



# Contractor and Subcontractor Terms and Conditions

## **ARTICLE 1 SUBCONTRACT TERMS AND CONDITIONS**

This subcontract (hereinafter the "subcontract") is made between Buddy L & Sons Construction, Inc hereinafter referred to as "Contractor" and the company referred on "Agreement between Contractor and Subcontractor" document as "Subcontractor" and hereinafter referred to as "Subcontractor"

The Contract Price shall be paid to Subcontractor by way of progress payments in the amounts and upon the times shown in the "REFERENCE DOCUMENT" referred in in the "Agreement between Contractor and Subcontractor".

## **ARTICLE 2 SCOPE OF THE WORK**

**2.1 DESCRIPTION OF THE WORK OF SUBCONTRACTOR.** The Contractor contracts with Subcontractor, as an independent contractor, to perform the work described herein and on Exhibit "B", a copy of which is attached hereto and incorporated herein by reference. Subcontractor shall perform such work (hereinafter called the "Subcontractor's Work") in a good and workmanlike manner, under the general direction of the Contractor, and in accordance with this Agreement and the Contract Documents, which are described in Article 14. Subcontractor agrees to furnish at its own cost and expense all labor, equipment, scaffolding, power, taxes, fees, materials, supplies, and other things necessary to perform and complete, in accordance with the Contract Documents described in Article 14, the work described herein and on Exhibit B.

Notwithstanding the foregoing description of the work to be performed by Subcontractor, and notwithstanding any reference to any part or portion of the drawings or specification, Subcontractor shall nevertheless be responsible for providing and/or furnishing at the expense of Subcontractor all labor, equipment and materials which are or would normally be furnished by Subcontractor as determined by trade or industry practice. The description of the work to be performed or materials to be furnished by Subcontractor by reference to a section or sections of the drawings or specifications shall not serve to limit Subcontractor's obligation to that of performing only such work or furnishing only such materials as are described in that section or sections if work or materials that are within the general description of the section or sections would normally, usually or customarily be required of the Subcontractor by trade practice or by any other provision or section of the drawings or specifications. Subcontractor shall furnish all material and perform all work coming within the general description of the designated section or sections, and reference to such section or sections is solely for convenience in describing subcontractor's work. Any dispute between subcontractors over responsibility for divisions or categories of work shall be reasonably resolved by Contractor, whose decision shall be final.

**2.2 SUBCONTRACTOR INVESTIGATIONS.** Subcontractor has thoroughly examined all of the Contract Documents, Drawings and Specifications and has examined the jobsite and ascertained the conditions for itself. Subcontractor enters into the subcontract relying on its own information and investigation and not on any statements or representations that may have been made by Contractor, Owner, or any architect, or engineer which in any manner relate to the conditions of the jobsite, the condition of the Project, or any applicable codes, statutes, regulations or ordinances.

**2.3 CONFLICTS.** In the event of any conflict between this Subcontract and any of the Contract Documents, this Subcontract shall govern.

**2.4 CANCELLATION OF PRIME CONTRACT.** In the event the Prime Contract should be terminated, rescinded, or canceled, either for cause or otherwise, before Subcontractor commences actually working on the Project, then this Subcontract shall be automatically canceled, and in such event Subcontractor shall not be entitled to any payment under this Subcontract nor shall Subcontractor be entitled to recover from Contractor any amounts or sums whatsoever for any lost profits, consequential damages, costs, expenses, overhead, lost opportunity cost, mobilization fee, de-mobilization fee, or any other cost or expense of any nature whatsoever.



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## ARTICLE 3 SCHEDULE OF WORK

**3.1 TIME IS OF THE ESSENCE.** Time is of the essence of the Subcontract, and Subcontractor agrees to conformance with the Contract Documents. Perform the work of improvement pursuant to the timelines described in the Schedule of Work below and in full.

**3.2 COMPLETION OF TASKS.** Subcontractor hereby agrees that Subcontractor shall perform work on the Project when Subcontractor receives notice from the Contractor that the work of Subcontractor is ready to be performed.

**3.3 SCHEDULE CHANGES.** The forgoing Schedule of Work is a description of the number of working days within which Subcontractor agrees to perform portions of the work of improvement. However, the foregoing does not constitute any representation or promise by Contractor as to which days the Project will be in a suitable condition to receive the work of Subcontractor. Subcontractor acknowledges and agrees that Contractor shall have the sole discretion to indicate the days and times at which Subcontractor shall be able to perform work at the Project. Moreover, nothing in this Agreement shall constitute any representation or agreement by Contractor that after commencing any portion of the work of improvement Subcontractor shall be able to work continuously or in an uninterrupted manner for any specific amount of time. Subcontractor agrees that the work of Subcontractor may without compensation to Subcontractor be interrupted, delayed, postponed, or rescheduled in any manner or for any length of time which Contractor, in the sole discretion of Contractor, deems advisable, prudent, appropriate or necessary.

**3.4 PRIORITY OF WORK.** The Contractor shall have the sole and exclusive right to decide and determine the time, order, and priority in which the various portions of the work of improvement shall be performed.

**3.5 SUBSTITUTE SUBCONTRACTOR.** In the event Subcontractor is unable or unwilling to diligently prosecute to completion the work of Subcontractor under this Subcontract, then Contractor shall be entitled to terminate this Subcontract without penalty and to engage a new subcontractor to complete the work of Subcontractor, or in the event this Subcontract is terminated pursuant to the terms of this paragraph, then Contractor shall be entitled to recover from Subcontractor all extra costs, expenses, overhead, losses, injuries, damages, or lost profits incurred by Contractor due to Subcontractor's not completing the work of this Subcontract.

## ARTICLE 4 PAYMENT

**4.1 PAYMENT USE RESTRICTION.** Payment received by the Subcontractor shall first be used to satisfy the indebtedness owed by Subcontractor to any person or entity furnishing labor, equipment or materials for use in performing the Subcontractor's Work on the Project. Any amounts remaining after such payments shall be disbursed, paid, allocated or consumed in the manner determined by Subcontractor.

**4.2 PAYMENT USE CONFIRMATION.** Contractor shall have the right at all times to contact the Subcontractor's subcontractors, vendors and suppliers to insure that the same are being paid promptly by the Subcontractor for labor, equipment or materials furnished for use or in connection with the performance of the Subcontractor's Work. However, nothing in this Subcontract shall obligate Contractor to take any such action or confirm any such payment by Subcontractor.

**4.3 PARTIAL LIEN WAIVERS AS PREREQUISITE FOR PAYMENT.** Subcontractor shall provide in a form which complies with applicable law and in a form satisfactory to the Owner and Contractor, progress payment or final payment lien waivers and releases from Subcontractor and the suppliers, vendors, and subcontractors of Subcontractor. Notwithstanding anything else in this Agreement to the contrary, no payment shall be due from Contractor to Subcontractor until such time as Subcontractor provides such waivers and releases for the work performed and materials and equipment supplied by Subcontractor which is the subject of such payment.

**4.4 SUBCONTRACTOR'S PAYMENT FAILURE.** Upon payment by the Contractor, Subcontractor shall promptly pay his subcontractors and material and equipment suppliers the amounts to which they are entitled. In the event that the Contractor believes or expects that labor, material or other obligations incurred in the performance of the Subcontractor's Work have not been or may not be paid, then Contractor may take any steps deemed necessary by Contractor to ensure that progress payments to Subcontractor are utilized to pay such obligations including, but not



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limited to, the issuance of joint checks. Moreover, Contractor shall have the right, at any time and in the sole discretion of Contractor, to require Subcontractor to provide documentary evidence confirming that the subcontractors and the material and equipment suppliers of Subcontractor are being paid by Subcontractor for the equipment, materials and labor which they are providing or have provided to the Project. If, upon request by contractor, the Subcontractor does not supply written evidence to the satisfaction of the Contractor that the monies owing to the subcontractor and suppliers of Subcontractor have been paid, then Contractor shall be entitled to require Subcontractor to post a bond with a surety acceptable to Contractor at the expense of Subcontractor in the full amount of the payment to be made under Subcontractor under this Subcontractor or any lesser amount which is satisfactory to Contractor. Any such bond shall inure to the benefit of Owner, Contractor, and Contractor's surety if any. In the event Subcontractor fails or refuses to promptly post such a bond after request by Contractor, then Contractor shall have the right either to 1) terminate this Subcontract or 2) to withhold from Subcontractor further payments until the work of Subcontractor under this Subcontract is completed and Contractor is satisfied that all suppliers and subcontractors of Subcontractor have been fully paid. Nothing in this paragraph shall be deemed to limit, modify, reduce or impair the obligation of Subcontractor to diligently pursue the work of the Subcontractor under this Subcontract unless Contract terminates the Subcontract as provided by this paragraph.

**4.5 SUBCONTRACTOR'S ASSIGNMENT OF PAYMENTS.** Subcontractor shall not assign any monies due or to become due to Subcontractor under this Contract or under any change order thereto without the written consent of Contractor.

**4.6 PAYMENT NOT ACCEPTANCE.** Payment to the Subcontractor does not constitute or imply acceptance of any portion of the Subcontractor's work. No payment made under this Agreement shall operate as any acceptance by Contractor of any part of Subcontractor's work or as any admission by Contractor that this Agreement, or any part of it, has been complied with by Subcontractor unless Subcontractor has, in fact, complied with this Agreement.

**4.7 PROGRESS PAYMENT.** Subcontractor shall issue invoices and lien releases monthly for all work completed during that month. The invoice shall be itemized as to all equipment, materials, or labor supplied by Subcontractor and supported by documentary evidence showing the work completed which is the subject of such invoice and release. Subcontractor agrees that any determination of the percentage of completion accomplished by Subcontractor which is made by Owner or any agent, employee or representative of Owner or any Construction Lender shall be binding upon Subcontractor for purposes of determining the amount of any progress payment due to Subcontractor.

**4.8 RETAINER/SECURITY.** Contractor shall withhold ten percent (10%) of each payment amount due to Subcontractor (hereinafter the "Retention"), which amount shall serve as additional security to Contractor for the full timely and faithful performance of Subcontractor under the Subcontract.

**4.9 TIME OF PAYMENT.** Progress payments to the Subcontractor for satisfactory performance of the Subcontractor's Work shall be made upon the earlier of 1) the tenth day following the end of the month in which the invoice and releases for the work and materials which are the subject of the invoice are submitted to the Contractor, or 2) within 10 days after Contractor receives payment from Owner for the portion of the work completed by Subcontractor and for which Subcontractor has submitted an invoice to Contractor.

**4.10 PAYMENT DELAY.** If Contractor, in its sole discretion, determines that the Subcontractor's Work does not meet industry standards, does not comply with the Contract Documents, has not been performed in a good and workmanlike manner, fails to comply with any statute, code, ordinance or regulation, or is otherwise unsatisfactory, then Contractor may delay payment of any progress payment until such time as Subcontractor's Work is repaired, removed, replaced, or otherwise made satisfactory to Contractor. Subcontractor shall not be entitled to any interest on any payment withheld from Subcontractor as provided by this paragraph. Nothing in this paragraph or this Subcontractor complies with all applicable codes, statutes, regulations, ordinances and building codes, (hereinafter the "Applicable Codes") and Subcontractor shall at all times and in all events be fully and solely responsible to construct the work of Subcontractor in full compliance with all Applicable Codes.

**4.11 FINAL PAYMENT.** Before the Contractor shall be required to pay the Subcontractor's invoice for final payment and release of the retainage the Subcontractor shall submit to the Contractor:

- (a) An affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontractor's Work for which the Owner or his property or the Contractor or the Contractor's surety might be in any way liable, have been paid or otherwise satisfied;



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- (b) Consent of surety to final payment, if required;
- (c) Satisfaction of Contractor with the close-out procedure required by Contractor;
- (d) Certification that insurance required by the Contract Documents will remain in effect beyond final payment pursuant to Article 11 and will not be canceled or allowed to expire without at least thirty (30) days written notice to the Contractor unless a longer period is stipulated in the Contract; and
- (e) Other data if required by the Contractor or Owner such as receipts, releases, manufacturer warranty information and documentation, and waivers of liens to the extent and in such from as may be designated by the Contractor or Owner. Final payment shall constitute a waiver of all claims by the Subcontractor relating to the Subcontractor’s Work, but shall in no way relieve the Subcontractor of liability for the obligations assumed under this Agreement or for faulty, defective or incomplete work of Subcontractor.

**ARTICLE 5  
CHANGES, CLAIMS AND DELAYS**

**5.1 OWNER CHANGES.** The Owner may make changes in the Work by issuing Modifications (hereinafter “Modifications”) to the Prime Contract. Upon receipt of such Modifications issued subsequent to the execution of this subcontract, Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work which would be inconsistent with the changes made by the Modifications to the Prime Contract or the Contract Documents.

**5.2 CHANGES.** The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of the Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Contract Documents issued subsequent to the execution of the Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to performing any further work on the Project and prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work.

**5.3 SUBCONTRACTOR CLAIMS.** The Subcontractor shall make claims promptly to the Contractor for additional cost or extensions or time as the Modifications may require. Any claim by Subcontractor for extra compensation due to changes in the Contract Documents shall be reasonable. In the event that Contractor and Subcontractor cannot agree upon a change to the amount to be paid to Subcontractor for Modifications or changes to the Work of Subcontractor, then Contractor may elect to have the additional work required by the Modifications performed by another Subcontractor or may elect to perform such additional work as may be required by the Modifications with his own forces. Subcontractor agrees that in such event the compensation to be paid to Subcontractor under this Subcontract shall be reduced by a reasonable amount if the Modifications will result in any reduction in the scope of work or materials to be supplied by Subcontractor. Should Contractor determine that it would be impracticable to have the remainder of the Subcontract work performed by Subcontractor and the Modifications performed by another subcontractor or by Contractor’s own forces, then Contractor shall be entitled to terminate the Subcontract and pay Subcontractor or the value of the work and services provided by Subcontractor up through the date of termination. In the event of any such termination, Subcontractor shall be entitled only to recover the reasonable value of labor, services, equipment and material provided to the Project, and shall have no claim for lost profits, lost opportunities, future overhead, mobilization charges, demobilization charges, or consequential damages, losses, or injuries of any kind or nature whatsoever.

**ARTICLE 6  
OBLIGATION**

**6.1 CONTRACT DOCUMENTS.** Prior to executing the Subcontract, the Contractor shall make available to the Subcontractor the Contract Document which are binding on the Subcontractor and which are set forth in Article 14.

**ARTICLE 7  
SUBCONTRACTORS OBLIGATIONS**

**7.1 OBLIGATIONS DERIVATIVE.** The Subcontractor binds itself to the Contractor under this Agreement in the same manner as the Contractor is bound to the Owner under the Contract Documents and will so bind its lower tier



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subcontractors. The Subcontractor shall make available to its lower tier subcontractors the Contract Documents, which Subcontract shall make binding on the lower tier subcontractors.

**7.2 RESPONSIBILITIES.** The Subcontractor shall furnish all of the labor, materials, equipment, and services including, but not limited to, competent supervision, shop drawings, samples, tools, and scaffolding as necessary for the proper performance of the Subcontractor's Work in accordance with the Contract Documents.

Prior to commencing work on the Project, Subcontractor shall provide to Contractor a list of proposed subcontractors and suppliers, shall be responsible for taking field dimensions, providing tests, ordering materials, and all other actions necessary to meet the Schedule of work.

**7.3 SUPERVISION.** Subcontractor agrees that the Work performed under this Agreement will be under the direct supervision by a Subcontractor employee. This supervision shall be performed at least once a day for each day that Subcontractor's Work is being performed. The Supervisor shall not be changed without written approval by the Contractor. Said supervisor shall be authorized to receive instructions from Contractor and shall be authorized to make such decisions on behalf of Subcontractor as are necessary for the prompt and efficient performance of the work of Subcontractor under this Agreement.

**7.4 SUBCONTRACTOR'S ASSIGNMENT OF WORK.** The Subcontractor shall not assign the whole or any part of the Subcontractor's Work without the prior written approval of the Contractor.

**7.5 SUBCONTRACTOR'S CONTRACTED SERVICES.** The Subcontractor shall not subcontract the whole or any part of the Subcontractor's Work without the prior written approval of the Contractor.

**7.6 NON-CONTRACTED SERVICES.** The Subcontractor agrees, except as otherwise provided in the Agreement, that no claim by Subcontractor for non-contracted construction services rendered or materials furnished shall be valid unless the Subcontractor provides Contractor with a written proposal for such services, and such written proposal is signed by Contractor. Neither party shall have the ability to orally change the provisions of this paragraph, and any such attempted oral modification shall be void. **Subcontractor expressly agrees for all purposes that any labor, equipment or materials outside the scope of the Subcontract which are provided by Subcontractor to the Project without the prior written consent of the Contractor shall for all purposes be deemed to have been supplied to the Project not at the instance or request of Contractor or any agent, employee or representative of Contractor, and shall not be deemed to have benefited the Owner, the Contractor, the Project or the value thereof. The provisions of the paragraph are hereby made expressly admissible and controlling in any subsequent claim, suit, action or proceeding by Subcontractor against any person or entity or Quantum Meruit, Quantum Valebant, Indebitatus Assumpsit, any common count, and any claim by Subcontractor for oral contract, oral modification of contract, or any similar claim under any similar theory which in any manner relates to any labor, equipment, or materials which Subcontractor claims to have provided to the Project which are outside the scope of the Subcontract. Subcontractor expressly agrees that unless the written consent of the Contractor is first obtained, the providing by Subcontractor of any labor, equipment or materials to the Project which are outside the scope of the Subcontract shall for all purposes be deemed not to result in any unjust enrichment to Contractor or any other person or entity. Nothing in this paragraph shall be construed to limit the legal rights of Subcontractor to record a mechanic's lien or commence an action to foreclose any such lien.**

**7.7 SHOP DRAWINGS.** Each Subcontractor shall be solely responsible for ensuring and confirming that any shop drawings prepared or submitted by Subcontractor adequately conform in all respects to all requirements of the Contract Documents. Any cost, loss or damage resulting from any non-conformance of shop drawings to the Contract Documents shall be the sole responsibility of Subcontractor, and Subcontractor shall defend, indemnify and hold harmless Contractor from all claims, actions or proceedings which in any manner relate to any loss, cost or damage arising from any failure of any shop drawings of Subcontractor to conform to any requirement of the Contract Documents. Shop drawings, or the approval by the Contractor, shall not be deemed to authorize deviations or substitutions from the requirements of the Contract Documents.

**7.8 COORDINATION.** The Subcontractor shall:

- (a) Cooperate with the Contractor and all others whose work may interfere with the Subcontractor's Work;





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- (b) Specifically note and immediately advise the Contractor of any such interference with the Subcontractor's Work; and
- (c) Participate in the preparation of coordination drawings and work schedules in areas of congestion.

**7.10 PROVISIONS FOR INSPECTION.** The Subcontractor shall notify the Contractor when portions of the Subcontractor's Work are ready for inspection. The Subcontractor shall at all times furnish the Contractor and its representatives adequate facilities for inspecting materials at the site or any place where materials under the Agreement may be in the course of preparation, process, manufacture, or treatment. Any approval by Contractor following inspection of any of the labor, equipment or materials provided to the Project by Subcontractor shall not in any degree relieve Subcontractor of Subcontractor's liability for providing any defective, inadequate, or improper labor, equipment or materials, and following any inspection by Contractor, Subcontractor shall remain fully and completely liable therefore.

The Subcontractor shall furnish to the Contractor, in such detail as is required by Contractor, full reports of the progress of the Subcontractor's Work irrespective of the location of such work.

**7.11 CLEANUP.** The Subcontractor shall follow the Contractor's cleanup and safety directions, if any, and in addition to any such directions shall:

- (a) At all times keep the Project, site and street free from debris, rubbish and unsafe conditions resulting from the Subcontractor's Work;
- (b) On completion of its work, promptly remove all surplus materials, tools, scaffolding and equipment, and
- (c) Broom clean each work area prior to discontinuing work in the same.

If the Subcontractor fails to immediately commence compliance with cleanup duties within twenty-four (24) hours after written notification from the Contractor of non-compliance, the Contractor may implement such cleanup measures without further notice and deduct the cost thereof from any amount due or to become due to the Subcontractor. Any equipment, tools, or materials which are not removed by Subcontractor within three business days after substantially completing the work of Subcontractor shall be deemed to have been abandoned by Subcontractor and may be disposed of by Contractor without accounting for such items to Subcontractor.

**7.12 SAFETY.** The prevention of accidents on or in the vicinity of its work is the Subcontractor's responsibility, even if the Contractor establishes a safety program for the entire Project. Subcontractor shall establish a safety program implementing safety measures, policies, and standards conforming to those required or recommended by governmental and quasi-governmental agencies having jurisdiction and by the Contractor and Owner including but not limited to, requirements imposed by the Contract Documents. Subcontractor shall comply with the reasonable recommendations of insurance companies that have any interest in the Project and shall stop any part of the Work which Contractor deems unsafe until corrective measure satisfactory to Contractor shall have been taken. Contractors' failure to stop any unsafe practice by Subcontractor shall not relieve Subcontractor of the responsibility thereof. Subcontractor shall at all times be fully liable and responsible for proceeding with work on the Project in a safe manner. Contractor shall not be responsible for safe or unsafe working conditions of Subcontractor and nothing in this Subcontract shall be construed to require Contractor to monitor, inspect, supervise or control the work of Subcontractor with respect to safe working conditions or practices. Subcontractor shall fully defend, indemnify and hold harmless Contractor of and from all claims; suits, demands, actions, or proceedings which are filed or commenced against Contractor which in any manner result from any unsafe condition or practice utilized by Subcontractor. Further, Subcontractor hereby agrees to fully defend, indemnify and hold harmless Contractor of and from any claim, suit, demand, action or proceeding commenced or filed by and employee of any agent, representative, subcontractor, or supplier of Subcontractor which in any manner relates to the work of Subcontractor on the Project. Notwithstanding the foregoing, Subcontractor shall not be required to defend, indemnify or hold harmless Contractor of or from any claim, demand, suit, action or proceeding which is filed or commenced against Contractor and which is based on the sole negligence or willful injury or damage by Contractor. Subcontractor shall notify Contractor immediately following any accident and promptly confirm the notice in writing. A detailed written report shall be furnished if requested by the Contractor. Subcontractor shall indemnify Contractor for fines, damages, or expenses incurred by the Contractor because of the Subcontractor's failure to comply with any safety requirements or procedures which are enforced or promulgated by any governmental entity or agency. Subcontractor shall at all times fully comply with all applicable codes, statutes, regulations and ordinances regarding safe procedures and workplace and worker safety.



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**7.13 PROTECTION OF THE WORK.** Subcontractor shall take necessary precautions to properly protect Subcontractor's Work and the work of others from damage caused by Subcontractor's operations. Should Subcontractor cause damage or loss to the work or property of Owner, Contractor, or others, then Subcontractor shall promptly pay for such damages to the satisfaction of the Contractor, or the Contractor may pay for such damage or loss and deduct the cost thereof from amounts due or to become due to Subcontractor.

**7.14 PERMITS, FEES AND LICENSES.** Subcontractor shall give adequate notices to all applicable governmental entities or authorities which are required by any such entity or authority and which are in any manner related to Subcontractor's Work. Contractor shall obtain and pay for any necessary building permit, electrical permit, plumbing permit and mechanical permits. Subcontractor shall secure and pay for all other permits, fees, licenses, assessments, inspections, and taxes necessary to complete Subcontractor's Work in accordance with the Contract Documents. Subcontractor shall promptly pay any re-inspection fees that may be caused by Subcontractor's Work not passing inspection.

## ARTICLE 8 SUBCONTRACT PROVISIONS

**8.1 LAYOUT RESPONSIBILITY AND LEVELS.** Subcontractor shall be strictly responsible for the accuracy of Subcontractor's Work and for any loss or damage to the Contractor or others by reason of Subcontractor's failure to schedule or perform its Work correctly.

**8.2 WORKMANSHIP.** Every part of Subcontractor's Work shall be executed in strict accordance with the Contract Documents in the most sound, workmanlike and substantial manner. All workmanship shall be of the best of its several kinds, and all materials used in Subcontractor's Work shall be furnished in ample quantities to facilitate the proper and expeditious execution of the Work; and shall be new except such materials as may be expressly provided in the contract Documents to be otherwise.

**8.3 MATERIALS FURNISHED BY OTHERS.** In the event the scope of the subcontractor's Work includes installation of materials or equipment to be furnished by others, it shall be the responsibility of the Subcontractor to examine the items so provided and thereupon handle, store, and install such items with such skill and care as to ensure satisfactory and proper installation. Loss or damage due to actions, inactions, or negligence of Subcontractor shall be deducted from any amounts due or to become due to Subcontractor.

**8.4 SUBSTITUTIONS.** No substitutions shall be made in Subcontractor's Work unless permitted in the Contract Documents and only then upon written authorization from Contractor. Subcontractor shall defend, indemnify and hold harmless the Contractor as a result of any unauthorized substitution has been made, and shall promptly pay for any consequential loss, damage, cost, or injury caused in whole or in part by any such unauthorized substitution.

**8.5 USE OF CONTRACTOR'S EQUIPMENT.** Subcontractor, its agents, employees, subcontractors or suppliers shall not use the Contractor's equipment without the express written permission of the Contractor.

If the Subcontractor or any of its agents, employees, suppliers or lower tier subcontractors utilize any machinery, equipment, tools, scaffolding, hoists, lifts or similar items owned, leased, or under the control of the Contractor, then Subcontractor shall defend, indemnify and hold harmless Contractor as provided in Article 10 for any loss or damage (including personal injury or death) which may arise from such use, except where such loss or damage shall be found to have due solely to the negligence of Contractor.

**8.6 PRIVACY.** Prior to final completion of the Project, the Subcontractor agrees not to perform any work directly for the Owner, or any tenant thereof, or deal directly with the Owner's representatives, in connection with the Project, unless otherwise directed in writing by the Contractor. All work for the Project performed by the Subcontractor shall be processed and handled exclusively by the Contractor.

**8.7 WARRANTY.** Subcontractor warrants its work against all deficiencies and defects in material and/or workmanship. Upon request by Owner or Contractor, Subcontractor shall fully and promptly remedy and defect, inadequacy or incompleteness in the work of Subcontractor, and if such defect, inadequacy or incompleteness has caused any damage, loss or injury to other portions of the Project or other property of Owner, Contractor, or others, then Subcontractor shall promptly pay for all such loss, damage or injury.



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Subcontractor hereby provides an express warranty of its work for a period of one year from the date of completion of the Project. In the event the Prime Contract provides for a warranty from Contractor to Owner for a period of time greater than one year, then the one year warranty provided by Subcontractor under this paragraph shall be extended to match the period of time for the warranty from Contractor to Owner as specified in the Prime Contract.

**8.8 NOTICES.** Any Notice which is to be sent to either of the Parties to the Subcontract shall be sent to such Party at the address listed immediately beneath that party's signature at the end of this Subcontract, and shall be sent either by Federal Express or Certified U.S. mail, return receipt requested. Any party may change its address for purpose of serving notices by providing the other party with notice of such change in address through the method of providing notice as provided in this paragraph.

## ARTICLE 9 RECOURSE BY CONTRACTOR

### 9.1 FAILURE OF PERFORMANCE.

**9.1.1 Notice to Cure.** If Subcontractor refuses or fails to supply enough properly skilled workers or the materials necessary to enable the work of Subcontractor to be performed in compliance with the Schedule of Work, or if Subcontractor fails to make prompt payment to its workers, lower tier subcontractors, vendors or suppliers, or if Subcontractor should fail to follow or comply with any applicable statute, code, ordinance or regulation, or in the event Subcontractor breaches any other material term of the Subcontract or any of the Contract Documents, then Subcontractor shall be in default of the obligations of Subcontractor under this Agreement. If Subcontractor fails within three (3) working days after written notification to correct any such default with diligence and promptness, then Contractor without prejudice to any rights or remedies of Contractor shall have the right to one or more of the following remedies.

- (a) Supply such number of workers and quality of materials, equipment and other facilities as Contractor deems necessary for the completion of Subcontractor's Work; or any part thereof which Subcontractor has failed to complete or perform after the aforesaid notice and charge the cost thereof to Subcontractor, which shall be liable for the payment of the same including reasonable overhead, profit, and attorney's fees of Contractor.
- (b) Contract with one or more additional subcontractors to perform such part of Subcontractor's Work as the Contractor shall determine will provide the most expeditious completion of the total Work and charge the cost thereof to Subcontractor.
- (c) Withhold payment of any money due to Subcontractor pending corrective action in amounts sufficient to cover losses and additional expenses incurred by reason of the default of Subcontractor, including but not limited to attorney's fees of Contractor; or
- (d) Terminate the Subcontract.
- (e) In the event of an emergency affecting the safety of persons or property, Contractor may proceed as described above in (a), (b) or (c) above without prior notice to Subcontractor.

**9.1.2 Effect of Default.** In the event of any default by Subcontractor such that Contractor either retains others to complete the work of Subcontractor, or completes the work of Subcontractor with Contractor's own forces, or terminates the Subcontract, then Subcontractor shall be liable to Contractor for the difference between 1) the Subcontract price and 2) the amounts paid to Subcontractor plus the actual cost to Contractor to complete the work of Subcontractor. Further, in the event of any such default, Subcontractor shall be fully liable to Contractor for all incidental or consequential damages to contractor, including but not limited to all losses, costs, expenses, or damages due to delay in completion of the Project or extra cost in completing the Project, along with all lost profits and lost opportunity costs of Contractor.

**9.1.3 Use of Subcontractor's Materials and/or Equipment.** If the Contractor performs work under this Article, due to Subcontractor's failure to perform, or sublets such work to be performed, and if Subcontractor does not within three working days from the Project all materials, tools, equipment or appliances belonging to Subcontractor, then Contractor and/or the persons to whom work has been sublet shall have the right to take and use without compensation to Subcontractor any materials, implements, equipment, appliances, or tools, furnished by, belonging or delivered to the Subcontractor and located on the Project.

**9.2 SUSPENSION BY OWNER.** Should the Owner suspend work being performed by Contractor or any part of the Project which includes the Subcontractor's Work, then Contractor shall so notify the Subcontractor in writing and upon





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written notification the Subcontractor shall immediately suspend the Subcontractor's Work. In any such event, Subcontractor shall not be entitled to any compensation for delay or for removing equipment or materials from the Project, nor for re-mobilizing workers, material or equipment when any such suspension is concluded, if at all.

In the event of any such Owner suspension, the liability of Contractor to Subcontractor shall be limited to the amount of the recovery actually obtained by Contractor in consideration for all work actually performed by Subcontractor. In the event of any such suspension by Owner, Contractor shall not be liable to Subcontractor for any lost profits or consequential damages incurred by Subcontractor.

**9.3 TERMINATION BY OWNER.** Should Owner terminate its Contract with the Contractor or any part thereof which includes the Subcontractor's Work, then Contractor shall so notify the Subcontractor in writing and upon written notification, this Agreement shall be terminated and the Subcontractor shall immediately stop Subcontractor's Work and follow all of Contractor's instructions. In event of such Owner termination, Contractor's liability to Subcontractor shall be limited to value of the services, equipment and materials actually provided by Subcontractor to the Project, and Subcontractor shall not be entitled to any consequential damages, including but not limited to any lost profits, any mobilization or de-mobilization costs, any opportunity costs, any overhead costs, or any other costs, losses, or damages of any kind or nature whatsoever.

**9.4 SUSPENSION BY CONTRACTOR.** The Contractor may order the Subcontractor in writing to suspend, delay or interrupt all or any part of the Subcontractor's Work for such period of time as may be determined to be appropriate for the convenience of the Contractor. In the event of a suspension by Contractor under this paragraph, Subcontractor shall not be entitled to payment for nor recovery of any mobilization or de-mobilization costs, any increased overhead costs, any lost profits, any lost opportunity costs, or any costs, expenses, losses or damages which are caused by or related to any such suspension under this paragraph. In the event of any suspension under this paragraph, the time for completion by Subcontractor of the work described in the Subcontract shall be extended by an amount of time equal to the time of the suspension.

**9.5 BANKRUPTCY.** If Subcontractor files a petition in Bankruptcy or makes a general assignment for the benefit of creditors, then this Agreement shall terminate if the Subcontractor, or the Subcontractor's trustee rejects the Agreement or, if there has been a default, the Subcontractor is unable to give adequate assurances that the Subcontractor will perform as required by this Agreement or otherwise is unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code.

**9.5.1 Interim Bankruptcy Remedies.** If the Subcontractor is not performing in accordance with the Schedule of Work at the time any petition in bankruptcy is filed, or at any subsequent time, the Contractor, while awaiting the decision of the Subcontractor or its trustee to reject or assume the Agreement and provide adequate assurance of its ability to perform hereunder may avail itself of such remedies under this Subcontract as are reasonably necessary to maintain the Schedule of Work. The Contractor may offset against any sums due or to become due the Subcontractor all costs incurred in pursuing any of the remedies provided hereunder including, but not limited to, reasonable overhead, profit and attorney's fees.

### ARTICLE 10 INDEMNIFICATION

**10.1 SUBCONTRACTOR'S PERFORMANCE.** To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance, non-performance, or incorrect performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is related or attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including loss of use resulting there from. Such obligation shall not be construed to limit, negate, abridge, or otherwise reduce other rights or obligations of indemnity which would or which do otherwise exist as to a party or person described in this Article.

**10.2 INDEMNITY LIMITATIONS.** In claims against any person or entity indemnified under this Article by any employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Article shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor of



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the Subcontractor's Sub-subcontractors under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

**10.3 ARCHITECTURAL INDEMNITY.** The obligations of the Subcontractor under this Article shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them, provided such giving or failure to give is the primary cause of the injury or damage.

**10.4 APPLICATION OF LAWS.** The Subcontractor agrees to be bound, at its own cost by and to comply with all federal, state and local laws, statutes, ordinances, and regulations (hereinafter collectively referred to as "Laws") applicable to the Subcontractor's Work including, but not limited to, equal employment opportunity, minority business enterprises, women's business enterprises, disadvantaged business enterprises, safety and all other laws with the Contractor must comply according to the Contract Documents.

**10.5 COMPLIANCE WITH ALL LAWS.** The Subcontractor shall be liable to the Contractor and the Owner for all losses, costs, damages, or expenses attributed to any acts of commission or omission by the Owner by the Subcontractor, its employees or agents resulting from the failure to comply with any of the Laws, including, but not limited to, any fines or penalties assessed due to any non-compliance, or corrective measures which are ordered or required because of any such non-compliance.

**10.6 EXTENDED SCOPE OF INDEMNITY.** The indemnity obligations of Subcontractor shall continue not only during the course of performance of Subcontractor's work but shall also apply to all claims, demands, or liabilities for damage, loss or injury occurring after completion of the Project, and shall extend to all such claims which are caused in whole or in part by the negligence or intentional misconduct of Subcontractor or any agent, employee, representative, supplier or sub-subcontractor of Subcontractor.

## ARTICLE 11 INSURANCE

**11.1 SUBCONTRACTOR'S INSURANCE.** Prior to the start of the Subcontractor's Work, the Subcontractor shall procure for the Subcontractor's Work and maintain in force throughout Subcontractor's work on the project worker's comprehensive or commercial general liability insurance on an occurrence basis, and any other type of insurance required of the Contractor under the Contract Documents.

Subcontractor shall take all such steps as are necessary to have the Contractor and Owner named as additional insured's on each of such policies except for worker's compensation and automobile policies of insurance. The insurances required by this paragraph shall include comprehensive general liability insurance covering the Subcontractor's obligations under Article 11. The insurance policies under this Article which are to name Owner and Contractor as additional insured's and shall provide that the coverage which is to be afforded under such policies for work to be done by Subcontractor is to be primary and any insurance policies held or owned by Contractor or Owner are to be considered excess and non contributory. CERTIFICATE SHALL STATE "INSURANCE IS PRIMARY"

### 11.2 INSURANCE TO BE PROVIDED:

**11.2.1 Workers Compensation:** Subcontractor to provide Statutory Worker's Compensation and Employer's Liability with a minimum coverage of \$1,000,000.00 each accident bodily injury, \$1,000,000.00 bodily injury by disease. Waiver of Subrogation to be included.

**11.2.2 General Liability Insurance.** Subcontractor's Comprehensive General Liability or Commercial General Liability insurance covering all operations by or on behalf of Subcontractor providing insurance for bodily injury liability and property damage liability for the limits and conditions listed below as well as those required by Paragraph 11.1:

Premises and Operations

Products and completed operations

Contractual liability insuring the obligations assumed by Subcontractor in this Agreement

Broad form property damage (included completed operations)

Personal Injury liability

Subcontractor's insurance to be Primary to Owner's and Contractor's

Contractor to be listed as Additional Insured



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## Waiver of Subrogation

The limits of liability shall be not less than the following

- \$1,000,000.00 for each occurrence (combined single limit for bodily injury and property damage)
- \$1,000,000.00 for personal injury liability
- \$1,000,000.00 aggregate for products-completed operations
- \$2,000,000.00 general aggregate

**11.2.3 Automobile Liability.** The Subcontractor's comprehensive or commercial general liability insurance and comprehensive automobile insurance as required by Paragraph 11.1 shall be written with limits of liability as described herein:

\$1,000,000.00 Owned, Hired and Non-owned Auto.

**11.3 NUMBER OF POLICIES.** Comprehensive or commercial general liability insurance and other liability insurance may be arranged under a single policy for the full limits required or by the combination of underlying policies with the balances provided by excess or umbrella policy.

**11.4 CANCELLATION, REMOVAL OR MODIFICATION.** The Subcontractor shall maintain in effect all insurance coverage required under this Agreement at the Subcontractor's sole expense and with insurance companies acceptable to the Contractor. All insurance policies shall contain the provision that the coverage afforded thereunder shall not be canceled or not renewed nor restrictive modifications added until at least thirty (30) days' prior written notice has been given to the contractor unless otherwise specifically required in the Contract Documents.

**11.5 INSURANCE CERTIFICATES.** Certificates of insurance, or certified copies of policies acceptable to the Contractor shall be filed with the Contractor prior to the commencement of the Subcontractor's Work. However, any failure to provide Contractor with such certificates or certified copies shall not abridge, limit, reduce or modify the obligations of Subcontractor to obtain and maintain the insurances required by this article.

**11.6 REMEDIES.** In the event that Subcontractor fails to obtain or retain any insurance coverage required under this Agreement, the Contractor may, but shall not be required to, purchase such coverage and charge the expense thereof to the Subcontractor, or terminate this Agreement.

## ARTICLE 12 DISPUTE RESOLUTION

### 12.1 DISPUTE RESOLUTION

The parties agree that any claim, dispute or controversy arising out of or relating to this Agreement or the breach thereof, except for any claim, dispute or controversy controlled by HRS § 672E, shall be resolved by a lawsuit filed in the court with the appropriate jurisdictional limits located in the Second Circuit of the State of Hawaii, located in Wailuku, Maui, Hawaii. Nothing in this agreement shall be construed to require mediation or any type of arbitration to resolve any claim, dispute or controversy arising out of or relating to this agreement, or the breach thereof.

## ARTICLE 13 CONTRACT INTERPRETATION

**13.1 INCONSISTENCY AND OMISSIONS.** Should inconsistencies or omissions appear in the Contract Documents, it shall be the duty of the Subcontractor to so notify the Contractor in writing within three (3) working days of the Subcontractor's discovery thereof. Upon receipt of said notice the Contractor shall instruct the Subcontractor as to the measures to be taken and the Subcontractor shall comply with the Contractor's instructions.

**13.2 LAW IN EFFECT.** This Agreement shall be governed by the laws of the State of Hawaii.

**13.3 SEVERABILITY AND WAIVER.** In the event any term or provision of the Subcontract or if any of the Contract Documents is found or determined to be void, voidable, illegal or invalid, then in such event the remaining terms and provisions of the Subcontract and the Contract Documents shall not be affected by such finding. The failure of either party hereto to insist in any one or more instances upon the performance of any of the terms, covenants or conditions of the Agreement or to exercise any right hereof, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right as respects further performance.



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**13.5 CAPTIONS.** The captions given to the several Articles and paragraphs in this Agreement are for ease of reference only and shall not be deemed to have any substantive meaning whatsoever.

**13.6 ENTIRE AGREEMENT.** This Subcontract represents the entire and integrated agreement between the parties hereto and fully supersedes and incorporates all prior and contemporaneous negotiations, representations, understandings and agreements, both written and oral.

**13.7 NEGOTIATED SUBCONTRACT.** This Subcontract shall for all purposes be deemed to be the product of negotiation between the parties hereto, shall not be deemed to have been prepared by only one of the parties hereto, and shall for all purposes be deemed to have been jointly prepared by both of the parties hereto.

**13.8 CONTROLLING DOCUMENT.** In the event that any Proposal or any form of contract, subcontract, or similar document from Subcontractor is attached to any part of this Subcontract, then the attached of such document will have been made for the convenience of the Parties to this Subcontract and not for the purpose of modifying or limiting any of the terms or provisions of the Subcontract. In the event such a document from Subcontractor is attached to any portion of this Subcontract, this Subcontract and its exhibits shall for all purposes be controlling.

**13.9 WARRANTY OF AUTHORITY.** Each person signing this Subcontract on behalf of a Corporation hereby represents and warrants that such person is fully authorized to sign this Subcontract on behalf of such corporation, and that no further corporate action or resolution is necessary in order to have this Subcontract be fully binding on such corporation by the signature of such person.

### ARTICLE 14 CONTRACT DOCUMENTS

**14.1 CONTRACT DOCUMENTS.** The Contract Documents (hereinafter the "Contract Documents") shall be based on the most current date of the document as of the execution of this Agreement consisting of all engineering or other specifications prepared for the Project (hereinafter the "Specifications"), all applicable governmental statutes, regulations, ordinances, codes and building codes, and the following specifically described documents:

- 1) Architectural drawings
- 2) Structural Engineering drawings
- 3) Civil Engineering drawings
- 4) General Conditions of the Contract between Owner and Contractor