

SUBCONTRACT AGREEMENT
05000 - 00000

This Subcontract Agreement for construction services is produced this 00 day of January 2016, by and between:

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hereinafter called "Subcontractor" and
Robert A. Bothman, Inc.
2690 Scott Boulevard
Santa Clara, CA 95050
hereinafter called the "Contractor"

in connection with the project commonly referred to as:

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SECTION 1. ENTIRE CONTRACT

The phrase "Contract Documents" is applicable to any Specified Project, - is defined to mean and include the following:
The Prime Contract, General Conditions, Supplemental Conditions and/or Special Conditions between Owner and Contractor, drawings, plan sheets, and all addenda, changes and amendments to the foregoing listed documents, this Subcontract Agreement and all Exhibits thereto; RAB Billing Procedures, the Labor Agreements listed in Section 13. Subcontractor certifies that it is fully familiar with all of the terms of the Contract Documents, the location of the job site, and the conditions under which the work is to be performed, and that it enters into this Agreement based upon its investigation of all such matters and is not relying on any opinions or representations of Contractor. This Agreement represents the entire agreement between Contractor and Subcontractor, and supersedes any prior oral or written agreements or representations. The Contract Documents are incorporated in this Agreement by reference, and Subcontractor, its subcontractors, suppliers and/or materialmen will be and are bound by the Contract Documents insofar as they relate in any way, directly or indirectly, to the work covered by this Agreement, Subcontractor agrees to be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the Contract Documents, including, but not limited to, all applicable terms and provisions thereof. 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. In the event that there is a conflict between documents, the more stringent of the documents shall apply. The Prime Contract between Owner and Contractor is available for review at the Contractor's office at 2960 Scott Boulevard, Santa Clara, CA 95050.

SECTION 2. SCOPE

Subcontract agrees to furnish all necessary labor, materials, tools, equipment, move-ins and other facilities (collectively "Work") required to complete the Work for the Project in accordance with the Contract Documents. The Work to be performed by the Subcontractor is as follows:

Exhibit "A" – attached hereto and incorporated herein by this reference, for the Subcontractors Scope of Work.

Exhibit "B" – attached hereto and incorporated herein by this reference, for the List of Contract Documents.

Exhibit "C" – attached hereto and incorporated herein by this reference, for the Insurance Requirements Checklist.

[Exhibit "D" – attached hereto and incorporated herein by this reference, for the Fingerprinting Requirements; Project Labor Agreement; etc.] IF APPLICABLE

The work to be performed by Subcontractor is not necessarily in one particular portion of the plans and specifications. Subcontractor will perform all of the work that falls within the general area of their 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. In the event of any dispute between Contractor and Subcontractor over the scope of Subcontractor's work under the Contract Documents, Subcontractor will not stop work but will prosecute the work diligently to completion, the dispute to be submitted for resolution in accordance with Section 17 below.

SECTION 3. CONTRACT PRICE

Contractor agrees to pay Subcontractor for the strict performance of its work the sum of: 0
\$0.00, or as set out in Section 29 below, subject to additions and deductions for changes in the work as may be directed in writing by Contractor, and to make payment in accordance with Section 4.

SECTION 4. PAYMENT SCHEDULE

Subcontractor agrees to follow Contractor's Billing Procedures, and apply for payment using Contractor's Payment Application. Contractor agrees to pay to Subcontractor in monthly progress payments of Ninety (90%) of labor of materials which have been placed in position, with funds received by Contractor from Owner for work performed by Subcontractor as reflected in Contractor's applications for payment. Such monthly progress payments shall be made seven (7) days after receipt of payment from the Owner by Contractor, except where a shortened period is required by law. Each progress payment shall be expressly conditioned upon Contractor's timely receipt of an accurate Conditional Waiver and Release Upon Progress Payment form. Similarly, final payment to Subcontractor shall be expressly conditioned upon Contractor's timely receipt of an accurate Conditional Waiver and Release Upon Final Payment form and shall be made seven (7) days after the entire work required by the prime contract has been fully completed in conformity with the Contract Documents and has been delivered to and accepted by Owner, Architect, and Contractor, with funds received by Contractor from Owner in final payment for work under the prime contract. Subcontractor agrees to complete, sign, and furnish insurance certificates and endorsements as set forth in Section 16, ~~certified payroll, payroll affidavits, statements of non performance, fringe benefit statement, proof of payment of fringe benefits, labor work force list of employees,~~ list of subcontractors/suppliers, releases from subcontractors/suppliers, list of signatory union forms, union status letters, ~~DAS140 with proof of transmittal to all approved apprentice training committees,~~ and all other receipts, vouchers, releases of claims for labor and material, and agrees to furnish same from its subcontractors, suppliers and/or materialmen of all tiers performing work or furnishing materials under this Agreement, all in form satisfactory to Contractor. Should Subcontractor subcontract any portion of its work under this Agreement, Subcontractor agrees to bind its lower tier subcontractors to these requirements and to furnish to Contractor all of the foregoing completed and signed documents by its lower tier subcontractors of all tiers to Contractor. It is agreed that no payment hereunder shall be made, except at Contractor's option, until and unless Subcontractor has furnished a complete and accurate Payment Application form and all of the foregoing listed documents have been furnished with complete and accurate information from Subcontractor and its lower tier subcontractors and suppliers. It is Subcontractor's exclusive responsibility to ensure compliance by its lower tier subs and suppliers. Contractor may, at its option, communicate directly with Subcontractor's lower tier subcontractors and suppliers in order to obtain complete and correct documentation; however, such communication by Contractor shall not relieve Subcontractor of its primary obligations under this Section to ensure compliance. Contractor, at its option, may make any payment due hereunder by check made payable jointly to Subcontractor and any of its subcontractors, suppliers and/or materialmen, of any tier, unions, and employees who have provided labor or furnished materials under this Agreement. Subcontractor agrees that payments made by joint check will be received by Subcontractor as a fiduciary for the secondary payee, and Subcontractor will immediately endorse and forward the check to the secondary payee. If Subcontractor disputes the right of the secondary payee to receive the funds, Subcontractor must return the check to Contractor within two (2) business days of receipt of the joint check. Should Subcontractor fail to return the check to Contractor and fail to endorse and/or forward the joint check or otherwise make payment to the secondary payee in the amount of the check within seven (7) calendar days of receipt, such action will constitute an admission that the funds are owed to the secondary payee and will constitute a material breach of Subcontractor's obligations under this Contract. Subcontractor agrees that Contractor, after giving written notice to Subcontractor, may pay a claim of a lower-tier subcontractor or employee directly in connection with this Subcontract whether or not a lien or bond claim has been filed, and deduct a corresponding amount from the Subcontract price, unless Subcontractor within five business (5) days of receipt of notice or such shorter period as Contractor finds necessary to meet its obligations to the Owner: (i) demonstrates that such sums are not due; or (ii) provides Contractor with adequate security for such amounts. Receipt of a joint check by Subcontractor shall constitute notice under this Section. Any payment made hereunder prior to completion and acceptance of the work, as referred to above, shall not be construed as evidence of acceptance or acknowledgment of completion of any part of Subcontractor's work, nor shall any payment constitute a release of Subcontractor for any liability or obligation hereunder. If Owner or other responsible party delays in making any 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 or other responsible party to obtain payment, including (but not limited to) mechanics' lien remedies.

If the Subcontractor asserts a claim which involves, in whole or in part, acts or omissions which are the responsibility of the Owner or another party, including but not limited to claims for failure to pay, an extension of time, delay damages, or extra work, Subcontractor shall present the claim to Contractor in sufficient time for Contractor to comply with any submission requirements under the Prime Contract and its failure to do so shall be a bar to the claim. All such claims shall itemize, in a form acceptable to Contractor with supporting documentation, any additional costs or time for performance being sought by Subcontractor. Contractor may present the Subcontractor's claim to the Owner or other responsible party. The Subcontractor shall cooperate fully with the Contractor in all steps taken in connection with prosecuting such claim and shall hold harmless and reimburse the Contractor for all expenses, including reasonable legal expenses, incurred by Contractor in submission of Subcontractor's claim to Owner or other responsible party. Subcontractor shall be bound by any adjudication or award in any action or proceeding such as a claim. If Contractor elects to not pursue Subcontractor's claim against Owner, and Subcontractor disputes such decision, Subcontractor may pursue its claim pursuant to the Disputes Resolution Article of this Subcontract. If, because of Subcontractor's claim, Owner withholds any sums due to Contractor, then Subcontractor shall pay to Contractor interest on the amounts so withheld at the rate of 10 percent per annum.

Contractor may deduct from any amounts due or to become due to Subcontractor any sum or sums owed by Subcontractor to Contractor in regard to this Agreement. In the event of the existence or assertion by any other party, including but not limited to Subcontractor's subcontractors or suppliers, employees, unions, Division of Apprenticeship Standards Department of Industrial Relations, Internal Revenue Service, Employment Development Division, et. al., of any claim or demand (whether in the nature of mechanic's lien, stop notice or otherwise) arising out of or relating to Subcontractor's performance hereunder, against Contractor, the Owner or the Project, Contractor shall have the right to retain out of any payments due or to become due Subcontractor pursuant to this Agreement an amount sufficient to protect and make whole Contractor from any and all loss, damage, liability or expense related thereto up to 125% of the claim amount, subject to Subcontractor's right to submit release bonds, pursuant to the Civil Code of the State of California, in which event any retained monies affected thereby shall be paid to Subcontractor.

SECTION 5. TIME

Time is of the essence of this Agreement. Subcontractor shall provide Contractor with scheduling information and a proposed schedule for performance of its work in a form acceptable to Contractor. Subcontractor shall conform to Contractor's progress schedule and all revisions or changes made thereto. Subcontractor shall prosecute its work in a prompt and diligent manner in accordance with Contractor's progress schedule without delaying or hindering Contractor's work or the work of other contractors or subcontractors. Subcontractor shall coordinate the work covered by this Agreement with that of all other contractors, subcontractors, suppliers and/or materialmen and of the Contractor, in a manner that will facilitate the efficient completion of the entire work. In the event Subcontractor fails to maintain its part of the Contractor's schedule, it shall, without additional compensation, accelerate the work as Contractor may direct until Subcontractor's work is in accordance with such schedule. Contractor shall have complete control of the premises on which the work is to be performed and shall have the right to decide the time and order in which various portions of the work shall be installed and the relative priority of the work of Subcontractor and other subcontractors, and, in general, all other matters pertaining to the timely and orderly conduct of the work of Subcontractor on the premises. Should Subcontractor be delayed in the prosecution or completion of work affecting a critical path activity by the act, neglect or default of Owner, Architect or Contractor, or should Subcontractor be delayed waiting for materials, if required by this Contract to be furnished by Owner or Contractor, or by damage caused by fire or other casualty for which Subcontractor is not responsible, or by the combined action of the workmen, in no way caused by or resulting from fault or collusion on the part of Subcontractor, or in the event of a lock-out by Contractor, then the time herein fixed for the completion of the work shall be extended the number of days that Subcontractor has thus been delayed, but no allowance or extension shall be made unless a claim therefore is presented in writing to Contractor within 48 hours of the commencement of such delay, and under no circumstances shall the time of completion be extended to a date which will prevent Contractor from completing the entire project within the time allowed Contractor by Owner for such completion.

Unless otherwise permitted in the Contract Documents, no claims for additional compensation or damages for delays, whether caused in whole or in part by any conduct on the part of Contractor, including, but not limited to, conduct amounting to a breach of this Agreement, or delays by other subcontractors or Owner, shall be recoverable from Contractor, and the above-mentioned extension of time for completion shall be the sole remedy of Subcontractor; provided, however, that in the event Contractor obtains additional compensation from Owner on account of such delays, 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 in the sole discretion of the Contractor. In the event that Contractor prosecutes a claim against Owner for additional compensation for any delay, Subcontractor shall cooperate fully with Contractor in the prosecution thereof and shall pay costs and expenses incurred in connection therewith, including reasonable attorneys' fees, to the extent that said claim is made by Contractor at the request of Subcontractor.

Subcontractor shall prepare and obtain approval as required by the Contract Documents for all shop drawings, details, samples, and do all other things necessary and incidental to the prosecution of its work in conformance with Contractor's progress schedule.

SECTION 6. CHANGES IN THE WORK

Subcontractor shall make any and all changes in the work described in the Contract Documents and this Agreement as directed by Contractor in writing, including, without limitations, additions and/or deletions to Subcontractor's scope of Work. Such change or written direction shall not invalidate this Agreement.

If necessary, the Contract Price stated in Section 3 and the time for Subcontractor's performance shall be adjusted by appropriate additions or deductions mutually agreed upon before Subcontractor performs the changed work. Subcontractor shall supply Contractor with all documentation necessary to substantiate the amount of the addition to or deduction from the price or time in a form satisfactory to Contractor, demonstrating the hourly costs for labor, materials, and equipment involved in the change along with supporting documentation. If the Contract Documents call for a particular form or format to be used in identifying the costs involved in the change, Subcontractor agrees to use such form or format. Unless the Contract Documents provide otherwise, Subcontractor shall be entitled to a maximum markup for profit and overhead of 15% on Subcontractor's actual cost of labor, 10% of Subcontractor's actual cost of materials and, for work performed by lower-tier subcontractors, Subcontractor's markup shall be a maximum of 10%. For deletions to the scope of Work, Subcontractor is not entitled to any compensation or damages including, without limitation, any lost profits or overhead with respect to the deletions of scope. If Contractor and Subcontractor cannot agree on the amount of the addition or deletion, Subcontractor shall nonetheless timely perform the work as changed by Contractor's written direction. Once Subcontractor receives Contractor's written direction, Subcontractor is solely responsible for timely performance of the work as changed by the written direction.

Payment for changed work shall be made in accordance with Section 4. Subcontractor will abide by the terms of Contractor's Billing Procedures which are incorporated by reference herein as though fully set forth. Subcontractor agrees to use Contractor's Payment Application form and that no payment for changes shall be due until Subcontractor provides the forms and format set forth above, with supporting documentation, and a change order has been issued by Contractor. Subcontractor shall not bill for unapproved changes but may list unapproved changes in the "pending" column on the Payment Application.

Subcontractor shall not make any changes to the work described in Section 2 or in any way cause or allow that work to deviate from the Contract Documents without written direction from Contractor. If Subcontractor makes any changes in the work described in Section 2 without written direction from Contractor, 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 change it makes without written direction from Contractor.

If a dispute arises between Contractor and Subcontractor about whether particular work is a change in the work described in Section 2, Subcontractor shall timely perform the disputed work. If Subcontractor intends to submit a claim for the disputed work, it shall give prompt written notice to Contractor before proceeding with the work. In addition, Subcontractor shall submit its written claim for additional compensation for that work within ten (10) days after such work is performed in sufficient detail for Contractor to make an evaluation of the merits of the claim unless a shorter time period is required by

the Prime Contract, in which case Subcontractor shall provide notification within a sufficient time to allow Contractor to provide the required notice to the Owner under the Prime Contract. Subcontractor's failure either to give the written notice before proceeding with the work or to submit the written claim as specified herein constitutes an agreement by it that it will not be paid for the disputed work.

No change, alteration, or modification to or deviation from this Agreement, the Contract Documents, prime contract, plans, or specifications, whether made in the manner provided in this section or not, shall release or exonerate, in whole or in part, any bond or any surety on any bond given in connection with this Agreement, and no notice is required to be given to such surety of any such change, alteration, modification, or deviation.

SECTION 7. DAMAGES CAUSED BY DELAYS

If Subcontractor should default in performance of the work described in Section 2 or should otherwise commit any act which causes delay to the prime contract work, Subcontractor shall be liable for all proportionate losses, costs, expenses, liabilities and damages, including consequential damages and liquidated damages, sustained by Contractor, or for which Contractor may be liable to Owner or any other party because of Subcontractor's default.

SECTION 8. BONDING OF SUBCONTRACTOR

Concurrently with the execution of this Agreement, Subcontractor shall, if required by Contractor as noted in Exhibit A, 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. Contractor shall pay the premium on said bonds unless otherwise provided herein or in the Contract Documents.

SECTION 9. STOP NOTICES, CLAIMS AND LIENS

Subcontractor acknowledges that its rights to remedies pursuant to California Mechanic's Lien law, Stop Notice and/or Design Professional Lien law (collectively referred to herein as "Lien") shall be governed, to the fullest extent permitted by law, by this clause. Subcontractor agrees that its rights to pursue a Lien shall be limited to that portion of its subcontract price which is unpaid and due under the terms of the subcontract at the time of recording a Lien claim or filing a Stop Notice. Subcontractor agrees that it shall not record Liens or file Stop Notices for sums which it may contend are due as damages by reason of delays, accelerations or other such claims, unless such sums are specifically agreed to be due to Subcontractor by written contract modification signed by all parties. Subcontractor acknowledges that a Lien recorded by it or Stop Notice filed by it may be disruptive of project finances and could have an adverse impact on the Contractor's relationships with the Owner and its other subcontractors. Therefore, Subcontractor agrees that if it records a Lien or files a Stop Notice which is not permitted by law, contains false or purposefully overstated information, or is otherwise improperly or unlawfully recorded or filed, Contractor shall be entitled to recover from Subcontractor any and all costs and/or damages arising therefrom, and Subcontractor shall further hold Contractor harmless and indemnify Contractor from all claims arising therefrom.

In case a stop notice or bond claim is filed or suit is brought on any claim or lien for labor performed or materials used on or furnished to the project, Subcontractor shall pay and satisfy any such stop notice, bond claim, lien or judgment as may be established by the decision of the court in the case of suit. Subcontractor agrees within five (5) days after written demand to cause the effect of any such stop notice, bond claim, suit or lien to be removed from the premises, and in the event Subcontractor shall fail so to do, Contractor is authorized to use whatever means in its discretion it may deem appropriate to cause said stop notice, bond claim, lien or suit to be removed or dismissed and the cost thereof, together with actual attorneys' fees, shall be immediately due and payable to Contractor by Subcontractor. Subcontractor may litigate any such stop notice, bond claim, lien or suit provided it causes the effect thereof to be removed, promptly in advance, from the premises, and shall further do such things as may be necessary to cause Owner not to withhold any monies due to Contractor from Owner by reason of such stop notices, bond claims, liens or suits.

It is understood and agreed that the full and faithful performance of this Agreement on the part of Subcontractor (including the payment of any obligations due from Subcontractor to Contractor, and any amounts due to labor or materialmen furnishing labor or material for said work) is a condition precedent to Subcontractor's right to receive payment for the work performed, and any monies paid by Contractor to Subcontractor under the terms of this Agreement shall be impressed with a trust in favor of labor and materialmen furnishing labor and material to Subcontractor on the work herein subcontracted.

SECTION 10. PROVISIONS FOR INSPECTION

Subcontractor shall at all times furnish to Contractor and its representatives 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 materialmen where materials under this Agreement may be in course of preparation, process, manufacture or treatment. Subcontractor shall furnish to Contractor as often as required by Contractor, full reports of the progress of the work at any place where materials under this Agreement may be in the course of preparation or manufacture. Such reports shall show the progress of such preparation and manufacture in such details as may be required by Contractor, including, but not limited to, any plans, drawings or diagrams in the course of preparation.

SECTION 11. MATERIALS AND WORK FURNISHED BY OTHERS

In the event the scope of work includes installation of materials or equipment furnished by others or work to be performed in areas to be constructed or prepared by others, it shall be the responsibility of Subcontractor to examine and accept, at the time of delivery or first access, the items so provided and thereupon handle, store and install the items with such skill and care as to insure a satisfactory completion of the work. Use of such items or commencement of work by Subcontractor in such areas shall be deemed to constitute acceptance thereof by Subcontractor. Loss or damage due to acts of Subcontractor shall be charged to the account of Subcontractor and deducted from monies otherwise due under this Agreement.

SECTION 12. PROTECTION OF WORK

Subcontractor shall effectually secure and protect its work done hereunder and assume full responsibility for the condition thereof until final acceptance by Architect, Owner and Contractor. Subcontractor further agrees to provide such protection as is necessary to protect the work and the workmen of Contractor, Owner and other subcontractors from its operations. Subcontractor shall be liable for any loss or damage to any work in place or to any equipment and materials on the job site caused by it or its agents, employees or guests.

SECTION 13. LABOR RELATIONS

13.1 Employment of labor by Subcontractor shall be effected under conditions which are satisfactory to Contractor. Subcontractor shall keep a representative at the job site during all times when Subcontractor's Work is in progress, and such representatives shall be authorized to represent Subcontractor as to all phases of the Work. Prior to commencement of the Work, Subcontractor shall notify Contractor who Subcontractor's representative is to be, and in the event of any change of representative, Subcontractor shall notify Contractor who the new representative is to be prior to such change becoming effective.

Subcontractor acknowledges that Contractor has entered into labor agreements covering work at its construction job sites with the following labor unions:

- Laborers International Union of North America
- International Union of Operating Engineers, AFL-CIO
- District Council of Plasters and Cement Masons of Northern California
- Carpenters 46 Northern California Counties Conference Board

Subcontractor hereby expressly agrees that all of the provisions of the applicable labor agreements are incorporated into this Subcontract as if they were set forth in their entirety. In the event Subcontractor employs any laborers, operating engineers, carpenters and/or cement masons on this project, the following provisions will apply: Subcontractor shall comply with all of the terms and conditions of those labor agreements identified above as if Subcontractor were a party to said agreements, including signatory status if required. Subcontractor agrees to pay initiation fees, dues, wages rates, observe hours, make the required trust fund payments into the respective labor trust funds, and observe all hours and all other terms of the labor agreements set forth above. Subcontractor agrees to comply with the terms and provisions of said agreements setting forth the jurisdiction and scope of work therein for resolution of jurisdictional disputes and all grievance and arbitration provisions. In the absence of any such procedure, or if such procedure fails to promptly resolve the jurisdictional dispute, Subcontractor agrees, at its own cost and expense, upon request of Contractor, to take any and all lawful steps to secure a binding and final determination of said jurisdictional dispute by the National Labor Relations Board. Subcontractor will comply with additional labor agreements with unions affiliated with the AFL-CIO but not listed herein. When the terms and conditions of the labor agreements referenced herein so require, Subcontractor shall perform its jobsite Work pursuant to all terms and conditions of an appropriate labor agreement with a union affiliated with the AFL-CIO.

Should there be picketing on Contractor's job site, and Contractor establishes a reserve gate for Subcontractor's purpose, it shall be the obligation of Subcontractor to continue the proper performance of its work without interruption or delay.

In the event Subcontractor employs any lower tier subcontractors to perform work which is claimed by the Laborers, Operating Engineers, Carpenters, and/or Cement Masons, subcontractor further promises and agrees that it will bind and require all of its subcontractors and vendors and their subcontractors of any tier and unions performing work of the type covered by any of the labor agreements specified above to agree to all of the foregoing promises and undertakings, to the same effect as herein provided with respect to Subcontractor.

13.2 Subcontractor hereby acknowledges that it is thoroughly familiar with all DBE/MBE/WBE requirements pertaining to the project. If the Subcontractor claims status as a DBE/MBE/WBE, the Subcontractor shall take all steps necessary and shall make all necessary records available to the Contractor and the Owner to assure that Subcontractor is in compliance with such requirements. In the event that any sub-subcontractor or supplier of the Subcontractor is designated as or is required to be a DBE/MBE/ WBE, Subcontractor agrees to be responsible for insuring that said sub-subcontractor or supplier meets all applicable requirements. Subcontractor acknowledges that Contractor is relying upon Subcontractor's representations regarding the validity of Subcontractor's status, if any, as a DBE/ MBE/WBE, and that misrepresentation of the status of Subcontractor or any of its sub-subcontractors or material suppliers is a material breach of this Agreement and grounds for immediate termination. In the event of termination as the result of material misrepresentation of the status of the Subcontractor as a DBE/MBE/WBE, Subcontractor shall not be entitled to any compensation not already paid.

13.3 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, Presidential Executive Orders No. 10925, 11114 and 11246, the California Fair Employment Practices Act, the Americans With Disabilities Act of 1991, and the Family and Medical Leave Act of 1993. Subcontractor shall comply with and agrees to be bound by all applicable Federal, State and local laws and regulations, including, but not limited to, all Fair Labor Standards Act provisions and California Labor Code provisions covering the Work. Upon request, Subcontractor agrees to submit certified payroll reports to Contractor no later than three (3) working days after labor has been paid.

SECTION 14. RECOURSE BY CONTRACTOR

14.1 Failure of Performance.

14.1.1 **Right to Adequate Assurance.** 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 five (5) days of the demand such assurance of due performance as is adequate under the circumstances of the particular case is a default under Section 14.1.2 of this Agreement.

- 14.1.2 Notice to Cure.** If Subcontractor at any time refuses or neglects to supply enough properly skilled workers and proper materials, or fails to properly and diligently prosecute the work covered by this Agreement, 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, fails to provide evidence of insurance satisfactory to the Contractor, or fails to provide adequate assurance pursuant to Section 14.1. 1, or is otherwise guilty of a material breach of a provision of this Agreement, and fails within forty-eight (48) 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, shall have the right to any or all of the following remedies:
- (a) supply such number of workers and quantity of materials, equipment and other facilities as Contractor deems necessary for the completion of Subcontractor's work, or any part thereof which Subcontractor has failed to complete or perform, and charge the cost thereof to Subcontractor, who shall be liable for the payment of same including reasonable overhead, profit, and actual attorneys' fees incurred as a result of Subcontractor's failure of performance;
 - (b) 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 including a fee of 15% for Contractor's administration, supervision, and overhead; and
 - (c) withhold payment of any monies due Subcontractor pending corrective action to the extent required by and to the satisfaction of Contractor.

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

- 14.1.3 Termination for Default.** If Subcontractor fails to commence and satisfactorily continue correction of a default within forty-eight (48) hours after receipt by Subcontractor of the notice issued under Section 14.1.2, then Contractor may terminate Subcontractor's right to perform under this Agreement and use any materials, implements, equipment, appliances or tools furnished by or belonging to Subcontractor to complete Subcontractor's work without any further compensation to Subcontractor for such use. Contractor also may furnish those materials and equipment, and/or employ such workers or subcontractors as Contractor deems necessary to maintain the orderly progress of the work.

In such case, 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 incurred by Contractor in performing Subcontractor's work, including a markup of fifteen percent (15%) 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 shall be liable for the payment of any amount by which such expenses may exceed the unpaid balance of the Contract Price.

- 14.1.4 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's place of business.

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 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 such termination, Subcontractor shall be entitled to payment in accordance with Section 4 only as follows: (1) the actual cost of the work completed in conformity with this Agreement; plus, (2) such other costs actually incurred by Subcontractor as are permitted by the prime contract and approved by Owner; plus (3) fifteen percent (15%) of the cost of the work referred to in item (1) above for overhead and profit. There shall be deducted from such sums as provided in this subparagraph the amount of any payments made to Subcontractor prior to the date of the termination of this Agreement. In no event shall payment due hereunder exceed the amount due for approved units of work or percentage of completion. In the event that Owner has terminated Contractor's right to perform, causing Contractor to terminate Subcontractor's right to perform, Subcontractor will be entitled to payment in accordance with the Prime Contract, which supersedes this Section in its entirety. 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 termination for convenience.

- 14.1.5 Grounds for Withholding Payment.** Contractor may withhold or, on account of subsequently discovered evidence, nullify the whole or part of any 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 or reasonable evidence indicating probable filing of claim; (3) failure of Subcontractor to make payments properly to its subcontractors, suppliers, unions, employees, etc. or for material, labor or fringe benefits; (4) a reasonable doubt that this Agreement can be completed for the balance then unpaid; (5) damage to another subcontractor; (6) penalties assessed against Contractor by Owner due to the actions and/or inactions of Subcontractor or for failure of Subcontractor to comply with state, federal or local laws and regulations; or (7) failure to comply with the administrative requirements, forms, insurance, etc. required by this Subcontract. Where Subcontractor repeatedly fails to submit complete and/or accurate documents in a timely manner, Subcontractor agrees to pay to Contractor an administrative fee of \$100 for excessive administration costs incurred by Contractor; (8) any other ground for withholding payment allowed by state or federal law, or as

otherwise provided in this Agreement. When the above matters are rectified, such amounts as then due and owing shall be paid or credited to Subcontractor.

- 14.1.6** In the event Contractor terminates Subcontractor pursuant to Section 14.1.3 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 14.1.4. Moreover, the damages, if any, Subcontractor shall be entitled to shall be limited to the compensation, if any, Contractor would be entitled to in the event of a termination for convenience in accordance with Section 14.1.4

14.2 Bankruptcy.

- 14.2.1 Termination Absent Cure.** Upon the appointment of a receiver for Subcontractor or upon Subcontractor making an assignment for the benefit of creditors, or if Subcontractor seeks protection under the Bankruptcy Code or commits any other act of insolvency, Contractor may, absent any applicable legal limitation, terminate this Agreement upon giving forty-eight (48) hours written notice, by certified mail, to Subcontractor and its surety, if any. If an order for relief is entered under the Bankruptcy Code with respect to Subcontractor, Contractor may terminate this Agreement by giving forty-eight (48) hours written notice, by certified mail, to Subcontractor, its trustee, and its surety, if any, unless Subcontractor, the surety, or the trustee:

- (a) promptly cures all defaults;
- (b) provides adequate assurance of future performance;
- (c) compensates Contractor for actual pecuniary loss resulting from such defaults; and
- (d) assumes the obligations of Subcontractor within the statutory time limits.

- 14.2.2 Interim Remedies.** If Subcontractor is not performing in accordance with the schedule of work at the time of entering an order for relief, or at any subsequent time, Contractor, while awaiting the decision of Subcontractor or its trustee to reject or to accept this Agreement and provide adequate assurance of its ability to perform hereunder, may avail itself of such remedies under this Section as are reasonably necessary to maintain the schedule of work.

Contractor may offset against any sums due or to become due Subcontractor all costs incurred in pursuing any of the remedies provided hereunder, including, but not limited to, reasonable overhead, profit and actual attorneys' fees incurred as a result of Subcontractor's non-performance. Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Contract Price.

SECTION 15. INDEMNIFICATION

- 15.1.1 Subcontractor's Performance.** With the exception that this Section 15 shall in no event be construed to require indemnification by Subcontractor to a greater extent than permitted under the public policy of the State of California, Subcontractor shall indemnify and save harmless Owner and Contractor, including their officers, agents, employees, affiliates, parents and subsidiaries, and each of them, of and from any and all claims, demands, causes of action, damages, costs, expenses, reasonable attorneys' fees, losses or liabilities, in law or in equity, of every kind and nature whatsoever ("Claims") arising out of or in connection with Subcontractor's operations to be performed under this Agreement for, but not limited to:

- (a) Personal injury, including, but not limited to, bodily injury, emotional injury, sickness or disease, or death to persons, including, but not limited to, any employees or agents of Subcontractor, Owner, Contractor, or any other subcontractor and/or damage to property of anyone (including loss of use thereof), caused or alleged to be caused in whole or in part by any act or omission of Subcontractor or anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable regardless of whether such personal injury or damage is caused by a party indemnified hereunder.
- (b) Penalties imposed on account of the violation of any law, order, citation, rule, regulation, standard, ordinance or statute, caused by the action or inaction of Subcontractor.
- (c) Infringement of any patent rights which may be brought against the Contractor or Owner arising out of Subcontractor's work.
- (d) Claims and liens (see Section 9) for labor performed or materials used or furnished to be used on job, including all incidental or consequential damages resulting to Contractor or Owner from such claims or liens.
- (e) Subcontractor's failure to fulfill the covenants set forth in each subpart of Section 13, Labor Relations.
- (f) Failure of Subcontractor to comply with the provisions of Section 16.1, Casualty Insurance.
- (g) Any violation or infraction by Subcontractor of any law, order, citation, rule, regulation, standard, ordinance or statute in any way relating to the occupational health or safety of employees, including, but not limited to, the use of Contractor's or others' equipment, hoists, elevators, or scaffolds (see Sections 16 and 20).
- (h) Economic loss or damage including, but not limited to, consequential damages, delay damages and /or liquidated damages.

The indemnification provisions of (a) through (h) above shall extend to Claims occurring after this Agreement is terminated as well as while it is in force. Such indemnity provisions apply to both direct and third party claims, regardless of any passive negligent act or omission of Owner or Contractor or their agents or employees, subject to the limitations of applicable law, including Civil Code Section 2782.05. Subcontractor, however, shall not be obligated under this Agreement to indemnify Owner or Contractor for Claims arising from the sole and/or active

negligence or willful misconduct of Owner or Contractor or their agents, employees or independent contractors who are directly responsible to Owner or Contractor, or for defects in design furnished by such persons. It is expressly acknowledged and understood by Subcontractor that the indemnity obligations specified herein shall arise and become due to owing to Contractor and Owner immediately upon receiving notice of any and all Claims; however, neither an allegation, claim, finding, opinion, declaration, decree or judgment of negligence and/or fault or liability against Subcontractor shall be a prerequisite for the accrual or triggering of said indemnity obligations.

15.1.2 Subcontractor shall:

- (a) At Subcontractor's own cost, expense and risk, defend all Claims as defined in Section 15.1.1 that may be brought or instituted by third persons, including, but not limited to, governmental agencies or employees of Subcontractor, against Contractor or Owner or their agents or employees or any of them;
- (b) Pay and satisfy any judgment or decree that may be rendered against Contractor or Owner or their agents or employees, or any of them, arising out of any such Claim; and/or
- (c) Reimburse Contractor or Owner or their agents or employees for any and all legal expense incurred by any of them in connection herewith or in enforcing the indemnity granted in this Section 15.

15.2 Risk of Loss.

All work covered by this Agreement done at the site or in preparing or delivering materials or equipment, or any or all of them, to the site shall be at the risk of Subcontractor exclusively until the completed work is accepted by Contractor.

SECTION 16. INSURANCE

16.1 Casualty Insurance. Prior to commencing work and until all obligations under this Contract are fulfilled, Subcontractor shall, at its expense, procure and maintain insurance on all of its operations, with companies acceptable to Contractor, as follows:

16.1.1 Workers' Compensation and Employer's Liability Insurance. Workers' Compensation insurance shall be provided as required by any applicable law or regulation. Employer's Liability insurance shall be provided in amounts not less than:

- \$1,000,000 each accident for bodily injury by accident
- \$1,000,000 policy limit for bodily injury by disease
- \$1,000,000 each employee for bodily injury by disease

If there is an exposure of injury to Subcontractor's employees under the U.S. Longshoreman and Harbor Workers' Compensation Act, the Jones Act or under laws, regulations or statutes applicable to maritime employees, coverage shall be included for such injuries or claims. Subcontractor, on its own behalf and on behalf of its insured and other providers of coverage, waives any all rights of recovery and right to subrogation in connection with matters to which Workers Compensation and Employer's Liability Insurance applies. Programs underwritten by any Self Insured Group require Contractor's prior written approval. If Subcontractor leases employees through an employment management, PE or other such company, evidence of insurance must be provided through an Alternate Employer/Leased Employee endorsement naming Subcontractor on the employment company's workers' compensation policy.

16.1.2 General Liability Insurance. Subcontractor shall carry primary Commercial General Liability insurance (General Liability Insurance shall be written on a form at least as broad as Insurance Services Office Form CG 00 01 or equivalent) covering all operations by or on behalf of Subcontractor providing insurance for bodily injury liability and property damage liability for the limits of liability indicated below and including but not limited to coverage for:

- (1) premises and operations
- (2) products and completed operations
- (3) contractual liability insuring tort obligations assumed by Subcontractor in this Contract
- (4) broad form property damage (including completed operations)
- (5) explosion, collapse and underground hazards (including subsidence and any other earth movement)
- (6) personal injury liability
- (7) independent contractor

The limits of liability shall be not less than the amounts required of Subcontractor under the Contract Documents, but in no event less than:

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

The general aggregate limit shall apply separately to Subcontractor's work under this Contract. For subcontracts in excess of \$250,000 an additional \$2,000,000 Excess Liability Insurance policy shall be maintained over the General Liability and Automobile Liability coverage. Such Excess coverage shall, at a minimum, include coverage for the exposures set forth in Section 16.1.2(1) – (7), above. Higher limits of liability may be required for hazardous work. Any such requirement is set forth in Section 29, Special Provisions.

In addition Subcontractor shall maintain primary and excess products liability and completed operations coverage through the expiration of the latent deficiency in construction statute of repose set forth in Section 337.1 of the California Code of Civil Procedure.

Contractor, its officers, directors and employees, and Owner shall be named as additional insured under the Commercial General Liability policy and Excess Liability Policy and such insurance afforded the additional insureds shall apply as primary insurance per ISO CG 20 01 or unmodified equivalent. Any other insurance maintained by Contractor or Owner shall not be called upon to contribute with this insurance.

Coverage for the Contractor, its officers, directors and employees and the Owner as additional insureds shall be provided by an endorsement providing coverage at least as broad as Additional Insured (Form B) endorsement form CG 2010 and CG 2037 or unmodified equivalents, as published by the Insurance Services Office (ISO). Additional insured endorsements shall be maintained and furnished to Contractor for three (3) years following completion of the Project. No deviation from this requirement will be accepted without the express written consent of Contractor.

Subcontractor shall insure that its subcontractors of every tier also carry insurance within the limits of liability specified above. Contractor may require written proof that the requisite insurance is being carried. Such written proof shall be furnished to Contractor within ten (10) days after such request has been made. Contractor may also require that the sub-subcontractor name Contractor and Owner as additional insureds. Such naming shall be provided at no cost or expense to Contractor or Owner.

Subcontractor, on its own behalf and on behalf of its insurer and other providers of coverage, waives any all rights of recovery and right to subrogation in connection with matters to which General and Excess Liability Insurance applies.

16.1.3 Professional Liability Insurance

If applicable as noted in Exhibit A, where Subcontractor's scope of work includes in whole or in part responsibility for design, engineering, surveying, or other professional services, including, without limitation, design-build with respect to mechanical, electrical, plumbing and/or fire sprinkler, Subcontractor shall, at its own expense, procure and maintain, with companies acceptable to Contractor, professional liability insurance (errors and omissions). The professional liability insurance shall have limits of liability no less than \$1,000,000, per occurrence, \$1,000,000 per aggregate, with a self-insured retention no greater than \$50,000. Such policy shall contain a vicarious liability endorsement in favor of the Contractor and Owner. Evidence of coverage in the form of a Certificate of Insurance, including applicable endorsements, shall be provided to Contractor prior to the start of Subcontractor's services, or within ten (10) days of the date the Agreement is signed, whichever is earlier.

16.1.4 Pollution Insurance

If applicable as noted in Exhibit A, Subcontractor shall maintain a policy of pollution liability insurance on an occurrence basis. The pollution liability insurance shall have limits of liability no less than \$1,000,000, per occurrence, \$1,000,000 per aggregate, with a self-insured retention no greater than \$50,000. Such policy shall contain no asbestos or mold exclusion. Subcontractor shall name Contractor and Owner as an additional insured under the pollution liability insurance policy. Evidence of coverage in the form of a Certificate of Insurance, together with applicable endorsements, shall be provided to Contractor prior to the start of Subcontractor's services, or within ten (10) days of the date the Agreement is signed, whichever is earlier. Contractor, at its sole discretion, may chose to waive this requirement in the event Subcontractor's work does not involve any risk of pollution liability. For such a waiver to be effective, it must be granted in writing and signed by the Contractor. A waiver by the Contractor of this Section 16.1.4 shall not constitute a waiver of any other section of this Subcontract.

If Subcontractor or any of its subcontractors are required to perform remedial hazardous materials operations or perform any work using or involving hazardous material, Subcontractor shall, at its own expense, procure and maintain in companies acceptable to Contractor, a Contractor's Pollution Liability policy, with limits of liability of not less than \$5,000,000 per occurrence and in the aggregate. Such policy shall contain no exclusion for asbestos removal. Contractor and Owner shall be named as additional insureds under the Contractor's Pollution liability insurance policy. Evidence of coverage in the form of a Certificate of Insurance , together with applicable endorsements, shall be provided to Contractor prior to the start of Subcontractor's services, or within ten (10) days of the date the Agreement is signed, whichever is earlier.

16.1.5 Claims Made/Self Insurance Provisions. Subcontractor shall not provide general liability insurance under any Claims Made General Liability form without the express prior written consent of Contractor. Any self- insurance program providing coverage in excess of \$25,000 per occurrence requires the prior written consent of Contractor.

16.1.6 Automobile Liability Insurance. Subcontractor shall carry automobile liability insurance, including coverage for all owned, hired and non-owned automobiles. The limits of liability shall be not less than \$1,000,000 combined single limit each accident for bodily injury and property damage. Any subcontractors subject to the Motor Carrier Act of 1980 must provide a MCS-90 endorsement with a primary limit of \$1,000,000 each accident.

16.1.7 Certificates of insurance, as evidence of the insurance required by this Contract and including the required "additional insured" endorsement(s) Form CG 2010 and CG 2037 and CG 2001 or unmodified equivalents, shall be furnished by Subcontractor to Contractor with its bid. Certificates shall set forth deductible amounts applicable to each policy and all exclusions or limitations not set forth in ISO Commercial General Liability Form CG 00 01 October 2001 version. The Contractor may allow deductible provisions if Subcontractor is willing to post security guaranteeing payment of losses and defense expenses for a period of one (1)

year after the project is completed. Standard ISO Form CG 0001 October 2001 version exclusions will also be allowed. Allowance of any additional exclusions or coverage limiting endorsements is at the discretion of the Contractor and Subcontractor's bid shall be subject to upward adjustment to compensate for the existence of such exclusions. Prior to commencement of the Work, Subcontractor shall furnish Contractor with a Certificate of Insurance and all insurance endorsements including, but not limited to, the Additional Insured Endorsement and waivers of subrogation endorsements described above.

Regardless of the allowance of exclusions, coverage limitations or deductibles by the Contractor, the Subcontractor shall be responsible for any deductible amount or any loss arising out of coverage denials by its insurance carrier(s). Subcontractor's certificates of insurance shall provide that there will be no cancellation or reduction of coverage without thirty (30) day's prior written notice to Contractor. Such thirty-day notice should be adequate to ensure replacement coverage is procured by Subcontractor.

All insurance (including, but not limited to general liability, automobile liability, and worker's compensation and employer's liability insurance) shall be provided by a California Admitted carrier with an A.M. Best's Rating of A- or better, financial capacity VIII or greater (except for State Fund of California for workers' compensation coverage).

- 16.1.8** Contractor may take such steps as are necessary to assure Subcontractor's compliance with its obligations under Section 16. Should any insurance policy lapse or be canceled during the contract period, the Subcontractor shall, prior to the effective expiration or cancellation date, furnish the Contractor with evidence of renewal or replacement of the policy. Failure to continuously satisfy insurance requirements as herein provided is a material breach of contract. In the event Subcontractor fails to maintain any part of any insurance coverage required, Contractor may, but is not required to, maintain such coverage and charge the expense to Subcontractor or may pursue its remedies under Section 14, Recourse by Contractor.
- 16.1.9** Any acceptance of insurance certificates by Contractor shall in no way limit or relieve Subcontractor of its duties and responsibilities under this Contract including the duty to indemnify and hold harmless Contractors set forth in Section 15. Indemnification.

Insurance coverage in the minimum amounts set forth herein shall not be construed to relieve the Subcontractor for liability in excess of such coverage nor shall it preclude the Contractor from taking such other actions as is available to it under any other provision of the contract or law. If higher limits or other forms of insurance are required in the Contract Documents, Subcontractor will comply with such requirements.

16.2 Property Insurance.

Waiver of Subrogation. Contractor and Subcontractor waive all rights against each other and against all other subcontractors and Owner for loss or damage to the extent reimbursed by any property or equipment insurance applicable to the work, except such rights as they may have to the proceeds of such insurance. If any applicable policies of insurance referred to in this Section require an endorsement or consent of the insurance company to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed or obtain such consent.

- 16.3** Failure of Contractor to enforce in a timely manner any of the provisions of this Section 16 shall not act as a waiver to enforce any of these provisions at a later date in the performance of this Agreement.

SECTION 17. DISPUTE RESOLUTION PROCEDURE

17.1 Preliminary Dispute Resolution Procedure and Agreement to Arbitrate

17.1.1 Disputes under Prime Contract. Any dispute resolution procedure in the prime contract shall be deemed incorporated in this Agreement, and shall apply to any disputes arising hereunder, except disputes not involving the acts, omissions or otherwise the responsibility of the Owner under the prime contract, those which have been waived by the making or acceptance of final payment, and questions regarding the licensure of the Subcontractor. Subject to compliance with all applicable laws, including but not limited to those relating to false claims, dispute and claim certifications, and cost and pricing data requirements, Contractor's sole obligation is to present any timely-filed claims by Subcontractor to Owner under such procedure and, subject to the other provisions of this Agreement, to pay to Subcontractor the proportionate part of any sums paid by the Owner to which Subcontractor is entitled.

17.1.2 Settlement Negotiations. Subject to prime contract disputes under Section 17.1. 1, and as for disputes not involving the acts, omissions or otherwise the responsibility of the Owner under the prime contract, promptly upon notification by the Subcontractor of a dispute, the Contractor and Subcontractor shall meet to informally resolve such dispute. In the event that no resolution is achieved, the parties, prior to the initiation of any action or proceeding under this section, shall make a good faith effort to resolve the dispute by negotiation between representatives with decision-making power, who, to the extent possible, shall not have had substantive involvement in the matters of the dispute, unless the parties otherwise agree. To facilitate the negotiation, the parties agree either to fashion a procedure themselves or seek the assistance of a person or organization experienced in alternative dispute resolution procedures such as mediation, minitrial or other similar procedures.

- 17.2 Arbitration Procedures.** In the event the prime contract contains an arbitration provision or for disputes not involving the acts, omissions or otherwise the responsibility of the Owner under the prime contract, the following shall apply:

17.2.1 Notice of Demand. For arbitration under the prime contract, notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and shall conform to the requirements of the arbitration provision set forth in the prime contract. For claims not involving the acts, omissions or otherwise the responsibility of the Owner under the prime contract, the parties hereto shall submit any and all disputes arising under or relating to the terms and conditions of the Subcontract to arbitration in accordance with the Construction Industry Rules of the American Arbitration Association. In either case, the demand for arbitration shall be

made within a reasonable time after written notice of the claim, dispute or other matter in question has been given, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim dispute or other matter in question would be barred by the applicable statute of limitations.

- 17.2.2 **Award.** The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.
- 17.2.3 **Work Continuation and Payment.** Unless otherwise agreed in writing, Subcontractor shall carry on the work and maintain the schedule of work pending arbitration, and, if so, Contractor shall continue to make payments in accordance with this Agreement.
- 17.2.4 **Consolidated Arbitration Proceedings.** To the extent not prohibited by their contracts with others, the claims and disputes of Owner, Contractor, Subcontractor and other subcontractors, suppliers and/or materialmen involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding. In this event, it shall be the responsibility of Subcontractor to prepare and present Contractor's case, to the extent the proceedings are related to this Agreement. Should Contractor enter into arbitration with the Owner or others regarding matters relating to this Agreement, Subcontractor shall be bound by the result of the arbitration to the same degree as the Contractor.
- 17.2.5 **No Limitation of Rights or Remedies.** This Section shall not be deemed a limitation of any rights or remedies which Subcontractor may have under any federal or state mechanics' lien laws or under any applicable labor and material payment bonds unless such rights or remedies are expressly waived by it.

SECTION 18. COMPLIANCE WITH ALL LAWS AND SAFETY PRACTICES

Subcontractor shall comply fully with all laws, orders, citations, rules, regulations standards and statutes affecting or relating to this Agreement or its performance, including but not limited to those with respect to occupational health and safety, the handling and storage of hazardous materials, accident prevention, safety equipment and practices including accident prevention and safety program of Owner and Contractor. If requested by Contractor, Subcontractor shall furnish to Contractor a copy of Subcontractor's Injury and Illness Prevention Plan and Code of Safe Practices and Job Hazard Analysis.

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

SECTION 19. NOTICE OF ACCIDENTS

- 19.1 **Immediate Notice Required.** The Subcontractor shall immediately notify Contractor of any accident or occurrence resulting in damage to property of another, or injury to the Subcontractor's employees or third party.
- 19.2 **Written Report.** The Subcontractor shall submit to Contractor a written report of the accident or occurrence on a form acceptable to Contractor. Upon request of Contractor, the Subcontractor shall furnish Contractor with a copy of any reports prepared by Subcontractor for submission to Subcontractor's insurance company or companies.
- 19.3 **Indemnification.** In the event that Subcontractor fails to comply with Section 19, Subcontractor agrees to defend, indemnify, and hold harmless Contractor for any and all claims, losses, or damages incurred as a result of the Subcontractors noncompliance.

SECTION 20. WARRANTY

Subcontractor warrants to Owner and Contractor that all material and equipment furnished shall be new unless otherwise specified and that all work under this Agreement shall be performed in a good and workmanlike manner, shall be of good quality, free from faults and defects and in conformance with the Contract Documents. All work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The warranty provided in this Section 20 shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Contract Documents.

SECTION 21. USE OF CONTRACTOR'S EQUIPMENT

In the event Subcontractor shall use Contractor's equipment, materials, labor, supplies or facilities, Subcontractor shall reimburse Contractor at a predetermined rate, except as provided in Section 14.1.2 or as otherwise stated herein. Further, Subcontractor assumes all responsibility for physical damage to such equipment, materials, labor, supplies, or facilities used by Subcontractor or its agents, employees, or permittees. In the event that Contractor's employees are used by Subcontractor, Subcontractor shall have full responsibility for all acts or omissions of Contractor's employees with regard to Subcontractor's use or employment of them. Subcontractor accepts any and all of Contractor's equipment, materials, labor, supplies or facilities as furnished.

SECTION 22. ASSIGNMENT OF CONTRACT

Subcontractor shall not, without written consent of Contractor, assign, transfer, or sublet any portion or part of the work required by this Agreement, nor assign any payment hereunder to others.

SECTION 23. INDEPENDENT CONTRACTOR

Subcontractor is an independent contractor and shall, at its sole cost and expense, and without increase in the Contract Price, comply with all laws, rules, ordinances and regulations of all governing bodies having jurisdiction over the work; obtain all necessary permits and licenses therefore, pay all

manufacturers' taxes, sales taxes, use taxes, processing taxes, and all federal and state taxes, insurance and contributions for social security and unemployment which are measured by wages, salaries, or other remunerations paid to Subcontractor's employees, whether levied under existing or subsequently enacted laws, rules or regulations. Subcontractor, upon request, shall furnish evidence satisfactory to Contractor that any or all of the foregoing obligations have been fulfilled.

SECTION 24. CLEAN-UP

Subcontractor shall at all times keep the Project site free of rubbish, debris, and waste and/or surplus materials resulting from its operations, and shall turn over the Subcontract Work in such condition as to permit the next succeeding or intervening work to be commenced without further cleaning. Subcontractor shall be responsible for picking up and removing its debris and trash resulting from its operations on a daily basis. If Subcontractor fails to comply with the provisions of this Section, Contractor shall have the right itself or through others, after giving two (2) working days prior written notice to cure to Subcontractor, to perform such cleaning and to charge the reasonable cost thereof to Subcontractor.

SECTION 25. VENUE AND ATTORNEY FEES

25.1 VENUE. Contractor and Subcontractor agree that this Subcontract is entered into in Santa Clara County, California, and in the event of any litigation or arbitration arising out of this Agreement, both parties hereto agree that Santa Clara County, State of California shall be proper jurisdiction and venue for any such dispute. Contractor, at its option, may elect jurisdiction and venue as being the County where the Project is located should that location be other than Santa Clara County.

25.2 ATTORNEY FEES. In the event the parties become involved in litigation or arbitration with each other arising out of the Agreement or other performance thereof in which the services of an attorney or other expert are reasonably required, the prevailing party shall be fully compensated for the cost of its participation in such proceedings, including the cost incurred for reasonable attorneys' fees and experts' fees. Unless judgment goes by default, the reasonable attorneys' fee incurred, regardless of the size of a judgment, it being the intention of the parties to fully compensate for reasonable attorneys' fees and experts' fees paid or incurred in good faith. In the case of a dispute under the prime contract dispute resolution provisions, Subcontractor shall be entitled to such reasonable attorneys' fees and other costs as may be provided for under the prime contract.

SECTION 26. PREVAILING WAGE – Intentionally Omitted.

SECTION 27. SUBCONTRACTOR'S EMPLOYEES AND REPRESENTATIVES:

Subcontractor shall employ labor satisfactory to Contractor. Subcontractor shall, immediately without delay, remove or cause to have removed from the project any employee or employees who are considered unsatisfactory by Contractor.

SECTION 28. STORM WATER POLLUTION PREVENTION

If applicable, Subcontractor shall prepare a Storm Water Pollution Prevention Plan (SWPPP) that contains specified information, including a description of Best Management Practices (BMPs) designed to divert off-site drainage around or through the construction project. Otherwise, while Subcontractor will not be required to prepare the SWPPP, it must comply with the project SWPPP provided by others. Only rain that falls directly on the project site is allowed to cross it. BMPs must also be designed to control erosion from the site, and to prevent a net increase of sediment load in stormwater discharges relative to natural levels.

Non-stormwater discharges are allowed only if necessary to complete the construction project and then only if the discharge does not cause or contribute to a violation of any water quality standard and is controlled by appropriate BMPs.

No discharge from the site may cause or contribute to a violation of a standard. If this happens, the discharger must revise its SWPPP to include new BMPs to solve the problem.

Subcontractor is responsible for informing its employees of this program. Fines from the State or any other government agency or entity for Pollution to Storm Water will be passed on to the subcontractor who causes this to happen.

If the subcontractor, or any of its lower-tier subcontractors, cause damage to any erosion or sediment control BMP device(s), Subcontractor agrees to bear the cost of repairing and/or replacing the device(s), as well as the costs of any and all penalties and/or fines that are assessed.

SECTION 29. SPECIAL PROVISIONS (INCLUDING UNIT PRICING, IF APPLICABLE)

29.1 Supervision. On your company letterhead, please submit the names and telephone numbers of all designated Superintendents and Foremen who will be involved on this Project. Please also include telephone numbers in the event of an emergency. Emergency telephone numbers must be available 24 hours.

29.2 Lower-Tier Subcontractors and Suppliers. If Subcontractor intends to subcontract any work to a lower-tier subcontractor, regardless of whether Subcontractor's form of agreement with the lower-tier Subcontractor is written or oral, you are required to submit on your company letterhead, the names of all lower-tiers subcontractors, addresses, telephone numbers, facsimile numbers, and respective work trade. The lower-tier subcontractor will be subject to the approval of Contractor prior to commencement of work. You are also required, prior to the commencement of work, to submit on your company letterhead, the names of all material suppliers that you intend to use on this project, including their addresses, telephone numbers and facsimile number.

In the event you receive a preliminary notice from a subcontractor or supplier you have contracted with on this Project, you are required to provide a copy of said notice to Contractor within ten (10) days of receipt.

- 29.3 Preliminary Construction Schedule.** Please submit a copy of your construction schedule for Contractor's information. Your preliminary construction schedule will be subject to Contractor's approval. This information may be used to develop our master construction schedule.
- 29.4 Material Safety Data ("MSD") Sheets.** Subcontractor is required to comply with all OSHA and Hazard Communication requirements relating to MSD Sheets. Three (3) copies of MSD Sheets shall be submitted to Contractor prior to material being delivered to the job site. Subcontractor is required to have MSD Sheets for their products and materials in Subcontractor's possession at the job site at all times.
- 29.5 Submittals, Shop Drawings and Material Samples.** In addition to any obligation under the Contract Documents, Subcontractor shall be responsible for and will prepare for the performance of Subcontractor's Work, including, without limitation, the submission of shop drawings, samples and all required submittal literature. Submittals are due within ten (10) days of the date of this Agreement. Upon completion of the Owner's review of shop drawings, samples and/or submittal literature, Contractor will return one (1) stamped copy and one (1) stamped material sample to Subcontractor. If Subcontractor needs multiple copies or samples, Subcontractor shall submit eight (8) copies of shop drawings or submittal literature and four (4) material samples. The same procedure shall be followed for any re-submittals. All shop drawings, material samples and submittal literature shall be properly identified with job name, product type, model number and certification stamp. All shop drawings, material samples and/or submittal literature must be mailed or hand-delivered to Contractor's office. Contractor will not accept or process any submittals sent by facsimile. Any exceptions to the required submittal material must be requested in writing and authorized by Contractor before they are submitted to Contractor for Owner review.

SECTION 30. AUTHORIZATION

Contractors are required by law to be licensed and regulated by the Contractors State License Board which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation.

A complaint regarding a latent act or omission pertaining to structural defects must be filed within 10 years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Registrar, Contractors State License Board, P.O. Box 26000, Sacramento, California 95826.

The person or persons signing this Agreement on behalf of Subcontractor hereby represent and warrant to Robert A. Bothman, Inc. that this Agreement is duly authorized, signed and delivered by Subcontractor.

SECTION 30.1

By their signatures executed below the parties enter into this Agreement as of the date of the last signature made. The parties agree that the terms of the Agreement have been in full force and effect since the date the Agreement was produced, as stated on page 1, or subcontractor's first day of work on the project, whichever is earlier.

Subcontractor

Name of Firm

Type of Organization:
____ Sole Proprietor ____ Partnership ____ Corporation

Signature

Printed Name

Title

Date

California Contractors License & Classification Number

Expiration Date

Federal Tax Identification Number or Social Security Number

Contractor

ROBERT A. BOTHMAN, INC.
2690 Scott Boulevard
Santa Clara, CA 95050
California Contractor's License No. 440332
A California Corporation

Brian L. Bothman / Vice President

Date

IF SIGNED BY OTHER THAN A SOLE PROPRIETOR, A GENERAL PARTNER, OR CORPORATE OFFICER, ATTACH A NOTARIZED POWER OF ATTORNEY OR CORPORATE RESOLUTION.