

## GENERAL PROVISIONS (CONSTRUCTION CONTRACT)

### 1. DEFINITIONS

(a) The term "Contracting Officer" as used herein means the person executing this contract on behalf of viNGN, INC. ("viNGN") or his or her designee, and includes the duly appointed successor of the person executing this contract or his or her designee, or the duly authorized representative of viNGN.

### 2. SPECIFICATIONS AND DRAWINGS

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned or both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy either in the figures, in drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he or she may consider necessary, unless otherwise provided.

### 3. CHANGES

(a) Subject to the approval of the President & CEO of viNGN, the Contracting Officer may, at any time, without notice to any sureties, by written order designated or indicated to be a change order, make any change in the work in the general scope of the contract, including but not limited to changes:

- (i) In the specifications (including drawings and designs);
- (ii) In the method or manner of performance of the work;
- (iii) In the furnished facilities, equipment, materials, services, or site; or
- (iv) directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly;

provided, however, that such change was duly approved by the President and CEO of viNGN; and provided further that except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required. And provided further, that in case of defective specifications for which viNGN is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, it must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by viNGN. The statement of claim hereunder may be included in the notice under (b) above.

(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this Contract.

### 4. DIFFERING SITE CONDITIONS

(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this Contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this Contract. The Contracting Officer shall promptly investigate the conditions, and if he or she finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefore may be extended by the viNGN in its discretion.

(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this Contract.

### 5. TERMINATION FOR DEFAULT--DAMAGES FOR DELAY--TIME EXTENSIONS

(a) If the Contractor refuses or fails to prosecute the work or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, viNGN may, by written notice to the Contractor, terminate the right to proceed with the work of such part of the

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work as to which there has been delay. In such event viNGN may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of any utilize in completing the work such materials, appliances, and other items as may be on the site of the work as necessary therefor. Regardless of whether the Contractor's right to proceed with the work is terminated, the Contractor and his sureties shall be liable for any damage to viNGN resulting from its refusal or failure to complete the work within the specified time.

(b) If fixed and agreed liquidated damages are provided in the contract and if viNGN so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned by viNGN in completing the work.

(c) If fixed and agreed liquidated damages are provided in the Contract and if viNGN does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with viNGN or the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from the unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the Contract,) notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of any delay and the extent the time for completing the work when, in his or her judgment, the findings of facts justify such an extension, and the findings of fact of the Contracting Officer shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contract was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for the convenience of viNGN, be the same as if the notice for termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience

of viNGN, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(f) The rights and remedies of viNGN provided in this clause are in addition to any other rights and remedies provided by law of under this contract.

### 6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Chairman of the Board of viNGN. The decision of the Chairman or his or her duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limited judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: **Provided, however,** That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative or board on a question of law.

### 7. PAYMENTS TO CONTRACTOR

(a) viNGN will pay the contractor the price as hereinafter provided.

(b) viNGN will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis of determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that it has acquired title to such material and that it will be utilized on the work covered by this contract.

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(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he or she may authorize any of the remaining progress payments to be made in full. Also, whenever the work is substantially complete, the Contracting Officer, if he or she considers the amount retained to be in excess of the amount adequate for the protection of viNGN, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefore without retention of a percentage.

(d) All material and work covered by progress payments made shall thereupon become the sole property of the owner of the premises, expressly subject to any interest therein of the federal or local government or any instrumentality thereof as a result of the use of federal grant funding or local funds in connection therewith, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or a waiving of the right of viNGN to require fulfillment of all the terms of the contract.

(e) Upon completion and acceptance of all work, the amount due to the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished viNGN with a release, if required, of all claims against viNGN or the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. § 203, 41 U.S.C. § 15), a release may also be required of the assignee.

## 8. ASSIGNMENT OF CLAIMS

(a) If this contract provides for payments aggregating \$1,000 or more, claims for monies due or to become due to the Contractor from viNGN under this contract may be assigned to a bank, trust company, or other financial institution, including any federal lending agency and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to an assignee of any monies due to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or setoff.

## 9. MATERIAL AND WORKMANSHIP

(a) Unless otherwise specifically provided in this contract, all equipment, material and articles incorporated into the work covered by this contract are to be new and of the most

suitable grade for the purpose intended. Unless otherwise specifically provided in this contract, reference to any equipment, material, article or patented process, by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article or process which, in the judgment of the Contracting Officer is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature, and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by this contract or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the material or articles which it contemplates incorporating in the work. When so directed, samples shall be submitted for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material and articles installed or used without required approval shall be at risk of subsequent rejection.

(b) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

## 10. INSPECTION AND ACCEPTANCE

(a) Except as otherwise provided in this contract, inspection and testing by viNGN of material and workmanship required by this contract shall be made at reasonable times and at the site of the work, unless the Contracting Officer determines that such inspection or test of material which is to be incorporated in the work shall be made at the place of production, manufacture, or shipment of such material. To the extent specified by the Contracting Officer at the time of determining to make off-site inspection or testing, such inspection or testing shall be conclusive as to whether the material involved conforms to the contract requirements. Such off-site inspection or testing shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of viNGN after acceptance of the completed work under the terms of paragraph (f) of this clause, except as hereinabove provided.

(b) The Contractor shall, without charge, replace any material or correct any workmanship found by viNGN not to conform to the contract requirements, unless in the public interest viNGN consents to accept such material or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(c) If the Contractor does not promptly replace rejected material or correct rejected workmanship, viNGN (1) may, by contract or otherwise, replace such material or correct such workmanship and charge the cost thereof to the Contractor, or (2) may terminate the Contractor's right to proceed in accordance with clause 5 of these General Provisions.

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(d) The Contractor shall furnish promptly, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspection and testing as may be required by the Contracting Officer. All inspection and testing by viNGN shall be performed in such manner as not unnecessarily to delay the work. Special, full size and performance tests shall be performed as described in this contract. The Contractor shall be charged with any additional cost of inspection when material and workmanship are not ready at the time specified by the Contractor for its inspection.

(e) Should it be considered necessary or advisable by viNGN at any time before acceptance of the entire work to make an examination of work already completed, by removing or tearing same, the Contractor shall, on request, promptly furnish all necessary facilities, labor and material. If such work is found to be defective or non-conforming in any material respect, due to the fault of the Contractor or its subcontractors, Contractor shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, an equitable adjustment shall be made in the contract price to compensate the Contractor for the additional services involved in such examination and reconstruction and, if completion of the work has been delayed thereby, it shall, in addition, be granted a suitable extension of time.

(f) Unless otherwise provided in this contract, acceptance by viNGN shall be made as promptly as practicable after completion and inspection of all work required by this contract. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards viNGN's rights under any warranty or guarantee.

## 11. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give its personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for the Contractor.

## 12. PERMITS AND RESPONSIBILITIES

The Contractor shall, without additional expense to viNGN, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable federal or local laws, codes and regulations, in connection with the prosecution of the work. The Contractor shall be similarly responsible for all damages to persons or property that may occur as a result of its fault or negligence. The Contractor shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

## 13. CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so

will not relieve it from responsibility for successfully performing the work without additional expense to viNGN. viNGN assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations are expressly stated in the contract.

## 14. OTHER CONTRACTS

viNGN may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and viNGN employees or agents and carefully fit its own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by viNGN employees or agents.

## 15. PATENT INDEMNITY

Except as otherwise provided, the Contractor agrees to indemnify viNGN and its officers, directors, agents and employees, against liability, including costs and expenses, arising out of the performance of this contract or out of the use or disposal by or for the account of viNGN of supplies furnished or construction work performed hereunder.

## 16. ADDITIONAL BOND SECURITY

If any surety upon a bond furnished in connection with this contract becomes unacceptable to viNGN, or if any such surety fails to furnish reports as to the Contractor's financial condition from time to time as requested by viNGN, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of viNGN and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

## 17. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting lawful payments to bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. Contractor further warrants that no payments have been made or are due which would violate any local or federal law with respect to kickbacks, lobbying, conflicts of interest or false claims. For breach or violation of this warranty, viNGN shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

## 18. OFFICIALS NOT TO BENEFIT

No member of the Legislature or members of Congress shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom.

## 19. UTILIZATION OF APPRENTICES OR TRAINEES & SMALL BUSINESS CONCERNS

(a) It is the policy of viNGN as declared by the Legislature that a fair portion of the purchases and contracts for

suppliers and services for viNGN be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this Contract.

(c) Contractor shall hire, in addition to any other employee he may retain, apprentices or trainees or both for the performance of the work hereunder, the total number of which shall be determined by the Director of the Division of Apprenticeship and Training upon the basis of one (1) Apprentice (or Trainee) for the first journeyman steadily employed, and one (1) additional Apprentice (or Trainee) for every two (2) additional Journeymen steadily employed.

(d) Within ten days of the execution of this Agreement the Contractor shall submit to the Division of Apprenticeship and Training, and to the Contracting Officer, a list of the occupations for which Journeymen will be required in the performance of this contract.

(e) Veterans of the U.S. Armed Forces shall be given priority with respect to the hiring of Apprentices and Trainees.

(f) Failure of the Contractor to comply with the aforesaid provisions of this section shall be a material breach thereof.

## 20. SUSPENSION OF WORK

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt any part of all of the work for such period of time as the Contracting Officer may determine to be appropriate for the convenience of viNGN.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment may be made, in the sole discretion of viNGN, for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order) and (2) unless the claim in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final payment under the contract.