



Job No.: number
 Subcontract No.: number
 Cost Code: number
 Vendor No.: number

SUBCONTRACT AGREEMENT

AGREEMENT made this date day of month, year (hereinafter “Agreement” or “Subcontract”) between

	Swinerton Builders (“Contractor”) street address city, state, zip Attn: project manager Phone: number Fax: number Email: project manager email address	
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and

	Subcontractor Name (“Subcontractor”) street address city, state, zip Attn: contact name Phone: number Fax: number Email: contact email address	
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For Subcontractor to perform work as described in Item B below for the following Project:

Project is:

project name
 project address

Owner:

owner's name
 owner's address

Architect:

architect's name
 architect's address

Contractor and Subcontractor (the “Parties”) agree as set forth below:

- A. Except for modifications and change orders issued after execution of this Agreement, the “Subcontract Documents,” consist of the following documents, all of which are either attached hereto as Attachments or are hereby incorporated by this reference and made a part hereof as follows:

1. This Subcontract Agreement, and the following Attachments:

<input type="checkbox"/>	A	Insurance / Bonding Requirements	date	<input type="checkbox"/>	J	MBE/WBE/DVBE Construction Program	date
<input type="checkbox"/>	B	Contract Document List	date	<input type="checkbox"/>	K	Subcontract Modifications	date
<input type="checkbox"/>	C	Scope of Work (Standard and Trade Specific)	date	<input type="checkbox"/>	L	Prevailing Wage	date
<input type="checkbox"/>	D	Contract Recapitulation	date	<input type="checkbox"/>	M	Virtual Design & Construction Guidelines	date
<input type="checkbox"/>	E	Billing Procedures	date	<input type="checkbox"/>	N	LEED Project Procedures	date
<input type="checkbox"/>	F	Project Schedule	date	<input type="checkbox"/>	O	Federal Project Requirements	date
<input type="checkbox"/>	G	Project Procedures Manual	date	<input type="checkbox"/>	P	Not used at this time	date
<input type="checkbox"/>	H	Collective Bargaining Agreement	date	<input type="checkbox"/>	Q	Quality Management Requirements	date
<input type="checkbox"/>	I	Safety, Health, Environmental Minimum/MPS	date				

2. The Prime Contract No. number, owner name & date, the following Amendments to the Prime Contract number & date or N/A and all documents incorporated therein including, but not limited to, drawings and specifications. An index of the Prime Contract Documents is attached hereto as **Attachment B**. (Attachment B is not applicable for this Agreement).

B. Subcontractor shall execute the following scope of work (“Work”) in accordance with the Subcontract Documents generally described as:

Brief description of scope of work (Scope of Work continues on Attachment C)

C. Contractor shall pay Subcontractor for performance of the Work the stipulated sum of written amount dollars (\$) (“Subcontract Sum”) subject to additions and deletions and retention as provided in the Subcontract Documents.

D. Subcontractor shall provide 100% Performance and Payment Bonds, pursuant to Terms and Conditions Yes No

E. Subcontractor shall provide certified payroll Yes No

Further, Contractor and Subcontractor agree upon the Standard General Terms and Conditions below.

1. **SUBCONTRACT DOCUMENTS**

- (a) **Definition and Access to Subcontract Documents.** The term “Subcontract Documents” as used herein, means the Agreement, Swinerton Builders Subcontract Terms and Conditions, all attachments identified in the Agreement, and modifications and change orders issued after execution of the Agreement, and the Prime Contract Documents. The “Prime Contract Documents” as used in the Subcontract Documents are defined to mean and include the Prime Contract between the Owner and Contractor, including, but not limited to, all drawings and specifications, general and special or supplementary conditions and all other documents or attachments incorporated in the Prime Contract. An Index of Prime Contract Documents is attached hereto as Attachment B. Upon Subcontractor’s request, Contractor shall make copies of the Subcontract Documents available for review and reproduction, however, Contractor reserves the right to redact confidential, financial and trade secret information from the Prime Contract Documents made available to Subcontractor.
- (b) **Assumption of Prime Contract Documents.** By signing this Agreement, Subcontractor certifies that it is fully familiar with all the terms and conditions of all Subcontract Documents and Prime Contract Documents, including but not limited to provisions relating to insurance, payment, change orders, claims presentation and dispute resolution, and certifies that it is familiar with the location of the job site, and the conditions under which the Work is to be performed and that it enters into this Subcontract based upon its investigation of all such matters and is not relying on any opinions or representations of Contractor. This Subcontract represents the entire agreement between the Parties. The Prime Contract Documents are incorporated in this Subcontract by reference. The Work to be performed hereunder is a portion of the work required of Contractor under the Prime Contract Documents. Subcontractor and its sub-subcontractors, of any tier, will be and are bound by and shall strictly comply with the terms and conditions of the Prime Contract Documents insofar as they relate in any way, directly or indirectly, to the Work covered by and supplied under this Subcontract. Subcontractor agrees to be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the Prime Contract Documents, to the extent of the Work provided for in this Subcontract, and that where reference is made to Contractor in the Prime Contract Documents, and the Work or specifications therein pertains to Subcontractor’s trade, craft, or type of work, then such Work or specification shall be interpreted to apply to Subcontractor instead of Contractor. All rights and remedies reserved to the Owner under the Prime Contract Documents shall apply to and be possessed by Contractor in its dealings with Subcontractor. Subcontractor agrees to incorporate the Subcontract Documents and Prime Contract Documents by reference into all sub-subcontracts and supplier agreements.
- (c) **Interpretation.** Capitalized terms defined in this Agreement shall apply to all Subcontract Documents, and terms not defined herein shall have the same meaning defined in other Subcontract Documents. The misplacement, addition or omission of a word or character shall not change the intent of the Subcontract Documents. The Subcontract Documents are complementary, and what is required by any one shall be as binding as if required by all. Subcontractor shall promptly report to Contractor in writing any discrepancies or errors which come to its attention in the Prime Contract Documents or the Subcontract Documents.
- (d) **Effective Date.** Subcontractor confirms that the Work performed by Subcontractor on the Project, prior to the date on which this Agreement is executed by the Parties, is subject to the terms and conditions of the Subcontract Documents and that all obligations, representations and warranties made by Subcontractor herein are retroactive to the date on which Subcontractor commenced Work on the Project.
- (e) **Order of Precedence.** In the event of conflicts in the Subcontract Documents, the order of precedence, highest to lowest, shall be as follows:
- (1) All modifications and change orders;
 - (2) Subcontract Agreement and Attachments; and
 - (3) The Prime Contract Documents.

In the event that there is an inconsistency or conflict among any of the provisions of the Subcontract and the obligations and duties arising therefrom, the provision imposing the most stringent obligation on the part of the Subcontractor will control.

2. **PERFORMANCE OF THE WORK**

- (a) The “Subcontract Work” or “Work” includes all labor, services, materials, freight, packaging, supplies, hardware, fasteners, fixtures, tools, layout, engineering, value engineering, detailing, equipment, scaffolds, hoisting, administration, supervision, transportation, warehousing, storage and other facilities, permits, and all other items and services necessary for the proper and complete performance and acceptance of the work and obligations set forth in the Subcontract Documents for a Project.
- (b) Subcontractor agrees (a) that materials and equipment furnished by Subcontractor shall conform strictly to the subcontract Documents, (b) to furnish all materials within the time specified herein, with all necessary certificates and permits for installation and erection of same, and to layout, install and erect same and complete said work within the time specified, according to the Subcontract Documents and to the satisfaction of Owner, Architect and Contractor, (c) to furnish all scaffold and equipment (including equipment for hoisting) that may be necessary to do its work expeditiously and to provide traffic and safety controls at all times while using such equipment on the job site, (d) to remove and replace any defective materials or work forthwith on notice from Architect or Contractor and to bear the expense of making good all work of others, including the Contractor, which is destroyed or damaged by such removal and replacement, (e) to perform the work entirely at Subcontractor’s risk, (f) to provide all proper and sufficient and necessary safeguards against all injuries and damage whatsoever, and to comply with all safety requirements imposed by law, (g) to secure and pay for those permits required by the Subcontract Documents to be secured for the work applicable to this Subcontract, (h) to provide a full-time competent superintendent acceptable to Contractor who shall have authority to act on behalf of Subcontractor and who shall attend all meetings as requested by Contractor and who shall supervise the work hereunder.
- (c) Subcontractor shall prepare, and obtain approval as required by the Subcontract Documents for, all shop drawings, details, samples, and do all other things necessary and incidental to the prosecution of its work all in conformance with Contractor’s progress schedule. Subcontractor shall submit a schedule of values for approval at the commencement of the work. Approval of shop drawings, submittals, details and samples by Contractor shall not relieve Subcontractor of its obligation to perform its work according to the terms and consistent with the intent of the Subcontract Documents.
- (d) The installation of the Subcontractor’s work will be considered evidence of its acceptance of the conditions as being correct and to its approval. The entire responsibility for proper configurations and dimensions for prefabrications of any part of the work shall rest with Subcontractor.

3. **SCHEDULE**

- (a) Time is of the essence of this Agreement. Subcontractor shall provide Contractor with scheduling information and a proposed schedule for performance of its work in a form and by a date acceptable to Contractor. Subcontractor shall conform to Contractor’s reasonable progress schedule and all reasonable revisions or changes made thereto, which Subcontractor recognizes shall be made for the benefit of the Progress of Project, and not necessarily the Subcontractor or its Work, however, Contractor shall make all reasonable efforts to incorporate Subcontractor’s reasonable requests into any Project schedules. As such, Subcontractor shall prosecute its work in a prompt and diligent manner in accordance with Contractor’s progress schedule without delaying or hindering Contractor’s work or the work of other contractors or subcontractors. Subcontractor shall coordinate the work covered by this Agreement with that of all other contractors, subcontractors, and of Contractor, in a manner that will facilitate the efficient completion of the entire work.

- (i) Subcontractor agrees to notify Contractor, in writing within two (2) working days (or 24-hours prior to the time within which Contractor must provide notice to the Owner pursuant to the terms of the Prime Contract, whichever is earlier) of any delays or anticipated delays in the performance of the work and to state the cause of said delays. If Subcontractor fails to provide the written notice in the time set forth in this provision, Subcontractor agrees that its failure shall constitute a waiver of all rights to recover any additional time or costs associated with all delays or anticipated delays for which timely notice was not given. If Contractor is properly notified, then, should the cause be a condition upon which the Owner permits extension of time in the Prime Contract Documents, Contractor will apply for such extension.
- (ii) In the event Subcontractor fails to maintain its part of Contractor's schedule, it shall, without additional compensation, accelerate the work as Contractor may direct until the Subcontract Work is in accordance with such schedule. Contractor shall have complete control of the premises on which the work is to be performed and shall have the right to decide the time and order in which various portions of the work shall be installed and the relative priority of the work of Subcontractor and other subcontractors, and, in general, all other matters pertaining to the timely and orderly conduct of the work of Subcontractor.
- (b) No claims for additional compensation or damages for delays, including, but not limited to, force majeure delays, delays caused by third-party utilities, governmental bodies and regulatory authorities, delays caused by the Owner, its agents, employees, or its separate contractors, or any other delay beyond the Control of Contractor shall be recoverable from Contractor, and the above-mentioned extension of time for completion shall be the sole remedy of Subcontractor; provided, however, that in the event Contractor obtains additional compensation from Owner, on account of such delays to Subcontract Work, Subcontractor shall be entitled to such portion of the additional compensation so received by Contractor from as is equitable under all of the circumstances. In the event that Contractor prosecutes a claim against Owner for additional compensation for any delay, Subcontractor shall cooperate fully with Contractor in the prosecution thereof and shall pay costs and expenses incurred in connection therewith, including actual attorneys' and consultants' fees and costs, to the extent that said claim is made by Contractor at the request of or for the benefit of Subcontractor.
- (c) If Subcontractor should default in performance of the work or otherwise commit any act which causes delay to Contractor's work, Subcontractor shall be liable for all losses, costs, expenses, liabilities and damages, including actual damages, consequential damages and any liquidated damages, sustained by Contractor, or for which Contractor may be liable to Owner or any other party because of Subcontractor's default or delay. Neither party shall be liable to the other for consequential or liquidated damages incurred directly by either party arising out of or related to a breach of this Subcontract, except that Subcontractor shall remain liable for indemnification and the duty to defend against any actual, consequential or liquidated damages that arise out of the Work of Subcontractor or a breach of this Agreement that are assessed or claimed against Contractor by third parties, which includes, but is not limited to, the Owner, as well as for any such damages that are caused by an insurable event and covered by insurance.
- (d) Subcontractor agrees to submit (1) on a weekly basis, and at the time of submission of progress payment requests, a report, in a form satisfactory to Contractor, itemizing on a weekly basis actual quantities of work performed and (2) on a daily basis a Subcontractor Daily Report" for each day on the jobsite that indicates the daily manpower and equipment employed by Subcontractor on the project, as well as a description of the activities performed that day.

4. **WARRANTY**

- a) Subcontractor warrants to Owner, Architect and Contractor that all materials and equipment furnished shall be new, unless otherwise specified, and that all Subcontract Work shall be free from faults and defects and in conformance with the Subcontract Documents. All work not conforming to these

requirements, including substitutions not properly approved and authorized in writing, shall be considered defective.

- b) Subcontractor will comply with all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any government or quasi-government entity having jurisdiction over the Project, the Project Site, the practices involved in the Project, or any Subcontract Work.

5. **CHANGES IN THE WORK**

- (a) Contractor may at any time, by written change order signed by Contractor's Project Manager only, and without notice to the Surety or Sureties who issued Subcontractor's bonds, make changes in the work to be performed hereunder, within the general scope hereof. If such changes cause an increase or decrease in the cost of the work or in the required time for its performance, an equitable adjustment shall be made subject to the conditions of this Paragraph. If Contractor and Subcontractor cannot agree on the cost or time of performance for the change order work, or if Contractor or Owner disagrees that any claimed work is change work, Subcontractor shall nevertheless timely perform the disputed work as directed by Contractor in accordance with the change and dispute provisions of this Subcontract and, if applicable, the Prime Contract Documents.
- (b) Subcontractor shall make no changes in the work nor shall it be entitled to any additional compensation unless first authorized in a change order signed by Contractor's Project Manager.
- (c) No increase in compensation of the Subcontractor or extension of time for performance shall be allowed for change order work unless the Subcontractor makes application therefor, in writing, to Contractor within seven (7) days from the date on which Subcontractor receives a notification of change in the work, (or three days prior to the time within which Contractor must submit a change order request or quotation to Owner pursuant to the terms of the Contract Documents, whichever is earlier), whether the notification instructs Subcontractor to proceed or not-to-proceed with the work. Subcontractor's application must include a detailed breakdown of all costs and any schedule delays. If Subcontractor does not submit an application in this time period, Subcontractor shall be deemed to waive and release any claim for additional compensation and additional time required for the performance of work. The Contractor will quote the Owner accordingly and Subcontractor will be responsible to perform the changes defined in the change order with no adjustment to Subcontractor's compensation or time required for the performance of the work.
- (d) Notwithstanding any other provision of this Subcontract, to the maximum extent allowed by applicable law, Contractor will be liable to Subcontractor for any delay, disruption, loss of productivity, interference, acceleration or other damages to Subcontractor, resulting from or arising out of: (1) any acts or omissions by Owner, Architect, third-party utilities, governmental and regulatory authorities, or anyone for whom these parties may be responsible, (2) fire or other casualty, riots, strikes or other combined action of the workmen or others, (3) any acts of God, or (4) any other cause beyond Contractor's reasonable control, only if and to the extent Owner is liable to Contractor for such damages and actually pays Contractor for such damages. It is expressly understood that the only obligation Contractor has to Subcontractor under this provision is to pass on to Owner any claim Subcontractor has for such damages, and to pay to Subcontractor any amounts which Owner pays to Contractor as a result of such claim. Subcontractor will reimburse Contractor for all costs and expenses, including attorneys' and consultants' fees and costs, incurred in connection with presenting any such claim to Owner.
- (e) If Subcontractor is performing disputed work pursuant to Section 5(a) above, the time and material cost associated with such work must be tracked and submitted to Contractor on a daily basis. Failure to provide any time and material tickets on a daily basis shall be agreement by the Subcontractor that work was not performed that day, and/or the work that was performed is not recoverable from Contractor. Any signature by Contractor employee on a time and material daily ticket shall mean Contractor is acknowledging receipt of the time and material ticket only, and such signature shall not be construed in

and of itself as an admission that Contractor is accepting any such time or cost as extra work or that the cost associated with such time or material is otherwise due Subcontractor.

6. **PAYMENT**

- (a) Contractor agrees, in consideration of the full and complete performance of the work by the Subcontractor in accordance with the terms and provisions hereof, to pay or cause to be paid to the Subcontractor the Subcontract Sum. Subcontractor understands that all payments to Subcontractor will be made only from a special fund and a specific source, namely, from payments made by Owner from time to time to Contractor in respect of work performed by Subcontractor. No payment, whether a progress payment or final payment, will be made to Subcontractor unless and until that fund comes into existence. It is therefore an express condition precedent to Contractor's obligation to make payment to Subcontractor that the Contractor shall first have been paid by Owner for the work performed by Subcontractor. Subcontractor acknowledges and agrees the express intent and effect of this paragraph is to affirmatively shift to Subcontractor the risk of nonpayment by Owner. Subject to the satisfaction of this condition precedent, Contractor shall make payments to Subcontractor within seven (7) days after receipt by Contractor of payment from Owner for the work of Subcontract for which payment has been made (or within such shorter period as may be required by law). If Contractor has provided payment or performance bonds for the project, the obligations of Contractor and its surety under any such bonds to make payment (whether a progress payment or final payment) to any claimant on such bonds is similarly subject to the express condition precedent of payment of funds designated for Subcontractor by Owner.
- (b) In the event the "pay if paid" provisions of paragraph (a) above is determined by the jurisdiction governing the interpretation of this agreement to be void and unenforceable, then the terms of this paragraph (b) shall apply. In the event Contractor is not paid by Owner any sum claimed due by Subcontractor, then Contractor's obligation to make payment to Subcontractor with respect to the time for payment to Subcontractor shall, in addition to any other conditions set forth in this Subcontract or the Contract Documents, be subject to the following conditions precedent:
- (i) If Contractor does not pay Subcontractor sums claimed due under the Subcontract as a result of nonpayment by the Owner and such nonpayment is thereafter "finally adjudged" (as hereafter defined) to have been caused by a breach by Contractor of the Prime Contract, then Contractor shall pay to Subcontractor such sum as is due under this Subcontract, inclusive of and limited to simple interest thereon at the rate of 10% per annum accruing from the date such sum was first due and owing to Subcontractor as set forth above. The term "finally adjudged" as used in this Paragraph (i) shall mean the date final judgment is entered in any action by Contractor against Owner for recovery of sums due under the Prime Contract.
- (ii) If Contractor does not pay Subcontractor sums claimed due under the Subcontract as a result of nonpayment by the Owner and such nonpayment is caused by the Owner's insolvency, bankruptcy, or lack of sufficient assets, or for reasons other than a breach by Contractor of the Prime Contract as provided in Paragraph (i) above, then Subcontractor's right to payment shall be conditioned upon the passage of such time as may be reasonable and necessary for Contractor to fully exercise and exhaust to final judgment its legal, extra judicial and appellate rights and remedies for collection of sums unpaid by Owner, together with the passage of such additional time as reasonably necessary for execution by Contractor of any final judgment entered in its favor. Simple interest only on such sums as are due to Subcontractor under this Paragraph (ii) shall accrue and be payable to Subcontractor at the rate of 10% per annum commencing from the expiration of the reasonable time reserved to Contractor in this Paragraph (ii) for recovery and collection from Owner.
- (iii) Subcontractor agrees to preserve and maintain its mechanic's lien (of any sort as allowed by law, including but not limited to construction lien, or materialman's lien) and stop notice rights with respect to the project and to exercise and exhaust those rights in the event that Contractor does

not pay Subcontractor sums due under the Subcontract as a result of payment default on the part of the Owner under the Prime Contract.

- (iv) Nothing contained herein shall be interpreted as releasing or waiving any statutory mechanic's lien (of any sort allowed by law including but not limited to construction lien or materialman's lien), bond or stop notice right reserved to Subcontractor under the law; provided however, that Subcontractor agrees in the event Subcontractor asserts a claim against any statutory or common law payment or performance bond issued in connection with the Project, the surety to such bond and the Contractor (if Contractor is a principal on the bond) shall have the right to assert as a defense to such claim, the nonoccurrence of any conditions to payments set forth in this Subcontract, including without limitation the failure or delay of payment to Contractor.
- (v) If any portion of this Section 6 is determined to be void, voidable or illegal, such portion shall be deemed severed from the other portions of this Section 6 that are not void, voidable or illegal and such other portions shall be enforceable in accordance with their terms.
- (c) Contractor shall retain from progress or other payments hereunder ten percent (10%) of the amount due until after final acceptance of the work by the Architect and Owner and until ten (10) days after Contractor's receipt of final retention payment from Owner. All billings for work performed during a calendar month shall be made on Contractor's standard forms "Progress Payment Request" and "Conditional Waiver and Release Upon Progress Payment" and must include a schedule of values itemizing in detail work completed and materials and equipment put in place during such month, and a current Change Order log itemizing approved change orders, submitted and outstanding quotes. No other form of payment request will be accepted. Payment requests must be delivered to Contractor sufficiently early as to not delay timely submission of Contractor's progress payment requests to Owner.
- (d) Subcontractor, as requested by Contractor, shall furnish certified copies of all payrolls in the manner prescribed by Contractor. Contractor reserves the right to require mechanics' lien, stop notice, construction lien, materialman and bond claim releases (including releases from lower tier subcontractors) and payment affidavits in duplicate with each application for progress payments and on final payment. Contractor also reserves the right to require Subcontractor to execute an Unconditional Waiver and Release form as to previously paid progress payments if required by the Contract Documents or the Owner. Receipt by Contractor of all required releases and affidavits, and approval by Contractor of those documents are conditions precedent to payment by Contractor to Subcontractor.
- (e) Unless otherwise provided in the Contract Documents, payments will be made on account of materials or equipment not incorporated in the Work but delivered and suitably stored at the site and, if allowed in the Contract Documents and approved in advance by the Contractor, payments may similarly be made for materials or equipment suitably stored at some other location agreed upon in writing. Payments for materials or equipment stored on or off the site shall be conditioned upon submission by Subcontractor of bills of sale or such other procedures satisfactory to Contractor to establish Owner's title to such materials or equipment or otherwise protect Owner's interest, including applicable insurance and transportation to the site for those materials and equipment stored off the site.
- (f) Contractor may withhold or, on account of subsequently discovered evidence, may nullify, the whole or part of any payment to protect Contractor from loss on account of (a) defective work not remedied; (b) third party claims filed or reasonable evidence indicating probable filing of such claims; (c) failure of Subcontractor to make payments properly to its subcontractors or for materials, equipment, labor or fringe benefits; (d) reasonable doubt that the work under this Agreement can be completed for the balance of the Subcontract Price then unpaid; (e) damage to Contractor, a separate contractor or another subcontractor; (f) reasonable doubt that the work under this Agreement can be completed within the time required herein and that the balance of the subcontract price then unpaid would be sufficient to cover the actual or liquidated damages resulting from the anticipated delay; (g) penalties assessed against Contractor or Subcontractor on account of Subcontractor's failure to comply with state, federal or local laws and regulations; (h) persistent failure to carry out the work under this Subcontract in accordance

with the Contract Documents; or (i) any other ground for withholding payment allowed by state or federal law, or as otherwise provided in this Subcontract. When the reason(s) for withholding payment is/are rectified, such amounts as are then due and owing shall be paid or credited to Subcontractor.

- (g) Contractor reserves the right to make payment by joint check or by direct check to Subcontractor's materialmen or sub-subcontractors or to any other person or entity who has performed work or furnished materials under this Subcontract and may have a claim or a right of action against Contractor, Contractor's Surety, or the project under any law; provided, however, that Contractor shall not be obligated to exercise the right reserved herein for the benefit of any person or entity other than itself. Subcontractor agrees that Contractor shall have the right to determine the manner in which payment shall be made. Contractor's payment by way of joint check or direct check to Subcontractor's materialmen or sub-subcontractors shall be applied as though the money had first been paid to Subcontractor. However, prior to making any payment by joint check or direct check, Contractor shall provide Subcontractor written notice of any such intent, and allow Subcontractor a reasonable opportunity to provide reasonable information why such funds are not due or owing to any sub-tier subcontractor or supplier.
- (h) Any payment made hereunder prior to completion and acceptance of the work shall not be construed as evidence or acknowledgment of proper completion of any part of Subcontractor's work.

7. INDEMNIFICATION AND DUTY TO DEFEND

- (a) **To the fullest extent permitted by law, Subcontractor specifically obligates itself to protect, immediately defend, indemnify and hold Contractor, Owner and their respective officers, directors, employees, agents and representatives and any other person indemnified by Owner (hereinafter referred to as the "Indemnitees") harmless against claims, damages, losses, costs, expenses, including any fees of accountants, attorneys, experts or other professionals, or investigation expenses, and liabilities in law or in equity arising out of, resulting from, or in any way connected with the Subcontractor's operations and the Subcontract Work. Subcontractor's obligations to protect, indemnify and hold Indemnitees harmless, in addition to the separate and independent duty to defend, include, but are not limited to, the following:**
 - (i) **All damages, liability, penalties, costs, losses, damages, expenses, costs (including attorneys' fees and costs), losses, causes of action, demands, claims or judgments, for any alleged or actual violation or infringement by Subcontractor (or Subcontractor's employees or subcontractors or consultants or vendors of any tier) of any law, statute, codes, safety or occupational health orders, rules, regulations, standards, orders or any patent or patent right;**
 - (ii) **All damages, liability, penalties, costs, losses, damages, expenses, costs (including attorneys' fees and costs), losses, causes of action, demands, claims or judgments, resulting from injury to or death of any person (including Subcontractor's employees) or damage to property of any kind (including economic loss), including the Subcontract Work under this Agreement or the work of others on the Project, which injury, death or damage arises out of or is in any way connected with the performance of Subcontract Work under this Agreement;**
 - (iii) **All damages, liability, penalties, costs, losses, damages, expenses, costs (including attorneys' fees and costs), losses, causes of action, demands, claims or judgments, arising from: (1) construction liens, mechanics' liens, or other materialman's lien of any sort, stop notice claims and payment bond claims made by any sub-subcontractor, suppliers, laborers, rental companies, or the like, and (2) claims and liens for labor taxes, materials, appliances, equipment, and supplies whatsoever, including any costs, attorneys' fees, and incidental damage resulting therefrom; and for failure by Subcontractor or any party acting on Subcontractor's behalf to comply with all laws, ordinances and regulations of all governmental authorities in any manner relating to the Subcontract Work;**

- (iv) **Subcontractor's failure to fulfill the covenants set forth in each subpart of Section 17, Labor Relations and Subcontractor Employees;**
 - (v) **Failure of Subcontractor to comply with the provisions of Section 8, Insurance;**
 - (vi) **Any failure or alleged failure to comply with the terms of this Agreement, the Subcontract Documents, including the Prime Contract Documents; and**
- (b) **Subcontractor's indemnity and hold harmless obligations hereunder shall apply to any acts, omissions, willful misconduct, negligent conduct, other fault, or liability without fault of any person or entity, including but not limited to Subcontractor's agents, employees, subcontractors, suppliers, and any other individual or entity for whom Subcontractor may be responsible, whether active or passive, and whether or not sole or concurrent with that of any other person or entity; except that this indemnity obligation shall not require that Subcontractor indemnify any of the persons or entities named as Indemnitees herein against claims arising from his, her, or its sole negligence or willful misconduct.**
- (c) **Subcontractor acknowledges the separate and independent duty to defend set forth in this paragraph, and shall defend the referenced parties upon demand regardless of whether any indemnification obligations later arises. Subcontractor agrees that it shall (at the option of the Indemnitee) at its own cost, expense and risk, immediately upon tender defend the Indemnitees, with counsel of the Indemnitees' own choosing, in any and all claims, demands, actions, lien actions, suits or other legal, arbitral, administrative or other proceedings which may be brought or instituted against Indemnitees. Subcontractor's duty to defend the Indemnitees, as set forth above, shall arise immediately upon notification and demand by an Indemnitee to Subcontractor. If an Indemnitee is forced to pay for its own defense because Subcontractor fails to immediately comply with its defense obligations set forth in this Paragraph 7, said Indemnitee shall be entitled to simple interest on the principal balance of attorneys' fees and costs incurred at the rate of 1 ½% monthly.**
- (d) **The foregoing indemnity and defense obligations are not limited by the amount of any available insurance and are in addition to any express or implied indemnity or contribution rights available to any of the Indemnitees at law or in equity.**
- (e) **All Work covered by this Agreement done at the site or in preparing or delivering materials or equipment, or any or all of them, to the site shall be at the risk of Subcontractor exclusively until the completed Work is accepted by Contractor.**
- (f) **With respect to claims against any person or entity indemnified in Paragraph 7(a) above, asserted by an employee of Subcontractor, by an employee of one of Subcontractor's subcontractors, by an employee of anyone directly or indirectly employed by them, or by an employee of anyone for whose acts they may be liable, the indemnity obligations under Paragraph 7(a) shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor or Subcontractor's subcontractors under worker's compensation acts, disability acts, or other employee benefit acts.**
- (g) **All indemnity obligations under this Subcontract shall apply to claims arising both before and after completion of the Work under this Agreement and to claims arising both before and after the termination of this Agreement.**
- (h) **The indemnity obligations set forth in this or in any other provision of this Agreement shall not be construed to negate, abridge, or reduce any other rights of indemnity accorded by law or equity to the persons or entities indemnified.**
- (i) **Contractor shall be entitled to recovery of its attorneys' fees and costs associated with enforcing any indemnity and duty to defend set forth in this Agreement.**

8. **INSURANCE**

- (a) Subcontractor shall, at its own expense, procure not less than the insurance coverages and limits of insurance as specified within the Insurance Attachment, which is attached to the Subcontract Agreement and is an integral part of this Agreement. Such insurance shall be maintained with insurers, policy forms and deductibles satisfactory to Contractor and the Owner. Such insurance shall not contain any exclusion(s) that apply to the type of work performed by Subcontractor under this agreement, or to the cause of resultant damage arising out of work performed by Subcontractor. If Subcontractor uses existing coverage to comply with these requirements and that coverage does not meet the requirements set forth within the Insurance Attachment, Subcontractor agrees to amend, supplement or endorse the existing coverage to do so, at no additional cost to Contractor.
- (b) Subcontractor will also carry any other insurance specified in the Contract Documents for protection of Owner, Contractor and Subcontractor, and will keep all policies and endorsements in force as long as may be necessary to protect any of the above. Any acceptance of insurance certificates or endorsements by Contractor shall in no way limit or relieve the Subcontractor of its duties and the responsibilities assumed by him in this Agreement.
- (c) At minimum, Subcontractor shall carry Workers' Compensation, General Liability and Automobile Insurances. Such General Liability coverage shall be endorsed to add the Owner and Contractor as additional insureds on the Subcontractor's policy for liabilities arising out of Subcontractor's work. The limits, scope of coverage and additional insurance requirements of the Subcontractor are more fully outlined in the Insurance Attachment.
 - (i) Subcontractor shall disclose all SIRs (Self Insured Retentions) on any insurance policy to Contractor prior to the award of the subcontract. Contractor reserves the right to reject any SIR or require a financial guarantee of the SIR amount. Upon notification by Contractor, Subcontractor shall immediately be responsible for all defense and indemnity obligations to Contractor within the SIR.
- (d) On execution of the Subcontract and prior to commencement of work, Subcontractor shall file on forms acceptable to Contractor a certificate of insurance and additional insured endorsement properly executed and signed by an authorized representative on behalf of the insurer(s) evidencing the above coverages and conditions as specified in the Insurance Attachment. Subcontractor shall maintain the required insurance and additional insureds for the period of time for which the Subcontractor may be held legally liable for its work. Also, the required certificates of insurance and additional insured endorsements shall be provided and maintained by the Subcontractor during the warranty period of Subcontractor's work. Subcontractor further agrees, upon written request by Contractor or Owner, to furnish copies of any insurance policies, certified by an authorized representative of the insurer(s).
- (e) Subcontractor shall be responsible for payment of the deductible for any Builder's Risk/Course of Construction Insurance ("Builder's Risk") claim regardless of whether such coverage is procured by the Owner, Contractor or Subcontractor. Subcontractor shall be responsible for payment of the deductible in proportion to its percentage of responsibility of the entire loss (covered under the Builder's Risk Policy), as calculated prior to the application of the policy deductible.
- (f) Contractor may, at its own option, insure either the General Liability and Excess, or the General Liability, Excess and Workers' Compensation coverages by the Contractor's Project Wrap Up Insurance Program. If the Project is under a Contractor's Project Wrap Up Insurance Program, then Subcontractor shall be responsible for payment of the deductible for any Workers Compensation and/or General Liability claim arising from its work under the Contractors' Project Wrap Up Insurance Program in accordance with the Project Specific Insurance Manual issued for the Project. Subcontractor shall be responsible for payment of the deductible in proportion to its percentage of responsibility of the entire loss (covered under the Contractors wrap-up insurance program), as calculated prior to the application of the deductible.

9. **BONDS**

If surety performance and/or payment bonds (“Bonds”) are required on a Project, then:

- (a) Any indemnities or bonds provided in the Contract Documents are hereby assumed by the Subcontractor to the extent of its work and it hereby agrees to furnish, concurrently with the execution hereof, a performance bond in an amount equal to full Subcontract Sum and a payment bond in an amount equal to full Subcontract Sum with a corporate Surety or Sureties listed in the most current United States Department of the Treasury-Federal Register. Bonds shall contain terms and be in a form satisfactory to Contractor and Owner conditioned upon faithful performance by him of each and all of the provisions hereof. Contractor reserves the right to require performance and payment bonds on any subcontract even though not required by the Contract Documents. If Subcontractor fails to provide the bonds specified herein within three (3) days after demand by Contractor, Contractor shall have the immediate right to (1) terminate this Agreement pursuant to Subcontractor’s default and recover all costs and damages arising out of such breach, including but not limited to the difference in cost of replacement contractor, and Subcontractor shall have no right to payment for any work performed prior to such termination, or (2) Contractor can secure such bonds for subcontractor and backcharge subcontractor for the cost of same.
- (b) If change order work results in an increase in the Subcontract Sum, Subcontractor shall provide bond riders evidencing that the penal sum of the bonds has been increased to equal the adjusted Subcontract Sum. The cost of such increase in bond coverage shall be at Subcontractor’s expense and included in said change orders.

10. **SAFETY**

- (a) Subcontractor shall comply fully with all laws, orders, citations, rules, regulations, standards and statutes 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. Subcontractor shall conduct inspections to determine that safe working conditions and equipment exist and accepts sole responsibility for providing a safe place to work for its employees and for employees of its subcontractors and suppliers of material and equipment, for adequacy of and required use of all safety equipment and for full compliance with the aforesaid laws, orders, citations, rules, standards and statutes.
- (b) Subcontractor will furnish Contractor with copies of all accident reports, promptly reporting any accident or injury to any of the employees, agents or servants of Subcontractor used or utilized on this project.
- (c) Subcontractor shall furnish Contractor with current Material Safety Data Sheets for hazardous materials prior to delivery of any hazardous materials to the job site. The Subcontractor shall inform the Contractor of any precautionary measures to be taken to protect employees.
- (d) Subcontractor agrees that it is Subcontractor’s sole responsibility to employ labor in accordance with all applicable safety codes, including but not limited to State and Federal Safety Codes, and under conditions satisfactory to Contractor.

11. **CLEAN-UP**

At all times during the course of performing the work under this Subcontract, Subcontractor shall perform its work, including any necessary clean-up, so as to maintain the Project site in a clean, safe and orderly condition. Upon completion of the work under this Subcontract, Subcontractor shall (a) clean all surfaces, fixtures, equipment and other items which are a part of the work under this Subcontract or may have been soiled by such work, and (b) remove from the job site and legally dispose of all temporary structures, debris, waste, and other items incidental to Subcontractor’s operations, including all hazardous materials, which do not constitute a permanent part of the Project. Subcontractor shall follow all directions of Contractor in regard to clean-up both during the course of the work and at the completion of Subcontractor’s work. Contractor

shall be entitled to backcharge Subcontractor for the costs of clean up if Subcontractor fails to clean up its work within two (2) working days after demand by Contractor.

12. **PROTECTION OF WORK**

- (a) Subcontractor shall secure and reasonably protect the work done hereunder and assume responsibility for the condition thereof until final acceptance by Architect, Owner and Contractor. Subcontractor further agrees to provide such reasonable protection as is necessary to protect the work and the workers of Contractor, Owner and other subcontractors from its operations.
- (b) Subcontractor shall be liable for any loss or damage to its work in place or its materials on the job site. Subcontractor shall also be liable for loss or damage to work in place or damage to equipment and/or materials on the job site caused by Subcontractor or its agents, employees or guests.

13. **USE OF CONTRACTOR'S EQUIPMENT**

In the event Subcontractor shall use Contractor's equipment, materials, labor, supplies or facilities, Subcontractor shall reimburse Contractor at a predetermined rate. Further, Subcontractor assumes liabilities connected therewith and responsibility for physical damage to such equipment, materials, labor, supplies, or facilities used by Subcontractor or its agents, employees, or permittees. In the event that Contractor's employees are used by Subcontractor, Subcontractor shall have full responsibility for all acts or omissions of Contractor's employees with regard to Subcontractor's use or employment of them. Subcontractor accepts any and all of Contractor's equipment, materials, labor, supplies or facilities as furnished. The use by Subcontractor of Contractor's equipment or employees must be approved by Contractor.

14. **CLAIMS FOR ADDITIONAL COMPENSATION AND DELAY**

A Claim is a written demand or assertion by Subcontractor seeking an adjustment of the Subcontract's terms, payment of money, delay, extension of time or other relief with respect to the Subcontract. As a condition to bringing any Claim against Contractor, Subcontractor must comply first with all timely notice requirements set forth in the Subcontract Documents. Subcontractor shall timely submit any Claim to Contractor within three (3) working days after the occurrence of the event giving rise to the Claim (or two (2) working days prior to the time within which Contractor must submit a pass-through request to the Owner pursuant to the terms of the Prime Contract Documents, whichever is earlier). Claims affecting either the Contract Sum or Schedule must be in writing, and contain sufficient narrative detail and supporting documentation justifying all claimed costs and delays. All Claims shall be dated, signed and certified (if required by the Prime Contract Documents) by an officer or duly authorized representative of Subcontractor. Any Claim not timely submitted shall be deemed waived and forever released by Subcontractor.

Notwithstanding any other provision of this Subcontract, to the maximum extent allowed by applicable law, Contractor will be liable to Subcontractor on any Claim only if and to the extent Owner is liable to Contractor for the adjustment sought in such Claim. It is expressly understood that the only obligation Contractor has to Subcontractor under this provision is to pass on to Owner any Claim, and to pay to Subcontractor any amounts which Owner pays to Contractor as a result of such Claim. Subcontractor will reimburse Contractor for all costs and expenses, including attorneys' and consultants' fees and costs, incurred in connection with presenting any such Claim to Owner.

Unless otherwise agreed in writing, Subcontractor shall continue to prosecute Subcontractor's Work and maintain the Project Schedule pending resolution of any Claim. Any failure of Subcontractor to continue diligent and timely prosecution of Subcontractor's Work shall be deemed a material breach of the Subcontract, entitling Contractor to all remedies provided hereunder, as well as other remedies which may exist as a matter of law.

15. **DISPUTES AND DISPUTE RESOLUTION**

- (a) **Dispute.** A Dispute shall arise when Contractor denies or otherwise challenges a timely Claim brought by Subcontractor or the Parties have another form of disagreement arising from the Subcontract Documents (collectively “Dispute”). A Dispute shall also include any Claim by Subcontractor that Contractor believes, in its discretion, involves, in whole or in part, disputes or claims between the Contractor and a third-party, including without limitation the Owner.
- (b) **Work Continuation and Payment.** Subcontractor shall not delay or postpone any Work pending resolution of any Dispute except as the Contractor and Subcontractor may otherwise agree in writing. Pending final resolution of a Dispute, including exhaustion of all applicable dispute resolution procedures, Subcontractor shall proceed diligently with the performance of the Subcontract Work, including any disputed work, and based on such performance, Contractor shall continue to make payments for undisputed Work in accordance with the Subcontract Documents.
- (c) **Disputes under the Prime Contract.** If any Dispute between Subcontractor and Contractor arising out of or relating to this Subcontract (“Subcontract Dispute”) pertains in any way to a claim, dispute, or matter in question between Contractor and Owner arising out of or relating to the Prime Contract (“Related Prime Contract Dispute”), then this Subcontract Dispute will be decided using the same procedures, forum, and process utilized for the Related Prime Contract Dispute, and the laws governing the resolution of Prime Contract disputes, regardless of whether Subcontractor formally joins the process as a litigant or named party. Any and all claims of the Subcontractor related to a Related Prime Contract Dispute shall be handled in this manner. Subcontractor agrees to: (i) cooperate with Contractor, (ii) assist in the discovery and other preparations for the hearing, (iii) make its employees available for testimony before and after the hearing, (iv) share proportionately the legal fees and costs associated with the preparation for and execution of the hearing to the extent mutually agreed upon related to the amount of damage being pursued by the Contractor on Subcontractor’s behalf, and (v) stay any action filed by the Subcontractor against Contractor as long as the Subcontractor’s position is being diligently pursued by the Contractor in the hearing where the Related Prime Contract Dispute is being heard, and until all such appeals pertaining to the Related Prime Contract Dispute are exhausted. Subcontractor will be bound by the results of the dispute resolution procedure controlling the Related Prime Contract Dispute as it relates to Subcontractor, and such results shall be final. Nothing in this Subcontract shall allow Subcontractor to be a named party in a dispute forum being utilized by Contractor and Owner where that Subcontractor has no legal standing to litigate its disputes before that forum.
- (d) **Subcontractor Cooperation.** In the event it is not possible to join a Related Prime Contract Dispute to the dispute resolution procedures between Owner and Contractor as provided in Paragraph 15(c) above, Subcontractor agrees to enter into a liquidating agreement with Contractor and to cooperate fully with Contractor and to furnish all documents, statements, witnesses and other information required by Contractor for prosecution or defense of Subcontractor’s Claim by Contractor. Subcontractor shall pay or reimburse Contractor for all expenses and costs, including reasonable attorneys’ and consultants’ fees and costs, incurred in connection therewith to the extent of Subcontractor’s interest in such Claim or dispute. Subject to compliance with all applicable laws, codes and regulations, including but not limited to those relating to false claims, dispute and claim certifications, and cost and pricing data requirements, Contractor’s sole obligation with respect to Subcontractor’s Claims is to act as a conduit in presenting any timely-filed Claims by Subcontractor to Owner under the dispute resolution procedures of the Prime Contract and, subject to the other provisions of this Agreement, to pay to Subcontractor the proportionate part of any sums actually paid by the Owner to which Subcontractor is entitled. Subcontractor further agrees to stay any action filed by the Subcontractor against Contractor as long as the Subcontractor’s position is being diligently pursued by the Contractor pursuant to the liquidating agreement contemplated above in this Paragraph 15(d), and until all Contractor has fully exhausted all remedies pursuant to that liquidating agreement, including obtaining a judgment, arbitration award or appellate decision.

- (e) **Disputes between Contractor and Subcontractor.** In the event that either (i) the provisions for resolution of Disputes between Contractor and Owner contained in the Prime Contract Documents do not permit joinder with disputes of third parties, such as Subcontractor, and Contractor elects not to enter into a liquidating agreement with Subcontractor, or (ii) if such Dispute is only between Contractor and Subcontractor, then the Parties shall submit the Disputes to the dispute resolution procedure set forth in Paragraphs 15(f) through 15(i) below. Contractor reserves the right to seek consolidation of any mediation, lawsuit or arbitration arising under this Agreement with any mediation, lawsuit or arbitration relating to disputes between Contractor and Owner.
- (f) **Mediation between Contractor and Subcontractor.** The Parties shall endeavor to resolve their Disputes through mediation. Any such mediation proceedings shall be under the auspices of and governed by the rules of the Prime Contract Documents. If the Prime Contract Documents do not provide rules for mediation, the mediation shall be governed by the Construction Industry Mediation Rules of the American Arbitration Association or the Parties may mutually agree to select another set of mediation rules. In such event, neither Party shall proceed with arbitration or litigation until the completion of the mediation process. The costs of the mediator shall be shared equally by the Parties.
- (i) A request for mediation shall be filed in writing with the other Party to this Agreement. The request may be made concurrently with the filing of a demand for arbitration or litigation but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the Parties or court order.
- (ii) The mediation shall be held in the city or county where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.
- (g) **Binding Arbitration for Disputes Less than \$1,000,000.** Unless otherwise agreed to in writing, for Disputes that are not governed by Paragraph 15(c) above, Parties agree to resolve such Disputes where the total principal amount in controversy is less than \$1,000,000 (exclusive of claimed attorneys' fees, interest or costs) by binding arbitration as follows:
- (i) Arbitration shall be conducted using the Construction Industry Arbitration Rules of the American Arbitration Association in effect at the time of initiation or the Parties may mutually agree to select another set of arbitration rules. The administration of the arbitration shall be as mutually agreed by the Parties
- (ii) It is the intention of the Parties that any dispute arising under this Agreement may be consolidated with arbitration or mediation proceedings arising under the Prime Contract Documents or other agreements relating to the same transaction or series of transactions relating the Work or the Project for which this Agreement was entered provided that the agreement governing the other arbitration or mediation (1) permits consolidation; and (2) the to be consolidated substantially involve common issues of law or fact creating the possibility of conflicting rulings.
- (iii) It is the intention of the Parties that in any Dispute arising under this Agreement either Party may include by joinder persons or entities who are parties to agreements relating to the same transaction or series of transactions relating the Work or the Project for which this Agreement was entered, whose presence is required if complete relief is to be accorded and to prevent the possibility of conflicting rulings on a common issue of law or fact and otherwise to prevent risk of the Parties being subjected to inconsistent obligations or decisions.
- (iv) Similarly, Subcontractor agrees to be joined in any arbitration or mediation between the Contractor and any person or entity with whom the Contractor has an agreement to arbitrate or mediate that relates to the same transaction or series of transactions relating the Subcontract

Work or the Project for which this Agreement was entered, including, but not limited to, the Prime Contract, when Subcontractor's presence is required if complete relief is to be accorded and to prevent the possibility of conflicting rulings on a common issue of law or fact and otherwise to prevent risk of the Parties being subjected to inconsistent obligations or decisions.

- (v) If a party fails or refuses to appear or participate in the arbitration, or in any portion of the arbitration, after having been given notice and opportunity to participate by failing to participate in arbitrator selection, failing to pay arbitrator costs or fees, failing to respond to the arbitration demand, failing to provide the arbitrator with papers or information demanded, or failing to appear at hearings, as provided in this Agreement, the arbitration will proceed and the arbitrator may render a final award on the basis of the evidence presented by the participating party. An award rendered under such circumstances is valid and enforceable as if all parties had participated fully.
- (h) **Litigation for Disputes \$1,000,000 or more / WAIVER OF JURY TRIAL.** Unless otherwise agreed to in writing, for disputes that are not governed by Paragraphs 15(c) above, Parties agree to resolve such disputes where the principal amount in controversy is \$1,000,000 or more (exclusive of claimed attorneys' fees, interest or costs) in either the state or federal court having jurisdiction of the matter in the location of the Project. **PARTIES WAIVE THE RIGHT TO A JURY TRIAL, AND AGREE THAT THEIR DISPUTE WILL BE DETERMINED BY A JUDGE. THE PARTIES SPECIFICALLY AGREE AND ACKNOWLEDGE THAT THE NATURE AND COMPLEXITY OF CONSTRUCTION DISPUTES IS SUCH THAT MATTERS ARE BETTER AND MORE EFFICIENTLY DECIDED BY A JUDGE RATHER THAN A JURY.**
- (i) **Joinder of Other Parties.** Subcontractor shall include in each of its contracts with its sub-subcontractors and suppliers a specific provision whereby the necessary party agrees to be joined or consolidated with any dispute procedure between Contractor and Subcontractor. Further, the Contractor and Subcontractor grant to any person or entity made a party to and conducted under this Section, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

16. **CONTRACTOR'S REMEDIES**

- (a) If Subcontractor or any of Subcontractor's subcontractors, suppliers, materialmen or laborers at any time commit any of the acts or omissions below in connection with any part of this Agreement, or otherwise, it shall constitute an event of Default under this Agreement:
 - (i) refuse or neglect to supply a sufficient number of properly qualified workers or a sufficient quantity of materials of proper quality;
 - (ii) abandon Subcontractor's work or fail in any respect to promptly and diligently prosecute Subcontractor's work;
 - (iii) fail to promptly pay subcontractors, suppliers, materialmen, rental companies or laborers;
 - (iv) fail to accelerate Subcontractor's work as required by Paragraph 3 hereof;
 - (v) give Contractor a reasonable basis to doubt that Subcontractor's work can be completed for the unpaid portion of the Subcontract Sum or within the required time;
 - (vi) declare bankruptcy or make a general assignment for the benefit of creditors or files for bankruptcy, assigns assets for the benefit of creditors, becomes insolvent or be unable to pay its obligations as they mature;

- (vii) otherwise fail to perform any of the terms, conditions, agreements and obligations set forth in the Subcontract Documents; or
 - (viii) a default in the performance of any contract or agreement with Contractor, whether related to the Project, or otherwise, shall constitute a Subcontractor default under this Agreement.
- (b) In the event of a Default, Contractor may pursue any remedies available by common law or statute, including but not limited to one or more of the following:
- (i) withhold any sums due or thereafter to become due to Subcontractor under the Subcontract and any other contract, including any contract between Subcontractor (or any of its subsidiaries or affiliates) and Contractor (or any of its subsidiaries or affiliates), whether related to the Project or otherwise and during such period such withheld amounts shall not accrue interest;
 - (ii) provide and/or supplement any labor and materials as Contractor shall determine to cure such default and deduct the cost thereof from any money then due or thereafter to become due to Subcontractor under the Subcontract or any other contract, agreement, or otherwise, including any contract between Subcontractor (or any of its subsidiaries or affiliates) and Contractor (or any of its subsidiaries or affiliates);
 - (iii) upon the appointment of a receiver for Subcontractor or upon Subcontractor making an assignment for the benefit of creditors or if Subcontractor seeks protection under the Bankruptcy Code or commits any other act of insolvency, Contractor may terminate this Agreement upon giving forty-eight (48) hours written notice, by certified mail, to Subcontractor and its surety, if any. If an order for relief is entered under the Bankruptcy Code with respect to Subcontractor, Contractor may terminate this subcontract by giving forty-eight (48) hours written notice, by certified mail, to Subcontractor, its trustee, and its surety, if any, unless Subcontractor, the surety, or the trustee:
 - (a) promptly cures all defaults;
 - (b) provides adequate assurance of future performance;
 - (c) compensates Contractor for actual pecuniary loss resulting from such defaults; and
 - (d) assumes the obligations of Subcontractor within the statutory time limits.
 - (iv) terminate the Subcontract for default, in which case Subcontractor assigns, conveys and transfers to Contractor all rights, title and interests in the following: (1) all contracts, whether written or oral, between Subcontractor and persons or entities providing labor, material or equipment pertaining to the Subcontract Work, and (2) all equipment, tools, materials or personal property of any kind located on a Project site at the time of termination. Upon the effective date of termination, Subcontractor shall be deemed to irrevocably constitute, appoint and designate Contractor as its attorney-in-fact with the right, but not the obligation, to exercise all rights of Subcontractor assigned or granted to Contractor, and to execute and deliver any other assignments, documents, instruments or agreements deemed necessary by Contractor to exercise its rights under this Agreement in the name of Subcontractor.
 - (v) take possession of all the materials, tools, equipment and appliances belonging to Subcontractor at the Project site without any further compensation to Subcontractor, and either complete Subcontractor's work or contract with any other person or persons to complete Subcontractor work and provide the material therefore; in which case if the unpaid portion of the amount to be paid under the Subcontract exceeds the charges, expenses and damages sustained by Contractor in completing the work or as a result of such defaults, such excess shall be paid by Contractor to Subcontractor, but if such charges, expenses, and damages exceed said unpaid portion, Subcontractor shall pay the difference to Contractor immediately upon demand; or

- (vi) offset and apply any amounts due Contractor as a result of such default against any earned but unpaid amounts owing to Subcontractor by Contractor under the Subcontract, including without limitation, any retainage held by Contractor, any amounts owed to Subcontractor under any other contract, including any contract between Subcontractor (or any of its subsidiaries or affiliates) and Contractor (or any of its subsidiaries or affiliates), whether related to the Project or otherwise.

Prior to exercising the remedies in this Paragraph 16(b), Contractor shall provide Subcontractor written notice of default with not less than two (2) working days to cure such default (unless the time to cure any default is less than two days in the Prime Contract, at which time the Prime Contract requirements will control). Subcontractor shall have the opportunity to remedy, to Contractor's satisfaction, the default, deficiency or failures which are the basis of Contractor's termination notice within the two (2) working days notice period.

Contractor's remedies are cumulative, and the exercise of one remedy shall not restrict Contractor, at the same time or thereafter, from exercising any other remedy set forth in this Agreement, or any right or remedy provided by equity or applicable law. Unless prohibited by Law, Contractor may set-off against the Subcontract Price the amounts owing from Subcontractor to Contractor, whether or not relating to the project.

In the event a termination for default issued pursuant to Paragraph 16(b) of this Subcontract is found not to have been warranted under this Subcontract, the total compensation and damages that Subcontractor is entitled to recover on account of such termination shall be limited to the compensation that would have been payable to Subcontractor under the provisions of this Subcontract as if the Subcontract had been terminated for Contractor's convenience pursuant to subparagraph (c) of this Paragraph 16 at the time Contractor terminated Subcontractor for default.

- (c) Termination for Contractor's Convenience. Contractor may at any time and for any reason, or for no reason, terminate any part of Subcontractor's services and work for Contractor's convenience. Such termination shall be by written notice to Subcontractor at Subcontractor's place of business.

Upon receipt of such notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue the work and the placing of orders for materials, equipment and supplies in connection with the performance of this Subcontract, and shall, if requested, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to Contractor, or at the option of Contractor, give Contractor the right to assume those obligations directly, including all benefits to be derived therefrom. Subcontractor shall thereafter do only such work as may be necessary to preserve and protect the work already in progress and to protect material and equipment on the Project site or in transit thereto.

Upon such termination, Subcontractor shall be entitled to payment of the following amounts, which shall constitute full and final satisfaction of all Subcontract Work and claims by Subcontractor for payment on account for work performed under this Subcontract: (1) payment for that portion of Subcontractor's work actually completed and materials actually delivered and accepted by Owner and Contractor, and only as to that portion of the Subcontract Price as allocated in the schedule of values for that portion of the Work performed, inclusive of profit, overhead, and general conditions allocated in the schedule of values for the Work completed, plus (2) such other costs actually incurred by Subcontractor as are payable to Contractor under the Prime Contract and approved by Owner; less (3) any amounts due Contractor, less (4) the amount of any payments made to Subcontractor prior to the date of termination. Subcontractor will not be entitled to any claim or lien against Contractor or Owner for any additional compensation or damages in the event of such termination and payment, and Subcontractor waives any such claims, including loss of anticipated profit. The provisions of this Subcontract, which expressly, or by their nature, survive final acceptance of the Work, will remain in full force and effect after any termination pursuant to this Section 16(c).

- (d) Termination Right Under the Prime Contract. Contractor may also terminate this Subcontract or suspend the Subcontract Work for the same reasons Owner may terminate or suspend Contractor under the Contract Documents. If the Prime Contract is terminated for the convenience of Owner, the termination settlement under this Subcontract shall be as provided in the Prime Contract. Subcontractor shall not be entitled to receive any greater amount than Contractor may on behalf of Subcontractor recover from Owner for such termination. Subcontractor shall cooperate by timely providing a proper termination for convenience cost proposal, if requested by the Contractor.
- (e) If this Subcontract, in whole or in part, is terminated for any reason, Subcontractor's warranties, guarantees and indemnities with respect to the Subcontract Work performed through the termination date will survive the termination and be in full force and effect for the time period prescribed by the Subcontract Documents or Law, whichever is longer. Subcontractor will, prior to final payment, provide all warranties and guarantees required by the Subcontract Documents with respect to the Subcontract Work.

17. **LABOR RELATIONS AND SUBCONTRACTOR EMPLOYEES**

- (a) Subcontractor shall comply with all of the provisions of any collective bargaining agreements executed by or on behalf of Contractor. Contractor shall have no liability to Subcontractor for any costs, expenses or liability resulting from any stoppage of work, however caused, arising out of a labor dispute or controversy. Subcontractor shall be liable for any and all costs, including but not limited to compensatory and liquidated damages, resulting from work stoppages or other labor disputes associated with Subcontractor, Subcontractor's employees or the subcontractor(s) or suppliers of Subcontractor. Should there be picketing on Contractor's job site and Contractor establishes a reserved gate, it shall be the obligation of Subcontractor to continue the proper performance of Subcontractor's work without interruption or delay.
- (b) Subcontractor shall employ only competent, well-disciplined workers to perform the Work hereunder and Subcontractor agrees to immediately remove and replace any employee(s), including Subcontractor's superintendent, whom Contractor, Owner or Architect deems unsatisfactory.
- (c) Subcontractor shall comply with all Laws pertaining to unemployment compensation, workers' compensation, Social Security and employment, including but not limited to, all Laws pertaining to immigration and prevailing wages. Contractor will not in any way be liable as an employer of, or on account of, any of the employees of Subcontractor.

18. **MISCELLANEOUS PROVISIONS**

- (a) **ARCHITECT**

The term "Architect" or "Architect/Engineer" as used herein includes anyone appointed to be the Owner's designated representative to supervise on its behalf the work of the Contractor, or as otherwise set forth in the Prime Contract.

- (b) **TAXES**

The compensation payable to Subcontractor as herein provided includes all sales, gross receipts, excise and other taxes and is not subject to any addition on account of taxes which are now or may hereafter be levied. It is hereby agreed that Subcontractor is an independent contractor within the purview of the Internal Revenue Code, the Federal Social Security Act, and any and all unemployment insurance laws, both State and Federal, and is solely responsible to the Federal and State Government for all payroll taxes, deductions, and contributions under such laws.

(c) **ASSIGNMENT**

Any assignment, subletting or delegation, by operation of law or otherwise, in whole or in part, by Subcontractor of this Agreement, of the work to be performed or of any claims arising hereunder without the prior written consent of Contractor shall be void. Contractor shall have the right in its sole discretion to assign its rights and obligations under this Agreement, as well as any claims arising hereunder, as allowable under the applicable law.

Contractor shall not recognize or be bound by any assignment of any right to payment earned or to be earned by performance hereunder by Subcontractor unless and until Contractor shall receive written notice which reasonably proves the assignment and identifies the rights assigned. Any assignment hereunder shall be subject to, and Contractor reserves, all rights and remedies possessed by or available to Contractor by law or under this agreement as against Subcontractor, its sureties and assigns including, without limitation, rights of set-off, to retain moneys, to amend or modify this agreement, and to assert all other defenses and claims whether or not arising under this agreement.

The making of any assignment by Subcontractor or any consent thereto by Contractor shall in no event relieve Subcontractor or its sureties hereunder of any of their obligations, duties, responsibilities or liabilities.

(d) **FAIR EMPLOYMENT**

The Subcontractor agrees to be bound by and comply with all applicable Fair Employment Practices, Provisions and Regulations of Federal, State or other Governmental authority having jurisdiction including the provisions of Executive Order No. 11246, and Title VII of the Civil Rights Act of 1964, including amendments or revisions thereof, relating to nondiscrimination in employment, and any affirmative action provisions (including MBE or WBE requirements) contained in the Contract Documents or required by applicable law.

(e) **ENTIRE AGREEMENT**

The Subcontract Documents represent the entire agreement between the parties and supersede any previous document including but not limited to Subcontractor qualifications, exclusions or other bid documents that the Subcontractor may have submitted to Contractor as well as any other prior representation, statement or agreement, oral or written, with regard to the subject matter herein. No modification hereto shall be valid unless it is in writing and signed by both parties, except for Contractor's unilateral change orders as set forth in Paragraph 5 of this Agreement.

(f) **WAIVER**

Waiver by Contractor of any particular default by Subcontractor shall not affect or impair Contractor's rights in respect to any subsequent default of the same or of a different nature.

(g) **NOTICES**

All notices provided hereunder shall be in writing and mailed to the other party at the address stated on the Subcontract Agreement.

(h) **CONTRACTOR'S LICENSE**

Subcontractor shall maintain any and all licenses it is required by law to have to perform work under this Subcontract. Failure to maintain such license shall be a material breach of this Subcontract.

(i) **SEVERABILITY**

If any term of provision of this Agreement including, but not limited to provisions relating to Subcontractor’s obligations under Section 7, Indemnification and Section 15, Dispute Resolution, or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of the Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Subcontract shall be valid and be enforced to the fullest extent permitted by law.

(j) **GOVERNING LAW AND VENUE**

This Agreement shall be construed and enforced in accordance with the laws of the State of Oregon, and venue for any legal action shall be in Oregon.

(k) **CONSTRUCTION OF AGREEMENT**

This Agreement shall not be construed as though drafted by either Party, and the Parties specifically covenant that the rule of contra proferentum, or construction of an agreement against its drafter, shall be inapplicable in the interpretation of this Agreement.

(l) **COUNTERPARTS AND ELECTRONIC SIGNATURES**

- (i) If any Subcontract Document or any document identified in the Subcontract Documents must be signed by either Party, the signature of that party sent by facsimile will be considered binding and may be relied upon by both Parties.
- (ii) Contractor may establish a procedure by which any one or more of the Subcontract Documents or any document issued under, pursuant to or in connection with the Subcontract Documents may be signed by one or both Parties using an electronic signature methodology designated by Contractor in its sole discretion. In such event, upon written notice to Subcontractor, Contractor may require that such documents be executed using such electronic signature methodology and Subcontractor’s and Contractor’s use of such electronic signature methodology will be considered as binding as an ink or facsimile signature by Subcontractor or Contractor and may be relied upon by both Parties.

Accepted, upon the Terms and Conditions stated herein.

PROJECT NAME: **PROJECT**

 SUBCONTRACTOR , Subcontractor

SWINERTON BUILDERS, Contractor

By: _____

By: _____

Name, Title _____

Name, Title Name/Title _____

Subcontractor License No:

Swinerton Builders License No: N/A