



Subcontract Terms and Conditions

Table of Contents

1. Contract Documents	13. Use of Contractors Equipment
2. Performance of the Work	14. Claims and Disputes
3. Schedule	15. Claims Resolution Procedures
4. Warranty	16. Contractor Remedies
5. Changes in the Work	17. Labor Relations and Subcontractor Employees
6. Payment	18. Miscellaneous Provisions:
7. Indemnification	(a) Architect
8. Insurance	(b) Taxes
9. Bonds	(c) Assignment
10. Safety	(d) Fair Employment & Affirmative Action
11. Clean-Up	(e) Entire Agreement
12. Protection of the Work	(f) Waiver
	(g) Notices
	(h) Contractor's License
	(i) Severability
	(j) Governing Law & Venue

HMH Job Name:
Location:
HMH Job No:

**HARBISON-MAHONY-HIGGINS BUILDERS, INC.
SUBCONTRACT TERMS AND CONDITIONS**

1. CONTRACT DOCUMENTS

- (a) The term "Contract Documents" is defined to mean and include the prime or general contract between the Owner and Contractor, including all drawings and specifications, general and special or supplementary conditions and all other documents or attachments incorporated in the prime contract.
- (b) Subcontractor certifies that it is fully familiar with all 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 Subcontract based upon its investigation of all such matters and is not relying on any opinions or representations of Contractor. This Subcontract represents the entire agreement between the parties. The Contract Documents are incorporated in this Subcontract by reference, and Subcontractor and its subcontractors 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 Subcontract. 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, to the extent of the work provided for in this Subcontract, and that where reference is made to Contractor in the Contract Documents, and the work or specifications therein pertains to Subcontractor's trade, craft, or type of work, then such work or specification shall be interpreted to apply to Subcontractor instead of Contractor.
- (c) The misplacement, addition or omission of a word or character shall not change the intent of this agreement or the drawings and specifications. Drawings and specifications are complementary and are to be taken in conjunction. Subcontractor shall promptly report to Contractor in writing any discrepancies or errors which come to its attention in the Contract Documents or this agreement.
- (d) Subcontractor confirms that the Work performed by Subcontractor on the Project, prior to the date on which this Agreement is fully executed, is subject to the terms and conditions of the contract Documents and that all representations and warranties made by Subcontractor herein are retroactive to the date on which Subcontractor commenced Work on the Project.

2. PERFORMANCE OF THE WORK

- (a) Subcontractor agrees (a) that materials and equipment furnished by Subcontractor shall conform strictly to the Contract Documents, (b) to furnish all materials within the time specified herein, with all necessary certificates and permits for installation and erection of same, and to layout, install and erect same and complete said work within the time specified, according to the Contract Documents and to the satisfaction of Owner, Architect and Contractor, (c) to furnish all scaffold and equipment (including equipment for hoisting) that may be necessary to do its work expeditiously and to provide traffic and safety controls at all times while using such equipment on the job site, (d) to remove and replace any defective materials or work forthwith on notice from Architect or Contractor and to bear the expense of making good all work of others, including the Contractor, which is destroyed or damaged by such removal and replacement, (e) to perform the work entirely at Subcontractor's risk, (f) to provide all proper and sufficient and necessary safeguards against all injuries and damage whatsoever, and to comply with all safety requirements imposed by law, (g) to secure and pay for those permits required by the Contract Documents to be secured for the work applicable to this Subcontract, (h) to provide a full-time competent superintendent acceptable to Contractor who shall have authority to act on behalf of Subcontractor and who shall attend all meetings as requested by Contractor and who shall supervise the work hereunder.
- (b) 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 all in conformance with Contractor's progress schedule. Subcontractor shall submit a schedule of values for approval at the commencement of the work. Approval of shop drawings, submittals, details and samples by Contractor shall not relieve Subcontractor of its obligation to perform its work according to the terms and consistent with the intent of the Contract Documents.
- (c) The installation of the Subcontractor's work will be considered evidence of its acceptance of the conditions as being correct and to its approval. The entire responsibility for proper configurations and dimensions for prefabrications of any part of the work shall rest with Subcontractor.

3. SCHEDULE

- (a) **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 and by a date 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, and of Contractor in a manner that will facilitate the efficient completion of the entire work. In the event Subcontractor fails to maintain its part of 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

HMH Job Name:

Location:

HMH Job No:

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.

Subcontractor agrees to notify Contractor, in writing within 48 hours, of any delays or anticipated delays in the performance of the work and to state the cause of said delays. If Contractor is so notified, then, should the cause be a condition upon which the Owner permits extension of time in the Contract Documents, Contractor will apply for such extension.

- (b) No claims for additional compensation or damages for delays, including, but not limited to, delays by separate contractors, 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 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 actual attorney's fees, to the extent that said claim is made by Contractor at the request of or for the benefit of Subcontractor.
- (b) If Subcontractor should default in performance of the work or otherwise commit any act which causes delay to the prime contract work, Subcontractor shall be liable for all 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.
- (d) Subcontractor agrees to submit on a weekly basis, and at the time of submission of progress payment requests, a report, in a form satisfactory to Contractor, itemizing on a weekly basis actual quantities of work performed and, on a daily basis, manpower and equipment employed by Subcontractor on the project.

4. WARRANTY

Subcontractor warrants to Owner, Architect and Contractor that all materials and equipment furnished shall be new unless otherwise specified and that all work under this subcontract 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 Paragraph 4 shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Contract Documents.

5. CHANGES IN THE WORK

- (a) Contractor may at any time, by written change order, and without notice to the Surety or Sureties on Subcontractor's bonds, make changes in the work to be performed hereunder, within the general scope hereof. If such changes cause an increase or decrease in the cost of the work or in the required time for its performance, an equitable adjustment shall be made. If Contractor and Subcontractor cannot agree on the cost or time of performance for the change order work, Subcontractor shall nevertheless timely perform the work as directed by Contractor.
- (b) Subcontractor shall make no changes in the work nor shall it be entitled to any additional compensation unless first authorized in writing by Contractor.
- (c) No increase in compensation of the Subcontractor or extension of time for performance shall be allowed for change order work unless the Subcontractor makes application therefore, in writing, to Contractor within seven (7) days from the date on which Subcontractor receives a notification of change in the work, (or three days prior to the time within which Contractor must submit a change order request or quotation to Owner pursuant to the terms of the Contract Documents, whichever is earlier), whether the notification instructs Subcontractor to proceed or not-to-proceed with the work. Subcontractor's application must include a detailed breakdown of all costs and any schedule delays. If Subcontractor does not submit an application in this time period, Contractor will assume that the change in the work results in no change to the compensation of the Subcontractor or the time required for the performance of work. The Contractor will quote the Owner accordingly and Subcontractor will be responsible to perform the changes defined in the change order with no adjustment to Subcontractor's compensation or time required for the performance of the work.

6. PAYMENT

- (a) Contractor agrees, in consideration of the full and complete performance of the work by the Subcontractor in accordance with the terms and provisions hereof, to pay or cause to be paid to the Subcontractor the Subcontract Sum. Subcontractor understands that all payments to Subcontractor will be made only from a special fund and a specific source, namely, from payments made by Owner from time to time to Contractor in respect of work performed by Subcontractor. Contractor shall make payments to Subcontractor within ten (10) days after receipt by Contractor of payment from Owner for the work of subcontractor for which payment has been made (or within such shorter period as may be required by law).
- (b) In the event Contractor is not paid by Owner any sum claimed due by Subcontractor, then Contractor's obligation to make payment to Subcontractor with respect to the time for payment to Subcontractor shall, in addition to any other conditions set forth in this Subcontract or the Contract Documents, be subject to the following conditions precedent:

HMH Job Name:

Location:

HMH Job No:

- (i) If Contractor does not pay Subcontractor sums claimed due under the Subcontract as a result of nonpayment by the Owner and such nonpayment is thereafter "finally adjudged" (as hereafter defined) to have been caused by a breach by Contractor of the Prime Contract, then Contractor shall pay to Subcontractor such sum as is due under this Subcontract, inclusive of and limited to simple interest thereon at the rate of 10% per annum accruing from the date such sum was first due and owing to Subcontractor as set forth above. The term "finally adjudged" as used in this Paragraph (i) shall mean the date final judgment is entered in any action by Contractor against Owner for recovery of sums due under the Prime Contract.
 - (ii) If Contractor does not pay Subcontractor sums claimed due under the Subcontract as a result of nonpayment by the Owner and such nonpayment is caused by the Owner's insolvency, bankruptcy, or lack of sufficient assets, or for reasons other than a breach by Contractor of the Prime Contract as provided in Paragraph (i) above, then Subcontractor's right to payment shall be conditioned upon the passage of such time as may **be reasonable and necessary** for Contractor to fully exercise and exhaust to final judgment its legal, extra judicial and appellate rights and remedies for collection of sums unpaid by Owner, together with the passage of such additional time as reasonably necessary for execution by Contractor of any final judgment entered in its favor. Simple interest only on such sums as are due to Subcontractor under this Paragraph (ii) shall accrue and be payable to Subcontractor at the rate of 10% per annum commencing from the expiration of the reasonable time reserved to Contractor in this Paragraph (ii) for recovery and collection from Owner.
 - (iii) Subcontractor agrees to preserve and maintain its mechanic's lien and stop notice rights with respect to the project and to exercise and exhaust those rights in the event that Contractor does not pay Subcontractor sums due under the Subcontract as a result of payment default on the part of the Owner under the Prime Contract.
 - (iv) Nothing contained herein shall be interpreted as releasing or waiving any statutory mechanic's lien, bond or stop notice right reserved to Subcontractor under the law; provided however, that Subcontractor agrees in the event Subcontractor asserts a claim against any statutory or common law payment or performance bond issued in connection with the Project, the surety to such bond and the Contractor (if Contractor is a principal on the bond) shall have the right to assert as a defense to such claim, the nonoccurrence of any conditions to payments set forth in this Subcontract, including without limitation the failure or delay of payment to Contractor.
 - (v) If any portion of this Section 6 is determined to be void, voidable or illegal, such portion shall be deemed severed from the other portions of this Section 6 that are not void, voidable or illegal and such other portions shall be enforceable in accordance with their terms.
- (c) Contractor shall retain from progress or other payments hereunder **ten percent (10%)** of the amount due until after final acceptance of the work by the Architect and Owner and until ten (10) days after Contractor's receipt of final retention payment from Owner. All billings for work performed during a calendar month shall be made on Contractor's standard forms "Progress Payment Request" and "Conditional Waiver and Release Upon Progress Payment" and must include a schedule of values itemizing in detail work completed and materials and equipment put in place during such month. No other form of payment request will be accepted. Payment requests must be delivered to Contractor sufficiently early as to not delay timely submission of Contractor's progress payment requests to Owner.
 - (d) Subcontractor, as requested by Contractor, shall furnish certified copies of all payrolls in the manner prescribed by Contractor. Contractor reserves the right to require mechanics' lien, stop notice, materialman and bond claim releases (including releases from lower tier subcontractors) and payment affidavits in duplicate with each application for progress payments and on final payment. Contractor also reserves the right to require Subcontractor to execute an Unconditional Waiver and Release form as to previously paid progress payments if required by the Contract Documents or the Owner. No payment will be made until required releases and affidavits have been received and approved by Contractor.
 - (e) Unless otherwise provided in the Contract Documents, payments will be made on account of materials or equipment not incorporated in the Work but delivered and suitably stored at the site and, if allowed in the Contract Documents and approved in advance by the Contractor, payments may similarly be made for materials or equipment suitably stored at some other location agreed upon in writing. Payments for materials or equipment stored on or off the site shall be conditioned upon submission by Subcontractor of bills of sale or such other procedures satisfactory to Contractor to establish Owner's title to such materials or equipment or otherwise protect Owner's interest, including applicable insurance and transportation to the site for those materials and equipment stored off the site.
 - (f) Contractor may withhold or, on account of subsequently discovered evidence, may nullify, the whole or part of any payment to protect Contractor from loss on account of (a) defective work not remedied; (b) third party claims filed or reasonable evidence indicating probable filing of such claims; (c) failure of Subcontractor to make payments properly to its subcontractors or for materials, equipment, labor or fringe benefits; (d) reasonable doubt that the work under this agreement can be completed for the balance of the Subcontract Price then unpaid; (e) damage to Contractor, a separate contractor or another subcontractor; (f) reasonable doubt that the work under this agreement can be completed within the time required herein and that the balance of the subcontract price then unpaid would be sufficient to cover the actual or liquidated damages resulting from the anticipated delay; (g) penalties assessed against Contractor or Subcontractor on account of Subcontractor's failure to comply with state, federal or local laws and regulations; (h) persistent failure to carry out the work under this Subcontract in accordance with the Contract Documents; or (i) any other ground for withholding payment allowed by state or federal law, or as otherwise

HMH Job Name:

Location:

HMH Job No:

provided in this Subcontract. When the reason(s) for withholding payment is/are rectified, such amounts as are then due and owing shall be paid or credited to Subcontractor.

- (g) Contractor reserves the right to make payment by joint check or by direct check to Subcontractor's materialmen or sub-subcontractors or to any other person or entity who has performed work or furnished materials under this Subcontract and may have a claim or a right of action against Contractor, Contractor's Surety, or the project under any law; provided, however, that Contractor shall not be obligated to exercise the right reserved herein for the benefit of any person or entity other than itself. Subcontractor agrees that Contractor shall have the right to determine the manner in which payment shall be made.
- (h) Any payment made hereunder prior to completion and acceptance of the work shall not be construed as evidence or acknowledgment of proper completion of any part of Subcontractor's work.

7. INDEMNIFICATION

- (a) Subcontractor specifically obligates itself to indemnify and hold Contractor harmless against claims, damages, losses, costs, expenses, and liabilities arising out of, resulting from, or relating to work performed under this agreement to the same extent that Contractor is obligated, under the Contract Documents, to indemnify Owner or any other person or entity against such claims, damages, losses, costs, expenses and liabilities. Notwithstanding the foregoing or any other provisions of the Contract Documents, Subcontractor obligates itself as a minimum, as follows:
 - (i) To protect, defend, indemnify and hold Owner and Contractor harmless from any and all claims, suits, liability, expense, penalties, fines, or damages for any alleged or actual violation or infringement by Subcontractor or Subcontractor's employees or subcontractors of any law, statute, codes, safety or occupational health orders, rules, regulations, standards, orders or any patent or patent right in connection with this agreement or anything done hereunder; and
 - (ii) To protect, defend, indemnify and hold Owner and Contractor (including their officers, agents, consultants and employees) harmless from all liability, penalties, costs, losses, damages, expenses, causes of action, claims or judgments, (including attorney's fees) resulting from injury to or death of any person (including Subcontractor's employees) or damage to property of any kind, which injury, death or damage arises out of or is in any way connected with the performance of work under this agreement. Subcontractor's aforesaid indemnity and hold harmless obligation shall apply to any acts, omissions, willful misconduct, negligent conduct, or other fault of any person or entity, including but not limited to Subcontractor's agents, employees, subcontractors and suppliers, whether active or passive, and whether or not sole or concurrent with that of any other person or entity; except that this indemnity obligation shall not require that Subcontractor indemnify any of the persons or entities named as indemnities herein against claims arising from its, her, or its sole negligence or willful misconduct.
- (b) With respect to claims against any person or entity indemnified in Paragraph 7(a) above, asserted by an employee of Subcontractor, by an employee of one of Subcontractor's subcontractors, by an employee of anyone directly or indirectly employed by them, or by an employee of anyone for whose acts they may be liable, the indemnity obligations under Paragraph 7(a) shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor or Subcontractor's subcontractors under worker's compensation acts, disability acts, or other employee benefit acts.
- (c) All indemnity obligations under this Subcontract shall apply to claims arising both before and after completion of the work under this agreement and to claims arising both before and after the termination of this agreement.
- (d) The indemnity obligations set forth in this or in any other provision of this agreement shall not be construed to negate, abridge, or reduce any other rights of indemnity accorded by law to the persons or entities indemnified.
- (e) Subcontractor further agrees to protect and fully indemnify the Owner and Contractor against all liability for (i) mechanic's liens, stop notice claims and payment bond claims made by any sub-subcontractor, suppliers, laborers, rental companies, or the like, and (ii) claims and liens for labor taxes, materials, appliances, equipment, and supplies whatsoever, including any costs, attorney's fees, and incidental damage resulting therefrom; and for failure by Subcontractor or any party acting on Subcontractor's behalf to comply with all laws, ordinances and regulations of all governmental authorities in any manner relating to Subcontractor's work.
- (f) Contractor shall be entitled to recovery of its attorney's fees and costs associated with enforcing any indemnity contained hereinabove.

8. INSURANCE

- (a) Subcontractor shall, at its own expense, procure not less than the insurance coverages and limits of insurance as specified within the Insurance Appendix, which is attached to the Subcontract Agreement and is an integral part of this agreement. Such insurance shall be maintained with insurers, policy forms and deductibles satisfactory to Contractor and the Owner. If

HMH Job Name:

Location:

HMH Job No:

forth within the Insurance Appendix, Subcontractor agrees to amend, supplement or endorse the existing coverage to do so, at no additional cost to Contractor.

- (b) Subcontractor will also carry any other insurance specified in the Contract Documents for protection of Owner, Contractor and Subcontractor, and will keep all policies and endorsements in force as long as may be necessary to protect any of the above. Any acceptance of insurance certificates or endorsements by Contractor shall in no way limit or relieve the Subcontractor of its duties and the responsibilities assumed by him in this agreement.
- (c) At minimum, Subcontractor shall carry Workers' Compensation, General Liability and Automobile Insurances. Such General Liability coverage shall be endorsed to add the Owner and Contractor as additional insured on the Subcontractor's policy for liabilities arising out of Subcontractor's work. The limits, scope of coverage and additional insurance requirements of the Subcontractor are more fully outlined in the Insurance Appendix.
- (c) On execution of the Subcontract and prior to commencement of work, Subcontractor shall file on forms acceptable to Contractor a certificate of insurance and additional insured endorsement properly executed and signed by an authorized representative on behalf of the insurer(s) evidencing the above coverages and conditions as specified in the Insurance Appendix. Subcontractor shall maintain the required insurance and additional insureds for the period of time for which the Subcontractor may be held legally liable for its work. Also, the required certificates of insurance and additional insured endorsements shall be provided and maintained by the Subcontractor during the warranty period of Subcontractor's work. Subcontractor further agrees, upon written request by Contractor or Owner, to furnish copies of any insurance policies, certified by an authorized representative of the insurer(s).
- (e) All Insurance coverage provided by the Subcontractor shall be through acceptable insurance carriers licensed in the state(s) where the work is being performed with a minimum A.M. Best Company standard of A: VII or greater.
- (f) Subcontractor shall be responsible for payment of the deductible for any Builder's Risk/Course of Construction Insurance ("Builder's Risk") claim regardless of whether such coverage is procured by the Owner, Contractor or Subcontractor. Subcontractor shall be responsible for payment of the deductible in proportion to its percentage of the entire loss (covered under the Builder's Risk Policy), as calculated prior to the application of the policy deductible.

9. BONDS

- (a) Any indemnities or bonds provided in the Contract Documents are hereby assumed by the Subcontractor to the extent of its work and it hereby agrees to furnish, concurrently with the execution hereof, a performance bond in an amount equal to full Subcontract Sum and a payment bond in an amount equal to full Subcontract Sum with a corporate Surety or Sureties listed in the most current United States Department of the Treasury-Federal Register. Bonds shall contain terms and be in a form satisfactory to Contractor and Owner conditioned upon faithful performance by him of each and all of the provisions hereof. Contractor reserves the right to require performance and payment bonds on any subcontract even though not required by the Contract Documents. If Subcontractor fails to provide the bonds specified herein within three (3) days after demand by Contractor, Contractor shall have the right to terminate this agreement and Subcontractor shall have no right to payment for any work performed prior to such termination.
- (b) If change order work results in an increase in the Subcontract Sum, Subcontractor shall provide bond riders evidencing that the penal sum of the bonds has been increased to equal the adjusted Subcontract Sum. The cost of such increase in bond coverage shall be at Subcontractor's expense and included in said change orders.

10. SAFETY

- (a) Subcontractor shall comply fully with all laws, orders, citations, rules, regulations, standards and statutes with respect to occupational health and safety, the handling and storage of hazardous materials, accident prevention, safety equipment and practices including the accident prevention and safety program of Owner and Contractor. 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, standards and statutes.
- (b) Subcontractor will furnish Contractor with copies of all accident reports, promptly reporting any accident or injury to any of the employees, agents or servants of Subcontractor used or utilized on this project.
- (c) Subcontractor shall furnish Contractor with current Material Safety Data Sheets for hazardous materials prior to delivery of any hazardous materials to the job site. The Subcontractor shall inform the Contractor of any precautionary measures to be taken to protect employees.
- (d) Subcontractor agrees that it is Subcontractor's sole responsibility to employ labor in accordance with all applicable safety codes, including but not limited to State and Federal Safety Codes, and under conditions satisfactory to Contractor.

11. CLEAN-UP

HMH Job Name:

Location:

HMH Job No:

At all times during the course of performing the work under this Subcontract, Subcontractor shall perform its work, including any necessary clean-up, so as to maintain the Project site in a clean, safe and orderly condition. Upon completion of the work under this Subcontract, Subcontractor shall (a) clean all surfaces, fixtures, equipment and other items which are a part of the work under this Subcontract or may have been soiled by such work, and (b) remove from the job site and legally dispose of all temporary structures, debris, waste, and other items incidental to Subcontractor's operations, including all hazardous materials, which do not constitute a permanent part of the Project. Subcontractor shall follow all directions of Contractor in regard to clean-up both during the course of the work and at the completion of Subcontractor's work. Contractor shall be entitled to backcharge Subcontractor for the costs of clean up if Subcontractor fails to clean up its work within 48 hours after demand by Contractor.

12. PROTECTION OF WORK

- (a) Subcontractor shall effectually secure and protect the 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 workers of Contractor, Owner and other subcontractors from its operations.
- (b) Subcontractor shall be liable for any loss or damage to its work in place or its materials on the job site. Subcontractor shall also be liable for any loss or damage to any work in place or any damage to equipment and/or materials on the job site caused by him or its agents, employees or guests.

13. 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. Further, Subcontractor assumes all liabilities connected therewith and 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. The use by Subcontractor of Contractor's equipment or employees must be approved by Contractor.

14. CLAIMS AND DISPUTES

All claims by Subcontractor relating to Subcontractor's work, including without limitation, any claimed adjustment to the Subcontract Price and any claimed delay in prosecution of Subcontractor's Work (collectively a "Claim"), shall be submitted to Contractor within seventy two (72) hours after the occurrence of the event giving rise to the Claim (or prior to the time within which Contractor must submit a claim to the Owner pursuant to the terms of the Contract Documents, whichever is earlier). Claims must be in writing in sufficient detail, dated, and signed by an officer or authorized representative of Subcontractor. Subcontractor's Claims will be allowed by Contractor if and to the extent they are allowed by Owner. Any Claim not timely submitted shall be deemed waived by Subcontractor. Unless otherwise agreed in writing, Subcontractor shall continue to prosecute Subcontractor's Work and maintain the Project Schedule pending resolution of any Claim. Any failure of Subcontractor to continue diligent and timely prosecution of Subcontractor's Work shall be deemed a material breach of the Subcontract, entitling Contractor to all remedies provided hereunder, as well as other remedies which may exist as a matter of law.

15. CLAIMS RESOLUTION PROCEDURE

- (a) In the event of any dispute or claim between Contractor and Owner which directly or indirectly involves Subcontractor's Work, or in the event of any dispute or claim between Contractor and Subcontractor which directly or indirectly involves Subcontractor's Work, or in the event of any dispute or claim between Contractor and Subcontractor which directly or indirectly involves a claim against Owner for either additional compensation or an extension of time under the Contract Documents, Subcontractor agrees to be bound to Contractor and Contractor agrees to be bound to Subcontractor by all decisions, findings or determinations made by the person so authorized in the Contract Documents, by an administrative agency, court of competent jurisdiction, or arbitration panel, whether or not Subcontractor is a party to the proceedings before said person, agency, court or panel. If any dispute or claim is prosecuted or defended by Contractor, Subcontractor agrees to cooperate fully with Contractor and to furnish all documents, statements, witnesses and other information required by

Contractor for such purpose and shall pay or reimburse Contractor for all expenses and costs, including reasonable attorney's fees, incurred in connection therewith to the extent of Subcontractor's interest in such claim or dispute. It is expressly understood and agreed in connection with the determination of such claims or disputes that, as to any and all work done and agreed to be done by Subcontractor, and as to any and all damages, if any, incurred by Subcontractor in connection with the Project, Contractor shall never be liable to Subcontractor to any greater extent than Owner is liable to Contractor. If a dispute between Contractor and Subcontractor is not subject to the dispute resolution procedure set forth in the Contract Documents, then the dispute resolution procedure set forth in paragraphs (b) and (c) below shall apply.

- (b) **MEDIATION**. Subcontractor agrees, upon the request of Contractor, to submit a dispute to a mediator and to negotiate in good faith to reach an agreement with respect to the dispute. Any such mediation proceedings shall be under the auspices of and

governed by the rules of the Construction Industry Mediation Rules of the American Arbitration Association. In such event, neither party shall proceed with arbitration or litigation until the completion of mediation proceedings. The costs of the

HMH Job Name:

Location:

HMH Job No:

mediator shall be shared equally by the parties.

- (c) **ELECTION OF ARBITRATION OR LITIGATION.** In the event of a dispute between contractor and Subcontractor, contractor may elect to arbitrate such dispute in the manner provided below, or to litigate the dispute in a forum with jurisdiction to decide the dispute. Any arbitration proceeding shall be conducted in accordance with the Construction Industry Rules of the American Arbitration Association, provided, however, that only one arbitrator shall hear the dispute. The award rendered by the arbitrator shall be final and judgment may be entered upon in accordance with applicable law in any court having jurisdiction.
- (d) **ENFORCEABILITY OF ELECTIONS/WAIVER OF JURY.** If the elections afforded Contractor in paragraphs (b) and (c) above hereof are not enforceable, then both parties shall be bound to arbitrate all disputes in which the disputed amount is less than \$50,000, and shall litigate any dispute involving a higher amount. In the event that any dispute between the parties is litigated in any court in any jurisdiction, the parties hereby agree to waive the right to a jury trial, and agree that their dispute will be determined by a judge (the parties specifically acknowledging that the nature and complexity of construction disputes is such that matters are better and more efficiently decided by a judge rather than a jury).
- (e) **FEDERAL ARBITRATION ACT.** The arbitration rights set forth herein shall be specifically enforceable under the Federal Arbitration Act, 9 U.S.C. 1, et seq., the parties agreeing that the transactions contemplated hereunder will have an effect on interstate commerce.

16. CONTRACTOR'S REMEDIES

- (a) If Subcontractor or any of Subcontractor's subcontractors, suppliers, materialmen or laborers, shall at any time:
 - (i) refuse or neglect to supply a sufficient number of properly qualified workers or a sufficient quantity of materials of proper quality;
 - (ii) abandon Subcontractor's work or fail in any respect to promptly and diligently prosecute Subcontractor's work;
 - (iii) fail to promptly pay subcontractors, suppliers, materialmen, rental companies or laborers;
 - (iv) fail to accelerate Subcontractor's work as required by Paragraph 3 hereof;
 - (v) give Contractor a reasonable basis to doubt that Subcontractor's work can be completed for the unpaid portion of the Subcontract Sum or within the required time;
 - (vi) declare bankruptcy or make a general assignment for the benefit of creditors or files for bankruptcy, assigns assets for the benefit of creditors, becomes insolvent or be unable to pay its obligations as they mature;
 - (vi) otherwise fail to perform any of the agreements and obligations set forth in the Subcontract, these Terms and Conditions or the Contract Documents; or
 - (viii) default in the performance of any contract or agreement with Contractor, whether related to the Project or otherwise; then Subcontractor shall be in default herein.
- (b) In any such event, Contractor may pursue any remedies available by common law or statute, including but not limited to one or more of the following.
 - (i) **withhold any sums** due or thereafter to become due to Subcontractor under the Subcontract **and any other contract**, whether related to the Project or otherwise and during such period such withheld amounts shall not accrue interest;
 - (ii) provide and/or supplement any labor and materials as Contractor shall determine to cure such default and deduct the cost thereof from any money then due or thereafter to become due to Subcontractor under the Subcontract or any other contract, agreement, or otherwise;
 - (iii) terminate the Subcontract, in which case all contracts whether written or oral between Subcontractor and persons or entities providing labor, material or equipment pertaining to Subcontractor's work shall be deemed assigned to Contractor, and Subcontractor hereby appoints Contractor as its attorney-in-fact to enforce the provisions of such contracts, provided that nothing herein shall obligate Contractor to honor such contracts, and;
 - (iv) **take possession** of all the materials, tools, equipment and appliances belonging to Subcontractor at the Project site without any further compensation to Subcontractor, and either complete Subcontractor's work or contract with any other person or persons to complete Subcontractor work and provide the material therefore; in which case if the unpaid portion of the amount to be paid under the Subcontract exceeds the charges, expenses and damages sustained by Contractor in completing the work or as a result of such defaults, such excess shall be paid by Contractor to

Subcontractor, but if such charges, expenses, and damages exceed said unpaid portion, Subcontractor shall pay the difference to Contractor immediately upon demand; or

HMH Job Name:

Location:

HMH Job No:

- (v) offset and apply any amounts due Contractor as a result of such default against any earned but unpaid amounts owing to Subcontractor by Contractor under the Subcontract, including without limitation, any retainage held by Contractor, any amounts owed to Subcontractor under any other contract, whether related to the Project or otherwise

Prior to exercising the remedies in this Section 16, Contractor shall provide Subcontractor **written notice of default** and not less than forty-eight (48) hours to cure such default. Subcontractor shall have the opportunity to remedy, to Contractor's satisfaction, the default, deficiency or failures which are the basis of Contractor's termination notice within the forty-eight (48) hour notice period. Contractor's remedies are cumulative, and the exercise of one remedy shall not restrict Contractor, at the same time or thereafter, from exercising any other remedy set forth herein or provided by applicable law.

In the event a termination of this Subcontract is found not to have been warranted under this or any other provision of this Subcontract, the total compensation and damages that Subcontractor is entitled to recover on account of such termination shall be limited to the compensation that would have been payable to Subcontractor under the provisions of this Subcontract as if the Subcontract has been terminated for Contractor's convenience pursuant to subparagraph (c) of this Paragraph 16 at that point.

- (c) Contractor may at any time and for any reason terminate Subcontractor's services and work for Contractor's convenience. Such termination shall be by written notice to Subcontractor at Subcontractor's place of business.

Upon receipt of such notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue the work and the placing of orders for materials, equipment and supplies in connection with the performance of this Subcontract, 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 Project site or in transit thereto.

Upon such termination, Subcontractor shall be entitled to payment of the following amounts, which shall constitute full satisfaction of all claims by Subcontractor for payment on account for work performed under this Subcontract: (1) the actual cost of the work completed in conformity with this Subcontract through the date of termination; plus (2) such other costs actually incurred by Subcontractor as are payable to Contractor under the Prime Contract and approved by Owner; plus (3) a reasonable sum for overhead and profit. There shall be deducted from the amount determined as provided in this subparagraph the amount of any payments made to Subcontractor prior to the date of termination.

Subcontractor shall not be entitled to any claim or claim of lien against Contractor or Owner for any additional compensation or damages in the event of such termination and payment.

- (d) 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 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 subcontract 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:
 - (i) promptly cures all defaults;
 - (ii) provides adequate assurance of future performance;
 - (iii) compensates Contractor for actual pecuniary loss resulting from such defaults; and
 - (iv) assumes the obligations of Subcontractor within the statutory time limits.

17. LABOR RELATIONS AND SUBCONTRACTOR EMPLOYEES

- (a) Subcontractor shall comply with all of the provisions of any collective bargaining agreements executed by or on behalf of Contractor. Contractor shall have no liability to Subcontractor for any costs, expenses or liability resulting from any stoppage of work, however caused, arising out of a labor dispute or controversy. Subcontractor shall be liable for any and all costs, including but not limited to compensatory and liquidated damages, resulting from work stoppages or other labor disputes associated with Subcontractor, Subcontractor's employees or the subcontractor(s) or suppliers of Subcontractor. Should there be picketing on Contractor's job site and Contractor establishes a reserved gate; it shall be the obligation of Subcontractor to continue the proper performance of Subcontractor's work without interruption or delay.
- (b) Subcontractor shall employ only competent, well-disciplined workers to perform the Work hereunder and Subcontractor agrees to immediately remove and replace any employee(s), including Subcontractor's superintendent, whom Contractor, Owner or Architect deems unsatisfactory.

HMH Job Name:
Location:
HMH Job No:

18. MISCELLANEOUS PROVISIONS

(a) ARCHITECT

The term "Architect" or "Architect/Engineer" as used herein includes anyone appointed to be the Owner's designated representative to supervise on its behalf the work of the Contractor.

(b) TAXES

The compensation payable to Subcontractor as herein provided includes all sales, gross receipts, excise and other taxes and is not subject to any addition on account of taxes which are now or may hereafter be levied. It is hereby agreed that Subcontractor is an independent contractor within the purview of the Internal Revenue Code, the Federal Social Security Act, and any and all unemployment insurance laws, both State and Federal, and is solely responsible to the Federal and State Government for all payroll taxes, deductions, and contributions under such laws.

(c) ASSIGNMENT

Any assignment, subletting or delegation, by operation of law or otherwise, in whole or in part, by Subcontractor of this agreement, of the work to be performed or of any claims arising hereunder without the prior written consent of Contractor shall be void.

Contractor shall not recognize or be bound by any assignment of any right to payment earned or to be earned by performance hereunder by Subcontractor unless and until Contractor shall receive written notice which reasonably proves the assignment and identifies the rights assigned. Any assignment hereunder shall be subject to, and Contractor reserves, all rights and remedies possessed by or available to Contractor by law or under this agreement as against Subcontractor, its sureties and assigns including, without limitation, rights of set-off, to retain moneys, to amend or modify this agreement, and to assert all other defenses and claims whether or not arising under this agreement.

The making of any assignment by Subcontractor or any consent thereto by Contractor shall in no event relieve Subcontractor or its sureties hereunder of any of their obligations, duties, responsibilities or liabilities.

(d) FAIR EMPLOYMENT AND AFFIRMATIVE ACTION

The Subcontractor agrees to be bound by and comply with all applicable Fair Employment Practices, Provisions and Regulations of Federal, State or other Governmental authority having jurisdiction including the provisions of Executive Order

No. 11246, and Title VII of the Civil Rights Act of 1964, including amendments or revisions thereof, relating to nondiscrimination in employment, and any affirmative action provisions (including MBE or WBE requirements) contained in the Contract Documents or required by applicable law.

(e) ENTIRE AGREEMENT

The Subcontract Documents represent the entire agreement between the parties and supersede any prior representation, statement or agreement, oral or written, with regard to the subject matter herein. No modification hereto shall be valid unless it is in writing and signed by both parties.

(f) WAIVER

Waiver by Contractor of any particular default by Subcontractor shall not affect or impair Contractor's rights in respect to any subsequent default of the same or of a different nature.

(g) NOTICES

All notices provided hereunder shall be in writing and mailed to the other party at the address stated on the Subcontract Agreement.

(h) CONTRACTOR'S LICENSE

Contractors are required by law to be licensed and regulated by the Contractors State License Board. Any questions concerning a contractor may be referred to the Registrar, Contractors State License Board, 9821 Business Park Drive, Sacramento, California 95827. Mailing Address: P.O. Box 26000, Sacramento, California 95826.

(i) SEVERABILITY

If any term of provision of this Subcontract Agreement or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of the Subcontract Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and

HMH Job Name:

Location:

HMH Job No:

each term and provision of this Subcontract shall be valid and be enforced to the fullest extent permitted by law.

(j) GOVERNING LAW AND VENUE

This Subcontract Agreement shall be construed and enforced in accordance with the laws of the State of California, and venue for any legal action shall be in California.