

RESOLUTION 2009-83

AUTHORIZING A CONTRACT WITH THE ILLUMINATING COMPANY (TIC), A PRIVATE UTILITY, IN A TOTAL SUM NOT TO EXCEED \$196,148.24 FOR COSTS ASSOCIATED WITH THE ADJUSTMENT AND/OR RELOCATION OF THE OVERHEAD AND UNDERGROUND LINES AS NECESSARY FOR THE INSTALLATION OF THE PROPOSED ROADWAY ENTRANCES AND EXITS FROM THE STEPHANIE TUBBS JONES EAST SIDE TRANSIT CENTER (ESTC) CONTRACT 46A (ENGINEERING & PROJECT DEVELOPMENT DEPARTMENT BUDGET)

WHEREAS, the Greater Cleveland Regional Transit Authority (GCRTA) proposes to construct the Stephanie Tubbs Jones East Side Transit Center – Contract 46A (hereinafter "ESTC") in Cleveland; and

WHEREAS, TIC owns, operates and maintains overhead and underground lines that will be over the proposed ESTC entrance and exit roadways; and

WHEREAS, the ESTC construction will require certain overhead lines owned and operated by TIC to be adjusted and/or relocated; and

WHEREAS, both TIC and the GCRTA desire to enter into an agreement to set forth their mutual understanding and agreement concerning costs and expenses of the adjustment, relocation, replacement, or betterment of TICS' affected facilities, including design and engineering costs associated with ESTC construction; and

WHEREAS, the costs GCRTA will be required to pay for the adjustments and relocations of TIC facilities have been determined and negotiated; and

WHEREAS, the costs and expenses of utility adjustments, relocations, replacements, or betterments, including design and inspections is expected to not exceed a price of one hundred ninety-six thousand one-hundred forty eight and 24/100 dollars (\$196,148.24); and

WHEREAS, the General Manager/Secretary-Treasurer deems the negotiated offer of TIC to be in the best interest of the Authority and recommends acceptance thereof by the Board of Trustees;

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of the Greater Cleveland Regional Transit Authority, Cuyahoga County, Ohio:

Section 1. That the offer of TIC, as negotiated for GCRTA to pay design and construction costs and expenses for the adjustments and relocations of the facilities owned, operated and maintained at ESTC where proposed roadway entrances and exits to the site will be constructed, is fair and reasonable.

Section 2. That said contract is payable from the RTA Development Fund, Engineering & Project Development Department budget, including but not limited to ARRA Capital grant OH-96-X027 in the amount of \$196,148.24 (100% federal funds).

Section 3. That this contract shall be binding upon and an obligation of the Authority contingent upon the Authority's receipt of Federal Stimulus funds for ESTC construction, compliance by TIC or contractor to the Specifications and Addenda, if any, the Affirmative Action Plan adopted by the Board of Trustees in Resolution 2009-023, bonding and insurance requirements and all applicable laws relating to contractual obligations of the Authority.

Section 4. That this resolution shall become effective immediately upon its adoption.

Adopted: September 15, 2009



President

Attest: 

CEO, General Manager/Secretary-Treasurer



TITLE/DESCRIPTION: CONTRACT: STEPHANIE TUBBS JONES EAST SIDE TRANSIT CENTER (ESTC) OVERHEAD/UNDERGROUND CABLE RELOCATION VENDOR: THE ILLUMINATING COMPANY AMOUNT: \$196,148.24 (100% ARRA FUNDING)	Resolution No.: 2009-83
	Date: September 10, 2009
	Initiator: Engineering & Project Development
ACTION REQUEST: <input checked="" type="checkbox"/> Approval <input type="checkbox"/> Review/Comment <input type="checkbox"/> Information Only <input type="checkbox"/> Other _____	

- 1.0 **PURPOSE/SCOPE:** This action will allow the Authority to enter into contract with The Illuminating Company, a private utility, to facilitate the Stephanie Tubbs Jones East Side Transit Center – Contract 46A (hereinafter “ESTC”) construction.

- 2.0 **DESCRIPTION/JUSTIFICATION:** This contract will allow for payment for TIC to adjust, relocate and replace its overhead and underground facilities affected by the ESTC construction - Contract 46A. The design and construction cost is valued at a total of \$196,148.24. TIC work authorized by this resolution is for TIC 2009 work scope that involves removing overhead lines, creating underground duct banks and the cabling and connection of those duct banks under the proposed ESTC location.

- 3.0 **PROCUREMENT BACKGROUND:** Ohio Revised Code 306.43(H)(8) excludes competitive bidding when “The purchase consists of the product or services of a public utility.”

 Based upon the above referenced section of the Ohio Revised Code, negotiations were undertaken with TIC as affected by the ESTC - Contract 46A.

 A cost analysis was performed and the negotiated price schedule was determined to be fair and reasonable to the Authority.

- 4.0 **DBE/AFFIRMATIVE ACTION BACKGROUND:** A DBE goal has not been established on this procurement because GCRTA entered into an agreement with TIC the nature of which is to reimburse TIC for work and costs incurred to support and facilitate the ESTC – Contract 46A construction.

- 5.0 **POLICY IMPACT:** Does not apply.

- 6.0 **ECONOMIC IMPACT:** That said contract is payable from the RTA Development Fund, Engineering & Project Development Department budget, including but not limited to ARRA Capital grant OH-96-X027 in the amount of \$196,148.24 (100% Federal funds).

STAFF SUMMARY & COMMENTS

Puritas - Public Utilities

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- 7.0 ALTERNATIVES: Reject the offer. Rejecting the utility offer to adjust and/or relocate the facilities would delay the construction of the ESTC and prevent completion.
- 8.0 RECOMMENDATION: The utility work authorization related to the ESTC - Contract 46A is necessary before reconstruction can begin. Staff recommends that the Board of Trustees approve the resolution to authorize work authorization to TIC, a private utility, for its 2009 work scope within ESTC 46A
- 9.0 ATTACHMENTS: Form of Agreement.

Recommended and certified as appropriate to the availability of funds, legal form and conformance with the Procurement requirements.



CEO, General Manager/Secretary-Treasurer

**UTILITY FACILITY ADJUSTMENT
AND
RELOCATION UNDERSTANDINGS
AND
AGREEMENT
for the
Stephanie Tubbs Jones Transit Center**

This Agreement is made this XXth day of _____ 2009 by and between the Greater Cleveland Regional Transit Authority, a political subdivision of the State of Ohio (hereinafter referred to as the "GCRTA") and The Cleveland Electric Illuminating Company, 6896 Miller Road, Suite 101, Brecksville, Ohio 44141 (hereinafter referred to as "UTILITY").

WHEREAS, the GCRTA proposes to construct the Stephanie Tubbs Jones Eastside Transit Center (hereinafter "STJETC") in the public right-of-way of Cleveland, and

WHEREAS, the construction of STJETC and the performance of the construction contracts therefor may require certain facilities owned and operated in the public right-of-way by various public and private utility corporations to be adjusted and/or relocated; and

WHEREAS, UTILITY is a private utility corporation which owns, operates and maintains facilities both within and outside the existing public right-of-way and within areas that may be utilized by the STJETC; and

Whereas both UTILITY and GCRTA understand and agree that the UTILITY (not a contractor of GCRTA) is performing its normal relocation and/or adjustments to its facilities as in any other situation where due to construction, adjustment and/or relocation of its facilities is required

WHEREAS, both UTILITY and the GCRTA desire to set forth their mutual understanding and agreement concerning the adjustments, relocation or betterment of UTILITY'S affected facilities:

NOW, THEREFORE, UTILITY and the GCRTA agree as follows:

I. Definitions. As used in this Agreement:

Adjustment means the minor movement of a Conflicting Facility required by the Project, including the work of (i) removing and reinstalling the facility at a higher or lower position, (ii) extending or reducing the height of the facility by constructive adding or dismantling, and/or (iii) protecting existing facilities during such activities.

Betterments mean and includes any new or Replacement Facility, or portion thereof, requested by the UTILITY and agreed to by the GCRTA which will increase or upgrade the service or design capacity, capability, appearance, efficiency or function over that which currently exists. However, the following shall not be considered Betterments:

i) An upgrade, which the parties mutually agree, will be of direct benefit to the construction or operation of the Project.

ii) An upgrade necessary to accomplish required Project Adjustments or Relocations.

City means the City of Cleveland.

Conflicting Facility is an existing utility facility that is so situated as to require Adjustment or Relocation in order to construct and operate STJETC as determined by GCRTA in its final Design Documents.

Cost means all design and engineering costs as well as the performance of the work, whether done by Utility employees, contractors or subcontractors.

STJETC means The Stephanie Tubbs Jones Eastside Transit Center Project.

GCRTA means The Greater Cleveland Regional Transit Authority.

Relocation means the lateral or vertical movement of a Conflicting Facility or a portion of a Conflicting Facility required by the Project, including the work of (i) removing and reinstalling the Facility or portion thereof at a new location, (ii) reconnecting the relocated Facility or portion thereof to its pre-existing connections, (iii) extending the length of the Facility as necessary to accomplish the reconnection; and/or (iv) protecting existing facilities during such activities. If a required movement cannot be achieved without damaging the Facility beyond repairability, then "Relocation" shall also be deemed to include demolition, removal and replacement or reconstruction of the Conflicting Facility or portion thereof with a permanent replacement facility, or a substitute facility functionally equal to the existing facility.

Utility Facility or Facility means the real or personal property sited within the STJETC project such as structures, improvements, and other physical properties owned and/or operated by the UTILITY and which shall include, but not be limited to, poles, wires, cables, pipes, ductbanks, conduits, valves, regulators, tunnels, conductors, transformers, manways, manholes, lines, facilities and systems for producing, transmitting or distributing communications, cable television, power, electricity, light, gas, oil, crude products, water, steam, wastewater, reclaimed water, storm water not connected with highway drainage, and other similar commodities, including publicly owned fire and police signal systems.

II. **Costs.**

The cost of Adjustments and Relocation of UTILITY facilities required by, or necessary for, STJETC shall be borne by the GCRTA pursuant to this contract and in accordance with the obligations of GCRTA under the Ground Sublease Agreement between the Euclid Avenue Housing Corporation and GCRTA . The cost of additions to and betterments of UTILITY facilities shall be borne by UTILITY. All Work Authorizations shall be issued in the format shown in **Attachment "A" hereto.**

III. **Design Review and Cost Estimating.**

- A. Preliminary Review and Estimating. GCRTA has furnished UTILITY with 60 percent project design drawings showing the location of STJETC project activities. UTILITY has studied such plans and reports to confirm the location of Utility Facilities and has advised GCRTA regarding Conflicting Facilities.
- B. After Conflicting Facilities are identified, GCRTA and Utility shall consult and confer as necessary to resolve identified conflicts so that the resolution of such conflicts may be incorporated into the final design drawings and specifications. Resolution of Conflicting Facilities shall include but not be limited to the issuance of a Work Authorization by the GCRTA to UTILITY to perform or a contract to perform an Adjustment or Relocation in accordance with Article IV of this agreement.
- C. Upon receipt of an executed GCRTA Work Authorization, UTILITY shall provide cost estimates to the GCRTA for the Adjustments and Relocations required to eliminate such Conflicting Facilities.
- D. Final Design and Cost Estimating. Information provided by the Utility in the preliminary design process and the consultative process described above shall be utilized in the production of the Final Design Documents. The Final Design Documents shall reflect the resolution of the Conflicts identified in the Preliminary design phase. UTILITY shall provide cost estimates to the GCRTA to perform the Adjustments and Relocations called for in the final design documents within 30 days after receiving a written request for such estimates from the GCRTA. Each request for cost estimates shall specify the conflict(s) to be adjusted or relocated. The cost estimate provided by UTILITY shall be quoted on a lump sum basis and shall include all design and engineering costs and the performance of the work. Cost estimates produced by UTILITY in this final design phase shall be binding upon UTILITY for ninety (90) days after receipt by the GCRTA.

IV. **Performance of Work.**

- A. UTILITY shall require its employees, agents or contractors to perform the work on its facilities. The GCRTA shall issue a Work Authorization to UTILITY to conduct Adjustments or Relocations of those Conflicting Facilities that are

identified and agreed upon and incorporated into the final design drawings and specifications.

- B. Any GCRTA Work Authorization shall contain a Work Description and a lump sum cost for the Work. All GCRTA Work Authorizations in amounts of \$100,000 or more are subject to acceptance and approval by the GCRTA Board of Trustees. A separate Notice to Proceed shall be issued that shall authorize UTILITY to proceed with the Project work. After UTILITY receives a GCRTA Work Authorization and Notice to Proceed, it shall commence and thereafter diligently prosecute the work to completion subject to the reasonable inspection and approval of GCRTA and subject to any changes or modifications to the work that are agreed to by both GCRTA and UTILITY.
1. All work performed pursuant to a GCRTA Work Authorization shall be performed by UTILITY, its employees, agents, contractors, or subcontractors. No portion of the work may be assigned by UTILITY without GCRTA's prior review and written approval that shall not be unreasonably withheld or denied.
 2. UTILITY shall use its reasonable efforts to coordinate the work authorized with the GCRTA Construction Manager and to perform within the STJETC schedule. Each GCRTA Work Authorization shall contain a firm completion date which shall be adjusted to account for any delays caused by matters outside the control of UTILITY, including but not limited to delays caused by GCRTA, other contractors not hired by UTILITY and events of force majeure not caused by UTILITY. Unless otherwise agreed in writing, or unless prohibited by federal, state or local law or regulation or any safety or operating code, the UTILITY shall carry on the performance of the GCRTA Work Authorization and maintain its progress during any dispute proceedings and the GCRTA shall continue to make payments to the UTILITY in accordance with the GCRTA Work Authorization.
 3. Change Orders approved in writing by both parties shall make changes to the work.
 4. All GCRTA Work Authorizations issued to UTILITY are subject to the terms and conditions of this Agreement and all work shall comply with standards established by the UTILITY, the GCRTA Quality Program Plan, Project Execution Manuals and the State of Ohio Department of Transportation, Construction and Material Specifications dated January 1, 2008 as it may be amended.
- C. If UTILITY intends to perform related work in conjunction with STJETC for the Betterment of its Facilities or an Adjustment or Relocation performed hereunder, it shall perform such work in coordination with the STJETC schedule. Upon reasonable notice, UTILITY may schedule special progress meetings, which representatives from GCRTA, if requested, shall attend.

V. Schedule of Work.

GCRTA shall provide UTILITY with a STJETC schedule of work. UTILITY agrees to use its reasonable efforts to diligently complete its work in such time and manner as to not delay or hinder the design and construction of STJETC and shall provide the GCRTA with estimated completion dates for its work. GCRTA shall advise UTILITY of any revisions that may be made in the STJETC construction schedule and UTILITY shall use its reasonable efforts to complete its work in conformity with any revised schedules. In the event that UTILITY and GCRTA or its contractors are performing work concurrently on, near, or within the same geographic area of work as UTILITY, UTILITY shall use its reasonable efforts to not impede or limit access to STJETC work; provided however, any delays caused by such other contractors shall extend the time frame within which UTILITY is working. GCRTA shall coordinate STJETC work between all contractors in accordance with paragraph XIII, and shall use reasonable efforts to eliminate conflicts between UTILITIES.

VI. Site Condition.

UTILITY shall complete all its work in the STJETC Project area in such a manner and leave the site in such a condition that it does not present a hazard or danger to the public and that will allow STJETC project activity to follow.

VII. As Built Drawings.

UTILITY shall provide "as built" drawings of all utility relocations, rehabilitations, or betterments within 30 days of completion of construction. GCRTA will distribute to contractors working at the STJETC site and will be incorporated into STJETC as built drawings.

VIII. Hazardous Substances and Contaminants.

UTILITY shall be responsible for lawfully disposing of all waste, contaminants, hazardous substances and excess materials that it brings on site, creates or releases in the performance of its work in the STJETC Project area. UTILITY shall not be responsible, burdened, or obligated in any way to GCRTA for preexisting site conditions.

IX. Licenses and Permits.

UTILITY shall be responsible for obtaining any and all licenses and permits necessary for the completion of its relocation, replacement or betterment activity in the STJETC area and for complying with all applicable federal, state and local laws, codes, rules and regulations related thereto.

X. Inspections.

Work performed by the UTILITY shall be inspected by the UTILITY and GCRTA. The UTILITY will provide a project representative, at its own cost, to observe and inspect its construction of its UTILITY relocations, rehabilitations, or betterments. The project representative shall act as a liaison during construction between the UTILITY and the GCRTA. UTILITY project representative shall meet regularly with GCRTA's authorized construction representative to discuss project schedules, changes, requests for information, and quality control issues. UTILITY project representative shall promptly report any observed problems, disagreements, and objections to GCRTA's Construction Superintendent at the STJETC construction site, and shall not issue any direction to any STJETC contractor working on the site.

XI. Key Contacts.

UTILITY, prior to commencement of any Adjustment, Relocation or Betterment, will provide a list of key contacts for its UTILITY facilities.

XII. Weekly Coordination Meetings.

During the course of the construction of STJETC, GCRTA will hold weekly progress meetings with its contractors. GCRTA shall invite UTILITY to attend such meetings in order to provide information and to resolve any potential conflicts. When requested, UTILITY agrees to attend STJETC construction progress meetings at mutually agreed times.

XIII. Insurance; Claims.

The following **minimum** limits of insurance will be maintained by UTILITY or any contractors or subcontractors retained by UTILITY or GCRTA to perform work that is part of or related to Utility work and STJETC.

Prior to commencement of any work and until completion of its work under a contract, each contractor or subcontractor shall maintain the following insurance coverage, at its cost, from insurers acceptable to the contracting party, giving evidence of such coverage to the contracting party prior to commencing work at the project site:

- a. Commercial General Liability Insurance (hereinafter "CGL") in the amount of \$10 million combined single limit each occurrence for bodily injury and/or property damage with a \$10 million annual aggregate. Said policy shall also include:
 - Premises / Operations coverage
 - Personal Injury coverage

- Liability for independent contractors
 - Products / Completed Operations liability insurance: This insurance must be maintained for a period of not less than 2 years from the completion of the work.
 - Contractual liability coverage insuring the "hold harmless" provisions set forth at XV infra in this Agreement.
 - Liability for explosion, collapse and underground property damage.
 - Said policy shall be written on an "occurrence" basis; ("Claims-first made" basis acceptable on the part of UTILITY and UTILITY agrees that the policy shall either continue to be in force or that an extended notification period be provided allowing for claims to be submitted for a minimum of 2 years following completion of the work).
 - GCRTA will accept any combination of primary CGL and Excess or Umbrella policies to meet the minimum coverage requirements above. A combination of primary CGL by contractors supplemented by a project-specific umbrella by owner will also be acceptable to Utility.
- b. Automobile Liability Insurance in the amount of \$2 million combined single limit each accident for bodily injury and/or property damage. Said policy shall apply to all owned, leased, hired and non-owned vehicles used in connection with the work.
- c. Statutory Workers' Compensation coverage in compliance with all applicable state workers' compensation laws to cover all employees furnishing labor under the terms of this contract and under the control of the Contractor or subcontractor. Employers' Liability coverage in the amount of \$1 million per accident / \$1 million per employee for disease will also be included, either under the Workers' Compensation policy or under the CGL policy (Stop Gap) referenced under a. above. In Ohio: a copy of a certificate of premium payment from the Industrial Commission and Bureau of Workers' Compensation, or a copy of the Certificate of Employer's Right to Pay Compensation Directly.
- d. Contractors Equipment Coverage must be provided on an "All Risk" basis, covering physical damage to all tools and equipment, including automotive equipment, used by the contractor. The UTILITY will have the ability to self-insure this risk.
- e. Where exposures involve asbestos abatement work, Asbestos Liability Insurance in the amount of \$2 million per occurrence; Bodily Injury and Property Damage, \$2 million general aggregate; and \$2 million completed

operations. As this insurance is written on a Claims-made basis, the policy shall either continue to be in force or that an extended notification period be provided allowing for claims to be submitted for a minimum of 2 years following completion of the contract. The UTILITY will have the ability to self-insure this risk.

- f. Where work involves environmental impairment exposures (to be determined by CITY & GCRTA) Environmental Impairment Liability Insurance in the amount of \$1 million each loss; \$2 million annual aggregate. As this insurance is written on a Claims-made basis, the policy shall either continue to be in force or that an extended notification period be provided allowing for claims to be submitted for a minimum of 2 years following completion of the contract. The UTILITY will provide evidence of Sudden and Accidental Pollution Insurance Coverage along with the evidence of Excess General Liability Coverage including a statement that the coverage for gradual pollution exposures is self-insured.
- g. General Requirements: The UTILITY or any contractor shall not commence work herein until it has obtained the required insurance and has received written approval of such insurance by the contracting party. It shall furnish evidence of such insurance in the form of a certificate (Acord or similar form).

The certificate shall provide the following:

- In the event the insurance should be changed or cancelled in a manner that is materially adverse to the Insured(s) under the policy, the insurance company will endeavor to give 30 days advance written notice either Utility or GCRTA's Director of Procurement, depending on the identity of the contracting party.
- Name UTILITY and GCRTA as an additional insured for coverages required under a., b., e. and f. above, for claims arising out of operations in conjunction with the contract.
- Contain a waiver of subrogation in favor of UTILITY and GCRTA.
- Specific reference to the subject contract.
- Specific reference to all deductibles & Self-Insured Retentions (SIR).
- Shall be primary and non-contributing to any insurance possessed or procured by UTILITY and GCRTA and any self-insurance program maintained by either.
- An insurance company having less than an A- X rating by The A. M. Best Company will not be considered acceptable to the GCRTA. All certificates are subject to acceptance by UTILITY and GCRTA. Any deductible or SIR is for the account of the contractor. UTILITY has indicated the current SIR of \$10 million and agreed to provide a certificate of self-insurance meeting all of the requirements under (h) above in addition to providing evidence of excess coverage where appropriate to meet required limits of insurance.

- i. Approval of the insurance by UTILITY or GCRTA shall not relieve or decrease the liability of the contractor, UTILITY or GCRTA hereunder. It is to be understood that GCRTA and UTILITY do not in any way represent that the insurance or the limits of insurance specified herein are sufficient or adequate to protect the contractor's interests or liabilities.
- j. In the event UTILITY or contractor neglects, refuses or fails to provide the insurance required under the Contract documents, or if such insurance is canceled for any reason, the GCRTA or UTILITY shall have the right but not the duty to procure the same, and the cost thereof shall be deducted from moneys then due or thereafter to become due to contractor.

XIV. A. Federal Assistance.

The work authorized under this contract may be supported in part by Federal assistance under various grants made by the Department of Transportation, Federal Transit Administration, including but not limited to grants made pursuant to the Urban Mass Transportation Administration Act of 1964 and amendments (49 U.S.C. 1601 et seq.) and Surface Transportation Assistance Acts of 1982 and 1987. As a recipient of federal funds, GCRTA is subject to all rules and regulations promulgated pursuant thereto, as they may be amended from time to time during the course of this contract. Unless in conflict with federal, state or local laws or regulations or any safety or operating code, or any collective bargaining agreement UTILITY shall perform any act, or not perform any act, GCRTA requests be performed or not be performed which GCRTA determines would cause violation to any of the terms and conditions of its FTA grants, after reasonable notice thereof is given by GCRTA. Any such requests involving increased costs to the UTILITY will be borne by the GCRTA. The UTILITY has no contract with the federal government in reference to this agreement.

B. No Obligation by the Federal Government.

UTILITY and GCRTA agree that, notwithstanding any concurrence by the Federal Government in, or approval of the solicitation or award of this contract, absent the express written consent of the Federal Government, the Federal Government is not a party to this contract and shall not be subject to any obligations or liabilities to the GCRTA, the Contractor or any other party pertaining to any matter resulting from the underlying contract; UTILITY further agrees to include this clause, without modification, in any contract issued hereunder.

XV. Indemnification.

- A. With respect to work performed by UTILITY, its contractors or agents, it shall indemnify, keep and save harmless the GCRTA and its respective

officers; agents and employees against all suits or claims that may be based upon any death or injury to persons or property that arise from, or that may be alleged to have arisen from the performance of this Contract by the UTILITY or its contractors, or as a result of the performance of this Contract by the UTILITY or its contractors, and the UTILITY shall at his/her own expense defend GCRTA in all litigation, pay all attorneys' fees, damages of any type, and all costs and other expenses arising out of the litigation or claim or incurred in connection therewith; and shall, at his/her own expense, satisfy and cause to be discharged such judgments as may be obtained against the GCRTA or any of its officers, agents or employees. This provision shall not apply to workers compensation claims filed by GCRTA employees.

- B. With respect to STJETC Adjustment or Relocation work performed by GCRTA contractors or agents, GCRTA shall contractually require its contractors and agents to indemnify, keep and save harmless the UTILITY and its respective officers; agents and employees against all suits or claims that may be based upon any death or injury to persons or property that arise from, or that may be alleged to have arisen from the performance of this Contract by the GCRTA contractor or agent, or as a result of the performance of this Contract by the GCRTA contractor or agent, and the GCRTA shall contractually require its contractors and agents to defend UTILITY in all litigation, pay all attorneys' fees, damages of any type, and all costs and other expenses arising out of the litigation or claim or incurred in connection therewith; and to satisfy and cause to be discharged such judgments as may be obtained against the UTILITY, or any of its officers, agents or employees. The obligations of this duty to indemnify are separate from and not dependent upon the coverage or lack thereof provided by any policy of insurance required by this agreement.
- C. GCRTA agrees that it shall, to the extent requested by UTILITY, seek performance of the GCRTA Contractor indemnification obligations under B above all at UTILITY'S cost including but not limited to attorney's fees.

XVI. GCRTA Work Authorization Payments.

Application for payment for work performed pursuant to a GCRTA Work Authorization shall be made monthly. The UTILITY shall submit to the GCRTA and its authorized construction representative an itemized Application for Payment, notarized, supported by such data substantiating the UTILITY'S right to payment for work performed as the GCRTA may require, including the number of jobs, manhours, and labor costs. UTILITY shall include in each application amounts properly due to contractors and material suppliers that are properly and timely submitted by them for work performed and not previously submitted. Such applications may not include requests for payment of amounts the UTILITY does not intend to pay to a contractor or material supplier because of a dispute or other reason. Within 14 days after receipt of UTILITY'S Application for Payment, the GCRTA will either accept it as submitted and proceed with the disbursement of the requested amount, or notify the UTILITY in writing of its reasons for withholding payment. In making these determinations, the GCRTA may rely on the advice of its Architects, Engineers, the Construction Manager, its own observation, or any other sources it may deem

appropriate. UTILITY will invoice GCRTA for the work performed pursuant to any GCRTA Work Authorization. Payment shall be made to UTILITY on a net thirty (30) day basis. Within ten (10) days after receiving payment from the Authority, UTILITY shall pay each contractor or material supplier all amounts due and invoiced pursuant to this paragraph.

XVII. Dispute Resolution.

- A. GCRTA and UTILITY (the "Parties") agree to attempt to resolve disputes arising from or relating to this Agreement, STJETC, and UTILITY Projects, through good faith negotiation among the parties involved. Any claim, controversy or dispute concerning the interpretation or performance of this Agreement, the performance of work relating to or necessary for the STJETC or UTILITY Projects, or to the threatened, alleged or actual breach of this Agreement which is not disposed of by mutual agreement within a period of seven (7) calendar days after one Party has provided written notice of the dispute to the other, first shall be subject to Progressive Dispute Resolution procedures described in this Article. If negotiations under the Progressive Dispute Resolution procedures are not successful within the time period contained in this Article, then either Party may use any available remedy to seek resolution of the dispute in any court of competent jurisdiction and these proceedings will have been without prejudice to either Party. Notwithstanding the Parties' agreement to these procedures, either Party may seek immediate injunctive relief if such Party believes that injunctive relief is necessary to prevent immediate irreparable harm to its interests. Nothing in this paragraph is intended to create new causes of action for either Party.

- B. Invocation of Progressive Dispute Resolution Procedures. The Party believing itself aggrieved (the "Invoking Party") shall call for progressive management involvement in the dispute negotiations by written notice to the other Party. Such notice shall be without prejudice to the Invoking Party's right to any other remedy permitted by this Agreement.

Progression of Management Involvement. The Parties shall use their best efforts to arrange personal meetings and/or telephone conferences as needed, at mutually convenient times and locations, between negotiators for the Parties at the successive management levels set forth below.

Level	UTILITY	GCRTA
Level 1	CEI Project Manager	GCRTA Project Manager
Level 2	CEI Engineering Supervisor	Deputy General Manager - Engineering & Proj. Mgt.
Level 3	CEI Director Operations Services	CEO/General Manager

- C. The negotiators at each management level shall have a period of ten (10) business days in which to attempt to resolve the dispute. The allotted time for the first-level negotiators shall begin on the date of receipt of the Invoking Party's notice.
- D. If a resolution is not achieved by negotiators at any given management level at the end of the allotted time or any extension thereto agreed to by the negotiators at that level in writing, the allotted time for the negotiators at the next management level, if any, shall begin immediately. The allotted time shall be deemed to have expired upon the Invoking Party's receipt of written notice that the other Party rejects the Invoking Party's position.
- E. If resolution is achieved at any management level, the resolution shall be memorialized in writing, shall state the agreements reached and describe the actions to be taken, if any, and shall be signed by the Deputy General Manager of Engineering and the CEI Northern Region Engineering Supervisor.
- F. The agreement of the Parties to these Progressive Dispute Resolution procedures is solely for the benefit of the Parties and is not intended to create any legal, equitable, or beneficial interest in any third party or to vest in any third party any interest with respect to the enforcement of performance of these procedures.

XVIII. Miscellaneous Provisions.

- (a) **Approvals; Further Documents.** Where this Agreement requires approval, consent, permission, satisfaction, agreement, or authorization by either party, such approval, consent, permission, satisfaction, agreement, or authorization shall not be unreasonably withheld nor delayed.

The parties agree to execute such further documents, agreements, instruments and notices as may be necessary or appropriate to effectuate the transactions contemplated by this Agreement.

- (b) **Notices.** Any notices required or permitted to be given under the terms of this Agreement shall be in writing and shall be deemed to be given as of the time of delivery to the addresses set forth below:

To the AUTHORITY:

The Greater Cleveland Regional Transit Authority
 Deputy General Manager, Engineering and
 Project Management Division
 1240 West 6th Street
 Cleveland, Ohio 44113-1331

To the UTILITY:

The Cleveland Electric Illuminating Company
 A FirstEnergy Company

6896 Miller Road – Suite 101
Brecksville, Ohio 44141

Attention: Frank G. Dibbs – Public Works Coordinator

(c) **Assignment.**

This Agreement is not assignable, except with the prior written consent of the other party. This agreement shall be binding upon the parties successors and assigns.

(d) **Waiver.**

The failure of any party at any time or times to require performance of any provision hereof shall in no manner affect the right at a later time to enforce the same. No waiver by any party of any condition, or of any breach of any term, covenant, representation, or warranty contained herein, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach of waiver of any other condition or of any breach of any other term, covenant, representation or warranty.

(e) **Entire Agreement; Modification.**

This Agreement contains the entire agreement of the parties with respect to the matters addressed herein. This Agreement may not be amended, modified, or superseded except by a written instrument executed by the party against which such amendment, modification, supersedure, is to be charged.

(f) **Force Majeure.**

Neither party shall be held liable for any loss or damage due to delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence, such causes may include acts of God, acts of civil or military authority, government regulations (except those promulgated by the party seeking the benefit of this section), embargoes, epidemics, war, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, strikes, power blackouts, other major environmental disturbances or unusually severe weather conditions.

(g) **Termination for Convenience.**

Upon written notice to UTILITY, the performance of work under this contract or any GCRTA Work Authorization may be terminated in whole or, from time to time, in part by the GCRTA whenever for any reason the GCRTA shall determine

that such termination is in the best interest of the GCRTA. Termination of work hereunder shall be effected by delivery to the UTILITY of a Notice of Termination specifying the extent to which performance of work under the contract is terminated and the date upon which such termination becomes effective. In the event of such termination, GCRTA shall remain liable to UTILITY for payment of all costs incurred by the UTILITY for all work performed up to the receipt of such termination notice, in addition to any costs that UTILITY incurs in restoring or relocating its facilities to working order and for any costs incurred by the UTILITY for its work to the extent for which it is not reimbursed, including, but not limited to, equipment or materials which have been ordered for the work and are not cancelable.

(h) **Governing Law and Venue.**

This Agreement shall be constructed and entered in accordance with the laws of the State of Ohio. Any legal action to enforce the terms of this Agreement shall be brought in Cuyahoga County, Ohio.

(i) **Headings.**

Headings and captions contained herein are inserted for convenience and of reference only, and are not to be deemed part of or to be used in constructing this Agreement.

(j) **Warranty.**

UTILITY shall perform its work in accordance with applicable industry standards and in a workmanlike manner. THE WARRANTY SET FORTH IN THIS PARAGRAPH IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER STATUTORY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE. In no event shall UTILITY be liable to GCRTA for any special, incidental, consequential, indirect, punitive or exemplary damages hereunder.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first written above.

**THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY**

**GREATER CLEVELAND REGIONAL
TRANSIT AUTHORITY**

By: _____
James Sears
Its: Northern Region Engineering Manager

By: _____
Joseph A. Calabrese, CEO
General Manager/Secretary-Treas.

The legal form and correctness of the within instrument are hereby approved.

General Counsel, Deputy General
Manager for Legal Affairs