**MASTER SUBCONTRACT AGREEMENT**

This Master Subcontract Agreement (this “**Agreement**”) is entered into this day of 20 (the “**Effective Date**”), by Energy Systems Group, LLC an Indiana limited liability company, (“**ESG**”), and [full legal name of subcontractor], a [form and jurisdiction of business] (“**Subcontractor**”). ESG and Subcontractor are each a “**Party**” and collectively the “**Parties**”.

1. ESG provides energy-related design, construction, and management services for the “**Customer**”. To provide these services, ESG may retain qualified engineers, contractors and related service providers to furnish, engineering, construction, and/or operations and maintenance services for such energy-related projects.
2. Subcontractor represents that it is qualified to provide such services for the type of work required.
3. This Agreement sets forth the general terms and conditions applicable to the Work. Terms specific to the Work Subcontractor shall perform on behalf of each Project will be included in Work Orders.

In consideration of the foregoing and the mutual covenants contained in this Agreement, the Parties agree:

* 1. DEFINITIONS.
     1. “**Affiliate**” means any legal entity that owns at least 50% of the voting shares of, controls, is controlled by, or is under common control with, another legal entity.
     2. “**Applicable Laws**” are all federal, state, or local laws, rules, codes, or regulations applicable to the Work and/or the Subcontractor.
     3. “**Applicable Permits**” are all permits or licenses issued or required by any governmental body having jurisdiction over the performance of the Work.
     4. An "**Application for Payment**" is Subcontractor’s application requesting and verifying payment for Work performed.
     5. A “**Change Order”** is any document signed by both Parties that changes the terms of or amends a Work Order.
     6. “**Claim**” or “**Claims**” mean all claims, losses, damages, expenses, or liabilities of a Party arising from or due to a Party’s performance or failure to perform under the Contract Documents.
     7. The “**Contract Amount**” means the contract value set forth in the Work Order as may be adjusted from time to time by Change Order, Field Directive, or amendment to the Work Order.
     8. The "**Contract Time**" means the prescribed period from the Start Date through the Substantial Completion and ending at Final Completion, as may be adjusted by Change Order, Field Directive, or other amendment to the Work Order.
     9. The “**Contract Documents”** include this Agreement, the Attachments, any amendments including Change Orders, all Work Orders, and any Specifications, Drawings or other documents referenced by or incorporated into the Work Order.
     10. The **“Cost-Plus Method”** means the actual, reasonable increased or decreased direct cost of performing the change, plus mark-ups added to the actual extra material and labor costs
     11. The “**Customer**” is the customer, also at times referred to as “Owner”, who benefits from the Work.
     12. A “**Customer Agreement**” means an agreement ESG enters into, as amended, under which ESG will furnish specified improvements at the Customer’s facility.
     13. **“Delay”** is when Subcontractor fails to achieve Substantial Completion or Final Completion within the Contract Time.
     14. A **“Dispute”** is a dispute that arises under this Agreement.
     15. “**Drawings**” include all drawings, plans, depictions and designs provided by ESG or prepared by Subcontractor (as part of ESG’s overall design) or its subcontractors, which are necessary or required for the construction, erection, installation and completion of the Work.
     16. A “**Field Directive**” is a written document either signed by both Subcontractor and ESG, or signed by ESG only, that describes no-cost directives on an individual Work Order.
     17. “**Final Completion**” or at times “**Turnkey Delivery**” references the stage in the progress of the Work following Substantial Completion, where ESG has received payment from the Customer for Subcontractor’s Work, there is no outstanding Work to be completed, and the system is fully and immediately ready to use and operate.
     18. “**Final Completion Date**” means the date of Final Completion as identified in the Work Order.
     19. **“Final Completion Notification”** means the notification from ESG to Subcontractor of acceptance and Final Completion.
     20. **“Final Project Completion”** means the date of Final Completion of the Project.
     21. “**Final Payment**” refers to the last payment made by ESG to Subcontractor that satisfies any outstanding balance of the Contract Amount, pursuant to the Work Order. Final Payment is subject to the conditions of the Contract Documents.
     22. A “**Force Majeure**” refers to an event that is unforeseeable and beyond the control of Subcontractor and neither caused nor contributed to by the fault or negligence of Subcontractor or those for whom Subcontractor is responsible, including, but not limited to, the following: earthquake, hurricane, tornado, flood or other unusually severe weather condition; fire; civil unrest or terrorist act; war; damage or disruption committed on behalf of any foreign interests to further international political objectives; injunction in connection with litigation; epidemic or quarantine; acts of God or the public enemy; failure by someone other than the Subcontractor or anyone for whom the Subcontractor is responsible to obtain or issue, as applicable, or any permits needed for the Work to be completed.
     23. “**Hazardous Substances**” shall mean: (i) any hazardous, toxic, or dangerous substances and materials and any other hazardous substances or mixtures in any form now or at any time subject to regulation, control, remediation, or otherwise addressed under Applicable Laws; (ii) any “hazardous substance” as defined by the Resource, Conservation and Recovery Act of 1976 (42 United States Code (“U.S.C.”), Section 6901 et seq.), as amended, and regulations promulgated thereunder; (iii) any “hazardous, toxic or dangerous waste, substance or material” specifically defined as such in the Comprehensive Environmental Responses, Compensation and Liability Act of 1980 (42 U.S.C. Section 9601 et seq.), as amended, and regulations promulgated thereunder; and (iv) any hazardous, toxic or dangerous waste, substance, or material as defined in any so-called “superfund” or “superlien” law.
     24. A "**Notice of Claim**" is a written notice from Subcontractor to ESG identifying an order or occurrence that Subcontractor contends should cause a change in the Work and requesting an adjustment of either the Contract Amount or Contract Time.
     25. A “**Project**” is the entirety of work ESG is contracted to perform for the Customer under the Customer Agreement.
     26. "**Project Schedule**" means the latest dated, ESG-approved schedule of Work at a Site Location that includes Start Date, Substantial Completion Date and Final Completion Date as identified in an individual Work Order.
     27. The “**Scope of Work**” at each Site Location is as described in the Work Order.
     28. The "**Site Location**" means the location of the Customer’s facility, and real property upon which such facility is located, where Subcontractor or its lower-tiered subcontractors shall perform the Work identified within the Work Order.
     29. “**Specifications**” mean specifications, equipment, materials, supplies lists, schedules and other written information relevant to the performance of any Work identified within the Work Order.
     30. The “**Start Date**” is the date specified on the Work Order that Subcontractor shall begin the Work, subject to the conditions in Section 2.b.
     31. "**Substantial Completion**" means the stage when the Work is sufficiently complete in accordance with the Contract Documents so that the Customer can utilize and take beneficial use of the Work for its intended use.
     32. “**Substantial Completion Date**” means the date of Substantial Completion as identified in the Work Order.
     33. The “**Term**” of this Agreement shall commence on the Effective Date and continue until terminated per its terms.
     34. The “**Work**” includes all necessary items and services Subcontractor is required to execute in the Scope of Work identified within each Work Order in conformance with this Agreement.
     35. The “**Work Order**” is the specific work order for a Project executed between the Parties and is attached to this Agreement as **Attachment A**.
  2. GENERAL RESPONSIBILITIES. Subcontractor represents and warrants, and shall perform all Work in conformance with, the following requirements:
     1. **Performance Standards.** Subcontractor is highly skilled and experienced in the type of project that is the subject of the Work Order(s). Unless modified by Attachment, all Work shall comply with industry standards for comparable work performed by reputable, highly skilled contractors working in the same geographic area where Subcontractor performs the Work. Such industry standards include, but are not limited to, standards set by the American Society of Heating, Refrigeration and Air-Conditioning Engineers and the National Fire Protection Association, if applicable. Subcontractor shall furnish and pay for all supervision, labor, transportation, equipment, tools, resources, materials, and other services and materials as necessary to complete the Work for the Project. Subcontractor shall efficiently, administer, supervise, and direct, and be responsible for, its own personnel and those of its subcontractors to achieve adequate performance and high-quality workmanship.
     2. **Conditions Prior to Starting Work.** Subcontractor may not commence Work under a Work Order until (i) the Parties have fully executed the Work Order; (ii) ESG receives payment and performance bonds (if required) from Subcontractor; (iii) Subcontractor provides ESG with a contractually compliant certificate of insurance; (iv) Subcontractor provides ESG with the identification of its subcontractors performing goods and/or services for Subcontractor under a Work Order in the format requested by ESG; (v) Subcontractor provides sufficient evidence of Subcontractor’s and its lower-tiered subcontractors’ compliance and safety requirements; and (vi) ESG issues Subcontractor a notice to proceed with the Work. Unless otherwise expressly agreed to by ESG, any Work performed by Subcontractor prior to completion of all requirements in this section will be at Subcontractor’s sole risk and expense. All materials and equipment furnished by Subcontractor remain the responsibility of the Subcontractor until ESG inspects and accepts such materials and equipment, unless otherwise specifically delegated in the Scope of Work.
     3. **Direction from ESG.** Unless otherwise authorized by ESG or because of immediate safety concerns, Subcontractor shall take direction only from ESG and not from Customer or others.
     4. **Site Location.** Before commencing Work on a Project, Subcontractor shall visit the Site Location and inspect the general and local conditions that could affect the Work. Failure of Subcontractor to do so will not relieve it from its responsibility to complete the Work properly without any increase in the Contract Time or the Contract Amount approved by ESG. Subcontractor shall confine its operations at the Site Location to areas permitted by Applicable Laws, Applicable Permits, the Contract Documents, and as authorized by ESG. Subcontractor shall not unreasonably encumber the Site Location with any materials or equipment and shall maintain the Site Location in a neat, orderly manner while performing the Work and shall clean and repair the Site Location upon Final Completion. Subcontractor and its subcontractors shall perform the Work to avoid interfering with or disrupting the business operations of Customer, ESG or ESG’s contractors. Subcontractor shall protect and prevent damage or disturbance to any vegetation outside of the clearing limits in the Contract Documents.
     5. **Applicable Permits.** Subcontractor shall have, keep current, and upon ESG’s request, validate the effectiveness of, all Applicable Permits to perform the Work.
     6. **Prevailing Wages.** If required by Applicable Law or the Contract Documents, Subcontractor and its subcontractors, if any, shall provide certified payroll reports to ESG with each Application for Payment, upon ESG’s request if the Service Contract Act is applicable, and weekly if the Davis Bacon Act is applicable. If applicable, Subcontractor shall provide certified payroll reports in a form and format as attached to the Work Order. Subcontractor must clearly separate fringe benefits from wages for reporting requirements. The Subcontractor shall prepare Department of Labor Form WH347, or equivalent state-required form, for all Work provided and shall retain such records for a period as required by the governing agency. Subcontractor shall maintain all documentation required by law, including documentation demonstrating that it has paid all appropriate prevailing wage rates to each of its employees engaged in performing any part of the Work per the classification of work performed.
     7. **Required Documentation.** Subcontractor shall provide any and all documentation as reasonably requested by ESG, including but not limited to (1) a completed and executed SF1413 upon signing a Purchase Order and, (2) if applicable, Subcontractor’s executive compensation information upon signing this Agreement.
  3. PROSECUTION OF WORK. Subcontractor shall prosecute its work expeditiously, continuously, and in conformance with the Project Schedule, if any, as well as the following requirements:
     1. **Submittals**: Prior to beginning on-site construction, Subcontractor shall provide ESG a complete list of all forthcoming submittal packages for written approval. The submittal packages must include manufacturer’s cut- sheets/product data/Drawings for all equipment and materials proposed to be used by Subcontractor and its subcontractors. Additionally, certain projects will require the submission of detailed coordinated shop Drawings for review and approval prior to the start of on-site construction.
     2. **Project Schedule.** No later than the Work Order Start Date, Subcontractor shall submit a proposed Project Schedule to ESG in a form acceptable to ESG that accomplishes the Project’s interim milestones, Substantial Completion, and Final Completion. Subcontractor shall begin Work on the Start Date according to the Project Schedule and prosecute the Work in an efficient, expeditious, and economic manner. The Subcontractor shall maintain and update the Project Schedule on a weekly basis. Subcontractor acknowledges ESG may rely on the Project Schedule (as revised and updated), including the milestones, Substantial Completion Date, and Final Completion Date, in planning and scheduling performance of its obligations associated with the Contract Documents or related to the Customer Agreement. Except in the event of a Force Majeure,if Subcontractor’s progress, as measured by the Project Schedule, does not keep pace with the requirements of this Agreement or relevant Work Order(s), ESG may order Subcontractor in writing, and Subcontractor shall cooperate in writing at its sole cost and expense, to take steps to modify or improve upon Subcontractor’s progress.
     3. **Start-up:** Subcontractor has included in the Contract Amount sufficient allowances to cover potential system, equipment and facility start-up costs and expenses. Subcontractor shall fully comply with each manufacturer’s specifications and instructions, including supervision by a manufacturer’s representative.
     4. **Project lines and levels.** If applicable, Subcontractor shall verify and be responsible for the accuracy of the Project lines and levels applicable to its Work. Subcontractor shall carefully compare the levels shown on the Drawings with existing levels and shall call to ESG’s attention any discrepancies before proceeding with the Work. Subcontractor shall align all finished surfaces.
     5. **Daily Reports, Rosters, and Look-Aheads**. Each day, Subcontractor shall provide ESG a report and roster to record the daily Project progress and activity for the Work at the Site Location. Subcontractor shall use ESG’s standard daily report template and daily roster format, or similar forms, as approved by ESG. The Subcontractor shall require each employee and any lower-tiered subcontractor employees to sign the job roster each day. Each week, Subcontractor shall submit to ESG’s Construction Manager a three-week look-ahead schedule in compliance with the critical path method schedule that reflects all construction activities Subcontractor and its subcontractors will perform within the next three weeks.
     6. **Tests.** If required by the Contract Documents, Applicable Laws, or ESG, Subcontractor shall inspect, test, or approve all or any portion of the Work at Subcontractor’s cost and expense. Subcontractor shall give ESG at least 48 hours’ written notice, unless otherwise specified in the Contract Documents, of its readiness for such inspecting, testing or approval. Subcontractor shall also secure, and promptly deliver to ESG, all required certificates of inspection, testing, or approval. If such inspection or testing reveals a noncompliance with the Contract Documents or Applicable Laws, Subcontractor shall bear all cost and expense, including compensation for any additional services of a design professional made necessary by such failure. Subcontractor will not be relieved of its obligations to perform the Work in accordance with the Contract Documents, notwithstanding any inspections, tests, or approvals provided by ESG.
     7. **Drawings and Specifications Preparation by Subcontractor.** If the Work Order includes assisting ESG with ESG’s overall responsibility for design of the Project by preparing certain Drawings and Specifications within its Scope of Work, Subcontractor shall comply with each of the following requirements:
        1. Subcontractor, or if allowed under state law, Subcontractor’s subcontractor(s) shall employ a qualified engineer licensed to practice professional engineering in the state and/or locality where the Project is located. Such licensed professional engineer shall (a) prepare the Drawings and Specifications in accordance with the Contract Documents, Applicable Laws, Applicable Permits, and in accordance with ESG’s overall Project design as set forth in the Work Order or any other documentation or guidance provided by ESG; (b) stamp the design upon completion of the Drawings and Specifications; and (c) periodically supply ESG copies of the Drawings and Specifications for review and approval.
        2. Subcontractor will be responsible for the adequacy, safety, suitability, and completeness of its Drawings and Specifications per the requirements of ESG, the Specifications, and any Drawings prepared by ESG. Subcontractor shall also periodically meet with representatives of ESG to discuss ESG’s design as specified in the Work Order. ESG will provide comment and feedback, and an ESG engineer will revise Drawings and Specifications as needed through this review and approval process. Subcontractor shall implement all revisions and other necessary changes to the Drawings and Specifications as directed by ESG. In the event that the Drawings and Specifications contain a material error or omission, Subcontractor shall indemnify, defend and hold ESG and its Customer harmless from all damages arising out of any such error or omission.
        3. ESG shall own and have the right to transfer Drawings and Specifications to the Customer, and Subcontractor shall provide to ESG, all of the electronic files associated with the Drawings and Specifications being provided by Subcontractor, including but not limited to Word, Excel, Trane Trace, AutoCAD, etc.) and all rights therein, including without limitation, all patent, copyright, trademark, service mark, trade secret or other intellectual property rights therein. Subcontractor shall obtain and/or retain no right, title or interest in or to the Drawings and Specifications, including without limitation, any patent, copyright, trademark, service mark, trade secret or other intellectual property rights therein, and hereby assigns and transfers to ESG any such rights Subcontractor may have in such Drawings and Specifications. Subcontractor agrees that any copyrightable Drawings and Specifications are a work for hire. Subcontractor hereby expressly grants ESG an irrevocable license to use and reuse all drawings, specifications, calculations, notations and other documents prepared by the Subcontractor or his lower tier Subcontractors for any purpose in connection with this project, including, but not limited to, original construction, future expansion, renovation, maintenance and repair. Subcontractor agrees to execute, deliver, and perform all documents, acts, or things that may be necessary to assign or transfer to ESG the rights granted hereby. Notice of copyright ownership of ESG shall be placed by Subcontractor on all Drawings and Specifications in a manner and location as to give reasonable notice of the claim of copyright. To Subcontractor's actual knowledge, the Drawings and Specifications do not infringe on the ownership or intellectual property rights of any third party. Application for copyright and/or patent registration shall be the responsibility of ESG. Subcontractor shall deliver such Drawings and Specifications free and clear of all liens, claims, and encumbrances of any kind.
        4. Notwithstanding anything to the contrary in this Section 3.g or the next Section 3.h., ESG shall have overall primary responsibility of design for the Project, and any Drawings and Specifications provided by Subcontractor or by another engineer will be considered to be in support of ESG’s overall primary responsibility for design.
     8. **Drawings and Specifications by Other Engineer.** If the Drawings and Specifications are being prepared by an engineer, Subcontractor shall, without limitation:
        1. Fully review the Drawings and Specifications and report to ESG any error, ambiguity, or omission discovered by Subcontractor, including any requirement which may be contrary to Appliable Law, any work not in accordance or compliance with the Work Order or ESG’s overall Project design. Subcontractor may not proceed with any portion of the Work affected by any such noncompliance until receipt of further direction or instruction by ESG.
        2. Provide recommendations on construction feasibility, availability of materials and labor, time requirements for installation and construction, factors related to cost, including costs of alternative designs or materials.
        3. Attend and provide necessary input at meetings as requested by ESG.
        4. Review the Drawings and Specifications prepared by ESG or Customer and recommend alternate solutions whenever design details, materials, or systems affect the construction budget, construction feasibility, or construction schedule.
  4. COMPLETION OF WORK.
     1. **Substantial Completion Certification.** Subcontractor shall notify ESG that it has reached Substantial Completion and shall certify Subcontractor has: (1) reviewed the Contract Documents; (2) inspected the Work; (3) confirmed that the Work is fully complete, ready for inspection and compliant with the Contract Documents; (4) cleared, checked, tested, and started-up all equipment and systems in accordance with the Contract Documents; (5) confirmed all equipment and systems are fully operational per the manufacturers’ manuals and any required acceptance tests; (6) removed all of its tools, construction equipment, machinery and surplus materials; (7) cleaned the Site Location to the same condition it was prior to the commencement of the Work; and (8) submitted the following materials and documentation in connection with its Substantial Completion Certification (collectively, the “**Closeout Documentation**”):
        1. All permit sign-offs or other approvals of the Customer or any other governmental agency with jurisdiction over the Project;
        2. Individual record sets, in the number, form and format as may be reasonably directed by ESG, of the following: (a) Specifications, (b) Project Drawings, (c) modifications, (d) ESG field orders, written instructions, sketches, etc., (e) approved shop Drawings, product data, and samples, (f) all test data and testing laboratory reports, (g) “Record,” or “As Built” Drawings and Specifications legibly marked to indicate the manufacturer, trade name, catalog number, and supplier of each product and item of equipment actually installed, and (h) one reproducible record and/or electronic AutoCAD copy, as approved by ESG, of “Record” or “As Built”, Drawings, legibly marked during the construction process;
        3. Individual sets, in the number, form and format as ESG may reasonably direct, of operating instructions and maintenance recommendations for all equipment and systems installed as a part of the Work, including, without limitation, a printed parts list for all items that might be subject to replacement. The instructions shall set forth all of the information necessary for Customer to maintain and operate and make full and efficient use of all equipment and systems comprising the Work. They shall provide the name, address, and telephone number of the firm or organization that the manufacturer of the installed materials authorized to service the equipment.
        4. All spare parts, maintenance materials, and any other materials or equipment for which Subcontractor was paid but not incorporated into the Work.
        5. Originals of all warranties, guaranties, bonds, or certificates of compliance required by the Contract Documents relating to the Work.
        6. Final affidavit and conditional lien waivers and releases from Subcontractor and, if requested by ESG or the Customer, all its lower-tiered subcontractors, as well as all applicable certified payroll reports.
        7. Copies, in the form, format and number as reasonably directed by ESG, of all manifests indicating transport and proper disposal of all Hazardous Substances, to the extent such transport and disposal are part of the Work.
     2. **ESG Inspection of Work.** Upon a reasonable time after its receipt of Subcontractor’s Substantial Completion Certification, ESG will inspect the Work to verify the status of completion. ESG will provide a punch list to Subcontractor of any Work that is incomplete, noncompliant or defective. Subcontractor shall immediately complete all punch list items and remedy all stated deficiencies, after which Subcontractor shall send ESG another written certification to allow ESG to re-inspect the Work.
     3. **Acceptance and Final Completion.** When ESG confirms the Work has reached Substantial Completion, all punch list items are completed, and Customer has accepted the Work, ESG will give Subcontractor the Final Completion Notification. Notwithstanding acceptance of the Work by ESG or Customer, Subcontractor is nonetheless responsible to repair and hold ESG and Customer harmless regarding any defects or deficiencies in the Work that may thereafter appear.
     4. **Non-Waiver of Post-Construction Obligations.** Neither ESG’s Final Completion Notification, its Final Payment, its acceptance of the Work, nor Customer’s possession of the Project shall operate as a waiver of any warranty provision of the Contract Documents or operate as a waiver of any other obligation of Subcontractor under this Agreement. Subcontractor’s acceptance of the Final Payment shall constitute a waiver of all Claims of Subcontractor except those previously and timely made in writing and expressly identified as unsettled at the time of submission of Subcontractor’s final Application for Payment.
     5. **Title.** Subcontractor warrants and guarantees that title to all Work, whether incorporated in the Project or not, will pass to ESG free and clear of all liens, Claims, security interests or encumbrances upon the date Subcontractor receives payment for such Work.
     6. **Patents and Copyrights.** Subcontractor shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product or publication which is the subject of patent rights or copyrights held by others. Subcontractor shall indemnify and save harmless ESG from all claims and liability of any nature of any kind, including costs and expenses, arising from or occasioned by any infringement or alleged infringement of patent rights or copyrights on any invention, design, process, product or publication, or any part thereof, furnished or installed by Subcontractor or used in the performance of the Work by said Subcontractor or arising from their use by the Customer.
     7. **Taxes.** Unless otherwise expressly stated in the Contract Documents, Subcontractor shall pay all sales tax and any other tax charged on the material, equipment and labor provided by Subcontractor under the Contract Documents for the Work.
  5. CHANGES IN THE SCOPE OF WORK.
     1. **Additional Work Requested by ESG**. If Subcontractor disagrees with any aspect of a Change Order or Field Directive, or if Subcontractor is requested to perform work it believes is outside of the Scope of Work, Subcontractor shall, within 10 days of Subcontractor being aware of such change, provide written notice to ESG that it is performing such work under protest and shall submit such protest to ESG as a Claim to be resolved in accordance with the terms of this Agreement.
     2. **Increases to Contract Amount**. If the addition of work requires the Contract Amount to be increased, such increase shall be determined by: (i) a mutually agreeable lump sum; (ii) unit prices stated in the Contract Documents and subsequently agreed upon; or (iii) the Cost-Plus Method.
     3. **Decreases to Contract Amount.** If there is a decrease in the Scope of Work, the revised Contract Amount is to be determined as follows: (i) for material that has not been ordered, the deduct value is to include material and mark-up costs as indicated on the detailed cost breakdown; (ii) for material that has been ordered, ESG may either purchase the material at the values indicated on the detailed cost breakdown (material cost and mark-up cost) or issue a deduct for the material cost minus a not-to-exceed value of 10% restock charge, plus the material mark-up costs; and (iii) for labor, a deduct value shall include the labor and mark-up costs as indicated on the detailed cost breakdown.
     4. **Disagreements Regarding Changes.** Subcontractor will not be entitled to any adjustment of the Contract Amount or Contract Time except in strict compliance with the procedures set forth in this Agreement. If Subcontractor disagrees with an adjustment in the Contract Amount, the disagreement is to be resolved according to this Section 5 in which case the adjustment will be determined on the basis of the actual, reasonable increased direct cost or savings attributable to the Change plus overhead and profit, calculated consistent with the Cost-Plus Method.
  6. CLAIMS. The Parties shall resolve Claims and Disputes relating to this Agreement and any Work Order as follows:
     1. **Subcontractor Claims Process.** Subcontractor shall first submit a Notice of Claim within the earliest to occur of the following (i) 10 days after the occurrence of the event or the condition giving rise to such Claim was or should have been first recognized; (ii) two days less than the time period required under the Customer Agreement; (iii) one day before the first date on which the Change is implemented; or (iv) immediately if the Claim involves an emergency which threatens or endangers life or property. Such Notice of Claim must clearly identify the event or condition that gives rise to the Claim, a clear statement of why it constitutes a basis for adjustment, the specific provision(s) in the Contract Documents on which Subcontractor bases its Claim, all documentation supporting the Claim, and the amount of time and/or compensation claimed.
     2. **Review of Claim.** In reviewing Subcontractor’s timely Claim, ESG has the right to require Subcontractor to submit such additional documents and information as ESG may reasonably request. If, upon completion of such review, ESG determines that a Change Order is justified, ESG will issue a Change Order amending the Contract Amount or Contract Time or both, as appropriate. If Subcontractor disputes the determination made by ESG, as a condition precedent of any further action to resolve such Dispute, Subcontractor shall notify ESG in writing within ten business days following receipt of the decision and permit ESG fifteen additional business days to reconsider and, if ESG deems appropriate, modify its decision.
     3. **Claims Involving Third Parties.** If a Claim involves an action or omission of the Customer or another ESG subcontractor, the Subcontractor will only be entitled to relief on its Claim to the extent that ESG obtains relief from the Customer or other ESG subcontractor. Where the Claim involves ESG subcontractors in addition to Subcontractor, and the recovery obtained by ESG does not afford complete relief, ESG shall apportion the relief obtained among the affected subcontractors in full accord and satisfaction of the Claim.
  7. PAYMENT
     1. **Application for Payment.** Subcontractor shall submit an Application for Payment to ESG for approval and payment each month for work performed during that month in a form acceptable to ESG. If Subcontractor includes off-site stored materials or equipment in the Application for Payment, the invoiced amount shall only be for the direct cost of the materials and/or equipment, without any overhead or profit allocation. Upon request, Subcontractor shall provide evidence that such off-site stored materials are fully insured per the terms of this Agreement.
     2. **Submitting Application for Payment.** ESG must receive all Applications for Payment no later than the 20th of each month. Subcontractor must submit all Applications for Payment, applicable lien waivers, and certified payroll reports per one of the following methods:

If submitted electronically, forward to the following e-mail address:

# [AP@energysystemsgroup.com](mailto:AP@energysystemsgroup.com) (PREFERRED METHOD)

Energy Systems Group, LLC   
9877 Eastgate Court

Newburgh, IN 47630   
Attn: Accounts Payable

Mailing hard copy versions of the Applications for Payment will possibly delay payment. If hard copies are required, Subcontract may submit electronic copies for purposes of entry and hard copies for purposes of payment.

* + 1. **Schedule of Values.** Within 14 calendar days following the date of execution of the Work Order or such earlier time set forth in the Work Order, Subcontractor shall prepare and submit for ESG’s approval a schedule of values apportioned to the various divisions or phases of the Work. Subcontractor shall assign a monetary value for each line item in the schedule of values such that the total of all such items shall equal the Contract Amount. Subcontractor must itemize and support the schedule of values and any other substantiating data as ESG may require for the Applications for Payment. Subcontractor shall revise and resubmit the schedule of values until it is acceptable to ESG.
    2. **Timing and Conditions of Payment(s).** ESG shall only make progress payments to Subcontractor with sums received by ESG from Customer for Work performed by Subcontractor as reflected in ESG’s applications for payment. Further, subject to the conditions in Section 7.e., ESG shall pay Subcontractor within 30 days after ESG’s receipt and approval of each Application for Payment, unless otherwise required under Applicable Law. ESG may withhold a retainage if applicable and in the amount provided in the Work Order. Subcontractor must promptly repay any overpayments to ESG. Except with respect to Final Payment, no payment to Subcontractor operates as an approval of Subcontractor’s Work, materials, or any part thereof. Subcontractor’s costs shall be limited to actual, reasonable costs.
    3. **Circumstances Justifying Withholding.** ESG may withhold paying Subcontractor for the following reasons, in ESG’s sole and reasonable judgment: (i) defective, noncompliant, or nonconforming Work not remedied; (ii) third party claims or liens filed or reasonable evidence indicating probable filing; (iii) failure of Subcontractor to make prompt and proper payments to its subcontractors; (iv) damage to ESG or to Customer for which Subcontractor is liable; (v) reasonable evidence that the Work will not be completed within the Contract Time; (vi) failure to perform the Work according to the Contract Documents; (vii) failure to comply with the Contract Documents and Applicable Laws; (viii) failure of Subcontractor to provide payment or performance bonds, current, contractually-compliant certificates of insurance, current certified payroll, or an acceptable schedule of values for the Work covered by the application; (ix) Subcontractor’s personnel’s safety violations; or (x) Subcontractor is indebted to ESG under this Agreement, any Work Order(s), or any other agreements between ESG and Subcontractor. In all instances, when Subcontractor corrects the reason for withholding payment, ESG will make payment of the withheld amounts, without interest.
    4. **Supporting Documentation.** In support of each Application for Payment, Subcontractor shall furnish payroll affidavits, receipts, vouchers, releases of claims for labor and material, lower-tier quotes, a release and waiver of liens by Subcontractor and, if requested by ESG, its subcontractors in the form of the lien waivers as found at the following link: https://energysystemsgroup.com/terms/, and all other applicable documents and records. If a pending Change Order and/or Claim is unresolved at the time that Subcontractor submits an Application for Payment, Subcontractor may enumerate each such outstanding Change Order or Claim that is not to be included in the release and waiver. Subcontractor waives any pending Change Order or Claim not so enumerated and Subcontractor may no longer pursue compensation or an extension of time for such Change or Claim.
    5. **Prompt Payment.** Subcontractor shall promptly pay its subcontractors and suppliers the amounts to which they are entitled and in accordance with Applicable Law. Upon receipt of a notice from ESG that Subcontractor is not paying its subcontractors and suppliers accordingly, the Subcontractor shall promptly (i) supply ESG satisfactory evidence that Subcontractor has paid its subcontractors and suppliers; or (ii) post a bond indemnifying the Customer, ESG, and ESG's surety from a Claim or lien. ESG has the right to issue joint checks to Subcontractor and Subcontractor’s subcontractor(s).
  1. SAFETY OF PERSONS AND PROPERTY
     1. Subcontractor and its lower-tiered subcontractors shall comply with all Applicable Laws, occupational safety and health requirements or regulations, ESG safety and health requirements, and customer safety requirements that affect the Work.  Subcontractor will give adequate notices to authorities pertaining to the Work and shall secure and pay for all Applicable Permits, assessments, inspections and taxes necessary to complete the work in accordance with this Agreement.  Subcontractor agrees to comply with ESG’s site-specific safety plan or accident prevention plan, if any, prepared for this Project, which ESG shall provide to Subcontractor upon request.  Subcontractor agrees to supply all required safety equipment for its employees.  Subcontractor agrees to report immediately to the ESG Project Manager all jobsite injuries, accidents, near misses, and incidents experienced by its employees or lower-tiered subcontractor employees.   ESG maintains a zero-tolerance policy in regards to workers on the jobsite using or being under the influence of alcohol or illegal drugs.  Subcontractor shall indemnify, defend and hold ESG and Owner harmless from any fines, penalties and other costs assessed against ESG and/or Owner arising out of Subcontractor's failure to comply with this Section 8.
     2. If ESG prepares a Site-Specific Safety Plan for a Project, All Subcontractor’s personnel working on a Project need to sign such Site-Specific Safety Plan.
     3. Subcontractor shall provide adequate training, supervision and properly qualified individuals to perform the Work in a safe and reasonable manner. If Subcontractor or its subcontractors cannot perform the Work safely, Subcontractor shall stop Work immediately and notify ESG. ESG may stop work if it deems that Subcontractor is doing the work in an unsafe manner. Subcontractor may not restart Work until Subcontractor can perform the Work safely and Subcontractor amends the job safety analysis, if required by ESG, to incorporate the new protocol. Subcontractor will not be entitled to additional compensation or an extension of time if Work is stopped due to unsafe conditions.
     4. When Site Location’s labor count for Subcontractor is 25 employees or less, including Subcontractor’s subcontractor’s employees, Subcontractor will designate an employee at the Site Location who will act as Subcontractor’s designated safety representative with a duty to prevent accidents. Unless otherwise identified in writing, the designated safety representative will be the Subcontractor’s project superintendent. When Site Location’s labor count for Subcontractor is 26 employees or more, including Subcontractor’s subcontractor’s employees, Subcontractor will provide a dedicated, full-time safety professional on-site during construction and have and implement a formal safety program. Every additional 100 count in labor will require an additional full-time on-site safety professional. Prior to commencement of Work, Subcontractor shall provide the safety training and experience records for the designated safety representative for ESG’s approval.
     5. Hazardous Substances.
        1. Subcontractor shall be responsible for, and comply with all Applicable Laws regarding, the use, removal, transport, and proper disposal of all waste materials including Hazardous Substances brought onto the Site Location or generated by Subcontractor or any of its subcontractors. Subcontractor shall provide ESG with certification Subcontractor transported from the Site Location and properly disposed of all Hazardous Substances. Subcontractor shall defend, indemnify, and hold ESG and Customer harmless from and against any and all Claims (including, but not limited to, attorneys’ fees and costs of litigation) arising out of, resulting from, or in any manner related to the release or threatened release of any Hazardous Substances brought onto the Site Location or generated by Subcontractor during the course of performing the Work. This responsibility includes protecting ESG and Customer from any clean-up responsibility imposed under Applicable Laws.
        2. Except as specified in Subcontractor’s Scope of Work, Subcontractor shall not be responsible for any pre-existing Hazardous Substances at the Site Location and shall provide written notice to ESG immediately upon the discovery of any pre-existing Hazardous Substances. Except in case of emergency, neither Subcontractor nor its subcontractors shall disturb, disrupt, remove, alter, dislodge, or otherwise handle any pre-existing Hazardous Substances at the Site Location without the prior written consent of ESG. As appropriate, ESG will issue a Change Order to Subcontractor for the removal of any pre-existing Hazardous Substances from the Site Location. Subcontractor shall defend, indemnify and hold ESG and Customer harmless from and against any and all Claims (including, but not limited to, attorneys’ fees and costs of litigation) resulting from or arising out of Subcontractor or any of its subcontractors disturbing or causing a release of any pre-existing Hazardous Substances at the Site Location.
        3. UNDER NO CIRCUMSTANCES SHALL ESG OR CUSTOMER BE LIABLE FOR ANY INJURY TO SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, DUE TO SUBCONTRACTOR’S OR ITS SUBCONTRACTOR’S EXPOSURE TO HAZARDOUS SUBSTANCES.
  2. WARRANTIES AND CORRECTION OF WORK
     1. **Warranties.** Subcontractor warrants to ESG that all Work, materials and equipment furnished under the Work Order will be new, merchantable, of good quality, in the specified quality, free from defects, completed in a good and workmanlike manner, and in strict conformance with (i) Applicable Law, (ii) the Contract Documents, (iii) ESG’s overall Project design, and (iv) equipment manufacturers' warranty provisions. Without limiting the responsibility or liability of Subcontractor under the Contract Documents, Subcontractor shall assign all manufacturers’ warranties and attendant rights on materials or equipment incorporated in the Work to ESG and Customer. All warranties in this Section 9.a. are collectively referred to as, the “**Warranty**”. The Warranty and the other warranties contained elsewhere in the Contract Documents or implied by law, are cumulative and not alternative or exclusive. No warranty shall alter or limit any other warranty, obligation, or any other remedy or right under the Contract Documents or provided by law. Any warranty period established by the Contract Documents relates only to the specific obligation of Subcontractor to correct the Work and has no relationship to the Project Schedule, nor any statute of limitations regarding when proceedings may be commenced against Subcontractor with respect to its warranty obligations.
     2. **Correction of Work.** At Subcontractor’s expense, Subcontractor shall correct, repair, or replace all defective and nonconforming Work, as well as any resulting damages, discovered by ESG or Customer during the warranty term specified in the Work Order. The Warranty and the other warranties set forth elsewhere in the Contract Documents shall survive Substantial Completion and Final Completion. Subcontractor must start, promptly perform and prosecute to completion all corrective Work as soon as possible or as specifically required per ESG’s written notice. If Subcontractor fails to timely correct the defective or nonconforming Work, ESG may either correct or accept such defective or nonconforming Work. Subcontractor shall be responsible for all of ESG’s costs and expenses for corrective actions (including engineering and other consultant’s fees and expenses) plus a fee equal to 15% of the repair costs. If ESG accepts defective or nonconforming Work, a Change Order will be issued to reflect a reduction in the Work Order Contract Amount.
  3. INSURANCE AND BONDS:
     1. During the Term and for a period of three years with the exception of Professional Liability (if required in the Work Order) for a period of four years thereafter, Subcontractor shall, at its own expense, maintain and carry insurance in full force and effect with insurance carriers having an AM Best’s Rating of A- VIII or better, and authorized to provide insurance in the state in which the Work is located. Such insurance shall be primary to any insurance maintained by ESG, and shall include, but not be limited to the following:

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| --- | --- | --- |
| **INSURANCE TYPE** | **INSURANCE LIMITS** | **ADDITIONAL REQUIREMENTS** |
| Worker’s Compensation and Employer’s Liability | Not less than $1,000,000 per accident |  |
| Commercial General Liability | Not less than $1,000,000 per occurrence (if coverage is subject to aggregate, the aggregate limit shall be $2,000,000) | * Coverage at least as broad as the Insurance Services Office Commercial General Liability Coverage “occurrence” form CG 00 01 04 13 |
| Business Auto | Not less than $1,000,000 per accident | * Coverage at least as broad as the Insurance Services Office Business Auto Coverage form CA 00 01 11 20 covering Automobile Liability, symbol 1 “any auto” |
| Excess / Umbrella | Provided on the Work Order | * Excess over and no less broad than the underlying Employer’s Liability, Commercial General Liability & Business Auto requirements listed above |
| Professional Liability (if required in the Work Order) | Not less than $1,000,000 per claim (if coverage is subject to aggregate, the aggregate limit shall be $2,000,000) | * Coverage shall be for a professional error, act, or omission arising out of the Scope of Work; * Subcontractor shall maintain such coverage continuously throughout its performance of its Work and for a period of four (4) years thereafter |
| Pollution Liability (if required in the Work Order) | Not less than $1,000,000 per claim (if coverage is subject to aggregate, the aggregate limit shall be $1,000,000) | * Coverage shall be for pollution exposures arising out of the Scope of Work |

* + 1. Neither shall this Section 10 nor the actual amounts of insurance maintained by Subcontractor or its subcontractors limit or reduce Subcontractor’s liability and indemnity obligations in this Agreement.
    2. **Additional Insurance Provisions.**
       1. Upon execution of this Agreement, upon execution of a Work Order, and at each insurance renewal thereafter, Subcontractor shall furnish ESG with certificates of insurance and endorsements of all required insurance for Subcontractor satisfactory to ESG. ESG may inspect the original policies or require complete certified copies at any time.
       2. The certificates shall state neither Subcontractor nor insurance carriers shall substantially modify or cancel its insurance coverage except after providing 30 days prior written notice to ESG and 10 days in the event of cancellation for non-payment of premium.
       3. Upon request, Subcontractor shall furnish ESG the same evidence of insurance for its subcontractors as ESG requires of Subcontractor or as required under Applicable Law.
       4. Acceptance by ESG of an improper certificate shall not constitute a waiver, release, or modification of any of the insurance coverages and endorsements required hereunder.
       5. Waiver of subrogation, as permitted by law, in favor of ESG’s insurers, ESG and its officers, directors, employees, agents, affiliates, subsidiaries and parent companies.
       6. Additional insured coverage on a primary and non-contributory basis in favor of ESG, its officers, directors, employees, agents, affiliate, subsidiary, and parent companies.
       7. Underlying limit requirements may be satisfied by a combination of primary, umbrella, or excess insurance.

# Performance and Payment Bonds: Upon ESG’s request, Subcontractor shall furnish performance and payment bonds with respect to Work performed pursuant to a Work Order in the full amount of the Contract Amount. All bonds shall be on AIA A-312 (2010) edition forms and issued by a surety company licensed in the state in which the Project is located. The surety company shall have a minimum AM Best rating of A-VIII and be acceptable to ESG. The cost of all bonds is included in Subcontractor’s price. The bonds shall cover all Work, including any changes, and shall remain in effect until Final Acceptance, Final Payment, and receipt by ESG of all lien releases.

* 1. DELAYS, TERMINATION, OR SUSPENSION

# Delays. Time is of the essence in the performance of the Work. If Subcontractor causes, or there is substantial certainty Subcontractor will cause, a Delay, and if Subcontractor fails to cure such Delay within five working days following ESG’s written notice, ESG may, at its option, (i) take such steps as are necessary to overcome the condition at Subcontractor’s cost, or (ii) terminate for cause Subcontractor's performance of all or a part of the Work per Section 11.b, Unless ESG and Subcontractor have agreed to liquidated damages as a remedy, Subcontractor shall be liable for and indemnify, reimburse and hold ESG harmless for such damages to the extent caused by Subcontractor.

# In the event of a Delay caused by a Force Majeure, Subcontractor’s sole and exclusive remedy shall be an extension of the Contract Time equal to the period of Delay. Subcontractor must, within 10 calendar days from the date when Subcontractor discovers the Force Majeure, furnish ESG a request for extension of time, along with Subcontractor’s justification and supporting documentation, including: (1) nature of the Delay; (2) date (or anticipated date) of commencement of Delay; (3) activities on the Project Schedule affected by the Delay, and/or new activities created by the Delay, and their relationship with existing activities; (4) reason for Delay; (5) identification of person(s), organization(s), or event(s) responsible for the Delay; (6) anticipated extent of Delay; (7) number of days of extension of the Contract Time being requested by Subcontractor; and (8) any recommended action to avoid or minimize current or additional Delays. Subcontractor must document extensions to the Contract Time in a Change Order or Field Directive signed by ESG.

# If a Delay exceeds 120 consecutive days due to a Force Majeure event, either Party may terminate a Work Order upon 7 days written notice to the other Party. If the Parties terminate a Work Order under this Section 11.a.ii, Subcontractor may recover from ESG payment for Work executed prior to the termination, including reasonable overhead and profit.

# Termination: ESG may terminate this Agreement or any Work Order for cause or convenience by providing Subcontractor with written notice of termination and its effective date. Upon receipt of such notice, Subcontractor shall: (a) immediately discontinue the Work on the date and to the extent specified in the notice; (b) place no further orders for materials, services or facilities other than as may be necessary or required for completion of such portion of the Work that is not terminated; (c) promptly cancel all orders and subcontracts to the extent they relate to the performance of the Work terminated or assign to ESG those orders and subcontracts and revoke agreements specified in such notice; (d) assist ESG as specifically requested in the maintenance, protection and disposition of property acquired by ESG under a Work Order; and (e) deliver to ESG or dispose of, as ESG may direct, all materials, supplies or work-in-process or raw materials identified in the Work Order.

* + - 1. Termination for cause: If the termination is for Cause, ESG may, subject to any prior rights of the surety: (a) take possession of all materials, equipment, tools, and construction equipment and machinery at the Site Location owned by Subcontractor; (b) accept assignment of subcontracts; and (c) finish the Work by whatever reasonable method ESG deems expedient. ESG may procure supplies or services similar to those so terminated and Subcontractor will be liable to ESG for any excess costs for such similar supplies or services, together with any such additional, incidental and consequential damages. This obligation for payment survives the termination of this Agreement or individual Work Order. Subcontractor will not be entitled to receive further payment until the Work is finished. If it is determined, by litigation, arbitration or otherwise, that termination for cause was unjustified for any reason, the termination shall be deemed a termination for convenience and Subcontractor’s remedies shall be limited to those provided for a termination for convenience.
      2. Termination for convenience: If the termination is for convenience, ESG shall pay Subcontractor for all Work performed up to the effective date of termination including fully burdened labor costs; subcontractor services performed; materials and equipment procured (including shipping and applicable taxes); equipment and materials installed; earned profit; and any equipment cancellation and/or restocking fees. Subcontractor will not be paid for anticipated profits or overhead. Subcontractor shall, as soon as practical after receiving a notice of termination for convenience, submit to ESG Subcontractor’s statement showing all unavoidable costs incurred by Subcontractor in the performance of the Work terminated for convenience. ESG shall, within 30 days after receipt of such statement, pay to Subcontractor all amounts properly included thereon. Subcontractor’s acceptance of such payment constitutes a waiver of all further claims by Subcontractor against ESG under the applicable Work Order. Upon ESG’s payment in this subsection, Subcontractor shall transfer to ESG title to all materials, equipment and other property included in or ordered for the terminated Work.

# ESG’s Right to Suspend Work:

* + - 1. ESG may order in writing Subcontractor to suspend, Delay or interrupt all or any part of the Work for such period as (a) requested by the Customer; or (b) ESG determines is necessary due to acts or omissions of Subcontractor. Upon receipt of such notice, the Subcontractor shall: (a) immediately discontinue the Work on the date and to the extent specified in the notice; (b) place no further orders for materials, services or facilities, other than as may be necessary or required for completion of such portion of the Work not terminated; (c) promptly cancel, upon terms satisfactory to ESG, all orders and subcontracts related to the performance of the Work terminated or assign to ESG those orders and subcontracts and revoke agreements specified in such notice; and (d) continue to protect and maintain all supplies and items of equipment.
      2. The Subcontractor shall resume performance of the suspended Work per the instructions in the notice. The Subcontractor hereby waives any claim it may have for additional time or extra compensation because of any suspension of the Work unless Subcontractor makes such claim within 10 days after the Subcontractor's receipt of notice to resume the Work and the Subcontractor has submitted for review a revised Project Schedule. ESG shall not grant compensation or extension of time under this Section if that suspension results from Subcontractor's noncompliance with this Agreement or Work Order, or if the Work would have been suspended for reasons other than ESG’s suspension order.
      3. If ESG orders a suspension, Delay or interruption of the Work, an adjustment of the Contract Amount will be made for any direct increases in Subcontractor’s costs of performance actually incurred, including a mark-up for overhead, profit, and Contract Time directly and necessarily caused by such suspension, Delay or interruption. Such mark-up shall not exceed 10% of the increase to the Contract Amount. If the suspension, Delay, or interruption is requested or caused by the Customer, Subcontractor will only have the right to an adjustment if and to the extent the Customer adjusts the Customer Agreement.
    1. **No Waiver of Rights**. No provision in this Section 11 relieves Subcontractor from its obligation to continue the performance of a Work Order to the extent not terminated, delayed, or suspended. ESG’s failure to exercise any particular rights or remedies set forth in this Section 11 does not prevent, nor operates as a waiver of, any other rights or remedies.
  1. INDEMNIFICATION **SUBCONTRACTOR WILL DEFEND AND INDEMNIFY ESG, ITS SURETY, ITS CUSTOMER, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, OWNERS, SUCCESSORS, AND ASSIGNS (COLLECTIVELY, THE “INDEMNITEES”) FROM ALL CLAIMS, INCLUDING ATTORNEY FEES, ARISING OUT OF (I) SUBCONTRACTOR’S BREACH OF ANY PROVISION OF THIS AGREEMENT; (II) SUBCONTRACTOR’S BREACH OF ANY CONTRACT BETWEEN SUBCONTRACTOR AND ANY THIRD PARTY; (III) ANY DELAY CAUSED BY SUBCONTRACTOR; (IV) SUBCONTRACTOR’S VIOLATION OF ANY APPLICABLE LAW, OR (V) SUBCONTRACTOR’S OR ITS SUBCONTRACTORS’ NEGLIGENCE, WILLFUL MISCONDUCT OR IMPROPER PERFORMANCE OF THIS AGREEMENT. SUBCONTRACTOR WILL NOT BE OBLIGATED TO INDEMNIFY AN INDEMNITEE TO THE EXTENT THE INDEMNITEE’S OWN NEGLIGENCE OR MISCONDUCT CAUSED THE LOSS GIVING RISE TO THE LIABILITY FOR WHICH INDEMNIFICATION IS SOUGHT. THE INDEMNITEES’ RIGHTS TO INDEMNIFICATION WILL BE INDEPENDENT OF ANY RIGHTS UNDER THE INSURANCE PROVISIONS IN THIS AGREEMENT. ESG WILL HAVE THE RIGHT TO BE PRESENT AND REPRESENTED BY COUNSEL AT ALL TIMES DURING ANY LITIGATION AND OTHER DISCUSSIONS RELATING TO ANY CLAIMS COVERED BY AN INDEMNITY OBLIGATION IMPOSED ON SUBCONTRACTOR BY THIS AGREEMENT. SUBCONTRACTOR WILL NOT SETTLE OR COMPROMISE ANY SUCH LITIGATION WITHOUT ESG’S CONSENT IF SUCH SETTLEMENT OR COMPROMISE ADMITS FAULT ON THE PART OF ESG, OBLIGATES ESG OR ITS INSURER TO MAKE ANY PAYMENT OR PART WITH ANY PROPERTY, OBLIGATES ESG TO ASSUME ANY OBLIGATION OR GRANT ANY LICENSE OR OTHER RIGHTS, OR SUBJECTS ESG TO ANY INJUNCTION DUE TO SUCH SETTLEMENT OR COMPROMISE. THESE INDEMNIFICATION OBLIGATIONS MAY NOT BE LIMITED BY THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR, OR ITS SUBCONTRACTORS, UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFITS ACTS, OR OTHER BENEFIT ACTS.**
  2. DISPUTE RESOLUTION.The Parties shall attempt to resolve any Dispute by either Party initiating the following process:
     1. **Field Representatives’ Meeting:** Within 15 days after one Party’s written notice of the Dispute to the other Party, ESG’s project manager shall meet with Subcontractor’s project representative in a good faith attempt to resolve the Dispute.
     2. **Executives’ Meeting:** If ESG’s and Subcontractor’s project representatives fail to resolve the Dispute, a senior executive for ESG and for Subcontractor, neither of whom have day-to-day Project management responsibilities, shall meet within 30 days after notice in Section 13.a. to attempt to resolve the Dispute.
     3. **Mediation**: If the Parties’ Senior Executives fail to resolve the Dispute, the Parties shall attempt to resolve the Dispute by mediation under the Commercial Mediation Procedures of the American Arbitration Association, which shall be a condition precedent to the institution of legal or equitable proceedings by either Party. Once one Party files a request for mediation, the Parties agree to conclude the mediation within 60 days of filing of the request. Either Party may terminate the mediation at any time after the first session by delivering such termination in person to the other Party’s representative and the mediator.
  3. CONFIDENTIALITY. All non-public, confidential, or proprietary information of ESG, Customer, and Subcontractor ("**Confidential Information**"), including, but not limited to, Specifications, samples, patterns, Drawings, documents, data, business operations, Designs, customer lists, pricing, discounts, whether disclosed by the disclosing Party orally or in written, electronic, or other form or media, or otherwise learned by the receiving Party in providing the Work, and whether or not marked, designated, or otherwise identified as "confidential," is confidential and may not be disclosed or copied unless authorized by the disclosing Party in writing. Confidential Information does not include any information that: (a) is or becomes generally available to the public other than as a result of the receiving Party's breach of this Agreement; (b) is obtained by the receiving Party on a non-confidential basis from a third-party that was not legally or contractually restricted from disclosing such information; or (c) the receiving Party establishes by documentary evidence, such information was in the receiving Party's possession prior to disclosing Party's disclosure; or (d) was or is independently developed by the receiving Party without using any Confidential Information. The Disclosing Party shall be entitled to injunctive relief for any violation of this Section.
  4. CYBER SECURITY
     1. **Definition.** 
        1. “Security Breach” means any act or omission that contributes to, facilitates, or allows any of the following:
           1. material compromise of the security, confidentiality or integrity of ESG’s Confidential Information (“**ESG’s Information**”);
           2. Data Breach (as addressed below); or
           3. failure or compromise of the physical, electronic, technical, administrative or organizational safeguards put in place by Subcontractor that relates to the protection of the security, confidentiality or integrity of ESG’s Information.
        2. Additionally, Subcontractor’s violation of the Privacy Act of 1974 constitutes a Security Breach.
     2. **Security Contact.** Subcontractor shall: (i) provide ESG with the name and contact information for an employee of Subcontractor who shall serve as ESG’s primary security contact and shall be available to assist ESG twenty-four (24) hours per day, seven (7) days per week as a contact in resolving obligations associated with a Security Breach; and (ii) notify ESG of a Security Breach as soon as practicable, but no later than twenty-four (24) hours after Subcontractor becomes aware of the Security Breach.  Subcontractor agrees to fully cooperate with ESG in ESG’s handling of the Security Breach, including, without limitation: (i) assisting with any investigation; (ii) providing ESG with physical access to the facilities and operations affected; (iii) facilitating interviews with Subcontractor’s employees and others involved in the matter; and (iv) making available all relevant records, logs, files, data reporting and other materials required to comply with Applicable Law, regulation, industry standards or as otherwise required by ESG.
     3. **Representations and Warranties.** If ESG or Customer data is held on Subcontractor’s system or if Subcontractor is electronically connecting ESG’s or Customer’s system, Subcontractor represents and warrants the following: (a) it has in place industry-standard technical and organizational measures (including policies, procedures and training on these measures) to manage the ability of its network and information systems to resist, at a high level of confidence, a Security Breach; (b) it has in place valid insurance protection against a Security Breach or any related cyber security risks; (c) it has not been the subject of any material Security Breach in the last two years; and (d) it has not had any liability associated with or arising from any Security Breach in the last two years. If Subcontractor is unable to represent and warrant that it has not been subject to either (c) or (d) of this Section 16.c., the Subcontractor shall provide to ESG in writing information detailing each occurrence, the mitigation efforts taken, and the ultimate resolution if the occurrence is no longer ongoing.
     4. **Certification of Compliance.** The Subcontractor’s signature shall act as certification of compliance with this Agreement, as well as all Applicable Laws and industry standards, including but not limited to the Procurement Integrity Act, Privacy Act of 1974, Trade Secrets Act, Cybersecurity Maturity Model Certification (CMMC), Federal Acquisition Regulation (FAR) as applicable, and the Department of Defense Federal Acquisition Regulation Supplement (DFARS) as applicable **including incorporation of the active revision, at the time of award, of the National Institute of Standards and Technology (NIST) SP 800-171 Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations** compliance. Subcontractor grants ESG or, upon ESG’s election, a third party on ESG’s behalf, permission to perform an assessment, audit, examination or review of all controls in Subcontractor’s physical and/or technical environment in relation to all ESG’s Information being handled and/or services being provided to ESG pursuant to this Agreement.  Subcontractor shall fully cooperate with such assessment by providing access to knowledgeable personnel, physical premises, documentation, infrastructure and application software that processes, stores or transports ESG’s Information for ESG pursuant to this Agreement.
     5. **Non-Repudiation.** Subcontractor’s data security system shall provide for origin authentication, data integrity, and signer non-repudiation.  Subcontractor shall use industry-standard login credential protection practices, including practices designed to maintain the confidentiality and integrity of login credentials when such credentials are assigned, distributed, and stored.
     6. **Data Access.** During the Term, ESG may view, review, or otherwise analyze the data stored, inputted or otherwise collected by Subcontractor for maintenance, system administration, technical support, and for any other purpose necessary to perform its obligations under this Agreement and/or to comply with laws, rules, and regulations. Upon ESG’s request, Subcontractor shall make available at all reasonable times the data described in this paragraph for examination, audit, or reproduction.
     7. **Data Privacy.** Subcontractor shall process all Personal Data on behalf of ESG in accordance with Applicable Laws and ESG’s reasonable requests, including: (i) restricting employee and agent/subcontractor access to Personal Data; (i) following ESG’s instructions in connection with processing Personal Data; (iii) not disclosing Personal Data to any third party without ESG’s written permission; (iv) applying appropriate security measures to protect Personal Data; and (v) deleting any Personal Data in Subcontractor’s possession or control at the expiry or termination of this Agreement unless otherwise agreed between the Parties. In the event of any unauthorized, unlawful, and/or unintended processing, access, disclosure, exposure, alteration, loss, or destruction of Personal Data, Subcontractor shall immediately notify and cooperate with ESG to investigate and remediate such incident and provide appropriate response and redress. “**Personal Data**” means any information that can be used directly or indirectly, alone or in combination with other information, to identify an individual.
     8. **Data Breach.** If Subcontractor becomes aware that data may have been accessed, disclosed, or acquired without proper authorization and contrary to the terms of this Agreement (a “**Data Breach**”), then Subcontractor shall report to ESG such Data Breach within 72 hours of discovery, and shall immediately take such actions as may be necessary to preserve forensic evidence and eliminate the cause of the Data Breach.
     9. **Data Protection.** Subcontractor shall implement controls reasonably necessary to prevent unauthorized use, disclosure, loss, acquisition of, or access to ESG’s Information. This includes personnel security measures, such as background checks.
  5. MISCELLANEOUS PROVISIONS
     1. **Stylistics.** Cross references, captions, headings, and citations of sections and subsections in this Agreement are for the convenience of the Parties, and they are not intended to be interpretive, plenary or exhaustive.
     2. **Order of Precedence.** In the event of a conflict or discrepancy among the various Contract Documents, the documents are to be given precedence in the following order (in descending order of precedence): (i) the Work Order, (ii) this Agreement, (iii) Specifications, (iv) Drawings (large-scale over small-scale), (v) meeting minutes, and (vi) installation, operations, and maintenance manuals.
     3. **Unenforceable Provisions.** If any clause of the Contract Documents is held as a matter of law to be unenforceable or unconscionable, the remainder of the Contract Documents will be enforceable without such clause.
     4. **Notices.** Any notices must be in writing and delivered by electronic mail, hand or first class certified U. S. Mail, return receipt requested to the other Party’s address and will be deemed given when delivered, or, if delivery is not accomplished by some fault of the addressee, when tendered.
     5. **Signs.** Neither Subcontractor nor its subcontractors may place signs on the Site Location without ESG’s prior written approval.
     6. **Governing Law.** In the event of a Dispute specific to a Work Order, this Agreement shall be construed in accordance with the laws of the venue and jurisdiction where the Work site is located. If the Dispute is not specific to a Work Order, this Agreement shall be construed in accordance with the laws of the state of Indiana, without the application of its choice of law rules and shall be binding upon the Parties and their successors and assigns. The prevailing Party in any action or proceeding brought to enforce the terms of this Agreement or arising out of this Agreement may recover its reasonable costs and attorneys’ fees expended in connection with such an action or proceeding from the other Party.
     7. **Flowdown Provisions.** Subcontractor shall comply with all applicable terms and conditions from the Customer Agreement. For all Work Orders on a Project for a federal Customer, Subcontractor shall fully comply with all federal Applicable Laws and contract provisions that ESG is required to flow down from the Customer Agreement (the “**Flowdowns**”). Such Flowdowns are listed in the Federal Business Services Addendum found at this link: <https://energysystemsgroup.com/terms/> and are incorporated into the Contract Documents if the Project is for a federal Customer. The Parties shall amend this Attachment B accordingly and promptly via a Change Order or amendment if a federal Customer requires ESG to amend the Applicable Laws or contract provisions in the Customer Contract.
     8. **Documents and Samples at Site Location.** Subcontractor shall maintain at the Site Location in good order the following documents for ESG’s inspection and copying:
        1. All documents which arise out of the Contract Documents or the construction of the Project, including, without limitation: subcontracts; shop drawings, submittals, Change Orders; Field Directives; Project correspondence; job meeting minutes, memoranda and notes; and any other related documents pertaining to the Contract Documents and/or the Scope of Work.
        2. A current marked set of Drawings and Specifications showing record, or "as-built", conditions, configurations and locations to facilitate the preparation of record, or "as-built", drawings. Subcontractor shall update all Drawings, Specifications and submittals under for construction on-site to “as-built” on a weekly basis.
     9. **Financial Books and Records.** Subcontractor shall maintain financial books, documents, and cost accounting records with respect to the Contract Amount on an accrual basis in accordance with generally accepted accounting principles. Subcontractor shall make these records available to ESG, upon reasonable request, if required by law, or if requested by the Customer, for audit, inspection, or copying.
     10. **No Third-Party Beneficiaries.** This Agreement does not create any third-party beneficiary rights or obligations.
     11. **Successors and Assigns**. Neither Party may assign this Agreement without the written consent of the other Party, which consent may not be withheld or delayed unreasonably. Provided however, ESG may assign this Agreement and all related agreements without the consent of Subcontractor (i) to an Affiliate of ESG; (ii) pursuant to a merger, consolidation, transfer of substantially all its assets; or (iii) by operation of law. ESG may assign its rights, but not its obligations, under the Contract Documents without the consent of Subcontractor to (x) a lender providing financing to ESG, or (y) a special purpose entity that is an Affiliate of such lender. This Agreement will be fully binding on the Parties and their respective successors and permitted assigns. Any assignment made in contravention of this section is void and unenforceable.
     12. **Counterparts**. The Parties may execute this Agreement and any Work Order in counterparts, each counterpart constituting an original, and all counterparts, collectively, constituting only one Agreement or Work Order, as applicable. The signatures of each Party need not appear on the same counterpart.
     13. **ESG’s Policies**. Subcontractor and its subcontractors shall develop and maintain policies regarding non-use of drugs, anti-harassment, and cell phone usage that are at least as strict as ESG’s policies with respect to these topics. Subcontractor’s project manager shall inform Subcontractor’s employees and its subcontractors of these policies and ensure that those persons and entities comply with those policies.
     14. **Ethics and Compliance Code.** Subcontractor shall comply with ESG’s Ethics and Compliance Code of Conduct for Consultants, Contractors, Suppliers and Vendors found at this link: <https://energysystemsgroup.com/terms/>.
     15. **Harassment**. Harassment of any kind is prohibited and will not be tolerated. Subcontractor and its subcontractors shall implement policies and procedures to identify and remedy issues of harassment based on race, color, religion, sex (including gender identity, gender expression, and pregnancy), national origin, age, disability, veteran status, political preference, sexual orientation, marital status, citizenship, or other status protected by law or regulation.
     16. **Conflicts of Interest**. Neither Subcontractor nor any director, employee or agent of Subcontractor or its subcontractors may give to or receive from any director, officer, employee or agent of ESG or Customer, any gift, entertainment or other favor of significant value or any commission, fee, or rebate without prior written notification and consent of ESG. Likewise, neither Subcontractor nor any director, employee, or agent of Subcontractor or its subcontractors, without prior written notification and consent of ESG, enter into any business relationship with any director, officer, employee, or agent of ESG or any Affiliate or of any Customer, unless such person is acting for and on behalf of ESG or such Customer. Subcontractor shall promptly notify ESG of any violation of this section and if Subcontractor receives any consideration because of such violation, it must pay or credit such compensation to ESG. Additionally, in the event of any violation of this section, including any violation occurring prior to the Effective Date that resulted in ESG’s consent to enter into this Agreement, ESG may terminate this Agreement. Any representatives authorized by ESG may audit all records of Subcontractor and its subcontractors and vendors for the sole purpose of determining whether there has been compliance with this section.
     17. **179D Tax Benefits.** ESG shall have overall primary responsibility of design for the Project. As such, Subcontractor acknowledges that ESG will be the “designer” as that term is identified in Internal Revenue Code (IRC) Section 179D, and ESG will have the exclusive right to report to any federal, state, or local agency, authority or other party, including under IRC Section 179D, any deduction, credit, or tax benefit associated with the Work. Subcontractor shall assist in ESG’s tax compliance, upon job completion, Subcontractor agrees to have its authorized representative execute the required Inspection, Certification and Calculation documents related to Section 179D of the Internal Revenue Code. ESG will be responsible for preparing these Documents, all accompanying documentation and the contents therein. Furthermore, the representative signing this contract agrees that ESG will be designated the sole Section 179D beneficiary.
     18. **Imports/Exports.** Subcontractor is responsible for exporting and importing all property related to the Work including obtaining all Applicable Permits. Subcontractor is responsible for all import and export costs, including any temporary import bonds. If an export license or other authorization issued to Subcontractor restricts the use, distribution transfer or re-export of items provided to ESG, Subcontractor shall provide said restrictions to ESG in writing at the time the item is provided to ESG. If Subcontractor receives an export license, Subcontractor shall specify the Export Control Classification Number (“ECCN”), export control list number, or other classification information in the notices provided to ESG.
     19. **Interpretation; Representation by Counsel.** In no instance should this Agreement be interpreted more strictly against either Party due to the rule or conclusion that a document should be construed more strictly against its drafter. Both Parties agree and acknowledge that they had the opportunity to be represented by legal counsel of their choosing.
     20. **Entire Agreement; Incorporation of Attachments.** This Agreement, including all referenced attachments attached hereto or identified within this section, along with any subsequent written amendments or Change Orders, constitutes the entire agreement between the parties and supersedes any and all other agreements, oral or written, between the parties with respect to the subject matter hereof. The Parties may amend this Agreement only by a writing signed by a duly authorized representative of each Party.

The Parties have executed this Agreement as of the Effective Date.

Energy Systems Group, LLC (“**ESG**”) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“**Subcontractor**”)

By: By: XXXXXXXXXXXXXXXXXXXXXXXXX

Name: Name:

Title: Title:

Date: Date:

**ATTACHMENT A –WORK ORDER TO MASTER SUBCONTRACT AGREEMENT**

This Work Order (“**Work Order**”) dated \_\_\_\_\_\_\_\_\_\_\_\_, 20XX (“**Work Order Effective Date**”) is issued pursuant to and is subject to the terms and conditions of the Master Subcontract Agreement by and between Energy Systems Group, LLC (“**ESG**”) and Subcontractor dated \_\_\_\_\_\_\_\_ (the “**Agreement**”). This Work Order incorporates the terms and conditions of the Agreement. Any terms not defined in this Work Order shall be as defined in the Agreement.

|  |  |
| --- | --- |
| **SUBCONTRACTOR** | Click or tap here to enter text. |
| **SUBCONTRACTOR’S ADDRESS** | Click or tap here to enter text. |
| **SUBCONTRACTOR’S PHONE NUMBER** | Click or tap here to enter text. |
| **SUBCONTRACTOR’S TAX ID # or SSN** | Click or tap here to enter text. |
| **MASTER SUBCONTRACT AGREEMENT NUMBER** | **#\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** |
| **ESG PROJECT NUMBER** | **#\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** |
| **PROJECT NAME** | Click or tap here to enter text. |
| **WORK ORDER NUMBER** | Click or tap here to enter text. |
| **WORK ORDER CONTRACT AMOUNT** | **$X.XX** |
| **RETENTION PERCENTAGE** | **X%** |
| **PAYMENT & PERFORMANCE BONDS REQUIRED** | YES or  NO |
| **PREVAILING WAGES REQUIRED** | YES or  NO |
| **LIEN WAIVERS REQUIRED** | YES or  NO |
| **JOB SAFETY ANALYSIS REQUIRED** | YES or  NO |
| **WARRANTY TERM** | Years from date of Final Completion: **1** |
| **PROFESSIONAL LIABILITY INSURANCE REQUIRED** | YES or  NO |
| **POLLUTION LIABILITY INSURANCE REQUIRED** | YES or  NO |
| **EXCESS/UMBRELLA INSURANCE LIMIT** | $X,XXX,XXX |
| **CHANGES TO INSURANCE (if applicable)** | Click or tap here to enter text. |
| **CUSTOMER** | Click or tap here to enter text. |
| **WORKSITE ADDRESS** | Click or tap here to enter text. |
| **SUBSTANTIAL/FINAL COMPLETION DATES** | See **Attachment A2** |
| **SUBCONTRACTOR PROJECT MANAGER** | Name: Click or tap here to enter text.  Minimum Committed Hrs/Week On-Site: Click or tap here to enter text. |
| **SUBCONTRACTOR PROJECT SUPERVISOR** | Name: Click or tap here to enter text.  Minimum Committed Hrs/Week On-Site: Click or tap here to enter text. |

1. **LIEN WAIVERS AND JOB SAFETY ANALYSIS**. If ESG requires Subcontractor to provide a lien waiver or Job Safety Analysis, the forms are found at the following link: <https://www.energysystemsgroup.com/terms/>.
2. **COUNTERPARTS**. The Parties may execute this Work Order in counterparts, each counterpart constituting an original and all counterparts, collectively, constituting only one Work Order. In the event that any signature is delivered by e-mail in “.pdf” format data file, such signature will have the same binding and effect as if such “.pdf” signature page was an original thereof.
3. **CUSTOMER AGREEMENT REQUIREMENTS.** If the Subcontractor’s proposal, quote, or portions thereof are included within Attachment A1 to this Work Order, the Parties agree that Subcontractor’s proposal shall not be binding on the Parties and shall not be part of this Work Order, except for the portions that define the scope of Subcontractor’s Work. If there is a conflict between the terms of this Work Order and any Attachment, the terms of this Work Order shall control. Subcontractor shall comply with all requirements of the Customer Agreement that flow down to subcontractors and that are listed in Attachment A4 to this Work Order. If there is a conflict between the terms of this Work Order and the obligations as described in Attachment A4, the inconsistency shall be resolved by an interpretation requiring the most stringent degree of obligation and responsibility to the Customer or to ESG, as the case may be, on the part of the Subcontractor.
4. **INVOICING.** Invoicing requirements (including lien waivers, invoicing structure, payment terms, submission of payroll documents, if applicable) are fully incorporated into the Agreement.
5. **ATTACHMENTS**. The following are attachments to this Work Order: **Attachment A1 - Scope of Work & Site Locations**; **Attachment A2 - Project Schedule**; **Attachment A3 - Work Order Price Breakdown**; **Attachment A4 – Customer Agreement Flowdowns**; **and Attachment A5 – Prevailing Wage Determination**

IN WITNESS WHEREOF, the Parties have executed this Work Order as of the Work Order Effective Date.

|  |  |
| --- | --- |
| Energy Systems Group, LLC (“**ESG**”) | (“**Subcontractor**”) |
|  |  |
| By: | By: |
| Name: | Name: |
| Date: | Date: |
| Title: | Title: |

**ATTACHMENT A1**

**SCOPE OF WORK & SITE LOCATIONS**

*Insert project Scope of Work, Scope of Work Attachments, and Site Locations here*

**ATTACHMENT A2**

**PROJECT SCHEDULE**

Subcontractor shall regularly monitor the progress of the Work, identify variances between scheduled and probable completion dates, and promptly report such variances to ESG. Subcontractor shall determine the adequacy of the personnel working on the Project and determine whether the equipment and the availability of materials and supplies are sufficient for Subcontractor to meet the Project Schedule. At its sole cost and expense, Subcontractor shall implement appropriate action to ensure that it complete its Work in accordance with the following Project Schedule.

Substantial Completion Date:

Final Completion Date:

**ATTACHMENT A3**

**WORK ORDER PRICE BREAKDOWN (*if not already provided in Attachment A1*)**

**ATTACHMENT A4**

**CUSTOMER AGREEMENT FLOWDOWNS**

*FLOWDOWNS MAY INCLUDE:*

*TAX EXEMPT CERTIFICATES*

*STATE AND/OR FEDERAL LAWS, RULES, AND REGULATIONS*

**ATTACHMENT A5**

**PREVAILING WAGE DETERMINATION**

**FOR COUNTY, STATE**

**DECISION #: \_\_\_\_\_\_\_\_\_\_\_\_ DATED \_\_\_/\_\_\_/\_\_\_**

The aforementioned Work Order is subject to the Service Contract Act (SCA) and/or Davis-Bacon Act (DBA). Subcontractor shall pay no less than the wage rates required by the SCA or DBA, as applicable

*For SOW’s that cross over -multiple counties, additional language may be require**d.*

*<The scope of work for this Work Order may cover multiple counties. Each county may have unique wage determinations, all have been provided within this Attachment. Subcontractor is required to submit separate certified payroll reports for each county for the entirety of this agreement.>*