



KINETICS  
MECHANICAL  
SERVICE, INC.

## GENERAL CONDITIONS OF THE SUBCONTRACT

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### **ARTICLE 1.0 ACCEPTANCE OF SUBCONTRACT**

- 1.1 The Subcontract shall be deemed as accepted by Subcontractor upon its signing of the Subcontract Document or upon the timely commencement of Subcontractor's performance hereunder, the earlier of these two events shall be the Effective Date of the Subcontract.

### **ARTICLE 2.0 CORRELATIONS AND INTENT OF SUBCONTRACT DOCUMENTS**

- 2.1 It is the intent of the Subcontract to provide for everything necessary for the completion and proper execution and finishing of the Work.
- 2.2 The groupings of the Articles of this Subcontract and of the Specifications under the various headings is solely for the purpose of convenient organization and in no event shall the grouping of provisions or the use of paragraphs or headings be construed to limit or alter the meaning of any of the provisions.
- 2.3 No provision contained in the Subcontract Documents, or any breach thereof shall create or shall give to any third party any claim or right of action against KMS, Owner or Subcontractor beyond such as may legally exist in the absence of any such provisions or breach.

### **ARTICLE 3.0 SHIPMENTS OF MATERIALS**

- 3.1 Unless otherwise specified, when making or ordering shipment, Subcontractor shall not consign or have consigned in the name of KMS or Owner any Materials or Supplies. KMS or Owner will accept no deliveries of Materials or Supplies purchased by the Subcontractor and consigned to either of them.
- 3.2 It shall be Subcontractor's full responsibility to pack and ship the Material in such a manner as to ensure against damage in shipment. Unless otherwise provided in the Subcontract, all cost associated with packing and shipping of materials and supplies are included in the Subcontract price.

### **ARTICLE 4.0 RIGHT TO HAVE MATERIALS STORED OR MOVED**

- 4.1 Unless otherwise specified, Subcontractor shall receive, unload and store all Materials and Supplies delivered to the Worksite and upon failure to do so, KMS may do so at Subcontractor's expense.
- 4.2 Subcontractor's storage of Materials and Supplies upon Owner's premises shall be confined to areas authorized or approved by KMS.
- 4.3 In the event temporary placement or storage of Materials or Supplies at the Worksite makes the partial or complete occupancy by KMS or Owner difficult, or makes the work of others difficult, KMS shall have the right to require Subcontractor to move at Subcontractor's sole expense, all said Materials promptly and to designate the areas in which said Materials shall be placed.

### **ARTICLE 5.0 OWNER-FURNISHED MATERIALS**

- 5.1 If the Subcontract provides for the use of certain and specific Owner-Furnished Material, then and in that event, KMS or Owner shall deliver to the Subcontractor, for use only in connection with and under the terms of this Subcontract, the Material described in the Subcontract Documents (hereinafter referred to as "Owner-Furnished Material"), at the times and locations stated therein. If Owner-Furnished Material, suitable for its intended use, is not so delivered to the Subcontractor, then the Subcontractor, upon timely written request to KMS, may seek an equitable adjustment of any affected provision of this Subcontract pursuant to the procedures as provided for elsewhere herein.
- 5.2 Subcontractor shall be required to accept delivery when made, and handle and transport the Owner-Furnished Material to the Worksite at its own expense. All such Owner-Furnished Material will be installed or incorporated into the Work at the expense of Subcontractor, unless otherwise indicated herein. Subcontractor shall verify the quantity and condition of such Owner-Furnished Material when delivered to it, acknowledge receipt thereof in writing to KMS, and in case of damage to or shortage of such Owner-Furnished Material, Subcontractor shall immediately report in writing such damage or shortage to KMS.
- 5.3 Title to Owner-Furnished Material shall remain at all times with the Owner. Subcontractor shall maintain adequate control records of Owner-Furnished Material in accordance with sound industry practice.
- 5.4 Unless otherwise provided in this Subcontract, Subcontractor, upon delivery to it of any Owner-Furnished Material, assumes the risk of, and shall be responsible for, any loss thereof or damage thereto except for reasonable wear and tear, and except to the extent that such Owner-Furnished Material is consumed in the performance of this Subcontract.

- 5.5 Subcontractor shall maintain adequate material control records for all Owner-Furnished Materials specified to be salvaged. These records may be in accordance with the Subcontractor's system of material control, if approved by KMS. Subcontractor shall be responsible for the adequate storage and protection of all salvaged Owner-Furnished Materials and shall replace, at no cost to KMS or Owner, all salvaged Owner-Furnished Materials which are broken or damaged during salvage operations as the result of its negligence, or while in its care.

**ARTICLE 6.o CARE, CUSTODY, CONTROL AND TITLE TO GOODS AND MATERIALS**

- 6.1 Good and clear title to all Goods and Materials furnished by Subcontractor under this Subcontract shall, except as expressly provided otherwise in this Subcontract, pass to Owner upon incorporation of same into the permanent structure or payment therefore, whichever shall first occur. Subcontractor shall ensure that vendors, suppliers and subcontractors from whom it obtains Goods and Materials do not retain, encumber or reserve title to such items. In addition to all other available remedies, KMS shall be entitled to an offset under Article 34.o below for all amounts, which, in its sole discretion, it expends to obtain good and clear title to any Goods or Materials furnished by Subcontractor.
- 6.2 Notwithstanding the provisions of Article 6.1 above, the care, custody, risk of loss, and control of the Work shall remain with Subcontractor until Final Acceptance, and shall thereupon pass to Owner unless KMS notifies Subcontractor in writing that such care, custody and control is assumed by Owner at an earlier date.

**ARTICLE 7.o PERMITS AND COMPLIANCE WITH LAWS**

- 7.1 Subcontractor shall give all notices to public authorities required by law, and shall obtain and pay for all necessary permits and licenses, and renewals thereof; pertaining to the Work and warrants that each of its Subcontractors will comply with the same requirements. The entire cost of all notices, permits and licenses and renewals thereof is included in the Price.
- 7.2 Subcontractor shall comply with all Federal, State, municipal and public laws, ordinances including building codes, rules, regulations and orders pertaining to the performance of the Work, now existing or hereafter enacted or in force, whether or not required to do so by the Subcontract Documents. The entire cost of such compliance is included in the Price.
- 7.3 Subcontractor shall not under any circumstances, cause or permit, in connection with the Work, the discharge, emission or release of any hazardous substance, waste, pollutant, contaminant or other substance in violation of any applicable laws, rules or regulations which are now or hereafter promulgated by any governmental authority having jurisdiction over the Work.
- 7.4 Subcontractor shall confine its employees, agents, equipment, machinery, tools and Materials in those areas in or near the Worksite required by any law, ordinance, regulation or permit or as required by KMS in writing, or by the Subcontract Documents.
- 7.5 Subcontractor expressly warrants that all Work performed under this Subcontract shall conform to: (1) the standards and/or regulations promulgated by the U.S. Department of Labor under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, PL 91-596), latest amendment, and (2) the standards and/or regulations promulgated by the U.S. Department of Labor under the Equal Employment Opportunity Act and all executive orders and latest amendments pertaining thereto.

**ARTICLE 8.o SUBCONTRACTOR'S SUPERINTENDENT AND EMPLOYEES**

- 8.1 Subcontractor shall provide a competent level of supervision for the Work, subject to the approval of KMS, including but not limited to, a competent superintendent (or foreman) who shall possess full authority to receive instructions from KMS and to act thereon. The superintendent (or foreman) shall be deemed the representative of Subcontractor in performance of the Work, and all directions, including Field Change Orders, instructions or notices given to him by KMS shall be binding upon Subcontractor, as if such were delivered in hand to Subcontractor.
- 8.2 Subcontractor shall permit only fit and skilled persons to perform the Work. Subcontractor shall enforce strict discipline and good order among persons performing the Work. In the event KMS determines that a particular person is unfit or unskilled for the Work assigned to him, Subcontractor shall remove said person from said Work immediately upon receipt of KMS's written notice to do so.

**ARTICLE 9.0 COOPERATION AT THE WORKSITE - COORDINATION OF WORK**

- 9.1 Subcontractor (and its subcontractors, if any) shall cooperate with others and shall proceed with the Work in a manner, which does not hinder, delay, obstruct or interfere with the work of others or result in the work of others being defective.
- 9.2 Subcontractor shall afford to others reasonable opportunity at the Worksite to introduce and to store materials, tools, etc., and to perform their Work.
- 9.3 Subcontractor shall properly connect and coordinate the Work with the work of others. If any part of the Work depends for proper execution upon work performed by others, or affects work performed by others, Subcontractor shall inspect such work and report in writing to KMS any defects, which render it unsuitable for proper execution of the Work. Subcontractor's failure to inspect and report such defects shall constitute its acceptance of said defects.
- 9.4 Subcontractor shall check all measurements necessary to fit properly the Work to the work of others. The accuracy of all measurements is Subcontractor's responsibility. Work performed in accordance with inaccurate measurements shall be defective work.
- 9.5 In the event Subcontractor causes damage to the work or property of others, Subcontractor shall settle said damage claim so that progress of the Work and of the work of others is not affected thereby. Should others damage any Work, Subcontractor, at its expense, shall correct the damaged Work so as to minimize the delay in proceeding with the Work.

**ARTICLE 10.0 SUBCONTRACTOR'S DUTIES AT THE WORKMSTE**

- 10.1 Subcontractor agrees it has had an opportunity to inspect the Worksite and to become aware fully of all existing conditions at the Worksite. Subcontractor acknowledges that it has investigated and satisfied itself as to the conditions affecting the Work, including but not limited to those bearing upon transportation, disposal, handling and storage of all Goods, Materials, and Supplies, availability of labor, water, electric power, roads and uncertainties of weather, river stages, tides or similar physical conditions at the Worksite, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during prosecution of the Work. Subcontractor further acknowledges that it has satisfied itself as to the character, quality and quantity of surface and subsurface materials, obstacles or pollutants to be encountered, including all exploratory work done by others as well as from information presented by the Drawings and Specifications made a part of this Subcontract. Any failure by Subcontractor to acquaint itself with the available information will not relieve it from responsibility for successfully performing the Work. KMS assumes no responsibility for any conclusions or interpretations made by Subcontractor on the basis of the information made available by KMS. Subcontractor agrees that it shall make no claim for an increase in the Price or an extension of the Completion Date based on a lack of knowledge or unfamiliarity with the conditions at the Worksite whether such conditions existed at the time of the commencement of the Work, or thereafter, if said lack of knowledge or unfamiliarity results from Subcontractor's failure to make all necessary examinations and investigations of the Worksite and/or if said conditions reasonably should have been anticipated or could have been discovered. KMS assumes no responsibility for any understanding or representations concerning conditions made by any of its representatives prior to the execution of this Subcontract unless such understanding or representations by KMS are expressly stated in the Subcontract.

**ARTICLE 11.0 SUBCONTRACTOR'S CARE OF ITS WORK AND THE WORKSITE**

- 11.1 Subcontractor shall at all times, in accordance with the best practices and at no additional cost to KMS, preserve and protect the Work and the Goods, Material, Supplies and equipment used by Subcontractor in the execution of the Work from damage or loss due to weather, fire, theft, unexplained disappearance or other casualty.
- 11.2 Subcontractor shall at all times, in accordance with the best practices and at no additional cost to KMS, protect from damage, due to Subcontractor's operations, equipment, Goods and Materials (whether stored or installed), paving, structures, improvements, utilities, vegetation and any and all other items on the Worksite belonging to others.
- 11.3 Subcontractor shall keep the Worksite reasonably free from accumulations of dirt, debris, cartons, crates, waste materials, tools, equipment and rubbish resulting from the Work and shall remove and properly dispose of the same. KMS shall have the right at any time to require the removal of said waste and rubbish and Subcontractor shall fulfill such request immediately. If Subcontractor fails to do so, KMS may remove the same and charge to Subcontractor the cost thereof.
- 11.4 Prior to Final Acceptance, or prior to Owner's partial or complete occupancy thereof, Subcontractor shall do the following: (1) Clean completely all surfaces of the Work so that they are ready for Owner's use and occupancy without further cleaning; (2) Remove from the Worksite all temporary buildings or facilities erected by Subcontractor and all equipment,

materials, supplies, tools, etc., which are the property of Subcontractor or s supplies over which Subcontractor has care, custody and control.

- 11.5 KMS shall not be responsible for any loss suffered by Subcontractor, or damage to the Work, or to Materials, tools and equipment of any third party, and Subcontractor assumes responsibility for any such loss or damage and for any cost of repairing, making good, or replacing any such loss or damage.

#### **ARTICLE 12.0 SAFETY OF PERSONS AND PROPERTY**

- 12.1 Subcontractor shall be solely responsible for the safety and protection of persons and property from damage, death, injury or illness arising out of or in any way connected with the Work.
- 12.2 Subcontractor shall comply strictly with all applicable federal, state, local and municipal laws, ordinances, orders, rules and regulations pertaining to health or safety which are applicable to the Subcontractor or to the Work including, but not limited to, the requirements of the Occupational Safety and Health Act of 1970, and subsequent revisions, amendments and regulations promulgated and issued pursuant thereto, and Subcontractor warrants that the Goods, Materials, equipment and facilities, whether temporary or permanent, furnished by Subcontractor in connection with the performance of the Work shall comply therewith.
- 12.3 Subcontractor shall develop and submit to KMS a written Safety Program to ensure compliance with Owner's safety requirements and the other safety requirements set forth in the Subcontract Documents. Subcontractor shall be responsible for enforcing said Safety Program.
- 12.4 In the event KMS deems any part of the Work or any part of the Worksite unsafe, when requested to do so in writing by KMS, Subcontractor shall stop performance of said Work and shall take prompt corrective measures, satisfactory to KMS, prior to recommencing said Work. Subcontractor shall be solely responsible for damages, any increase in the Price, or delay in the Completion Date, arising out of KMS's request. In the event Subcontractor does not adopt such corrective measures, KMS may perform them and deduct their cost from payments due or to become due to the Subcontractor. KMS's failure to notice or to stop unsafe practices shall not relieve Subcontractor of its duties under this Article.
- 12.5 Subcontractor's continued cooperation in strict adherence with all safety requirements is mandatory and KMS will require immediate dismissal of any employee in violation of any of the safety procedures established by the Subcontract or by law.
- 12.6 Compliance with provisions of this Article by its subcontractors will be the responsibility of Subcontractor.
- 12.7 Subcontractor shall defend, indemnify and hold harmless KMS and Owner and each of its respective officers, employees and agents from and against any and all claims, actions, damages, loss or liability in any manner arising out of Subcontractor's failure to comply with this Article 12.0.

#### **ARTICLE 13.0 SUBCONTRACTS AND PURCHASE ORDERS**

- 13.1 Subcontractor shall not subcontract performance of all or any portion of the Work under this Subcontract without first notifying KMS of the intended subcontracting and obtaining KMS's written approval of the subcontracting and the subcontractor.
- 13.2 Subcontractor guarantees that its subcontractors will comply fully with the terms of this Subcontract applicable to the portion of the Work performed by them. If any portion of the work, which has been subcontracted by Subcontractor, is not performed in accordance with this Subcontract, on request of KMS, the subcontractor shall be replaced at no additional cost to KMS and shall not be employed again on the Work.
- 13.3 KMS shall have the right from time to time to contact Subcontractor's subcontractors to discuss their progress.

#### **ARTICLE 14.0 SEPARATE CONTRACTS**

- 14.1 The Owner and KMS reserve the right to let contracts for other work upon the Site or Project of which the Work of the Subcontractor is a part. No Subcontractor has exclusive use of any area or areas on the site. The Subcontractor shall afford other subcontractors reasonable opportunity for the introduction and storage of their materials and for the execution of their work, and the Subcontractor shall properly connect and coordinate its work with theirs so that there will be no interference or delay in any manner with the Work of the Owner, KMS or of other subcontractors or with the construction schedule.

**ARTICLE 15.o WORK IN HARMONY**

- 15.1 Subcontractor agrees that all labor employed by it, its agents and/or subcontractors for Work at the Site shall be in harmony with and be compatible with all labor used by others. Subcontractor shall become familiar with local conditions and practices so as not to encounter work interference and/or disruption of work at the project Worksite. Any delays and/or costs incurred due to such failure are the sole responsibility of the Subcontractor.

**ARTICLE 16.o INSPECTION OF WORK-TESTS**

- 16.1 Subcontractor shall inspect all Goods and Materials that are to be incorporated in the Work. In addition, Subcontractor shall conduct a continuous program of quality control for all Work.
- 16.2 KMS and its representatives, and others as may be required by applicable laws, ordinances and regulations, shall have the right at all reasonable times to inspect the Work and all Goods and Materials for the Work at the Worksite and at Subcontractor's and its suppliers' or subcontractors' shops for conformance with the Subcontract. Subcontractor shall provide, or cause to be provided, access and sufficient, safe and proper facilities for such inspections. Neither the failure to make such inspection or to discover defective workmanship, Goods and Materials, nor approval of or payment to Subcontractor for such Work, Goods and Materials shall prejudice the rights of KMS.

**ARTICLE 17.o GUARANTEES AND WARRANTIES**

- 17.1 Subcontractor guarantees and warrants to KMS, Architect/Engineer and Owner that the Work shall comply strictly with the provisions of this Subcontract and all specifications and drawings referred to in this Subcontract or thereafter furnished by KMS; that the Work shall be first-class in every particular and shall be executed in a workmanlike, safe and substantial manner; and that the Work shall be free from defects in materials, workmanship and in any design or engineering furnished by Subcontractor. Subcontractor guarantees and warrants to Subcontractor that all Goods, Materials, Supplies and equipment furnished by Subcontractor for the Work shall be new, merchantable, of the most suitable grade and fit for their intended purposes. Subcontractor further guarantees and warrants to KMS and Owner that Subcontractor has good title, free and clear of all liens, claims, security interests or encumbrances, to all Goods and Materials furnished under this Subcontract for the Work.
- 17.2 Any guarantee or warranty obtained by Subcontractor from any manufacturer shall be deemed to have been obtained for the benefit of KMS and Owner. This guarantee or warranty shall be in addition to all other guarantees, warranties and remedies express or implied, under the law. Subcontractor shall obtain and turn over to KMS upon installation of any such Goods or Materials, all manuals and documentation necessary to give effect to these obligations.
- 17.3 Without limitation of any other rights or remedies of KMS, if any defect in the Work arises within eighteen (18) months after the date of Final Payment pursuant to Article 32.o, Subcontractor shall, upon the receipt of written notice of such defect, promptly correct at no cost to KMS, Architect/Engineer or Owner such defect and cause the Work to comply fully with the foregoing guarantees and warranties. In addition, Subcontractor shall be liable for all costs and expenses in connection with the correction of any other work damaged by such defect, which may be damaged in correcting such defect, or which may be damaged in uncovering such defect.

**ARTICLE 18.o SCHEDULING AND OVERTIME**

- 18.1 Within one (1) week after the effective date of this Subcontract or prior to commencing the Work, whichever first occurs, Subcontractor shall submit to KMS for approval a written progress schedule showing the sequence in which Subcontractor proposes to perform the Work, the start and completion dates of all separable portions of the Work, manpower forecasts, Materials procurement and delivery plans and any other information specified by KMS. Subcontractor agrees to adhere to the schedule approved by KMS.
- 18.2 During the performance of the Work, Subcontractor shall submit to KMS periodic progress reports on the actual progress and updated schedules as may be required by this Subcontract or requested by KMS. In the event Subcontractor's performance of the Work is not in compliance with the schedule established for such performance, KMS may, in writing, require the Subcontractor to submit its plan for schedule recovery, or specify in writing the steps to be taken to achieve compliance with such schedule, and/or exercise any other remedies under this Subcontract. Subcontractor shall thereupon take such steps as may be necessary to improve its progress without additional cost to KMS.
- 18.3 Costs incurred due to Overtime work, whether scheduled or incidental shall be the Subcontractor's sole responsibility unless the compensation therefore is specifically authorized in writing by KMS. In the event KMS approves compensation of Subcontractor's overtime in advance, such compensation as separately authorized shall be limited to the actual cost to Subcontractor of the premium portion only of all applicable wages, craft fringe benefits, and payroll burdens imposed by

any governmental authority and measured by the compensation payable to employees. To establish the amount of payment, Subcontractor shall comply with the procedures established in Article 25.o below.

#### **ARTICLE 19.o CLAIMS FOR EXTRAS**

- 19.1 No claim by the Subcontractor that any instructions, by Drawings or otherwise, constitute a change in the Work for which there should be an addition to the Price of the Subcontract, shall be valid unless made in writing to the KMS within seven (7) days after receiving such instructions. Failure to do so shall constitute a waiver of such claim. If such claim is approved, the procedures shall then be as provided for in Article 25.o. If such claim is not approved, the Subcontractor shall proceed to execute the Work in accordance with such instructions.

#### **ARTICLE 20.o DELAYS**

- 20.1 Subcontractor agrees to perform all its duties and obligations required by the Subcontract Documents so that others will not be delayed, obstructed or hindered. Where KMS's approval is required before Subcontractor may proceed with performance, Subcontractor shall request such approval sufficiently in advance of the performance date so that KMS's approval will not delay performance of the Work and will not delay the progress of the project, including the work of others. The need to obtain KMS's approval of minor field changes shall not form the basis of a claim for delay by Subcontractor. Subcontractor's time of performance of this Subcontract is of the essence.
- 20.2 Subcontractor shall not be responsible for delays caused by Force Majeure. Failure to obtain labor, materials or equipment shall not be considered a Force Majeure delay, as defined in Article 21.o, unless directly caused by reason of Force Majeure.
- 20.3 In the event Subcontractor is delayed, obstructed or hindered in the prosecution or completion of the Work by KMS, Architect/Engineer and/or Owner (not permitted by the Subcontract Documents or by law), or by any other subcontractor or by any subcontractor or materialmen not hired by Subcontractor, and without the fault of Subcontractor, then, except as provided in Article 28.o, the time for completion shall be extended for a period equal to the period of time lost, as determined by KMS. No extension shall be granted unless a claim therefore is presented in writing to KMS within seven (7) days after the start of such delay.
- 20.4 Subcontractor hereby releases KMS, its affiliates, shareholders, employees and agents from any claim for damages, whether direct, incidental, contingent, special, or consequential, for loss of profits, and for additional or extra compensation or costs on account of any delay, due to Force Majeure or any cause whatsoever. Subcontractor agrees that its sole right and remedy in the case of any delay, whether or not described in this Article 20.o, not the fault of Subcontractor or its subcontractors or materialmen, shall be an extension of the Completion Date; provided, however, Subcontractor shall not be entitled to an extension of the Completion Date in the event KMS terminates the Subcontract pursuant to Article 28.o. This provision shall not be construed to prohibit Subcontractor from seeking recovery for damages from any other subcontractor.
- 20.5 Subcontractor shall be responsible for all damages, whether direct, incidental, contingent, special, consequential or liquidated, for loss of profits and for additional extra compensation or costs asserted against KMS and arising from any delay of Subcontractor not otherwise excused under this Article 20.o. The indemnity provisions of Article 29.o are applicable to such damages and to claims arising in respect thereto.

#### **ARTICLE 21.o FORCE MAJEURE**

- 21.1 The term "Force Majeure" shall mean an act of God, an act or omission of government, act or omission of civil or military authority, act of a public enemy, war, blockade, insurrection, riot, epidemic, landslide, earthquake, fire, storm, lightning, flood, washout, or civil disturbance, which in each case, could not have been avoided through the exercise of reasonable care, prudence and diligence. A labor dispute or strike involving the employees or agents of the Subcontractor or any of the Subcontractor's subcontractors is explicitly not included within the meaning of the Force Majeure clause herein and any delay caused as a result shall be unexcused.
- 21.2 In the event either party to this Subcontract, by reason of a Force Majeure, is rendered unable to perform its respective duties under the Subcontract, then upon said party giving written notice, detailed information, and estimated duration of said Force Majeure to the other party within seven (7) days after occurrence of said Force Majeure, its time for performance shall be extended for a period equal to the time performance is delayed by said Force Majeure. The effects of said Force Majeure shall, so far as possible, be remedied with all reasonable dispatch, and said party giving notice shall use its best efforts to eliminate and mitigate the consequence thereof. A Force Majeure for which said notice has not been given shall be an unexcused delay.

**ARTICLE 22.0 DISPUTES**

22.1 Any controversy or claim (except any claim for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, and except any claim for damages because of damage to or destruction of property) arising out of, or relating to the Subcontract or its breach, which may arise between the parties hereto and which is not resolved by the authorized representatives of the parties, shall be noticed in writing by the complaining party as provided in Article VIII of the Signature Document. Such controversy or claims shall not cause the Subcontractor to interrupt the progress of Work and the Subcontractor shall proceed to execute the Work in accordance with KMS's instructions. Such controversy or claim shall subsequently be reviewed and discussed between Subcontractor and the KMS as a condition precedent to any litigation.

**ARTICLE 23.0 OWNER'S RIGHT TO OCCUPY**

23.1 KMS and/or Owner shall have the right to take possession or occupy any portion of the Work and the Worksite at any time. The exercise of said right and any occupancy resulting therefrom shall not constitute partial or Final Acceptance of the Work.

**ARTICLE 24.0 FINAL ACCEPTANCE**

24.1 When Subcontractor has determined that the Work is completed, Subcontractor shall provide written notice to KMS that the Work is ready for inspection and Final Acceptance. Within five (5) days after receipt of such notice, KMS and Owner will either (i) verify that all conditions of the Subcontract have been met and will execute a Final Acceptance statement; or (ii) advise Subcontractor in writing of any defects, deficiencies and/or discrepancies of which KMS and Owner then have knowledge. Subcontractor shall then perform corrective measures to remove such defects, deficiencies and/or discrepancies and shall again provide notice to KMS that the Work is deemed ready for inspection and Final Acceptance.

**ARTICLE 25.0 RIGHT TO CHANGE SCOPE OF THE WORK**

25.1 KMS unilaterally may require Subcontractor to perform Extra Work or Changed Work by written amendment or written directive without invalidating any provisions of this Subcontract. Except for changes in the Price and/or Completion Date, all provisions of the Subcontract shall apply to Extra Work and Changed Work.

25.2 Extra Work, Changed Work and any modification to the Subcontract Documents are legally enforceable only by use of a written amendment prepared and executed by an authorized designee of KMS. No change in the Price or the Completion Date shall be made for Extra Work and Changed Work not authorized by a written amendment or directive.

**ARTICLE 26.0 RIGHT TO SUSPEND PERFORMANCE OF THE WORK**

26.1 KMS shall have the right to require Subcontractor at any time to suspend performance of all or part of the Work upon providing written notice of it to Subcontractor. Subcontractor shall immediately cease performance of the Work, and shall take all measures necessary to mitigate the cost of the suspension. Subcontractor agrees to recommence performance of the suspended Work immediately after receiving KMS's notice to recommence the suspended Work. KMS's liability to Subcontractor hereunder is limited to the extent of KMS's recovery on Subcontractor's behalf under the Prime Contract with Owner.

**ARTICLE 27.0 TERMINATION FOR DEFAULT**

27.1 In the event that Subcontractor, at any time, fails or refuses to perform any part of the Work or fails to perform any obligation or duty required by the Subcontract Documents, strictly in accordance with the Subcontract and to KMS's reasonable satisfaction, or makes a general assignment for the benefit of creditors, or becomes insolvent, or if a receiver is appointed for Subcontractor or its assets, or if reorganization or arrangement proceedings by or against Subcontractor are approved by a court, then Subcontractor shall be in default hereunder, and KMS after two (2) days written notice to Subcontractor, may terminate all or any part of this Subcontract and all rights and duties hereunder, except for those certain rights and duties that will survive said termination as set forth in Article 42.0 and may do all things necessary, including using Subcontractor's tools, and materials at the Worksite, to complete the Work. In the event of such termination, Subcontractor shall not be entitled to receive any further payment until the Work is completed. Upon completion and Final Acceptance, the cost of completing the Work shall be deducted from any unpaid portion of the Subcontract Price. If the unpaid portion of the Price exceeds the expense incurred by KMS in completing the Work, such excess shall be paid by KMS to Subcontractor; but if such expense exceeds such unpaid balance, the Subcontractor shall pay the difference to KMS.

27.2 Subcontractor shall, upon direction of KMS, protect and preserve property in its possession in which KMS or Owner has an interest. Payment for completed Materials or Supplies delivered to and accepted by KMS and payment for the protection and preservation of property shall be in an amount agreed upon by KMS and Subcontractor. KMS may withhold from

amounts otherwise due Subcontractor for such completed Supplies or Materials such sum as KMS determines to be necessary to protect KMS or Owner against loss because of liens, claims of liens or rights of lien.

- 27.3 Upon termination in the manner specified in 27.1 above, KMS reserves the right to procure Materials, Supplies and services similar to those so terminated and further reserves the right to hold Subcontractor liable to KMS for excess costs for such similar Materials, Supplies, and services. Subcontractor shall continue the performance of this Subcontract to the extent not terminated under the provisions of this Article.
- 27.4 In the event a court finds that Subcontractor was not in default at the time of KMS termination, then said termination will be deemed to have been made pursuant to Article 28.0.
- 27.5 The rights and remedies of KMS as provided in this Article 27.0 are in addition to any other rights and remedies provided by law or under this Subcontract.

#### **ARTICLE 28.0 TERMINATION FOR CONVENIENCE**

- 28.1 KMS shall have the right at any time, with or without cause, to terminate this Subcontract, in whole or in part, upon three (3) days written notice to Subcontractor. On the date of such termination stated in said notice, Subcontractor shall stop performance of the Work. Subcontractor shall preserve and protect the tools, construction equipment and facilities at the Site; Subcontractor's materials, supplies, equipment, tools and appliances purchased for or committed to the Work (whether delivered to the Site or on order); and Work in progress or completed Work (whether at the Site or other locations); and if requested by KMS, Subcontractor shall turn over same to KMS or Owner, including title to said Supplies, Materials and equipment or dispose of same in accordance with KMS's instructions.
- 28.2 Upon receipt of said notice, Subcontractor shall place no further orders or subcontracts in connection with the Work, except as may be necessary for completion of such portion of the Work as is not terminated. Subcontractor shall promptly make every reasonable effort to procure cancellation, upon terms satisfactory to KMS, of all orders and subcontracts to the extent they relate to the performance of Work terminated; or shall take such other action relative to such orders or subcontracts as may be directed by KMS.
- 28.3 KMS shall pay to Subcontractor for Work performed prior to the effective date of such termination an amount equal to that percentage of the Price that the Work completed prior to the effective date of termination bears to the total Work plus reasonable costs incurred for demobilization; provided that the performance for which payment is to be made is strictly in accordance with the Subcontract Documents and to KMS's and Owner's satisfaction. There shall be deducted from the amount determined above, all payments previously made by KMS and all amounts which KMS is entitled to charge Subcontractor under the Subcontract Documents. In no event shall the amount to be paid plus all amounts previously paid, plus all amounts that KMS is entitled to charge Subcontractor, exceed the Price, as adjusted. The payments set forth herein shall be Subcontractor's sole remedy upon termination for convenience.
- 28.4 All requests for compensation under this Article shall be submitted to KMS in accordance with the provisions of Article 25.0. In no event shall KMS be entitled to any prospective profits or any damages of any type.
- 28.5 As set forth in Article 42.0, the provisions of this Article 28.0 shall survive termination of the Subcontract and shall remain in full force and effect after such termination.

#### **ARTICLE 29.0 INDEMNIFICATION**

- 29.1 Subcontractor agrees, to the fullest extent permitted by applicable law, to defend, indemnify and hold harmless KMS, Architect/Engineer and Owner, and all of their respective directors, officers, employees, agents and representatives ("Indemnified Party") from and against all claims, losses, loss of use, damages, attorney's fees, incidental and consequential damages, actions, causes of action, liability, demands, judgments, costs and expenses:
- 29.1.1 Arising by reason of claims from any party, including third parties, Subcontractor's subcontractors and the employees of Subcontractor, KMS, or any governmental body for any actual or asserted failure of Subcontractor to comply with this Subcontract or with any law, ordinance, regulation, rule, or order of any governmental or quasigovernmental body, having jurisdiction over this Subcontract, including but not limited to actual or asserted failure of Subcontractor to pay taxes;
- 29.1.2 Arising from actual or asserted infringement or improper appropriation or use by KMS or Subcontractor of trade secrets, proprietary information, know-how, copyright rights (both statutory and nonstatutory) or patented or unpatented inventions, or for actual or alleged unauthorized limitation of the work

of others, arising out of the use or sale of materials, equipment, methods, processes, designs, information, or other things (including construction methods, construction equipment, and temporary construction facilities) furnished by Subcontractor or its subcontractors, or suppliers in or for performance of the Work;

29.1.3 Arising directly or indirectly out of this Subcontract, including those arising from the Work and/or the acts or omissions to act of Subcontractor or its subcontractors, suppliers or agents or the employees of any thereof, in the performance of the Work, including the use or operation by Subcontractor and its sub-subcontractors of construction equipment, tools, scaffolding, or facilities furnished to Subcontractor by KMS to perform the Work and including any claim for breach of any warranty in connection with the Work as set forth in the Subcontract Documents; and

29.1.4 Arising out of, related to or based upon the actual, alleged or threatened discharge, dispersal, release, explosion or escape of Pollutants and/or any directions to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants arising directly or indirectly out of the Work, including the acts or omissions of Subcontractor or its subcontractors or suppliers in the performance of the Work. As used herein, "Pollutants" shall mean any kind of solid, liquid, gaseous, or thermal irritant, contaminant or explosive, including asbestos, smoke, vapor, soot, fumes, acids or alkalis, chemicals and waste, as well as hazardous waste as defined in the Resource Conservation and Recovery Act of 1976 and hazardous substances as defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as each may be amended from time to time.

29.2 Subcontractor's indemnification obligations under this Article 29.0 shall not be limited in any way by: (i) any statutory immunity or other limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or any subcontractor under Worker's Compensation acts, disability benefit acts or other employee benefit acts; or (ii) any alleged active or passive negligence or participation in the wrong or any alleged breach of any statutory duty or obligation on the part of any Indemnified Party.

29.3 An Indemnified Party shall have the right to select counsel and control any claims, actions or litigation arising hereunder.

29.4 In jurisdictions that require separate consideration for contractual indemnification provisions and when such a requirement is applicable to this contract, Subcontractor warrants that additional compensation, in an amount sufficient to meet the relevant jurisdiction's minimum consideration requirements, has been included in the contract price for the express purpose of compensating the Subcontractor for the above indemnification.

#### **ARTICLE 30.0 INSURANCE**

30.1 Without limiting the liability and indemnification obligations of Subcontractor under this Subcontract, Subcontractor shall purchase and maintain in force for the duration of the Subcontract and all applicable warranty periods, the insurance coverages set forth in the "Subcontractor Insurance Requirements" attached hereto. Subcontractor shall cause each of its subcontractors to purchase and maintain the insurance coverages set forth in said document.

30.2 The insurance required under this Article 30.0 shall include contractual liability insurance applicable to Subcontractor's obligations under Article 29.0.

#### **ARTICLE 31.0 BONDS**

31.1 Subcontractor shall furnish Performance and Payment Bonds, if required by KMS, each in an amount at least equal to the Subcontract Price as security for the faithful performance and payment of its obligations under this Subcontract and it shall not be a violation of the terms of the bonds to order changes in the Work. These bonds shall be provided at the time this Subcontract is executed and in any event prior to commencing the Work. These bonds shall remain in effect at least until the later of one year after the date when final payment becomes due or Subcontractor completes its warranty obligations hereunder, except as otherwise provided by law, regulation, or by the Subcontract. In addition, at any time during the performance of the Work, KMS may require the Subcontractor to provide Payment and Performance Bonds. All bonds shall be in the forms prescribed by law, regulation, or by the Subcontract Documents and shall be executed by such sureties as are acceptable to KMS and Owner and are licensed to do business in the state where the Worksite is located. All bonds signed by an agent must be accompanied by a certified and current copy of its authority to act.

31.2 If the Surety on any bond furnished by Subcontractor is declared bankrupt, becomes insolvent, is terminated from its right to do business in any state where any part of the Project is located, or ceases to meet the requirements of Paragraph 31.1, Subcontractor shall substitute another bond and surety, both of which must be acceptable to KMS and Owner, within five

(5) days of such event. Failure to provide an acceptable substitute bond and surety shall be grounds for Termination for Default.

31.3 Any bond obtained by Subcontractor to meet its obligations hereunder shall contain a provision from the Surety that, upon being notified that Subcontractor has been terminated for default, the Surety shall not delay the Work or the Project but shall provide for performance of the Work as though termination for default had not occurred.

#### **ARTICLE 32.0 PAYMENTS**

32.1 Within ten (10) days after the effective date of this Subcontract, Subcontractor shall submit to KMS for approval a detailed Schedule of Values in accordance with KMS's job order numbers established for the Work, and on which Subcontractor's Applications for Payment shall be based. KMS's approval of the Schedule of Values is a condition precedent to the submittal of any Application for Payment.

32.2 The Subcontract Price shall be paid as follows: The fifteenth (15th) day of each month Subcontractor shall submit to KMS a written request for Progress Payment containing an estimate of the percent of all Work performed during the preceding month and a job order breakdown of the preceding month's costs.

Within thirty (30) days after receipt of its payment from Owner, KMS shall pay to Subcontractor an amount (Progress Payment) equal to ninety percent (90%) of that percentage of the Subcontract Price that the Work completed during the preceding month bears to the total Work. The final ten percent (10 %) (Final Payment) shall be paid within thirty (30) days after the obligations under the Subcontract have been satisfied, Final Acceptance has been granted, KMS has received a completed Release of Liens and Claims form, and if required by KMS, after receipt of completed lien waivers signed by Subcontractor and its subcontractors and materialmen, and KMS has received its payment from the Owner.

32.3 The Subcontract Price shall be subject to increase or decrease solely as provided in Article 25.0.

32.4 Subcontractor agrees to defend, indemnify and hold harmless KMS and Owner from and against liability for and the payment of all sums and items included within the Subcontract Price, including but not limited to the following:

32.4.1 All contributions, taxes and premiums required by law measured by the payroll of persons performing the Work; and

32.4.2 All sales, use or other taxes assessed against KMS, Owner, Subcontractor or its subcontractors arising out of the Work, including, but not limited to taxes on any kind of building materials, supplies or equipment furnished by Subcontractor.

32.5 The disbursement of any Progress Payment by KMS shall not constitute Final Acceptance of the Work, and shall not constitute a waiver by KMS or Owner of any of its rights under the Subcontract Documents.

32.6 Subcontractor's acceptance of all or part of the Final Payment shall operate as a release of KMS and Owner from any and all claims and liability to Subcontractor for any act or omission of KMS or Owner relating to the Work and for anything KMS or Owner performed or furnished or failed to perform or furnish to Subcontractor under the Subcontract Documents.

32.7 KMS shall have the right to withhold any Progress Payment if for any reason the Subcontractor has failed, or there is reasonable cause to believe that Subcontractor is, unable to fulfill its obligations under this Subcontract.

32.8 Payment by Owner to KMS for the Work is a condition precedent to payment by KMS to Subcontractor. Subcontractor shall be entitled to payment only for that portion of the Work for which KMS has been paid by Owner.

#### **ARTICLE 33.0 LIENS**

33.1 To the fullest extent permitted by applicable law, Subcontractor, for itself, its subcontractors, employees and servants hereby waives and releases any and all rights of mechanic's liens and similar rights for payment in connection with the Work ("liens"). Subcontractor agrees to execute and to obtain from its subcontractors such documentation as is required by Owner or KMS in connection with the above documents, including but not limited to complete or partial waivers and releases of liens, to the extent and in such form as may be designated by Owner or KMS.

33.2 Subcontractor shall at all times promptly pay all of its subcontractors, employees and servants in connection with the Work and shall, at its sole cost and expense, keep Owner's premises and all property belonging to Owner or KMS free and clear of any and all of the liens and rights of lien referred to in Article 33.1 above.

33.3 Subcontractor shall defend, indemnify and hold harmless KMS and Owner from and against all liens, claims, rights of lien and actions thereon, including all damages, expenses, costs and attorney's fees associated therewith asserted by

Subcontractor, its subcontractors, employees and servants, which arise in connection with the Work. Within five (5) days after receipt of notice from KMS or Owner of the existence of a lien or claim of lien pursuant to this Article 33.0, Subcontractor shall cause the same to be satisfied, released and removed of record, at Subcontractor's sole cost and expense. Notwithstanding anything to the contrary herein, KMS and Owner reserve the right to deal directly with any of Subcontractor's subcontractors, their respective employees and servants and at Subcontractor's sole expense, may settle, satisfy or litigate any and all liens, claims, rights of lien and actions thereon.

33.4 If Subcontractor fails to satisfy, release and remove of record any lien, claim of lien or rights of lien as provided in Article 33.3 above, KMS may, notwithstanding Subcontractor's defense thereto and without liability to KMS, retain out of any payment due to or become due to Subcontractor thereafter, an amount equal to KMS and Owner's total payments by reason of any such lien, claim of lien or rights of lien, including all attorney's fees and other expenses, as well as the amount of any premium for any bond required by KMS or Owner to obtain the discharge of any lien, or for the interest on any money deposited for the purpose of discharging any lien.

#### **ARTICLE 34.0 RIGHT TO OFFSET**

34.1 KMS, without waiver or limitation of any of its rights or remedies, shall be entitled from time to time to deduct from any amounts due or owing by KMS to Subcontractor in connection with this Subcontract (or any other contract with KMS), any and all amounts owed by Subcontractor to KMS in connection with this Subcontract.

#### **ARTICLE 35.0 ASSIGNMENTS**

35.1 Subcontractor shall not assign this Subcontract, in whole or in part, or assign any right or duty arising under the Subcontract Documents and shall not assign any money due or to become due, without the prior written consent of KMS, which consent shall be granted at its sole discretion. Notwithstanding any assignment or transfer, Subcontractor shall not be relieved from responsibility or liability under the Subcontract Documents and Subcontractor shall remain primarily responsible to complete the Work as defined herein.

35.2 Subject to Article 35.1 above, the provisions of this Subcontract shall inure to the benefit of and be binding upon the parties hereto and upon their respective heirs, executors, administrators, successors and assigns. KMS reserves the right, at its sole option, to assign this Subcontract to its affiliates or to Owner.

#### **ARTICLE 36.0 CONFIDENTIAL INFORMATION**

36.1 Subcontractor agrees that it will not disclose to third persons or use for its own benefit any of KMS's or Owner's developments, confidential information, know-how, discoveries, production methods, proprietary information and the like (collectively referred to as "Confidential Information") that may be disclosed to Subcontractor or which Subcontractor may acquire in connection with the Work.

36.2 All documents containing confidential information furnished by KMS or Owner to Subcontractor shall remain the property of KMS or Owner as the case may be, and upon completion of the work, Subcontractor shall, as requested by KMS, either destroy or return such documents, including any copies thereof.

#### **ARTICLE 37.0 INDEPENDENT CONTRACTOR RELATIONSHIP**

37.1 Subcontractor represents that it is an independent contractor and that in its performance of the Work it shall be and shall act as an independent Contractor and that all of its agents and employees, and all agents and employees of anyone performing the Work, shall be subject solely to the control, supervision and authority of Subcontractor, or its subcontractors, as the case may be, and they shall be considered to be employees of Subcontractor and under no circumstances or for any purpose, are they to be construed or considered to be employees, agents or representatives of KMS or Owner.

37.2 Neither Subcontractor nor any of its employees shall act on behalf of or in the name of KMS or Owner unless so requested by KMS in writing.

#### **ARTICLE 38.0 COMPOSITION OF SUBCONTRACTOR**

38.1 If Subcontractor hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

#### **ARTICLE 39.0 WAIVER AND SEVERABILITY**

39.1 KMS's waiver of any breach or failure to enforce any term, covenant, condition of other provision of this Subcontract shall not in any way limit, modify or waive its right thereafter to enforce or compel compliance with every term, covenant, condition or other provision hereof.

39.2 In the event any one or more provisions of this Subcontract shall be held to be invalid, void or otherwise unenforceable, such holding shall not affect the validity or continuing force and effect of any other provision.

**ARTICLE 40.0 ARBITRATION**

40.1 In the event that KMS is required to arbitrate a dispute with the Owner or a third party, which dispute arises out of or is related to this Subcontract, Subcontractor agrees to join in such arbitration proceeding, as KMS may direct, and shall submit to such jurisdiction and be finally bound by the judgment rendered in accordance with the arbitration rules as may be established therein.

**ARTICLE 41.0 ACCOUNTING RECORDS AND AUDIT RIGHTS**

41.1 The Subcontractor shall prepare and maintain current such system of full and detailed accounts as may be necessary for proper financial planning and management under this Subcontract, including but not limited to records and books of accounts which substantiate or otherwise prove KMS's receipt of and Subcontractor's expenditure for all cost of Work for which payment is or may be made by KMS under the Subcontract and said system shall be satisfactory to KMS.

41.2 KMS or Owner shall have the right to audit and shall be afforded access upon reasonable notice to Subcontractor to all Subcontractor's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to this Subcontract as set out in the Subcontract Documents. The Subcontractor shall preserve all such records for a minimum period of three years, or for such longer period as may be required by law, after the final payment.

41.3 The provisions of the above Paragraphs 41.1 and 41.2 shall be incorporated into the provisions of Subcontractor's subcontracts under this Agreement if such subcontracts are awarded without competitive bidding or if such subcontracts provide for payments in other than a lump sum amount. Each such subcontract shall provide that KMS and Owner shall have the right, upon reasonable notice to Subcontractor, to audit all such records and accounts required to be maintained by subcontract.

**ARTICLE 42.0 SURVIVAL**

42.1 The rights, duties and obligations of the parties hereto under Articles 7.0, 12.0, 17.0, 20.0, 26.0, 28.0, 29.0, 32.0 and 33.0, 36.0, 41.0; and any related Special or Supplemental Conditions shall survive termination of this Subcontract.