



KOZENY-WAGNER, INC. SUBCONTRACT AGREEMENT

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Arnold, Missouri 63010

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Section 1 - The Agreement

This Subcontract, entered into this _____ day of _____, by **Kozeny-Wagner, Inc.**, a Missouri Corporation, hereinafter called "**Contractor**", and _____, hereinafter called "**Subcontractor**", for Subcontract work on the following project:

Project Name:

KWI Project Number:

Project Location:

Project Owner:

Project Architect/Engineer:

KWI/Owner Contract Date:

Sub to Begin Work:

Days to Complete:

Project Classification(s): Federally Funded Tax Exempt Certified

Payroll *

Project Classification(s): ARRA Funded Subcontract Bond Required

** If Certified Payroll is marked, Certified Payroll documentation shall be submitted to Kozeny-Wagner monthly, along with Subcontractor's billing. (1) Original and (1) Copies.*

Subcontractor Name

Subcontractor Street Address:

Subcontractor City, State, Zip:

Description of Work:

KWI Cost Code:

Design Services Included?

If yes, see Article IX.

Contract Amount:

Commitment Number:

Table of Contents

		Page
I.	Contract Documents -----	3
II.	Scope of Work -----	3
III.	Contract Price -----	3
IV.	List of Lower Tier Subcontractors and Suppliers -----	4
V.	Compliance with All Laws, Safety Practices, and Licensure Requirements -----	4
VI.	Notice of Accidents -----	5
VII.	Taxes, Federal Labor Standards, Pension Benefits and Fringe Benefits -----	5
VIII.	Performance -----	5
IX.	Design Delegation -----	7
X.	Use of Contractor’s Equipment or Facilities -----	7
XI.	Bonding of Subcontractor -----	8
XII.	Submittals -----	8
XIII.	Cleanup -----	8
XIV.	Time of Performance, Scheduling and Coordination -----	9
XV.	Changes in the Work -----	10
XVI.	Progress Payments -----	11
XVII.	Final Payment -----	12
XVIII.	Owner’s Payment to Contractor Mandatory -----	12
XIX.	[Reserved] -----	13
XX.	Warranty and Defective Work -----	13
XXI.	Subcontractor’s Failure of Performance, Right to Cure, and Termination -----	14
XXII.	Consequential Damages -----	15
XXIII.	Insurance -----	15
XXIV.	Indemnification -----	16
XXV.	Work Continuation and Payment -----	16
XXVI.	Dispute Resolution -----	16
XXVII.	Miscellaneous Provisions -----	18

THE APPENDICES MARKED BELOW ARE ATTACHED TO THIS SUBCONTRACT:

_____	Appendix A:	Drawing List
_____	Appendix B:	Scope of Work
_____	Appendix C:	List of Lower Tier Subcontractors and Suppliers
_____	Appendix D:	Contractor’s Safety Program
_____	Appendix E:	Subcontractor Certification Affidavit
_____	Appendix F:	EEO Requirements
_____	Appendix G:	Project Schedule
_____	Appendix I:	Insurance Requirements

I. Contract Documents

The Contract Documents consist of the following:

1. This Subcontract Agreement and all exhibits to this Subcontract Agreement.
2. Bidding instructions for the scope of work called for by this Subcontract Agreement.
3. The General Contract between Contractor and the Owner, and all of its component parts including but not limited to the plans, specifications, general conditions, special conditions, supplementary conditions, reference standards, bulletins, addenda and exhibits.

The Contract Documents are incorporated in this Subcontract Agreement by reference, and Subcontractor is bound by the Contract Documents insofar as they relate in any way, directly or indirectly, to the work covered by this Subcontract Agreement. With respect to Subcontractor's Scope of Work, Subcontractor agrees to be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the terms of the General Contract. Where, in the Contract Documents, reference is made to Contractor and the work or specifications therein pertain to Subcontractor's trade, craft or type of work, such work or specifications shall be interpreted to apply to Subcontractor instead of to Contractor.

Contractor shall have the benefit of all rights and remedies against Subcontractor which the Owner, by the Contract Documents, has against the Contractor, insofar as is applicable to this Subcontract: provided that where any provision of the Contract Documents between the Owner and the Contractor could be interpreted to provide the Contractor with rights against the Subcontractor less than or more limited than those provided in favor of the Contractor in this Subcontract Agreement, this Subcontract Agreement shall govern. This Subcontract Agreement and the General Contract shall be read together so that under no circumstances, with respect to the Subcontractor's works, shall Subcontractor's obligations to Contractor be less than the Contractor's obligations to Owner. If a conflict in the Subcontractor documents is discovered, then the strictest interpretation or the most costly interpretation shall prevail unless waived by Contractor.

Prior to execution of this Subcontract Agreement, a copy of the General Contract (including the contract documents incorporated therein) with private financial data redacted was made available by Contractor for Subcontractor's inspection at the Contractor's office, and Subcontractor has had the opportunity to review all of the Contract Documents. Subcontractor enters into this Subcontract Agreement with full knowledge of the requirements set forth therein.

This Subcontract constitutes the final and complete agreement between Contractor and Subcontractor and supersedes all prior or contemporaneous communications, representations, or agreements, whether oral or written, relating to the subject matter of this Subcontract.

II. Scope of Work

Subcontractor agrees to furnish all necessary materials, labor, employee benefits, tools, equipment, supplies, materials, services, fixtures, installation, safety, protection, hoisting, insurance, taxes, fees, licenses, permits (except building permit), transportation, scaffolding, supervision, temporary storage and other facilities of every kind and description required and necessary to perform the prompt and efficient execution of the work set forth as follows:

Appendix "B" – attached hereto and incorporated herein by this reference, for the Subcontractor's Scope of Work.

Subcontractor shall maintain all applicable permits throughout the duration of the Project.

Subcontractor agrees to complete the work described in Appendix B in accordance with, and reasonably inferable from, that which is indicated in the Contract Documents and consistent with the Progress Schedule. The Drawing List for the Project is attached as Appendix "A". Subcontractor will perform all of the work that falls within the general area of its scope, regardless of the fact that the work to be performed may be distributed throughout the plans and specifications, and Contract Documents, as well as all incidental work reasonably necessary to complete the scope of work. The Subcontractor shall perform the Subcontract work under the general direction of the Contractor.

III. Contract Price

Contractor agrees to pay, or cause to be paid, Subcontractor as consideration for the performance of its work, the Contract Price stated on Page 1 of this Subcontract Agreement, subject to additions and deductions for changes in the work as provided for in the Contract Documents.

IV. List of Lower Tier Subcontractors and Suppliers:

Subcontractor shall complete Appendix C to this Subcontract Agreement, identifying all of Subcontractor's lower tier subcontractors and suppliers that Subcontractor intends to use on the Project. A phone number shall be provided for each lower tier subcontractor or supplier identified. Subcontractor shall immediately notify Contractor in writing if Subcontractor adds to or changes any lower tier subcontractors or suppliers for the Project. Subcontractor shall not engage a lower tier subcontractor with an EMR \geq 1.0 without first obtaining the consent in writing of Contractor to such engagement. If Subcontractor proposes a lower tier subcontractor with an EMR greater than 1.0 and Contractor does not consent to same, Subcontractor shall replace the originally proposed lower tier subcontractor with a new subcontractor who has an EMR less than 1.0 at no additional cost to Contractor.

Subcontractor shall not assign this Subcontract or any amounts due or to become due thereunder to any third party without prior written consent of the Contractor. Subcontractor shall not subcontract the whole or any portion of this Subcontract without prior written consent of the Contractor (except to those subcontractors or vendors identified in Appendix C). If Subcontractor does, with approval, sublet this Subcontract Agreement or any part thereof, it shall require that its Subcontractor be bound to Subcontractor and to assume toward Subcontractor all of the obligations and responsibilities that Subcontractor has assumed toward Contractor. Approval of a sub-subcontractor will not imply that Contractor assumes any responsibility for such sub-subcontractor or that sub-subcontractor is relieved of any responsibility with respect to the Sublet Work.

V. Compliance with All Laws, Safety Practices and Licensure Requirements

Subcontractor is an independent contractor and shall comply with all laws, orders, citations, rules, regulations, standards and statutes affecting or relating to this Subcontract Agreement or its performance, including but not limited to those with respect to occupational health and safety, the handling and storage of hazardous materials, federal, state and local tax laws, social security acts, unemployment compensation acts, and immigration reform and control acts.

Subcontractor and all of its subcontractors, regardless of tier, shall be licensed as a Trade Contractor for this work, and shall be licensed to operate in respect to its scope of work, at the project site location, all as required by the licensure requirements of the applicable state, municipal and local authorities. Such licenses shall be maintained throughout the duration of the Project.

Subcontractor agrees to fully comply with Contractor's Safety Program, a copy of which is attached to this Subcontract Agreement as Appendix D.

Subcontractor shall conduct inspections to determine that safe working conditions and equipment exist in compliance with Contractor's Safety Program, and accepts sole responsibility for providing a safe place to work for its employees and for employees of its subcontractors and suppliers of material and equipment, for adequacy of and required use of all safety equipment and for full compliance with the aforesaid laws, orders, citations, rules, regulations, standards and statutes.

Subcontractor agrees to inspections by Contractor to determine compliance with safety, health, and environmental standards. Subcontractor acknowledges that Contractor's right to inspect shall not in any way relieve Subcontractor of its obligations. If at any time, Subcontractor violates OSHA standards or in the opinion of Contractor, performs its work in an unsafe manner or otherwise not in compliance with Contractor's Safety Program, Contractor may either require Subcontractor to immediately cease work until the unsafe practice is corrected, or provide the required safety measures at Subcontractor's cost.

Violation of any provisions of Contractor's Safety Program by Subcontractor's employees shall be sufficient grounds for immediate discharge from the project site. Subcontractor agrees that although Subcontractor is responsible for the safety and health of its employees, Contractor shall have the right to request immediately removal from the jobsite any Subcontractor personnel engaging in conduct in violation of any provisions of Contractor's Safety Program.

It is Contractor's intent to comply with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "Act"), and such other acts, rules and regulations as may be issued from time to time by federal, state and local authorities which have the intent and purpose of immigration and control. Contractor's goal is to achieve such compliance, while at the same time respecting all laws protecting the privacy rights of individuals, all in a fashion that will not in any way wrongfully discriminate against any individuals. It is Contractor's intent that only legal labor shall be employed on Contractor jobsites, whether the labor is performed by the Contractor's employees or by subcontractors of all tiers.

Subcontractor agrees to execute the Subcontractor Certification Affidavit, in the form of Appendix E. Subcontractor shall provide no labor on the Project site, nor shall Subcontractor be entitled to any payments respecting the Project until Subcontractor has provided Contractor with a properly executed copy of the Subcontractor Certification Affidavit. Subcontractor shall secure like certifications from all firms who Subcontractor contracts work to who will be performing labor on the Project site. No lower tier subcontractors performing labor for Subcontractor shall be permitted on site until such time as they have first provided Contractor with a properly executed copy of the Subcontractor Certification Affidavit.

Subcontractor further agrees that in the event that Contractor should object in writing to the employment on site of any specific employee, with concerns stated in writing respecting the employee's compliance with I-9 protocol, Subcontractor shall promptly remove the employee from the project site and not return the employee to the project site until such time as the Subcontractor provides Contractor with sufficient information to address Contractor's concerns, within Contractor's reasonable discretion.

Subcontractor is liable to Contractor and the Owner for all fines and penalties assessed by any governmental entity against Contractor or Owner as a result of Subcontractor's failure to perform its work under this Subcontract in compliance with the requirements of the Contract Documents. **Subcontractor agrees to indemnify, defend and hold harmless Contractor from any and all liability and damages, fines, costs, and attorneys' fees incurred by Contractor on account of Subcontractor's failure to comply with all laws and governmental regulations applicable to the work.**

VI. Notice of Accidents

A. Immediate Notice Required: Subcontractor shall immediately notify Contractor's on-site representative orally of any accident or occurrence resulting in damage to property of another, or injury to the Subcontractor's employees or third party.

B. Written Report: Subcontractor shall submit to Contractor a written accident report on a form acceptable to Contractor within two hours of the incident. Upon request of Contractor, the Subcontractor shall furnish Contractor with a copy of any reports prepared by Subcontractor for submission to Subcontractor's insurer(s).

C. **Indemnification: If Subcontractor fails to comply with this Section, Subcontractor agrees to defend, indemnify, and hold harmless Contractor for any and all claims, losses, or damages, including attorney's fees, incurred as a result of Subcontractor's noncompliance.**

VII. Taxes, Federal Labor Standards, Pension Benefits and Fringe Benefits

Subcontractor shall pay all taxes, levies, duties and assessments of every nature due in connection with the work under this Subcontract.

Subcontractor shall comply with and agrees to be bound by all applicable Federal Labor Standards Provisions covering the Work. Upon request, Subcontractor agrees to submit Certified Payroll Reports to Contractor.

Subcontractor shall comply with all equal employment opportunity and affirmative action requirements promulgated by any governmental authority, including, without limitation, the requirements of the Civil Rights Act of 1964 (as amended), Executive Order Numbers 11246 and 11395 (as amended) which provide equal employment opportunity and prohibit discrimination because of Race, Color, Religion, Sex or National Origin, and all other applicable laws or regulations, federal, state or local, relating to Civil Rights or Equal Opportunity, and to file any and all reports as required.

Subcontractor shall comply with all provisions of the Immigration Reform and Control Act.

Subcontractor shall be solely responsible for and make all contributions or payments required to be made to any health and welfare, pension, vacation, apprenticeship, training or other fringe benefit or employee benefit program or trust in a timely fashion. Contractor shall have the right to insist upon and receive, prior to making any progress payment or final payment, written documentation confirming that Subcontractor is current in making all such contributions or payments.

Indemnification: If Subcontractor fails to comply with any provisions of this Section, Subcontractor agrees to defend, indemnify and hold harmless contractor from any and all claims, losses or damages, including attorneys' fees, incurred as a result of Subcontractor's noncompliance.

VIII. Performance

A. Control Of Work: Subcontractor is responsible for, and has control over, all construction means, methods, techniques, sequences, procedures, and coordination of all portions of the Subcontract Work, unless the Contractor shall give specific written instruction concerning these matters. Subcontractor is responsible for, and has control over, all activities necessary to comply with Contractor's Safety Program (attached as Exhibit C). Subcontractor is fully responsible for, and has control over, all construction means, methods, techniques, sequences, procedures and coordination of the Subcontract Work related to the performance of Subcontractor's employees and any other persons working in the area of the Subcontract Work. Subcontractor has no authority to act or make any agreements or representation on behalf of Contractor or Owner, and no contractual relationship exists between Subcontractor and Owner. No employee or agent engaged by Subcontractor shall be, or shall be deemed to be, an employee or agent of Contractor or Owner.

B. Jobsite Representative and Project Executive: Subcontractor shall keep a representative at the jobsite during all times when Subcontractor's work is in progress, and such representative shall be authorized to represent Subcontractor as to all phases of the work. Subcontractor's jobsite representative must attend all jobsite coordination meetings. Prior to commencement of the work, Subcontractor shall notify Contractor who Subcontractor's representative is to be. Any direction, instructions, information or data given to Subcontractor's representative by Contractor, either written or verbal, shall be as binding as though given to Subcontractor himself. Subcontractor shall also designate a Project Executive who shall be identified on Appendix C of this Subcontract Agreement. Subcontractor shall immediately notify Contractor in writing if there is any change to Subcontractor's jobsite representative or Subcontractor's Project Executive.

C. Errors in Contract Documents: Subcontractor shall make a careful analysis and comparison of the drawings, specifications, other Subcontractor Documents and information furnished by the Owner or Contractor relative to the Subcontract Work. Should Subcontractor discover any errors, inconsistencies or omissions in the Subcontract Documents, Subcontractor shall report such discoveries to Contractor in writing within three days. Upon receipt of notice, Contractor shall instruct Subcontractor as to the measures to be taken and Subcontractor shall comply with such instructions. If Subcontractor performs work knowing it to be, or reasonably should have known it to be, contrary to any applicable laws, statutes, ordinances, building codes, rules or regulations without notice to Contractor and advance approval by appropriate authorities, including Contractor, Subcontractor shall assume appropriate responsibility for such work and shall bear all associated costs, charges, fees and expenses incurred to remedy the violation. Nothing herein shall relieve Subcontractor of responsibility for its own errors, inconsistencies and omissions.

D. Progress Reports: Subcontractor shall submit the following reports to Contractor's site Superintendent at the stated time:

1. Daily Reports shall be submitted within 24 hours of the completed work shift.
2. Toolbox Meeting Reports and Safety Audits shall be submitted on a weekly basis.

Subcontractor shall also furnish periodic progress reports, in a form mutually agreed upon by Subcontractor and Contractor, respecting information on the availability of materials and equipment under its Subcontract which may be in the course of preparation or manufacture. If requested by Contractor, Subcontractor shall provide manufacturer's name, phone number, contact person, and the purchase order number and amount.

E. Layout Responsibility: Except as otherwise provided in Subcontractor's scope of work as defined in Appendix B, the following provisions shall apply respecting Layout Responsibility: Contractor or Owner shall establish principal axis lines and levels, and control points, whereupon Subcontractor shall be strictly responsible for the layout and accuracy of its work in accordance with the locations, lines and grades specified or shown in the Contract Documents, subject to such modifications as Contractor may require as the Work progresses. Subcontractor is responsible for any loss or damages to other Subcontractors engaged in work on the site by reason of failure of Subcontractor to set out or perform its work correctly. Subcontractor is responsible for the layout of all points and grades in excess of building corners, column lines, grid lines and finish floor elevations (which will be established by Contractor). Subcontractor shall exercise prudence so that actual final conditions and details shall result in alignment of finish surfaces that are within industry standard tolerances. If Subcontractor moves or destroys or renders inaccurate any survey control point, such control point shall be replaced by Contractor at Subcontractor's expense.

F. Labor Relations: Subcontractor shall be fully responsible for the acts and performance of its employees and shall maintain peaceful relations among its employees to avoid labor conflicts. Subcontractor acknowledges that the Project may have both union and non-union personnel. Subcontractor undertakes the responsibility to see to it that all individuals employed by it on the Project will work on the Project at all times when normally scheduled to work. Should picketing or other labor activity occur on the jobsite by employees or unions with issues against Subcontractor, then Subcontractor shall mitigate any resulting conditions that impede the progress of the work, and Subcontractor shall continue the proper performance of its work without interruption or delay. Any costs incurred by Contractor due to such actions shall be reimbursed by Subcontractor. If Contractor establishes a reserved gate system, Subcontractor shall ensure that all of its employees, suppliers, visitors, and managers obey the reserved gate rules. Subcontractor shall bind all its sub-subcontractors and material supplier to the terms of this paragraph.

G. Protection of Property: In carrying out its work, Subcontractor shall take necessary precautions to protect the work of other trades from damage caused by its operations. Subcontractor shall make every effort to protect its own work from damage of any sort and shall continue to protect its work until Subcontractor has completed its work in its entirety. Subcontractor shall locate all utility lines before digging and take all reasonable precautions to avoid disturbing existing utilities.

H. Provisions For Inspection: Subcontractor shall at all times furnish Contractor safe and ample facilities for inspecting materials at the site of construction, shops, factories, or any place of business of Subcontractor and its subcontractors and suppliers where materials under this Agreement may be in course of preparation, process, manufacture or treatment.

I. Uncovering of Work: Subcontractor shall uncover its work upon request by Contractor to provide for inspection to insure that the work is in accordance with the Subcontract Documents. If the work uncovered is determined to be in accordance with the Contract Documents, then Contractor shall pay Subcontractor its actual costs to uncover and recover the work. If the work uncovered is determined to not be in accordance with the Contract Documents, then Subcontractor shall bear all costs associated with uncovering the work, remedying the work, and recovering the work.

J. Unforeseen Site Conditions: Subcontractor represents that it has visited the Project site and is familiar with the nature of construction in the general area where the site is located, including site conditions. Subcontractor shall make no claims for differing site conditions except as authorized in the Contract Documents. If Subcontractor presents a claim to Contractor for differing site conditions, Contractor will in good faith present a like claim for compensation and/or a time extension (where applicable) to the Owner so long as Contractor believes in good faith that there is a reasonable basis for Subcontractor's claim. Contractor shall have no obligation to compensate Subcontractor for any claim for a differing site condition unless and until Owner compensates Contractor for such condition, and Subcontractor shall not receive an extension of time for a differing site condition unless Contractor receives a like extension of time from the Owner. Contractor's liability to Subcontractor for differing site conditions shall be limited to Owner's liability to Contractor for any costs or time allegedly incurred by Subcontractor (unless Contractor refuses to present a like claim to the Owner for consideration).

K. Work for Others: Until final completion of the Subcontract Work, Subcontractor agrees not to perform any work directly for the Owner or any tenants, or deal directly with the Owner's representatives in connection with the Subcontract Work, unless otherwise directed in writing by the Contractor to do so.

IX. Design Delegation

If the Contract Documents require Subcontractor to provide design services, Subcontractor shall provide those design services necessary to satisfactorily complete the Subcontract Work. Subcontractor shall procure design services from licensed design professionals (the "Designer") retained by Subcontractor as permitted by the law of the place where the Project is located. Subcontractor shall be responsible for conformance of its design with the information given and the design concept expressed in the Contract Documents. 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 Contractor. Contractor shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by the Designer.

If the Designer is an independent professional, the design services shall be procured pursuant to a separate agreement between Subcontractor and the Designer. The Subcontractor – Designer agreement shall not provide for any limitation of liability inconsistent with Subcontractor's liability established by the Contract Documents. Subcontractor shall fully identify any Designer in Appendix C, List of Lower Tier Subcontractors and Suppliers.

Subcontractor's design services shall include providing the design and engineering for the structure, systems machinery and equipment encompassed by Subcontractor's scope of work. Subcontractor warrants that its design and engineering shall include all applicable specifications and criteria specified by the Contract Documents, shall be sufficient to pass all applicable inspections and testing required by any federal, state or local authorities with jurisdiction of the work (such that the Project may be substantially completed and fit for its intended purpose), and shall comply with all applicable federal, state and local laws and regulations. Subcontractor shall ensure that its design and engineering is completed and submitted for approval within such time as is necessary to allow the Project to remain on schedule. Subcontractor acknowledges that in performing its design and engineering work as provided herein it will not rely upon any specifications or criteria specified in the Contract Documents, but will produce its design and engineering so as to ensure that the completed work will be accepted by the appropriate inspecting authority. Subcontractor acknowledges and agrees that it is solely responsible for providing the proper design and engineering for its work.

X. Use of Contractor's Equipment or Facilities

Subcontractor may utilize from time to time (if permission is granted by Contractor in writing) certain of Contractor's equipment or facilities. If Subcontractor uses Contractor's equipment or facilities, Subcontractor shall reimburse Contractor at a predetermined rental rate. Upon request by Contractor, Subcontractor shall execute an equipment rental agreement in a form acceptable to Contractor. Subcontractor shall assure itself of the condition of such equipment and facilities and shall assume all risks and responsibilities during its use. Contractor makes no warranty as to the sufficiency of such equipment or facilities for Subcontractor's specific needs, and Subcontractor accepts the equipment or facilities in an "as-is" condition. **Subcontractor shall indemnify and hold Contractor harmless from any claims, actions, demands, damages, liabilities, expenses, and attorney's fees, resulting from the use of such equipment or facilities by Subcontractor.** Contractor and Subcontractor shall jointly inspect such equipment or facilities before its use and upon its return. The cost of all necessary repairs or replacement for damages other than normal wear and tear shall be Subcontractor's expense. If equipment is furnished with an operator, the services of such operator will be performed under the

complete direction and control of Subcontractor, and such operator shall be considered Subcontractor's employee for all purposes other than the payment of wages, worker's compensation insurance or other benefits. Subcontractor shall have full responsibility for all acts or omissions of Contractor's operators with regard to Subcontractor's use or employment of them.

XI. Bonding of Subcontractor

Concurrently with the execution of this Agreement, Subcontractor shall, if required by Contractor on page 1, execute a labor and material bond and performance bond, in an amount equal to one hundred percent (100%) of the Contract Price. Said bonds shall be executed by a corporate surety acceptable to Contractor and shall be in a form satisfactory to Contractor. Payment for the premium on said bonds shall be made as otherwise provided in the Contract Documents. No change, alteration or modification in or deviation from this Subcontract Agreement or the plans or specifications shall release or exonerate, in whole or in part, any surety on any bond given in connection with this Subcontract Agreement, and neither Owner nor Contractor shall be obligated to notify any surety or sureties of any such change.

XII. Submittals

A. Submission of Submittals: Subcontractor shall examine the Contract Documents to ascertain the approval material to be submitted such as shop drawings, product data, cut sheets, calculations, schedules, samples, manufacturer's literature, and brochures (collectively "Submittals"). Subcontractor shall submit to Contractor, at Subcontractor's cost, all Submittals required by the Contract Documents. Submittals shall be submitted to Contractor in sufficient time and sequence so that Subcontractor's work may be done effectively, expeditiously and in a manner that will not cause delay in the progress of the Work of Subcontractor, Contractor or other Subcontractors.

B. Submittals Not Identified In Contract Documents: If the Contract Documents do not contain submittal requirements pertaining to the Subcontractor's work (or some portion of Subcontractor's work), Subcontractor agrees upon request to submit in a timely fashion to Contractor for approval any Submittals as may reasonably be required and requested by the Contractor, Owner or Architect.

C. Review/Approval of Submittals: Review of Submittals by Contractor, Owner or Architect shall relate solely to general conformity with the Contract Documents. Such review shall not be construed as an approval in detail of conformity of such Submittals with the design drawings, specifications or other Contract Documents, and shall not excuse Subcontractor from fully complying with the terms and conditions of the Contract Documents. No such approval or review shall constitute a waiver of, or agreement to, any change or deviation to the Contract Documents (except in the case of "Alternate" Submittals as provided below). **If approved Submittals deviate from or are inconsistent with the design drawings, the specifications or other Contract Documents, and such deviations or inconsistencies impose upon Contractor any expense because of delays or extra work or otherwise, Subcontractor agrees to hold Contractor harmless from and to indemnify Contractor from any such expense or damage, including attorney's fees.**

D. Deviations and Substitutions: If Subcontractor desires to request a deviation or a substitution from the Subcontract Documents, such request should be made as and conspicuously marked as a separate "**ALTERNATE**" submittal (and shall be provided in addition to the regular submittal), and shall clearly identify the deviations and/or substitutions requested and the reasons for such request. If the Architect or Owner approves the Alternate submittal in writing, then Subcontractor may proceed with construction containing such deviations or substitutions in accordance with the approval given, but shall remain responsible to pay for any extra costs incurred by others as a result of such substitution or deviation. All extra or additional costs associated in any way with an Alternate submittal shall be borne by Subcontractor. Under no circumstances shall Subcontractor be entitled to an increase in the Contract price resulting from the submission and approval of any Alternate submittal.

E. Close Out Submittals: Upon completion of its work, Subcontractor shall submit all "in place" or "as-built" drawings, owner's manuals, operating manuals, labor and materials warranties, and any other close out documents required by the Contract Documents. Final Payment to Subcontractor (including any payments that may be otherwise due for Claims) shall not be deemed due to Subcontractor until such time as Subcontractor has submitted all required Close-Out Submittals.

XIII. Cleanup

General Clean-Up Obligations: Subcontractor shall at all times maintain a clean, safe and orderly working area, free from unreasonable accumulations of rubbish, debris, and waste and/or surplus materials (collectively "Debris") resulting from its operations. Debris shall be removed to and placed at a location designated by Contractor each day (or as otherwise required by Contractor) during the course of its work.

Minimizing Debris: Subcontractor shall make reasonable provisions to minimize and confine dust and debris resulting from its construction activities.

Remedies: If Subcontractor does not comply with its clean up obligations, Contractor may, after giving one working days prior notice and upon failure of the Subcontractor to comply with its clean up obligations in such one- day period, have Subcontractor's clean-up obligations performed by others, and charge the reasonable cost thereof to Subcontractor.

XIV. Time of Performance, Scheduling and Coordination

A. Time: Time is of the essence of this Subcontract.

B. Compliance with Schedule: Subcontractor shall commence preparatory and planning work immediately upon execution of this Subcontract Agreement and shall timely mobilize its forces to the project site in order to commence its work in accordance with Contractor's progress schedule. Contractor will prepare a progress schedule that will permit Contractor to substantially complete the work in accordance with the time stated in the Contract Documents. Subcontractor shall diligently prosecute its work in accordance with Contractor's progress schedule and all revisions thereto, it being expressly understood that Contractor has agreed to meet a date of Substantial Completion for the Project as defined in the Contract Documents, and that Contractor has undertaken that obligation to the Owner in reliance upon Subcontractor's ability and promise to timely perform its work in accordance with the progress schedule. If Subcontractor, in the opinion of Contractor, fails to satisfactorily maintain the progress of the Work, Contractor may, upon 24 hours written notice, direct Subcontractor to cure the issues impeding Subcontractor's progress and to take such steps as Contractor deems necessary to improve the rate of progress of the Work, including requiring Subcontractor to increase the number of shifts and/or to pursue overtime operations, and to submit for approval a schedule demonstrating the manner in which the required rate of progress will be regained, all without additional cost to Contractor. If Subcontractor fails to timely respond to Contractor's direction to cure the deficiencies impeding the rate of progress of Subcontractor's Work, Contractor may proceed as provided in Article XXI.

C. Contractor's Delay Damages: Subcontractor shall be liable for any damages for delay sustained by Contractor caused by Subcontractor, including, but not limited to, damages, liquidated or otherwise, for which Contractor is liable to the Owner.

D. Contractor's Control Of Scheduling: Contractor shall have the right to decide the time and order in which various portions of the work shall be installed, the priority of the work between Subcontractor and the other subcontractors, and, in general, all matters representing the timely and orderly conduct of the work of Subcontractor on the premises. Contractor shall decide the sequence of the work, and may require Subcontractor to perform part of the work in one area while delaying work in another area to suit the needs of the Project.

E. Scheduling of Work: Subcontractor shall provide Contractor with scheduling information and a proposed schedule for performance of its work in form acceptable to Contractor. Subcontractor shall comply with the Project Schedule of the Contractor including, but not specifically limited to, commencement, duration, and sequencing of activities. Contractor shall reasonably cooperate with the Subcontractor in scheduling Subcontractor's work and shall attempt, as reasonably possible, to avoid conflicts or interference with Subcontractor's work.

F. Coordination: Subcontractor shall cooperate with Contractor and other subcontractors whose work might interfere with the Subcontractor's work, and shall participate in the preparation of coordinated drawings and schedules in areas of congestion, specifically noting and advising the Contractor of any such interference. Subcontractor shall coordinate its work with that of all other subcontractors and Contractor, in a manner that will not delay or hinder their work and that will facilitate the timely and orderly completion of the entire work.

G. Overtime: Subcontractor agrees that overtime operations may be required of Subcontractor. If overtime operations are required in the judgment of Contractor as a result of delays caused by Subcontractor, then Subcontractor will perform overtime operations for no additional compensation. If, however, Contractor requires overtime operations for any reason that is not the fault of Subcontractor, then Contractor will reimburse Subcontractor its actual premium time costs only, which Subcontractor will accept as its exclusive and only compensation related to Contractor's request to perform overtime operations. Overtime operations may include Saturday and Sunday work, two or three shift work, or overtime on a one shift basis.

H. Force Majeure: Subcontractor has taken into account and has made allowances for delays which should be reasonably anticipated or foreseeable. If the critical path of Subcontractor's work is impacted and delayed in the prosecution of the Work by an act, neglect or default of the Owner, Architect or Contractor, or by labor disputes, fire, unavoidable casualties, Acts of God, or other causes beyond the Subcontractor's reasonable control, then the time fixed for Subcontractor's completion of the Work shall be extended by the number of days that Subcontractor has been delayed, so long as (a) Subcontractor provides Contractor with written notice of the delay within either five days, or such shorter time as may be required by Owner, of the commencement of such delay, and (b) Subcontractor provides Contractor with a written claim for the time extension sought within seven days after the delay period has ended. Subcontractor's sole and exclusive remedy for any delay to its work shall be an extension of time, subject only to the specific exception stated in Paragraph J below.

I. Inclement Weather: Subcontractor has taken into account and has made allowance for delays caused by inclement weather to be reasonably anticipated for the geographic area where the Project is located. Subcontractor shall be entitled to an extension of time for inclement weather so long as such inclement weather in fact impacts and delays the critical path of Subcontractor's work, and such inclement weather is beyond that which should have been reasonably anticipated; provided, however, that if the Contract Documents otherwise provide any specific provisions respecting the Contractor's right to make a claim for extension of time for inclement weather, then the provisions of such Contract Documents shall apply and govern the Subcontractor's right to make a claim for time extension due to inclement weather. Subcontractor shall have no right to a time extension for inclement weather unless the Contractor has the same right for a time extension from the Owner.

J. Claims For Compensation Due To Delays Or Schedule Interference: No claims for additional compensation or damages for delays or schedule interference, including claims for loss of productivity, disruption, "ripple effect" costs or "impact" costs, whether caused in whole or in part by any conduct on the part of Contractor, other subcontractors or Owner or Architect, or by any other contributing causes, shall be recoverable from Contractor, and the above-mentioned extension of time for completion shall be the sole and exclusive remedy of Subcontractor; provided, however, that in the event the Contract Documents permit the Contractor to obtain additional compensation from Owner on account of a delay, and in the event Contractor does in fact obtain and collect additional compensation from Owner on account of a delay, Subcontractor shall be entitled to such portion of the additional compensation so received by Contractor from Owner as is equitable under all of the circumstances, so long as Subcontractor has (a) requested in writing that Contractor prosecute a claim against Owner for additional compensation for any delay, (b) cooperated fully with Contractor in the prosecution therefore, and (c) paid Contractor an equitable amount for costs and expenses incurred by Contractor in connection with bringing such delay claim, including attorneys' fees. Contractor's receipt of any funds from the Owner attributable to such a delay claim shall be a condition precedent to any obligation by Contractor to Subcontractor.

XV. Changes in the Work

A. Contractor Change Notice Directives: Contractor may, without notice to sureties, by written **Change Notice**, denominated as such, signed by the Contractor's Representative, unilaterally make any change to the Subcontractor's work described in the Contract Documents, including but not limited to changes:

1. in the drawings and specifications;
2. in the sequence of Subcontractor's work;
3. directing acceleration or deceleration in the performance of the work;
4. modifying the schedule of the work; and
5. adding to or deleting from the Subcontractor's Scope of Work.

Upon receipt of a Change Notice, Subcontractor shall promptly proceed with the Work reflected by the Change Notice in accordance with the directives of Contractor.

B. Pricing Change Order Work; Agreement on Change Orders: Subcontractor shall within a reasonable time after receipt of a Change Notice, submit to Contractor an itemized estimate reflecting any cost changes and/or time impact required to make the requested changes. The itemized estimate shall detail the anticipated direct labor man-hours and labor costs, direct material, direct equipment, applicable labor markups for employee labor burdens and benefits, and any other such detail as may be required by the Owner. Mark-up on Subcontractor's direct costs shall be ten percent (five percent on Sub-Subcontractor's work) to cover supervision, field office and home office overhead, and profit. If additional time is sought, the estimate shall provide a detailed explanation how and why the requested change will impact the critical path of the Subcontractor's work. All elements of potential cost and time impact are subject to negotiation. If the parties agree with respect to the amount of the change and the time impact, if any, associated with the change, then the parties shall execute a Change Order signed by both parties. Agreement on any Change Order shall constitute a full and final settlement and accord and satisfaction of all matters relating to the change in the work which is the subject of the Change Order, including, but not limited to, all direct and indirect costs associated with such change and any and all adjustments to the Contract Sum and the construction schedule.

C. Proceedings If Parties Cannot Agree on Change Order: Subcontractor shall timely perform the work contemplated by the Change Notice regardless of whether the parties agree on a Change Order. If the parties cannot agree on a Change Order, then Subcontractor shall treat the matter as a claim and proceed in accordance with Paragraph G below. Subcontractor's claim for a time extension is limited to the documented effect that the change work will have on the critical path of the Subcontractor's work. If it is reasonably possible to perform the change in the work concurrently with Work that is critical to overall completion, no time extension shall be granted by reason of a change in the Work. Subcontractor's claim for extra costs shall be limited to the amount by which Subcontractor's direct costs have been reasonably increased over the direct cost of performing the Work without the change in the Work, plus ten percent (five percent on Sub-Subcontractor's work) of direct cost to cover supervision, field office and home office overhead, and profit.

D. **Unauthorized Changes In the Work:** Subcontractor shall not make any changes in the work that would in any way cause or allow the work to deviate from that required in the Contract Documents without first obtaining a Change Notice from the Contractor, or an Alternate Submittal approved in writing by the Architect or Owner. If Subcontractor makes any changes in the work without receiving such documentation, such change constitutes an agreement by Subcontractor that it will not be paid for that changed work, even if it received verbal direction from Contractor or any form of direction, written or otherwise, from Owner or any other person or entity. In addition, Subcontractor shall be liable for any and all losses, costs, expenses, damages, and liability of any nature whatsoever associated with or in any way arising out of any such unauthorized change in the work.

E. **Disputes About Subcontractor's Scope of Work:** If a dispute arises between Subcontractor and Contractor with respect to whether particular work is a change in the scope of the work, Subcontractor shall give Contractor prompt written notice of the matter before proceeding with the work. Such written notice shall include an estimate of the extra costs the Subcontractor believes will be involved with the disputed work, and the effect on the project schedule, if any. Subcontractor shall timely perform the disputed work. Within ten days after completing the disputed work, Subcontractor shall provide Contractor with a claim in writing detailing Subcontractor's direct costs and markup, which shall be computed in accordance with the provisions of Subparagraph C above, and any claim for a time extension. Subcontractor's failure to provide either the required written notice before proceeding with disputed work, or to timely provide the written claim after completing the disputed work shall constitute an agreement by Subcontractor that it will not be paid for the disputed work. Subcontractor shall treat any such dispute as a claim and proceed in accordance with Paragraph G below. Subcontractor shall proceed diligently with performance of the work, including work in dispute, and comply with the directions of the Contractor, pending final resolution of the Dispute.

F. **No Notice To Surety Required:** No change, alteration, or modification to or deviation from this Subcontractor Agreement or the Contract Documents shall release or exonerate, in whole or in part, any bond or any surety on any bond given in connection with this Subcontract Agreement, and no notice is required to be given to such surety of any such change, alteration, modification or deviation.

G. **Referral To Dispute Resolution And Continued Performance:** Any issues related to changes in the work that are not resolved by execution of a Change Order shall, so long as Subcontractor has otherwise complied with the provisions of this Section, be treated as a Dispute subject to resolution by the dispute resolution provisions of this Subcontract Agreement. Subcontractor shall proceed diligently with performance of the work, including work ordered by Change Notices and work in dispute, and comply with the directions of the Contractor, pending final resolution of the Dispute.

XVI. Progress Payments

A. **Applications for Payment:** Subcontractor shall submit to Contractor applications for payment in a form acceptable to Contractor and for a time period as directed by Contractor not later than the date prescribed by the Contractor. Applications shall be for payment for materials incorporated in the work and work performed in place during the time period since Subcontractor commenced its work or since its last application for payment, whichever is later. Subcontractor agrees to furnish, as and when required by Contractor, certified payroll and affidavits, receipts, vouchers, lien waivers, releases of claims for labor, material and subcontractors performing work or furnishing materials under this Agreement, and any other documents reasonably requested by Contractor, all in form satisfactory to Contractor, and it is agreed that no payment hereunder shall be made, except at Contractor's option until and unless such documents have been furnished. In addition to the foregoing, prior to receiving any payment, Subcontractor must furnish Contractor with a valid certificate of insurance.

B. **Schedule of Values:** Subcontractor shall, as and when directed by Contractor, and in no event before submitting its first application for payment, submit to the Contractor a schedule of values of various parts of the work aggregating the total sum of this Subcontract, made out in such detail as the Subcontractor and Contractor may agree upon, or as required by the Owner, and supported by such evidence as to its correctness as the Contractor may direct. The Schedule of Values shall clearly identify the portions of the work that are attributable to each of the lower tier subcontractors and suppliers identified in Exhibit D. This schedule, when approved by the Contractor shall be used as a basis for all applications for payment, unless it is found to be in error. In applying for payment, the Subcontractor shall submit a statement based upon this schedule.

C. **Stored Materials:** If payment is requested on account of materials or equipment not incorporated in the work but delivered and suitably stored on site or off site at some other location agreed upon in writing, payment for such materials or equipment shall be made in accordance with the terms and conditions as allowed by the Contract Documents. In such cases: (1) insurance shall be provided with Contractor and Owner's names on the policy, and Subcontractor shall furnish detailed inventory, including invoices, for all such stored materials, and (2) Subcontractor shall comply with such other procedures satisfactory to the Owner and Contractor to establish the Owner's title to such materials and equipment, or otherwise to protect the Owner's and Contractor's interest including transportation to the site. If the Contract Documents do not permit payment for stored materials, then no such payment will be made.

D. **Retainage:** The rate of retainage shall be as established by Contractor's Agreement with Owner, which amount is equal to the percentage retained from the Contractor's payment by the Owner for the Subcontract Work. If the Subcontract Work is satisfactory

and the Contract Documents provide for reduction of retainage at a specified percentage of completion, the Subcontractor's retainage shall also be reduced when the Subcontract Work has attained the same percentage of completion and the Contractor's retainage for the Subcontract Work has been so reduced by the Owner.

E. Subcontractor's Payments to Lower Tier Providers: The Subcontractor shall pay for all materials, equipment and labor used in, or in connection with, the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor to verify compliance with the above requirements. Subcontractor acknowledges and agrees that its failure, after receipt of payment from Contractor, to make timely payments to its subcontractors, vendors and laborers shall constitute a material breach of this Subcontract Agreement. Contractor shall have the right to contact Subcontractor's subcontractors and suppliers to ascertain whether they are being paid by Subcontractor in accordance with this Agreement.

F. Lien Waivers: Accompanying Subcontractor's Applications for Payment, Subcontractor shall provide lien waivers in the form required by Contractor or Owner to document that all accounts pertaining to the Project have been paid in full. Subcontractor shall also provide similar lien waivers from all sub-subcontractors and vendors of any tier who are providing goods and services for the Project. If Subcontractor does not provide lien waivers in accordance with this Paragraph, or if Contractor otherwise reasonably determines that Subcontractor is not timely paying its subcontractors and suppliers, then Contractor shall have the right to issue joint checks, make payments directly to Subcontractor's subcontractors or suppliers, or to take other reasonable actions in connection with payment, in order to reasonably protect Contractor's interest. All payments made by Contractor by joint check or directly to Subcontractor's subcontractors or suppliers shall reduce the amounts due Subcontractor under this Subcontract Agreement. Contractor may assess an administrative charge of up to 5% of the value of the joint check issued and deduct same from Subcontractors account. It is agreed that no payment hereunder shall be made to Subcontractor, except at Contractor's option, until and unless lien waivers have been provided in accordance with this Paragraph.

G. Payment to Subcontractor: Provided that Subcontractor is not in breach or default or otherwise in noncompliance with the terms of this Subcontract Agreement, Contractor shall make payment to Subcontractor within ten days of receipt of like payment from Owner. Contractor may deduct from any amounts due or to become due to Subcontractor any sum or sums owed by Subcontractor to Contractor on account of defective work not remedied, claims filed, reasonable evidence indicating the probability of the filing of claims or reasonable doubt that the Subcontract can be completed for the balance of the Subcontract amount then unpaid, or the breach of any provision of the Contract Documents. Contractor may also offset any sums due Subcontractor hereunder the amount of any liquidated or unliquidated obligations of Subcontractor to Contractor, whether or not arising out of this Subcontract Agreement.

H. Grounds For Withholding Payment: Contractor may withhold or, on account of subsequently discovered evidence, nullify the whole or part of any previous payment to the extent necessary to protect Contractor from loss, including costs and actual attorneys' fees, on account of (1) defective work not remedied; (2) claims filed by lower tier subcontractors or suppliers, or reasonable evidence indicating probable filing of claim; (3) failure of Subcontractor to make payments properly to its subcontractors or suppliers or for material, labor or fringe benefits; (4) a reasonable doubt that this Subcontract Agreement can be completed for the balance then unpaid; (5) penalties assessed against Contractor or Owner for failure of Subcontractor to comply with state, federal or local laws and regulations; (5) Subcontractor's failure to comply with the immigration and control provisions of this Agreement, or (6) any other amount due from Subcontractor to Contractor or (7) any other ground for withholding payment allowed by state or federal law, or as otherwise provided in this Subcontract Agreement. When the above matters are rectified, such amounts as then due and owing shall be paid or credit to Subcontractor.

XVII. Final Payment

Contractor shall make final payment to Subcontractor after the Work is complete and accepted by Owner, or such others whose approval is required under the Contract Documents, providing like payment shall have been made by Owner to Contractor, and further providing that Subcontractor has submitted a final application for payment, and (a) Subcontractor shall have furnished Contractor with a Final Lien Waiver in the form required by Contractor, (b) that sub-subcontractors and vendors of any tier who are providing goods and services for the Project have provided a Final Lien Waiver in the form required by Contractor, (c) Final Lien Waivers in the form required by Contractor have been provided by any other sub-subcontractors and vendors as requested by Contractor, (d) Subcontractor provides Contractor with satisfactory evidence that all labor and material accounts incurred by Subcontractor in connection with the Subcontract Work have been paid in full, (e) consent of surety, if any, has been received, (f) Subcontractor has submitted, in a form acceptable to Contractor, all Guaranty/Warranty forms, Operations and Maintenance Manuals, As-Built drawings, a valid certificate of insurance, and any other close-out documents required by the Contract Documents, and (g) proof of satisfaction of all union benefit amounts due from work on this Project.

Subcontractor's acceptance of final payment shall constitute a waiver of all claims, except those expressly reserved in writing in Subcontractor's final application for payment.

XVIII. Owner's Payment to Contractor Mandatory

A. **Owner's payment to Contractor shall be a condition precedent to Contractor's obligation to pay Subcontractor and Subcontractor's right to receive payment. Subcontractor hereby acknowledges that it is assuming the risk of non-payment by the Owner. This condition precedent also applies to Contractor's obligation to pay progress payments, change orders, retainage, final payment and any other payment required by the Contract Documents. This paragraph supersedes all other provisions of this Agreement, and any conflicting language shall be modified or deemed to be consistent herewith.**

B. **This Paragraph shall be deemed to apply only in those jurisdictions in which by statute or by judicial interpretation the terms of Paragraph 1 are not enforceable. In such instance, the following provision shall apply: if Owner delays making payment to Contractor from which payment to Subcontractor is to be made, Contractor and its sureties shall have a reasonable time to make payment to Subcontractor. "Reasonable time" shall be determined according to the relevant circumstances, but in no event shall be less than the time Contractor, Contractor's sureties, and Subcontractor require to pursue to conclusion their legal remedies against Owner to obtain payment, including, but not limited to, mechanic's lien remedies.**

C. Interest: If Contractor fails to make any payment to Subcontractor as provided in the Contract Documents, then Subcontractor shall be entitled to interest on amounts not paid when due at the Prime Rate.

XIX. [Reserved]

XX. Warranty and Defective Work

Subcontractor warrants that all materials and equipment furnished and incorporated by it in the Project shall be new unless otherwise specified, of clear title, and that all work under this Subcontract will be performed in a good and workmanlike manner, shall be of good quality, free from faults and defects, and in accordance with the Contract Documents. All work not conforming to these requirements, including substitutes not properly approved and authorized, may be considered defective. The warranty contained in this section shall be in addition to and not a limitation of any other warranty or remedies provided by law or by the Contract Documents, such as warranties for manufactured or fabricated equipment as provided in the specifications for the Project.

The warranty contained in this section shall remain in effect for a period from the commencement of the Subcontractor's Work to a date one year after substantial completion of the Project; provided that, if the General Contract requires the Contractor's general warranty to be measured from some point after substantial completion of the Project, or if it provides for a longer period of guarantee, then Subcontractor shall be bound to such altered means of measurement or longer period.

If at any time during the warranty period, Contractor or Owner shall discover any aspect of Subcontractor's Work not in compliance with this warranty (the "Defect"), then written notice shall be provided to Subcontractor of the Defect, and Subcontractor shall, within twenty four hours of receipt of such notice, propose corrective actions to cure the Defect so as to meet the requirements of this Subcontract, and shall immediately proceed to cure the Defect upon written direction from Contractor to proceed.

Contractor, at its sole discretion, may direct Subcontractor in writing, and Subcontractor agrees to:

- (a) Rework, repair, remove, replace and otherwise correct any Defect at a time and in a manner acceptable to Contractor;
- (b) Cooperate with others assigned by Contractor to correct such defects and pay Contractor all actual costs reasonably incurred by Contractor in performing or in having performed corrective actions; or
- (c) Propose and negotiate in good faith an equitable reduction in the Subcontract price in lieu of corrective action.

All costs incidental to corrective actions including demolition for access, removal, disassembly, transportation, reinstallation, reconstruction, retesting and reinspections as may be necessary to correct the Defect and to demonstrate that the previously defective work conforms to the requirements of this Subcontract shall be borne by Subcontractor.

If Subcontractor fails to commence repairs required hereunder as provided above and/or fails to diligently prosecute appropriate repairs to completion, then any such repairs may be performed by others and it shall be Subcontractor's responsibility to reimburse Contractor or Owner for the costs of such repairs. Any such costs (including home office and field overhead) incurred by Contractor in responding to the circumstances associated with the defective work and in performing the appropriate repairs of Subcontractor's work, including a reasonable amount for overhead and profit on such expenses, plus actual attorneys' fees incurred, shall be the responsibility of Subcontractor. Any such costs incurred by Contractor or Owner may be offset against payments otherwise due under the Contract Documents to Subcontractor.

Subcontractor further warrants any and all corrective actions it performs against defects in design, equipment, materials and workmanship for an additional period of twelve months following acceptance by Contractor of the corrected Work, or for such longer or altered period of time as provided for in the General Contract.

Subcontractor's obligation to correct Defects as described above does not limit the enforcement of Subcontractor's other obligations with regard to this Subcontract Agreement and the Contract Documents.

In the event of an emergency affecting the safety of persons or property, Contractor may proceed as above without notice.

XXI. Subcontractor's Failure of Performance, Right to Cure, and Termination

A. Right to Adequate Assurances: When reasonable grounds for insecurity arise with respect to Subcontractor's performance, Contractor may in writing demand adequate assurance of due performance. Subcontractor's failure to provide within three (3) days of the demand such assurance of due performance as is adequate under the circumstances will constitute a default pursuant to the terms of this Section. Contractor's right to demand adequate assurances shall in no way limit Contractor's right to immediately issue a notice to cure as provided below.

B. Default And Notice To Cure: If Subcontractor fails to supply enough properly skilled workers and proper materials, or fails to properly and diligently prosecute the Work, or fails to make prompt payment to its workers, sub-subcontractors or suppliers, or becomes delinquent with respect to contributions or payments required to be made to any health and welfare, pension, vacation, apprenticeship or other employee benefit program or trust, or fails to provide adequate assurances pursuant to the terms of the preceding paragraph, or is otherwise guilty of a material breach of any provision of the Contract Documents (the "Default"), and fails within twenty-four (24) hours after receipt of written notice to commence and continue satisfactory correction of such Default with diligence and promptness, then Contractor, without prejudice to any rights or remedies, and without the need for previously having requested adequate assurances, shall have the right to any or all of the following remedies:

(1) Supply such number of workers and quantity of materials, equipment and other facilities as Contractor deems necessary to properly perform and complete Subcontractor's work, and charge the cost thereof to Subcontractor, who shall be liable for the payment of same including reasonable overhead, profit, and attorneys' fees incurred as a result of Subcontractor's failure of performance;

(2) Contract with one or more additional contractors to perform such part of Subcontractor's work as Contractor shall determine will provide the most expeditious completion of the total work and charge the cost thereof to Subcontractor;

(3) Withhold payment of any monies due Subcontractor pending corrective action to the extent required by and to the satisfaction of Contractor; and/or

(4) Declare Subcontractor in Default as provided for in the following Paragraph.

In the event of an emergency affecting the safety of persons or property, Contractor may proceed as above without notice.

C. Termination For Default: If Subcontractor fails to commence and satisfactorily continue correction of a Default within three days after receipt by Subcontractor of the notice to cure described in the preceding paragraph, then Contractor may terminate Subcontractor's right to perform under this Subcontract Agreement and use any materials, implements, equipment, appliances or tools furnished by or belong to Subcontractor to complete Subcontractor's work without any further compensation to Subcontractor for such use. If Subcontractor is declared in Default, Subcontractor shall be entitled to no further payment until the balance of Subcontractor's work has been completed. At that time, all of the costs (including home office and field overhead) incurred by Contractor in responding to the circumstances comprising the default and in performing Subcontractor's work, including a reasonable amount for overhead and profit on such expenses, plus actual attorneys' fees as provided above, shall be deducted from any monies due or to become due Subcontractor. Subcontractor and its sureties, if any, shall be liable for the payment of any amount by which such expenses may exceed the unpaid balance of the Contract Price. Termination for default shall not relieve Subcontractor of any obligations and duties that would ordinarily survive completion, including but not limited to warranty obligations and duties to indemnify and insure risks.

D. Termination for Convenience: Contractor may at any time and for any reason terminate Subcontractor's services and work at Contractor's convenience. Cancellation shall be by service of written notice to Subcontractor. Upon receipt of such notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue the work and placing of orders for materials, facilities and supplies in connection with the performance of this Subcontract Agreement, and shall, if requested, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to Contractor or, at the option of Contractor, give Contractor the right to assume those obligations directly, including all benefits to be derived therefrom. Subcontractor shall thereafter do only such work as may be necessary to preserve and protect the work already in progress and to protect material and equipment on the job site or in transit thereto.

Upon any such termination for convenience, Subcontractor shall be entitled to payment only as follows: (1) the actual cost of the work completed in conformity with this Subcontract Agreement; plus, (2) ten percent (10%) of the cost of the work completed for overhead and profit. There shall be deducted from such sums the amount of all payments Subcontractor has previously received on account of such work performed. Subcontractor shall not be entitled to any claim or claim of lien against Contractor or Owner for any additional compensation or damages in the event of such a termination for convenience and payment. Termination for convenience shall not relieve Subcontractor of any obligations and duties that would ordinarily survive completion, including but not limited to warranty obligations with respect to work installed and duties to indemnify and insure risks.

E. In the event Contractor terminates Subcontractor pursuant to Paragraph C above and it is subsequently determined in a civil action or arbitration that it was a wrongful termination or termination for default was improper, Contractor's liability to Subcontractor shall be no greater than it would be if Contractor would have terminated Subcontractor for convenience pursuant to Section D above. Moreover, the damages, if any, Subcontractor shall be entitled to shall be limited to the compensation, if any Subcontractor would be entitled to in the event of a termination for convenience in accordance with Section D above.

XXII. Consequential Damages

Subcontractor waives all claims against Contractor for consequential damages arising out of or relating to this Agreement.

XXIII. Insurance

A. Subcontractor's Insurance Generally: Before commencing the Subcontract Work, and as a condition of payment, Subcontractor shall purchase and maintain insurance that will protect it from claims arising out of its operations under this Subcontract Agreement, whether the operations are by Subcontractor, or any of its consultants or subcontractors or anyone employed by any of them, or by anyone for whose acts any of them may be liable. Subcontractor shall comply with all provisions of Appendix I.

B. Certificates of insurance showing required coverage to be in force shall be filed with Contractor prior to commencement of the Subcontract Work, and no payments shall be made to Subcontractor until such time as Subcontractor provides Contractor with a valid certificate of insurance.

C. Subcontractor shall continue to carry Completed Operations Liability Insurance for at least one year after Substantial Completion of the Project. Subcontractor shall furnish Contractor evidence of such insurance.

D. Subcontractor shall maintain in effect all insurance coverages required under this agreement at the Subcontractor's sole expense. The policies shall contain a provision that coverage will not be cancelled or not renewed until at least thirty days' prior written notice has been given to Contractor.

E. If Subcontractor fails to obtain or maintain any insurance coverage required under this Agreement, such act shall constitute an act of Default, and Contractor may invoke its termination rights as provided for in this Agreement.

F. Professional Liability Insurance: If the Subcontract Agreement requires Subcontractor to provide design services and/or to specify design and performance criteria, then Subcontractor shall maintain Professional Liability insurance, including contractual liability insurance against the liability assumed by Subcontractor in contractually agreeing to perform design services, and including coverage for any professional liability caused by any of the Subcontractor's consultants. Subcontractor shall maintain at least the limits of liability in a company satisfactory to the Contractor as provided for in the PLI schedule contained in Appendix I.

The Professional Liability Insurance shall contain prior acts coverage sufficient to cover all subcontract services rendered by the Subcontractor. Said insurance shall be continued in effect with an extended period of ten years following final payment to Subcontractor.

Subcontractor shall furnish to Contractor, before Subcontractor commences its services, a certificate evidencing the coverages required by this Paragraph. No policy shall be cancelled or modified without thirty days' prior written notice to Contractor.

G. Builder's Risk Insurance, Waiver of Subrogation: Contractor or Owner shall provide Builder's Risk insurance for the Project. Contractor and Subcontractor waive all rights against each other, the Owner and the architect and engineer, and any of their respective consultants, subcontractors, and sub-subcontractors, agents and employees, for damages caused by perils to the extent covered by the proceeds of the Builder's Risk Insurance or any property insurance provided for the Project, except such rights as they may have to the insurance proceeds, provided, however, that the waiver stated in this paragraph shall not be effective if the Owner has not agreed in the Contract Documents to a waiver of claims for damages caused by perils to the extent covered by the proceeds of the Builder's Risk Insurance. Subcontractor shall require similar waivers from its subcontractors. The policies shall provide such waivers of subrogation by endorsement or otherwise.

H. Builder's Risk Deductible: Claims under Contractor's Builder's Risk policy shall be subject to a deductible amount. If the Owner has provided the Builder's Risk policy for the Project, claims thereunder shall be subject to the deductible amount of the policy obtained by the Owner. If claim results from construction activity, the Subcontractor or subcontractor of any tier that is deemed to be responsible shall pay the deductible amount (regardless of whether Contractor or the Owner provided the Builder's Risk policy). In the case of theft of Subcontractor's materials, supplies or equipment, Subcontractor shall be responsible for same to the extent the loss is not covered by the Builder's Risk policy. Contractor shall not be responsible for loss or damage to or obtaining and/or maintaining in force insurance on temporary structures, construction equipment, tools or personal effects, owned or rented to or in the care, custody and control of Subcontractor or subcontractors of any tier.

XXIV. Indemnification

To the fullest extent permitted by law Subcontractor shall indemnify and hold harmless Contractor and Owner (and their respective officers, agents, employees, affiliates, parents and subsidiaries) from and against all claims, demands, causes of action, damages, costs, losses, liability, and expenses, including but not limited to attorneys' fees, arising out of or resulting from Subcontractor's performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property other than the Work itself, but only to the extent caused by the acts or omissions of the Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable. Subcontractor shall not be required to indemnify any party for their sole negligence or willful misconduct.

Subcontractor's indemnity obligation shall not be limited in any way by any limitation of amount or type of damages, compensation or benefits payable by or for the Subcontractor under worker's compensation acts, disability acts or other employee benefit acts. Subcontractor specifically waives any immunity provided against this indemnity by any industrial insurance or workers' compensation statute.

Subcontractor shall also indemnify and hold harmless Contractor from any and all claims, demands, causes of action, damages, costs, expenses, attorneys' fees, losses or liability of every kind and nature whatsoever arising out of or in connection with Subcontractor's operations to be performed under this Agreement, and to the extent caused by Subcontractor's breach of any of its obligations under the Contract Documents.

In such cases where this indemnity agreement applies (or where any other indemnity agreement provided for in the Contract Documents applies) Subcontractor, upon demand by Contractor, shall provide a competent defense of all claims covered by the indemnity agreement and shall remain responsible for all of the costs of defense of the claim, and for any damages awarded to the claimant by settlement, mediation, arbitration, litigation or otherwise.

XXV. Work Continuation and Payment

Subcontractor shall carry on the work and maintain the schedule of work pending resolution of any claims by dispute resolution. **Under no circumstances shall Subcontractor stop the work for any reason, except as provided for in this Paragraph.** The sole exception to Subcontractor's promise not to stop the work is the following: If Contractor fails to pay Subcontractor within ten days after Contractor has received payment from Owner for work that was properly performed and billed by Subcontractor, and for which Subcontractor has completed all requirements that entitle it to receive such payment, Subcontractor shall give Contractor seven days written notice citing the condition that gives rise to the stop work right, allowing Contractor the ability to cure such condition. If Contractor fails to cure the condition that gave rise to the stop work right within the seven day cure period, then Subcontractor shall have the right to stop the work. If Contractor thereafter makes payment, Subcontractor shall promptly recommence work. Any extra costs incurred by Subcontractor to stop the work and to remobilize its forces may be submitted to Contractor as a Change Order.

XXVI. Dispute Resolution

A. Mediation: Any Claim arising out of or related to the Agreement shall be subject, at Contractor's discretion, to mediation as a condition precedent to arbitration or the institution of legal or equitable or other binding dispute resolution proceedings by either party. Disputes that the Contractor elects not to submit to mediation shall be determined by arbitration as provided below or by litigation, in the Contractor's discretion.

B. The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be conducted in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect at the time of the mediation; provided, however, that if the Project at issue is physically located in Missouri or Illinois, then the mediation shall be conducted by and through U.S. Arbitration and Mediation Service in St. Louis. Mediation shall be completed within 45 days after written demand for mediation is served upon the other party. If mediation has not been completed in this time frame, either party may proceed to file for arbitration in accordance with this Article without further delay, and the parties shall have no further obligation to mediate their Claims.

- C. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in St. Louis. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.
- D. Arbitration: Claims which have not been resolved by mediation shall be decided, at Contractor's discretion, by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect at the time of the arbitration. The demand for arbitration shall be filed in writing with the other party to the Agreement and with the American Arbitration Association. The jurisdiction of the Arbitrator, and the arbitrability of any issue raised by the parties shall be decided by the Arbitrator. Disputes that the Contractor determines shall not be submitted to arbitration shall instead be submitted to litigation for resolution.
- E. A demand for arbitration may be made no earlier than after the mediation is concluded, or after 45 days have passed since the written demand for mediation, whichever is earlier, but in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations.
- F. An arbitration pursuant to this Article may be joined with an arbitration involving common issues of law or fact between Contractor and Owner and/or any person or entity with whom the Owner or Contractor has a contractual obligation to arbitrate disputes which does not prohibit consolidation or joinder, with the claims and disputes of Owner, Contractor, Subcontractor and other subcontractors involving a common question of fact or law to be heard by the same arbitrator(s) in a single proceeding. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to the Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.
- G. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.
- H. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.
- I. In any dispute between Contractor and Subcontract or related to this Subcontract Agreement, the prevailing party shall be entitled to recover its attorney's fees, expert fees, and costs from the non-prevailing party. Determination of which party prevailed shall be made by the arbitrator(s) (or the judge if the matter is determined by litigation). Determination of which party prevailed shall be made by reviewing the Claims resolved at arbitration (and shall not include Claims resolved prior to the taking of evidence at the arbitration hearings (or trial if the matter is being determined by litigation)), considering the quantum of the Claims being prosecuted and defended, and then determining which party achieved the greater success by quantifying the amounts awarded the party recovering damages and comparing same with the amounts that the party paying damages saved (ie the damages actually awarded versus those that were claimed).
- J. The arbitration hearings for any arbitration conducted pursuant to this Agreement shall commence within 180 days after the Demand for Arbitration is filed, and shall continue to completion on successive week days (not including Saturdays, Sundays and holidays) until the taking of evidence is completed; provided, however, that the arbitrator(s) shall have the right in their discretion to adjust the schedule of the hearings after they have commenced based upon the special needs and considerations related to the circumstances of the dispute. The arbitration shall take place in St. Louis, unless joined with an arbitration between the Owner and Contractor, in which case it shall take place in the location prescribed for in the General Contract.
- K. Nothing about these dispute resolution provisions shall prohibit Subcontractor from taking the necessary actions to perfect its mechanic's lien rights or payment bond rights. Any mechanic's liens or payment bond claims filed with a Court shall be promptly stayed pending resolution of the dispute in accordance with these dispute resolution provisions.
- L. Subcontractor shall carry on its work and maintain the schedule of work pending resolution of any disputes under these dispute resolution procedures.
- M. Notwithstanding the foregoing, in the event that a dispute arises between Contractor and Owner involving common issues of law or fact between Contractor and Subcontractor (including situations where Contractor disputes liability to the Owner, but in the alternative seeks to hold Subcontractor liable to Contractor if Contractor is deemed to be liable to Owner), and the dispute resolution provisions of the General Contract are different than the foregoing provisions, then at Contractor's option, such differing dispute resolution provisions shall be incorporated herein, and Subcontractor agrees to comply with such provisions and to participate in and be fully bound by such differing dispute resolution provisions.
- N. Notwithstanding the foregoing Paragraphs A through M of this Section XXVI, Contractor at its option may invoke the following dispute resolution provisions, to which Subcontractor agrees to be bound in lieu of the provisions stated in Paragraphs A through M above. Specifically, upon written application of Contractor, the parties agree to submit their dispute to resolution before the American

Arbitration Association (“AAA”) in accordance with the Construction Industry Mediation Rules of the AAA currently in effect at the time of the mediation, adjusted as follows: (a) Contractor will file a written demand with the AAA for mediation of the dispute, with the dispute to be heard by a mediator in St. Louis, Missouri; (b) the mediation shall be completed within 60 days after written demand for mediation is served upon the other party; (c) by no later than 14 days prior to the mediation, the parties shall serve upon the mediator and each other a written position statement, with exhibits, outlining their respective claims and defenses; (d) by no later than 3 days prior to the mediation, the parties shall serve upon the mediator and each other a written position statement in reply to that earlier filed by the other party; (e) after eight hours of actual mediation time to be conducted in a single day, if the matter is not resolved, the mediator shall immediately assume the role of an arbitrator; (f) the arbitrator shall not consider any item of evidence which was not produced by the parties in their respective statements of position nor disclosed to the other in the course of the Mediation, all as determined by the arbitrator; (g) at such time as the mediator shall become an arbitrator, each party shall promptly make one last, best and final offer and demand in writing, which shall be simultaneously submitted to the arbitrator; (h) the arbitrator shall then disclose to the parties the amounts of said last offers and demands; (i) within five days of having received said last offers and demands (but not earlier than seventy-two hours of having received said last offers and demands), the arbitrator shall issue an Award which shall adopt one and only one of said last offers or demands, without modification or amendment, and the same shall then constitute the Award. Each side shall bear its own attorneys fees, costs and expenses, including AAA fees and expenses. The Award of the arbitrator shall be final and binding, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. If the Award is issued prior to final completion of the Project, then the parties agree to sign a Change Order to reflect the Award.

XXVII Miscellaneous Provisions

A. Patents: **Subcontractor agrees to indemnify, defend and hold harmless Owner and Contractor from any claims, demands, or damages of any nature on account of the alleged use of any patented invention, article or process in connection with its work under this Agreement, either in the course of construction or after completion of the Subcontractor’s work, and Subcontractor further agrees to defend at its own expense, any suit for alleged infringements.**

B. Liens: **Subcontractor shall indemnify and hold harmless Contractor and Owner from and against any and all liens, stop payment notices, and/or payment bond claims (collectively “Liens”) arising from Subcontractor’s performance of its Work. Subcontractor shall, within ten days after receiving notice of any such Lien from Contractor, remove and/or resolve such Lien to Contractor’s satisfaction.** If Subcontractor fails to remove and/or resolve the Lien as provided above, Contractor is authorized to use whatever means in its discretion it may deem appropriate to cause the Lien to be removed and/or resolved. In such event, any costs incurred by Contractor, including the cost of payment made to remove and/or resolve the Lien, and including attorney’s fees incurred by Contractor, shall be immediately due and payable to Contractor by Subcontractor. Contractor may reduce any amounts otherwise due Subcontractor by the amount of such costs and fees incurred. This paragraph shall not be interpreted to prevent Subcontractor itself (as opposed to its laborers, lower tier subcontractors and suppliers) from filing a lien, stop payment notice, or bond claim in the event of Contractor’s default of its payment obligations.

C. Hazardous Materials: To the extent that the Contractor has rights or obligations under the General Contract or by law regarding hazardous materials as defined by the Contract Documents, with respect to any hazardous materials within the scope of the Subcontract Work, Subcontractor shall have the same rights or obligations.

D. Notices: Written notice, where required by the terms of this Subcontract Agreement, may be accomplished by personal delivery of said notice or by use of FAX or any other delivery services for which a receipt may be obtained to confirm delivery. It is specifically understood that e-mail is NOT sufficient to constitute any written notice required by this Subcontract Agreement. The written notice shall become effective upon the date received by the party to whom the notice is directed. Personal delivery is complete when the notice is delivered to the Project Executive identified in Appendix C of this Subcontract Agreement.

E. Confidentiality: To the extent that the Owner imposes any confidentiality limitations on Contractor, like confidentiality limitations are agreed to be imposed on Subcontractor.

F. Law Governing: This Subcontract shall be governed by the laws of the State where the Project is located.

G. Waiver of Breach: Waiver by Contractor of any breach hereby by Subcontractor, or Contractor’s failure to assert any right, shall not constitute a waiver of any subsequent breach of the same or any other provision hereof. Rights may only be waived if expressed in writing and signed by an officer of Contractor. If any provision of this Agreement, or any part thereof, shall at any time be held to be invalid, in whole or in part, under any applicable Federal, State, Municipal or other law, ruling or regulation, then such provision shall remain in effect to the extent permitted, and the remaining provisions hereof shall remain in full force and effect.

H. Availability Of Records, Accounts And Audit: Subcontractor shall make its books, records and project documents available to Contractor for review and inspection and/or audit in accordance with the same terms and conditions that are stated in the General Contract requiring the Contractor to make its books, records and project documents available to the Owner and/or permit the Owner

to audit the Contractor's records. It is intended that the Contractor will have the same rights in this regard against the Subcontractor as the Owner has against the Contractor.

I. Lien Waiver Forms: Lien Waiver Forms may be obtained through Contractor and shall be such as are prescribed by Contractor and/or Owner for the Project.

J. Schedule: A Project Schedule, if any, is included as Appendix G. Please note that start and end dates could change due to circumstances beyond Contractor's control, but duration of activity periods shall remain the same. Updated schedules will be distributed to the Subcontractor as required.

K. Contingent Assignment: To the extent that the Contract Documents require that Subcontractor contingently assign this Subcontract to Owner and/or Owner's Lender (such as upon an event of termination of Design-Builder), Subcontractor agrees to such assignment.

NOTICE OF INDEMNIFICATION: SUBCONTRACTOR AND CONTRACTOR HEREBY ACKNOWLEDGE AND AGREE THAT THIS SUBCONTRACT AGREEMENT CONTAINS CERTAIN INDEMNIFICATION OBLIGATIONS AND COVENANTS.

THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

- Appendix A: Drawing List
- Appendix B: Scope of Work
- Appendix C: List of Lower Tier Subcontractors and Suppliers
- Appendix D: Contractor's Safety Program
- Appendix E: Subcontractor Certification Affidavit
- Appendix G: Project Schedule
- Appendix I: Insurance Requirements

SUBCONTRACTOR:

By: _____
Title:

Date: _____

CONTRACTOR:

Kozeny-Wagner, Inc.

By: _____
Title:

Date: _____