

MASTER SUBCONTRACT AGREEMENT

This Master Subcontract Agreement (the "Agreement" or "Subcontract") is made and entered into as of _____ ("the Effective Date") by and between the parties described below, hereinafter referred to as "Contractor" and "Subcontractor."

CONTRACTOR:

Date: _____

D. Wilson Construction Company
 P. O. Box 3455
 McAllen, Texas 78502-3455
 (956) 686-9573
PayApplications@DWilsonConstruction.com

SUBCONTRACTOR:

Name: _____
 Address: _____
 Phone: _____
 Fax: _____

THE ATTACHED TERMS AND CONDITIONS ARE PART OF THIS AGREEMENT

IN CONSIDERATION of the mutual promises set forth below, Contractor and Subcontractor (each a "Party" and together with the "Parties") mutually agree as follows:

- A. **MASTER AGREEMENT AND WORK ORDERS:** Contractor may, by written project-specific Work Orders ("Work Order") to be issued at a later date, offer Subcontractor the opportunity to perform services, from time to time. The Parties agree that for any work performed by Subcontractor, the terms of this Agreement govern that work and the relationship between Subcontractor and Contractor. This Agreement does not obligate the Contractor to request services from Subcontractor, nor does it obligate Subcontractor to accept orders for services from the Contractor. When Subcontractor receives a Work Order issued by Contractor pursuant to the terms of this Agreement, it may accept or reject the Work Order. The Parties agree that either Subcontractor's a) written signature on the Work Order or b) beginning work on the scope of work contained in or contemplated by the Work Order will represent Subcontractor's acceptance of the Work Order and agreement to perform the entire Work Order according to the terms of the Work Order and this Agreement.

If there is a conflict between this Agreement and the terms of any Work Order, this Agreement shall take precedence over the Work Order except to the extent that the Work Order contains handwritten terms specific to the respective project that has been initialed by both Parties. In the absence of such initials by both Parties, the handwritten terms shall have no effect. No waiver by Contractor of any of the terms, provisions or conditions of this Agreement shall be effective unless said waiver shall be in writing and signed by an authorized officer or manager of Contractor. The Subcontractor shall, at all times, faithfully, with due diligence and to the best of Subcontractor's ability, experience and talent, perform all of the duties set forth in any Work Order, or reasonably inferable therefrom as necessary for completion of the scope of the work therein described, in accordance with the terms of this Agreement ("Subcontractor's Work"). This includes furnishing all materials, labor, supervision, tools, equipment and supplies as necessary to perform all of the Subcontractor's Work in complete accordance with the terms and conditions of the Prime Contract (as hereinafter defined), together with all Drawings, Specifications, General, Supplemental and Special Conditions, Addenda and all other documents referenced or made a part thereof.

- B. **CONTRACT DOCUMENTS:** The Subcontractor understands that each Work Order involves work that Contractor is performing for a project owner ("Owner"), and that Contractor's obligations are set out in a contract between Contractor and Owner (the "Prime Contract") which includes business terms regarding changes, delays, warranties, and other matters and incorporates plans and specifications and possibly other documents as well. The term "Contract Documents" means and includes this Master Subcontract Agreement, its attached Terms and Conditions, the Prime Contract between the Owner and Contractor, including all drawings and specifications, general and special or supplementary conditions, all other documents or attachments incorporated in the Prime Contract, and all addenda issued prior to and all modifications and change orders issued after execution of the Prime Contract. These documents, together with all other documents referenced or made a part thereof, are incorporated by reference in this Agreement and are as fully a part of this Agreement as if attached hereto or repeated herein in full. All of the Contract Documents are available to Subcontractor upon request, except that proprietary and/or financial information may be redacted.

- C. **COMPLIANCE WITH CONTRACT DOCUMENTS:** By executing or accepting a Work Order, Subcontractor agrees that it has received or has had sufficient opportunity to review the Prime Contract and all other Contract Documents and that Subcontractor is satisfied that it can complete its scope of work to the satisfaction of Contractor, the Owner, and the Owner's Architect. The

subcontractor is bound to the Contractor by the terms of the Prime Contract and other Contract Documents. Subcontractor assumes all obligations to Contractor that Contractor has assumed towards Owner or other parties in connection with the respective project and under the Contract Documents as they relate to Subcontractor's work or obligations under any Work Order. In addition to and without limitation of the rights and remedies stated in this Work Order, the Contractor shall have the benefit of and shall be entitled to enforce against Subcontractor all rights and remedies that Owner and/or other parties have against Contractor under the Prime Contract or other Contract Documents. By executing or accepting a Work Order, Subcontractor further 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 Subcontractor's work is to be performed and that it enters into the Work Order and this Agreement based upon its investigation of all such matters and is not relying on any opinions or representations of Contractor or the Owner.

- D. **TERM OF AGREEMENT:** This Agreement, as modified, shall remain in force and effect until terminated pursuant to the terms of this Agreement or by mutual agreement in writing by the Parties. Either Party may give the other written notice of its intent to terminate this Agreement with 30 days' notice. Upon termination, the Contractor and Subcontractor shall remain bound to complete any Work Orders issued and outstanding as of the date of such termination. Termination shall not relieve Subcontractor of any obligations that by their nature survive termination including, without limitation, liability for defective or incomplete work, and all warranties, indemnification, insurance and back charges, offsets, deductions and/or damages due and owing by Subcontractor to Contractor.
- E. **COMMENCEMENT AND COMPLETION:** Time is of the essence. Subcontractor shall commence Subcontractor's Work with diligence on the date specified by Contractor in a written notice to proceed, or if none given, on the date specified on the respective Project Schedule, as may be amended by Contractor from time to time. Subcontractor acknowledges that Contractor is required by the Prime Contract and/or Owner to complete all work by a certain date, and Subcontractor shall, without additional compensation, commence, perform and complete the work within the duration and by the deadlines set forth in the Project Schedule or any schedule then or thereafter issued by Contractor and as otherwise may be necessary for Contractor to achieve such deadline.

The contractor may, without adjustment to Subcontractor's compensation, make modifications to any schedule to coordinate other work performed by the Contractor or to ensure timely completion of the Project. Such modifications may include, without limitation, suspending, re-sequencing and/or accelerating the work. Subcontractor acknowledges that the Contractor does not guarantee any start/finish dates or durations included in any schedule and that modifications to any schedule will not entitle the Subcontractor to additional compensation. Subcontractor shall achieve final completion of Subcontractor's Work on or before the date specified in the respective Project Schedule, as may be amended by the Contractor from time to time, or on such other date as determined by the Contractor. Subcontractor shall assume toward Contractor liability for liquidated damages which the Contractor may have assumed toward the Owner as a requirement of the Contract Documents to the extent such liquidated damages are attributable to Subcontractor's Work.

Subcontractor shall designate in writing its authorized representative(s) who shall have authority for all matters concerning this Subcontract.

- F. **PAYMENT:** The full compensation due Subcontractor shall be as described in the particular Work Order issued hereunder unless alternate arrangements have been submitted and mutually agreed to by Contractor and Subcontractor in writing, and shall include all labor, equipment, materials, supplies, tools, and supervision provided by Subcontractor and all other expenses incurred by Subcontractor with respect to the work covered by such Work Order. The subcontractor shall submit monthly invoices for work completed and/or material stored on-site or at a location approved by the Owner. All Applications for Payment shall be submitted in PDF format, by e-mail, to: PayApplications@DWilsonConstruction.com. Invoices shall reflect retainage percentage required by the Prime Contract and shall be received by Contractor no later than the 20th day of each month or as specified in a notice sent to the Subcontractor.

Late invoices may not be considered for payment until the following billing period.

The subcontractor shall only be paid in accordance with the terms of the Contract Documents and provided that a properly completed application for payment is delivered to the Contractor on or before the date provided herein. **Subcontractor agrees that all payments received shall be used solely for the benefit of persons or firms supplying labor, materials, supplies, tools, equipment, or services for the Project, and that money paid to Subcontractor shall immediately become and constitute a trust for the benefit of such persons and firms and shall not be directed to any other purpose until all obligations arising hereunder have been satisfied.**

- G. **INSURANCE:** Subcontractor shall provide and maintain insurance coverage in not less than the amounts as set forth in the Terms and Conditions of this Subcontract or the respective Work Order, to the extent alternate insurance requirements are specified therein.
- H. **BONDS:** If specified in the Work Order or the Contract Documents, the Subcontractor shall cause Payment and Performance Bonds in the form acceptable to Contractor and in the amount specified in the respective Work Order to be executed and delivered to Contractor prior to commencing Subcontractor's Work.

The premium for Payment and Performance Bonds, if any, is included in the Subcontract Price.

- I. **SALES TAX:** Each Work Order issued hereunder shall indicate whether the respective Project is Tax Exempt in accordance with the Contract Documents.
- J. **SUCCESSORS AND ASSIGNS:** The parties hereto, their heirs, executors, administrators, successors, and assigns, do hereby agree to the full performance of the covenants and agreements herein specified.
- K. **THE ARCHITECT:** The Architect is the party identified as the Architect in the Contract Documents, and any replacement thereunder.
- L. **TERMS AND CONDITIONS, EXHIBITS:** The Terms and Conditions and Exhibits attached to this Subcontract are hereby incorporated herein by reference and made a part hereof for all purposes.
- M. **EQUAL OPPORTUNITY:** The Contractor is an equal opportunity employer. By executing this Subcontract, the Subcontractor agrees to comply with all applicable provisions of the Civil Rights Act, as amended, and Executive Order 11246, if applicable, for the duration of this Subcontract. Subcontractor further agrees it will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The Subcontractor agrees and certifies that it is and will remain in compliance with the Vietnam Era Veterans Readjustment Assistance Act of 1974 as set forth in 41 C.F.R. 60-250.3, and the Rehabilitation Act of 1973 as set forth in 41 C.F.R. 60-741.4, if applicable, for the duration of this Subcontract. If this Subcontract is subject to Executive Order No. 11246, the Vietnam Era Veterans Readjustment Assistance Act of 1974 as set forth in 41 C.F.R. 60-250.3, or the Rehabilitation Act of 1973 as set forth in 41 C.F.R. 60-741.4, Subcontractor will execute Exhibit "1" if attached hereto certifying compliance with the aforementioned Acts and Executive Order.
- N. **PROJECT SAFETY REQUIREMENTS:** Subcontractor shall become familiar with and abide by the safety rules and regulations of the Contractor, and any governmental body having the authority to control the manner or method of carrying out the work, including, but not limited to, the Williams-Steiger Occupational Safety and Health Act of 1970 (OSHA), all rules of regulations established pursuant thereto, and all amendments and supplements thereto.
- O. **INDEMNIFICATION**
FOR GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED, CONTRACTOR AND SUBCONTRACTOR AGREE AS FOLLOWS:

TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR SHALL, AT SUBCONTRACTOR'S EXPENSE AND WITH COUNSEL ACCEPTABLE TO THE CONTRACTOR, FOREVER PROTECT, DEFEND, HOLD HARMLESS AND UNCONDITIONALLY INDEMNIFY CONTRACTOR, CONTRACTOR'S SURETY, THE OWNER, THE ARCHITECT, THE ENGINEER, AND ALL PARTIES OR PERSONS WHOM CONTRACTOR IS REQUIRED TO INDEMNIFY PURSUANT TO THE TERMS OF THE CONTRACT DOCUMENTS, AND ALL OF THEIR RESPECTIVE OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, AND AGENTS (HEREINAFTER COLLECTIVELY REFERRED TO AS "INDEMNITEES"), AGAINST, FROM AND FOR ALL LIABILITY, COSTS, EXPENSES, CLAIMS, LIENS, CITATIONS, PENALTIES, FINES, ATTORNEY'S FEES, LOSSES, AND DAMAGES (COLLECTIVELY, "INDEMNIFIED LOSSES") WHICH THE INDEMNITEES MAY AT ANY TIME SUFFER OR SUSTAIN OR BECOME LIABLE FOR BY REASON OF ANY ACCIDENTS, DAMAGES OR INJURIES WHATSOEVER, ECONOMIC OR OTHERWISE, EITHER TO THE PERSONS OR PROPERTY OR BOTH OF CONTRACTOR, SUBCONTRACTOR, OR SUBCONTRACTOR'S LOWER-TIER SUBCONTRACTORS AND SUPPLIERS, OR THE WORKMEN OR EMPLOYEES OF ANY SUCH PARTY, OR ANY OTHER PARTIES, IN ANY MATTER ACTUALLY OR ALLEGEDLY ARISING OUT OF, RELATING TO, OR RESULTING FROM THIS SUBCONTRACT, ANY WORK ORDER, SUBCONTRACTOR'S PERFORMANCE OR NON-PERFORMANCE HEREUNDER, SUBCONTRACTOR'S BREACH OF CONTRACT, OR FAILURE OR DEFECTS IN MATERIALS OR GOODS SUPPLIED BY OR ON BEHALF OF SUBCONTRACTOR OR LOSS OF USE OF PROPERTY, REGARDLESS OF CAUSE, INCLUDING THE SOLE, PARTIAL, CONTRIBUTORY, OR STRICT NEGLIGENCE, ACTS, OMISSIONS, OR FAULT OF ANY PARTY INDEMNIFIED HEREUNDER, IT BEING THE EXPRESS INTENT OF THE PARTIES THAT SUBCONTRACTOR SHALL INDEMNIFY, PROTECT, AND DEFEND THE INDEMNITEES IN ALL CASES AGAINST THE CONSEQUENCES AND/OR EFFECTS OF THEIR OWN NEGLIGENCE; PROVIDED, HOWEVER, TO THE EXTENT CHAPTER 151 OF THE TEXAS INSURANCE CODE (THE "ANTI-INDEMNITY STATUTE") APPLIES TO THIS SUBCONTRACT, SUBCONTRACTOR'S INDEMNITY OBLIGATIONS HEREUNDER SHALL NOT APPLY TO THE EXTENT THE INDEMNIFIED LOSSES ARE CAUSED BY THE NEGLIGENCE, ACT OR OMISSION, OR OTHER FAULT OF THE PARTY TO BE INDEMNIFIED, EXCEPT IN THE CASE OF "EMPLOYEE-INJURY CLAIMS" AS DEFINED BELOW. IT IS THE EXPRESS INTENT OF THE PARTIES THAT THIS INDEMNITY CLAUSE COMPLY FULLY WITH THE PROVISIONS OF THE ANTI-

INDEMNITY STATUTE AND ANY OTHER APPLICABLE LAWS AND BE CONSTRUED ACCORDINGLY THEREWITH TO THE MAXIMUM EXTENT PERMITTED BY LAW.

NOTWITHSTANDING THE FOREGOING, SUBCONTRACTOR ACCEPTS FULL RESPONSIBILITY TO INSPECT CONTINUOUSLY, MONITOR AND WARN ANY AGENT, INVITEE, SERVANT OR EMPLOYEE OF THE SUBCONTRACTOR AND ITS LOWER-TIER SUBCONTRACTORS AND SUPPLIERS WHO COME ONTO ANY PROJECT SITE (HEREINAFTER COLLECTIVELY REFERRED TO AS "SUBCONTRACTOR PARTIES") OF ANY UNSAFE CONDITION OF THE PREMISES, AS NECESSARY TO ENSURE THAT THE SUBCONTRACTOR PARTIES MAY SAFELY COMMENCE OR CONTINUE WITH THE SUBCONTRACT WORK. IF AN INDEMNITEE IS SUED BY (A) AN EMPLOYEE OF THE SUBCONTRACTOR, (B) AN EMPLOYEE OF THE SUBCONTRACTOR'S SUBCONTRACTOR (OF ANY TIER), OR (C) AN INSURANCE COMPANY OF EITHER FOR PERSONAL INJURY, DEATH, SICKNESS OR DISEASE ARISING OUT OF OR RELATING TO THIS SUBCONTRACT ("EMPLOYEE-INJURY CLAIMS"), SUBCONTRACTOR SHALL ADDITIONALLY INDEMNIFY AND DEFEND THE INDEMNITEES AGAINST SUCH CLAIMS TO THE EXTENT CAUSED OR CONTRIBUTED TO BY ANY INDEMNITEE'S NEGLIGENCE OR FAULT, INCLUDING ALLEGATIONS OF NEGLIGENT SUPERVISION OF THE WORK OR WORK SITE; SUBCONTRACTOR EXPRESSLY ACKNOWLEDGES IN SUCH CASE IT IS INDEMNIFYING THE INDEMNITEES AGAINST THE CONSEQUENCES AND EFFECTS OF THEIR OWN NEGLIGENCE, INCLUDING SOLE NEGLIGENCE OR FAULT, WITH RESPECT TO SUCH EMPLOYEE-INJURY CLAIMS.

SUBCONTRACTOR SHALL OBTAIN INSURANCE SUFFICIENT TO COVER ITS INDEMNITY OBLIGATIONS AS DEFINED HEREIN, BUT THE COVERAGE OF ANY INSURANCE POLICY REQUIRED HEREIN OR ACTUALLY CARRIED BY SUBCONTRACTOR SHALL IN NO WAY LIMIT THE EXTENT OF SUBCONTRACTOR'S LIABILITY UNDER THE FOREGOING INDEMNITY PROVISIONS.

SUBCONTRACTOR'S INDEMNITY OBLIGATIONS HEREUNDER SHALL NOT BE LIMITED IN ANY WAY BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR THE SUBCONTRACTOR UNDER ANY INSURANCE REQUIRED HEREUNDER, OR ANY WORKER'S OR WORKMAN'S COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS.

SUBCONTRACTOR'S INDEMNITY OBLIGATIONS HEREUNDER SHALL SURVIVE THE TERMINATION OF THE SUBCONTRACT FOR ANY REASON.

IN WITNESS WHEREOF, the parties have executed this Subcontract as of the day and year first above written.

CONTRACTOR:

D. WILSON CONSTRUCTION COMPANY

By: _____

Title: _____

Date: _____

SUBCONTRACTOR:

By: _____

Title: _____

Date: _____

MASTER SUBCONTRACT AGREEMENT - TERMS AND CONDITIONS**TABLE OF CONTENTS**

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I. Contract Documents

- A. **SUBCONTRACTOR BOUND BY CONTRACT DOCUMENTS.** With respect to each and every Work Order executed or accepted by Subcontractor pursuant to the terms of this Agreement, Subcontractor acknowledges that Subcontractor has been given an opportunity to, and has carefully examined, read and understood the respective Contract Documents, including without limitation, the Prime Contract and all Drawings and Specifications relating to or affecting Subcontractor's Work, and that Subcontractor has resolved to its satisfaction any ambiguities or discrepancies within or among the Subcontract, these Terms and Conditions or the Contract Documents. Subcontractor and its sub-subcontractors, materialmen and suppliers are bound by any and all parts of the Contract Documents in the same manner and to the same extent that Contractor is bound to Owner under the Contract Documents. Subcontractor assumes toward Contractor all of the obligations and responsibilities assumed by Contractor toward Owner, as applicable to the Subcontract and these Terms and Conditions, including without limitation, any obligation to pay liquidated damages, waiver of claims, and to participate in and be bound by any specified dispute resolution procedures.
- B. **FAMILIAR WITH PROJECT SITE.** With respect to each and every Work Order executed or accepted by Subcontractor pursuant to the terms of this Agreement, Subcontractor warrants and represents that Subcontractor has physically visited the Project site and is fully acquainted with and has verified the conditions under which Subcontractor's Work is to be performed, including without limitation, subsurface and other conditions which in any manner can affect Subcontractor's Work, applicable laws, codes and other restrictions, local labor conditions, local weather patterns, access restrictions to and from the Project site, prior work performed by others on the Project, and all other matters which may affect the time and cost of completing Subcontractor's Work. Subcontractor is not relying on any representations, statements or information provided by Contractor except as set forth in the Contract Documents. Subcontractor assumes full and complete responsibility for all existing conditions relating to Subcontractor's Work, the Project site and its surroundings, and all risks in connection therewith, including, without limitation, unforeseen difficulties or obstructions which may be encountered.
- C. **CONFLICT BETWEEN CONTRACT DOCUMENTS.** The Subcontract, these Terms and Conditions, the Contract Documents, and the respective Work Order are intended to be read as a whole. In the event of a conflict between the Subcontract, the respective Work Order, these Terms and Conditions, and/or any of the Contract Documents, the provisions of the Subcontract and these Terms and Conditions shall control; provided, however, if the Contract Documents or Work Order impose a stricter requirement on Subcontractor than the Subcontract or these Terms and Conditions, such stricter requirements shall control. In the event of a conflict between the Subcontract and the respective Work Order, the provisions of the Subcontract regarding priority of documents shall control.

II. Scope of Subcontractor's Work

- A. **GENERAL SCOPE OF WORK.** With respect to each and every Work Order executed or accepted by Subcontractor pursuant to the terms of this Agreement, Subcontractor represents that it is familiar with the type of work contemplated therein, and is fully capable of performing the Work in strict accordance with the Contract Documents. Unless expressly provided otherwise herein, Subcontractor shall provide all supervision, labor, materials, supplies, equipment, tools, shop and working drawings, permits and testing to complete Subcontractor's Work, including without limitation all work described in the applicable portions of the Drawings and Specifications or reasonably inferable therefrom or typically performed by Subcontractor's trade. Subcontractor shall begin, carry on and complete Subcontractor's Work in a skillful, prompt and diligent manner so as not to interfere with or delay the work of Contractor or the work of any other subcontractor. Subcontractor shall promptly pay for all materials/equipment purchased or rented and shall pay for all labor in a timely manner.
- B. **APPROVAL BY ARCHITECT.** All Work furnished pursuant to this Subcontract shall be in compliance with all Contract Documents, and Subcontractor shall be bound by said documents in the performance of this Subcontract. Subcontractor's Work shall be subject to the final approval by Contractor, Architect, Owner

and/or Owner's authorized agent. The Architect's, Owner's, or Owner's authorized agent's decision in matters relating to aesthetic matters shall be final, if consistent with the terms of the Contract Documents.

- C. **STORAGE OF MATERIALS, RISK OF LOSS.** Subcontractor shall store materials and equipment at the Project site only in areas designated by Contractor. Materials delivered to and stored at the Project site shall be limited to materials required to be incorporated into Subcontractor's Work, taking into account any space restrictions at the Project site. Such material, once delivered, shall not be removed from the Project site, except that any excess materials shall be removed from the Project site upon completion of Subcontractor's Work. Subcontractor will be responsible for proper storage and for any damage, defect, deficiency or theft of any material stored on the Project site and shall retain all risk of loss or damage to such materials.
 - D. **USE OF CONTRACTOR'S EQUIPMENT.** Subcontractor agrees that Contractor's equipment will be available to Subcontractor only at Contractor's discretion and on mutually satisfactory terms. Should Contractor allow the use of its equipment and/or its operator by Subcontractor, Subcontractor agrees that such operator shall be considered as the agent or servant of Subcontractor and Subcontractor shall be solely responsible for the acts of such operator during the time of the equipment use. Subcontractor shall make a thorough inspection to Subcontractor's satisfaction as to the physical condition and capacity of the equipment as well as the competency of the operator, there being no representations or warranties by Contractor with reference to such matters. Subcontractor waives any and all claims against Contractor relating to the use by Subcontractor of Contractor's equipment or operators.
 - E. **LIEN FREE PROJECT.** To the extent Subcontractor has been paid by Contractor as required hereunder, Subcontractor shall ensure that each Project remains free and clear of all claims, including payment bond claims, encumbrances and liens for labor, services, or materials. If Subcontractor fails to pay for any labor, services, or materials used or purchased for use in the prosecution of Subcontractor's Work, Contractor may, at its option, with hold amount stated past due until such matter is proven resolved. In the event suit is filed against Owner, Contractor or Contractor's bonding company, by any person, firm, or corporation asserting a claim or lien for labor, services, or materials used or purchased for use in Subcontractor's Work, Subcontractor will, at its own cost and expense including attorneys' fees, defend such suit and pay any judgment rendered therein. If requested by Contractor, Subcontractor shall provide a bond to indemnify the Contractor, Owner and Owner's property against any lien or claim arising from any subcontractor supplier, or vendor of Subcontractor.
- Subcontractor shall furnish upon request all necessary lien waivers, affidavits, or other documents which may be required to ensure that Owner's property and premises are totally free from any liens or claims for liens, arising out of the furnishing of the Work of this Subcontract. Said lien waivers, affidavits, or other documents shall be furnished as payments are made from time to time to Subcontractor according to the terms of this Subcontract.
- F. **RESPONSIBILITY FOR SUBCONTRACTOR'S WORK.** Subcontractor shall secure and protect the work done hereunder and assume all 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 Project and the workers of Contractor, Owner and other subcontractors, and adjacent property from Subcontractor's operations. Subcontractor shall be liable for any loss or damage to any work in place or to any equipment and materials on the Project site resulting from Subcontractor's Work, or presence on the Project site. In the event of loss or damage to Subcontractor's Work, whether caused by Subcontractor or others, Subcontractor shall proceed promptly to repair or replace the damaged work, property or materials at its own expense, and as directed by Contractor.
 - G. **JOB AND SAFETY MEETINGS.** Subcontractor shall attend all job and safety meetings, tests, inspections and other meetings pertaining to Subcontractor's Work.
 - H. **SUBCONTRACTOR'S AUTHORIZED REPRESENTATIVE.** Subcontractor shall designate an authorized representative to supervise Subcontractor's Work. Said authorized representative shall have complete authority to act on behalf of Subcontractor, including without limitation, the authority to agree to changes in

Subcontractor's Work, and adjustments in the Subcontract Price and time for completion. Said authorized representative shall not be changed unless Contractor is given forty-eight (48) hours written notice.

- I. **LABOR RELATIONS.** Subcontractor shall take all reasonable steps to ensure harmonious labor relations at the Project site. Subcontractor shall strictly comply with all of the terms and conditions of labor agreements applicable to the Project, including payment requirements to labor trust funds, and jurisdiction and scope of work claimed by various crafts and the procedures contained in such agreements for resolution of jurisdictional disputes. Should there be picketing on Contractor's job site and Contractor establishes a reserved gate for Subcontractor's purposes, it shall be the obligation of Subcontractor to continue the proper performance of Subcontractor's Work without interruption or delay. If any person or entity performing Subcontractor's Work engages in a strike, work stoppage or slowdown so that Subcontractor's Work is hindered or delayed, Contractor, at its option, may employ others to prosecute Subcontractor's Work, and to charge the cost thereof to Subcontractor.
- J. **HOURS OF WORK.** Subcontractor shall prosecute Subcontractor's Work only during the hours when Contractor's superintendent is present at the Project site unless Contractor gives prior written approval.
- K. **APPROVAL OF SUB-SUBCONTRACTORS.** Prior to commencing Subcontractor's Work, Subcontractor shall submit a list, for Contractor's review and approval, of sub-subcontractors, suppliers, materialmen, laborers and leased employees (identified by classification) to be used in Subcontractor's Work, and shall update the list as changes occur. Subcontractor shall ensure that any sub-subcontractors will abide by and be governed by the terms and conditions of this Subcontract and the Contract Documents. Contractor may require the removal of any person, Subcontractor or supplier to whom Contractor objects.

III. Payment

- A. **SCHEDULE OF VALUES.** Subcontractor shall, before Subcontractor's first application for payment, submit to Contractor a schedule of values of the various parts of Subcontractor's Work, aggregating the total sum of the Subcontract, prepared in such detail as Contractor or Owner may require, and supported by such evidence as to its correctness as Contractor may direct. The schedule of values shall be submitted electronically as a Microsoft Excel spreadsheet. Said schedule, when approved by Contractor, shall be used as a basis for approving Subcontractor's application for payment, unless found to be in error, in which event, Contractor shall determine what amount, if any, may be due Subcontractor based on Contractor's revision or correction to the Schedule of Values or the Contractor's assessment of the value of Subcontractor's Work in place.
- B. **APPLICATIONS FOR PAYMENT.** Unless otherwise expressly specified herein, on the twentieth (20th) day of each month, Subcontractor shall present to Contractor a statement of the work done since the twentieth (20th) day of the preceding month, such statement to be on a form prescribed by Contractor, which statements will be paid within five (5) days after receipt of payment from the Owner, provided progress of the work and payments of labor used and material purchased by Subcontractor have been satisfactory. The Contractor, may, at its option on each payment, retain the percentage specified in the Contract Documents or Work Order, of each estimate until final payment, which shall be made after completion of the work covered by this Subcontract and written acceptance thereof by the Architect, Owner, and Contractor, and full payment therefor by Owner, provided Subcontractor has furnished a consent from its surety, if any, to final payment and evidence, if required, that all claims for labor and materials have been paid, and provided further that Subcontractor has strictly complied with all the provisions of this Subcontract. In the event Contractor has incurred any charges or costs for completion of Subcontractor's Work, whether by agreement or otherwise, Contractor shall be entitled to deduct all costs of material or labor purchased or furnished for or on behalf of Subcontractor, plus an administrative fee of fifteen percent (15%), from the respective Application for Payment. The acceptance of final payment by Subcontractor constitutes a full, final, and complete release of any and all claims against the Owner, Contractor, and Owner's property.

All Applications for Payment shall be submitted in PDF format, by e-mail, to:
PayApplications@DWilsonConstruction.com.

Subcontractor shall accompany each application with:

1. a partial release executed by Subcontractor in a form acceptable to Contractor;
 2. evidence satisfactory to Contractor and Owner that all sub-subcontractors, suppliers, materialmen, laborers and union trust funds have been paid; and
 3. certified payroll reports acceptable to Owner, if required; and
 4. all other documentation required by the Subcontract, these Terms and Conditions, the Contract Documents or reasonably required by Contractor.
- C. FINAL PAYMENT. Final payment shall be made after (i) the respective Project is fully completed and Owner has made final payment to Contractor, (ii) Subcontractor has submitted final lien releases as may be required by the Subcontract and these Terms and Conditions, the Contract Documents, or as required by Owner, and (iii) Subcontractor has submitted all documentation required under this Subcontract, these Terms and Conditions or the Contract Documents, including without limitation, the warranties, as built drawings and other documents described in Section XII(B) hereof, and (iv) Subcontractor has provided satisfactory evidence that Subcontractor has paid all sales and use taxes. The acceptance of final payment by Subcontractor constitutes a full, final, and complete release of any and all claims against the Owner, Contractor, and Owner's property.
- Contractor, in its sole discretion, may make payment to Subcontractor by checks made payable jointly to Subcontractor and Subcontractor's sub-subcontractors, materialmen and/or suppliers.
- D. CONDITIONS PRECEDENT TO PAYMENT. Notwithstanding anything in the Subcontract, any Work Order, or these Terms and Conditions to the contrary, Subcontractor agrees that all progress payments and final payment to Subcontractor are contingent upon and subject to the Owner's acceptance of Subcontractor's Work and Contractor's receipt of payment from Owner for Subcontractor's Work. Subcontractor agrees to accept the risk of nonpayment by Owner, except to the extent such non-payment is attributable to Contractor's failure to meet its contractual obligations to Owner and not attributable to Subcontractor. Subcontractor further agrees that Owner's payment to Contractor for all progress payments and final payment for any work performed by Subcontractor, other subcontractors and Contractor shall be an express condition precedent to any obligation of Contractor to make any progress payment, retainage payment, or final payment to Subcontractor, except to the extent such non-payment is attributable Contractor's failure to meet its contractual obligations to Owner and not attributable to Subcontractor, and Subcontractor waives all right to commence litigation or arbitration against Contractor for any such non-payment. Subcontractor's sole remedy for such non-payment shall be an assignment of Contractor's pass-through claim against the Owner to the Subcontractor.
- E. PAYMENTS TO EMPLOYEES. At Contractor's request, Subcontractor shall obtain and furnish Contractor weekly with signed reports (Certified Payroll Reports) from all workers showing the date of payment, amount paid, number of hours paid for, the days on which said work was performed, the classification of the labor so paid, and the rate of wage per hour paid, and at Contractor's request shall supply Contractor weekly with a reasonable number of copies of payroll verified by Subcontractor.
- F. PAYMENT FOR STORED MATERIAL. If payments are made to Subcontractor on account of materials not incorporated in Subcontractor's Work but delivered and suitably stored at the Project site, or at some other location agreed upon in writing, such payments shall be in accordance with the Terms and Conditions of the Contract Documents. Payment on account of materials stored shall constitute transfer of ownership to Contractor and/or Owner but shall not in any way relieve Subcontractor of risk of loss or Subcontractor's responsibility or liability for security protection and conformance of said materials against damage, theft or defectiveness.
- G. PAYMENTS TO SUB-SUBCONTRACTORS. Subcontractor shall promptly pay for all materials and labor used in, or provided in connection with the performance of the Subcontract and these Terms and Conditions, through the period covered by previous payments received from Contractor, and furnish satisfactory evidence when requested by Contractor, to verify such payment. Subcontractor shall promptly notify Contractor in

writing of Subcontractor's intention to withhold payment to any sub-subcontractor, supplier, materialman or laborer, and subcontractor shall not include any such amount in an application for payment until the reason for withholding payment has been resolved and Subcontractor is prepared to pay such sub-subcontractor, supplier, materialman or laborer.

- H. **BONDS AND INSURANCE CONDITION PRECEDENT.** No payment will be made on account of any labor, services or materials furnished under the Subcontract and these Terms and Conditions unless and until the properly executed Subcontract and bonds (if required) and satisfactory evidence of required insurance, or satisfactory renewals or replacements of any of the foregoing have been received by Contractor.
- I. **PAYMENT IS NOT ACCEPTANCE.** Payments made on account of materials delivered or work completed shall not be construed as acceptance of defective or faulty workmanship or materials or waiver of any claims arising therefrom.

IV. Scheduling; Delays; Acceleration

- A. **SUBCONTRACTOR'S SCHEDULE.** Time is of the essence of this Subcontract and any Work Order issued hereunder. Prior to commencement of Subcontractor's work, Subcontractor shall submit to Contractor for Contractor's review and approval, a schedule showing the completion dates for all portions of Subcontractor's Work. Subcontractor's schedule shall conform with the regularly updated performance schedules and sequencing prepared by Contractor and Owner. Subcontractor shall proceed with each portion of Subcontractor's work in a prompt and diligent manner and in strict compliance with Subcontractor's schedule, and all of Owner's and Contractor's performance schedules and sequencing, as directed by Contractor. Subcontractor shall promptly provide all information and data requested by Contractor for preparation of revisions to necessary performance schedules. Subcontractor's failure to maintain the project schedule as updated from time to time shall be considered a material default. In the event of such default, delay or failure to cure any defects or non-conforming materials as provided herein, Subcontractor shall indemnify the Contractor and Owner against any loss, damage, or expense, including attorney's fees and litigation costs, occasioned by such breach of performance. Any loss, damage, or expense incurred shall include consequential damages suffered by Contractor or Owner.
- B. **NO DAMAGE FOR DELAY.** Contractor shall not be liable to Subcontractor for damages due to delay to Subcontractor's Work by the act, neglect, or default of Owner, Contractor, Architect or others or by reason of fire or other casualty, or on account of riots or strikes, acts of war or other combined action of the workers or others, or on account of any act of God or any other cause or on account of any circumstances caused or contributed to by Subcontractor. Upon any such delay described herein, excepting a delay caused by Subcontractor, Subcontractor shall receive an extension of time only, and only if (i) written claim for delay is made to Contractor within seventy-two (72) hours from the beginning of the delay, and (ii) Owner has granted Contractor a similar extension. No other damages for delay are compensable, except to the extent Contractor actually receives compensation from Owner under the Contract Documents with respect to Subcontractor's Work.
- C. **ACCELERATION OF SUBCONTRACTOR'S WORK.** If in the judgment of Contractor there exists a reasonable basis that Subcontractor will not be able to fully complete Subcontractor's Work within the time required thereunder or complete a portion of Subcontractor's Work as necessary for the overall coordination and timely completion of the Project, Contractor may order Subcontractor to reasonably prosecute Subcontractor's Work on an overtime basis and Subcontractor shall, at the expense of Subcontractor, promptly, but in no event more than forty-eight (48) hours after such order, commence and continue to perform Subcontractor's work on such basis to the extent necessary to cause Subcontractor's Work to be fully completed in a timely fashion in accordance with the regularly updated Project Schedule, the Subcontract and these Terms and Conditions. Should Subcontractor believe the acceleration of its work is due to the fault of another, it may file a claim as outlined in Section XI.
- D. **LIQUIDATED DAMAGES.** Should Subcontractor fail to achieve completion of its Work in accordance with the Project schedule as may be modified or amended by Contractor, Subcontractor shall pay to Contractor liquidated damages in the amount specified in the respective Work Order. The liquidated damages shall not

constitute a penalty, but a reasonable estimation of Contractor's damages in the event of Subcontractor's delay, such potential damages being difficult or impossible to ascertain with certainty both at the time of contracting and in the event of any delay. Subcontractor shall further be responsible for any liquidated damages assessed against the Contractor for any delays attributable to Subcontractor.

V. Changes in Subcontractor's Work

- A. **CONTRACTOR'S RIGHT TO ORDER CHANGES.** Contractor, at any time prior to final payment hereunder, may order additions, omissions or alterations to the scope of Subcontractor's Work by providing a written directive to Subcontractor. Subcontractor shall diligently proceed to complete any directed change in Subcontractor's Work whether or not Subcontractor has agreed on any adjustments to the Subcontract Price or required completion time hereunder. Contractor, may solicit proposals from Subcontractor for changes in Subcontractor's Work, in which case Subcontractor shall respond promptly but in no event more than five (5) days after such solicitation, with proposed adjustments, if any, in the Subcontract Price and time. Should Subcontractor fail to respond within five (5) days or, in Contractor's sole opinion, Subcontractor fails to submit an acceptable proposal for the change in Subcontractor's Work, Contractor may complete any change in Subcontractor's work by other means. Contractor shall have no obligation to use Subcontractor to complete any change in Subcontractor's Work.
- B. **SUBCONTRACTOR INITIATED CHANGES.** Subcontractor may submit proposed revisions in Subcontractor's Work to Contractor in writing, but shall not proceed therewith unless and until Contractor, in writing, has approved the proposed change or directed the Subcontractor to proceed with the proposed change. Upon such approval or direction, Subcontractor shall diligently proceed to complete any directed change in Subcontractor's Work, whether or not Subcontractor has agreed on any adjustments to the Subcontract Price or required completion time hereunder. Contractor shall not be liable to Subcontractor for any work not authorized by Contractor as provided herein.
- C. **ADJUSTMENT OF SUBCONTRACT PRICE OR TIME.** As soon as reasonably possible after Contractor has directed a change in Subcontractor's Work or approved a change proposed by Subcontractor, Subcontractor and Contractor shall attempt to agree on adjustments, if any, in the Subcontract Price and time. Subcontractor shall not be entitled to any such adjustment unless Contractor has directed or approved such change in writing. Any such adjustment shall be effective only if agreed to in writing by Contractor's project manager. Unless otherwise provided in the Contract Documents, the adjustment in price for additional work or deleted work shall be at a cost similar to the rate for similar items of Subcontractor's Work. Subcontractor shall submit detailed backup support for any price quoted. If Subcontractor disagrees with a proposed adjustment in the Subcontract Price or time included as part of a change directive, Subcontractor shall submit such disagreement as a claim within the time and in the manner specified in Article XI hereof. If Contractor and Subcontractor are unable to agree on the appropriate adjustment to the Subcontract Price or Time and the adjustment amount is submitted to a dispute resolution proceeding, the amount attributable to Subcontractor's overhead and profit shall not exceed fifteen percent (15%) of the direct, actual cost of the ordered change. No employee of Contractor has authority to incur any debts in connection with the Project, including Subcontractor's Work, other than Contractor's project manager.

VI. Warranty

WARRANTY. Subcontractor warrants and guarantees that all materials and equipment incorporated in Subcontractor's Work shall be new and that all work shall be of good quality, free from faults and defects and in strict conformance with the requirements of the Subcontract, the Work Order, these Terms and Conditions and the Contract Documents. Contractor shall have the right to inspect Subcontractor's Work and to reject any portion thereof not in accordance with the requirements of the Contract Documents, and Subcontractor, at its sole expense, shall promptly replace rejected portions of Subcontractor's Work in a manner satisfactory to Contractor. Further, upon the receipt of a written notice from Contractor, Subcontractor shall promptly repair and make good in accordance with the Contract Documents any defects that may appear in Subcontractor's Work within one (1) year after final completion of the respective Project (as determined in accordance with the Contract Documents), or within such longer period as is required by the Contract Documents with respect to any specific aspect of Subcontractor's Work; provided, however, that if the warranty period begins on an earlier date under the Contract Documents with respect to Subcontractor's Work because of early occupancy by Owner, such earlier date shall apply. Said one-year period shall begin anew with respect to any defect so repaired beginning at the time of completion of such repair. Subcontractor, at its sole expense, shall also repair or replace any adjacent work or materials disturbed or damaged during or as a result of such corrective work. The obligation to repair defects in Subcontractor's Work as described herein shall not limit the obligations of Subcontractor or rights of Contractor or Owner under the Subcontract, these Terms and Conditions, the Contract Documents and applicable law. Should Contractor determine that Subcontractor may be unable to satisfy its warranty obligations hereunder, Subcontractor shall, within (7) days of Contractor's request, provide a warranty bond to ensure compliance with such obligation. The warranty obligations expressed herein are in addition to any implied warranties available by law.

VII. Safety Precautions

- A. **SAFETY REQUIREMENTS.** Subcontractor shall be solely responsible for and comply with all statutory safety requirements and any special requirements that may be stated in the Contract Documents and fully cooperate and comply with safety programs and measures initiated by Contractor and/or Owner. Subcontractor is solely responsible for developing, enforcing and monitoring for compliance, any Fall Protection Program, if applicable. Subcontractor shall report in writing to Contractor, within twenty-four (24) hours of occurrence, any injury to Subcontractor's employees at the Project site. Subcontractor shall maintain safe working conditions on the project at all times while mobilizing, demobilizing or performing its work.
- B. **REMOVAL OF DEBRIS.** Subcontractor shall at times keep the Project site clean of debris arising out of Subcontractor's Work, and shall remove all rubbish, debris and surplus which may accumulate from the prosecution of the Subcontractor's Work. Should Subcontractor fail to do so, then Contractor may, at its option and pursuant to twenty-four (24) hour written notice, cause the same to be removed and charge the expense of such removal to Subcontractor. Upon completion of portions of Subcontractor's Work, Subcontractor shall broom-clean the area affected by such portions.
- C. **HAZARDOUS SUBSTANCES.** Before using at the Project material or substance considered hazardous under applicable federal, state or local law, regulation or ordinance, Subcontractor shall furnish Contractor with two (2) sets of the Material Safety Data Sheet for such material or substance and Subcontractor shall file a copy of such Material Safety Data Sheet for such material or substance and documentation as may be required by the proper authorities. Subcontractor shall notify Contractor, all proper authorities, and all subcontractors, suppliers and materialman in advance of storing or using any hazardous materials on the Project site. Subcontractor shall label all hazardous materials on the Project site, and shall be solely responsible for the proper storage, removal, disposal, application and training of personnel utilizing the hazardous material.

VIII. Compliance with Laws

- A. **COMPLIANCE WITH LAWS.** Subcontractor shall at all times comply with all federal, state and local laws, regulations, rules and ordinances applicable to Subcontractor's Work. Without limiting the generality of the foregoing, Subcontractor shall comply with all (i) OSHA requirements, (ii) equal opportunity requirements (iii) Drugs-in-the-Workplace requirements, (iv) Social Security, unemployment and workers' compensation requirements, (v) environmental requirements; and (vi) immigration laws. Subcontractor shall indemnify Contractor for any loss, cost or expense incurred as a result of Subcontractor's breach of these requirements, including reasonable attorneys' fees.
- B. **DISCREPANCY WITH APPLICABLE LAW.** Subcontractor shall notify Contractor in writing of discrepancies between the Plans and Specifications and any laws, ordinances, rules, regulations or orders of any public authority bearing on performance of Subcontractor's Work. In the event Subcontractor commences Subcontractor's Work without notice to Contractor of such discrepancy, Subcontractor shall be solely responsible for bringing Subcontractor's Work (and the work of others affected thereby) into conformance with applicable law.
- C. **PAYMENT OF TAXES.** Subcontractor shall pay all sales, consumer, use and other similar taxes on materials and equipment supplied, ordered or used in connection with Subcontractor's Work, and shall secure and pay for all permits and licenses and official inspections necessary for the execution of the Subcontractor's Work.

IX. Insurance; Bonds

- A. **INSURANCE.** Prior to commencement of work, Subcontractor shall furnish Contractor certificates showing that Subcontractor has, and will maintain throughout the Subcontract, insurance written by companies acceptable to Contractor that are BEST RATED "A" OR BETTER and will include Contractor, Owner, and any other parties required by the Contract Documents ("Contractor Parties") as additional insureds for the following types and minimum amounts (or such additional amounts as Owner may require or by addendum hereto):

1. Worker's Compensation and Employer's Liability.

- a. Statutory Worker's Compensation for all states in which operations are conducted.
- b. Employer's Liability with a limit of \$ 1,000,000.

2. Comprehensive General Liability (other than automobile).

- a. Covering liability arising out of all work performed by or on behalf of Subcontractor, including products and completed operations liability and contractual liability assumed under this Subcontract.
- b. Limits of Liability:

Each Occurrence:	\$1,000,000
Damage to Rented Premises	\$50,000
Med Exp	\$5,000
Personal & Adv Injury	\$1,000,000
General Aggregate	\$2,000,000
Products-Completed Ops Agg	\$2,000,000
- c. Policy shall be endorsed to provide per Project Aggregate, Form CG 2503 or equivalent.
- d. Policy shall be endorsed to provide Blanket Waiver of Subrogation, Form CG2404.
- e. Policy shall be endorsed to provide Additional Insured Form CG2010 or CG2033 or equivalent.
- f. Policy shall be endorsed to provide Additional Insured Form CG 2037. (Completed Operations)
- g. Policy shall be endorsed to provide 30-day notice of cancellation.

3. Automobile Liability:

- a. Form to include coverage for all owned, non-owned or hired automobiles.
- b. Limits of Liability:

Combined Single limit: \$1,000,000

- c. Policy shall be endorsed to provide Waiver of Subrogation, Form CA0444.
- d. Policy shall be endorsed to provide 30-day notice of cancellation.
- e. Policy shall be endorsed to provide Additional Insured, Form CA0403

4. Umbrella liability -

- a. Minimum limits of \$1,000,000
- b. Policy shall be endorsed to provide 30-day notice of cancellation.

5. Policy Exclusions - The policies providing coverage will not exclude coverage for the type of construction or project being performed. The following exclusions/limitations/endorsements (or their equivalents(s)) to coverage are prohibited:

- Continuous or Progressive Injury or Damage exclusion or any variation thereof;
- Classification limitation exclusions;
- Third party action over exclusions;
- Exclusion – Injury to Contractors, Volunteers and Other Workers;
- Unacceptable roofing operation warranties including open roof exclusions;
- Subcontracted work exclusions or coverage limitations;
- Subsidence exclusions applicable to Texas;
- Punitive damages exclusion – Texas;
- Total Pollution exclusion;
- Any designated work exclusions that include work in the Subcontractor's scope;
- CG2139 – Contractual Liability Limitation or equivalent;
- Amendment of Insured Contract Definition;
- Limitation of Coverage to Designated Premises or Project;
- Any construction defect completed operations exclusion;
- Any endorsement modifying or deleting the exception to the Employer's Liability exclusion;
- Any endorsement deleting or modifying coverage for explosion, collapse, or underground work;
- Any "Insured vs. Insured" exclusion;
- Any pre-existing injury, loss, or damage exclusion;
- Any residential or habitation exclusion if such work is to be performed;
- Any endorsement that reduces coverage for the Subcontractor's indemnity obligations for bodily injury to its employees.

To the fullest extent of coverage allowed under Chapter 151 of the Texas Insurance Code, Subcontractor shall provide Contractor with a written endorsement showing Contractor Parties as additional insureds on the Subcontractor's comprehensive general liability, Forms CG2010 or CG2033 (07/04) or equivalent form and automobile insurance, CA0403 (06/04) and the policies shall be endorsed to provide thirty (30) days written notice of cancellation. Subcontractor's failure to provide the written endorsement may be considered by Contractor to be a material breach of the Subcontract, the Contractor may, at its sole option, terminate the Contract and seek damages as a result of any such breach. The insurance required to be carried by Subcontractor naming Contractor Parties as additional insureds, shall be primary over any insurance policy maintained by Contractor and shall contain a "Waiver of Subrogation" endorsement in their favor.

Builder's Risk Insurance will be carried by the Contractor, unless stipulated otherwise in the Contract Documents. In any case, Builder's Risk Insurance coverage shall conform to the requirements of the Contract Documents and shall extend to the Work performed by the Subcontractor under this Subcontract, subject to all provisions and exclusions as specified by said Builder's Risk Insurance, but in no case does it apply to any tools or equipment not meant to become a part of the permanent structure. Such loss of tools or equipment owned or used by the Subcontractor shall be the exclusive and sole responsibility of the Subcontractor. Subcontractor shall be solely responsible for any deductible feature of said Builder's Risk Insurance as shall be applicable to his share of the specific loss.

- B. **SUB-SUBCONTRACTOR'S INSURANCE.** If Subcontractor should subcontract any of Subcontractor's Work to a third party, Subcontractor shall also require that such third party procure and maintain the insurance policies meeting the requirements set forth herein, including without limitation the naming of Contractor and other designated entities as additional insureds on said policies as provided therein. A third party's obtaining the required insurance shall in no manner lessen or affect Subcontractor's obligations or liability as set forth herein or otherwise imposed by law.
- C. **PAYMENT AND PERFORMANCE BONDS.** When specified in the Subcontract or Work Order or requested in writing by Contractor, Subcontractor shall furnish Contractor with payment and performance bonds in the full amount of the Subcontract Price, issued by a surety acceptable to Contractor. If the original Subcontract Price increases during the course of Subcontractor's Work, the amount of said bonds shall be increased to the adjusted Subcontract Price. The payment and performance bonds shall be in a form acceptable to Contractor and shall remain in effect and enforceable (without default, failure or insolvency of the surety) to satisfy all obligations and responsibilities of Subcontractor relating to the performance of its work. No change, alteration of, modification to or deviation from the Subcontract and the Terms and Conditions, or any of the Contract Documents, shall release or exonerate, in whole or in part, any surety issuing a payment and performance bond, and no notice is required to be given to such surety of any change, alteration, modification, or deviation.
- D. **FAILURE TO OBTAIN EVIDENCE OF INSURANCE/BONDS NOT A WAIVER.** Failure of Contractor to require or obtain evidence of the insurance or the bonds required hereunder shall not be deemed a waiver of such requirements.
- E. **WAIVER OF SUBROGATION.** Subcontractor waives, and shall require all sub-subcontractors to the lowest tier to waive, all rights against each other and against the Contractor and Owner and all other persons or entities providing labor or material to the Project as required by the Contract Documents for damages caused by fire or other perils to the extent covered by any insurance relating to the Project, except such rights as any of them may have to the proceeds of such insurance, subject to its pro-rata share of any deductibles.
- F. **WAIVER BY SUBCONTRACTOR OF INSURED LOSSES.** Subcontractor waives and shall require all subcontractors to the lowest tier to waive, all rights against Contractor and Owner, their officers, directors, shareholders, employees, agents, Contractor's surety and all parties whom Contractor is required to insure pursuant to the terms of the Contract Documents, for recovery of damages to the extent these damages are covered by the worker's compensation and employer's liability, or commercial general liability insurance and commercial umbrella liability insurance obtained by Subcontractor pursuant to the terms of this Subcontract or of the Contract Documents.
- G. **EVIDENCE OF INSURANCE.** All policies of insurance shall be endorsed to provide Contractor 30-days written notice prior to the cancellation or material change in coverage. Prior to commencing the Work, Subcontractor shall furnish Contractor certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements set forth above and with all endorsements to Subcontractor's insurance policies attached, including the required additional insured endorsements. Contractor shall have the right, but not the obligation, to prohibit Subcontractor from entering the Project site until such certificates have been received and approved by Contractor. Failure to maintain the required insurance may result in termination of this Subcontract at Contractor's sole option. If Subcontractor fails to maintain the insurance as set forth herein, Contractor shall have the right, but not the obligation, to purchase said insurance at Subcontractor's expense. Subcontractor shall provide certified copies of all insurance policies required above within ten (10) days of Contractor's written request for said copies.

X. Claims; Disputes

- A. **CLAIMS.** 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 in writing within 72 hours after the occurrence of the event giving rise to the Claim or, if earlier, in advance of the time required for submitting any such Claim

under the Contract Documents, or such longer period required by law. The parties expressly acknowledge and agree the purpose of this notice of claim provision is to allow Contractor the opportunity to investigate claims and mitigate potential damages before they are incurred. Consequently, 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.

- B. **DISPUTE RESOLUTION INVOLVING OWNER.** 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 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 purposes and shall pay or reimburse Contractor for all expenses and costs, including reasonable attorneys' 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 below shall apply.
- C. **MEDIATION.** Except as otherwise provided herein, Subcontractor agrees to submit any dispute to mediation and to negotiate in good faith to reach an agreement with respect to the dispute prior to filing a demand for arbitration. Such mediation shall be a condition precedent to filing a demand for arbitration or instituting any other claim resolution process. 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 nor litigation until the completion of mediation proceedings.
- D. **ARBITRATION.** Except as otherwise provided herein, any controversy, claim, or dispute between Contractor and Subcontractor arising out of or related to the Subcontract, the breach thereof, or any other issue related to the Project, shall at Contractor's sole option and discretion be resolved by arbitration in accordance with the most current edition of the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.

If elected by Contractor, arbitration shall be administered by the Houston Regional Office of the American Arbitration Association, and any and all hearings shall take place in the place of the Project.

Subcontractor agrees that any arbitration proceedings between it and Contractor may be consolidated with any other arbitration proceedings regarding same, similar, or related issues. Subcontractor shall use reasonable effort to include in its contracts with its subcontractors and suppliers' provisions granting Contractor the right it has under this Section. Subcontractor specifically agrees that any dispute between it and Contractor shall not interfere with Subcontractor's progress of its work in any manner, and that Subcontractor shall proceed with its work as ordered, pending resolution of the claim, arbitration, or litigation.

- 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.
- F. VENUE. Unless otherwise required under the Contract Documents, the exclusive venue for any mediation or arbitration proceeding relating to Subcontractor's Work shall be in the County in which Contractor's home office is located.

XI. Shop Drawings; As-Built

- A. SHOP DRAWINGS AND SAMPLES. Subcontractor shall promptly submit shop drawings and samples as required in order to carry on Subcontractor's Work efficiently and at a speed that will not cause delay in the progress of Subcontractor's Work or work carried out by Contractor or other subcontractors. Subcontractor shall not be entitled to a time extension for delays in preparing or receiving approvals of shop drawings or samples which, by the exercise of reasonable diligence and judgment, could have been anticipated and avoided. The approval by Architect, Owner or Contractor of shop drawings or samples shall not relieve Subcontractor of responsibility for any deviation, error or omission from the requirements of the Contract Documents unless Subcontractor has informed Contractor in writing of such deviation at the time of submission and Contractor and Architect have given prior written approval for the specific deviation.
- B. AS-BUILT DRAWINGS. Upon substantial completion of Subcontractor's Work or of the Project, whichever is earlier, Subcontractor shall submit to Contractor as-built drawings and all maintenance and operations manuals with respect to Subcontractors Work within fifteen (15) days of completion of Subcontractor's Work satisfactory to Owner and Contractor.

XII. Default; Termination

- A. EVENTS OF DEFAULT, REMEDIES. An Event of Default shall occur if Subcontractor or any of Subcontractor's sub-subcontractors, suppliers, materialmen or laborers, shall at any time:
 1. refuse or neglect to supply a sufficient number of properly qualified workers or a sufficient quantity of materials of proper quality;
 2. abandon Subcontractor's Work or fail in any respect to promptly and diligently prosecute Subcontractor's Work;
 3. fail to promptly pay sub-subcontractors, suppliers, materialmen or laborers;
 4. fail to accelerate Subcontractor's Work as required hereunder;
 5. give Contractor a reasonable basis to doubt that Subcontractor's Work can be completed for the unpaid portion of the Subcontract Price or within the required time;
 6. declare bankruptcy or make a general assignment for the benefit of creditors or file for bankruptcy, assign assets for the benefit of creditors, become insolvent or be unable to pay its obligations as they mature;
 7. otherwise fail to perform any of the agreements and obligations set forth in the Subcontract, these Terms and Conditions or the Contract Documents; or
 8. 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.

In the event of such default, Contractor may do one or more of the following:

- a. withhold any sums due or thereafter to become due to Subcontractor under the Subcontract and any other contract between the parties, whether related to the respective Project or otherwise and during such period such withheld amounts shall not accrue interest;
- b. 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 Work Order, or any other contract, agreement, or otherwise;
- c. terminate the Subcontract or respective Work Order, 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;
- d. take possession of all the materials, tools, equipment and appliances belonging to Subcontractor at the respective 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's Work and provide the material therefor; 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
- e. 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, and any amounts owed to Subcontractor under any Work Order or any other contract, whether related to the Project or otherwise. Prior to exercising the remedies in subsections (b), (c) and (d) above, Contractor shall provide Subcontractor written notice of default and not less than forty-eight (48) hours to cure such default. 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 Contractor terminates the Subcontract pursuant to this Section, and such termination later is determined to be invalid or wrongful, such termination shall be converted to and treated as a termination for convenience and Subcontractor shall be entitled to receive only the amounts payable under Section XII(C) hereof.
- f. In any event, following termination for default, Subcontractor shall not be entitled to payment of any outstanding sum until the Work is completed and all deductions, back-charges, and offsets to which Contractor is entitled have been made.

- B. **TERMINATION BY OWNER.** If Owner suspends or terminates the Project or terminates the contract between Owner and Contractor, whether with or without cause, then Subcontractor shall be entitled only to such compensation as is received by Contractor relating to such suspension or termination as is provided under the Contract Documents and relating to Subcontractor's Work.

XIII. Independent Contractor

- A. **INDEPENDENT CONTRACTOR.** Subcontractor is an independent contractor with the resources, expertise, and capability to act as required to fulfill Subcontractor's Work in this Subcontract. The status of Subcontractor pursuant to this Subcontract is that of an independent contractor and the parties hereby signify their express intent to this effect. Subcontractor shall not be controlled by Contractor as to the specific details

or manner of Subcontractor's business, it being understood that the primary interest of Contractor is the result achieved by Subcontractor. Subcontractor's business is separate and apart from that of Contractor and it is of the essence of this Subcontract that Subcontractor is an independent business. Any contrary final determination by any governmental agency or court of competent jurisdiction shall entitle either party to cancel this Subcontract. Neither Subcontractor nor any of its employees, agents, or servants shall be considered or deemed in any way to be employees, agents, or servants of Contractor and neither party has the right nor power, express or implied, to do any act or thing that would bind the other, except as herein specifically provided. The parties do not intend to act as joint employers, joint venturers, or in any other legal capacity other than separate and distinct businesses acting pursuant to the terms of this Subcontract. Furthermore, none of the benefits provided by Contractor to its employees is available from Contractor to Subcontractor or to Subcontractor's employees, agents, or servants, except as required by law. Subcontractor will be solely and entirely responsible for its acts and for the acts of its employees, agents, and servants during the performance of this Subcontract and will save and hold Contractor harmless from any and all damages which may arise therefrom, including attorneys' fees.

XIV. General Provisions

- A. **NO ASSIGNMENT BY SUBCONTRACTOR.** Subcontractor shall not assign the Subcontract or any amounts due or to become due thereunder without the prior written consent of Contractor. Contractor may, at Contractor's option, terminate the Subcontract upon knowledge that an assignment has taken place. Notwithstanding anything herein to the contrary, under no circumstances shall any valid assignment of accounts receivable, whether expressly approved or by operation of law, have priority over payment responsibilities to any creditors, sub-subcontractors, suppliers, materialmen or laborers of Subcontractor. Assignees who take an interest in the Subcontract as collateral agree that they shall be paid, after proper notice and presentment under law, only after all sub-subcontractors, suppliers, materialmen and laborers have been paid, and any claims of Contractor hereunder have been satisfied, and further agree to repay to Contractor upon demand any amount received in violation of this Section.
- B. **ATTORNEYS' FEES AND EXPENSES.** Should Contractor employ an attorney to enforce any of the provisions hereof, or to protect its interest in any matter arising under the Subcontract or these Terms and Conditions, or to collect damages for the breach of the Subcontract or these Terms and Conditions, or to prosecute or defend any suit resulting from the Subcontract or these Terms and Conditions, or to recover against any surety bond given by Subcontractor under the Subcontract or these Terms and Conditions, Subcontractor and its surety, jointly and severally, agree to pay all reasonable costs, charges, expenses and attorneys' fees, including expert witness fees expended or incurred therein.
- C. **NO THIRD-PARTY BENEFICIARIES.** The Subcontract and these Terms and Conditions are solely for the benefit of the signatories hereto.
- D. **SAVINGS CLAUSE.** Should any clause in the Subcontract or these Terms and Conditions, or a particular application thereof, be held to be invalid or unenforceable, in whole or in part, by any court or arbitration panel, the remaining clauses or other applications herein shall continue in full force and effect.
- E. **ENTIRE AGREEMENT.** The Subcontract, respective Work Order, these Terms and Conditions, and the Contract Documents insofar as they relate in any part or in any way to Subcontractor's Work, constitute the entire agreement between the parties with respect to the subject matter hereof, and it is expressly understood and agreed that there are no other agreements or promises by and between said parties, except as aforesaid, and that any additions thereto or changes therein shall be in writing and signed by both parties thereto, and shall not create any third party beneficiaries or third party obligations enforceable against Contractor. **NO ALTERATIONS, CHANGES, OR ADDITIONS SHALL BE MADE TO THIS SUBCONTRACT EXCEPT UPON CONTRACTOR'S WRITTEN ORDER.**
- F. **NOTICES.** All notices required or permitted hereunder shall be made in writing and delivered to the address or transmitted to the telecopy number set forth on the front page of the Subcontract, or such other address or number as either party may designate by like notice. All notices shall be deemed given when delivered in person or made by telecopy, and three (3) days after deposit in the U.S. mail, certified with postage prepaid.

- G. **ASSIGNMENT BY CONTRACTOR.** Contractor shall have the right to assign all or any portion of its rights and interest in the Subcontract to Owner, Owner's lender, a joint venture or partnership of which Contractor is a part, or an entity affiliated with Contractor and upon such assignment Subcontractor shall be obligated to any such person or entity to the same extent Subcontractor is obligated to Contractor. Upon request, Subcontractor shall promptly provide Contractor with written confirmation of Subcontractor's consent to any such assignment.
- H. **TIME IS OF THE ESSENCE.** Time is of the essence of the Subcontract, any Work Order issued hereunder, and these Terms and Conditions.
- I. **WAIVER.** The waiver by Contractor of any breach hereof by Subcontractor shall not constitute a waiver of any subsequent breach of the same or any other provision.
- J. **SEVERABILITY.** The provisions of this Subcontract are severable and if for any reason any provision or provisions herein are determined to be invalid, illegal or unenforceable, such determination shall not affect any other provision hereof.
- K. **APPLICABLE LAW.** This agreement and the rights of the parties hereunder shall be governed and construed in accordance with the laws of the State of Texas.

SAMPLE FOR EXECUTION

SUBCONTRACT WORK ORDERProject Name:
Project No.:

Date:

THIS Subcontract Work Order (the "Work Order") is issued as of _____ ("the Effective Date") by and between the parties described below, hereinafter referred to as "Contractor" and "Subcontractor" or, collectively, as the "Parties," in accordance with and pursuant to the terms of that certain Master Subcontract Agreement entered into between the Parties on _____. This Work Order establishes Subcontractor's Scope of Work and Price for the project identified below and is subject to all the terms and conditions of documents identified below and attached hereto and incorporated by reference herein:

Contractor: **D Wilson Construction Company**
Address: P.O. Box 3455
McAllen, Texas 78502

Subcontractor: **Subcontractor Name**
Address: Address
City, State, Zip

PROJECT INFORMATION:

1. Project Name: _____
2. Owner/Contractor Contract Dated: _____
3. Contractor Job Number: _____
4. Contractor Name: _____
Contractor Address: _____
5. Subcontractor Name: _____
Subcontractor Address: _____
Phone No. _____ Fax No. _____
6. Owner Name: _____
Owner Address: _____
Architect/Engineer Name: _____
Architect/Engineer Phone: _____
7. **RETAINAGE:** Retainage for this Project: _____
8. **SALES TAX:** This Project is _____
9. Subcontract Work Order Documents:
The following documents comprise this Subcontract Work Order and are incorporated by this reference as if fully set forth herein:
 - A. Prime Contract between Owner and Contractor dated _____ for the Project identified above together with all documents attached thereto and incorporated therewith.
 - B. Master Subcontract Agreement between Contractor and Subcontractor dated _____ together with all "Contract Documents" specified therein.
 - C. This Work Order and any amendments, modifications or Changes thereto, together with **Exhibit 1** "Scope of Work" and **Exhibit 2** "List of Drawings and Specifications" attached hereto and incorporated herewith by this reference.

This Work Order, together with all documents identified herein and/or attached hereto or incorporated by reference, constitutes the entire agreement of Contractor and Subcontractor relative to this Subcontract Work Order. All prior or contemporaneous representations, discussions, statements, negotiations and agreements between Contractor and Subcontractor, whether oral or written, with the exception of the Master Subcontract Agreement referenced above, are merged herein and superseded hereby. No oral or written representations not contained herein shall bind the Contractor or Subcontractor. This Work Order may be amended, but only by a written instrument signed by Contractor and Subcontractor. Subcontractor acknowledges that Subcontractor has received, read and examined this Work Order, and all of the documents listed herein, as well as other documents incorporated by reference into those documents. Subcontractor agrees to all of the terms and conditions of the Work Order and associated Contract Documents.

D. WILSON CONSTRUCTION CO.**SUBCONTRACTOR NAME**

By: _____
Title: _____
Date: _____

By: _____
Title: _____
Date: _____