

# SUBCONTRACT AGREEMENT

## ARTICLE 1 AGREEMENT

This Agreement is entered into this XX day of XXXXXX in the year XXXX by and between **FLINTCO, LLC**, 2179 Hillshire Circle, Memphis, TN 38133-6074, referred to in this Agreement as the Contractor, and the

SUBCONTRACTOR XXXXXXXXXXXX  
XXXXXXXXXXXXXX  
XXXXXX, XX XXXXXX

ATTENTION: XXXXXXX XXXXXXXXXXXXXXXX

referred to in this Agreement as the Subcontractor for services in connection with this

PROJECT NAME XXXXXXXXXXXXXXXXXXXXXXXXXXXX

PROJECT NO. XXXXXXX

LOCATION XXXXXXXXXXXXXXX  
XXXXXXXXXX, XX XXXXXXX

whose

OWNER is XXXXXXXXXXXXXXX  
XXXXXXXXXXXX  
XXXXXX, XX XXXXXXX

and whose

ARCHITECT/  
ENGINEER is XXXXXXXXXXXXXXX  
XXXXXXXXXXXX  
XXXXXX, XX XXXXXXX

**NOTICE TO THE PARTIES SHALL BE GIVEN AT THESE ADDRESSES**

## 2. Safety

**2.1** The Subcontractor agrees that the prevention of accidents to workmen and property engaged upon or in the vicinity of the Subcontract Work is its responsibility. The Subcontractor agrees to comply with all Federal, State, Municipal and local laws, ordinances, rules, regulations, codes, standards, orders, notices and requirements concerning safety as shall be applicable to the Subcontract Work, including, among others, the Federal Occupational Safety and Health Act of 1970, as amended, and all standards, rules, regulations and orders which have been or shall be adopted or issued thereunder, and with the safety standards established during the progress of the Subcontract Work by the Contractor.

**2.2** When so ordered, the Subcontractor shall stop any part of the Subcontract Work which the Contractor deems unsafe until corrective measures satisfactory to the Contractor have been taken. The Subcontractor agrees that it shall not have nor make any claim for damages arising from such stoppages. Should the Subcontractor fail to take appropriate corrective measures in a timely manner, the Contractor may do so at the cost and expense of the Subcontractor and may deduct the cost and expense thereof from any payments due or to become due to the Subcontractor. Failure on the part of the Contractor to stop unsafe practices shall in no way relieve the Subcontractor of its responsibility therefore.

**2.3** The Subcontractor will follow the provisions of all applicable statutes and ordinances which require persons or firms doing excavation to do so only after giving notice to utility companies and obtaining information on the location of utilities (such as "one-call" systems).

## 3. Subcontractor Representations

**3.1** The Subcontractor acknowledges receipt of all policies/procedures listed in Exhibit C. Subject to applicable law the Subcontractor further agrees to be bound by these policies/procedures as part of this Agreement. The Subcontractor represents and agrees that it has carefully examined and understands this Agreement and the other Subcontract Documents, has investigated the nature, locality and site of the Subcontract Work and the conditions and difficulties under which it is to be performed, and that it enters into this Agreement on the basis of its own examination, investigation and evaluation of all such matters and not in reliance upon any opinions or representations of the Contractor, the Owner or any of their respective officers, agents or employees.

**3.2** The commencement of the Subcontract Work by the Subcontractor on the site of the Project shall constitute the legal and binding acceptance by the Subcontractor of this Agreement. For purposes of this paragraph the mobilization of equipment, delivery of materials or the performance of actual labor on the Project site, whichever occurs first, shall constitute a "commencement" of Subcontract Work by the Subcontractor. The Contractor reserves the right, however, to insist on a signed Agreement prior to the making of any payment to the Subcontractor.

## 4. Bonds

If required by the Contractor, a Performance Bond and a Separate Payment Bond satisfactory to the Contractor, in its sole determination are required to be furnished in the full amount of the Subcontract Amount. If Bonds are required they shall be furnished by a surety acceptable to the Contractor, in the full amount of the Subcontract Amount, and on the forms attached as Exhibit G. Subcontractor must also furnish any applicable statutory bonds if required by the state in which the Project is located.

## 5. Subcontractor Duties

**5.1 Subcontract Work.** The Contractor retains the Subcontractor as an independent contractor, to provide all labor, materials, equipment and services necessary or incidental to complete the part of the work which the Contractor has contracted with the Owner to provide on the Project as set forth in Exhibit A to this Agreement, consistent with the Project Schedule and in strict accordance with and reasonably inferable from the Subcontract Documents. The Subcontractor agrees to perform such part of the work (hereafter called "Subcontract Work") for the Project under the general direction of the Contractor and subject to the final approval of the Contractor, Architect/Engineer or other specified representative of the Owner.

**5.2 Subcontract Documents.** The Subcontract Documents include this Agreement, Agreement between the Owner and the Contractor ("Prime Contract"), including all addenda, modifications, revisions, plans, drawings, specifications, details, together with all general, technical, supplementary and special terms and conditions, any invitations for bids or information for bidders, if any, to the extent applicable, and all other documents listed in or referred to by the Prime Contract. The Contractor and the Subcontractor are mutually bound by the terms of this Subcontract. To the extent the terms of the Prime Contract apply to the work of the Subcontractor, then the Contractor assumes toward the Subcontractor all the obligations, rights, duties and redress that the Owner under the Prime Contract assumes toward the Contractor. In the identical way, the Subcontractor assumes toward the Contractor all the same obligations, rights, duties and redress that the Contractor assumes toward the Owner and Architect/Engineer under the Prime Contract. This Agreement and the rest of the Subcontract Documents are intended to supplement and complement each other and shall, where possible, be so interpreted. However, if any provision of this Agreement irreconcilably conflicts with a provision of the Subcontract Documents, the provision granting greater rights or remedies to the Contractor or imposing the greater duty, standard or responsibility or obligation on the Subcontractor shall govern.

**5.3 Design Delegation.** If the Subcontract Documents (1) specifically require the Subcontractor to provide design services and (2) specify all design and performance criteria, the Subcontractor shall provide the design services necessary to satisfactorily complete the Subcontract Work. Design services provided by the Subcontractor shall be procured from licensed, design professionals (the "Designer") retained by the Subcontractor as permitted by the law of the place where the Project is located. The Designer's signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by the Designer. Shop Drawings and other submittals related to the Subcontract Work designed or certified by the Designer, if prepared by others, shall bear the Subcontractor's and the Designer's written approvals when submitted to the Contractor. The Contractor shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by the Designer.

**5.3.1** If the Designer is an independent professional, the design services shall be procured pursuant to a separate agreement between the Subcontractor and the Designer. The Subcontractor-Designer agreement shall not provide for any limitation of liability or exclusion from

participation in the multiparty proceedings requirement of Paragraph 21.6. If applicable, the Designer(s) is (are)

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\_\_\_\_\_  
\_\_\_\_\_

The Subcontractor shall notify the Contractor in writing if it intends to change the Designer. The Subcontractor warrants the design furnished by the Designer will be in conformance with the information given and the design concept expressed in the Subcontract Documents. The Subcontractor shall not be responsible for the adequacy of the performance or design criteria required by the Subcontract Documents furnished by the Owner, Architect/Engineer or Contractor

**5.3.2** The Subcontractor shall not be required to provide design services in violation of any applicable law.

**5.4 Clean Up.** The Subcontractor is responsible for its own "clean-up" and keeping the Subcontract Work areas "broom clean". If the Contractor determines the Subcontract Work area to be unsatisfactorily cleaned, the Contractor will so advise the Subcontractor. If the Subcontractor fails to commence cleaning procedures within twenty four (24) hours and continue to clean said area to the Contractor's satisfaction, the Contractor may without further notice execute and complete such clean up activities as the Contractor deems necessary and charge the cost to the Subcontractor or deduct such cost from payments due to the Subcontractor. The Subcontractor is responsible to clean the mud and gravel off its vehicles (including vehicles operated by its subcontractors and suppliers) prior to leaving the site. Any mud or gravel that is tracked onto the surrounding roads shall be removed immediately. The Contractor has the right to clean up surrounding roads immediately upon the Subcontractor's failure to do so, the cost of which shall be deducted from the Subcontractor's next payment.

**5.5 Protection of Subcontract Work.** The Subcontractor is responsible for protection of its material, equipment and installation until the final acceptance by the Owner and the Architect.

**5.6 Protection of the Project.** The Subcontractor shall confine operations at the Project site to areas permitted by the Contractor and shall not unreasonably encumber the Project site with materials or equipment. The Subcontractor is responsible for any damage caused to adjacent property or access roads by the Subcontractor, its subcontractors or suppliers during the course of the Subcontract Work.

**5.7 Supervision.** All of the Subcontract Work is the sole and absolute responsibility of the Subcontractor; shall be initiated, managed, performed and completed by qualified, competent, skilled and reputable supervisors, administrators, mechanics and laborers, all of which are satisfactory to the Contractor; shall be in full compliance with the Subcontract Documents including this Subcontract; and shall meet the approval and acceptance of the Contractor and the Owner or its authorized representative.

**6. Schedule**

Time is of the essence. The Subcontractor shall commence the Subcontract Work under this Subcontract when notified by the Contractor and shall complete the Subcontract Work in a diligent manner in accordance with the Subcontract Documents and the Schedule of Work as set forth in Exhibit E so that progress or completion of the Project will not be delayed and in such a manner that the Contractor, any other subcontractors, and any separate contractors of the Owner shall not be delayed or impeded in their work. The Subcontractor shall participate and cooperate in the development of schedules and other efforts to achieve timely completion of the Subcontract Work by providing information on the timing and sequence of operations so as to meet the Contractor's overall schedule requirements. The Subcontractor shall continuously monitor the Project Schedule including any revisions thereto, and other work on the Project so as to execute the Subcontract Work in accordance with the requirements of the Project Schedule. The Subcontractor agrees to be responsible for, carry out, and perform all time guarantees upon work or materials referred to in the Subcontract Documents relating to any labor performed or material furnished under this Subcontract.

**7. Payment**

**7.1** In consideration of faithful and timely performance by the Subcontractor of all the covenants and the conditions aforesaid, the Contractor agrees to pay the Subcontractor, subject to other provisions hereof, including authorized additions and deletions, the sum of

**Zero Dollars (\$0)**

(the "Subcontract Amount") which sum includes all applicable taxes. Payment shall only be due for the portion of the Subcontract Work actually completed to the satisfaction of the Contractor, the Architect and the Owner. Within ten (10) days after receipt by the Contractor of payment from the Owner, the Contractor shall make payment in the amount and to the extent received from the Owner, less any applicable retainage or other set off. However, receipt of payment by the Contractor from the Owner for the Subcontract Work is a condition precedent to the obligation by the Contractor to pay the Subcontractor for the Subcontract Work in accordance with the preceding sentence, and payment for the Subcontract Work will be made to Subcontractor by the Contractor if and only to the extent such payment is received by the Contractor from the Owner. The Subcontractor hereby acknowledges that it relies on its own evaluation of the credit worthiness of the Owner, and not the credit worthiness of the Contractor, with respect to payment for the Subcontract Work, and expressly assumes the risk of non-payment by the Owner thereof, for any reason including, without limitation, insolvency of the Owner. Notwithstanding Subparagraph 5.2 of this Agreement, the provisions of this Section shall prevail over any conflicting provisions in the Prime Contract. Progress payment applications must be submitted by the Subcontractor each month in an amount equal to **XXXXXXXX percent (XX%)** of the estimated value of the labor, materials and equipment incorporated in the construction and materials and equipment suitably stored at the Project site, less the aggregate of previous payments. The Subcontractor's Affidavit and Waiver of Lien for prior payments must be properly executed by an authorized representative of the Subcontractor and returned to the Contractor prior to issuance of subsequent payments.

**7.2** Within fifteen (15) days from the date payment is requested, the Subcontractor shall furnish the Contractor with a tabulated breakdown of the portion

of the Subcontract Work included in the payment request, listing items of the work in sufficient detail as determined by the Contractor to easily facilitate payment requests to be checked by the Contractor as the work progresses.

**7.3** Each payment request or invoice must be received by the Contractor by the **XX** day of the month to be processed with the Contractor's payment application that month. Invoices and payment requests received that are inaccurate or without substantiation, or after said day of the month will be held until corrected and substantiated, and then processed with the following month's payment application.

**7.4** The Subcontractor shall submit its request for partial payment conforming to the standard Contractor billing form, with schedule of values attached thereto, representing a true and accurate estimate of the Subcontract Work completed, and materials stored during the immediately preceding month or such other immediately preceding period as directed by the Contractor. In addition, if allowed by the Subcontract Documents, all invoices and insurance certificates shall be included for all stored materials in an off-site storage area applicable to the payment request.

**7.5** The Subcontractor shall, additionally with each payment request, submit copies of payrolls to document the value of work in place and a Partial Release of Lien from all lower tier subcontractors and major material suppliers for which payment has previously been made to the Subcontractor by the Contractor.

**7.6** If the Contractor, in its sole discretion, deems it necessary, the Subcontractor agrees to receive each of its progress payments and final payment in the form of multiple checks issued jointly between the Subcontractor's lower tier subcontractors and major material suppliers and the Subcontractor. Lower tier subcontractors that are to receive part or all of their progress payments as joint checks shall additionally submit with their Payment Requests all invoices from each lower tier subcontractor and major supplier and the net payments to be issued to each.

**7.7** No partial payment, or certificate therefore, shall constitute acceptance or approval by the Contractor of the Subcontract Work or material for which the partial payment is made. No partial payment shall constitute a waiver by the Contractor of any right to require fulfillment of all the terms of this Subcontract. Neither the final payment nor any partial payment, nor any certificate for either, shall constitute acceptance by the Contractor of defective work or improper materials or of any element of the Subcontractor's performance determined to be at variance with this Subcontract.

**7.8** The Contractor shall have the right to set off any amounts the Subcontractor owes to the Contractor under this Subcontract or bylaw against the remaining balance under this Subcontract, or against any amounts due the Subcontractor under any other agreements with the Contractor.

**7.9 Final Payment.** Final payment by the Contractor to the Subcontractor shall not become due and payable to the Subcontractor until the following express conditions precedent have been met: (1) The completion of the Subcontract Work required by this Subcontract and acceptance of the Subcontract Work by the Contractor, the Owner and the Architect; (2) execution and delivery by the Subcontractor, in a form satisfactory to the Contractor, of a general release running to and in favor of the Contractor and the Owner; and (3) complete and full satisfaction of all claims, demands, disputes and obligations of the Subcontractor arising out of or related to this Subcontract, including those between the Contractor and the Subcontractor and between the Subcontractor and any third party. Should there be any such claim, lien or unsatisfied obligation, whether before or after final payment is made, the Subcontractor shall deliver payment to the Contractor an amount equal to whatever cost the Contractor and/or the Owner must pay to discharge or defend against any such claim, obligation, lien or action brought, or any judgment thereon and all costs, including legal fees and expenses and a 15% Administrative Fee, incurred in connection therewith.

## **8. Hazardous Materials**

The Subcontractor shall at all times comply with all rules and regulations of any municipality, state or federal environmental protection, and toxic waste and hazardous substances laws, ordinances and regulations, and how they relate to the Subcontract Work, and shall be equally responsible for actions and inactions of subcontractors, sub subcontractors, and any other agents or independent contractors of the Subcontractor. The Subcontractor shall be deemed to, and shall, have included in the Subcontract Amount the containment, removal, disposal or neutralization of all toxic wastes and hazardous substances created, generated or transported to or from the Project site in conjunction with the Subcontract Work. The Subcontractor will be responsible for identifying toxic wastes and hazardous substances generated, released, caused by or resulting from the Subcontract Work and notifying the Contractor of its presence in writing as soon as it is identified. The terms "toxic wastes" and "hazardous substances" shall have the same meaning as defined under federal environmental laws and regulations. At all times the Subcontractor shall defend, indemnify and hold harmless the Contractor from any and all expenses, costs, damages, suits, fines, assessments, penalties and/or causes of action, including attorney's fees through all investigations, negotiations, hearings or appeals, relating to or arising out of the Subcontractor's failure to strictly comply with the terms of this paragraph.

## **9. Compliance with Laws**

**9.1** The Subcontractor agrees to be bound by, and at its own costs comply with, all federal, state and local laws, ordinances and regulations (the "Laws") applicable to the Subcontract Work, including but not limited to safety, equal employment opportunity, minority business enterprise, women's business enterprise, disadvantaged business enterprise, sexual and racial harassment, and all other Laws with which the Contractor must comply.

**9.2** Where prescribed by Law pursuant to direct Federal contracts or Federally-financed or aided contracts, or otherwise required by Law, the Subcontractor agrees the following clauses found in the Subcontract Documents or in the Code of Federal Regulations (CFR) are incorporated in this Subcontract and binding on Subcontractor as if written herein word for word: the clauses entitled "Equal Opportunity Clause" (41 CFR Sections 60-1.4 & 60-4.3); "Affirmative Action Obligations of Contractors and Subcontractors for Disabled Veterans of the Vietnam Era" (41 CFR Section 60-250.4); "Affirmative Action Obligations of Contractors and Subcontractors for Handicapped Workers" (41 CFR Section 60-741.1); "Contract Work Hours and Safety Standards Act-Overtime Compensation"; "Apprentices and Trainees"; "Payrolls and Basic Records"; "Compliance with Copeland Act Requirements"; "Withholding"; "Subcontracts"; "Contract Termination-Department"; "Disputes Concerning Labor Standards"; "Compliance with Davis-Bacon and Related Act Requirements"; and "Certification of Eligibility" and such other clauses as the Federal Government has required by law or contract. Subcontractor agrees to include all such clauses in any non-exempt, lower-tier subcontracts.

**9.3 Immigration Compliance.** The Subcontractor represents and warrants to the Contractor that the Subcontractor is in compliance with, and shall remain in compliance with, the provisions of the Immigration Reform and Control Act of 1986 (The "Act") and all other Federal, State, and/or local immigration statutes/ordinances, as applicable, including, but not limited to the provisions of the Act prohibiting hiring and continued employment of unauthorized aliens, requiring verification and record keeping with respect to identity and eligibility for employment and prohibiting discrimination on the

basis of national origin, United States citizenship, or intending citizen status. The Subcontractor agrees to indemnify the Contractor and to hold the Contractor harmless from all liability, including liability for interest and penalties, the Contractor incurs which results from or is attributable to the Subcontractor's failure to comply with any provisions of the Act, and or applicable Federal, State, and/or local immigration statute/ordinance, including reimbursing the Contractor any monies expended by the Contractor in participating in or responding to any investigation/suit/civil or criminal immigration matter involving the Subcontractor. As it relates to immigration compliance, the Subcontractor shall be responsible for completing any and all required documentation in accordance with requirements put forth by the Owner, Contractor or applicable law.

**9.4** The Subcontractor shall be liable to the Contractor and the Owner for all loss, cost and expense attributable to any acts of commission or omission by the Subcontractor, its Sub-Subcontractors at any tier, and its and their respective employees and agents resulting from the failure to comply with Laws, including, but not limited to, any fines, penalties, restitution, judgments, and other damages resulting from such acts of commission or omission.

## 10. Insurance

**10.1** The Subcontractor agrees to procure, pay for and maintain in full force and effect during the course of the performance of the Subcontract all insurance required by the laws of the state in which the Subcontract Work covered by this Subcontract is being performed, and in such form and amounts as described in Exhibit B which is attached hereto and incorporated into this Subcontract. The Subcontractor shall not commence the Subcontract Work nor receive any payment hereunder until Certificate of such insurance is furnished to the Contractor.

**10.2** The Contractor shall have no duty to the Subcontractor or to any of its insurers or their insurance agents to review any certificates or copies of insurance furnished to the Contractor or to determine whether the terms of each certificate or policy of insurance comply with the insurance-related provisions of the Subcontract. A failure of the Contractor to detect that the Subcontractor has not submitted certificates, or proper certificates, or is otherwise not in compliance with the insurance-related provisions of the Subcontract shall not be construed as a waiver or other impairment of any of the Contractor's rights under such insurance-related provisions.

**10.3** If the Subcontractor fails to procure and maintain such insurance, in addition to the option of declaring the Subcontractor in default for breach of a material provision of this Subcontract, the Contractor shall have the right, but not the duty, to procure and maintain the same insurance, or other insurance that provides the Contractor with equivalent protection, and the Subcontractor shall furnish all necessary information to make effective and maintain such insurance. At the option of the Contractor, the cost of said insurance purchased by the Contractor shall be charged against and deducted from any monies then due or to become due to the Subcontractor or the Contractor shall notify the Subcontractor of the cost thereof and the Subcontractor shall promptly pay such cost.

**10.4** The Subcontractor shall identify by certificate any Residential, Mold, EIFS, Silica or other major exclusions that impact the Subcontractor's ability to insure its risk. If the Project includes any Residential components or the proposed design includes EIFS systems, then the Subcontractor shall obtain appropriate endorsements acceptable to the Contractor as a condition of this Subcontract.

**10.5** The Subcontractor shall at its own expense provide insurance coverage for materials stored off the site after written approval of the Contractor at the value established in the approval, and also for portions of the Subcontract Work in transit until such materials are permanently incorporated into the Project. The risk of loss for material and equipment provided by this Subcontract, whether in a deliverable state or otherwise, shall remain with the Subcontractor. Any damages to the material and equipment or loss of any kind occasioned in transit shall be borne by the Subcontractor, notwithstanding the manner in which the goods are shipped or who pays the freight or other transportation costs.

## 11. Indemnity

**11.1 General Indemnity.** To the fullest extent allowed by law, the Subcontractor agrees to defend, indemnify and hold harmless the Contractor to the same extent Contractor is obligated to defend, indemnify and hold harmless the Owner. In the absence of such Owner-required defense and indemnification, the Subcontractor shall defend, indemnify and hold harmless the Contractor, the Contractor's other subcontractors, the Architect/Engineer, the Owner and their agents, consultants, members and employees (the Indemnitees) from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, costs and expenses for bodily injury and property damage that may arise from the performance of the Subcontract Work to the extent of the negligent acts or omissions by, or the fault of, the Subcontractor, the Subcontractor's sub-subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts or omissions any of them may be liable. The Subcontractor agrees to purchase and maintain contractual liability insurance covering its obligations in this article. These obligations shall not be interpreted to reduce or negate any other rights or obligations of indemnity otherwise existing with regard as to any party or person described in this Article.

**11.2 Patents.** The Subcontractor hereby agrees to defend, indemnify and hold harmless the Contractor and the Owner from and against any and all liability, loss or damage and to reimburse the Contractor and the Owner for any costs, including legal fees and expenses, which the Contractor and the Owner may incur because of claims or litigation on account of infringement or alleged infringement of any letters patent or patent rights by reason of the Subcontract Work, or materials, equipment or other items used by the Subcontractor in its performance.

**11.3 No Limitations.** In furtherance to, but not in limitation of the indemnity provisions in this Subcontract, the Subcontractor hereby expressly and specifically agrees that its obligation to indemnify, defend and hold harmless as provided in this Subcontract shall not in any way be affected or diminished by any statutory or constitutional immunity it enjoys from suits by its own employees or from limitations of liability or recovery under worker's compensation laws.

## 12. Termination for Convenience

**12.1** It is understood that the basic assumption underlying the mutual obligations and responsibilities entered into by the parties to this Subcontract is the continued performance with respect to the Prime Contract that exists between the Contractor and the Owner. If, for any reason, the Prime Contract is breached, rescinded or terminated, the Contractor shall have the right to immediately terminate this Subcontract. In no event shall the Contractor be obligated to the Subcontractor for any anticipatory profits or any damages incurred by the Subcontractor as a result of the termination of this Subcontract, unless approved and paid by the Owner. The Subcontractor agrees that the Contractor's decision or determination regarding the pro rata share of any monies received from the Owner as damages or compensation for said breach, rescission or termination of the Agreement shall be final and conclusive

and that the Subcontractor shall have no claim or cause of action against the Contractor for any reason or greater amount.

**12.2** The Contractor shall have the right at any time by written notice to the Subcontractor, to terminate this Subcontract without cause and require the Subcontractor to cease work. In the event of such a termination for convenience, the Subcontractor shall be entitled to payment pursuant to the terms of the Subcontract for the portion of the Subcontract Work actually completed as of the date of termination, together with reasonable costs of demobilization and such other reasonable costs as may be encountered by the Subcontractor and directly attributable to such termination provided that such amount may be reduced by all amounts for which the Subcontractor is liable or responsible. However, the Subcontractor shall only be entitled to profit on that portion of the work actually completed and approved for payment to the date of termination together with retainages withheld from prior payments. The Subcontractor waives any claim for loss of anticipated profits or other damages in the event the Contractor exercises this clause.

### 13. Failure of Performance

**13.1. Non-Conforming Subcontract Work.** The Subcontractor shall provide sufficient, safe and proper facilities at all times for inspection by the Architect, the Owner or the Contractor of the Subcontract Work in the field, at shops or at any other place where materials required hereunder are in course of preparation, manufacture, treatment or storage. The Subcontractor shall, within twenty four (24) hours after receiving written notice from the Contractor to that effect, proceed to remove from the site any materials condemned by the Architect, the Owner, or the Contractor, whether worked or unworked, and to take down all portions of the Subcontract Work which the Architect, the Owner or the Contractor has condemned in writing, as unsound or improper, or as in any way failing to conform to the drawings, specifications and addenda and shall take full financial responsibility for all damage caused by such removal. In the event that all or any portion of the Subcontract Work as condemned should be of such a nature, or the time available should be so limited, that in the judgment of the Architect, the Owner or the Contractor it would not be expedient to order the same replaced or corrected, the Contractor, at its option, may deduct from the payments due or to become due to the Subcontractor such amount or amounts as in the opinion of the Architect or the Owner shall represent the difference between the fair and reasonable value of the Subcontract Work so condemned and its value had it been executed in conformity with the Subcontract Documents.

**13.2 Notice to Cure** If the Subcontractor is unable, refuses or fails to supply enough properly-skilled workers, proper materials, correct non-conforming Subcontract Work, or maintain the Schedule of Work, or fails to make prompt payment to its workers, subcontractors or suppliers, or disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, the Subcontractor shall be deemed in default of this Agreement. If the Subcontractor fails within three (3) business days after written notification to commence and continue satisfactory correction of the default with diligence and promptness, then the Contractor without prejudice to any other rights or remedies, shall have the right to any or all of the following remedies:

- 13.2.1** to supply workers, materials, equipment and facilities as the Contractor deems necessary for the completion of the Subcontract Work or any part which the Subcontractor has failed to complete or perform after written notification, and charge the cost, including reasonable overhead, profit, attorneys' fees, costs and expenses to the Subcontractor;
- 13.2.2** to contract with one or more additional contractors to perform such part of the Subcontract Work as the Contractor determines will provide the most expeditious completion of the Subcontract Work, and charge the cost to the Subcontractor; and/or
- 13.2.3** withhold any payments due or to become due the Subcontractor pending corrective action in amounts sufficient to cover losses and compel performance to the extent required by and to the satisfaction of the Contractor.
- 13.2.4** terminate the Subcontractor for default by delivering written notice of such termination to the Subcontractor.
- 13.2.5** to charge to the Subcontractor an Administrative Fee of 15% of all costs incurred by the Contractor in exercising any of the above remedies.

In the event of an emergency affecting the safety of persons or property, the Contractor may proceed as above without notice, but the Contractor shall give the Subcontractor notice promptly after the fact as a precondition of cost recovery.

**13.3 Termination for Default.** If the Subcontractor has been terminated for default, the Contractor may take possession of the plant and Subcontract Work, materials, tools, appliances and equipment of the Subcontractor at the Project site, and through itself or others provide labor, equipment and materials to prosecute Subcontract Work on such terms and conditions as shall be deemed by the Contractor as necessary, and shall deduct the cost, including without restriction all claims, charges, expenses, losses, costs, damages, and attorneys' fees, incurred as a result of the Subcontractor's failure to perform, from any money then due or thereafter to become due to the Subcontractor under this Agreement.

**13.3.1** If the Contractor so terminates the employment of the Subcontractor, the Subcontractor shall not be entitled to any further payments under this Agreement and no sum shall be deemed due or to become due to the Subcontractor until Subcontract Work has been completed and accepted by the Owner, all Subcontract requirements have been fulfilled, and payment has been received by the Contractor from the Owner. In the event the unpaid subcontract earnings exceed the Contractor's cost of completion and any and all incidental costs, including administrative, legal and other professional fees, the difference shall be paid to the Subcontractor, but if such expenses exceed the subcontract earnings, the Subcontractor agrees to pay the difference to the Contractor promptly.

**13.3.2** If it is determined or agreed that the Contractor wrongfully exercised any option under this Article, the Contractor shall be liable to the Subcontractor solely for the reasonable value of Subcontract Work performed by the Subcontractor prior to such action, including reasonable overhead and profit on the Subcontract Work performed, less prior payments made. Under no circumstances shall the Subcontractor be entitled to recovery of claimed lost future profits.

### 14. Delays

**14.1** Should the progress of the Subcontract Work be delayed, obstructed or interfered with through any fault, action or failure to act by the Subcontractor or any of its officers, agents, employees, subcontractors or suppliers so as to cause any additional cost, expense, liability or damage to the Contractor or the Owner, including legal fees or expenses incurred in defending claims arising from such delay or seeking reimbursement and indemnity from the Subcontractor and its surety hereunder, the Subcontractor and its surety agree to compensate and indemnify the Contractor and the Owner against all such costs, expenses, damages and liabilities.

**14.2** In addition, the Subcontractor, at the Contractor's direction and at the Subcontractor's own cost and expense, shall work such overtime as may be necessary to make up for all time lost in the completion of the Subcontract Work and in the completion of the Project due to such delay. If the Subcontractor fails to make up for the time lost by reason of such delay, the Contractor has the right to use other subcontractors or suppliers and to take whatever other action the Contractor deems necessary to avoid delay in the completion of the Subcontract Work and the Project, the cost of which shall be borne by the Subcontractor. In the event Subcontractor delays timely performance of the Subcontract Work or to the completion of the Project, either by its acts or omissions, and such delays result in the Contractor being charged by the Owner with actual or liquidated damages, then the Subcontractor shall reimburse the Contractor the full amount of all such damages and charges resulting from the delays caused by the Subcontractor. The Contractor may offset any such damages against the remaining balance due to the Subcontractor on the Subcontract Amount, if any.

**14.3** If the commencement and/or progress of the Subcontract Work is delayed without the fault or responsibility of the Subcontractor, the time for the Subcontract Work shall be extended by Subcontract Change Order to the extent obtained by the Contractor from the Owner pursuant to the Prime Contract, and the Schedule of Work shall be revised accordingly.

## 15. Changes

**15.1 Subcontract Changes.** The Contractor and the Subcontractor agree the Contractor may make changes to the Subcontract Work, including but not limited to; additions, deletions or revisions. Any changes made to the Subcontract Work involved, or any other parts of this Agreement, shall be by a written Change Order. To the extent that any such change impacts Subcontractor's cost of or time for performance, the Subcontract Amount and Subcontract Schedule shall be equitably adjusted to compensate for such impact. Changes shall be initiated by one of the three methods outlined below, or as provided in the Prime Contract and shall be incorporated into the Subcontract by a Change Order.

**15.1.1. Request for Change Proposal.** A Request for Change Proposal (RFCP) is a written request that informs Subcontractor about a potential change in the Subcontract Work and requests a proposal for the potential change. Subcontractor shall promptly reply with such request. Subcontractor shall not implement the change or incur any costs until a Change Order is fully executed.

**15.1.2. Construction Change Directive.** A Construction Change Directive (CCD) is a written directive that instructs Subcontractor to take some immediate action in connection with the Subcontract Work. CCDs are issued when there is not time to issue a RFCP or Change Order. Subcontractor shall immediately proceed so as not to delay the progress of the Work and in accordance with the terms of the CCD. Any impact of a CCD on the Contract Price or Schedule shall be adjusted by a Change Order.

**15.1.3. Change Order Requests.** Within seven (7) calendar days after the occurrence of any event or observance of any condition that Subcontractor believes entitles Subcontractor to an adjustment in Subcontract Amount and/or Subcontract Schedule, Subcontractor shall prepare and submit a Change Order Request (COR) to Contractor. The COR shall include a detailed factual narrative, a detailed analysis showing entitlement and a detailed analysis of the proposed change to the Subcontract Amount and/or Subcontract Schedule.

**15.2 Change Orders.** A Change Order (CO) is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement with the change in the Subcontract Work and any adjustment to the Subcontract Amount and/or Subcontract Schedule. All changes and/or additions in the Subcontract Work ordered in writing by the Contractor shall be deemed a part of the Subcontract Work and shall be performed and furnished in strict accordance with all terms and conditions of this Agreement and the Subcontract Documents, including the current Schedule of Work.

Change Orders will be used to implement approved Requests for Change Proposals, Construction Change Directives and Change Order Requests. Upon receipt of a properly documented COR or CCD, the parties shall negotiate in good faith to determine if the Subcontractor is entitled to a Change Order and, if so, the appropriate equitable adjustment. Any adjustment to the Subcontract Amount shall be established by one of the following methods:

- a. mutual acceptance of an itemized lump sum, or
- b. unit prices as indicated in the Subcontract Documents or as subsequently agreed to by the parties; or
- c. costs determined in a manner acceptable to the parties and a mutually acceptable fixed or percentage fee; or
- d. another method provided in the Subcontract Documents.

If the Parties are unable to agree on the dispositions of a COR or CCD, Contractor will either (i) issue a Notice denying Subcontractor's request or (ii) issue a unilateral Change Order setting forth the Contractor's final determination regarding the adjustments. Any cost and schedule adjustments shall be a full accord and satisfaction for all cumulative impacts of the underlying change.

**15.3** The Subcontractor shall not be entitled to receive additional compensation for extra work or materials or changes of any kind except to the extent the same was ordered by the Contractor or any of its representatives. The Subcontractor shall be responsible for any costs incurred by the Contractor for changes of any kind made by the Subcontractor that increase the cost of the Work for either the Contractor or other subcontractors when the Subcontractor proceeds with such changes without a Change Order or Construction Change Directive.

**15.4 Determination by Owner or Architect/Engineer.** Notwithstanding any other provision, if the Subcontract Work for which the Subcontractor claims additional compensation is determined by the Owner or Architect/Engineer not to entitle the Contractor to a Change Order, additional compensation or a time extension, the Contractor shall not be liable to the Subcontractor for any additional compensation or time extension for such Subcontract Work, unless the Contractor agrees in writing to pay such additional compensation or to grant such extension.

## 16. Claims

**16.1** A Claim is a written demand by Subcontractor seeking an adjustment in the Subcontract Amount and/or Subcontract Schedule or some other relief under the terms of the Subcontract for events other than a RFCP that has been denied in writing. Subcontractor shall provide Notice to Contractor of any potential Claim within seven (7) calendar days after the event giving rise to the Claim. Within fifteen (15) calendar days thereafter, Subcontractor shall submit a detailed factual narrative, a detailed analysis showing entitlement and a detailed analysis of the alleged change to the Subcontract Amount and/or Subcontract Schedule. Claims not timely made, in writing, by the Subcontractor shall be deemed to have been abandoned and waived. The acceptance and consideration of any claim out of time by the Contractor shall not create any precedent nor "course of dealing" between the Contractor and the Subcontractor, nor shall it waive the Contractor's right to insist on strict adherence by the Subcontractor to the contract claims procedures. If Contractor denies Subcontractor's Claim, Subcontractor may pursue the matter under Article 21 Dispute Resolution.

**16.2** The Subcontractor shall not delay or suspend the Subcontract Work because of the pendency of or the denial by the Contractor of any such claim or because of the continuance of the condition out of which the claim arose, but shall proceed diligently in performing the Subcontract Work while the claim is being resolved by agreement or being fully adjudicated.

**16.3** In the event the Subcontractor asserts that it should receive additional compensation because of an act or omission on the Owner's part, or someone for whom the Owner is responsible, the Subcontractor shall promptly submit the claim to the Contractor in writing at least three (3) working days before the date the Contractor is required to submit such claims under the Prime Contract. If timely submitted with all documentation required by the Prime Contract, the Contractor will, on behalf of the Subcontractor, submit the same to the Owner for its consideration. Failure of the Subcontractor to submit such claims in a timely and proper manner shall result in a waiver of such claim and the Contractor is not required to submit it to the Owner, and the Subcontractor shall be bound to the same consequence which the Contractor would suffer under the Prime Contract.

**16.4** The Subcontractor shall fully cooperate with the Contractor in the submission of such pass through claims, shall prepare all supporting data and do everything else necessary to properly present the claims, including payment of legal fees incurred by the Contractor to prepare, submit and negotiate or otherwise resolve such claim. Should the Owner allow and pay additional compensation to the Contractor on account of such pass through claim asserted by the Subcontractor, the Contractor will pay the same to the Subcontractor, less the Contractor's overhead, costs, expenses, legal fees and a 15% Administrative Fee.

**16.5** It shall be an express condition precedent to any obligation on the part of the Contractor to make payment of any cost, reimbursement, compensation or damages to the Subcontractor hereunder that the Contractor shall first be determined to be entitled to such compensation on behalf of the Subcontractor and then receive such payment from Owner, and Subcontractor expressly acknowledges that the Contractor is not obligated or required to pursue the Subcontractor's claim against the Owner if the Contractor, in its sole discretion, after review of the Subcontractor's claim, has deemed the claim to lack merit in whole or in part.

**16.6** If at any time a controversy should arise between the Contractor and the Subcontractor with respect to any matter in this Subcontract which the Contractor determines is not a claim, dispute or controversy which should involve or be asserted against the Owner, the decision of the Contractor relating to the subject of the controversy shall be followed by the Subcontractor.

## 17. Taxes

The Subcontract Amount includes all applicable sales, excise, transportation, unemployment compensation, social security, and any other taxes presently existing or subsequently imposed and levied and the Subcontractor agrees to pay all of the above and to conform to all applicable municipal, state and federal laws in connection with such taxes. The Subcontractor further agrees to withhold taxes from the wages and salaries of all employees of the Subcontractor and pay the same in accordance with the federal and state laws and regulations pertaining thereto. The Subcontract Amount includes federal, state and municipal taxes now levied or in force or hereafter imposed on any and all tangible personal property sold or transferred to the Contractor under this Subcontract and the Subcontractor agrees to pay such tax or taxes on such property, the cost of which is included in the Subcontract Amount.

## 18. Liens

**18.1** The Subcontractor shall promptly pay when due all its project creditors, together with the project creditors of all those below it in the contractual chain.

**18.2** If the Project involves private work, the Subcontractor shall keep the property and improvements free and clear of all mechanic, materialmen and similar lien claims or statements. In the event any such lien is filed, asserted or claimed, the Subcontractor shall immediately secure its release either by paying the lien claimant, by filing a lien release bond, or by any other means permitted by law. If not so released, the Contractor may retain an amount equal to 150% of the lien or claim and may pay the claimant and offset that amount, plus any legal fees from the amount so retained. If the Project involves public work, the Subcontractor shall promptly pay and secure releases from all of its project creditors, including all those below it in the contractual chain, who are entitled to assert claims against the Contractor or its surety.

**18.3** If any claim or lien is made or filed with or against the Contractor, the Owner, the Project, the Premises or the Project funds by any person claiming that the Subcontractor or any subcontractor or other person under subcontract to the Subcontractor, or any person or entity employed or engaged by the Subcontractor at any tier, has failed to make payment for any labor, services, materials, equipment, taxes or other obligations furnished or incurred in connection with the Subcontract Work, or if the Subcontractor or any subcontractor or other person under subcontract to the Subcontractor, or any person or entity employed or engaged by the Subcontractor at any tier causes damage to the Subcontract Work or any other work on the project, or if the Subcontractor fails to perform or is otherwise in default of any term or provision of this Subcontract, the Contractor shall have the right to retain from any payment then due or thereafter due an amount which the Contractor deems sufficient to (1) satisfy, discharge and/or defend against any such claim or lien, (2) make good any such nonpayment, failure, damage or default, and (3) defend, indemnify and hold harmless the Contractor and the Owner against any and all losses, damages and costs, including legal fees and expenses, incurred by either or both of them. The Contractor shall require proof that any such nonpayment, claim or lien is fully satisfied, dismissed and discharged before any remaining retained funds will be released. The Contractor shall, in addition, have the right to apply and charge against the Subcontractor so much of the amount retained as may be required for the foregoing purposes and the Subcontractor shall pay and reimburse the Contractor and the Owner all such losses, damages, and costs incurred by them which



exceed the retained funds.

## 19. Assignment

To the fullest extent permitted by law, the Subcontractor agrees that it shall not assign, sell, transfer, delegate or encumber any rights, duties or obligations arising under this Subcontract including, but not limited to, any right to receive payments hereunder, without the prior written consent of the Contractor in its sole discretion and the giving of any such consent to a particular assignment shall not dispense with the necessity of such consent to any further or other assignments. In the event the Subcontractor assigns, sells, encumbers or otherwise transfers its right to any funds due or to become due under this Subcontract as security for any loan, financing or other indebtedness ("Assignment"), notification to the Contractor of such Assignment must be sent by certified mail, return receipt requested, to the Contractor and the Assignment shall not be effective as against the Contractor until the Contractor provides its written consent to such Assignment. The Subcontractor agrees that any such Assignment shall not relieve the Subcontractor of any of its agreements, duties, responsibilities or obligations under this Subcontract and the Subcontract Documents and shall not create a contractual relationship or a third party beneficiary relationship of any kind between the Contractor and such assignee or transferee.

## 20. Guarantee/Warranty

For a period equal to that imposed upon the Contractor under the Prime Contract, but in no event less than one year from the date of the Owner's final acceptance of the Subcontract Work, the Subcontractor guarantees and warrants that the Subcontract Work complies with the Subcontract Documents requirements and is free from defects in material and workmanship. The Subcontractor shall remain liable for defects in the Subcontract Work for the same period the Contractor remains liable to the Owner under the Prime Contract, or as required by law, whichever is greater. This guarantee/warranty shall include, but is not limited to, the cost of all labor, material and related items necessary to correct any such defect, plus the cost of repairing any damage to other items which may have been caused by the defective material or workmanship. If the Subcontractor fails to begin warranty work within forty-eight (48) hours of being notified that such work is necessary, the Contractor may, at its option, perform the necessary remedial work or secure its performance by others and charge the Subcontractor with the cost thereof, plus a 15% Administrative Fee. Nothing in this paragraph shall shorten the statute of limitations on any action by the Contractor for breach of contract, negligence or other cause of action against the Subcontractor.

## 21. Dispute Resolution

**21.1 Scope of Disputes Provisions.** All Claims, disputes or other matters in question between the parties to this Subcontract which arise out of or relate to this Agreement (or the breach thereof), whether in contract or tort, (hereinafter "Dispute") shall be subject to the dispute resolutions set forth below.

**21.2 Initial Dispute Resolution/Mediation.** A Dispute which either party desires to pursue shall be set forth in a detailed written statement of claim submitted to the other party providing the specific basis upon which monetary or other relief is claimed to be due, the specific contractual provision(s) supporting the claim and an itemization of the amount claimed to be due. Following submission of the detailed statement of claim, Contractor and Subcontractor shall endeavor to settle the Dispute first through face to face direct discussions between corporate officers of the Contractor and Subcontractor which discussions shall be held at the Contractor's office location involved with the Project within thirty (30) calendar days of a request by either party. If the Dispute cannot be resolved through direct discussions, the parties shall participate in mediation under the Construction Industry Mediation Rules of the American Arbitration Association as a condition precedent and before recourse to any other form of binding dispute resolution. The location of the mediation shall be the same city as the location of the Project, unless the parties agree on another location. Upon written notice requesting mediation provided to the other party and the American Arbitration Association, the parties agree to proceed with the mediation as scheduled by the mediator. Either party may terminate the mediation at any time after the first session, but the decision to terminate must be personally delivered to the other party and the mediator.

**21.3 Binding Dispute Resolution.** In the event Contractor and Subcontractor cannot resolve the Dispute through direct discussions or mediation as contemplated above, then the Dispute shall, at the sole discretion of Contractor, be decided either by submission to (a) arbitration administered by the American Arbitration Association or other arbitration tribunal mutually agreed upon by the parties; or (b) litigation subject to the exclusive jurisdiction and venue of the location of the Project.

### 21.4 Arbitration Election

**21.4.1** In the event Contractor exercises its exclusive right to resolve the Dispute in arbitration, such arbitration shall be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association or the applicable rules of such other arbitration tribunal as the parties may mutually determine in effect at the time the arbitration is commenced as modified by the terms hereof. Any arbitration hereunder shall be held at the location of the Project.

**21.4.2** Should Contractor exercise its exclusive right to resolve the Dispute by arbitration, then within fourteen (14) days after Contractor gives Subcontractor notice of Contractor's election of arbitration, the parties shall use good faith efforts to select a single arbitrator mutually acceptable to both parties. If the parties are unable to select an arbitrator, then the parties will select the arbitrator(s) from a panel of experienced construction arbitrators on the American Arbitration Association's large complex case panel or a comparable panel of experienced construction arbitrators maintained by such other arbitration tribunal mutually selected by the parties then in effect. In the event the amount in Dispute exceeds \$1,000,000.00, Contractor and Subcontractor agree the arbitration shall be heard by a panel of three (3) arbitrators; otherwise, the Dispute shall be heard by a single arbitrator.

**21.4.3** The parties will enter into an Electronically Stored Information Agreement outlining the scope and volume for ESI discovery, which shall take into account the amount and complexity of the Dispute.

**21.4.4** The arbitration award shall be final and binding upon the parties, shall include attorneys' fees and costs to the prevailing party or parties, and may be entered as a judgment in any court having proper jurisdiction. In any arbitration the Arbitrator(s) shall have no power to render an award which has the effect of altering or amending or changing in any way any provisions of this Subcontract.

**21.4.5** The parties stipulate and agree that the performance of this Subcontract is a transaction involving interstate commerce.

Notwithstanding other provisions in the Subcontract, or choice of law provisions to the contrary, this agreement to arbitrate shall be enforced pursuant to, and governed by, the Federal Arbitration Act, 9 U. S. C. §1 et seq., which shall not be superseded or supplemented by any other arbitration act, statute or regulation.

**21.4.6** At the sole discretion of Contractor, any arbitration with Subcontractor shall be consolidated with any other arbitration proceeding relating to the work under the General Contract.

**21.5 Litigation Election.** In the event Contractor elects not to exercise its exclusive right to resolve the Dispute by arbitration, or in the event the Dispute between Contractor and Subcontractor, or any portion thereof, is found to be non-arbitrable, then the parties hereby agree that the Dispute or a portion thereof (as the case may be) shall be subject to exclusive jurisdiction and venue at the location of the Project. In any such Dispute or portion thereof which is resolved by litigation, Subcontractor expressly waives any right to trial by jury.

**21.6 Multiparty Proceeding.** To the extent permitted by Subcontract Documents, all parties necessary to resolve a claim shall be parties to the same dispute resolution proceeding. To the extent Disputes between the Contractor and the Subcontractor involve in whole or in part disputes between the Contractor and the Owner, Disputes between the Subcontractor and the Contractor shall be decided by the same tribunal and in the same forum as disputes between the Contractor and the Owner.

**21.7 Stay of Proceedings.** (a) In the event the provisions for resolution of disputes between the Contractor and the Owner contained in the Subcontract Documents do not permit consolidation or joinder with disputes of third parties, such as the Subcontractor, resolution of any Dispute between Contractor and Subcontractor involving in whole or in part disputes between Contractor and Owner shall be stayed pending conclusion of any dispute resolution proceeding between Contractor and Owner. (b) In the event that any action is filed prior to exhaustion of remedies under the Subcontract; such action shall be stayed pending conclusion of any dispute resolution proceedings.

**21.8 Work Continuation and Payment.** Unless otherwise agreed in writing, Subcontractor shall continue the Subcontract Work and maintain the Schedule of Work during any dispute resolution proceedings. As Subcontractor continues to perform, Contractor shall continue to make payments in accordance with this Agreement.

**21.9 Cost of Dispute Resolution; Attorneys' Fees.** The cost of any mediation proceeding shall be shared equally by the parties participating.

**21.9.1** The prevailing party in any Dispute arising out of or relating to this Agreement or its breach that is resolved by a dispute resolution procedure designated in the Subcontract Documents shall be entitled to recover from the other party those reasonable attorneys' fees, costs and expenses (including expert fees and expenses) incurred by the prevailing party in connection with such dispute resolution process after direct discussions and mediation.

**21.9.2** In the event the Subcontractor is awarded an amount equal to or less than the last written offer of settlement from Contractor, prior to the commencement of binding dispute resolution, Contractor shall be deemed prevailing party and be entitled to recover those reasonable attorneys' fees, costs and expenses (including expert fees and expenses) incurred by the Contractor.

## **22. Miscellaneous**

**22.1** No one, other than the parties hereto, their successors, trustees and assigns, shall be entitled to bring action on this Subcontract or the Performance Bond provided by the Subcontractor, it being the express intent of the parties that this Subcontract shall not be for the benefit of any third party.

**22.2** Any term or provision of this Subcontract which is held to be invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Subcontract or affecting the validity or enforceability of any of the terms or provisions of this Subcontract in any other jurisdiction.

**22.3** This Subcontract, together with the documents referred to or incorporated herein by reference, constitute the complete agreement between the parties. No agent or employee of either party possesses the authority to make, and the parties shall not be bound by nor liable for, any statement, representation, promise or agreement not set forth herein. Any article, section, paragraph or other headings contained in this Subcontract are for reference purposes and shall not affect in any way the meaning or interpretation of this Subcontract.

**22.4** The terms and provisions shall extend to and be binding upon the successors, trustees and assigns of the parties hereto, and shall be governed and controlled, except as expressly provided herein or as required by the Subcontract Documents, by the laws of the State of the Project.

**22.5** The Subcontractor agrees to comply with the provisions and any applicable local, state or federal ordinance, regulation, status, or other mandate regarding affirmative action and/or minority/women's business enterprise participation.

**22.6** This subcontract has not been altered in any manner from its original form as sent to the Subcontractor except for required signatures and dates, or as clearly marked and initialed by this Subcontractor. Any changes to this subcontract not initialed by the Contractor will not be binding.

**23. Schedule of Exhibits to the Agreement**

The following Exhibits are attached to and are a part of this Agreement.

- Exhibit A:** Scope of Work
- Exhibit B:** Insurance Requirements
- Exhibit C:** Policies/Procedures Acknowledgement
- Exhibit D:** List of Drawings, Specifications and Addenda

The Subcontract Documents are identified in Article 5.2

- Exhibit E:** Schedule of Work
- Exhibit F:** Certification of Non-Segregated Facilities
- Exhibit G:** Not Used
- Exhibit H:** Not Used
- Exhibit I:** Not Used
- Exhibit K:** Not Used
- Exhibit N:** Not Used
- Exhibit X:** Not Used

This Agreement is entered into as of the date entered in Article 1.

XXXXXXXXXXXX

BY: \_\_\_\_\_

**Print Name:** \_\_\_\_\_

**Print Title:** \_\_\_\_\_

Designate type of organization: \_\_\_\_\_

Organized in the State of: \_\_\_\_\_ License Number: \_\_\_\_\_

with its principal place of business at \_\_\_\_\_

**FLINTCO, LLC**

BY: \_\_\_\_\_

**Print Name:** \_\_\_\_\_

**Print Title:** \_\_\_\_\_



## FLINTCO, LLC SERVICES SUBCONTRACT SAMPLE INSURANCE REQUIREMENTS

The insurance requirements set out in this Exhibit are independent from all other obligations of the Service Subcontractor under this Services Subcontract and apply whether or not required by any other provision of this Services Subcontract.

Contractor utilizes myCOI Central, a software management system used to track certificates of insurance and to track and verify insurance coverage. Upon Services Subcontractor's receipt of this Agreement, Services Subcontractor will receive an e-mail from [RiskManagementFlintco@flintco.com](mailto:RiskManagementFlintco@flintco.com). Service Subcontractor must follow the instructions contained in the e-mail and complete the online registration. Upon completion of registration, Contractor will request proof of insurance directly from Services Subcontractor's insurance agent(s). In addition to the other terms and conditions contained herein, Services Subcontractor may not commence Work and no payments will be made, until Services Subcontractor is registered in myCOI Central and a compliant Certificate of Insurance has been received.

Certificates of Insurance ("Certificates") are to be issued on ACORD Form 25 and show that the below required insurance coverages in companies with a minimum A.M. Best's Rating of A-, VIII or companies acceptable to Contractor are in force. Required endorsements must be attached to such Certificates. All certificates must reference the specific project in the certificate description/comments area for identification purposes.

Services Subcontractor waives against Contractor any and all rights of recovery for loss, damage, or expense to the extent the same are recovered pursuant to valid and collectible policies of insurance and to the extent such waiver is permitted by such policies of insurance. In addition, Services Subcontractor waives all such claims against Owner and any other contractors, services subcontractors, or suppliers to the same extent.

If coverage limits specified by the Owner are required of Services Subcontractor and if greater than the coverage limits reflected on the Certificates provided to Contractor, Services Subcontractor shall immediately obtain the required higher coverage limits and furnish Contractor with replacement Certificates showing proper coverage limits and otherwise complying with this Exhibit B.

**Services Subcontractor shall maintain in effect all insurance coverage required under this Agreement at Services Subcontractor's sole expense and with insurance companies acceptable to Contractor. Services Subcontractor agrees to notify Contractor in writing, at least 30 days in advance, of any reduction by the insurers in required coverages or coverage limits, cancellation, or non-renewal of Services Subcontractor's policies. Services Subcontractor agrees to file new, complying Certificates showing proper renewal coverages and limits in force at least 10 days prior to expiration of the current policies.**

(a) **WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY INSURANCE:**

- 1) Workers' Compensation coverage in accordance with the laws of the State within the jurisdiction the work is performed. In the event that the work of this contract falls within the Federal Employer's Liability Act, the Services Subcontractor shall extend Workers' Compensation Insurance to provide and maintain in full force and effect during the period covered by this Services Subcontract, insurance against the liability imposed under the above-mentioned Act as applicable. No alternative or benefit plan in lieu of statutory Workers' Compensation coverage will be acceptable even in those jurisdictions where permitted.
- 2) Employer's Liability Coverage with a minimum limit of: \$1,000,000 Bodily Injury by Accident – Each Accident; \$1,000,000 Bodily Injury by Disease – Policy Limit; \$1,000,000 Bodily Injury by Disease – Each Employee

Where permitted by law the Services Subcontractor waives subrogation against Contractor, Owner and others as required by the Owner-Contractor Agreement.

(b) **COMMERCIAL GENERAL LIABILITY INSURANCE**, on a coverage form at least equal to that provided under ISO CG 00 01, latest available edition, on an occurrence basis. The above coverage shall be written for not less than the following minimum limits:

\$1,000,000 GENERAL AGGREGATE (PER PROJECT; if not PER PROJECT, the limit shall be \$2,000,000)

\$1,000,000 PRODUCTS-COMPLETED OPERATIONS AGGREGATE  
\$1,000,000 PERSONAL & ADV. INJURY  
\$1,000,000 EACH OCCURRENCE

**Continuation of Coverage** Services Subcontractor shall maintain Products-Completed Operations coverage under Commercial General Liability for the applicable Statute of Repose following Substantial Completion of the Work.

- (c) AUTOMOBILE LIABILITY INSURANCE including the following coverages: Owned, Hired, and Non-Owned vehicles shall be written for not less than the following minimum limits: \$1,000,000 PER ACCIDENT
- (d) UMBRELLA (EXCESS) LIABILITY INSURANCE with combined single limits for bodily injury and property damage of not less than \$1,000,000 EACH OCCURRENCE and \$1,000,000 AGGREGATE. Such coverage shall be in excess of all liability insurance required under the above Paragraphs (a) 2, (b) and (c) and shall provide coverage as broad as the underlying coverage, including additional insured as required herein.

**Continuation of Coverage** Services Subcontractor shall maintain Products-Completed Operations coverage under Umbrella (Excess) Liability for the applicable Statute of Repose following Substantial Completion of the Work.

- (e) [AS APPLICABLE PER OUTLINED SCOPE] PROFESSIONAL LIABILITY INSURANCE is required for Services Subcontractor responsible for any professional services within their scope of Work. Coverage shall be written for not less than the following minimum limits: \$1,000,000 EACH CLAIM and \$1,000,000 AGGREGATE. Any retroactive date applicable to the policy shall precede the commencement of any professional services provided under this Agreement. Professional Liability Insurance coverage shall be maintained by the Professional Engineer/Services Subcontractor for not less than three (3) years beyond the completion of the project with no change in the original retroactive date.
- (f) [AS APPLICABLE PER OUTLINED SCOPE] CONTRACTOR'S POLLUTION LIABILITY INSURANCE shall be written for not less than the following minimum limits: \$1,000,000 EACH OCCURRENCE and \$1,000,000 ANNUAL AGGREGATE. If coverage is written on a claims-made form, any retroactive date applicable to the policy shall precede the commencement of Work performed under this Agreement. This insurance shall be maintained for a period of three (3) years after completion of the Work by Services Subcontractor or its sub-Services Subcontractors. Coverage shall include Contractor and Owner and others as required by the Owner-Contractor Agreement as primary/non-contributory additional insureds.

Contractor and Owner and others as required by the Owner-Contractor Agreement shall be added as additional insureds under the Commercial General Liability and Automobile Liability coverages. The coverage afforded the additional insureds for Commercial General Liability must provide coverage at least equal to that of ISO form CG 20 10 07/04 for ongoing operations. It is agreed by the parties that such coverage will be primary and non-contributory and any coverage maintained by Contractor and/or Owner will be excess of Services Subcontractor's coverage. All limits of liability available to the Services Subcontractor shall inure to the benefit of the Additional Insureds.

The amount and types of insurance coverage required to be provided by Services Subcontractor herein, including any limitation on Services Subcontractor's obligation to include Contractor, Owner and others as required by the Owner-Contractor Agreement as Additional Insureds on Services Subcontractor's liability policies, shall not be construed to be a limitation of the liability on the part of the Contractor or any of its Subcontractors.

Services Subcontractor shall be responsible for securing whatever fire and extended coverage Services Subcontractor may deem necessary for protection against loss of owned, rented, or borrowed equipment and tools, including, but not limited to any tools, equipment, scaffolding, staging and trailers owned, rented, or borrowed by Services Subcontractor. Contractor shall have no liability with respect to such equipment and tools. Failure of the Services Subcontractor to secure such insurance or to maintain adequate levels of coverage shall not obligate Contractor for any losses on owned, rented, or borrowed equipment.

To the fullest extent permitted by law, all insurance policies procured, paid for, and maintained by the Services Subcontractor for the work performed according to this Services Subcontract Agreement must contain a Waiver of Subrogation in favor of the Contractor, Owner and others as required by the Owner-Contractor Agreement. This Waiver of Subrogation is required not only with respect to insurance required of Services Subcontractor in this article, but also with respect to any other property, inland marine, liability, or other insurance the Services Subcontractor may have in force that may cover the work performed for this job.

Contractor shall have no duty to Services Subcontractor or to any of its insurers or their insurance agents to review any Certificates or copies of insurance furnished to Contractor or to determine whether the terms of each Certificate or policy of insurance comply with the insurance-related provisions of the Services Subcontract Documents. A failure of Contractor to detect that Services Subcontractor has not submitted Certificates, or proper Certificates, or is otherwise not in compliance with the insurance-related provisions of the Services Subcontract Documents shall not be considered a waiver or other impairment of any of Contractor's rights under such insurance-related provisions.

**Number of Policies** Commercial General Liability Insurance and other liability insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability Policy. If the full required limits are arranged under a combination of Primary and Excess or Umbrella policies, all policies will be primary and non-contributory and any coverage

maintained by Contractor and/or Owner will be excess of Services Subcontractor's coverage.

Any deductibles or retentions under Services Subcontractor's policies shall be paid by, assumed by, for the account of, and at Services Subcontractor's sole risk.

If the Services Subcontractor fails to procure and maintain such insurance, in addition to the option of declaring Services Subcontractor in default for breach of a material provision of the Services Subcontract, Contractor shall have the right, but not the duty, to procure and maintain the same insurance, or other insurance that provides Contractor with equivalent protection, and Services Subcontractor shall furnish all necessary information to make effective and maintain such insurance. At the option of Contractor, the cost of said insurance purchased by Contractor shall be charged against and deducted from any monies then due or to become due to Services Subcontractor or Contractor shall notify Services Subcontractor of the cost thereof and Services Subcontractor shall promptly pay such cost.

If Services Subcontractor enters into any subcontract with any lower-tier subcontractor, Services Subcontractor shall require such lower-tier subcontractor to maintain insurance similar to that required of Services Subcontractor under this Agreement, including primary/non-contributory additional insured and waiver of subrogation provisions as required hereunder.

BUILDER'S RISK coverage including the interests of Services Subcontractor will be provided by Contractor or Owner as identified in the Services Subcontract Documents. The Services Subcontractor is responsible for the Builder's Risk deductible for each loss to the extent losses payable under the Builder's Risk policy are attributable to Services Subcontractor's work, acts or omissions, or the work, acts or omissions of any lower tier subcontractor, or any other party for whom Services Subcontractor may be responsible. Contractor and Services Subcontractor waive all rights against each other and any of their subcontractors for damages caused by fire or other causes of loss to the extent covered by Builder's Risk insurance, except such rights as they have to proceeds of such insurance held by the Contractor or Owner as fiduciary. Services Subcontractor shall require all of its subcontractors, by appropriate agreement, written where legally required for validity, similar waivers each in favor of other parties enumerated herein.

# FLINTCO, LLC

## POLICIES/PROCEDURES ACKNOWLEDGEMENT

The following Policies and Procedures are part of the Agreement by reference. (Obtain documents at [www.flintco.com](http://www.flintco.com), Select Subcontractors tab and then click on Forms.)

- **Substance Free Workplace:** I acknowledge that I have obtained a copy of the FLINTCO, LLC policy statement regarding Substance Free Workplace and have read and understand my obligations under this policy.
- **Firearm, Weapons-Free Workplace Policy:** I acknowledge that I have obtained a copy the FLINTCO, LLC policy statement regarding Firearm, Weapons-Free Workplace and have read and understand my obligations under this policy.
- **Smoke-Free Workplace:** I acknowledge that I have obtained a copy of the FLINTCO, LLC policy statement regarding a Smoke-Free Workplace and have read and understand my obligations under this policy.
- **Safety Manual:** I acknowledge that I have obtained a copy of the FLINTCO, LLC Safety Manual and have read and understand my obligations regarding Job Site safety.

Subcontractor acknowledges obtaining a copy of and agrees to comply with the preceding policies and procedures related to Subcontractor performance on the jobsite. \_

Firm Company Name XXXXXXXXXXXX
Signature of Authorized Representative
Name of Authorized Representative (Print or Type)
Title of Authorized Representative

**Return this signed form with your executed subcontract.**



# FLINTCO, LLC

## DRAWINGS, SPECIFICATIONS & ADDENDA

**Specifications:** XXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

**Addenda:** XXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

**Drawings:** XXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

## FLINTCO, LLC **SCHEDULE OF WORK**

THE CONSTRUCTION SCHEDULE WILL BE MAINTAINED AT THE PROJECT SITE AND WILL BE UPDATED AS WORK PROGRESSES.

SUBCONTRACTOR WILL GIVE INPUT REGARDING THE SCHEDULE AT REGULARLY SCHEDULED PROGRESS MEETINGS. THE SUBCONTRACTOR SHALL FOLLOW THE MOST CURRENT VERSION OF THE SCHEDULE MAINTAINED BY CONTRACTOR AND PERFORM THE SUBCONTRACT WORK ACCORDING TO THAT SCHEDULE.

# CERTIFICATION OF NON-SEGREGATED FACILITIES

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By the submission of this bid, the bidder, offeror, applicant, or subcontractor certifies that he does not maintain or provide for his employees any segregated facilities at any of his establishments, and that he does not permit his employees to perform their services at any location under his control, where segregated facilities are maintained. He certifies further that he will not maintain or provide for his employees any segregated facilities at any of his establishments, and that he will not permit his employees to perform their services at any location, under his control where segregated facilities are maintained. The bidder, offeror, applicant or subcontractor agrees that a breach of this certification is a violation of the Equal Opportunity clause in this Contract. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color or national origin, because of habit, local custom or otherwise. He further agrees that (except where he has obtained identical certifications from proposed subcontractors or specific time period) he will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding \$10,000 which are not exempt from the provision of Equal Opportunity clause; that he will retain such certifications in his files; and that he will forward the following notice to such subcontractors (except where the proposed subcontractors have submitted identical certifications for specific time periods):

### Notice to Prospective Subcontractors of Requirements for Certifications of Nonsegregated Facilities.

Notification of Nonsegregated Facilities, as required by the May 9, 1967, order on Elimination of Segregated Facilities, by the Secretary of Labor (32 Fed. Reg. 7439, May 19, 1967), must be submitted prior to the award of a subcontract exceeding \$10,000 which is not exempt from the provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontractor or for all subcontracts during a period (i.e. quarterly, semiannually, or annually).

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Note: The penalty for making false statement in offers is prescribed in 18 U.S.C. 1001.

Firm Company Name XXXXXXXXXXXX
Signature of Authorized Representative
Name of Authorized Representative (Print or Type)
Title of Authorized Representative

**Return this signed form with your executed subcontract.**