**Fabcon Precast, LLC (“Fabcon”) Proposal Terms and Conditions (“Terms and Conditions”)**

1. **Binding** **Terms and Conditions**. These Terms and Conditions shall govern any work performed by Fabcon (“**Work**”) pursuant to a Fabcon proposal (“**Proposal**”) signed by the customer (“**Customer**”) in connection with a project (“**Project**”). Capitalized terms not otherwise defined herein shall have the same meaning as in the Proposal. In the event of any conflict between these Terms and Conditions and any other Subcontract Documents (defined below), the Terms and Conditions shall control; provided, however, that any term expressly set forth in the Proposal that conflicts with these Terms and Conditions will control over these Terms and Conditions. These Terms and Conditions may only be amended by a separate writing signed by Fabcon and Customer.
2. **Subcontract Documents**. The “**Subcontract Documents**” consist of (1) the Proposal; (2) these Terms and Conditions; (3) Modifications issued after execution of the Proposal and signed by the parties; and (4) Any plans, drawings, specifications or other technical data prepared for the Project and incorporated into the Proposal by reference. Collectively, the Subcontract Documents are referred to herein as the “**Agreement**”. Customer acknowledges and agrees that Fabcon will not be bound by any terms in a separate agreement between a Project owner and Customer (“**Prime Contract**”), if any, unless Fabcon has been provided a copy of the Prime Contract and it has been expressly incorporated into the Proposal.
3. **Payment Terms**:
	1. Obligation to Pay. By executing the Proposal, Customer agrees to pay Fabcon the amount set forth in the Proposal for the Work (“**Subcontract Sum**”). In the event the Proposal is based upon preliminary information, Customer acknowledges and agrees that Fabcon shall only be required to proceed with manufacturing and installation of materials once the design for the Work is complete and the parties have executed a mutually agreeable Change Order (defined below). Fabcon does not accept the risk of Customer’s receipt of payments from any source to satisfy the Subcontract Sum, and in no event will payments to Fabcon be based upon, or subject to, Customer’s receipt of payment from any third party, including but not limited to any Project owner or its lender. Fabcon reserves the right to stop Work pending receipt of reasonable financial information from Customer that funding is in place to pay for the Work.
	2. Progress Payments. Customer shall make progress payments of the Subcontract Sum to Fabcon in accordance with monthly pay applications or submitted by Fabcon. Fabcon shall submit a schedule of values to Customer prior to, or concurrently with, Fabcon’s first application for payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by Fabcon. The schedule of values shall allocate the entire Subcontract Sum among the various portions of Fabcon’s Work. Customer shall make payment on each application for payment within thirty (30) days after receipt of same.
	3. Stored Materials. Monthly progress payments to Fabcon shall include the value of material stored at the jobsite or an offsite location prior to incorporation into the Project. Fabcon will provide reasonable proof of insurance and safe storage of such materials in connection with its application for payment.
	4. Retainage. Unless otherwise set forth in the Proposal, retainage of five percent (5%) may be held from all progress payments, provided that such retainage shall be reduced to two and a half percent (2.5%) when the Work is fifty percent (50%) complete.
	5. Non-Payment. If Customer does not make any payment within seven (7) days from the due date, then interest will accrue on the unpaid balance at the rate of one and a half percent (1.5%) per month or the maximum rate allowed by applicable law, whichever is lower. Further, in the event of any late payment by Customer, Fabcon may, upon three (3) business days’ notice to Customer, stop Work until the late payment has been received. In such event, the Subcontract Sum and Schedule shall be equitably adjusted as a result of such Work stoppage.
	6. Final Payment. When Fabcon’s Work is substantially complete, final payment, constituting the entire unpaid balance of the Subcontract Sum, including retainage, shall be made by Customer within thirty (30) days following Fabcon’s issuance of its final application for payment. Substantial completion means that the Work has been sufficiently completed in accordance with all Subcontract Documents such that all other Project trades that require the completion of the Work in order to undertake their work could commence to undertake such work.
4. **Schedule; Delays**. Fabcon shall perform the Work in accordance with the schedule set forth in the Proposal (“**Schedule**”). If no schedule is set forth in the Proposal, Fabcon and Customer shall mutually agree to an appropriate Schedule via Change Order. In the event of any delay in the commencement or progress of the Work outside Fabcon’s reasonable control, including but not limited to delays caused by the Project owner or architect, Customer or any other party for whose acts Customer is responsible, as well as any weather-related or other force majeure-type event, the Subcontract Sum and Schedule shall be equitably adjusted. Customer expressly acknowledges and agrees that delays impacting Fabcon’s production schedule will have a material impact on Fabcon’s operations and that damages flowing from such delays will be included in any equitable adjustment of the Subcontract Sum.
5. **Modifications**. Customer may request in writing that Fabcon make changes to the Work within the general scope of the Agreement consisting of additions, deletions or other revisions, so long as the Subcontract Sum and the Schedule are equitably adjusted. No such change will be binding on Fabcon unless the same is in writing and signed by authorized representatives of both Fabcon and Customer (“**Change Order**”).
6. **Warranty**. Fabcon warrants the Work against defects in materials or workmanship for a period of one (1) year from the date of substantial completion of the Work. If warranted material or workmanship is defective, then Fabcon’s obligation will be limited to, in Fabcon’s sole discretion, repairing, replacing, crediting or refunding the defective material or workmanship. Repaired or replaced materials or workmanship are warranted only for the remainder of the original warranty period. This warranty will not apply if any part of the purportedly defective Work is (a) altered, modified or repaired by anyone other than an authorized representative of Fabcon; or (b) improperly maintained, repaired, misused, or damaged by force majeure, or if the failure is due to the fault or negligence of anyone other than an authorized representative of Fabcon. **THIS WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, REPRESENTATIONS AND CONDITIONS. FABCON EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE AND MERCHANTABILITY.**
7. **Limitation of Liability**. Fabcon’s liability for any and all claims arising out of or in connection with the Work will be limited to direct damages of Customer and will under no circumstances exceed the Subcontract Sum. Under no circumstance will Fabcon be liable to Customer for any liquidated, special, incidental, indirect, consequential or punitive damages, including without limitation damages based on lost goodwill, lost sales or profits, delays in delivery, work stoppages, production failures, impairment of other goods, or any other cause, whether arising out of or in connection with breach of warranty, breach of contract, misrepresentation, negligence or otherwise.
8. **Union Subcontractor.** Customer acknowledges and agrees that Fabcon will be utilizing employees affiliated with the International Union of Bricklayers and Allied Craftsmen and the Laborers’ International Union of North America (“**Unions**”) in connection with the performance of the Work. Customer consents to the use of such employees in connection with the performance of the Work and acknowledges that nothing in the Agreement shall be deemed to require that Fabcon breach its agreements with the Unions. In the event of a labor dispute affecting the project, Customer shall provide and maintain a two (2) gate system within twenty-four (24) hours of such dispute and both Customer and Fabcon agree that they will cooperate with each other in taking measures to eliminate or neutralize the dispute as allowed under the law and existing collective bargaining agreements. Fabcon will not be liable for any lost time associated with any labor dispute beyond its reasonable control. Jurisdictional disputes will be handled under the rules and regulations established by the National Labor Relations Board or under Fabcon’s agreements with the Unions, as determined by Fabcon. Work will proceed as assigned by Fabcon during proceedings to resolve the jurisdictional dispute.
9. **Termination:**
	1. Termination by Fabcon. Fabcon may terminate this Agreement for nonpayment of amounts due hereunder for thirty (30) days or longer or in the event of any other material breach of this Agreement by Customer that is not cured within seven (7) days after Customer’s receipt of written notice from Fabcon of such breach. In the event Fabcon terminates this Agreement, Fabcon shall be entitled to recover from Customer payment for the Work executed as well as any damages flowing from Customer’s breach, including but not limited to reasonable overhead and profit on Work not executed.
	2. Termination by Customer. If Fabcon repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Agreement and fails to commence and continue correction of such breach within seven (7) days after receipt of written notice from Customer of same, Customer may, by additional written notice to Fabcon, terminate this Agreement. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing Fabcon’s Work and other damages actually incurred by Customer and not expressly waived, such excess shall be paid to Fabcon.
10. **Indemnity**. To the fullest extent permitted by law the Fabcon shall defend, indemnify and hold harmless Customer and any Project owner from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the willful misconduct or the negligent acts or omissions of Fabcon or anyone for whose acts Fabcon is responsible, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.
11. **Disputes**:
	1. Arbitration. Any claim arising out of or related to this Agreement, except those waived in this Agreement, shall be, at the election of Fabcon, subject to arbitration administered by the American Arbitration Association in accordance with its Construction Rules and Mediation Procedures in effect on the date of this Agreement. A demand for arbitration shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the arbitration. The award of the arbitrator(s) will be binding on each party. The judgment upon the award rendered by the arbitrator(s) may be entered and enforced in any court having jurisdiction thereof.
	2. Governing Law; Venue. Any dispute hereunder shall be governed by the law of the state of where the Project is located. Arbitrations under this Agreement shall be located in the state where the Project is located. Disputes not resolved through arbitration shall be venued in state or federal courts in the state where the Project is located.
	3. Attorneys’ Fees. Fabcon shall be entitled to recover its reasonable attorney fees and associated costs incurred in enforcing its rights under this Agreement.
12. **INSURANCE**. Fabcon shall carry the following insurance while performing the Work and for a period of one (1) year after substantial completion:

Commercial General Liability: $1,000,000 per occurrence/$2,000,000 aggregate;

Automobile Liability Insurance: $1,000,000 per accident;

Employers Liability: $1,000,000;

Workers Compensation: Statutory; and

Umbrella/Excess Liability: $5,000,000.

1. **RESPIRABLE CRYSTALLINE SILICA**. Customer will be responsible for controlling dust (which may include respirable crystalline silica) on the Project site regardless of its source(s) including, but not limited to, windblown onto the site, generated by truck and equipment travel regardless of who is operating the truck or equipment, or generated by other parties. Fabcon shall only be responsible for control of dust generated by the performance of its work activities or work activities it directs through its sub-subcontractors. These work activities may include cutting, sawing, drilling, grinding, attaching, patching or altering the precast. Fabcon reserves the right to inspect the Project site, materials and equipment to identify existing and foreseeable respirable crystalline silica hazards. Fabcon shall have the right to stop work and restrict access to the affected area(s) under the applicable OSHA standard if it can show, through appropriate monitoring devices or other methods, that the dust being generated is in excess of OSHA requirements related to total dust or respirable crystalline silica. Any civil penalties imposed by OSHA or other regulatory bodies against Fabcon due to non-compliance with the dust standards and due to no fault of Fabcon or its sub-subcontractors shall be the responsibility of Customer.
2. **CLEAN-UP**. Fabcon shall keep the premises and surrounding area reasonably free from accumulation of waste materials or rubbish caused by operations performed under this Agreement; provided, however, that Fabcon shall not perform additional cleaning operations except as set forth in the Proposal. Fabcon shall not be held responsible for unclean conditions caused by others.
3. **PERMITS, FEES, TARIFFS AND TAXES**. Except to the extent excluded in the Proposal, Fabcon shall secure and pay for required permits and fees necessary for proper execution and completion of the Work. Fabcon shall not be responsible for tariffs or taxes not enacted as of the date the Proposal is executed by the parties.
4. **MISCELLANEOUS**:
	1. Severability. If any provision of this Agreement is held to be invalid or unenforceable, then the provision will be enforced to the maximum extent permissible under applicable law and the other terms and conditions of this Agreement will remain in full force and effect.
	2. Assignment. Neither party shall assign this Agreement without the prior written consent of the other party.
	3. Notices. Any and all notices, demands or other matters required or permitted to be given under this Agreement must be in writing and will be deemed given when (1) personally delivered to the party to whom it is addressed; (2) deposited in the United States Mail, certified mail, return receipt requested, postage prepaid, to the corresponding address set forth in the Proposal; or (3) when sent by electronic mail to the address set forth in the Proposal. Notices personally served shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated on the fifth day after mailing or upon receipt, whichever occurs first; and notices sent by electronic mail shall be deemed communicated on the date of transmission, provide no bounce-back or other “undeliverable” notification is returned to sender.
	4. Electronic Signatures. Facsimile or electronic signatures shall be sufficient for the purpose of executing, negotiating and finalizing the Agreement.
	5. Waiver. No waiver by Fabcon of any provision under this Agreement is effective unless explicitly set forth in writing, with a specific reference to this Agreement, and signed by Fabcon. No failure to exercise, delay in exercising, or partial exercise of any right or remedy under this Agreement by Fabcon will serve to waive or preclude any other or further exercise of such right or remedy, and no signed and written waiver by Fabcon will operate to waive any failure, breach or default not expressly identified in such waiver.
	6. Standard Terms of Seller. No terms, provisions or conditions of any purchase order, acknowledgment or other business form that Customer may use in connection with the Project will have any effect on the rights, duties or obligations of the parties under, or otherwise modify, this Agreement, regardless of any failure of Fabcon to object to such terms, provisions or conditions.
	7. Rejection of Work. Fabcon specifically excludes project specifications which unilaterally entitle any third party, including but not limited to Customer, the Project owner or their architect to reject Work that is correctable utilizing standard industry methods. Fabcon reserves the right to attempt to cure any defect observed in its Work prior to product rejection.
	8. No Waiver of Lien Rights. Fabcon expressly reserves the right to record a lien or bond claim in connection with its Work on the Project.
	9. Site Access. Customer shall provide Fabcon access to the site in accordance with MNL-127 and as reasonably determined by Fabcon. Fabcon shall not be held responsible for any access conditions that would prevent Fabcon from performing its Work at the Project site.