

## CONSTRUCTION AGREEMENT

THIS AGREEMENT made as of 27<sup>th</sup> day of June, 2016, by and between Luzerne County Convention Center Authority, 255 Highland Park Boulevard, Wilkes-Barre, PA 18702 ("Owner") and Total Mechanical Services, Inc., 402 Broadway Avenue, St. Paul Park, MN 55071 ("Contractor")

### WITNESSETH:

WHEREAS, Owner is the owner and operator of real property known as Mohegan Sun Arena at Casey Plaza in Wilkes-Barre Township, Pennsylvania (the "Premises") and, having engaged in a public bidding process, wishes to engage Contractor to perform the work described on Exhibit "A" attached hereto, subject to possible modifications or adjustments to conditions based upon preliminary findings as work commences (the "Work").

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) to each in hand paid by the other, the receipt of which is hereby acknowledged and of the mutual covenants hereinafter contained and intending to be legally bound hereby, the parties hereto agree as follows:

1.     THE WORK.

Contractor shall acquire and provide all necessary labor and permits, including building permits, and furnish all of the materials and perform all of the labor required to complete the Work in accordance with the specifications set forth on Exhibit "A".

2. **TIME OF COMMENCEMENT AND COMPLETION.**

The Work shall be commenced on or about the day hereof following the execution by the parties of this Agreement and shall be fully and finally completed as expeditiously as possible, but no later than July 24, 2016.

3. **CONTRACT TERM.**

Owner shall pay to Contractor, for performance of the Work, subject to additions and deductions by Change Order as hereinafter provided, on a time and material basis as outlined on Exhibit "B" (the "Contract Fee").

Upon requisition for payment prepared by Contractor, certifying the completion of the Work, and approval thereof by Owner (which shall not be unreasonably withheld) which approval (or disapproval) shall be given within three (3) business days of the receipt of said requisition, Owner shall pay to Contractor the Contract Fee, within ten (10) business days after said approval.

Should Owner not approve of the Work performed by Contractor in any instance after receiving the requisition for payment, the Owner shall give written notice of its disapproval and the reasons therefore to Contractor within five (5) business days of Owner's receipt of Contractor's requisition.

4. **CONTRACTOR.**

(a). Contractor shall perform and direct the Work, using its best skill and attention. Contractor shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work. Contractor shall properly and diligently perform the Work.

(b). Unless otherwise specifically noted herein, Contractor shall provide and pay for all labor, materials, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

(c). Contractor warrants to Owner that all materials and equipment incorporated into the Work will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the requirements of Exhibit "A". All Work not so conforming to these standards may be considered defective.

(d). Contractor shall pay all sales, consumer, use and other similar taxes required by law and shall secure all permits and licenses necessary for the execution of the Work.

(e). Contractor shall give all notices, obtain all permits and comply with all laws, ordinances, rules and regulations and orders of any public authority bearing on the performance of the Work.

(f). Contractor shall be responsible for the acts and omissions of all of its employees and all subcontractors, their agents and employees and all other persons performing any of the Work.

(g). Contractor at all times shall keep the Premises free from accumulation of waste, materials or rubbish caused by its operations and performance of the Work. Upon the completion of the Work, Contractor shall remove all waste, materials and rubbish from and about the Premises as well as all tools, construction equipment, machinery and surplus materials and it shall leave the Work "broom clean" or, if applicable, in such condition described in Exhibit "A".

(h). Owner will provide any necessary plans and specifications for filing with and as required by lending institutions, building departments and other governmental agencies.

(i). If at any time there shall be evidence of any lien or claim for work or materials furnished in the performance of the Work under this Contract which, if established, would be an encumbrance upon the Premises or for which Owner might become liable, Owner shall have the right to (i) retain out of any payment then due or thereafter to become due under the terms of this Agreement an amount sufficient to completely indemnify it against such lien or claim until said lien or claim is paid by Contractor; (ii) require the Contractor to "bond-off" the claim pursuant to the provisions of 49 Pa C.S.A. Section 1510; or (iii) receive payment from Contractor, an amount sufficient to completely indemnify it against such lien or claim, until said lien or claim is paid by Contractor or resolved in a manner which is satisfactory to Owner. Contractor shall also execute the Waiver of Liens and Release annexed hereto as Exhibit "C" and cause its subcontractors to execute a Waiver of Liens and Release as may be requested by Owner in connection with Contractor's receipt of any payment under this Agreement.

**5. ACCESS TO THE WORK.**

Owner and its representatives shall at all times during the progress of the Work have the right to inspect same, and whenever any part of said Work is required to be specially tested or approved, Contractor shall give notice to Owner of its readiness for such inspection and approval.

6. **PROTECTION OF PERSONS AND PROPERTY.**

(a). During the progress of the Work, Contractor shall maintain adequate protection of the Work and shall protect any owner of adjacent property from injury arising from the implementation of this Agreement and shall be financially responsible for any such damage and injury.

(b). To the fullest extent permitted by law, Contractor shall indemnify and hold harmless Owner, and its affiliates, agents and employees from and against any and all claims, damages, losses and expenses, including but not limited to attorney's fees and costs, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property, including the loss of use resulting therefrom, and (b) is caused in all or in part by any negligent or intentional act or omission of Contractor, any subcontractor, anyone directly or indirectly employed by any of them or by anyone for whose act any of them may be liable.

7. **CONTRACTOR'S LIABILITY INSURANCE.**

(a). During the progress of the Work, Contractor shall purchase and maintain such insurance as will protect Contractor from claims set forth below which may arise out of or result from Contractor's operations under this Agreement, whether such operations be by Contractor or by any subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

(i) Claims under workers' compensation, disability benefit and other similar employee benefit acts;

(ii) Claims for damages because of bodily injury, occupational sickness or disease, or death of his employees;

- (iii) Claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees;
- (iv) Claims for damages insured by usual personal injury liability coverage which are sustained (1) by any person as a result of an offense directly or indirectly related to the employment of such person by Contractor, or (2) by any other person;
- (v) Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom; and
- (vi) Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.

(b). Contractor shall carry public liability insurance in the minimum amount of ONE MILLION and 00/100 (\$1,000,000.00) DOLLARS for personal injury per occurrence and property damage in the minimum limit of ONE MILLION and 00/100 (\$1,000,000.00) DOLLARS per occurrence, such insurance protecting Owner, and such other parties as Owner may designate and Contractor as their interests may appear, against third-party liability claims. Certificates of such insurance shall be filed with Owner, prior to the commencement of the Work, and shall contain a provision that coverages afforded under said policies will not be cancelled until at least thirty (30) days prior written notice has been given to Owner.

(c). The insurance required by this paragraph shall include contractual liability insurance applicable to Contractor's obligations under paragraph 9 hereof.

8. **CORRECTION OF WORK AND GUARANTEES.**

Contractor shall correct any of the Work that fails to conform to the requirements of Exhibit "A" or otherwise is not constructed in a good and workmanlike manner (including instances where such failure to conform appears during the progress of the Work) and shall further remedy any defects due to faulty workmanship which appear within a period of one (1) year from the date of completion of the Work and payment therefore. Contractor shall supply Owner with all manufacturers warranties on material and equipment and Owner shall be entitled to the benefits thereof. The provisions of this paragraph apply to work done and supplied by subcontractors as well as to any of the Work done by direct employees of Contractor. Contractor shall provide Owner at the time of final payment of the Contract Fee with copies of all written guarantees and warranties on products incorporated in the Work which are received from subcontractors and/or material suppliers.

9. **TERMINATION BY OWNER.**

If Contractor persistently or repeatedly refuses or fails, except in cases for which an extension of time is provided in writing by Owner, to supply enough properly skilled workmen or proper materials, or persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a violation of a provision of this Agreement, then Owner may, without prejudice to any right or remedy, and after giving Contractor five (5) days written notice, terminate this Agreement. If the unpaid balance of the Contract Fee exceeds the cost of finishing the Work, such excess shall be paid to Contractor. If, however, such cost exceeds such unpaid balance, Contractor shall be responsible for the difference to Owner. Owner shall

have the right to terminate this Agreement without cause at any time upon written notice to Contractor, in which event the Contract Fee shall be equitably apportioned based upon the percentage of Work completed as of the date of such termination.

**10. TIME.**

All time limits stated in this Agreement and set forth on Exhibit "A" are to be considered to be of the essence of this Agreement.

**11. ARBITRATION.**

(a). All disputes that may arise under this Agreement and of the Work which cannot be settled by the parties shall be submitted to and decided in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. Such arbitration shall be conducted in the City of Wilkes-Barre upon written request of either party.

(b). Notice of the demand for arbitration shall be filed in writing with the other party and with the American Arbitration Association. The demand for arbitration shall be within a reasonable time after the claim, dispute or other matter in question has arisen and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim would be barred by the applicable statute of limitations.

(c). Unless otherwise agreed in writing, Contractor shall carry on the work and maintain its progress during any arbitration proceedings. The expense of such arbitration shall be borne equally by the parties. The decision of the arbitrator shall be final and binding on the parties hereto and may be entered as a final judgment in any court of record.



**12. POSSESSION.**

Owner shall be in possession of the Premises throughout the performance of the Work.

**13. NOTICE.**

All notices as provided herein shall be given by certified mail, return receipt requested to Contractor at Total Mechanical Services, Inc., 402 Broadway Avenue, St. Paul Park, MN 55071 and to Owner at Luzerne County Convention Center Authority, 255 Highland Park Boulevard, Wilkes-Barre, PA 18702.


**14. ENTIRE AGREEMENT.**

It is understood that this instrument contains the entire agreement between the parties and that no other agreement, representation, understanding or statement relative thereto shall be binding upon the parties, their heirs, representatives and assigns, unless in writing and signed by the parties hereto.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties have caused this instrument to be executed the day and year first above written.

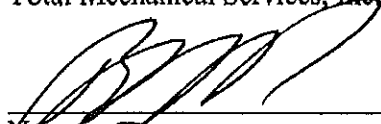
OWNER:

Luzerne County Convention Center Authority

  
Name: DAVID PALERMO  
Title: CHAIRMAN

CONTRACTOR:

Total Mechanical Services, Inc.

  
Name: Bruce RYIKAS  
Title: PRESIDENT

## Exhibit "A"

The work shall involve the testing and repairing of individual leaks at the Ice Rink Arena at Mohegan Sun Plaza located in Wilkes-Barre Township, Wilkes-Barre, Pennsylvania, including piping testing and repair procedures as follows:

1. Contractor will remove and store the existing brine solution in the owner provided totes.
2. Contractor will use air as a testing medium to pressurize the rink floor beginning at 50 psi, and proceeding to approximately 65 psi. We would provide a testing station so rink floor pressure could be closely monitored.
3. Contractor will use soap and mops to mop the entire rink floor and look for soap bubbles. We have employed this method on other rink floor projects.
4. Contractor will notify the engineer and parties involved, and show any affected areas on the rink floor.
5. Contractor will then proceed to carefully jackhammer out any areas that required further examination.
6. Contractor will also remove any boards that maybe required facilitating the repairs in the rink.
7. Contractor will locate the leaking pipe or fittings in the rink floor, remove air pressure in the rink floor and make the required repairs with new parts as required.
8. Contractor will re-pressurize the rink floor, check all repairs, and re-check the entire rink floor.
9. Contractor will proceed with the pressure testing until the rink floor had held pressure and no more leaks exist.
10. Contractor will provide a design mix, and install new concrete and hardener in the affected areas, and cured.
11. Contractor will remove the air pressure and install the brine solution. Contractor will circulate the rink pumps in the process to remove all of the air in the system.

**Exhibit "B"**

The work will be performed on a Time & Material basis as follows:

- A. Supervision will be billed out at \$130.00 per hour. Actual hours on site will be invoiced. Only one supervisor will be assigned to the project.
- B. Labor provided by Total Mechanical Services, Inc. employees will be billed out at \$105.00 per hour.
- C. Materials will be invoiced at actual cost plus 15% mark-up.
- D. Subcontractors will be invoiced at actual cost plus 5% mark-up.
- E. Travel, meals, car rental, parking and housing will be invoiced at actual with no mark-up.
- F. Travel time will be billed at the hourly rates listed above.

Exhibit "C"

## WAIVER OF LIEN AND RELEASE

\_\_\_\_\_ (the "Releasor"), on behalf of itself, its successors and assigns, for and in consideration of, and upon and subject to receipt of payment of, \_\_\_\_\_ and \_\_\_/100 DOLLARS (\$\_\_\_\_\_) ("Final Payment"), does hereby irrevocably waive, release, remise, relinquish and quit-claim all mechanics' liens, claims, right of lien, and all manner of actions, suits, debts, judgments, claims and demands of any kind whatsoever in law or equity, for all services performed by or through the Releasor for Luzerne County Convention Center Authority (the "Owner"), for services rendered, work performed, or materials supplied as a Contractor (or Subcontractor) for or with respect to the testing and repairing of individual leaks at the rink Ice Rink Arena at Mohegan Sun Plaza located in Wilkes-Barre Township, Wilkes-Barre, Pennsylvania at the Mohegan Sun at Pocono Downs Complex, located at Plains Township, Luzerne County, Pennsylvania (the "Project") owned by the Owner, which the Releasor ever had, or now has, against the Project, the property on which the Project is located (the "Property"), the owner of the property on which the Project is located, its partners, parents, subsidiaries and affiliates, at all tiers, and their insurers, sureties, lenders, employees, officers, directors, representatives, shareholders, agents, and all persons acting for any of them (collectively, the "Releasee Entities"), including, without limitation, all claims related to, in connection with, or arising out of all facts, acts, events, circumstances, changes or additional services, constructive or actual delays or accelerations, interferences and the like, if any, which have occurred or may be claimed to have occurred through the date of this Final Waiver and Release. The Final Payment is more particularly described in the Application for Payment dated \_\_\_\_\_, 2016 ("Invoice"), which Invoice is incorporated herein by this reference and is made in connection with the Project.

The Releasor warrants and represents that: (a) the Releasor has not assigned or pledged any rights or claims in any amount due or to become due from the Owner, and (b) all consultants, subcontractors, suppliers and materialmen at all tiers who were entitled to receive a portion of any progress payment previously paid to Releasor with respect to the Project have been paid in full, for all services performed or materials furnished by or through the Releasor for the Project through the date thereof and will be paid the portion of the Final Payment to which they are entitled.

Releasor hereby represents and warrants to Owner that (i) the Final Payment constitutes payment in full of all amounts due from the Owner to Releasor for labor performed and materials and equipment furnished arising out of or relating to the Project, (ii) no notice of unpaid balance and right to file a lien or mechanic's or materialman's lien or claim has been filed against the Property, or any Releasee Entities, by Releasor, or to the best of Releasor's knowledge, information and belief, no notice of unpaid balances and right to file a lien, by any of its subcontractors or sub-subcontractors or suppliers of subcontractors who performed labor or furnished materials or equipment with respect to the Project has been filed against the Property or any Releasee Entities, and (iii) there is no known basis for the filing of any mechanic's or materialmen's lien, claim or stop notice with respect to the Project.

Releasor further declares that, by signing and sealing this instrument, Releasor shall be completely estopped from filing or maintaining any and all liens, claims and stop notices against the Project and the Property for or with respect to the Work described in the Invoice, and that in the event that any such lien, claim, or stop notice is filed, Releasor shall immediately take steps to cause such lien, claim, or stop notice to be discharged, or satisfied of record, or bonded off.

To the fullest extent permitted by applicable law, the Releasor agrees to defend, indemnify and hold the Releasee Entities harmless from and against any and all actions, causes of action, losses or damages of whatever kind, including, without limitation, reasonable attorneys' fees and costs at the pre-trial and appellate levels, which the Releasee Entities may suffer by reason of any claim made against any of the Releasee Entities, relating to services performed by or through the Releasor through the date hereof, arising out of or resulting from the assertion by the Releasor, or any of its subcontractors, sub-subcontractors or suppliers, of any mechanic's lien or claim or the filing of any mechanic's lien, claim, notice of intention or stop notice to be discharged or satisfied of record or bonded off against the Project, the Property, or the Releasee Entities, or the failure to discharge mechanic's liens, claims and other filings, as aforesaid.

The Releasor acknowledges and agrees that the tendering of payment by the Owner and the receipt of payment and the execution of this Final Waiver and Release by the Releasor shall not, in any manner whatsoever, release the Releasor from: (i) its continuing obligations with respect to the completion of any services in connection with the Project that remain incomplete, (ii) any contractual, statutory or common law obligations of the Releasor with respect to any of the Releasee Entities; or (iii) any other obligations of the Releasor with respect to any of the Releasee Entities.

The undersigned hereby represents that he or she has the authority to execute this instrument on behalf of the party and entity indicated and that he or she has obtained all necessary approvals and authority to make such a representation.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2016.

WITNESSES:

\_\_\_\_\_  
Name: \_\_\_\_\_

RELEASOR:  
Contractor/ Subcontractor

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_

\_\_\_\_\_  
(Seal)

STATE OF )  
 ) ss:  
COUNTY OF )

SWORN TO, SUBSCRIBED AND ACKNOWLEDGED before me this \_\_\_ day of \_\_\_\_\_, 2016 by \_\_\_\_\_ the \_\_\_\_\_ of the Releasor, who executed the foregoing instrument on behalf of said Releasor, who acknowledged to and before me that he/she executed said instrument in his/her official capacity as an officer of said Releasor and as the act and deed of said Releasor after being duly authorized and directed, and who is personally known to me or who produced \_\_\_\_\_ as identification.

Name: \_\_\_\_\_  
Notary Public, State of \_\_\_\_\_  
Commission No. \_\_\_\_\_  
My Commission expires: \_\_\_\_\_  
(Seal)