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BUILDING A BETTER WAY

**ConsensusDocs® 750**  
**STANDARD AGREEMENT BETWEEN CONSTRUCTOR AND SUBCONTRACTOR**



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# ConsensusDocs® 750

## STANDARD AGREEMENT BETWEEN CONSTRUCTOR AND SUBCONTRACTOR

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### ARTICLE 1 AGREEMENT

Job Number: [ ]

Account Code: [ ]

This Agreement is made this [ ] Day of [ ] in the year [ ], by and between the

CONSTRUCTOR, [ ]

and the

SUBCONTRACTOR, [ ]

Tax identification number (TIN) [ ]

Contractor License No., if applicable [ ]

for services in connection with the Subcontract Work for the following

PROJECT [ ]

Owner is [ ], and the Design Professional is [ ].

### ARTICLE 2 SCOPE OF WORK

**2.1 PARTIES RELATIONSHIP** Each Party agrees to act on the basis of mutual trust, good faith, and fair dealing. The Parties shall each endeavor to promote harmony and cooperation, and perform in an economical and timely manner.

**2.1.1 ETHICS** Each Party shall perform with integrity. Each shall: (a) avoid conflicts of interest; and (b) promptly disclose to the other Party any conflicts that arise. Each Party warrants that it has not and shall not pay nor receive any contingent fees or gratuities to or from the other Party, including its agents, officers, employees, subcontractors or others for whom they may be liable, to secure preferential treatment.



2.2 SUBCONTRACT WORK Constructor contracts with Subcontractor as an independent contractor to provide all labor, materials, equipment, and services necessary to complete the Subcontract Work in accordance with, and reasonably inferable from, the Subcontract Documents, and consistent with the Progress Schedule, as may change from time to time. Subcontractor shall perform the Subcontract Work under Constructors general direction and in accordance with the Subcontract Documents.

2.3 CONSTRUCTORS WORK Constructors Work is the construction and services required of Constructor to fulfill its obligations pursuant to its agreement with Owner (the Work). The "Subcontract Work" is a portion of Constructors Work.

2.4 SUBCONTRACT DOCUMENTS The Subcontract Documents include this Agreement, the prime agreement, special conditions, general conditions, specifications, drawings, addenda issued and acknowledged before execution of this Agreement, amendments, laboratory testing that are Contract Documents, other documents listed in this Agreement, and modifications issued in accordance with this Agreement. Constructor shall provide to Subcontractor, before the execution of this Agreement, copies of the existing Subcontract Documents. Subcontractor shall provide copies of applicable portions of the Subcontract Documents to its proposed subcontractors and suppliers. Nothing shall prohibit Subcontractor from obtaining copies of the Subcontract Documents from Constructor at any time after the Subcontract Agreement is executed.

2.4.1 ELECTRONIC DOCUMENTS If Owner requires that Owner, Design Professional, Constructor and Subcontractors exchange documents and data in electronic or digital form, before any such exchange, Owner, Design Professional, and Constructor shall agree on and follow ConsensusDocs 200.2 or a written protocol addendum governing all exchanges, which specifies: (a) the definition of documents and data to be accepted in electronic or digital form or to be transmitted electronically or digitally; (b) management and coordination responsibilities; (c) necessary equipment, software, and services; (d) acceptable formats, transmission methods, and verification procedures; (e) methods for maintaining version control; (f) privacy and security requirements; and (g) storage and retrieval requirements. Subcontractor shall provide whatever input is needed to assist Constructor in developing the protocol and shall be bound by the requirements of the written protocol. Except as otherwise agreed upon in writing, the Parties shall each bear their own costs as identified in the protocol. In the absence of a written protocol, use of documents and data in electronic or digital form shall be at the sole risk of the recipient.

2.5 CONFLICTS In the event of a conflict between this ConsensusDocs 750 Standard Agreement as modified and the other Subcontract Documents, the ConsensusDocs 750 shall govern.

## 2.6 DEFINITIONS

2.6.1 "Agreement" means this ConsensusDocs 750 Standard Agreement Between Constructor and Subcontractor, as modified by the Parties, and exhibits and attachments made part of this agreement upon its execution.

2.6.1.1 The following exhibits are as follows:

- Exhibit A: The Subcontract Work, [ ] pages, and dated [ ].
- Exhibit B: The Drawings, Specifications, General and Other Conditions dated [ ], addenda dated [ ], and other information.
- Exhibit C: Progress Schedule, [ ] pages.
- Exhibit D: Alternates and Unit Prices and Estimated Quantities, [ ] pages.
- Exhibit E: Temporary Services, [ ] pages.
- Exhibit F: Insurance Provisions, [ ] pages.



Exhibit G: Labor Relations, [ ] pages.

2.6.2 "Business Day" means all Days, except weekends and official federal or state holidays where the Project is located.

2.6.3 The term "Day" shall mean calendar day.

2.6.4 "Interim Directive" is a written order containing Work instructions or directing the Subcontractor to proceed with the Subcontract work in question. An Interim Directive may also be referenced in the Contract Documents as a Construction Change Directive or other equivalent directive, and shall be treated as an Interim Directive.

2.6.5 "Law" means a federal, state, or local law, ordinance, code, rule, or regulation applicable to the Subcontract Work with which a Party must comply that is enacted as of the Agreement date.

2.6.6 The "Parties" are collectively Constructor and Subcontractor.

2.6.7 A "Subcontract Change Order" is a written order signed by The Parties after execution of this Agreement, indicating changes in the scope of the Subcontract Work, the Subcontract Amount or Subcontract Time, including substitutions proposed by Subcontractor and accepted by Constructor.

2.6.8 "Subcontract Time" means the time period on the Progress Schedule between commencing and completing the Subcontract Work.

2.6.9 "Worksite" means the geographical area of the Project location as identified in ARTICLE 1 where the Work is to be performed.

### **ARTICLE 3 SUBCONTRACTOR'S RESPONSIBILITIES**

3.1 OBLIGATIONS The Parties are mutually bound by the terms of this Agreement. To the extent the terms of the prime agreement apply to the Subcontract Work, then Constructor assumes toward Subcontractor all the obligations, rights, duties, and redress that Owner under the prime agreement assumes toward Constructor. In an identical way, Subcontractor hereby assumes toward Constructor all the same obligations, rights, duties, and redress that Constructor assumes toward Owner and Design Professional under the prime contract. In the event of an inconsistency among the documents, the specific terms of this Agreement shall govern.

3.2 RESPONSIBILITIES Subcontractor shall furnish its diligent efforts to perform the Subcontract Work in an expeditious manner and to cooperate with Constructor so that Constructor may fulfill its obligations to Owner. Subcontractor shall furnish all of the labor, materials, equipment, and services, including but not limited to competent supervision, shop drawings, samples, tools, and scaffolding as are necessary for the proper performance of the Subcontract Work, all of which shall be provided in full accord with and reasonably inferable from the Subcontract Documents. Subcontractor shall provide Constructor a list of its proposed subcontractors and suppliers, and be responsible for taking field dimensions, providing tests, obtaining required permits related to the Subcontract Work and affidavits, ordering of materials, and all other actions as required to meet the Progress Schedule.

3.3 INCONSISTENCIES AND OMISSIONS Subcontractor shall examine and compare the drawings, specifications, other Subcontract Documents, and information furnished by Owner relative to the Subcontract Work. Such examination and comparison shall be solely for the purpose of facilitating the Subcontract Work and not for the discovery of errors, inconsistencies, or omissions in the Subcontract Documents nor for ascertaining if the Subcontract Documents are in accordance with Laws. Subcontractor shall not have liability for errors, omissions, or inconsistencies discovered under this



subsection unless Subcontractor knowingly fails to report a recognized problem to Constructor. Should Subcontractor discover any errors, inconsistencies, or omissions in the Subcontract Documents, Subcontractor shall promptly report such discoveries to Constructor in writing. Following receipt of written notice, Constructor shall promptly instruct Subcontractor as to the measures to be taken, and Subcontractor shall comply with Constructor's instructions. If Subcontractor performs work knowing it to be contrary to Laws without notice to Constructor and advance approval by appropriate authorities, including Constructor, Subcontractor shall assume responsibility for such work and bear all associated costs, charges, fines, penalties, fees, and expenses necessarily incurred to remedy the violation. Subcontractor may be entitled to additional costs or time because of clarifications or instructions arising out of Subcontractor's reports described in this section. Nothing in this section shall relieve Subcontractor of responsibility for its own errors, inconsistencies, and omissions.

**3.4 WORKSITE VISITATION** Before commencing the Subcontract Work, Subcontractor shall examine and compare the Subcontract Documents, relevant field measurements made by Subcontractor or shared by Constructor, and any visible conditions at the Worksite affecting the Subcontract Work. If Subcontractor discover any errors, omissions, or inconsistencies in the Subcontract Documents or between its Worksite observations and the Subcontract Documents, such discrepancies shall be promptly reported to Constructor.

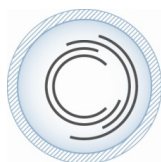
**3.5 INCREASED COSTS OR TIME** Subcontractor may assert a claim if Constructor's clarifications or instructions in response to requests for information are believed to require additional time or cost. If Subcontractor fails to perform the reviews and comparisons required in §3.3 and §3.4, to the extent Constructor is held liable to Owner because of Subcontractor's failure, Subcontractor shall pay the costs and damages to Constructor that would have been avoided if Subcontractor had performed those obligations.

**3.6 COMMUNICATIONS** Except as otherwise provided in the Subcontract Documents or for emergencies, Subcontractor shall direct Project-related communications to Constructor.

### **3.7 SUBMITTALS**

**3.7.1** Subcontractor promptly shall submit for approval to Constructor all shop drawings, samples, product data, manufacturers' literature, and similar submittals required by the Subcontract Documents. Submittals shall be submitted in electronic form if required. Subcontractor shall be responsible to Constructor for the accuracy and conformity of its submittals to the Subcontract Documents. Subcontractor shall prepare and deliver its submittals to Constructor in a manner consistent with the Progress Schedule and in such time and sequence so as not to delay Constructor or others in the performance of the Work. Subcontractor's submittals shall identify in writing for each submittal all changes, deviations, or substitutions from the requirements of the Subcontract Documents. The approval of any Subcontractor submittal shall not be deemed to authorize changes, deviations, or substitutions in the requirements of the Subcontract Documents unless express written approval is obtained from Constructor and Owner authorizing such change, deviation, or substitution. Such approval shall be promptly memorialized in a Subcontract Change Order within seven (7) Days following approval by Constructor and, if applicable, provide for an adjustment in the Subcontract Amount or Subcontract Time. If the Subcontract Documents do not contain submittal requirements pertaining to the Subcontract Work, Subcontractor agrees upon request to submit in a timely fashion to Constructor for approval any shop drawings, samples, product data, manufacturers' literature, or similar submittals as may reasonably be required by Constructor, Owner, or Design Professional.

**3.7.2** Constructor, Owner, and Design Professional are entitled to rely on the adequacy, accuracy, and completeness of any professional certifications required by the Subcontract Documents concerning the performance criteria of systems, equipment, or materials, including all relevant calculations and any governing performance requirements.



### 3.8 DESIGN DELEGATION

3.8.1 If the Subcontract Documents specify that Subcontractor is responsible for the design of a particular system or component for Project incorporation, then all design and performance criteria shall be specified. Subcontractor shall not be responsible for the adequacy of such performance and design criteria. Subcontractor shall be responsible for conformance of its design with the information given and the design concept expressed in the Subcontract Documents. As required by the Law, Subcontractor shall procure design services and necessary certifications from licensed design professionals. The signature and seal of Subcontractor's design professional shall appear on all drawings, calculations, specifications, certifications, shop drawings, and other submittals related to the Subcontract Work designed or certified by Subcontractor's design professional. Constructor shall be entitled to rely upon the adequacy, accuracy, and completeness of the services, certifications, or approvals performed by Subcontractor's design professional.

3.8.2 If Subcontractor's design professional is an independent professional, the design services shall be procured pursuant to a separate agreement between Subcontractor and the design professional. The agreement between Subcontractor and Subcontractor's design professional shall not include any limitation of liability, except to the extent that consequential damages are waived pursuant to §5.4.1, or exclusion from participation in the multiparty proceedings requirement of §11.4. Subcontractor's design professional(s) is [\_\_\_\_]. Subcontractor shall notify Constructor in writing if it intends to change its procured design professional.

3.9 COORDINATION Subcontractor shall: (a) cooperate with Constructor and others whose work may interface with the Subcontract Work, (b) specifically note and immediately advise Constructor of any such interface with the Subcontract Work, and (c) participate in preparing coordination drawings and work schedules in congested areas.

3.10 SUBCONTRACTOR'S REPRESENTATIVE Subcontractor's authorized representative is [\_\_\_\_]. This person shall possess full authority to receive and act upon instructions, orders, or directions. If Subcontractor changes its representative, or the representative's authority, Subcontractor shall immediately notify Constructor in writing.

3.11 TESTS AND INSPECTIONS Subcontractor shall schedule all required tests, approvals, and inspections of the Subcontract Work at appropriate times so as not to delay the progress of the Work or other work related to the Project. Subcontractor shall give proper written notice to all required Parties of such tests, approvals, and inspections. Except as otherwise provided in the Subcontract Documents, Subcontractor shall bear all expenses associated with tests, inspections, and approvals required of Subcontractor by the Subcontract Documents, which shall be conducted by an independent testing laboratory or entity approved by Constructor and Owner. Required certificates of testing, approval, or inspection shall, unless otherwise required by the Subcontract Documents, be secured by Subcontractor and promptly delivered to Constructor.

3.12 WARRANTIES Subcontractor warrants that all materials and equipment shall be new unless otherwise specified, of good quality, in conformance with the Subcontract Documents, and free from defective workmanship and materials. Upon request by Constructor, Subcontractor shall furnish satisfactory evidence of the quality and type of materials and equipment furnished. Subcontractor further warrants that the Subcontract Work shall be free from material defects not intrinsic in the design or materials required in the Subcontract Documents. Subcontractor's warranty does not include remedies for defects or damages caused by normal wear and tear during normal usage, use for a purpose for which the Project was not intended, improper or insufficient maintenance, modifications performed by others, or abuse. Subcontractor's warranties shall commence on the date of Substantial Completion of the Work or a designated portion.



### 3.13 CLEANUP

3.13.1 Subcontractor shall at all times during its performance of the Subcontract Work keep the Worksite clean and free from debris resulting from the Subcontract Work. Before discontinuing the Subcontract Work in an area, Subcontractor shall clean the area and remove all its rubbish and its construction equipment, tools, machinery, waste, and surplus materials. Subcontractor shall make provisions to minimize and confine dust and debris resulting from its construction activities. Subcontractor shall not be held responsible for unclean conditions caused by others.

3.13.2 If Subcontractor fails to commence compliance with cleanup duties within two (2) Business Days after written notification from Constructor of non-compliance, Constructor may implement appropriate cleanup measures without further notice and shall deduct the reasonable costs from any amounts due or to become due Subcontractor in the next payment period.

3.14 SAFETY PROGRAMS Subcontractor is required to perform the Subcontract Work in a safe and reasonable manner. Subcontractor shall prevent against injury, loss, or damage to persons or property by taking reasonable steps to protect: (a) employees and other persons at the Worksite; (b) materials and equipment stored on or off the Worksite for performing the Subcontract Work; and (c) all property and structures located at the Worksite and adjacent.

3.14.1 Subcontractor shall give all required notices and comply with all applicable rules, regulations, orders, and other lawful requirements established to prevent injury, loss, or damage to persons or property.

3.14.2 Subcontractor shall implement appropriate safety programs pertaining to the Subcontract Work and the Project, including establishing safety rules, posting appropriate warnings and notices, erecting safety barriers, and establishing proper notice procedures to protect persons and property at the Worksite and adjacent to the Worksite from injury, loss, or damage.

3.14.3 Subcontractor shall exercise extreme care in carrying out any of the Subcontract Work which involves explosive or other dangerous methods of construction or hazardous procedures, materials, or equipment. Subcontractor shall use properly qualified individuals or entities to carry out the Subcontract Work in a safe and reasonable manner so as to reduce the risk of bodily injury or property damage.

3.14.4 Damage or loss not insured under property insurance and to the extent caused by the negligent or intentionally wrongful acts or omissions of Subcontractor, or anyone for whose acts Subcontractor may be liable, shall be promptly remedied by Subcontractor. Damage or loss to the extent caused by the negligent or intentionally wrongful acts or omissions of Constructor, or anyone for whose acts Constructor may be liable, shall be promptly remedied by Constructor.

3.14.5 Subcontractor is required to designate an individual at the Worksite in the employ of Subcontractor who shall act as Subcontractor's designated safety representative with a duty to prevent accidents. Unless otherwise identified by Subcontractor in writing to Constructor, the designated safety representative shall be Subcontractor's project superintendent. Such safety representative shall attend Worksite safety meetings as requested by Constructor.

3.14.6 Subcontractor has an affirmative duty not to overload the structures or conditions at the Worksite and shall take reasonable steps not to load any part of the structures or Worksite so as to give rise to an unsafe condition or create an unreasonable risk of bodily injury or property damage. Subcontractor shall have the right to request, in writing, from Constructor loading information concerning the structures at the Worksite.



3.14.7 Subcontractor shall give prompt written notice to Constructor of any accident involving bodily injury requiring a physician's care, any property damage exceeding five hundred dollars (\$500.00) in value, or any failure that could have resulted in serious bodily injury, whether or not such an injury was sustained.

3.14.8 Prevention of accidents at the Worksite is the responsibility of Constructor, Subcontractor, and all other subcontractors, persons, and entities at the Worksite. Establishment of a safety program by Constructor shall not relieve Subcontractor or other parties of their safety responsibilities. Subcontractor shall establish its own safety program implementing safety measures, policies, and standards conforming to those required or recommended by governmental and quasi-governmental authorities having jurisdiction and by Constructor and Owner, including, but not limited to, requirements imposed by the Subcontract Documents. Subcontractor shall comply with the reasonable recommendations of insurance companies having an interest in the Project, and shall stop any part of the Subcontract Work which Constructor deems unsafe until corrective measures satisfactory to Constructor shall have been taken. Constructor's failure to stop Subcontractor's unsafe practices does not relieve Subcontractor of its responsibility. Subcontractor shall notify Constructor immediately following a reportable incident under applicable rules, regulations, orders, and other lawful requirements, and promptly confirm the notice in writing. A detailed written report shall be furnished if requested by Constructor. To the fullest extent permitted by Law, each Party to this Agreement shall indemnify the other Party from and against fines or penalties imposed as a result of safety violations, but only to the extent that such fines or penalties are caused by its failure to comply with applicable safety requirements. This indemnification obligation does not extend to additional or increased fines that result from repeated or willful violations not caused by Subcontractor's failure to comply with applicable rules, regulations, orders, and other lawful requirements.

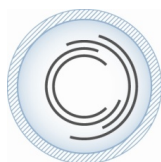
3.15 PROTECTION OF THE WORK Subcontractor shall take necessary precautions to properly protect the Subcontract Work and the work of others from damage caused by Subcontractor's operations. Should Subcontractor cause damage to the Subcontract Work or property of Owner, Constructor, or others, Subcontractor shall promptly remedy such damage to the satisfaction of Constructor, or Constructor may, after forty-eight (48) hours' written notice to Subcontractor, remedy the damage and deduct its cost from any amounts due or to become due Subcontractor, unless such costs are recovered under applicable property insurance.

3.16 EMERGENCIES In an emergency affecting the safety of persons or property, Subcontractor shall act to prevent threatened damage, injury, or loss. Any change in the Subcontract Amount or the Progress Schedule from actions of Subcontractor in an emergency situation shall be determined as provided in ARTICLE 7.

3.17 PERMITS AND TAXES Subcontractor shall give timely notices required by Law pertaining to the Subcontract Work, and is responsible for all permits, fees, licenses, assessments, inspections, testing, and taxes necessary to complete the Subcontract Work in accordance with the Subcontract Documents.

3.18 HAZARDOUS MATERIALS Subcontractor shall have the same rights and obligations as Constructor does under the prime agreement or Law regarding hazardous materials, provided that the hazardous materials affect the Subcontract Work's area or originate with Subcontractor.

3.19 SAFETY DATA SHEETS (SDS) Subcontractor shall submit to Constructor all SDS required by law for materials or substances necessary for the performance of the Subcontract Work. SDS sheets obtained by Constructor from other subcontractors or sources shall be made available to Subcontractor by Constructor.



3.20 LAYOUT RESPONSIBILITY AND LEVELS Constructor shall establish principal axis lines of the building and Worksite, and benchmarks. Subcontractor shall lay out and be strictly responsible for the accuracy of the Subcontract Work and for any loss or damage to Constructor or others by reason of Subcontractor's failure to lay out or perform Subcontract Work correctly. Subcontractor shall exercise prudence so that the actual final conditions and details shall result in alignment of finish surfaces.

### 3.21 CORRECTION OF COVERED SUBCONTRACT WORK

#### 3.21.1 UNCOVERING OF SUBCONTRACT WORK

3.21.1.1 If required in writing by Constructor, Subcontractor must uncover any portion of the Subcontract Work which has been covered by Subcontractor in violation of the Subcontract Documents or contrary to a directive issued to Subcontractor by Constructor. Upon receipt of a written directive from Constructor, Subcontractor shall uncover such work for Constructor's or Owner's inspection and restore the uncovered Subcontract Work to its original condition at Subcontractor's time and expense.

3.21.1.2 Constructor may direct Subcontractor to uncover portions of the Subcontract Work for inspection by Owner or Constructor at any time. Subcontractor is required to uncover such work whether or not Constructor or Owner had requested to inspect the Subcontract Work before it being covered. Except as provided by the subsection immediately above, this Agreement shall be adjusted by Subcontract Change Order for the cost and time of uncovering and restoring any work which is uncovered for inspection and proves to be installed in accordance with the Subcontract Documents, provided Constructor had not previously instructed Subcontractor to leave the work uncovered. If Subcontractor uncovers work pursuant to a directive issued by Constructor, and such work upon inspection does not comply with the Subcontract Documents, Subcontractor shall be responsible for all costs and time of uncovering, correcting and restoring the work so as to make it conform to the Subcontract Documents. If Constructor or some other entity for which Subcontractor is not responsible caused the nonconforming condition, Constructor shall be required to adjust this Agreement by Subcontract Change Order for all such costs and time.

#### 3.21.2 CORRECTION OF WORK

3.21.2.1 If the Design Professional or Constructor rejects the Subcontract Work or the Subcontract Work is not in conformance with the Subcontract Documents, Subcontractor shall promptly correct the Subcontract Work whether it had been fabricated, installed, or completed. Subcontractor shall be responsible for the costs of correcting such Subcontract Work, any additional testing, inspections, and compensation for services and expenses made necessary by the defective Subcontract Work.

3.21.2.2 In addition to Subcontractor's obligations under this §3.21, Subcontractor agrees to promptly correct, after receipt of a written notice from Constructor, all Subcontract Work which proves to be defective in workmanship or materials within a period of one year from the date of substantial completion of the Subcontract Work or for a longer period of time as may be required by specific warranties in the Subcontract Documents. Substantial completion of the Subcontract Work, or of a designated portion, occurs on the date when construction is sufficiently complete in accordance with the Subcontract Documents so that Owner can occupy or utilize the Project, or a designated portion, for the use for which it is intended, without unapproved disruption. If, during the one-year period, Constructor fails to provide Subcontractor with prompt written notice of the discovery of defective or nonconforming Subcontract Work, Constructor shall neither have the right to require Subcontractor to correct such Subcontract Work nor the right to make a claim for breach of warranty. If Subcontractor



fails to correct defective or nonconforming Subcontract Work within a reasonable time after receipt of notice from Constructor, Constructor may correct such Subcontract Work pursuant to §10.1.1.

3.21.3 Subcontractor's correction of Subcontract Work pursuant to this section shall not extend the one-year period for the correction of Subcontract Work, but if Subcontract Work is first performed after Substantial Completion, the one-year period for corrections shall commence when that Subcontract Work portion is substantially complete. Subcontractor's obligation to correct Subcontract Work within one year does not limit the enforcement of Subcontractor's other obligations with regard to the Agreement and the Subcontract Documents.

3.21.4 If Subcontractor's correction or removal of Subcontract Work destroys or damages other completed or partially completed work or existing buildings, Subcontractor shall be responsible for destroyed or damaged work correction costs.

3.21.5 If portions of Subcontract Work which do not conform with the requirements of the Subcontract Documents are neither corrected by Subcontractor nor accepted by Constructor, Subcontractor shall remove such Subcontract Work from the Project Worksite if so directed by Constructor.

3.22 MATERIALS OR EQUIPMENT FURNISHED BY OTHERS If the scope of the Subcontract Work includes installation of materials or equipment furnished by others, Subcontractor is responsible for exercising proper care in receiving, handling, storing, and installing such items, unless otherwise provided in the Subcontract Documents. Subcontractor shall examine the items provided and report to Constructor in writing any items it may discover that do not conform to requirements of the Subcontract Documents. Subcontractor shall not proceed to install nonconforming items without further instructions from Constructor. Loss or damage due to acts or omissions of Subcontractor shall, upon two (2) Business Days' written notice to Subcontractor, be deducted from any amounts due or to become due Subcontractor.

3.23 SUBSTITUTIONS No substitutions shall be made in the Subcontract Work unless permitted in the Subcontract Documents, and only upon Subcontractor first receiving all approvals required under the Subcontract Documents for substitutions.

3.24 USE OF CONSTRUCTOR'S EQUIPMENT Subcontractor, its agents, employees, subcontractors, or suppliers shall use Constructor's equipment only with the express written permission of Constructor's designated representative and in accordance with Constructor's terms and conditions for such use. If Subcontractor or any of its agents, employees, subcontractors, or suppliers utilize any of Constructor's equipment, including machinery, tools, scaffolding, hoists, lifts, or similar items owned, leased, or under the control of Constructor, Subcontractor shall indemnify and be liable to Constructor as provided in ARTICLE 9 for any loss or damage (including bodily injury or death) which may arise from such use, except to the extent that such loss or damage is caused by the negligence of Constructor's employees operating Constructor's equipment.

3.25 WORK FOR OTHERS Until final completion of the Subcontract Work, Subcontractor agrees not to perform any work directly for Owner or any tenants, or deal directly with Owner's representatives in connection with the Subcontract Work, unless otherwise approved in writing by Constructor.

3.26 SYSTEMS AND EQUIPMENT STARTUP With the assistance of Owner's maintenance personnel and Constructor, Subcontractor shall direct the check-out and operation of systems and equipment for readiness, and assist in their initial startup and the testing of the Subcontract Work.



3.27 COMPLIANCE WITH LAWS Subcontractor agrees to comply with the Law at its own cost. Subcontractor shall be liable to Constructor and Owner for all loss, cost, and expense attributable to any acts or omissions by Subcontractor, its employees, subcontractors, suppliers, and agents resulting from the failure to comply with the Law, including any fines, penalties, or corrective measures, except as provided in §3.14.8. However, liability under this section shall not apply if prior approval by appropriate authorities and Constructor is received.

3.27.1 To the extent Constructor receives reimbursement or additional time from Owner under the prime agreement, the Subcontract Amount or Progress Schedule shall be equitably adjusted for changes in the Law enacted after the date of this Agreement, including taxes, affecting the performance of the Work.

3.28 CONFIDENTIALITY To the extent the prime agreement provides for the confidentiality of any of Owner's proprietary or otherwise confidential information disclosed in connection with the performance of this Agreement, Subcontractor is equally bound by Owner's confidentiality requirements.

3.29 ROYALTIES, PATENTS, AND COPYRIGHTS Subcontractor shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods, or systems selected by Subcontractor and incorporated in the Subcontract Work. Subcontractor shall defend, indemnify, and hold Constructor and Owner harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection. Subcontractor shall be liable for all loss, including all costs, expenses, and attorneys' fees, but shall not be responsible for such defense or loss when a particular design, process, or product of a particular manufacturer or manufacturers is required by the Subcontract Documents.

#### ARTICLE 4 CONSTRUCTOR'S RESPONSIBILITIES

4.1 CONSTRUCTOR'S REPRESENTATIVE Constructor's authorized representative is [\_\_\_\_]. Constructor's representative shall be the only person Subcontractor shall look to for instructions, orders, or directions, except in an emergency. If Constructor changes its representative, Constructor shall promptly notify Subcontractor in writing.

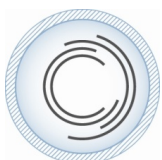
#### 4.2 OWNER'S ABILITY TO PAY

4.2.1 Unless expressly prohibited by the prime agreement, Constructor shall promptly provide to Subcontractor the following information received from Owner: (a) upon Subcontractor's request, information regarding Owner's financial ability to pay for the Work, and (b) notice of any material variation in Owner's financial ability to pay. Constructor, however, does not warrant the accuracy or completeness of the information provided.

4.2.2 If Subcontractor does not receive the information referenced in the subsection immediately above with regard to Owner's ability to pay for the Work as required by the Contract Documents, Subcontractor may request the information from Owner or Owner's lender.

4.3 CONSTRUCTOR APPLICATION FOR PAYMENT Upon request, Constructor shall give Subcontractor a copy of the most current Constructor application for payment reflecting the amounts approved or paid by Owner for the Subcontract Work performed to date.

4.4 INFORMATION OR SERVICES Subcontractor is entitled to request through Constructor any information or services required for Subcontractor's performance of the Subcontract Work which is under Owner's control. Subcontractor also is entitled to request through Constructor any information necessary to give notice of or enforce mechanic's lien rights and, where applicable, stop notices. This information shall include Owner's interest in the real property on which the Project is located and the recorded legal



title. To the extent Constructor receives such information or services, Constructor shall provide them to Subcontractor in a timely manner. Constructor, however, does not warrant the accuracy or completeness of the information provided by Owner. To the extent Owner provides any warranty of Owner provided information, Constructor agrees to permit Subcontractor to prosecute a claim in the name of Constructor for the use and benefit of Subcontractor, pursuant to §5.3.2.

**4.5 STORAGE AREAS** Constructor shall allocate adequate storage areas, if available, for Subcontractor's materials and equipment during the course of the Subcontract Work. Unless otherwise agreed upon, Constructor shall reimburse Subcontractor for the additional costs of having to relocate such storage areas at the direction of Constructor.

**4.6 TIMELY COMMUNICATIONS** Constructor shall transmit to Subcontractor, with reasonable promptness, all submittals, transmittals, and written approvals relative to the Subcontract Work. Unless otherwise specified in the Subcontract Documents, if communications are not through Subcontractor, Constructor shall inform Subcontractor of the communications Constructor has with Subcontractor's subcontractors and suppliers. Constructor shall provide to Subcontractor a copy of Constructor's payment bond on the Project upon the Subcontract Work commencing. Constructor shall provide to Subcontractor a copy of the Builder's Risk Insurance Certificate issued on the Project promptly after Constructor receives it.

**4.7 USE OF SUBCONTRACTOR'S EQUIPMENT** Constructor, its agents, employees, other subcontractors, or suppliers shall use Subcontractor's equipment only with the express written permission of Subcontractor's designated representative and in accordance with Subcontractor's terms and conditions for such use. If Constructor or any of its agents, employees, or suppliers utilize any of Subcontractor's equipment, including machinery, tools, scaffolding, hoists, lifts, or similar items owned, leased, or under the control of Subcontractor, Constructor shall indemnify and hold harmless Subcontractor as provided in ARTICLE 9 for any loss or damage which may arise from such use, except to the extent that such loss or damage is caused by the negligence of Subcontractor's employees operating Subcontractor's equipment.

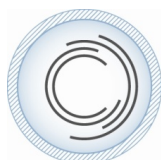
## **ARTICLE 5 PROGRESS SCHEDULE**

**5.1 TIME IS OF THE ESSENCE** Time is of the essence with regard to the obligations of the Subcontract Documents.

**5.2 SCHEDULE** Subcontractor shall provide Constructor with any scheduling information proposed by Subcontractor for the Subcontract Work. In consultation with Subcontractor, Constructor shall prepare the schedule for performance of the Work ("Progress Schedule") and shall revise and update such schedule, as necessary, as the Work progresses. The Progress Schedule binds each Party and all subsequent changes and additional details shall be submitted to Subcontractor promptly and reasonably in advance of the required performance. Constructor shall have the right to determine and, if necessary, make reasonable changes to the time, order, and priority in which the various portions of the Work shall be performed and all other matters relative to the Subcontract Work. To the extent such changes increase Subcontractor's time and costs, Subcontractor may seek equitable adjustment in the Subcontract Amount or Subcontract Time in accordance with the Subcontract Documents.

**5.3 DELAYS AND EXTENSIONS OF TIME**

**5.3.1 OWNER CAUSED DELAY** Subject to §5.3.2, if the commencement or progress of the Subcontract Work is delayed without the fault or responsibility of Subcontractor, the Subcontract Time shall be extended by Subcontract Change Order and the Subcontract Amount equitably adjusted to the extent obtained by Constructor under the Subcontract Documents, and the Progress Schedule shall be revised accordingly.



5.3.2 CLAIMS RELATING TO OWNER Subcontractor agrees to initiate all claims for which Owner is or may be liable in the manner and within the time limits provided in the Subcontract Documents for like claims by Constructor upon Owner and in sufficient time for Constructor to initiate such claims against Owner in accordance with the Subcontract Documents. At Subcontractor's request and expense to the extent agreed upon in writing, Constructor agrees to permit Subcontractor to prosecute a claim in the name of Constructor for the use and benefit of Subcontractor in the manner provided in the Subcontract Documents for like claims by Constructor upon Owner.

5.3.3 CONSTRUCTOR CAUSED DELAY Nothing in this article precludes Subcontractor's recovery of delay damages caused by Constructor.

5.3.4 CLAIMS RELATING TO CONSTRUCTOR Subcontractor shall give Constructor written notice of all claims not included in §5.3.2 within fourteen (14) Days of Subcontractor's knowledge of the facts giving rise to the claim. Thereafter, Subcontractor shall submit written documentation of its claim, including appropriate supporting documentation, within twenty-one (21) Days after giving notice, unless the Parties agree upon a longer period of time. Constructor shall respond in writing denying or approving, in whole or in part, Subcontractor's claim no later than fourteen (14) Days after receipt of Subcontractor's documentation of claim. Constructor's failure to respond shall be deemed a denial of Subcontractor's claim. All unresolved claims, disputes, and other matters in question between the Parties not relating to claims included in §5.3.2 shall be resolved as provided for in ARTICLE 11.

#### 5.4 LIMITED MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES

5.4.1 Except for any (a) liquidated, consequential, or other damages that Owner is entitled to recover against Constructor under the prime agreement, and (b) losses covered by insurance required by the Subcontract Documents, the Parties mutually waive all claims against each other for consequential damages, including but not limited to, damages for loss of business, loss of financing, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. Similarly, Subcontractor shall obtain in contracts with its subcontractors mutual waivers of consequential damages that correspond to Subcontractor's waiver of consequential damages. The provisions of this subsection shall also apply to and survive this Agreement.

#### 5.5 LIQUIDATED DAMAGES

5.5.1 If the Subcontract Documents provide for liquidated damages or other damages for delay beyond the completion date set forth in the Subcontract Documents that are not specifically addressed as a liquidated damage item in this Agreement, and such damages are assessed, Constructor may assess a share of the damages against Subcontractor in proportion to Subcontractor's share of the responsibility for the damages. However, the amount of such assessment shall not exceed the amount assessed against Constructor. This section shall not limit Subcontractor's liability to Constructor for Constructor's actual damages caused by Subcontractor.

### ARTICLE 6 SUBCONTRACT AMOUNT

6.1 As full compensation for performance of this Agreement, Constructor agrees to pay Subcontractor in current funds for the satisfactory performance of the Subcontract Work subject to all applicable provisions of this Agreement:

6.1.1 the fixed-price of [\_\_\_\_\_] dollars (\$[\_\_\_\_\_] subject to additions and deductions as provided for in the Subcontract Documents; or



6.1.2 alternates and unit prices in accordance with the attached schedule of alternates and unit prices and estimated quantities, which is incorporated by reference and identified as Exhibit D; or

6.1.3 time and material rates and prices in accordance with the attached Schedule of Labor and Material Costs which is incorporated by reference and identified as Exhibit [\_\_\_\_\_].

The fixed-price, unit prices, or time and material rates and prices are referred to as the Subcontract Amount.

## ARTICLE 7 CHANGES

7.1 Subcontractor may request or Constructor may order changes in the Subcontract Work or the timing or sequencing of the Subcontract Work that impacts the Subcontract Amount or Subcontract Time. A change in the Subcontract Work that affects the Subcontract Amount or the Subcontract Time shall be formalized in a Subcontract Change Order and processed in accordance with this article.

7.1.1 For changes in the Subcontract Work, the Parties shall negotiate in good faith an appropriate adjustment to the Subcontract Amount or the Subcontract Time and shall conclude these negotiations as expeditiously as possible. Acceptance of the Subcontract Change Order and any adjustment in the Subcontract Amount or Subcontract Time shall not be unreasonably withheld.

7.2 INTERIM DIRECTIVES Constructor may issue a written Interim Directive directing Subcontractor to proceed with the Subcontract Work in question. If such Interim Directive is issued as a result of Owner's issuance of an Interim Directive, then the applicable provisions of the prime agreement shall govern. Otherwise, Subcontractor shall separately submit its costs for the resulting change, beginning with its next regularly scheduled application for payment submitted after the issuance of the Interim Directive. If there is a cost dispute, Constructor shall pay Subcontractor fifty percent (50%) of its actual (incurred or committed) cost to perform the Subcontract Work. In such event, the Parties reserve their rights as to the disputed amount. Constructor's payment does not prejudice its right to be reimbursed should it be determined that the disputed work was within the scope of the Subcontract Work. Subcontractor's receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed Subcontract Work should it be determined that the disputed Subcontract Work is not within scope. Undisputed amounts may be included in applications for payment and shall be paid in accordance with the Subcontract Documents.

When the Parties agree upon an adjustment in Subcontract Amount or Subcontract Time, such agreement shall be reflected in a Subcontract Change Order, and the payments to date shall be adjusted to reflect the Subcontract Change Order. If no agreement is reached, the Parties shall resolve the matter as provided in ARTICLE 11.

7.3 CONCEALED OR UNKNOWN SITE CONDITIONS If a condition encountered at the Worksite is (a) a subsurface or other physical condition materially different from those indicated in the Subcontract Documents, or (b) an unusual and unknown physical condition materially different from conditions ordinarily encountered and generally recognized as inherent in the Subcontract Work provided for in the Subcontract Documents, Subcontractor shall stop affected Work after the condition is first observed and give prompt written notice of the condition to Constructor. Subcontractor shall not be required to perform any Work relating to the condition without the written mutual agreement of the Parties. Any change in the Contract Price or the Contract Time as a result of the condition, including a dispute about its existence or nature, shall be determined as provided in ARTICLE 7.

7.4 ADJUSTMENTS IN SUBCONTRACT AMOUNT An adjustment in the Subcontract Amount resulting from a Subcontract Change Order shall be determined by one of the following methods:



7.4.1 mutual acceptance of an itemized lump sum;

7.4.2 unit prices as indicated in the Subcontract Documents or as subsequently agreed to by the Parties; or

7.4.3 costs as determined in the Subcontract Documents or in a manner otherwise acceptable to the Parties, and a mutually acceptable fixed or percentage fee.

7.5 **SUBSTANTIATION OF ADJUSTMENT** If Subcontractor does not respond promptly or disputes the method of adjustment, the method and the adjustment shall be determined by Constructor on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in the case of an increase in the Subcontract Amount, an allowance for overhead and profit of the percentage provided in §7.6, or if none is provided, as mutually agreed upon by the Parties. Subcontractor may contest the reasonableness of any adjustment determined by Constructor. Subcontractor shall maintain for Constructor's review and approval an appropriately itemized and substantiated accounting of the following items attributable to the Subcontract Change Order:

7.5.1 labor costs, including Social Security, health, welfare, retirement, and other fringe benefits as normally required, and state workers' compensation insurance;

7.5.2 costs of materials, supplies, and equipment, whether incorporated in the Subcontract Work or consumed, including transportation costs;

7.5.3 costs of renting machinery and equipment other than hand tools;

7.5.4 costs of bond and insurance premiums, permit fees, and taxes attributable to the change; and

7.5.5 costs of additional supervision and field office personnel services necessitated by the change.

7.6 Adjustments shall be based on net change in Subcontractor's reasonable cost of performing the changed Subcontract Work plus, in case of a net increase in cost, an agreed upon sum for overhead and profit not to exceed [ ] percent ([ ]%).

7.7 **NO OBLIGATION TO PERFORM** Subcontractor shall not be obligated to perform changes in the Subcontract Work until a Subcontract Change Order has been executed or written instructions have been issued in accordance with §7.2 or §7.8.

7.8 **INCIDENTAL CHANGES** Constructor may direct Subcontractor to perform incidental changes in the Subcontract Work which do not involve adjustments in the Subcontract Amount or the Subcontract Time. Incidental changes shall be consistent with the scope and intent of the Subcontract Documents. Constructor shall initiate an incidental change in the Subcontract Work by issuing an Interim Directive to Subcontractor, which shall be carried out promptly and is binding on the Parties.

## **ARTICLE 8 PAYMENT**

8.1 **SCHEDULE OF VALUES** As a condition precedent to payment, Subcontractor shall provide a schedule of values satisfactory to Constructor not more than fifteen (15) Days from the date of execution of this Agreement.

### **8.2 PROGRESS PAYMENTS**

8.2.1 **APPLICATIONS** Subcontractor's applications for payment shall be itemized and supported by substantiating data as required by the Subcontract Documents. If Subcontractor is obligated to



provide design services pursuant to §3.8, Subcontractor's applications for payment shall show its design professional's fee and expenses as a separate cost item. Subcontractor's application for payment shall be notarized and if allowed under the Subcontract Documents may include a properly authorized Interim Directive. Subcontractor's application for payment for the Subcontract Work performed in the preceding payment period shall be submitted for approval by Constructor in accordance with the schedule of values if required in §8.2.2 through §8.2.4. Constructor shall incorporate the approved amount of Subcontractor's application for payment into Constructor's application for payment to Owner for the same period and submit it to Owner in a timely fashion. Constructor shall promptly notify Subcontractor of any changes in the amount requested on behalf of Subcontractor.

**8.2.2 RETAINAGE** The rate of retainage shall be [\_\_\_\_\_] percent ([\_\_\_\_\_]%), which is equal to the percentage retained from Constructor's payment by Owner for the Subcontract Work. If the Subcontract Work is satisfactory and the prime agreement provides for reduction of retainage, Subcontractor's retainage shall also be reduced when Constructor's retainage of the Subcontract Work has been so reduced by Owner.

**8.2.3 TIME OF APPLICATION** Subcontractor shall submit progress payment applications to Constructor no later than the [\_\_\_\_\_] Day of each payment period for the Subcontract Work performed up to and including the [\_\_\_\_\_] Day of the payment period indicating work completed and, to the extent allowed under the subsection below, materials suitably stored during the preceding payment period.

**8.2.4 STORED MATERIALS** Unless otherwise provided in the Subcontract Documents, applications for payment may include materials and equipment not yet incorporated in the Subcontract Work but delivered to and suitably stored on or off the Worksite including applicable insurance, storage, and costs incurred transporting the materials to an off-site storage facility. Approval of payment applications for such stored items on or off the Worksite shall be conditioned upon submission by Subcontractor of bills of sale and required insurance or such other procedures satisfactory to Owner and Constructor to establish Owner's title to such materials and equipment, or otherwise to protect Owner's and Constructor's interest including transportation to the Worksite.

**8.2.5 TIME OF PAYMENT** Progress payments to Subcontractor for satisfactory performance of the Subcontract Work shall be made no later than seven (7) Days after receipt by Constructor of payment from Owner for the Subcontract Work. If payment from Owner for such Subcontract Work is not received by Constructor, through no fault of Subcontractor, Constructor will make payment to Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed.

**8.2.6 PAYMENT DELAY** If Constructor has received payment from Owner and if for any reason not the fault of Subcontractor, Subcontractor does not receive a progress payment from Constructor within seven (7) Days after the date such payment is due, as defined in the subsection immediately above, or, if Constructor has failed to pay Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed, Subcontractor, upon giving seven (7) Days' written notice to Constructor, and without prejudice to and in addition to any other legal remedies, may stop work until payment of the full amount owing to Subcontractor has been received. The Subcontract Amount and Time shall be adjusted by the amount of Subcontractor's reasonable and verified cost of shutdown, delay, and startup, which shall be effected by an appropriate Subcontractor Change Order.

**8.2.7 PAYMENTS WITHHELD** Constructor may reject a Subcontractor application for payment in whole or in part or withhold amounts from a previously approved Subcontractor application for payment, as may reasonably be necessary to protect Constructor from loss or damage for which Constructor may be liable and without incurring an obligation for late payment interest based upon:



8.2.7.1 Subcontractor's repeated failure to perform the Subcontract Work as required by this Agreement;

8.2.7.2 except as accepted by the insurer providing Builders Risk or other property insurance covering the Project, loss or damage arising out of or relating to this Agreement and caused by Subcontractor to Owner, Constructor, or others to whom Constructor may be liable;

8.2.7.3 Subcontractor's failure to properly pay for either labor, materials, equipment, or supplies furnished in connection with the Subcontract Work, provided that Constructor is making payments to Subcontractor for that portion of the Subcontract Work in accordance with this Agreement;

8.2.7.4 rejected or defective Subcontract Work which has not been corrected in a timely fashion;

8.2.7.5 reasonable evidence of delay in performance of the Subcontract Work such that the Work will not be completed within the Subcontract Time, and that the unpaid balance of the Subcontract Amount is not sufficient to offset the liquidated damages or actual damages that may be sustained by Constructor as a result of the anticipated delay caused by Subcontractor;

8.2.7.6 reasonable evidence demonstrating that the unpaid balance of the Subcontract Amount is insufficient to cover the cost to complete the Subcontract Work; and

8.2.7.7 uninsured third-party claims involving Subcontractor or reasonable evidence demonstrating that third-party claims are likely to be filed unless and until Subcontractor furnishes Constructor with adequate security in the form of a surety bond, letter of credit, or other collateral or commitment sufficient to discharge such claims if established.

No later than seven (7) Days after receipt of an application for payment, Constructor shall give written notice to Subcontractor, at the time of disapproving or nullifying all or part of an application for payment, stating its specific reasons for such disapproval or nullification, and the remedial actions to be taken by Subcontractor in order to receive payment. When the above reasons for disapproving or nullifying an application for payment are removed, payment will be promptly made for the amount previously withheld.

## 8.2.8 SUBSTANTIAL COMPLETION

8.2.8.1 Upon substantial completion of the Subcontract Work or a designated portion thereof, Constructor shall assume responsibility for security and protection of the Subcontract Work pending the achievement of Substantial Completion of the Project. However, acceptance of the Subcontract Work for the purpose of allowing succeeding Work to proceed shall not result in the commencement of the warranty period for the Subcontract Work unless otherwise provided in the prime agreement.

8.2.8.2 Unless otherwise provided for in the prime agreement, partial Owner occupancy or use of completed portions of the Subcontract Work shall constitute Substantial Completion of that portion of the Subcontract Work and the warranty period applicable to the Subcontract Work shall commence upon the achievement of Substantial Completion of the Project and acceptance by Owner under the terms of the prime agreement.

## 8.3 FINAL PAYMENT



8.3.1 APPLICATION Upon acceptance of the Subcontract Work by Owner and Constructor and receipt from Subcontractor of evidence of fulfillment of Subcontractor's obligations in accordance with the Subcontract Documents and the subsection below, Constructor shall incorporate Subcontractor's application for final payment into Constructor's next application for payment to Owner without delay, or notify Subcontractor if there is a delay and the reasons for the delay.

8.3.2 REQUIREMENTS Before Constructor shall be required to incorporate Subcontractor's application for final payment into Constructor's next application for payment, Subcontractor shall submit to Constructor:

- (a) An affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontract Work have been paid, satisfied, or are to be paid with the proceeds of final payment, so as not to encumber Owner's property, Constructor, or Constructor's surety;
- (b) As-built drawings, manuals, copies of warranties, startup and testing required in §3.26, and all close-out documents and satisfaction of close-out procedures if required by the Subcontract Documents.
- (c) Release of any liens, conditioned on final payment being received, and in such form as may be required by the Subcontract Documents;
- (d) Consent of surety to final payment, if required;
- (e) A report of any outstanding known and unreported accidents or injuries experienced by Subcontractor at the Worksite;
- (f) Other data, if required, such as receipts and releases.

8.3.3 TIME OF PAYMENT Final payment of the balance due of the Subcontract Amount shall be made to Subcontractor within seven (7) Days after receipt by Constructor of final payment from Owner for such Subcontract Work.

8.3.4 FINAL PAYMENT DELAY If Owner or its designated agent does not issue a certificate for final payment or Constructor does not receive such payment for any cause which is not the fault of Subcontractor, Constructor shall promptly inform Subcontractor in writing. If final payment from Owner for such Subcontract Work is not received by Constructor, through no fault of Subcontractor, Constructor will make payment to Subcontractor within a reasonable time.

8.3.5 WAIVER OF CLAIMS Final payment shall constitute a waiver of all claims by Subcontractor relating to the Subcontract Work, but shall in no way relieve Subcontractor of liability for the obligations assumed under §3.20 and §3.21, or for faulty or defective work or services discovered after final payment, nor relieve Constructor for claims made in writing by Subcontractor as required by the Subcontract Documents before its application for final payment as unsettled at the time of such payment.

8.4 LATE PAYMENT INTEREST Progress payments or final payment due and unpaid under this Agreement shall bear interest from the date payment is due at the prevailing statutory rate at the place of the Project. However, if Owner fails to timely pay Constructor as required under the prime agreement through no fault or neglect of Constructor, and Constructor fails to timely pay Subcontractor as a result of such nonpayment, Constructor's obligation to pay Subcontractor interest on corresponding payments due and unpaid under this Agreement shall be extinguished by Constructor promptly paying to Subcontractor



Subcontractor's proportionate share of the interest, if any, received by Constructor from Owner on such late payments.

**8.5 CONTINUING OBLIGATIONS** Provided Constructor is making payments in accordance with this Agreement, Subcontractor shall reimburse Constructor for costs and expenses for any claim, obligation, or lien asserted before or after final payment is made that arises from the performance of the Subcontract Work. Subcontractor shall reimburse Constructor for costs and expenses including attorneys' fees and costs and expenses incurred by Constructor in satisfying, discharging, or defending against any such claims, obligation, or lien, including any action brought or judgment recovered. If any Law or bond requires Subcontractor to take any action before the expiration of the reasonable time for payment referenced in §8.2.5 in order to preserve or protect Subcontractor's rights with respect to mechanic's lien or bond claims, then Subcontractor may take that action before the expiration of the reasonable time for payment and such action will not: (a) create the reimbursement obligation recited above, (b) be in violation of this Agreement, or (c) be considered premature for purposes of preserving and protecting Subcontractor's rights.

**8.6 PAYMENT USE RESTRICTION** Payments received by Subcontractor shall be used to satisfy the indebtedness owed by Subcontractor to any person furnishing labor or materials, or both, for use in performing the Subcontract Work through the most current period applicable to progress payments received from Constructor before it is used for any other purpose. In the same manner, payments received by Constructor for the Subcontract Work shall be dedicated to payment to Subcontractor. This applies to this Agreement only, and is not for the benefit of third parties. Moreover, this section does not restrict commingling funds nor require separate accounts for deposits. Nothing in this section creates a fiduciary duty on the Parties, nor creates any tort cause of action or liability for breach of trust, punitive damages, or other equitable remedy or liability for alleged breach.

**8.7 PAYMENT VERIFICATION** If Constructor has reason to believe that Subcontractor is not complying with payment terms in this Agreement, Constructor may contact Subcontractor's subcontractors and suppliers to ascertain whether they are being paid by Subcontractor in accordance with this Agreement.

**8.8 PARTIAL LIEN WAIVERS AND AFFIDAVITS** As a prerequisite for payments, Subcontractor shall provide, in a form satisfactory to Owner and Constructor, partial lien and claim waivers in the amount of the application for payment and affidavits covering its subcontractors and suppliers for completed Subcontract Work. Such waivers shall be conditional upon payment. In no event shall Subcontractor be required to provide an unconditional waiver of lien or claim, before receiving payment or in an amount in excess of what it has been paid.

**8.9 SUBCONTRACTOR PAYMENT FAILURE** Upon payment by Constructor, Subcontractor shall promptly pay its subcontractors and suppliers the amounts to which they are entitled. If Constructor has reason to believe that labor, material, or other obligations incurred in the performance of the Subcontract Work are not being paid, Constructor may give written notice of a potential claim or lien to Subcontractor and may take any steps deemed necessary to assure that progress payments are utilized to pay such obligations, including but not limited to the issuance of joint checks. If upon receipt of notice, Subcontractor does not (a) supply evidence to the satisfaction of Constructor that payment owed has been paid; or (b) post a bond indemnifying Owner, Constructor, Constructor's surety, if any, and the premises from a claim or lien, Constructor shall have the right to withhold from any payments due or to become due to Subcontractor a reasonable amount to protect Constructor from any and all loss, damage, or expense including attorneys' fees that may arise out of or relate to any such claim or lien.

**8.10 SUBCONTRACTOR ASSIGNMENT OF PAYMENTS** Subcontractor shall not assign any payment due or to become due under this Agreement, without the written consent of Constructor, unless the assignment is intended to create a new security interest within the scope of Article 9 of the Uniform Commercial Code. Should Subcontractor assign all or any part of any payment due or to become due



under this Agreement to create a new security interest or for any other purpose, the instrument of assignment shall contain a clause to the effect that the assignee's right in and to any money due or to become due to Subcontractor shall be subject to the claims of all persons, firms, and corporations for services rendered or materials supplied for Subcontract Work.

8.11 PAYMENT NOT ACCEPTANCE Payment to Subcontractor does not constitute or imply acceptance of any portion of the Subcontract Work.

## ARTICLE 9 INDEMNITY, INSURANCE, AND BONDS

### 9.1 INDEMNITY

9.1.1 INDEMNITY To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Constructor, Design Professional, Owner, and their agents, consultants, and employees (the "Indemnitees") from all claims for bodily injury and property damage other than to the Work itself that may arise from the performance of the Subcontract Work, including reasonable attorneys' fees, costs, and expenses, that arise from the performance of the Work, but only to the extent caused by the negligent or intentionally wrongful acts or omissions of Subcontractor, Subcontractor's subcontractors, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. Subcontractor shall be entitled to reimbursement of any defense cost paid above Subcontractor's percentage of liability for the underlying claim to the extent attributable to the negligent or intentionally wrongful acts or omissions of the Indemnitees.

9.1.2 NO LIMITATION ON LIABILITY In any claim against the Indemnitees by any employee of Subcontractor, anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable, the indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

### 9.2 INSURANCE

9.2.1 SUBCONTRACTOR'S INSURANCE Before commencing the Subcontract Work, and as a condition precedent to payment, Subcontractor shall purchase and maintain insurance that will protect it from the claims arising out of its operations under this Agreement, whether the operations are by Subcontractor, or any of its consultants or subcontractors or anyone directly or indirectly employed by any of them for whose acts Subcontractor may be liable.

9.2.2 MINIMUM LIMITS OF LIABILITY Subcontractor shall procure and maintain in force Workers' Compensation Insurance, Employers' Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance (CGL) with insurance companies licensed in the jurisdiction in which the Project is located and acceptable to Constructor, which acceptance shall not be unreasonably withheld, at least the limits of liability as set forth in Exhibit F.

#### 9.2.3 PROFESSIONAL LIABILITY INSURANCE

9.2.3.1 If required by §3.8, Subcontractor shall require its design professional(s) to maintain professional liability insurance with a company reasonably satisfactory to Constructor, including contractual liability insurance against the liability assumed, and including coverage for any professional liability caused by consultants of its design professional. Said insurance shall have specific minimum limits as set forth below:



Limit of [ ] dollars (\$[ ]) per claim.

General Aggregate of [ ] dollars (\$[ ]) for the subcontract services rendered.

The professional liability insurance shall contain prior acts coverage sufficient to cover all subcontract services rendered by the design professional. Said insurance shall be continued in effect with an extended period of [ ] years following final payment to the design professional. Such insurance shall have a maximum deductible amount of [ ] dollars (\$[ ]) per occurrence. The Professional Liability Insurance shall contain a retroactive date providing prior acts coverage sufficient to cover all Services performed by the Subcontractor's design professional for this Project. Coverage shall be continued in effect for [ ] ([ ]) year(s) following Substantial Completion. Subcontractor shall pay the self-insured retention and deductible. The combined total deductible and self-insured retention maximum shall be [ ] dollars (\$[ ]).

9.2.3.2 Subcontractor shall require its design professional to furnish to Subcontractor and Constructor, before the design professional commences its services, a copy of its professional liability policy evidencing the coverages required in this subsection. No policy shall be cancelled or modified without thirty (30) Days' prior written notice to Subcontractor and Constructor.

9.2.4 NUMBER OF POLICIES Commercial General Liability Insurance (CGL) and other liability insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability Policy.

9.2.5 CANCELLATION, RENEWAL, AND MODIFICATION To the extent commercially available to Subcontractor from its current insurance company, insurance policies required under §9.2.1 shall contain a provision that the insurance company or its designee must give Constructor written notice transmitted in paper or electronic format: (a) 30 Days before coverage is nonrenewed by the insurance company and (b) within 10 Business Days after cancelation of coverage by the insurance company. Before commencing the Work and upon renewal or replacement of the insurance policies, Subcontractor shall furnish Constructor with certificates of insurance until one year after Substantial Completion or longer if required by the Contract Documents. In addition, if any insurance policy required under §9.2.1 is not to be immediately replaced without lapse in coverage when it expires, exhausts its limits, or is to be cancelled, Subcontractor shall give Constructor prompt written notice upon actual or constructive knowledge of such condition.

9.2.6 CONTINUATION OF COVERAGE Subcontractor shall continue to carry Completed Operations Liability Insurance for at least one year after final payment to Constructor. Before commencing the Work, Subcontractor shall furnish Constructor with certificates evidencing the required coverages.

9.2.7 BUILDER'S RISK POLICY INSURANCE Upon Subcontractor's written request, Constructor shall provide Subcontractor with a copy of the Builder's Risk policy of insurance or any other property or equipment insurance in force for the Project and procured by Owner or Constructor. Constructor shall advise Subcontractor if a Builder's Risk policy of insurance is not in force.

9.2.8 WAIVER OF SUBROGATION The Parties waive all rights against each other, Owner, and Design Professional, and any of their respective consultants, subcontractors, subsubcontractors, suppliers, agents, and employees, for damages caused by perils to the extent covered by the proceeds of the insurance provided in §9.2.7, except such rights as they may have to the insurance proceeds and such rights as they may have for the failure to obtain and maintain any Project Builders Risk Coverage that they may have been obligated to provide in the prime agreement. Subcontractor shall require similar waivers from its subcontractors.



9.2.9 ENDORSEMENT If the policies of insurance referred to in this article require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

9.2.10 ADDITIONAL GENERAL LIABILITY COVERAGE Constructor  shall/  shall not require Subcontractor to purchase and maintain additional liability coverage, primary to Constructor's coverage pursuant to the subsection immediately above. If required, the additional liability coverage required of Subcontractor shall be:

9.2.10.1  ADDITIONAL INSURED. Constructor shall be named as an additional insured on Subcontractor's CGL specified, for on-going operations and completed operations, excess/umbrella liability, commercial automobile liability, and any required pollution liability, but only with respect to liability for bodily injury, property damage, or personal and advertising injury to the extent caused by the negligent acts or omissions of Subcontractor, or those acting on Subcontractor's behalf, in the performance of Subcontract Work for Constructor at the Worksite. The insurance of the Subcontractor shall be primary and non-contributory to any insurance available to the Additional Insureds.

9.2.10.2  OCP. Subcontractor shall provide an Owners' and Constructors' Protective Liability Insurance ("OCP") policy with limits equal to the limits on CGL specified, or limits as otherwise required by Constructor.

Any documented additional cost in the form of a surcharge associated with procuring additional general liability coverage in accordance with this subsection shall be paid by Constructor directly or costs may be reimbursed by Constructor to Subcontractor by increasing the Subcontract Amount to correspond to the actual cost required to purchase and maintain the coverage. Before commencing the Subcontract Work, Subcontractor shall provide either a copy of the OCP policy, or a certificate and endorsement evidencing that Constructor has been named as an additional insured, as applicable.

### 9.3 BONDS

9.3.1 Performance and Payment Bonds  are/  are not required of Subcontractor. Such bonds shall be issued by a surety admitted in the state in which the Project is located and must be acceptable to Constructor. Constructor's acceptance shall not be withheld without reasonable cause. The penal sum of the Payment Bond and Performance Bond shall each be in the original full Subcontract Amount.

9.3.2 Subcontractor shall be reimbursed, without retainage, for the cost of any required performance or payment bonds simultaneously with the first progress payment. The reimbursement amount for Subcontractor bonds shall be [\_\_\_\_\_] percent ([\_\_\_\_\_]%) of the Subcontract Amount, which sum is included in the Subcontract Amount. If acceptable to Constructor, Subcontractor may, in lieu of retainage, furnish a retention bond or other security interest, acceptable to Constructor, to be held by Constructor.

9.3.3 If Subcontractor shall fail to promptly provide any required bonds, Constructor may terminate this Agreement and enter into a subcontract for the balance of the Subcontract Work with another subcontractor. All Constructor costs and expenses incurred by Constructor as a result of said termination shall be paid by Subcontractor.

9.3.4 PAYMENT BOND REVIEW Constructor  has/  has not provided Owner a payment bond.

## ARTICLE 10 SUSPENSION, NOTICE TO CURE, AND TERMINATION



## 10.1 FAILURE OF PERFORMANCE AND TERMINATION

10.1.1 NOTICE TO CURE A DEFAULT If Subcontractor persistently fails to supply enough qualified workers, proper materials, or equipment to maintain the Progress Schedule, or fails to make prompt payment to its workers, subsubcontractors, or suppliers, or disregards a Law or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, Subcontractor shall be deemed in default of this Agreement. If Subcontractor fails within three (3) Business Days after written notification to commence and continue satisfactory correction of the default with diligence and promptness, then Constructor shall give a second notice to Subcontractor and surety, if any, to correct the default within a two (2) Business Day period. If Subcontractor fails to promptly commence and continue satisfactory correction of the default following receipt of such second notice, Constructor without prejudice to any other rights or remedies, shall have the right to any or all of the following remedies:

10.1.1.1 supply workers, materials, equipment, and facilities as Constructor deems necessary for the completion of the Subcontract Work or any part which Subcontractor has failed to complete or perform after written notification, and charge Subcontractor costs and expenses, including reasonable overhead, profit, and attorneys' fees that are due or to become due. Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Subcontract Amount. At Subcontractor's request, Constructor shall provide a detailed accounting of the costs to finish the Subcontract Work;

10.1.1.2 contract with one or more additional contractors to perform such part of the Subcontract Work as Constructor determines will provide the most expeditious completion of the Work, and charge the cost to Subcontractor as provided under the subsection above;

10.1.1.3 withhold any payments due or to become due Subcontractor pending corrective action in amounts sufficient to cover losses and compel performance to the extent required by and to the satisfaction of Constructor. In the event of an emergency affecting the safety of persons or property, Constructor may proceed as above without notice, but Constructor shall give Subcontractor notice promptly after the fact as a precondition of cost recovery; or

10.1.1.4 terminate the Agreement by written notice.

10.1.2 USE OF SUBCONTRACTOR'S EQUIPMENT If Constructor performs work under this article, either directly or through other subcontractors, Constructor or other subcontractors shall have the right to take and use any materials or supplies for which Constructor or other subcontractors have paid and located at the Worksite for the purpose of completing any remaining Subcontract Work. Constructor and others performing work under this article shall also have the right to use construction tools and equipment located on the Worksite and belonging to the Subcontractor and its subcontractors for the purpose of completing the remaining Work, but only after Subcontractor's written consent, which shall not be unreasonably withheld. If Constructor uses the tools and equipment in accordance with this subsection, Constructor shall indemnify and hold harmless Subcontractor in connection with Constructor's use of such tools and equipment. Immediately upon completion of the Subcontract Work, any remaining materials, implements, equipment, appliances, or tools not consumed or incorporated in performance of the Subcontract Work, and furnished by, belonging to, or delivered to the Project by or on behalf of Subcontractor, shall be returned to Subcontractor in substantially the same condition as when they were taken, normal wear and tear excepted.

## 10.2 BANKRUPTCY



10.2.1 TERMINATION ABSENT CURE If Subcontractor files a petition under the Bankruptcy Code, this Agreement shall terminate if: (a) Subcontractor or Subcontractor's trustee rejects the Agreement, (b) a default has occurred, and Subcontractor is unable to give adequate assurance of required performance; or (c) Subcontractor is otherwise unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code.

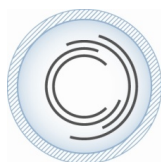
10.2.2 INTERIM REMEDIES If Subcontractor is not performing in accordance with the Progress Schedule at the time a petition in bankruptcy is filed, or at any subsequent time, Constructor, while awaiting the decision of Subcontractor or its trustee to reject or to assume this Agreement and provide adequate assurance of its ability to perform, may avail itself of such remedies under this article as are reasonably necessary to maintain the Progress Schedule. Constructor may offset against any sums due or to become due Subcontractor all costs incurred in pursuing any of the remedies provided including, but not limited to, reasonable overhead, profit, and attorneys' fees. Subcontractor shall be liable for the payment of any amount by which costs incurred may exceed the unpaid balance of the Subcontract Amount.

10.3 SUSPENSION BY OWNER FOR CONVENIENCE Should Owner suspend the Work or any part which includes the Subcontract Work for the convenience of Owner and such suspension is not due to any act or omission of Constructor, or any other person or entity for whose acts or omissions Constructor may be liable, Constructor shall notify Subcontractor in writing and, upon receiving notification, Subcontractor shall immediately suspend the Subcontract Work. To the extent provided for under the prime agreement and to the extent Constructor recovers such on Subcontractor's behalf, the Subcontract Amount and the Subcontract Time shall be equitably adjusted by Subcontract Change Order for the cost and delay resulting from any such suspension. Constructor agrees to cooperate with Subcontractor, at Subcontractor's expense, in the prosecution of any Subcontractor claim arising out of an Owner suspension and to permit Subcontractor to prosecute the claim, in the name of Constructor, for the use and benefit of Subcontractor.

10.4 TERMINATION BY OWNER Should Owner terminate its contract with Constructor or any part which includes the Subcontract Work, Constructor shall notify Subcontractor in writing within three (3) Business Days of the termination and, upon written notification, this Agreement shall be terminated and Subcontractor shall immediately stop the Subcontract Work, follow all of Constructor's instructions, and mitigate all costs. In the event of Owner termination, Constructor's liability to Subcontractor shall be limited to the extent of Constructor's recovery on Subcontractor's behalf under the Subcontract Documents, except as otherwise provided in this Agreement. Constructor agrees to cooperate with Subcontractor, at Subcontractor's expense, in the prosecution of any Subcontractor claim arising out of Owner termination and to permit Subcontractor to prosecute the claim, in the name of Constructor, for the use and benefit of Subcontractor, or assign the claim to Subcontractor. If Owner terminates Constructor for cause, through no fault of Subcontractor, Subcontractor shall be entitled to recover from Constructor its reasonable costs arising from the termination of this Agreement, including reasonable overhead and profit on Work not performed.

10.5 CONTINGENT ASSIGNMENT OF THIS AGREEMENT Constructor's contingent assignment of this Agreement to Owner, as provided in the prime agreement, is effective when Owner has terminated the prime agreement for cause and has accepted the assignment by notifying Subcontractor in writing. This contingent assignment is subject to the prior rights of a surety that may be obligated under Constructor's bond, if any. Subcontractor consents to such assignment and agrees to be bound to the assignee by the terms of this Agreement, provided that the assignee fulfills the obligations of Constructor.

10.6 SUSPENSION BY CONSTRUCTOR Constructor may order Subcontractor in writing to suspend all or any part of the Subcontract Work for such period of time as may be determined to be appropriate for the convenience of Constructor. Phased Work or interruptions of the Subcontract Work for short periods of time shall not be considered a suspension. Subcontractor, after receipt of Constructor's order, shall



notify Constructor in writing in sufficient time to permit Constructor to provide timely notice to Owner in accordance with the prime agreement of the effect of such order upon the Subcontract Work. The Subcontract Amount or Subcontract Time shall be adjusted by Subcontract Change Order for any increase in the time or cost of performance of this Agreement caused by such suspension. No claim under this section shall be allowed for any costs incurred more than fourteen (14) Days before Subcontractor's notice to Constructor. Neither the Subcontract Amount nor the Progress Schedule shall be adjusted for any suspension, to the extent that performance would have been suspended, due in whole or in part to the fault or negligence of Subcontractor or by a cause for which Subcontractor would have been responsible. The Subcontract Amount shall not be adjusted for any suspension to the extent that performance would have been suspended by a cause for which Subcontractor would have been entitled only to a time extension under this Agreement.

**10.7 WRONGFUL EXERCISE** If Constructor wrongfully exercises any option under this article, Constructor shall be liable to Subcontractor solely for the reasonable value of Subcontract Work performed by Subcontractor before Constructor's wrongful action, including reasonable overhead and profit on the Subcontract Work performed, less prior payments made, together with reasonable overhead and profit on the Subcontract Work not executed, and other reasonable costs incurred by such action, including reasonable attorneys' fees.

**10.8 TERMINATION BY SUBCONTRACTOR** If the Subcontract Work has been stopped for thirty (30) Days because Subcontractor has not received progress payments or has been abandoned or suspended for an unreasonable period of time not due to the fault or neglect of Subcontractor, then Subcontractor may terminate this Agreement upon giving Constructor seven (7) Days' written notice. Upon such termination, Subcontractor shall be entitled to recover from Constructor payment for all Subcontract Work satisfactorily performed but not yet paid for, including reasonable overhead, profit, and attorneys' fees related to termination, costs, and expenses. However, if Owner has not paid Constructor for the satisfactory performance of the Subcontract Work through no fault or neglect of Constructor, and Subcontractor terminates this Agreement under this article because it has not received corresponding progress payments, Subcontractor shall be entitled to recover from Constructor, within a reasonable period of time following termination, payment for all Subcontract Work executed and for any proven loss, cost, or expense in connection with the Work, including all demobilization costs plus reasonable overhead and profit on Subcontract Work not performed. Constructor's liability for any other damages claimed by Subcontractor under such circumstances shall be extinguished by Constructor pursuing said damages and claims against Owner on Subcontractor's behalf as provided for in §10.3 and §10.4.

## **ARTICLE 11 DISPUTE MITIGATION AND RESOLUTION**

**11.1 WORK CONTINUATION AND PAYMENT** Subcontractor shall continue the Subcontract Work and maintain the Progress Schedule during any dispute mitigation or resolution procedure. If Subcontractor continues to perform, Constructor shall continue to make payments in accordance with this Agreement.

**11.2 DISPUTES BETWEEN THE PARTIES** If the dispute resolution provisions between Constructor and Owner in the Subcontract Documents do not permit consolidation or joinder with disputes of third parties, such as Subcontractor, or if such dispute is only between the Parties, then the Parties shall submit the dispute to the dispute resolution procedures set forth in the section below.

### **11.3 CONSTRUCTOR-SUBCONTRACTOR DISPUTE MITIGATION AND RESOLUTION**

**11.3.1 DIRECT DISCUSSIONS** If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties' representatives, who shall possess the necessary authority to resolve such matter and who shall record the date of first discussions. If the Parties' representatives are not able to resolve such matter within five (5) Business Days, the Parties' representatives shall



immediately inform senior executives of the Parties in writing that a resolution could not be reached. Upon receipt of such notice, the senior executives of the Parties shall meet within five (5) Business Days to endeavor to reach resolution. If the matter remains unresolved after fifteen (15) Days from the date of first discussion, the Parties shall submit such matter to the dispute resolution procedures selected in this ARTICLE 11.

11.3.2 MEDIATION If direct discussions pursuant to the subsection immediately above do not result in resolution of the matter, the Parties shall endeavor to resolve the matter by mediation. The mediation shall be convened within thirty (30) working Days of the matter first being discussed and shall conclude within forty-five (45) working Days of the matter being first discussed. Either Party may terminate the mediation at any time after the first session by written notice to the non-terminating Party and to the mediator. The costs of the mediation shall be shared equally by the Parties. The Parties choose mediation through:

- the current Construction Industry Mediation Rules of the American Arbitration Association (AAA), and administered by AAA.
- the current Mediation Guidelines of JAMS and administered by JAMS
- the current rules and administration by [\_\_\_\_\_].

If no box is checked the default is AAA rules and administration.

11.3.3 BINDING DISPUTE RESOLUTION If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, except as provided in §11.4, the Parties shall submit the matter to the binding dispute resolution procedure selected below:

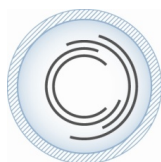
#### 11.3.3.1 ARBITRATION

The Parties choose binding arbitration for any claim or dispute arising out of or relating to this Agreement. **EACH PARTY WAIVES THEIR RIGHT TO BE HEARD IN A COURT OF LAW**, with or without a jury. Arbitration does not involve a judge or jury. Instead, an arbitrator with the power to award damages and other appropriate relief will decide claims and disputes. An arbitrator's award shall be final and binding upon the Parties, and judgment may be entered upon it in any court having jurisdiction.

11.3.3.2 Neither Party may commence arbitration if the claim or cause of action would be barred by the applicable statute of limitations had the claim or cause of action been filed in a state or federal court. Receipt of a demand for arbitration by the person or entity administering the arbitration shall constitute the commencement of legal proceedings for the purposes of determining whether a claim or cause of action is barred by the applicable statute of limitations. If, however, a state or federal court exercising jurisdiction over a timely filed claim or cause of action orders that the claim or cause of action be submitted to arbitration, the arbitration proceeding shall be deemed commenced as of the date the court action was filed, provided that the Party asserting the claim or cause of action files its demand for arbitration with the person or entity administering the arbitration within thirty (30) Days after the entry of such order.

11.3.3.3 The arbitration shall use the following rules:

- the current AAA Construction Industry Arbitration Rules and AAA administration. AAA Construction Fast Track Rules shall apply to all two-party cases when neither Party's disclosed claim or counterclaim



exceeds \$250,000. If arbitration is selected but no rules are selected, then this subsection shall apply by default;

the current JAMS Engineering and Construction Arbitration Rules and Procedures and administered by JAMS; or

the current arbitration rules of [\_\_\_\_\_] and administered by [\_\_\_\_\_].

#### 11.3.3.4 LITIGATION

Litigation in either the state or federal court having jurisdiction of the matter in the location of the Project.

If not indicated in §11.3.3, then litigation is the default and not arbitration.

11.3.4 COSTS The costs of any binding dispute resolution procedure and reasonable attorneys' fees shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.

11.3.5 VENUE The Project location shall serve as the venue.

11.4 MULTIPARTY PROCEEDING All parties necessary to resolve a matter agree to be parties to the same dispute resolution proceeding, if possible. To the extent disputes between the Parties involve in whole or in part disputes between Constructor and Owner, disputes between Subcontractor and Constructor shall be decided by the same tribunal and in the same forum as disputes between Constructor and Owner.

11.5 NO LIMITATION OF RIGHTS OR REMEDIES Except as expressly waived, this article does not limit any rights or remedies which Subcontractor may possess under lien laws or payment bonds.

### ARTICLE 12 MISCELLANEOUS

12.1 EXTENT OF AGREEMENT Except as specifically provided, this Agreement is for the exclusive benefit of the Parties, and not for the benefit of any third party. This Agreement represents the entire and integrated agreement between the Parties, and supersedes all prior negotiations, representations, or agreements, either written or oral.

12.2 ASSIGNMENT OF SUBCONTRACT WORK Except as provided in §8.10, Subcontractor shall neither assign the whole nor any part of the Subcontract Work without prior written approval of Constructor.

12.3 GOVERNING LAW The Law in effect at the location of the Project shall govern this Agreement.

12.4 SEVERABILITY The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision.

12.5 NOTICE Unless changed in writing, a Party's address indicated in Article 1 shall be used when delivering notice to a physical address. Except for Agreement termination and as otherwise specified in the Contract Documents, notice is effective upon transmission by any effective means, including U.S. postal service and overnight delivery service.

12.6 NO WAIVER OF PERFORMANCE Either Party's failure to insist upon any performance of any of the terms, covenants, or conditions of this Agreement, or to exercise any of its rights, shall not be construed as a waiver or relinquishment of term, covenant, condition, or right with respect to further performance.



12.7 TITLES Titles given to articles and sections of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose.

12.8 JOINT DRAFTING The Parties expressly agree that this Agreement was jointly drafted, and that they both had opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms before execution. Therefore, this Agreement shall be construed neither against nor in favor of either Party, but shall be construed in a neutral manner.

### ARTICLE 13 SUBCONTRACT DOCUMENTS

#### 13.1 INTERPRETATION OF SUBCONTRACT DOCUMENTS

13.1.1 The drawings and specifications are complementary. If Work is shown only on one but not on the other, Subcontractor shall perform the Subcontract Work as though fully described on both consistent with the Subcontract Documents and reasonably inferable from them.

13.1.2 In case of conflicts between drawings and specifications, the specifications shall govern. In any case of omissions or errors in figures, drawings, or specifications, Subcontractor shall immediately submit the matter to Constructor for clarification by Owner. Subject to an equitable adjustment in Subcontract Time or Subcontract Amount pursuant to ARTICLE 7 or ARTICLE 11, Owners clarifications are final and binding.

13.1.3 Where figures are given, they shall be preferred to scaled dimensions.

13.1.4 Unless otherwise specifically defined in this Agreement, any terms that have well-known technical or trade meanings shall be interpreted in accordance with their well-known meanings.

13.1.5 ORDER OF PRECEDENCE In case of any inconsistency, conflict, or ambiguity among the Subcontract Documents, the documents shall govern in the following order: (a) Subcontract Change Orders and written amendments to this Agreement; (b) this Agreement; (c) subject to §13.1.2, the drawings (large scale governing over small scale), specifications and addenda issued before the execution of this Agreement; (d) information furnished by Owner that is identified as a Subcontract Document; (e) other documents listed in this Agreement. Among categories of documents having the same order of precedence, the term or provision that includes the latest date shall control.

CONSTRUCTOR [ ]

BY: \_\_\_\_\_ NAME: \_\_\_\_\_ TITLE: \_\_\_\_\_

WITNESS: \_\_\_\_\_ NAME: \_\_\_\_\_ TITLE: \_\_\_\_\_

SUBCONTRACTOR: [ ]

BY: \_\_\_\_\_ NAME: \_\_\_\_\_ TITLE: \_\_\_\_\_

WITNESS: \_\_\_\_\_ NAME: \_\_\_\_\_ TITLE: \_\_\_\_\_

END OF DOCUMENT.

