

EXHIBIT "A"

TERMS AND CONDITIONS OF SUBCONTRACT AGREEMENT

Revised March 2016

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NOTE TO SUBCONTRACTOR: No changes or edits to these Terms & Conditions shall be valid and binding unless agreed upon by both parties in an Addendum to the Subcontract signed by both parties. No handwritten and initialed modifications by You shall be valid against Big-D. Big-D will print an unmodified copy of these Terms & Conditions to include with the subcontract package after you have executed the Subcontract Agreement.

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1. PERFORMANCE OF WORK

1.1. Subcontract Documents.

1.1.1 Subcontract Documents. The Subcontract Documents are identified in the Agreement. You agree to be bound by the terms and requirements of the Subcontract Documents, and this Subcontract shall not create a contractual relationship of any kind between anyone other than You and us.

1.1.2 Prime Contract Documents. You understand that the Prime Contract requires us to bind You to the terms and conditions of the Prime Contract. We shall have all rights, remedies, powers, and privileges as, to, or against You which the Owner has against us. For administration of the Project, You agree to be bound to us in the same manner and to the same extent as we are bound to the Owner. You shall submit all required documentation and materials, including, but not limited to, all notices, payment applications, claims, and submittals, directly to us. You shall be deemed to have made all representations, warranties, guarantees, and covenants to us and Owner that we have made to Owner under the Prime Contract, insofar as they relate to the Subcontract Work. Where in the Prime Contract, reference is made to Contractor, and the work or specifications therein pertain in any way to the Subcontract Work, such work or specifications shall be interpreted to apply to You. If any term of the Subcontract is inconsistent with any term in the Prime Contract, the more stringent of the terms shall govern.

1.2. Scope of Work.

The Subcontract Work includes that work generally set forth in this Subcontract, as well as all other related work, including all work necessary for a complete Project and normally performed by your trade. You will provide, at your own expense, all tools, equipment, scaffolding, hoisting facilities, elevator service, implements, storage space, shop and working drawings, tests, samples, models, guarantees, permits, licenses, unloading facilities and services, etc., and all other items necessary for the proper performance of the Subcontract Work, unless specifically excluded by us in this Subcontract. You must comply with all applicable laws, building codes, ordinances, and requirements or orders of any authority having jurisdiction of the Project.

1.3. Review of Documents / Site.

You are entering into this Subcontract on the basis of your own examination and evaluation of the Subcontract Work, and not based on any opinions or representations by us or the Owner, or of any of our

employees. You have carefully reviewed and understand the Subcontract Documents and are aware of any impact, or interference which the site, site conditions, climate, construction sequence, Subcontract Documents, and the work of other subcontractors or contractors will have upon your access, operations, efficiency, etc.

1.4. Timely Performance.

Time is of the essence of this Subcontract. You agree:

- (1) to obtain and prepare your materials so as to be ready to begin work when we direct;
- (2) to plan, perform, and complete the Subcontract Work in a prompt and diligent manner so as not to delay or interfere with our work or the work of other subcontractors;
- (3) to proceed in a skillful and productive manner, with sufficient labor, tools and materials;
- (4) to provide, at your expense, additional workers and/or to work on an overtime or shift basis should this be required to maintain the project schedule; and
- (5) to complete the Subcontract Work in conjunction with other subcontractors on the job to ensure the uninterrupted progress of the project and enable us to complete the Project as scheduled.

You are obligated to commence work within five (5) days after receipt of a notice to proceed from us, or longer as indicated in such notice. Failure to commence work on site within the designated timeframe shall constitute a material breach of this Subcontract.

1.5. Schedules.

You understand that the Owner has imposed requirements for the Project Schedule. We will schedule the Project. You agree to furnish us any information necessary to prepare the schedule(s) in a format acceptable to us. We shall not be bound to use your scheduling information, but we may rely upon the same at our discretion. Any float in the project schedule belongs to us for use in coordinating the work.

We retain the right to modify, suspend, delay or accelerate the schedule(s), change work sequences and priorities, and to otherwise schedule the work so as to achieve timely project completion. In addition, you understand that we are required to meet owner demands and follow the Owner's direction regarding the schedule. **So long as such modifications, changes in sequence, etc., are not arbitrary, You agree to adapt your efforts and to meet the schedule(s) as modified without additional cost.**

1.6. No Damage For Delay.

Should your performance be delayed, hindered, or otherwise disrupted by anyone, including by us, unless the delay was totally unforeseeable by the parties, your sole remedy shall be: (a) a time extension for the performance of the Subcontract Work (but only if you notified us in writing of the cause of delay within seven (7) days of the occurrence of the event, and only if a similar time extension is allowed us by the Owner) and (b) compensation for such delays limited to the pro rata portion of the amount paid to us by the Owner arising from such delays.

1.7. Shop Drawings and Submittals.

You must promptly provide us all shop drawings, samples, product data, manufacturers' literature and other submittals required by the Subcontract Documents. You are responsible for the accuracy and conformity of your submittals to the Subcontract Documents. You must prepare and deliver your submittals to us in a manner consistent with the Schedule of Work and in such time and sequence so as not to delay us or others in the performance of the work. The review of any submittal shall not be deemed to authorize deviations, substitutions or changes in the requirements of the Subcontract Documents unless express written consent is obtained from us. In the event the Subcontract Documents do not contain submittal requirements, you agree, upon request, to submit in a timely fashion for review any shop drawings, samples, product data, manufacturers' literature or similar submittals as may reasonably be required by us, the Owner or Architect.

1.8. Permits, Fees and Inspections.

You will pay for all inspection fees, royalties, and license fees related to the Subcontract Work, unless specifically excluded. If we incur the cost of procuring permits, fees, or inspections on your behalf, we shall be entitled to deduct those costs from any balance otherwise owed to You.

1.9. Independent Contractor, EEO and Affirmative Action.

You hereby represent you are an independent contractor in fact and also within the scope of the United States Internal Revenue Code; Social Security and unemployment insurance laws and regulations; applicable safety, health and environmental laws and regulations (e.g. OSHA, MSHA); and applicable collective bargaining agreements and are therefore solely responsible for: (1) compliance with such laws, regulations and agreements, (2) all payroll taxes, and (3)

all trust fund and other deductions, withholdings and contributions payable under such laws, regulations and agreements. The Subcontract Amount includes all applicable sales and use taxes; franchise, excise, and other taxes; and governmental impositions of all kinds and is not subject to any addition for any such taxes or impositions now or hereafter levied. When lawfully required, You must fully comply with wage hour regulations and shall take vigorous affirmative action to comply with E.E.O. and Affirmative Action Clauses 41 CFR 60-1.4, 41 CFR 60-250.4, and 41 CFR 60-741.4 as revised, amended or superseded.

1.10. Supervision.

You must provide competent and continuous supervision of the Subcontract Work. Instructions given by us to your superintendent or foreman and documents executed by your superintendent or foreman shall be binding upon You. We shall designate one or more persons who shall be our authorized representative(s) on-site and off-site. Such authorized representative(s) shall be the only person(s) You shall look to for instructions, orders and/or directions, except in an emergency.

1.11. Safety.

1.11.1. Safety Procedures.

At all times while any of your employees, agents, or subcontractors are on the Owner's premises, You are solely responsible for providing them with a safe work place of employment, and you shall inspect all areas where they may work and shall promptly take action to correct conditions which are or may become unsafe. You and your agents, employees, materialmen and subcontractors shall perform the Subcontract Work in a safe manner, including but not limited to:

- (1) designating an individual in your employ at the site who shall act as your designated safety representative with a duty to prevent accidents. Unless otherwise identified in writing by You, the designated safety representative shall be your project superintendent;
- (2) complying with all safety regulations, including all federal and state OSHA regulations;
- (3) providing safe tools and equipment;
- (4) holding weekly safety meetings;
- (5) installing barricades, signs, flags, lights and other safeguards where reasonably required;
- (6) providing our superintendent with a copy of Safety Data Sheets (SDS) for each chemical or hazardous material You have delivered to the project;
- (7) making certain that hazardous material containers are properly labeled and your employees have been properly trained;

(8) insuring your workers' job attire, at a minimum, includes long or short sleeve shirts, long pants, leather shoes or boots, safety glasses and hard hats and such other appropriate safety equipment; and

(9) having your employees and subcontractors conform to our drug-free work place policy which shall be displayed on the job site.

1.11.2. Job Hazard Analysis.

You shall conduct regular inspections to determine that safe working conditions and equipment exist. You shall implement regular procedures to conduct jobsite hazard analysis. Upon request, we will make jobsite hazard analysis forms from Big-D's safety program available to you, which you shall have the option to use, in your discretion. Use of such forms or resources shall not be deemed to alter your sole control and responsibility for safety of your employees, agents, or subcontractors or your means and methods.

You shall ensure that your work and your work area does not create a safety hazard for any other persons on the jobsite. Any feedback provided by us, the Owner, or the Architect related to site safety shall not be deemed to take control of your responsibility for site safety. If you believe that you have been provided any recommendations to related to site safety that you do not recommend, you shall notify us immediately and prior to proceeding with such recommendation.

1.11.3. Safety Indemnification.

You shall indemnify Big-D, Owner, and their officers, employees and agents, from any and all claim, loss or liability, including attorneys fees, arising out of your failure to comply with this provision. You shall comply fully with all laws, orders, citations, rules, regulations, standards and statutes affecting or relating to this Subcontract or its performance, including but not limited to those with respect to occupational health and safety, the handling and storage of hazardous materials, accident prevention, safety equipment and practices including the accident prevention and safety program of Owner and Contractor.

1.12. Fines.

If acts or omissions by You or anyone working for You result in a fine or penalty being levied against us by OSHA or any other lawful regulatory agency or court, then any such fine shall be deducted from any amounts we owe You, including any attorneys fees, expert fees, or other reasonable costs that we incur to contest such fine.

1.13. Layout Responsibility.

We shall establish principal axis lines of the building and site upon which You shall layout and be strictly responsible for the accuracy of your work. You are responsible for any loss or damage to us or others by reason of your failure to layout or perform the Subcontract Work correctly. You must exercise care so that the actual final conditions and details of the Subcontract Work shall result in alignment of finish surfaces.

1.14. Acceptance of the Work of Others.

Should the proper performance of any Subcontract Work depend upon the proper performance of any work or material furnished by us or others, **You agree to use all reasonable means necessary to discover any defects and report them in writing to us before proceeding with the Subcontract Work.** Should You find any, You agree to allow us a reasonable time in which to remedy such defects. If You do not report any defects to us in writing, then You shall be responsible for satisfactory performance of the Subcontract Work, regardless of the defective work of others. The provisions of this paragraph shall not extend to latent defects in the work or defects not reasonably capable of discovery by a subcontractor performing work similar to the Subcontract Work.

We do not provide any warranties regarding data, documents, drawings or other information provided by Owner or Architect. The accuracy of such information is not warranted by us. To the extent that you seek additional time or compensation arising from inaccuracies in such information, you shall proceed as required under Article 7.

1.15. Workmanship and Quality Control.

Every part of the Subcontract Work shall be executed in accordance with the Subcontract Documents in a workmanlike and skillful manner. All materials used in the Subcontract Work shall be furnished in sufficient quantities to facilitate the proper and expeditious execution of the Subcontract Work, and shall be new except such materials as may be expressly provided in the Subcontract Documents to be otherwise. All work shall be done in strict accordance with the Subcontract Documents, subject to the final approval of us, the Owner, and Architect. You shall designate a quality control representative at the site who shall have full authority and responsibility to comply with the workmanship and quality control requirements of the Subcontract Documents.

1.16. *Clean-up.*

You are responsible for clean-up of your work area. Should You not properly clean up your work area within 24 hours of being notified by us, then You will be charged the cost of having someone else do the clean-up for You. You must dispose of any environmentally hazardous waste caused by the Subcontract Work in a lawful and appropriate manner. To the extent any snow or ice needs to be removed for you to perform the Subcontract Work, it is your responsibility to remove it at your expense. You agree to participate in any job-wide clean-ups as may be periodically requested by the project superintendent.

1.17. *Warranty.*

You warrant the Subcontract Work against all deficiencies and defects in materials and/or workmanship and as called for in the Subcontract Documents. You agree to proactively manage and satisfy any warranty obligations, including manufacturers' warranties, which appear within the warranty period established in the Subcontract Documents without cost to us or to the Owner. Unless otherwise specified in the Subcontract Documents, You shall warrant the Subcontract Work as described above for a period of one (1) year from the date(s) of substantial completion of the Project. You further agree to furnish any special warranties that shall be required in accordance with the Subcontract Documents prior to final payment. Nothing in this section shall be construed to limit any of our remedies against You for deficiencies in the Subcontract Work. Your responsibility for patent or latent deficiencies in the Subcontract Work shall extend beyond the warranty period to the maximum period of time permitted by law.

1.18. *Responsibility for Subcontract Work.*

You understand that you, alone, are responsible for the accuracy and completeness of the Subcontract Work. You are also solely responsible for the means and methods of your work. Any feedback provided by us, the Owner, or the Architect shall not be deemed to take control of your means and methods. If you believe that you have been provided any direction to perform the Subcontract Work with means and methods that you do not believe appropriate, you shall notify us immediately and prior to proceeding with such work.

You understand that we are a general contractor and we rely on your expertise and experience as a subcontractor with specialized experience in your trade to perform the Subcontract Work. We shall not be responsible to inspect the Subcontract Work for adequacy or to perform quality control or assurance regarding the Subcontract Work. **Any general supervision or oversight we provide is in our role as a general contractor and you**

understand this does not in any manner impact your responsibility for the Subcontract Work.

2. **CHANGES IN WORK**

2.1. *Field Orders/Contractor-Directed Change.*

We may add to or deduct from the Subcontract Work and these changes shall be defined only by our written Change Order or by our written Field Order. Upon request, you shall provide us a proposal for any such work and shall itemize your price by labor, material, equipment, subcontractor, overhead and profit, and bond costs. Your pricing shall be fair and reasonable; not in excess of the pricing methodology used in your bid or proposal; and shall be subject to the limitations on subcontractor markup in the Prime Contract. You shall provide Us with detailed pricing and time extension information within seven (7) days of receipt of notice of the change or Field Order.

A Field Order is used in the absence of total agreement on the terms of a Change Order. You shall be obligated to proceed with the work upon receipt of a Field Order, so as not to delay the progress of the work. A Field Order will be replaced by a Change Order upon agreement as to compensation and time. If mutual agreement is not possible, then the compensation and time impact shall be determined as provided in Section 7.

2.2. *Subcontractor Request for Additional Compensation.*

In the event that you believe that you are entitled to additional compensation for any reason, you must provide us written notice of such event within three (3) days after such event commences. **Failure to provide Us such written notice shall constitute a waiver of any right to compensation or a time extension arising from such event.** You shall provide Us with detailed pricing and time extension information for such event within a reasonable time but no later than ten (10) days after providing us notice of such event.

To the extent that such request for compensation relates to acts or omissions by the Owner or the Architect, you shall only be compensated to the extent that we receive additional compensation under the Prime Contract. No claim for additional compensation shall be paid unless the same is furnished pursuant to a written Change Order or Field Order signed by Us. Pricing information shall comply with the requirements of Section 2.1 hereof and our obligation to pass such claim to the Owner is as provided in Article 7.

2.3. Incidental Changes.

Unless otherwise noted in this Subcontract, reasonable amounts for unloading, hoisting, clean-up, templates, layout or other services we provide for You or your employees, and reasonable amounts for your use of our equipment, tools, etc., may be deducted from amounts otherwise due You. We will make a reasonable effort to notify You when we feel these charges are needed, but our failure to do so shall not limit our ability to charge You for work done or tools provided on your behalf.

3. INSURANCE AND INDEMNIFICATION

3.1. Bonds.

If surety bonds are required by this Subcontract, You shall furnish us, at your expense, corporate surety bonds guaranteeing the faithful performance of this Subcontract and the payment of all labor and material bills incurred in the execution of the work covered by this Subcontract. Notwithstanding any language to the contrary, which may appear on the bonds themselves, said bonds shall automatically extend and apply to all work performed pursuant to this Subcontract including Change Orders, to your responsibility for actual and/or liquidated damages, and to your guarantee and warranty obligations. Surety bonds must be written by a surety company acceptable to us and in a form satisfactory to us.

3.2. Certificates of Insurance.

Prior to commencing the Subcontract Work, You must furnish and thereafter maintain certificates of insurance and additional insured endorsements satisfactory to us and evidencing compliance with the terms of this Subcontract. We shall not be obligated to release any payments to you until you have provided proof of adequate insurance. Insurance must be written with a company rated A or better, financial size category VII or higher, as shown in the current A.M. Best Key Rating Guide of Property-Casualty insurance companies. The required insurance policies shall not be canceled or modified until thirty (30) days after written notice has been given to us, and the certificate must provide this. Required coverages must be maintained without interruption from the date You commence work until one year after substantial completion of the Project, or the time required by the Subcontract Documents, whichever is longer. You must furnish us evidence of such insurance at the time of completion of the Subcontract Work.

3.3. Worker's Compensation Insurance.

You agree to provide and maintain Worker's Compensation insurance at the levels required by law.

3.4. Liability Insurance.

You must maintain such Commercial General Liability insurance, including automobile and blanket contractual liability as will protect you from claims for damage because of bodily injury, including death, or damage because of injury to or loss, destruction, or loss of use of property which may arise from your operations under this Subcontract, whether such operations be by you or your subcontractors or anyone directly or indirectly employed by any of you. Your liability insurance shall include Big-D, Owner, and Architect as additional insureds.

Your insurance shall provide the greater of the minimum limits set forth in the Prime Contract Documents or the following minimum limits of coverage:

- (1) Commercial General Liability, (a) general/products aggregate \$1,000,000 per project; (b) each occurrence \$1,000,000; and (c) personal and bodily injury \$1,000,000.
- (2) Automobile Liability Insurance for all owned autos including non-owned, hired liability \$1,000,000.
- (3) Excess Liability Umbrella Insurance of \$1,000,000.

Commercial General Liability coverage shall be written on an occurrence basis rather than on a claims-made basis, and will be primary to any insurance of the additional insureds. You agree to waive any claims for subrogation against us or the Owner or our respective insurance carriers. Equivalent insurance must be obtained from each sub-subcontractor and supplier otherwise their insurance must be included in your policy. You agree that in the event your insurance does not name us, Owner and Architect as additional insureds, is not in force during the period provided for in paragraph 3.2, or fails to provide coverage as set forth in this paragraph, you will pay and reimburse us, Owner, Architect, and their insurers, for any and all judgments, settlements, costs, attorneys fees, or other payments or expenses which would have been covered by your insurance had the provisions of paragraphs 3.2 and 3.4 been met.

If the Project is subject to an Owner or Contractor-Controlled Insurance Program, Sections 3.2 and 3.4 shall be superseded by the insurance exhibit hereto for all coverages provided by such program.

3.5. Builder's Risk Insurance.

You shall satisfy yourself as to the existence, coverage and deductibles of Builder's Risk/property insurance prior to starting work on the Project. Upon your written request, we will provide You with a copy of the Certificate of Builder's Risk/property insurance in force for the Project if we have obtained such insurance for the Project. Until final acceptance of the Project by Owner, You shall be responsible for (1) any uninsured loss of or damage to your stored and installed materials, and (2) your pro-rata share of any deductible amount associated with an otherwise insured loss (but you have the option to insure against the deductible).

3.6. Duty to Indemnify, Defend and Hold Harmless.

With the exception that this provision shall in no event be construed to require indemnification by You to a greater extent than permitted under the public policy of the State of the Project, You shall indemnify and save harmless us and Owner, including our officers, directors, agents, employees, affiliates, parents and subsidiaries, and any other entities required to be indemnified by Contractor under the Prime Contract, and each of them (collectively referred to as "Indemnitees" and individually referred to as "Indemnitee"), of and from any and all claims, demands, causes of action in law or in equity, damages, penalties, costs, expenses, actual attorneys' fees, experts' fees, consultants' fees, judgments, losses or liabilities, of every kind and nature whatsoever arising out of or in any way connected with or incidental to, the performance of the Subcontract Work under this Subcontract or any of the obligations contained in this Subcontract ("Claims"). Except for Claims that are covered by insurance provided hereunder, **you shall not be required to indemnify any Indemnitee for the portion of such loss caused by the Indemnitee.**

The obligations under this provision shall apply to any acts or omissions, willful misconduct or negligent conduct, whether active or passive, on your part, or on the part of your subcontractors, agents, consultants, materialmen, employees, officers and/or partners. Without limitation, "damages" include personal injury, including, but not limited to bodily injury, emotional injury, sickness or disease, or death to persons, including, but not limited to, any employees or agents of Subcontractor, Contractor, Owner, or any other subcontractor, or any person; or other damages of any kind to anyone including, without limitation, economic loss, taxes, penalties, property damage, and loss of use. You agree, at your own cost, expense and risk to defend the Indemnitees against any Claims as defined in this provision that may be brought or instituted by third persons, including, but not limited to, government agencies or your employees. In the event You fail to do

so, we, in addition to any other legal rights we may have, may defend the same and all costs and expenses incidental to the defense thereof, including, but not limited to, actual attorneys' fees and expert costs, or settlement of any such claim or liability, or payment of any judgment, cost, attorneys' fees, expert fees, and expenses incidental thereto, or said amount as we in our discretion deem necessary to defend and resolve such claims or liability, such costs shall be deducted from the amount due to You and withheld by us. If we are not withholding sufficient monies to compensate us for the above, then You agree to immediately pay such excess to us. We expressly reserve the right to approve the attorney to be retained by You to defend against Claims as defined in this provision.

It is expressly acknowledged and agreed that each of the foregoing indemnities is independent, that each shall be given effect, and that each shall apply despite any acts or omissions, misconduct or negligent conduct, whether active or passive, on the part of us, Owner or other Indemnitee. It is expressly acknowledged and agreed that You and any other responsible party shall be jointly and severally liable to us with respect to Claims described herein above.

The insurance requirements set forth in this Subcontract are separate and distinct from other obligations, including, without limitation, the indemnity obligations contained in this provision.

3.7. Workers Compensation Limitation.

In any claim against us, Owner, or Architect by any of your employees, anyone directly or indirectly employed by You, or anyone for whose acts You may be liable, the indemnification, duty to defend and hold harmless obligations in this Subcontract shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for You under liability insurance, worker's compensation, disability benefit or other employee benefit acts or regulations.

4. PAYMENTS

4.1. Schedule of Values.

Within thirty (30) days of the date of this Subcontract, You agree to submit for our review and approval a detailed cost breakdown of the Subcontract Price sufficiently itemized as to work elements, general conditions, labor, equipment, materials, bond, insurance, etc., to allow us to monitor your progress and to evaluate your periodic billings. Your overhead and profit shall be distributed on a pro rata basis to each line item. An intentionally unbalanced, distorted or misrepresented cost breakdown

shall be deemed to be fraudulent and shall constitute a material breach of the Subcontract.

4.2. Billings/Payments.

We agree to make monthly payments to You for that portion of the Subcontract Work satisfactorily performed in the preceding month in accordance with monthly billings prepared by You and approved by us, Architect and Owner. Applications for monthly progress payments shall be in writing, on approved forms, with a schedule of values and conditional lien waivers submitted to us on or before the date outlined in your Subcontract. We will mail payment to You within ten (10) days of receiving payment from Owner. In the event we do not receive a proper and reasonable monthly billing from You prior to the date set forth above, we may include in our monthly billing to Owner such amount, if any, as we feel proper for the Subcontract Work and You agree to accept the approved portion, if any, as your monthly payment. You must also submit Supplier Affidavits, on our forms to receive payment from us. You agree that any funds received for the performance of this Subcontract shall be used exclusively for labor, materials, and equipment furnished for this Project, that You have a fiduciary responsibility with respect to these funds, and that You will not divert any of these funds to satisfy obligations You may have under any other contracts. You agree that we have the right to communicate with any of your subcontractors or suppliers regarding the status of your account for our job(s).

You agree not to transfer or sublet all or any part of this Subcontract without our prior written consent. Other than a chose in action for breach of this Subcontract, your rights to any payments are non-assignable except with our written consent, and any assignment made without our written consent is void.

You acknowledge that you are relying on the financial ability of the Owner and not Big-D for payment of the work. As an absolute condition precedent to you receiving any payment under this Subcontract, we must have first received from the Owner the corresponding periodic payment including the approved portion of your monthly billing, unless the Owner's failure to make payment was caused exclusively by us.

4.3. Payments by Subcontractor.

You must pay for materials, equipment, and labor used on this job through the period covered by previous payments received from us, and must furnish releases, lien waivers, or other evidence we may request to verify You have done so.

4.4. Payments Withheld.

Payments otherwise due You, including payment of retainage and final payment, may be withheld on account of: (1) your failure to provide any of the following required documents: (a) surety bonds (if required), (b) acceptable and current certificates of insurance and additional insured endorsements, (c) an acceptable schedule of values, (d) Supplier Affidavit, (e) appropriate lien waiver and release forms; (2) defective work not remedied; (3) your failure to make payments owing to your employees, suppliers or subcontractors for material, services or labor; (4) claim(s) filed by or involving You or your subcontractors or suppliers or reasonable evidence indicating the probability of such a claim being filed; (5) your failure to perform any obligation made by You in this Subcontract; (6) your failure to perform per our schedule; or (7) a reasonable doubt that You can complete the Subcontract Work for the balance then unpaid. Payment to You pursuant to monthly or final billings shall not constitute nor imply acceptance by us, Architect or Owner of any portion of the Subcontract Work.

4.5. Right to Offset/Joint Checks.

We may offset against any sums we owe You the amount of any money You owe us, whether or not arising out of this Subcontract. We may issue joint checks to You and your suppliers and subcontractors. Our options set out in this paragraph confer no enforceable rights upon any third party.

We reserve the right to ensure that your subcontractors and suppliers are timely paid undisputed amounts, even if we have a dispute with you regarding payment. In the event we elect to pay your subcontractor, suppliers, or employees directly, we shall advise you of our intention to pay and the proposed amount in writing. Unless you advise us in writing within three (3) days that any portion of the amount is not properly due such party, you will be deemed to have waived any right to contend that such amount paid by us was not properly due.

4.6. Liens.

You must complete our appropriate lien waiver and release and Supplier Affidavit forms, and keep the project free from all liens, stop notices, and encumbrances, including, but not limited to, mechanic's and materialmen's liens arising out of the Subcontract Work. If you fail to remove any lien, stop notice, or other encumbrance, by bonding or otherwise, we may retain and pay funds out of any amounts due You to remove the lien, stop notice, or other encumbrance and all costs and attorneys fees we incur to do so.

4.7. Final Payment and Retainage.

The retainage portion of your approved progress billings, and any other portion of the Subcontract Price that is unpaid at the time of final completion of the Subcontract Work shall not be paid to You until: (1) **We receive final project retainage payment from Owner;** (2) Architect and Owner accept your work, warranties, etc.; and (3) You furnish us with satisfactory evidence that all your bills and obligations on the Project have been paid in full. Unless required by statute, we will not pay You interest on retained funds, and You must submit an invoice for retainage to receive payment for retainage. **Your acceptance of final payment shall constitute a waiver of any and all claims you may have against us, Owner and Architect, unless you have notified us (certified mail) in writing of such claims prior to final payment.**

4.8. Audit.

You shall keep detailed books and records related to the Project for a minimum of three (3) years after substantial completion of the Project. You understand that the Owner requires access to certain information from Us and You related to the Project for purposes of auditing and regulatory compliance. You agree to provide Us the same access to your books and information as We are required to provide the Owner. **No audit rights shall alter the lump sum nature of this Agreement.** To the extent we are required to provide detailed breakdowns of material, labor, and equipment prices related to the Project to the Owner or to any taxing authority, you agree to promptly provide such information to us.

5. FAILURE OF PERFORMANCE

5.1. Notice to Cure.

If You (1) refuse or fail to supply enough properly skilled workers, proper materials, or maintain the schedule of work, or (2) if You fail to make prompt payment to your workers, subcontractors or suppliers; or (3) if You disregard laws, ordinances, rules, regulations, or orders of any public authority having jurisdiction, or (4) otherwise are guilty of a material breach of a provision of this Subcontract, You may be deemed in default of this Subcontract. If You fail, within three (3) days after written notification, to commence and continue satisfactory correction of such default, then at your expense, we will: (a) Provide the most expeditious correction of the default, including contracting with others to perform the Subcontract Work; (b) Supply labor, materials, equipment, subcontractors, etc. as we deem necessary for the satisfactory correction of your default, and charge the cost to you—such costs may include reasonable overhead, profit and attorneys' fees; and (c) Withhold payment of moneys due You until the work is fully

completed and accepted by the Owner. If the unpaid balance of the Subcontract Price exceeds the expense of finishing the Subcontract Work, You shall pay such excess to us within seven (7) days of written demand.

5.2. Notice to Cure Excused.

In the event of (a) an emergency affecting the safety of persons or property or (b) we are directed by the Owner to take action related to the Subcontract Work in a shorter period than three days, we may commence correction of such default, without first giving three (3) days' written notice. We shall not be required to give you notice and an opportunity to cure if the Owner materially changes or eliminates the Subcontract Work related to defective performance by You.

5.3. Termination of Subcontractor.

If you fail to commence and satisfactorily continue correction of a default within three (3) days after written notification (as explained in Section 5.1), then we may issue a written notice of termination and terminate all or part of your Subcontract immediately. We may take possession of all materials and equipment associated with this job. All costs we incur in performing the Subcontract Work, including reasonable overhead, profit and attorneys' fees, shall be deducted from any moneys due or to become due You under this Subcontract. You shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Subcontract Price, or if the unpaid balance of the Subcontract Price exceeds the expense of finishing the Subcontract Work, You shall pay such excess to us within seven (7) days of written demand. In the event our termination of You for cause is later determined to have been improper, the termination shall be automatically converted to a termination for convenience and you shall be limited in your recovery strictly to the compensation provided for in Section 6.2.

5.4. Delay Damages.

If the Prime Contract Documents provide for liquidated or other damages for delay, and such damages are assessed by the Owner against us, then we shall assess such damages against You in proportion to your share of responsibility for such delay and damage. If you and another subcontractor concurrently caused a delay, we shall allocate any delay damages assessed against us proportionally against you. In addition, You will also be liable for all actual damages sustained by us as a result of your delays.

6. SUSPENSION/TERMINATION

6.1. *Suspension.*

We may, for our convenience or by direction, suspend all or part of the Subcontract Work. We will give written notice to You stating the nature, effective date and anticipated duration of such suspension, whereupon You shall suspend the Subcontract Work to the extent specified and shall place no further orders or perform no other work except as permitted by our notice of suspension. During the period of such suspension, You must care for all work, materials and equipment at the project site or at storage areas under your responsibility. The Subcontract Price shall be adjusted as provided in Section 2 if the cost of the work is increased or decreased by reason of such suspension. If additional time for completion of the work is required as a result of such suspension, You shall submit a written request for additional time. Failure to submit a timely written request for additional time due to such suspension shall result in no extension of time being granted.

6.2. *Termination for Convenience.*

In the event the Owner terminates the Prime Contract for any reason, this Subcontract shall immediately terminate for convenience. In such circumstance, you shall only be entitled to payment for the portion of the Subcontract Work approved and paid by the Owner. You shall not be entitled to receive payment from us in excess of the payment we received from the Owner attributable to the Subcontract Work.

In addition, we reserve the right to terminate this Subcontract at any time for our convenience. In the event we decide to terminate all or part of the Subcontract Work prior to project completion, then an equitable settlement for work performed under this Subcontract will be negotiated. You will receive, as your entire compensation, payment for the percentage of the Subcontract Work completed prior to termination (according to the schedule of values), plus reasonable costs of termination such as demobilization and restocking charges. In no event, however, shall the amount due you exceed the amount you would have earned for that work absent the decision to terminate the Subcontract. You are not entitled to collect any overhead or profit on unperformed work.

Further, in the event that, prior to termination, we provided You notice pursuant to Section 5.1 of a deficiency that you failed to correct within three (3) days of such notice, we shall be entitled deduct the cost to correct such deficiency from amounts due you under this paragraph.

7. DISPUTES

7.1. *Pass-Thru Claims.*

In the event You request us to prosecute a claim against the Owner for payment, additional compensation for extra work, delays, or any other kind of claim relating to the scope or performance of the Subcontract Work, You must give us notice required under this Subcontract. If we believe there is a good faith basis for such claim, we shall pass such claim through to the Owner. Our agreement to pass any such claim through to the Owner for consideration shall not be considered an admission that such money is due and owing but shall only indicate that we believe there is a reasonable basis to present such claim to the Owner. In addition, you agree to cooperate fully with us in the prosecution of your claim, and agree to pay all costs and expenses incurred in connection therewith, including actual attorneys' fees and experts' fees.

7.2. *Prime Contract Procedures.*

Any dispute resolution procedure in the Prime Contract Documents shall be deemed incorporated into this Subcontract, and shall apply to any dispute arising hereunder, to the extent they involve the Owner. We may join or consolidate an arbitration under this Subcontract with any other dispute pending in arbitration or litigation involving the Owner, Architect, any other subcontractor, or any other party having an interest in the proceeding whose presence is required if complete relief. Such right of joinder eliminates any need to comply with the requirements of Section 7.3 as conditions precedent.

7.3. *Negotiation and Mediation.*

Except as provided in Section 7.2, any dispute relating to this Subcontract shall be settled first by negotiation. A representative from each party shall meet in an executive negotiation upon fourteen (14) days written request to discuss and attempt to resolve the dispute.

If negotiation is unsuccessful, the parties agree to participate in a minimum of four (4) hours of mediation in accordance with the mediation procedures of the American Arbitration Association, the cost of which will be shared equally between the parties, and which mediation shall be held at our discretion in the county where the project is located or at such other location as we shall agree. **Such mediation shall be a condition precedent to initiating or continuing any arbitration.**

7.4. *Arbitration.*

In the event the dispute, claim or other matter in dispute is not resolved by negotiation or mediation, it shall be

decided in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association or such other private arbitration service as the party may agree with a single arbitrator, with the following procedural parameters for discovery and hearing in any such proceeding: (a) the discovery period shall be no longer than 180 days; (b) the following Federal Rules of Civil Procedure shall apply: FRCP 26, 33, 34, 36, 45, and 56; and (c) each party shall be limited to three fact witness depositions. Further, each party shall be limited to a maximum of 20 hours of hearing time at the arbitration (with time spent on cross examination to count against the questioning party). Each party shall be entitled to submit its expert reports as evidence to reduce required direct examination testimony from experts. The arbitrator shall issue a reasoned award no later than 30 days after the hearing.

The decision of the arbitrator(s) shall be final and binding and shall be rendered in writing and may be entered for enforcement in any court of competent jurisdiction. You agree to carry on the work and maintain its progress during any lawsuit, arbitration, or other legal proceeding.

In the event local law requires you to file a mechanic's lien action or payment bond action to preserve your rights, such action shall be stayed pending resolution of mediation and arbitration required under this Subcontract.

7.5. Recovery of Attorneys Fees, Interest, Etc.

In the event of a dispute, the prevailing party shall be entitled to recover from the other party all reasonable attorneys fees, experts' fees, costs and expenses incurred, including statutory interest. This includes reasonable costs of travel, legal research, investigation, and copying.

7.6. Consequential Damages.

Under no circumstances shall we be liable to You for consequential damages including, but not limited to, loss of use or loss of profit, loss of bonding capacity, lost revenue, damage to reputation, or home office overhead, even if the damage results from our negligence.

You shall not be liable to us for the consequential damages of loss of use, lost profit, or loss of revenue except to the extent that either (a) such damages are costs sought by a third-party for which you have an obligation to indemnify us or (b) such damages are covered by insurance that you are required to provide under this Subcontract.

8. LABOR RELATIONS

Should there be picketing on the job site, and we establish a reserved gate for your purpose, it shall be your obligation to continue the proper performance of the Subcontract Work without interruption or delay.

You hereby acknowledge that You are thoroughly familiar with all DBE/MBE/WBE/DVBE requirements pertaining to the project. If You claim status as a DBE/MBE/WBE/DVBE, You shall take all steps necessary and shall make all necessary records available to us and the Owner to assure that You are in compliance with such requirements. In the event that any sub-subcontractor or supplier of yours is designated as or is required to be a DBE/MBE/WBE/DVBE, You further agree to be responsible for insuring that said sub-subcontractor or supplier meets all applicable requirements. You acknowledge that we are relying upon your representations regarding the validity of your status, if any, as a DBE/MBE/WBE/DVBE and that misrepresentation of your status, or the status of any of your sub-subcontractors or material suppliers, is a material breach of this Subcontract and grounds for immediate termination. In the event of termination as the result of material misrepresentation of your status as a DBE/MBE/WBE/DVBE, You shall not be entitled to any compensation not already paid.

You shall comply with and agree to be bound by all applicable federal, state and local laws and regulations, including, but not limited to, all provisions of the Fair Labor Standard Act, the Americans With Disabilities Act, the federal Family and Medical Leave Act, all federal and state Labor Code, any state Fair Employment and Housing Act, and any state Family Rights Act. Upon request, You shall submit certified payroll records to us no later than three (3) working days after labor has been paid.

9. ADDITIONAL PROVISIONS

9.1. Owner Approval.

This Subcontract is subject to approval by the Owner. This Subcontract shall not become binding upon the parties hereto until the Owner executes the Prime Contract and the Owner or its representative has given approval for us to proceed under the Prime Contract.

9.2. Sole and Entire Subcontract.

This Subcontract is the sole agreement between the parties. All verbal or written terms, conditions, proposals, opinions, representations, negotiations, and agreements made prior to the date of this Subcontract have, where appropriate, been made part of this Subcontract. It shall

be binding upon the heirs, administrators, executors, successors and assigns of the parties. **No modification or change of the terms of this Subcontract shall be binding on us unless approved in writing by an authorized officer or the designated Project Manager.**

9.3. Notice.

Any notice to terminate this Subcontract pursuant to Section 5 shall be mailed by certified mail or personally delivered to an agent of the affected party, and shall be effective at the time received.

All other notices required by this Subcontract shall be valid if made by any of the following ways: email, facsimile, US Mail, hand delivery, or certified mail. Email notices shall be deemed received upon either: (a) reply from recipient or (b) receipt of a read-receipt.

9.4. Days.

All references to day or days shall mean calendar days, except as stated otherwise.

9.5. Non Enforcement Not a Waiver.

Should either party decide to not exercise its rights under any part of this Subcontract, that action shall not waive the ability to enforce those rights in the future.

9.6. Severability.

Any provision of this Subcontract determined to be in violation of any law shall be void, but shall not affect the validity and enforceability of any other provision.

9.7. Governing Law/Jurisdiction.

Venue for any litigation relating to this Subcontract shall be in a court of competent jurisdiction in the county where the project is located. The Subcontract shall be interpreted under the laws of the State of the Project.

9.8. Neutral Construction.

You agree with us that this Subcontract will be interpreted neutrally, and that the language will not be construed for or against any party deemed to be the drafter. No prior versions or drafts of this Subcontract shall be relevant or admissible to interpret or construe the terms of the Subcontract.

9.9. Assignment.

You shall not be entitled to assign this Subcontract Agreement to any party without our express written

consent. You understand that we are required to contingently assign this Subcontract Agreement to the Owner and/or the lender. You consent to such assignment.

9.10. Lender Requirements.

You agree to cooperate with commercially reasonable requests of Owner's lender for information.