

# MASTER TERMS AND CONDITIONS AGREEMENT

This Master Terms and Conditions Agreement (herein called Agreement) is made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between

(name, address and phone number of Subcontractor) (herein called Subcontractor), and

(name, address and phone number of Pankow entity) (herein called Contractor).

## RECITALS

A. Contractor is a licensed California Contractor providing general contracting services for various commercial projects. Contractor desires from time to time to retain Subcontractor to provide specialty construction work within one or more projects.

B. Subcontractor desires to provide construction services to Contractor in his area of specialization and for which he holds a valid California license.

C. Contractor and Subcontractor contemplate that separate subcontract agreements will be place by Contractor with Subcontractor relating to specific projects or works of improvement and that such projects or works of improvement will require a separate subcontract agreement incorporating by reference the provisions of this Master Terms and Conditions Agreement.

## SECTION 1. DOCUMENTS

1.1 The terms and conditions contained in this document and any subsequent Subcontract Agreement (Exhibit A).

## SECTION 2. TERM

2.1 This Agreement shall apply to all work performed or entered into, between Contractor and Subcontractor for the calendar year \_\_\_\_\_.

## SECTION 3. AUTHORIZATION TO DO WORK

3.1 This Agreement does not in itself obligate Contractor to award work to Subcontractor. Any work will be made by issuance of a Subcontract Agreement (Exhibit A) at the sole discretion of the Contractor.

## SECTION 4. TERM

4.1 The terms of this Agreement will remain in full force for the term specified unless terminated in accordance with the provisions of Section 14. If Subcontractor shall start work on a given project prior to execution of a Subcontract Agreement (Exhibit A), then the terms of this Master Terms and Conditions Agreement shall be in full force.

## SECTION 5. TIME

5.1 Time is of the essence of this Agreement. The Subcontractor shall conform to Contractor's schedule (herein called Project Schedule) and all revisions or changes made thereto by Contractor. The Subcontractor shall confer with Contractor regarding the Project Schedule for timely completion of various portions of the Work. The Subcontractor shall prosecute the Work in a prompt and diligent manner in accordance with Project Schedule without delaying or hindering the work of other contractors, subcontractors, suppliers, materialsmen, Contractor and Owner. The Subcontractor shall coordinate the Work with the work of other contractors, subcontractors, suppliers, materialsmen, Contractor and Owner, in a manner that will facilitate the efficient completion of the entire work required by the Prime Contract. In the event Subcontractor fails to maintain the Project Schedule, Subcontractor shall, without additional compensation, accelerate the Work as Contractor may direct until the Work is in accordance with the Project Schedule. The Contractor shall have the right to decide the time and order in which various portions of the Work shall be performed and installed, and the relative priority of the Work and other subcontractor's work, and all other matters pertaining to the timely completion of the Project.

5.2 The Subcontractor agrees to submit drawings, lists, samples or other information through Contractor for approval as required by the Contract Documents within fifteen (15) days of Subcontractor signing Subcontract Agreement (Exhibit A). The Subcontractor agrees to order all of its materials within five (5) days after approval of said drawings, lists, or samples and to procure delivery of its materials to allow the Work to be performed in accordance with the Project Schedule. Upon request, Subcontractor shall provide evidence satisfactory to Contractor of placement of such orders.

5.3 If Subcontractor is delayed in the prosecution or completion of the Work by the negligence or fault of Owner, Architect or Contractor, or should Subcontractor be delayed waiting for materials, if required by this Agreement to be furnished by Owner or Contractor, or by damage caused by fire or other casualty for which Subcontractor is not responsible, or by the combined action of workmen, not caused in whole or in part or resulting from fault or collusion on the part of Subcontractor, or in the event of a lock-out by Contractor, then the time herein fixed for the completion of the Work shall be extended the number of days that Subcontractor has been delayed thereby. However, no allowance or extension of time shall be made unless a claim therefore is presented by Subcontractor in writing to Contractor within forty-eight (48) hours of the commencement of such delay, and under no circumstances shall the time to complete the Work be extended to a date which will prevent Contractor from completing the Project within the time allowed Contractor by Owner for such completion.

5.4 No allowance or extension of time shall be made to Subcontractor as a result of Subcontractor's delay in preparing drawings required by this Agreement, or Subcontractor's delay in securing approval of drawings by Architect, or when Subcontractor could have anticipated and avoided the delay by the exercise of reasonable diligence and judgment.

5.5 No claims for additional compensation or damages for delays, whether caused in whole or in part by any conduct on the part of Contractor, including conduct amounting to a breach of this Agreement, or delays by other subcontractors or Owner, shall be recoverable from Contractor. The extension of time for completion set forth in paragraph 5.3 shall be the sole remedy of Subcontractor. However, in the event Contractor obtains additional compensation from Owner on account of such delays, Subcontractor shall be entitled to its proportionate share of the additional compensation so received by Contractor from Owner. If Contractor presents a claim against Owner for additional compensation for any delay, Subcontractor shall cooperate fully with Contractor in the prosecution thereof and shall pay all cost, expenses, and attorneys' fees incurred in connection therewith, to the extent that said claim is made by Contractor at the request of Subcontractor. Subcontractor recognizes and agrees that such claims to the Owner shall be submitted and resolved pursuant to the requirements of the contract between Contractor and Owner and that it shall be bound to Contractor to the same extent that Contractor is bound to Owner by the terms of the Contract Documents. Contractor has final authority to settle such claims to the Owner. Subcontractor agrees that its recovery shall be limited to the relief Contractor has recovered from Owner, whether or not Subcontractor is a party to such proceedings involving such claims.

## **SECTION 6. CHANGES IN THE WORK**

**6.1** Contractor may, at any time, either unilaterally or by direction of the Owner, and without notice to sureties, make changes, additions and/or deletions in the Work. The Subcontractor shall make any and all such changes in the Work as directed by Contractor in writing (herein called Changed Work). Such Changed Work shall not invalidate this Agreement.

**6.2** If necessary, the Contract Price and the time for Subcontractor's performance shall be adjusted by appropriate additions or deductions that are agreed upon by Contractor and Subcontractor before Subcontractor proceeds with Changed Work. Agreement on any Changed Work constitutes a final settlement and accord and satisfaction of all matters relating to the Changed Work, including but not limited to all direct and indirect costs associated with such change and any and all adjustments to the Contract Price, time, schedule, or completion date.

**6.3** If Contractor provides new, revised or updated documents to Subcontractor or requests a price for Changed Work, Subcontractor shall provide a price or acknowledge no change in cost within ten (10) days. The Subcontractor shall supply Contractor with all documents necessary to substantiate the amount of the addition or deduction to the Contract Price or the time for Subcontractor's performance. If Subcontractor fails to submit a price for Changed Work within ten (10) days, Contractor shall unilaterally determine the price and the time for Subcontractor's performance, and Subcontractor shall be bound to such determination. If Owner issues a change or proposed change affecting Subcontractor's Work, Subcontractor agrees, if directed by Contractor, to meet with Contractor and Owner to review and discuss such change. Subcontractor shall only be entitled to appropriate additions or deletions for Owner directed Changed Work to the extent Contractor actually receives such additions or deletions from Owner. If Subcontractor disputes the addition or deletion, such dispute shall be resolved pursuant to Section 17 of the agreement.

**6.4** If Subcontractor provides a price for Changed Work within ten (10) days and Contractor and Subcontractor cannot agree on the amount of the addition or deduction, at Contractor's option and written direction, Subcontractor shall nonetheless timely perform the Changed Work. The amount of the addition or deduction shall then be determined by the reasonable expenses and savings in the performance of the Changed Work, including the following:

- (a) Cost of material and equipment rental directly related to the Changed Work;
- (b) Cost of labor, including wages, payroll taxes, workers' compensation premiums, and fringe benefits which are standard in the industry and properly allocable to the Changed Work, as validated by daily work reports for the Changed Work and verified by the Contractor's Superintendent;
- (c) Cost of taxes, insurance and bond premiums directly related to the Changed Work;
- (d) Cost of sub-subcontractor's work directly related to the Changed Work;
- (e) Additional compensation to Subcontractor of fifteen percent (15%) of the sum of Subclauses (a), (b), and (c) above, unless a different amount is required by the Prime Contract; and
- (f) Additional compensation to Subcontractor of five percent (5%) of Subclause (d) above, unless a different amount is required by the Prime Contract

**6.5** When Subcontractor receives Contractor's written direction, Subcontractor is solely responsible for timely performance of the Changed Work.

**6.6** Payment for Changed Work shall be made in accordance with Section 5 of Subcontract Agreement (Exhibit A).

**6.7** If Contractor and Subcontractor have a dispute about particular work being a change in the Work, Subcontractor shall timely perform the disputed work in accordance with the interpretation and direction of Contractor. If Subcontractor intends to submit a claim for the disputed work, it shall give prompt written notice to Contractor before proceeding with the disputed work. In addition, within ten (10) days after the disputed work is performed, Subcontractor shall submit its written claim for additional compensation for the disputed work to Contractor in sufficient detail for Contractor to make an evaluation of the merits of the claim and in the form described in Section 6.3. The Subcontractor's failure to give written notice to Contractor before proceeding with the disputed work or to submit the written claim within ten (10) days after the disputed work is performed, constitutes an agreement by Subcontractor that it will not be paid for the disputed work.

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

## **SECTION 7. DAMAGE CAUSED BY DELAYS**

**7.1** If Subcontractor defaults in performance of the Work, or otherwise commits any act or omission which causes delay to the Prime Contract work or the work of any other party, Subcontractor shall be liable for all losses, costs, expenses, liabilities, attorneys' fees and damages, including consequential damages and liquidated damages, sustained by Contractor, or for which Contractor may be liable to Owner or any other party as a result thereof.

**7.2** The Contractor will determine the proportion of fault for any delay among all subcontractors, and the damages for delay will be distributed between subcontractors accordingly. The Contractor's allocation of fault shall be final and binding on Subcontractor, so long as the allocation is made in good faith.

## **SECTION 8. EVIDENCE OF FINANCIAL ABILITY**

**8.1** The Subcontractor agrees to provide and update, prior to the start of the Work and at intervals not less than once each 12 months, Contractor's electronic prequalification form which shall include a letter from Subcontractor's surety in form approved by Contractor, indicating that Subcontractor's available bonding limits equal or exceed the Contract Price, and providing the Subcontractor's bonding limits and premium rate. The Subcontractor's surety shall be admitted in the state in which the Project is located with an A.M. Best rating of B+ or higher. The Subcontractor assumes the continuing obligation to advise Contractor of changes to its financial condition which may materially and adversely affect its bonding capacity or impair its ability to complete the Work for the unpaid balance of the Contract Price. The Contractor may withhold, the whole or part of, any payment to Subcontractor to the extent necessary to protect Contractor from loss due to Subcontractor's failure to comply with this Section 8.

## **SECTION 9. LIENS**

**9.1** In the event of any claim, lien or suit for labor performed or materials furnished pursuant to this Agreement, Subcontractor shall pay and satisfy any such claim, lien or suit. The Subcontractor agrees that within ten (10) days after written demand by Contractor, to cause the effect of any such claim, lien or suit to be removed from the Premises. In the event Subcontractor fails to do so, Contractor is authorized to use whatever means, in its discretion it may deem appropriate, to cause said claim, lien or suit to be satisfied and the cost thereof, including expenses and attorneys' fees, shall be immediately due and payable to Contractor by Subcontractor. The Subcontractor may prosecute such claim, lien or suit provided Subcontractor causes the effect thereof to be removed from the Premises within ten (10) days, and Subcontractor takes all action necessary to prevent Owner from withholding any amounts due to Contractor as a result of any such claim, lien or suit.

**9.2** The Subcontractor agrees that its full and faithful performance of this Agreement, including the payment of any obligation due from Subcontractor to Contractor, and payment of any amounts due for labor or materials furnished pursuant to this Agreement, is a prerequisite to Subcontractor's right to receive payment for the Work performed. Any amount paid by Contractor to Subcontractor under the terms of this Agreement shall be impressed with a trust in favor of labor and materialsmen furnishing labor and material to Subcontractor for the Work.

## **SECTION 10. PROVISIONS FOR INSPECTION**

**10.1** The Subcontractor shall at all times furnish to Contractor and its representatives, safe and ample facilities for inspecting materials at the Premises, shops, factories or any place of business of Subcontractor, its subcontractors and materialsmen where materials provided under this Agreement may be in the course of preparation, process, manufacture or treatment. The Subcontractor shall furnish to Contractor as often as required by Contractor, full reports

of the progress of the Work and the materials provided under this Agreement. Such reports shall provide, in the detail required by Contractor, the progress of the preparation and manufacture, including any plans, drawings or diagrams prepared in the course of preparation, process, manufacture or treatment.

#### **SECTION 11. MATERIALS AND WORK BY OTHERS**

**11.1** In the event the Work includes installation of materials or equipment furnished by others, at the time Subcontractor has access to such items, it shall be the responsibility of Subcontractor to examine and accept the items so provided and to handle, store and install such items with the skill and care necessary to insure the satisfactory completion of the Work. The Subcontractor's use of such items shall be deemed to constitute acceptance thereof by Subcontractor.

**11.2** In the event the Work is to be performed in areas to be constructed or prepared by others, at the time Subcontractor has access to such areas, it shall be the responsibility of Subcontractor to examine and accept the areas so provided. The Subcontractor's commencement of Work in those areas shall be deemed to constitute acceptance thereof by Subcontractor.

**11.3** The Subcontractor shall notify Contractor in writing with twenty-four (24) hours of discovery of any unacceptable material, equipment or condition that would prevent commencement or prosecution of the Work in accordance with the Project Schedule.

**11.4** It is Subcontractor's responsibility to leave the Work in proper condition to receive the subsequent application of work of other trades and subcontractors.

#### **SECTION 12. PROTECTION OF WORK**

**12.1** The Subcontractor shall adequately secure and protect the Work and assume full responsibility for the condition thereof until final acceptance by Architect, Owner and Contractor. The Subcontractor further agrees to provide the protection necessary to protect the work and workmen of Contractor, Owner, suppliers, materialsmen and other subcontractors from Subcontractor's operations.

**12.2** The Subcontractor shall be liable for all loss or damage to the Premises or to any work, equipment and materials at the Project caused by Subcontractor, its agents, representative, employees, guests and sub-subcontractors.

**12.3** The Subcontractor recognizes that a reasonable amount of damage to the Work and work of others will occur during the course of construction. When the damaging party cannot be identified, Contractor shall allocate the costs to repair the damage among the likely parties. The Contractor's allocation shall be final and binding on Subcontractor, so long as the allocation is made in good faith.

#### **SECTION 13. LABOR RELATIONS**

**13.1** The Subcontractor shall keep a qualified representative at the Project during all times when the Work is in progress, and such representative shall be authorized to represent and bind Subcontractor as to all matters relating to the Work. Prior to commencement of the Work, Subcontractor shall notify Contractor of the identity of Subcontractor's representative. In the event of a change in Subcontractor's representative, Subcontractor shall notify Contractor of the identity of the new representative prior to a change of representative becoming effective. The Contractor shall have the right to approve or reject the change in Subcontractor's representative. The Subcontractor's representative shall attend weekly subcontractors' meetings at the Contractor's project office immediately prior to and during the Work. The Subcontractor shall provide its representative with a two-way radio (with Contractor's frequency), a mobile telephone or other acceptable means of communication.

**13.2** The Subcontractor agrees to be bound and comply with all the terms and conditions of any labor agreements executed by the Contractor or on Contractor's behalf and labor provisions in the Prime Contract, (herein called Labor Agreements), to the same degree and extent as if Subcontractor were a party to the Labor Agreements, including payments to employee benefit trust funds required by Labor Agreements, and including Subcontractor's submission to, and Subcontractor's compliance with, the arbitration and other dispute resolution requirements of Labor Agreements. The Subcontractor agrees to comply with the terms and conditions contained in such Labor Agreements for resolution of jurisdictional disputes. In the absence of any such procedure, or if such procedure fails to promptly resolve any jurisdictional dispute, Subcontractor agrees, at its own cost and expense, upon request of Contractor to take all lawful steps to secure a binding and final determination of said jurisdictional dispute by the National Labor Relations Board.

**13.3** The Subcontractor acknowledges that terms and conditions of the Labor Agreements may require that Subcontractor comply with additional labor agreements with unions affiliated with the AFL-CIO. When the terms and conditions of the Labor Agreements so require, Subcontractor shall perform the Work pursuant to the terms and conditions of labor agreements with unions affiliated with the AFL-CIO.

**13.4** If there is picketing at the Project and Contractor establishes a reserved gate for Subcontractor's purpose, it shall be the obligation of Subcontractor to continue the proper performance of the Work without interruption or delay.

**13.5** The Subcontractor agrees that it will bind and require all of its subcontractors and their subcontractors performing work of the type covered by the Labor Agreements to agree to all of the foregoing promises and commitments, to the same extent as Subcontractor.

**13.6** If strikes, picketing or disputes of any nature cause Subcontractor to be persistently, repeatedly, or for a period of three (3) consecutive days to be unable to supply proper labor, materials or equipment to execute the Work, then Subcontractor shall be in default and Contractor may terminate this Agreement, and proceed in accordance with Section 14.1.2 hereof.

**13.7** The Subcontractor shall comply with and agrees to be bound by all applicable federal, state and local laws and regulations, including all provisions of the Fair Labor Standards Act, the American With Disabilities Act, the federal Family and Medical Leave Act, the California Labor Code, the California Fair Employment and Housing Act, and the California Family Rights Act. Upon request, Subcontractor shall submit certified payroll records to Contractor no later than three (3) working days after labor has been paid.

#### **SECTION 14. RECOURSE BY CONTRACTOR**

**14.1** The Contractor may demand adequate written assurance from Subcontractor of its ability to perform under this Agreement. The Subcontractor's failure to provide that assurance within fifteen (15) days is a default under section 14.2 of this Agreement.

**14.2** If Subcontractor refuses or neglects to provide a sufficient number of properly skilled workers and proper materials to maintain the Project Schedule, or fails to properly and diligently prosecute the Work, or fails to make prompt payment to its workers, subcontractors, materialsmen or suppliers, or becomes delinquent with respect to contributions or payments required to be made to any health and welfare, pension, vacation, apprenticeship or other employee benefit program or trust, or fails to provide adequate assurance pursuant to section 14.1, or is otherwise guilty of a material breach of a provision of this Agreement, such shall constitute a default by Subcontractor. If Subcontractor fails to commence and satisfactorily continue correction of a default within forty-eight (48) hours after Subcontractor's receipt of notice of default, then Contractor, without prejudice to any other rights or remedies, shall have the right to any or all of the following remedies:

- (a) Provide such number of workers and quantity of materials, equipment and other facilities as Contractor deems necessary for completion of the Work or any part thereof, which Subcontractor has failed to timely complete or perform, and charge the cost thereof to Subcontractor, who shall be liable for the payment of such cost, including profit, expenses and attorneys' fees incurred as a result thereof;
- (b) Contract with one or more additional subcontractors to perform such part of the Work as Contractor shall determine will provide the most expeditious completion of the Work and charge the cost thereof to Subcontractor;
- (c) Withhold payment of any amount due Subcontractor pending corrective action to the extent required by Contractor;
- (d) Terminate Subcontractor's right, in whole or in part, to perform the Work and use any materials, implements, equipment, appliances, facilities or tools furnished or belonging to Subcontractor to complete the Work, without any additional compensation to Subcontractor for such use;

- (e) Require Subcontractor to assign and transfer to Contractor, in whole or in part, Subcontractor's subcontracts, orders and commitments relating to the Work. The Subcontractor shall execute and deliver all documents and take all action required to transfer Subcontractor's rights in subcontracts, orders and commitments relating to the Work to Contractor;
- (f) Require Subcontractor to cancel, all or part, of Subcontractor's subcontracts, orders and commitments relating to the Work;
- (g) Require Subcontractor to sell at prices approved by Contractor such materials, equipment, tools, supplies, and facilities obtained pursuant to this Agreement, as Contractor shall direct, the proceeds of such sale shall be paid to Contractor or credited to Contractor, as Contractor shall direct;
- (h) Withhold payments to Subcontractor until the Work has been completed. At that time, all costs, including expenses and attorneys' fees, incurred by Contractor to complete the Work, plus fifteen percent (15%) mark-up for overhead and profit shall be deducted from the Contract Price. The Subcontractor shall be liable for payment of any amount which exceeds the unpaid balance of the Contract Price.

**14.3** In the event of an emergency affecting the safety of persons or property, Contractor may proceed with the remedies set forth in 14.2, without written notice to Subcontractor.

**14.4** The Contractor may at any time and for any reason terminate this Agreement. Such termination shall be by written notice to Subcontractor.

- (a) Upon receipt of such notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue the Work and placing of orders for materials, equipment, facilities and supplies relating to the Work. If requested by Contractor, Subcontractor shall make every reasonable effort to procure cancellation of all existing subcontracts, orders and commitments upon terms satisfactory to Contractor or, at the option of Contractor, Subcontractor shall give Contractor the right to assume those obligations directly, including all benefits to be derived therefrom. The Subcontractor shall thereafter do only such work as may be necessary to preserve and protect the Work already in progress and to protect materials, equipment, facilities and supplies at the Project or in transit thereto.
- (b) Upon such termination, Subcontractor shall only be entitled to payment in accordance with Subcontract Agreement (Exhibit A), as follows: (1) the actual cost of the Work completed in conformity with this Agreement; (2) such other costs actually incurred by Subcontractor as are permitted by the Prime Contract and approved by Owner; and (3) fifteen percent (15%) of the cost of the Work referred to in item (1) above for overhead and profit unless a different amount is required by the Prime Contract. There shall be deducted from such sums as provided in this paragraph the amount of any payments made to Subcontractor prior to the date of the termination of this Agreement. In no event shall payment due hereunder exceed the amount due for the percentage of Work completed based on the detailed breakdown submitted by Subcontractor in accordance with Section 5.1 of Subcontract Agreement (Exhibit A). The Subcontractor shall not be entitled to any claim or lien against Contractor, Owner or Premises for any additional compensation or damages in the event of such termination and payment.

**14.5** The Contractor may withhold or nullify on account of subsequently discovered evidence, the whole or part of any payment to Subcontractor to the extent necessary to protect Contractor from loss, including costs, expenses and attorneys' fees on account of: (1) failure of Subcontractor to remedy defective work; (2) claim or reasonable evidence indicating a probable claim arising out of Subcontractor's acts or omissions; (3) failure of Subcontractor to make prompt payments to its subcontractors or for material, labor or fringe benefits; (4) reasonable doubt that Work can be completed for the balance of the unpaid Contract Price; (5) damage to Contractor, Owner, Premises or other subcontractor arising out of Subcontractor's acts or omissions; (6) penalties, fines, taxes or assessments against Contractor, Owner, Premises or Subcontractor resulting from Subcontractor's failure to comply with any state, federal or local law, ordinance or regulations; (7) claims Contractor may have against Subcontractor arising out of other projects; or (8) any other ground for withholding payment allowed by state or federal law, or as otherwise provided in this Agreement. When the above matters have been rectified, the amounts due to Subcontractor shall be paid or credited to Subcontractor.

**14.6** The waiver of any neglect, failure or default on the part of Subcontractor by Contractor shall not constitute the waiver of any additional or continued neglect, failure or default by Subcontractor.

**14.7** Upon the appointment of a receiver for Subcontractor, or upon Subcontractor making an assignment for the benefit of creditors, or upon Subcontractor seeking protection under the Bankruptcy Code, or upon Subcontractor committing any other act of insolvency, Contractor may, absent any applicable legal limitation, terminate this Agreement upon forty-eight (48) hours written notice, by certified mail, to Subcontractor, its trustee, and its surety, if any, unless Subcontractor, its trustee, or its surety: (1) promptly cures all defaults; (2) provides adequate assurance of future performance of this Agreement; (3) compensates Contractor for actual pecuniary loss resulting from all defaults; and (4) assumes the obligations of Subcontractor within the statutory time limits.

**14.8** If Subcontractor is not performing in accordance with the Project Schedule at the time of entering an order for relief, or at any subsequent time, while Contractor is awaiting the decision of Subcontractor or its trustee to reject or accept this Agreement and provide adequate assurance of its ability to perform hereunder, Contractor may avail itself of such remedies as are reasonably necessary to maintain the Project Schedule. The Contractor may offset against any amounts due or to become due to Subcontractor, all costs incurred in pursuing any of the remedies provided herein, including reasonable overhead, profit, expenses and attorneys' fees incurred as a result of Subcontractor's non-performance. The Subcontractor shall be liable for the payment of any amount which such costs, overhead, profit, expenses and attorney's fees exceed the unpaid balance of the Contract Price.

## **SECTION 15. INDEMNIFICATION**

**15.1** The Subcontractor shall fully defend, fully indemnify and save harmless Contractor and Owner, including their officers, agents, representatives, employees, affiliates, parents and subsidiaries, (herein called Indemnified Parties), and each of them, from any and all claims, demands, causes of action, damages, costs, losses, liabilities, expenses, attorneys' fees, executive expenses and administrative expenses of the Indemnified Parties, of every kind and nature whatsoever, in law or equity, (herein called Claims), caused by, resulting from, arising out of, or occurring in connection with the Work, including, but not limited to, the following:

- (a) Personal injury, including bodily injury, emotional injury, sickness, disease or death to persons, including employees, representatives or agents of Contractor, Owner, Subcontractor, or any other subcontractor and damage to property of anyone, including loss of use thereof, caused or alleged to be caused in whole or in part by an act or omission of Subcontractor or anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable, regardless of whether such personal injury or property damage is caused in part by Indemnified Parties.
- (b) Penalties or fines imposed on account of the violation of any law, order, citation, rule, regulation, standard, ordinance or statute caused by an act or omission of Subcontractor.
- (c) Infringement of any patent rights which may be brought against Contractor or Owner, arising out of the Work.
- (d) Liens and claims for labor performed or materials furnished as part of the Work.
- (e) Failure of Subcontractor to comply with the provisions of Section 13 of this Agreement.
- (f) Failure of Subcontractor to comply with the provisions of Section 16 of this Agreement.
- (g) Violation or infraction by Subcontractor of any law, order, citation, rule, regulation, standard, ordinance or statute relating in any way to the occupational safety and health of employees, including the use of equipment, hoists, elevators or scaffold.
- (h) Use of scaffolding, platforms, temporary structures, conveyors, runways, manlifts, hoists, cranes, equipment or tools.
- (i) Errors in the performance of the Work by Subcontractor, its subcontractors, materialsmen or suppliers.

**15.2** The Subcontractor is responsible for latent and patent defects in the Work until barred by the applicable statute of limitations.

**15.3** If it is determined by Contractor or by legal proceedings, that Subcontractor has no direct, contributory or incidental negligence or other obligation to the Indemnified Parties and that Subcontractor is not a proper party to the Claims, then Subcontractor shall not be obligated to indemnify and save harmless the Indemnified Parties for such Claims. However, until such determination is made by Contractor or by legal proceedings, Subcontractor's obligations under Section 15 shall remain in full force and effect.

- 15.4** The Subcontractor agrees that its obligations to indemnify and save harmless the Indemnified Parties shall not in any way be affected or diminished by any statutory or constitutional immunity Subcontractor may have from suits by its employees, or from limitations of liability or recovery under Workers' Compensation laws.
- 15.5** The indemnification provisions in Section 15 shall extend to Claims occurring after this Agreement is terminated. The indemnification provisions in Section 15 apply regardless of any active or passive negligent act or omission of the Indemnified Parties. However, Subcontractor shall not be obligated under this Agreement to indemnify for Claims arising from the sole negligence or willful misconduct of the Indemnified Parties or other contractors directly responsible to the Indemnified Parties. The indemnification provisions in Section 15 shall not be construed to require indemnification by Subcontractor to a greater extent than permitted under the statutes and public policy of the state where the Project is located.
- 15.6** The Subcontractor shall defend at its own cost and expense, all Claims that may be made, asserted, or initiated against the Indemnified Parties by third parties, including governmental agencies or employees of Subcontractor.
- 15.7** Subcontractor shall pay and satisfy any adjudication, award, judgment, verdict or decree that may be rendered against Indemnified Parties, arising out of any Claims.
- 15.8** Subcontractor shall reimburse Indemnified Parties for all costs, expenses and attorneys' fees incurred pursuing or enforcing any of the provisions of Section 15.
- 15.9** All Work shall be at the risk of Subcontractor exclusively, until the completed Work is accepted by Contractor, Owner and Architect.
- 15.10** It is expressly understood that the provisions of Section 15 are in addition to and not limited by any provisions provided elsewhere in this Agreement.
- 15.11** Notwithstanding any existing indemnification provisions under this section 15, the Subcontractor's obligations under this section shall be limited to the extent that this Agreement applies to a residential construction contract or amendment thereto, entered into in California after January 1, 2008 pursuant to California *Civil Code*, Section 2782. All other provisions of this section not in conflict with this statute or applicable law shall remain in full force and effect.

## **SECTION 16. INSURANCE**

### **16.1 Casualty Insurance.**

The Subcontractor shall, at its expense, procure and maintain insurance on all of its operations and the Work, with companies acceptable to Contractor, as follows:

#### **16.1.1 Workers' Compensation and Employer's Liability Insurance.**

Workers' Compensation insurance shall be provided as required by any applicable law or regulation. Employer's Liability insurance shall be provided with the coverage and limits of liability specified in Subcontract Exhibit 7.

#### **16.1.2 General Liability Insurance.**

- (a) Primary Commercial General Liability insurance (Insurance Services Office, Form CG 00 01 or equivalent) covering all operations by or on behalf of Subcontractor, providing insurance for bodily injury liability and property damage liability with the coverage and limits of liability specified in Subcontract Exhibit 7.
- (b) Primary and Excess Products Liability and Completed Operations coverage through the expiration of the applicable statute of limitations for latent and patent defects in the Work, with the coverage and limits of liability specified in Subcontract Exhibit 7.
- (c) The Indemnified Parties listed in Subcontract Exhibit 7 shall be named as an additional insured on the Subcontractor's Commercial General Liability policy and Excess Liability policy and such insurance afforded the additional insured shall apply as primary insurance. Any other insurance maintained by the Indemnified Parties shall not be called upon to contribute with this insurance.
- (d) The Subcontractor shall ensure that its sub-subcontractors of every tier also maintain insurance with the coverage and limits of liability specified in Subcontract Exhibit 7. The Contractor requires written proof in the form of Certificates of Insurance indicating that the required insurance has been procured by Subcontractor and its sub-subcontractors. Such Certificates of Insurance shall be furnished to Contractor within ten (10) days of Subcontractor signing this Agreement. The Subcontractor shall require its sub-subcontractors to have the Indemnified Parties named as additional insured on its sub-subcontractors' insurance policies required by this Agreement.
- (e) The naming of the Indemnified Parties as additional insured on the Subcontractor's and its sub-subcontractors' insurance policies as required by this Agreement, shall be at no additional cost or expense to the Indemnified Parties.
- (f) Contractor may elect at his option to provide on-site General Liability/Excess Liability insurance to Eligible Subcontractors through a Contractor Controlled Insurance Program (CCIP) as specified in Subcontract Exhibit 7. The CCIP program will satisfy Subcontractor's on-site general liability insurance requirements for sections 16.1.2.a, 16.1.2.b, and 16.1.2.c above.

#### **16.1.3 Automobile Liability Insurance.**

Automobile Liability insurance, including coverage for all owned, hired and non-owned vehicles, with the coverage and limits of liability specified in Subcontract Exhibit 7.

**16.1.4** Regardless of Contractor's consent to exclusions, coverage limitations or deductibles, the Subcontractor shall be responsible for any deductible amount or any loss arising out of coverage denials by its insurance carrier(s).

**16.1.5** The Contractor may take whatever actions are necessary to assure Subcontractor's compliance with its obligations under this section of the Agreement. Should any insurance policy lapse or be canceled during the period of this Agreement, the Subcontractor shall, prior to the effective expiration or cancellation date, furnish the Contractor with evidence of renewal or replacement of the policy. Failure to continuously satisfy the insurance requirements herein is a material breach of this Agreement. In the event Subcontractor fails to maintain any part of the insurance coverage required, Contractor may, but is not required to, procure such coverage and charge the expense to Subcontractor or Contractor may pursue other remedies available under this Agreement.

**16.1.6** Any acceptance of insurance certificates by Contractor shall in no way limit or relieve Subcontractor of its duties and responsibilities under this Agreement, including the duty to indemnify and hold harmless Contractor as set forth in Section 15, Indemnification.

**16.1.7** Insurance coverage in the minimum amounts set forth in Subcontract Exhibit 7 shall not be construed to relieve the Subcontractor for liability in excess of such coverage nor shall it preclude the Contractor from taking such other actions available to Contractor under any other provision of this Agreement or by law. If higher limits or other forms of insurance are required in the Contractor Documents, Subcontractor will comply with such requirements.

### **16.2 Property Insurance.**

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

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

## **SECTION 17. DISPUTE RESOLUTION PROCEDURE**

**17.1** If a dispute or claim between Contractor and Subcontractor arises out of or relates to this Agreement or its breach (herein called Dispute), Contractor and Subcontractor shall endeavor to settle the Dispute first through direct discussions. If the Dispute cannot be settled through direct discussions, and as a condition precedent to initiation of arbitration or litigation, Contractor and Subcontractor shall endeavor to settle the Dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association (herein called AAA) before recourse to arbitration. The location of the mediation shall be the AAA office closest to the Project unless the parties otherwise agree. Once a request for mediation has been filed with the AAA, the mediation will be concluded within sixty (60) days of the filing of the request.

**17.2** A Dispute not resolved pursuant to Paragraph 17.1 shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the AAA then prevailing, unless Contractor and Subcontractor agree otherwise. Selection of arbitrators shall be in accordance with such rules, with no greater than one out of the three arbitrators a practicing lawyer. If a lawyer is an arbitrator, that lawyer shall preside over the arbitration panel. The other two arbitrators shall be experienced in the field of the Dispute.

**17.3** The award, exclusive of any punitive or exemplary damages, rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. In no event shall the arbitrators be empowered to assess punitive or exemplary damages. Any punitive or exemplary damages assessed as part of an award shall not be enforceable.

**17.4** The Subcontractor shall not interrupt, cease or delay the Work during the pendency of any arbitration. Contractor and Subcontractor shall make every effort to expedite the rapid conclusion of any arbitration proceedings.

**17.5** To the extent not prohibited by their contracts with others, the claims and disputes of Owner, Contractor, Subcontractor, other subcontractors, materialsmen and suppliers involving a common question of fact or law shall be consolidated, joined and heard by the same arbitrators in one arbitration proceeding. In this event, it shall be the responsibility of Subcontractor to prepare and present Contractor's case, to the extent the proceedings are related to this Agreement. Should Contractor enter into arbitration with the Owner or others regarding matters relating to this Agreement, Subcontractor shall be bound by the result of the arbitration to the same degree as Contractor

**17.6** Notice of the demand for arbitration shall be filed with the other party to this Agreement and with the AAA. The demand shall be made within a reasonable time after the Dispute has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such Dispute would be barred by the applicable statute of limitations.

**17.7** In any Dispute, Contractor and Subcontractor shall not be entitled to recover attorneys' fees, expert fees, arbitration fees, costs or expenses incurred in connection with such Dispute.

**17.8** The Subcontractor agrees that contracts entered into by Subcontractor relating to the Project will contain provisions requiring consolidation and joinder, to permit disposition of all related disputes in one arbitration proceeding.

**17.9** In the event that any dispute by and between Contractor and Subcontractor also includes Owner as a party, the dispute resolution provisions of the Prime Contract by and between Owner and Contractor, to the extent they are in conflict with the dispute resolution provisions of this section, shall take precedence over the provisions of this Section 17. Contractor agrees to provide a copy of the pertinent language of the Prime Contract to Subcontractor upon request.

## **SECTION 18. COMPLIANCE WITH LAWS AND SAFETY PRACTICES**

**18.1** The Subcontractor shall comply fully with all laws, codes, orders, citations, rules, regulations, ordinances, standards and statutes affecting or relating to this Agreement or Subcontractor's performance, including, those relating to occupational health and safety, handling and storage of hazardous materials, accident prevention, safety equipment, and safety practices, including the accident prevention and safety program of Contractor and Owner.

**18.2** The Subcontractor shall have a written safety program. The Subcontractor shall conduct inspections of the Project to determine that safe working conditions and equipment exist and accepts sole responsibility for providing a safe place to work for its employees and the employees of its subcontractors, materialsmen and suppliers. The Subcontractor shall have sole responsibility for the adequacy and required use of all safety equipment. The Subcontractor shall appoint a competent safety person from its full-time on-site personnel to address safety issues.

**18.3** If Subcontractor removes any construction safety protection, Subcontractor shall promptly reinstall such protection in a proper condition prior to leaving the work area. Construction safety protection includes handrails, floor opening protection, barricades, and signage.

**18.4** The Subcontractor shall provide flagmen for traffic control for its deliveries and equipment operation to insure worker and public safety.

**18.5** If there is an injury to any of Subcontractor's employees at the Project, Subcontractor shall report that incident to Contractor on the day of occurrence. The Subcontractor shall provide a written report of the incident to Contractor within ten (10) days of occurrence.

**18.6** Prior to Subcontractor using scaffolding, platforms, temporary structures, conveyors, runways, manlifts, hoists, hoisting equipment, cranes, equipment, tools or other items used for construction (herein called Equipment), Subcontractor shall examine and test the Equipment before beginning work each day. Subcontractor assumes all responsibility for its use, installation or operation of Equipment at the Project.

## **SECTION 19. WARRANTY AND QUALITY PRACTICES**

**19.1** The Subcontractor warrants to Owner and Contractor that the materials and equipment furnished under this Agreement shall be new unless otherwise specified. The Work shall be performed in a good and workmanlike manner, shall be good quality, shall be free from faults and defects, and in accordance with the Contract Documents. The Subcontractor shall have a written quality program and shall appoint one full-time on-site employee as their quality representative to address quality issues and assure compliance with the requirements of the Contract Documents. The Work not conforming to these requirements, including substitutions not properly approved and authorized, shall be considered defective. The Subcontractor shall correct defective Work and materials, including costs incurred in connection with any defects in materials or workmanship, which may occur or develop prior to the Contractor's release from responsibility to the Owner for the Work.

**19.2** The warranty provided in Section 19 shall be in addition to, and not in limitation of, any other warranty or remedy required by law or by the Contract Documents.

## **SECTION 20. USE OF CONTRACTOR'S FACILITIES**

**20.1** In the event Subcontractor shall use Contractor's equipment, hoisting, scaffolding, materials, labor, supplies, water, power, lighting, heating or storage, (herein called Contractor's Facilities), Subcontractor shall reimburse Contractor for the cost of such use. Further, Subcontractor assumes all responsibility for physical damage to Contractor's Facilities used by Subcontractor, its subcontractors, materialsmen or suppliers. Subcontractor agrees to indemnify and defend Contractor against and save harmless from any and all damages, claims, suits, or losses caused directly or indirectly by Subcontractor's use of Contractor's Facilities. Subcontractor shall provide a "Competent Person" and appropriate training of personnel as defined by OSHA or other governmental regulations prior to use of Contractor's Facilities. 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. The Subcontractor accepts Contractor's Facilities as furnished.

## **SECTION 21. ASSIGNMENT OF CONTRACT**

**21.1** The Subcontractor shall not, without written consent of Contractor, assign, transfer or sublet the Work, in whole or in part, nor assign any payment hereunder. The assignment, transferring or subletting of the Work, in whole or in part, shall not relieve Subcontractor of its responsibilities under this Agreement.

21.2 If Subcontractor subcontracts any of the Work, such subcontract will incorporate by reference all provisions of this Agreement.

## **SECTION 22. INDEPENDENT CONTRACTOR**

22.1 The Subcontractor is an independent contractor and shall, at its sole cost and expense, and without increase in the Contract Price: (1) comply with laws, codes, orders, citations, rules, regulations, ordinances, standards and statutes of all governing bodies having jurisdiction over the Work; (2) obtain all necessary permits and licenses to deliver its materials and perform the Work; and (3) pay all manufacturers' taxes, sales taxes, use taxes, processing taxes, federal taxes, state taxes, county taxes, municipality taxes, insurance, and contributions for social security and unemployment which are measured by wages, salaries, or other remunerations paid to Subcontractor's employees, whether levied under existing or subsequently enacted laws, rules or regulations. At Contractor's request, Subcontractor shall furnish evidence satisfactory to Contractor that any or all of the foregoing obligations have been fulfilled.

22.2 The Subcontractor acknowledges that Contractor relies on Subcontractor's special expert knowledge of the laws, codes, orders, citations, rules, regulations, ordinances, standards and statutes that apply to the Work.

## **SECTION 23. CLEAN UP**

23.1 The Subcontractor shall at all times keep the Premises free from accumulation of waste materials or rubbish arising out of the Work.

23.2 The Subcontractor shall remove from the Premises all of its waste materials or rubbish. If Subcontractor places its waste materials and rubbish in trash containers provided by Contractor, Subcontractor shall pay for trash containers or portions of trash containers used for its waste materials and rubbish. The Subcontractor shall clean-up and dispose of its waste materials and rubbish daily as the Work progresses and as directed by Contractor to maintain a neat, orderly and safe Premises.

23.3 Surplus materials not required for the Work shall be removed from the Premises by Subcontractor.

23.4 Upon completion of the Work, Subcontractor shall remove from the site all hazardous materials, temporary structures, debris, waste materials and rubbish incident to the Work and clean all surfaces, fixtures and equipment related to the performance of this Agreement.

23.5 The Subcontractor shall perform final cleaning of the Work, as required to achieve final acceptance by the Owner. When the Work is complete, Subcontractor shall leave the Work in a condition free of dirt, dust and foreign materials.

23.6 If Subcontractor fails to comply with the terms of Section 23 within twenty-four (24) hours after receipt of notice of non-compliance from Contractor, without further notice Contractor may perform removal of hazardous materials, temporary structures, debris, waste materials, rubbish and surplus materials and deduct the cost of such removal from any amounts due to Subcontractor.

## **SECTION 24. SHOP AND DESIGN DRAWINGS**

24.1 If Subcontractor makes changes in design, including dimensional changes, either through shop drawings or actual field work, it shall accept all responsibility for structural and functional adequacy and obtaining approval of such changes by Owner and Architect. In addition, Subcontractor shall be responsible for the costs of additional work, modifying and repairing work by other trades or Contractor, resulting from such changes.

24.2 If Subcontractor is responsible for design drawings, it shall accept all responsibility for structural, functional, and design adequacy of such drawings and obtaining approval of Owner, Architect and governing authorities of such drawings. Any structural or functional failure or inadequacy that may result from such design drawings shall be remedied by the Subcontractor. In addition, the Subcontractor shall be responsible for the costs of additional work, modifying or repairing work by other trades or Contractor, architectural and engineering changes, loss of rent, and any other damages resulting from such structural or functional failure or inadequacy.

24.3 If this Subcontract is based on preliminary, outline, or otherwise unfinished Plans and Specifications, Subcontractor accepts responsibility for cooperating and coordinating with Architect and other trades in developing final Plans and Specifications so as not to impose additional work or cost on other trades or Contractor or to cause an increase in the Contract Price.

24.4 The Subcontractor's obligations include taking field measurements for the Work and approval of shop drawings by Owner and Architect.

24.5 The Subcontractor shall not be relieved from correcting Work reflected in error on its shop drawings, not conforming to field requirements, or not complying with the terms of this Agreement. It is not incumbent upon Contractor to discover mistakes, errors, omissions or deviations in the quality, quantity or type of materials used by Subcontractor or in the shop drawings, schedules and reports submitted by Subcontractor, and Contractor's or Owner's approval of such shall not relieve Subcontractor from responsibility for unauthorized changes, mistakes, errors, omissions or deviations of any sort.

24.6 The Subcontractor shall be responsible for reviewing and having complete familiarity with shop drawings provided by Contractor, other subcontractors and suppliers, so that Subcontractor will avoid conflicts with the work of other trades.

## **SECTION 25. NON-WAIVER**

25.1 Waiver by Subcontractor of any breach of this Agreement by Subcontractor shall not constitute a waiver of any subsequent breach of this Agreement.

## **SECTION 26. SEVERABILITY**

26.1 In the event that any provision or any part of a provision of this Agreement shall be determined to be superseded, invalid, illegal or otherwise unenforceable pursuant to applicable laws by an authority having jurisdiction, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provisions or parts of provisions of this Agreement which shall remain in full force and effect as if the unenforceable provision were deleted.

## **SECTION 27. CAPTIONS**

27.1 The titles of any terms or conditions of this Agreement are for convenience only and shall not be deemed to limit, restrict or alter the content, meaning or effect thereof.

## **SECTION 28. NEGOTIATED TERMS**

28.1 The Contractor and Subcontractor acknowledge that the terms and conditions of this Agreement are the result of negotiations between Contractor and Subcontractor. Any conflict, inconsistency or ambiguity in the terms or conditions of this Agreement shall not be construed against Contractor or Subcontractor.

## **SECTION 29. ENTIRE AGREEMENT**

29.1 This Agreement constitutes the entire Agreement between Contractor and Subcontractor relative to the Project. No oral representations or other agreements have been made by Contractor and Subcontractor except as stated in this Agreement. This Agreement may not be changed in any way except as herein provided, and no term or condition of the Agreement may be waived by Contractor except in writing signed by Contractor's duly authorized officer or representative.

**EXHIBITS**

Exhibit A Subcontract Agreement (not attached)

The Contractor and Subcontractor, for themselves, their heirs, executors, administrators, successors and assigns, do hereby agree to the full performance of all of the terms and provisions herein contained.

**CONTRACTOR:**

**PANKOW SPECIAL PROJECTS, L.P.**

**SUBCONTRACTOR:**

*Subcontractor's Name*

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Richard G. Walterhouse, President  
Pankow Special Projects, Inc., General Partner

License No. 776365

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(SUBCONTRACTOR'S LICENSE NO.)

SAMPLE