obligations and warranties hereunder, nor will acceptance of any part of the Order bind the Buyer to accept future shipments or Services or deprive Buyer of any rights under the Uniform Commercial Code. No action or failure to act on the part of Buyer will be deemed a waiver of Buyer’s rights to cancel or return all or any portion of the Goods or terminate Services because of failure to conform to the Order by reason of defects, latent or patent, or other breach of warranty or to make any claim for damages. In no event will payment be deemed to constitute acceptance.

If inspection discloses that any part of the Goods and/or Services received is not in accordance with Buyer's specification or if any of the Goods and/or Services fail to meet the warranties set forth herein, Seller, upon notice thereof from Buyer, must promptly correct or replace the same at Seller's expense. If Seller fails so to do, Buyer may cancel this Order as to all such Goods and/or Services and, in addition, may cancel the then remaining balance of this Order. After notice to Seller, all such Goods will be held at Seller's risk. Buyer may, and at Seller's direction will, return Goods to Seller at Seller's risk, and all transportation and handling charges, both to and from the original destination, must be paid by Seller. Any payment for such Goods must be refunded by Seller. Return of any defective material by Buyer is not deemed a waiver of any right or remedy which Buyer may have as a result of or in connection with the existence of such defect or defects.

7. **Payment.** Payment shall be made according to the terms set forth on the face of this Order. Unless otherwise agreed, invoices shall be processed for payment within 30 days after the receipt of the invoice or of the Goods and/or Services by Buyer, whichever is later. It is understood that the cash discount period will date from the receipt by Buyer of the Goods and/or Services or of the invoice, whichever is later. C.O.D. shipments will not be accepted.

8. **Warranties.** Buyer has the right to all Buyer's remedies and Seller's warranties to the fullest extent provided under the Uniform Commercial Code, including, but not limited to, warranties of merchantability, fitness and fitness for a particular purpose, and non-infringement, and such remedies and warranties survive inspection, tests, acceptance and payment.

9. **Indemnification and Insurance.** Seller will indemnify, defend and hold the Buyer and its successors and assigns harmless from and against any and all claims, losses, liabilities, damages, charges, costs and expense, including but not limited to court costs, attorney fees, inspection fees or costs of testing arising out of an actual or alleged defect in the Goods (including but not limited to the presence of environmentally-banned substances) and/or Services, and arising out of any act or omission of Seller, its agents, employees and subcontractors, and with respect to any recall, inspection, tests, replacement or correction related in whole or in part to a defect or alleged defect in the Goods.

Seller must maintain workers' compensation and insurance coverages in the following kinds and amounts:

Workers' compensation insurance covering the statutory requirements of the State of Ohio;

Commercial auto insurance: \$1,000,000 combined single limit for bodily injury and property damage per occurrence;

\$2,000,000 aggregate;

Commercial general liability: \$1,000,000 combined single limit per occurrence;

\$2,000,000 aggregate;

\$1,000,000 personal injury;

\$2,000,000 products/completed operations aggregate;

Umbrella: \$5,000,000 above the auto and general liability policies

The insurance will be on an “occurrence basis” and will name Buyer as a named insured. Seller will furnish Buyer with certified copies of its insurance policies from companies acceptable to Buyer must be filed with Buyer prior to commencement of work and must contain a provision that coverages afforded will not be canceled until at least 30 days’ prior written notice to Buyer.

10. **Changes; Cancellation.** Buyer has the right at any time by written notice to cancel, suspend or change from time to time the Goods and/or Services to be furnished by Seller hereunder.

Upon receipt of such notice, Seller must immediately comply with the notice and adjust operations in connection with this order accordingly. All costs and expenses related to this Order and incurred by Seller subsequent to the receipt of such notice are the sole responsibility of Seller.

In the event of cancellation, suspension or modification of this Order, Buyer is responsible and liable only for the price of the Goods and/or Services accepted prior to such notice plus the actual and reasonable costs incurred by Seller prior to notice of cancellation, suspension or modification with respect to the Goods and/or Services.

Buyer is not liable for lost profits, consequential, incidental, indirect, special or punitive damages.

11. **Default.** Buyer reserves the right, by written notice, to cancel this Order without liability to Buyer and obtain the Goods or Services from another source in the event of (i) insolvency of Seller, (ii) the filing of a Petition in Bankruptcy by or against Seller, (iii) the appointment of a Receiver or Trustee for Seller, or (iv) the execution by Seller of an Assignment for the Benefit of Creditors. Seller is liable for Buyer’s damages in connection with such breach or failure to perform including consequential damages reasonably foreseeable by Seller or of which Seller was informed by Buyer, provided, however, the Seller shall not be responsible for delays or defaults occasioned by Acts of God, Force Majeure, war or riots, but in the event of such occurrence, Buyer reserves the right to cancel this Order without liability of any kind.

12. **Intellectual Property Indemnification.** Except when Buyer supplies all specifications for the Goods, Seller will indemnify, defend and hold and save harmless Buyer, its successors, assigns, customers and users from any and all claims, losses, liabilities, damages, charges, costs and expenses, including but not limited to court costs, attorney fees, and expert fees arising out of or existing because of the infringement or alleged infringement of any third party’s intellectual property rights (including but not limited to patent, trademark, copyright and/or trade secret) for or on account of the manufacture, sale or use of any Goods and/or Services furnished hereunder.

13. **Consignment.** Machinery, equipment, patterns, drawings, specifications and samples furnished to Seller by Buyer on other than a charge basis are held by Seller as upon consignment, and upon the completion of this Order must be returned to Buyer or otherwise satisfactorily accounted for. Unless otherwise agreed, Seller, at its expense, must insure all such items for the reasonable value thereof against loss or damage of any kind.

14. **Confidentiality.** Seller will keep and maintain as confidential all information concerning the Goods and Services excepting only the disclosure of such information as may be required for purposes of obtaining permits and/or licenses from applicable governmental entities and/or agencies; Seller will obtain similar agreements from persons and firms employed by Seller and this requirement will survive the completion of this Order.

The obligations of confidentiality and non-disclosure of all information concerning the project apply absolutely and unconditionally, unless the Seller can prove that the information: (a) was available to the public at the time it was disclosed to the Seller; (b) becomes available to the public through no fault of Seller or Buyer; and (c) was in the Seller's possession as evidenced by written records at the time of disclosure to the Seller by the Buyer; or (d) was disclosed to the Seller by a third party who is not legally prohibited from doing so.

The Seller shall have the burden of proof and persuasion to prove that the information came to the Seller's knowledge or possession as the result of one or more of the above set forth exceptions.

15. **Compliance with Laws.** Seller must, in the furnishing of Goods and/or Services, performance of work and Services under this Order, fully comply with all applicable Federal, State and local laws and regulations, and indemnify, defend, save and hold harmless Buyer from any and all claims, losses, liabilities, damages, charges, costs and expenses, including but not limited to court costs, attorney fees and expert fees resulting from Seller's failure of compliance.

16. **Compliance with Ohio Revised Code Sections 145.036, 145.037 and 145.038 Relating to Ohio Public Employees Retirement System.** Pursuant to the above-referenced Revised Code Sections, the parties represent and agree as follows:

Seller is either:

16.1 A Business Entity – a corporation, association, firm, limited liability company, partnership, sole proprietorship or other entity engaged in business and has five or more employees; and

16.1.1 This Contract provides that all individuals employed by Seller that is a Business Entity who provide personal services to Buyer are not public employees for purposes of Chapter 145 of the Ohio Revised Code;

or

16.2 Other than a Business Entity, whether an individual or an entity engaged in business having less than five employees; and

16.2.1 This Contract provides that all individuals employed by Seller who provide personal services to Buyer are not public employees for purposes of Chapter 145 of the Ohio Revised Code; and

16.2.2 Seller must provide the names, addresses and other contact information of Seller's employees as follows:

1. _____ 3. _____
2. _____ 4. _____ ; and

16.2.3 Seller must notify the individuals employed by Seller rendering the personal services that they are not classified as public employees and that no contribution will be made to the Ohio Public Employees Retirement System on their behalf; and

16.2.4 Seller must obtain or assist Buyer in obtaining signed Independent Contractor/Worker Acknowledgment Forms (PEDACKN (Rev. 4 20 13)) for each Individual employed.

- 16.3 Seller Is an Independent Contractor as defined in Ohio Administrative Code 145 I 42(A)(2), and
- 16.3.1 Is a party to a bilateral agreement which must be a written document, ordinance, or resolution that defines the compensation, rights, obligations, benefits and responsibilities of both parties;
 - 16.3.2 Is paid a fee, retainer or other payment by contractual arrangement for particular services;
 - 16.3.3 Is not eligible for workers' compensation or unemployment compensation;
 - 16.3.4 Is not eligible for employee fringe benefits such as vacation or sick leave;
 - 16.3.5 Does not appear on Buyer's payroll;
 - 16.3.6 Is required to provide his own supplies and equipment, and provide and pay his assistants or replacements if necessary;
 - 16.3.7 Is not controlled or supervised by personnel of Buyer as to the manner of work; and
 - 16.3.8 Receives an Internal Revenue Service form 1099 for income tax reporting purposes.

17. **Assignment.** Seller shall not assign or transfer this Order or any interest therein or monies payable thereunder without the written consent of the Buyer and any assignment or transfer made without such consent is null and void.

18. **Remedies.**

Dispute Resolution. Any claim or controversy between the parties arising out of or relating to this Contract or the breach thereof will be resolved in accordance with the dispute resolution procedures set forth in Exhibit 2 attached hereto and incorporated herein by reference as fully rewritten.

The remedies provided to Buyer herein are cumulative and in addition to any other remedies provided by law or equity. A waiver of a breach of any provision hereunder does not constitute a waiver of any other breach.

19. **Ohio Law and Forum.** The laws of the State of Ohio disregarding conflicts of law, govern the terms and provisions of this Contract and the relationship between the parties. Any disputes between the parties will be resolved by the state and federal courts having jurisdiction in Summit County, Ohio, and Seller hereby submits to that exclusive jurisdiction and venue. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this transaction.

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EXHIBIT I

NON-DISCRIMINATION CLAUSE

The Seller is expected to comply with all Federal laws pertaining directly to indirectly to the Contract, including Executive Order 10925 as amended by Executive Order 11114, which prohibits discrimination in employment and the Governor's Executive Order of January 27, 1972. Specifically, during the performance of this contract, the Seller agrees as follows:

- A. The Seller will not discriminate against any employee or applicant for employment because of race, creed, color, religion, national origin, ancestry, sex, disability or military status. The Seller will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, religion, national origin, ancestry, sex, disability or military status. Such action shall include, but is not limited to, the following: hiring, employment, upgrading, promotion, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Seller agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this non-discrimination clause.
- B. The Seller will in all solicitations or advertisements for employees placed by or on behalf of the Seller, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, religion, national origin, ancestry, sex, disability or military status.
- C. The Seller will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer advising the said labor union or workers' representatives of the Seller's commitments under this covenant and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- D. The Seller will comply with all provisions of the Executive Orders set forth above, and with the implementing rules, regulations and applicable orders of the State and Federal Agencies relative to equal employment opportunity.
- E. The Seller agrees he will fully cooperate with the State Administering Agency, the State Equal Opportunity Coordinator and with any other official or agency of the State or Federal government which seeks to eliminate unlawful employment discrimination, and with all other State and Federal efforts to assure equal employment practices under this contract, and said Seller shall comply promptly with all requests and directions from the State Administering Agency, the State Equal Opportunity Coordinator, and any of the State of Ohio's officials and agencies in this regard, both before and during construction.
- F. Full cooperation as expressed in clause (E) above, shall include but not be limited to, being a witness and permitting employees to be witnesses and complainants in any proceeding involving questions of unlawful employment practices, furnishing all information and reports required by the State and Federal authorities and by the rules, regulations and orders of those authorities; and permitting access to all books, records, and accounts by the State and Federal authorities for purposes of investigation to ascertain compliance with such rules, regulations and orders.

G. In the event of the Seller's noncompliance with the non-discrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Seller may be declared ineligible for further State Contracts or State Assisted Construction Contracts in accordance with procedures authorized by the Executive Orders set forth above, and such other sanctions as may be instituted and remedies invoked as provided in the Executive Orders set forth above or by rule, regulation, or order of the State or Federal authorities, or as otherwise provided by law.

H. The Seller will include the provisions of paragraphs (A) through (G) in every subcontract or purchase order, unless otherwise exempted by the rules, regulations or orders promulgated pursuant to the Executive Orders set forth above so that such provisions will be binding upon each Seller or vendor. The Seller will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for non-compliance.

In the event this contract is terminated for a material breach of said Regulation, the Seller shall become liable for any and all damages, which shall accrue to the State Administering Agency, and Applicant and the State of Ohio as a result of said breach.

EXHIBIT 2

DISPUTE RESOLUTION

The parties agree to binding arbitration in Summit County, Ohio and hereby irrevocably submit themselves to the exclusive jurisdiction and agreed venue of the state and federal courts of Summit County, Ohio. Ohio law applies to the interpretation and enforcement of the terms and conditions of this Agreement.

Any claim or controversy between the parties arising out of or relating to this agreement or the breach thereof will be resolved as follows:

- (i) The parties will meet and confer in good faith in an attempt to resolve the dispute or problem.
- (ii) In the event that the parties are unable to resolve the claim or controversy, either party may notify the other that the matter shall be submitted to binding arbitration in Akron, Summit County, Ohio in accordance with the applicable provisions of Chapter 2711 of the Ohio Revised Code, excepting that the following terms and conditions will control and supersede and/or supplement the provisions of Chapter 2711:
 - (a) After a party gives notice by personal delivery or certified United States mail to the other, the parties shall select a single arbitrator within 15 days.
 - (b) In the event that the parties cannot agree upon a single arbitrator, they shall each select an arbitrator within five days, and the two arbitrators selected shall select a third.
 - (c) In the event a party fails or refuses to select an arbitrator, the provisions of Ohio Revised Code Section 2711.03 apply.
 - (d) Within 20 days, the parties and arbitrator(s) will meet to establish the rules to be followed in the arbitration, such as procedures, pre-arbitration discovery, the place of the arbitration, time allowed for presentation of each case, the making of a record for the proceedings, subpoena and sanctions powers of the arbitrator(s), confidentiality of the proceedings, arbitrator(s)' fees, the award, appealability and procedures and standards for appeal.
 - (e) The arbitration will be conducted within 60 days of the selection of the arbitrator(s).
 - (f) After the arbitration is concluded, the written decision will be rendered within 30 days.
 - (g) The decision is subject to Sections 2711.08-.12 inclusive, and is subject to appeal pursuant to Section 2711.15 Ohio Revised Code.
 - (h) The fees and expenses of the arbitrator(s) will be paid equally by the parties. Each party will pay its own fees and expenses.
- (iii) In the event of any claim or controversy necessitating dispute resolution, the work of the Seller will continue as time is of the essence, and with respect to any such claim or controversy, the parties will be bound by the determination reached as the result of the dispute resolution procedures.