

**SECOND TIER SUBCONTRACT/SUPPLY AGREEMENT**

**Subcontract No. \_\_\_\_\_**

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## SECOND TIER SUBCONTRACT AGREEMENT

Subcontract No. \_\_\_\_\_

This Second Tier Subcontract Agreement (hereinafter the "Subcontract") made and entered into as of the date of execution hereof by and between **SUBCONTRACTOR**, \_

\_\_\_\_\_ a \_\_\_\_\_ corporation, whose principal office is located at \_\_\_\_\_ ("Subcontractor") and **SECOND TIER**

**SUBCONTRACTOR/SUPPLIER**, \_\_\_\_\_, whose principal office is at \_\_\_\_\_ ("Second Tier Subcontractor").

PROJECT: USACE– Hurricane Michael Debris Removal  
(hereinafter the "Project")

OWNER: Ceres Environmental Services, Inc. / USACE  
(hereinafter the "Owner")

OWNER'S AGENT: Donna Pick  
(hereinafter the "Owner's Agent")

For and in consideration of the Subcontract Amount (as defined in Article 5 herein) and other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the Subcontractor and the Second Tier Subcontractor agree, and contract as set forth below:

### ARTICLE 1 CONTRACT DOCUMENTS

1.1 The "Subcontract Documents", as such term is used herein, consist of this Second Tier Subcontract, and all plans, drawings, specifications, and addenda issued by the Owner or the Owner's Agent, the General Conditions of the Contract. All modifications to the Subcontract Documents which are incorporated pursuant to Article 9 herein shall be incorporated herein to the same extent as set forth above.

1.2 Second Tier Subcontractor hereby agrees to timely undertake and perform all obligations, expressed and implied, required by the Subcontract Documents as defined in paragraph 1.1. All of the Subcontract Documents set forth in paragraph 1.1 are intended to be complimentary. In the event of any irreconcilable difference between the Second Tier Subcontract and any other of the Subcontract Documents, the Second Tier Subcontract shall be controlling. In the event of an irreconcilable difference between plans, drawings and specifications, the more stringent requirements shall take precedence; whereafter, if a conflict continues to exist the specific provisions shall govern over the general provisions. Any work that may reasonably be inferred from the plans, drawings and specifications as being required to produce the intended result shall be supplied, whether or not it is specifically listed or otherwise required.

1.3 This Second Tier Subcontract is controlling with respect to the relationship between Subcontractor and Second Tier Subcontractor. The Second Tier Subcontractor agrees to be bound to the Subcontractor to the same extent as the Subcontractor is bound to the Contractor with respect to the performance and completion of the Work.

1.4 This Second Tier Subcontract does not create, nor does any course of conduct between the Subcontractor and Second Tier Subcontractor pursuant to this Subcontract, nor does it create, any contractual relationship between any parties other than the Subcontractor and Second Tier Subcontractor. The Second Tier Subcontractor is in all respects an independent contractor. Second Tier Subcontractor shall have no authority to bind the Subcontractor by any statement, representation, or promise of any kind. The Second Tier Subcontractor shall not interfere with the Subcontractor's relationship with the Contractor nor any other entity or person, and the Second Tier Subcontractor shall not deal directly with the Contractor or Owner without prior authorization, in each instance, in writing, from the Subcontractor. The Second Tier Subcontractor agrees not to enter into any other contract relating to the Project without the Subcontractor's prior written consent.

1.5 Second Tier Subcontractor hereby represents and acknowledges that it has reviewed and inspected all the Subcontract Documents as set forth in paragraph 1.1. and has investigated and satisfied itself as to the conditions affecting the Work including, but not restricted to, those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads, and uncertainties of weather, river stages, tides or similar physical conditions of the Project and the type of equipment and facilities needed to perform the Work. Any failure by Second Tier Subcontractor to acquaint itself with the available information will not relieve it from responsibility for estimating properly the difficulty or cost of successfully performing the Work and will not relieve it from responsibility for performing the Work unclassified. Second Tier Subcontractor acknowledges that it has conducted a site visit and viewed firsthand the project conditions. Subcontractor assumes no responsibility for any conclusions or interpretations made by Second Tier Subcontractor on the basis of any information made available by the Subcontractor, Owner or Contractor.

## **ARTICLE 2 THE WORK**

Second Tier Subcontractor and Subcontractor agree that the "Work" to be performed by the Second Tier Subcontractor is defined as and consists of the following:

All work required by the Subcontract Documents.

2.1 Second Tier Subcontractor will furnish all labor, materials, tools, equipment, permits, installation, supervision, shop drawings, erection drawings, field use drawings, permits, samples, reports and any other services necessary to perform and fully complete the Work as described in and in accordance with the Subcontract Documents. Second Tier Subcontractor will obtain all necessary work permits from all authorities having jurisdiction over the Project and obtain final inspection for the Work as required by such authorities and the Subcontract Documents.

2.2 The Second Tier Subcontractor will comply with and perform all activities required by the Employee Parking arrangement set forth by the Contractor.

**ARTICLE 3  
OBLIGATIONS OF SUBCONTRACTOR**

3.1 Subcontractor shall in good faith undertake to fulfill all obligations of Subcontractor to Second Tier Subcontractor in a manner consistent with the Subcontract Documents. Second Tier Subcontractor shall prepare the schedule for all of its work in accordance with specifications and shall submit it to Subcontractor. Second Tier Subcontractor is responsible for making all changes to the schedule as required by the Contractor.

3.2 The Subcontractor shall provide for communications in a manner to facilitate Second Tier Subcontractor's performance of the Work.

3.3 The Second Tier Subcontractor shall manage the Project logistics to afford Second Tier Subcontractor access to the Project in accordance with the Contractor's Schedule (as defined in paragraph 4.3 herein).

3.4 The Subcontractor shall expeditiously pursue conflict resolutions so as to minimize, to the extent possible, the impact on Second Tier Subcontractor's performance of its obligations.

**ARTICLE 4  
OBLIGATIONS OF SECOND TIER SUBCONTRACTOR**

4.1 Second Tier Subcontractor agrees to commence the Work when directed by Subcontractor and to diligently and continuously prosecute such Work and to coordinate the Work with other work performed on the Project so that Contractor shall not be delayed in completion of the Project by any act or omission of Second Tier Subcontractor performing and completing its Work within the time specified in the Subcontract Documents.

4.2 Time is of the essence of this Subcontract and Second Tier Subcontractor, in agreeing to complete the Work within the times and sequences herein mentioned, has taken into consideration and made allowances for all the hindrances and delays incident to the Work.

4.3 A Project schedule (the "Schedule") shall be developed by the Second Tier Subcontractor which shall schedule and coordinate the times required for each area of work on the Project. Second Tier Subcontractor shall participate and cooperate in scheduling the times and sequences required in performing Second Tier Subcontractor's Work and shall perform its Work in accordance with the Schedule including all amendments thereto. Second Tier Subcontractor shall continuously monitor its Schedule and advise Subcontractor of the status of Second Tier Subcontractor's progress on a regular basis, including information on the status of shop drawings, samples, submittals and materials or equipment which may be in the course of preparation or manufacture. In the event that critical path method or any other project planning and control technique is used, Second Tier Subcontractor shall comply with all requirements resulting from use of the technique as to start, completion and phasing of Work on the Project.

4.4 Second Tier Subcontractor shall immediately (within three (3) days) notify Subcontractor of any circumstances which may affect times and sequences in the Schedule and shall immediately make all requests for extensions of time, in writing to Subcontractor.

4.5 Second Tier Subcontractor's Project supervisor or foreman shall report to Subcontractor's Project superintendent prior to commencing any Work on the Project and report again prior to commencing any Work after any extended absence from the Project in order to advise Subcontractor's Project superintendent of the particular phase of Work Second Tier Subcontractor is about to perform. During the time Second Tier Subcontractor is performing the Work, daily work report forms shall be completed by Second Tier Subcontractor and turned in at the Subcontractor's Project office at the end of each work day. Second Tier Subcontractor's Project supervisor or foreman shall attend meetings as scheduled by Subcontractor's Project superintendent for the purpose of coordinating and scheduling all activities on the Project.

4.6 If Second Tier Subcontractor is responsible for any delays in time or sequence of the Schedule, Second Tier Subcontractor shall pay Subcontractor for all costs and damages suffered by Subcontractor as a result of such delays, including, without limitation, any damages assessed against Contractor by the Owner and against Subcontractor by the Contractor.

4.7 In the event that Second Tier Subcontractor's performance of the Work is delayed or interfered with, for any reason and for any period of time, by acts or omissions of Owner, Contractor or other subcontractors, Second Tier Subcontractor may request an extension of time for performance of the Work, but shall not be entitled to any increase in the Subcontract Amount or to damages or additional compensation as a consequence of such delays or interference, except to the extent that Subcontractor is entitled to compensation for such delays, and then only to the extent of any amounts that Subcontractor may, on behalf of Second Tier Subcontractor, actually recover from Contractor and Contractor can actually recover from the Owner for such delays.

4.8 Any time Second Tier Subcontractor is behind Schedule in its Work as a result of acts or omissions by Second Tier Subcontractor or as a result of delays for which Second Tier Subcontractor is not entitled to an extension (including, without limitation, delays for which Second Tier Subcontractor has failed to notify Subcontractor in accordance with Article 4 of this Agreement), Second Tier Subcontractor shall, at its own expense, provide Subcontractor with a recovery schedule on request from Subcontractor and supply additional labor, supervision and equipment, perform overtime work, and do everything necessary to bring its Work back on Schedule pursuant to such recovery schedule.

4.9 Second Tier Subcontractor acknowledges that the Project will be constructed, and work performed, utilizing many other employers, suppliers and vendors providing supplies and materials, who may or who may not, be party to, or signatory to, collective bargaining agreement(s).

4.9.1 Second Tier Subcontractor represents and warrants that, if it is party to collective bargaining agreements(s), such agreement(s) contain "no strike" clauses, or affirmatively provide that hiring, termination and actions of employers other than Second Tier Subcontractor do not provide a basis to strike, for a labor dispute, or for slowdown or work stoppage by Second Tier Subcontractor's employees.

4.9.2 If Second Tier Subcontractor is a party to any collective bargaining agreement(s), Second Tier Subcontractor shall deliver copies of such agreement(s) to Subcontractor's Project office within twenty-four (24) hours of receipt of such written request.

4.9.3 Second Tier Subcontractor represents and warrants that it has no reason to believe that the execution of this Subcontract and its working on this Project will, or could, give rise to any work stoppage, slowdown, strike or labor dispute on the Project.

4.9.4 Second Tier Subcontractor shall at all times take all legal action necessary to prevent and avoid all work stoppages, slowdowns, strikes or labor disputes by its employees. In an event of any work stoppage or slowdown by Second Tier Subcontractor's employees, Second Tier Subcontractor shall within twenty-four (24) hours or as soon as legally permissible, take all legal action permitted by collective bargaining agreements or by law to expedite complete resumption the of Work on the Project.

4.9.5 In the event of any strike, picket, sympathy strike, work stoppage or other form of labor dispute at the Project, no matter at whom directed, Second Tier Subcontractor agrees to diligently and continuously prosecute its Work under this Subcontract without stoppage, hindrance, delay, interruption, or slowdown, whatsoever. In the event Second Tier Subcontractor fails to diligently continue its Work, without interruption or delay, due to any of such events, the Subcontractor, in addition to damages and all other rights it has under this Subcontract and at law, may terminate this Subcontract after giving Second Tier Subcontractor forty eight (48) hours written notice of its intent to do so for failure to man the Project and violation of this provision.

4.10 Second Tier Subcontractor agrees at its own expense: (1) to take all necessary precautions to protect the work of other trades from any damage caused by Second Tier Subcontractor's operations; and (2) to watch over, care for and protect from damage or injury, by any cause whatsoever, all of Second Tier Subcontractor's Work, complete or otherwise, and all of its materials, supplies, tools and equipment at or near the Project. Second Tier Subcontractor agrees, without loss or damage to Subcontractor, to make good any loss or damage to any and all such Work, materials, supplies, tools, and equipment up to the final acceptance of the entire Project by the Owner.

4.11 Second Tier Subcontractor shall be responsible for the safety of its operations and its employees and shall take all reasonable safety precautions with respect to its Work. Second Tier Subcontractor shall comply with all safety policies and procedures initiated by Subcontractor and Contractor for the Project, including Subcontractor and Contractor's policy regarding drugs, alcohol and controlled substances and shall comply with all applicable laws, ordinances, rules, regulations and orders of any public authority for the safety of persons or property, including, but not limited to, the Federal Occupational Safety and Health Act (OSHA). Second Tier Subcontractor shall immediately notify Contractor of any injury to any of the Second Tier Subcontractor's employees. Second Tier Subcontractor shall require its personnel to attend any safety meetings Subcontractor or Contractor might conduct and direct Second Tier Subcontractor to attend.

4.11.1 Second Tier Subcontractor agrees that in performing its work, it will not create, use or dispose of any hazardous chemicals or substances in an unlawful or hazardous manner and shall be solely responsible for the lawful, proper and safe handling, storage and removal of all hazardous wastes, chemicals and substances which are introduced to the Project, or removed from the Project, by Second Tier Subcontractor's operations. The term "hazardous waste, chemicals or substances" shall mean those materials and substances prohibited, proscribed, or the use of which is controlled, by any agency of the federal government or the applicable state or local agency having jurisdiction of such matters. Second Tier Subcontractor shall comply with all federal, state and local regulations dealing with the use, storage or disposal of all hazardous wastes, chemicals and substances. Second Tier Subcontractor shall be responsible for any and all claims and damages resulting from the use, handling and storage and removal and disposal of such hazardous wastes, chemicals or substances from the Project, and will defend and hold Subcontractor and Contractor harmless, in accordance with paragraph 4.17 herein, from any and all liability associated with such use, handling, storage, removal and disposal including all associated attorneys' fees and costs of all clean-up operations wherever and whenever required by any governmental authority, Subcontractor or Contractor.

4.12 Second Tier Subcontractor shall not subcontract, assign or transfer the performance of this Subcontract or any part thereof without the written consent of Subcontractor and Contractor. Second Tier Subcontractor shall notify the Subcontractor in writing of any assignment of amounts due it, or to become due it, under this Subcontract. Second Tier Subcontractor agrees that this Subcontract shall be freely assignable by the Subcontractor and agrees to perform or continue to perform Second Tier Subcontractor's obligations for the assignee subject to assignee's fulfillment of all Subcontractor's obligations hereunder.

4.13 Second Tier Subcontractor warrants that all materials and equipment furnished and incorporated by it on the Project shall be new, unless otherwise specified, and that all the Work under the Subcontract Documents shall be of good quality, free from faults and defects and in conformance with the Subcontract Documents. All Work not conforming to these standards shall be considered defective. This warranty shall be in addition to and not a limitation of any other warranty or remedy provided by law or by the Subcontract Documents. Second Tier Subcontractor hereby agrees to provide all warranties and guarantees to Owner for its Work required by the Owner under its agreement with the Contractor.

4.14 Second Tier Subcontractor shall give all notices and comply with all codes, laws, ordinances, rules, regulations and orders of any public authority bearing on the performance of the Work. Subcontractor shall secure and pay for all costs and expenses to perform the Work including, without limitation, bond premiums, permits, fees and licenses necessary for the execution of the Work, and all federal, state and local taxes in connection with the Work, and Second Tier Subcontractor agrees that all costs thereof are included in the Subcontract Amount. When required by Contractor or Subcontractor, Second Tier Subcontractor will furnish satisfactory evidence showing that all such payments have been made. Second Tier Subcontractor shall promptly review the Subcontract Documents and report in writing to Subcontractor any variance with codes, laws, ordinances, rules and regulations, and without having given such notice to the Subcontractor, Second Tier Subcontractor shall assume full responsibility therefor, and shall bear all costs and damages attributable thereto.

4.15 Second Tier Subcontractor shall comply with federal, state and local tax laws, Social Security acts, Unemployment compensation acts and Workers' Compensation acts, insofar as applicable to the performance of the Work, and shall comply with all procedures rules and regulations with regard to nondiscrimination issued or to be issued by any federal, state or local government or agency, including the Equal Employment opportunity Commission, insofar as they may apply to the Work.

4.16 FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, Second Tier Subcontractor agrees, to the fullest extent permitted by law, to indemnify, defend and hold harmless Subcontractor, Contractor, the Owner and the Project architect and the employees, agents and representatives of each (collectively "Indemnitees") from and against all liabilities, costs, losses, expenses (including, without limitation, attorneys' and consultants' fees and expenses of litigation), fines, claims, causes of action which any Indemnitee may at any time suffer or sustain or become liable for caused by or resulting from the Second Tier Subcontractor's, or any of Second Tier Subcontractor's agents, representatives, subcontractors, suppliers or any one directly or indirectly employed by any of them or anyone for whose acts they may be liable (collectively "Liabilities"): (1) violation of any law or governmental regulation; (2) breach of any requirement or representation in the Subcontract Documents; or (3) negligent or willful acts or omissions in performance of the Work, regardless of whether such Liabilities are caused in part by an Indemnitee; provided, however, that no provision of this paragraph shall be interpreted to hold Second Tier Subcontractor responsible to indemnify an Indemnitee against Liabilities resulting from the sole acts or omissions of such Indemnitee. This indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Second Tier Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts or insurance coverage of Second Tier Subcontractor.

4.17 To the extent permitted by the laws of the state in which the Project is located, Second Tier Subcontractor waives all rights related to and will save and keep the Project and the lands upon which it is situated free from all mechanic's liens and all other liens by reason of the Work or any labor, materials or other things used on the Project. If Second Tier Subcontractor fails to remove any lien by bonding it or otherwise, Subcontractor may retain sufficient funds, out of the Subcontract Amount, to pay the same and all costs incurred by reason thereof, including, without limitation, attorney's fees.

4.18 Second Tier Subcontractor will clean up all debris occasioned by the Work performed hereunder and will at all times keep the Project premises clean. Any trash, debris, or liquid that poses a possible threat of fire or safety shall be removed from the premises immediately. If, after twenty-four (24) hours' notice by Subcontractor to Second Tier Subcontractor, Second Tier Subcontractor has not diligently proceeded with the clean-up as outlined in this paragraph, then Subcontractor has the right to proceed with the clean-up work at Second Tier Subcontractor's cost and expense.

4.19 Second Tier Subcontractor shall cooperate with the Contractor, Subcontractor and other second tier subcontractors whose work or responsibilities might interfere with Second Tier Subcontractor's Work and shall participate in the preparation of the Schedule and shall coordinate his operations in areas of congestion, specifically advising Subcontractor of any such interference.

4.20 All of Second Tier Subcontractor's workmanship, materials, submissions, and samples shall be subject to the approval of Subcontractor, Owner, Owner's Agent and Contractor.

4.21 Second Tier Subcontractor shall submit to Subcontractor complete shop drawings, data, catalog cuts and samples as required by the Subcontract Documents, or as required by the Subcontractor or Contractor.

4.22 Second Tier Subcontractor shall be responsible for its layout and for the protection and preservation of all installed engineering data and layout points and shall take all necessary precautions to ensure that said data is not damaged, destroyed, altered or changed. Re-engineering, if required, shall be performed at the Second Tier Subcontractor's expense.

4.23 Second Tier Subcontractor shall be responsible for all cutting and patching required in the prosecution of the Work.

4.24 Second Tier Subcontractor agrees to require any and all of its subcontractors to assume all obligations and responsibilities under the Subcontract Documents.

4.25 Second Tier Subcontractor shall furnish to Subcontractor in a timely fashion all information necessary for the preparation and submission by Subcontractor of any and all reports required by Contractor and Owner for the Work.

4.26 If any design, device, material, or process covered by letters, of patent, or copyright is used by the Second Tier Subcontractor, whether required or not, it shall provide for such use by suitable legal agreement with the owner of the patent or copyright, protecting the Subcontractor and Contractor from and against all claims for infringement, and shall include the cost of such agreement in the Subcontract Amount. It shall be the duty of the Second Tier Subcontractor, if so demanded by the Subcontractor or Contractor, to furnish the Subcontractor or Contractor with a copy of the legal agreement with the owner of the patent or copyright, and if such copy is not furnished when demanded, then Owner may, if it so elects, withhold any and all payments due to the Subcontractor until said legal agreement is furnished. The Second Tier Subcontractor shall pay all royalties and license fees. The Second Tier Subcontractor shall defend suits or claims for infringement of patent rights and shall hold the Subcontractor and Contractor harmless from loss on account thereof but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Subcontract Documents. If, however, the Second Tier Subcontractor has reason to believe that the required design, process or product is an infringement of a patent, the Second Tier Subcontractor shall be responsible for such loss unless such information is promptly furnished to the Subcontractor.

**ARTICLE 5  
THE SUBCONTRACT AMOUNT**

5.1 Subject to the provisions of this Subcontract and as full consideration for complete performance of the Work and of all Second Tier Subcontractor's obligations and representations under the Subcontract Documents, the Subcontract amount is listed on the attached schedule of bid items.

5.2 This Subcontract Amount shall be the total amount to which Second Tier Subcontractor is entitled, except as may be amended by Change Order or other provisions as set forth herein. Subcontractor will provide one full-time person as a Project Manager/Quality Control Manger. This person is provided solely for Subcontractor's benefit as Second Tier Subcontractor is solely responsible for managing its work and performing the quality control of that work to insure that the work complies with all the requirements of the Subcontract Documents. Subcontractor will purchase the materials required for Second Tier Subcontractor's work and be reimbursed for all such purchases from the Second Tier Subcontractor. Second Tier Subcontractor shall notify Subcontractor of quantities and delivery requirements for supplying the material.

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5.3 The Subcontractor agrees to pay to the Second Tier Subcontractor the stated consideration for such work under this Subcontract. The Subcontractor shall retain 10% of each progress payment requested and approved by Subcontractor. All the money is to be paid, subject to the condition precedent stated below, in current funds ten days after the Subcontractor has received funds from the Contractor. Notwithstanding the above and below, it shall be an absolute condition precedent to any liability of the Subcontractor to the Second Tier Subcontractor for progress or final payments for any work performed by the Second Tier Subcontractor on the project that the Subcontractor be in receipt of payment by the Contractor and owner for such work. If the owner or Contractor has not paid the Subcontractor, for whatever reason (including, but not limited to, the owners inability to pay, insolvency, bankruptcy or other financial problems) the Second Tier Subcontractor agrees that the Subcontractor shall not be liable to, or indebted to, the Second Tier Subcontractor on account of such work. The Second Tier Subcontractor accepts the risk that it will not be paid for work performed by the Second Tier Subcontractor in the event that the Subcontractor and Contractor, for whatever reason, are not paid by the owner for such work, and the Second Tier Subcontractor states that he relies entirely for payment for work performed on the credit of the owner, and not of the Subcontractor or Contractor. The Second Tier Subcontractor acknowledges he understands and agrees to the terms and conditions of the payments as outlined in this section of the contract. The Second Tier Subcontractor agrees that the liability of the surety on Subcontractor's payment bond, if any, for payment to the Second Tier Subcontractor, is subject to the same conditions precedent as are applicable to the Subcontractor's liability to the Second Tier Subcontractor.

## **ARTICLE 6 PROGRESS PAYMENTS**

6.1 Second Tier Subcontractor shall, within 15 days after execution of the Subcontract, and before the first Application for Payment (as defined in paragraph 6.2 below), submit to Subcontractor a schedule of values (hereinafter "Schedule of Values") of the various parts of the Work aggregating the total sum of the Subcontract Amount made out in such detail as the Subcontractor or the Subcontract Documents may require, and supported by such evidence as to its correctness as Subcontractor may direct. This Schedule of Values, when approved by Subcontractor, shall be used as the basis for the Applications for Payment.

6.2 Second Tier Subcontractor shall submit to Subcontractor on a bi-monthly basis an Application for Payment (hereinafter "Application for Payment") in triplicate, complete with required breakdown data to permit checking and approval, in a form acceptable to Subcontractor. The amount of the Application for Payment will be equal to Ninety Percent (90%) (Ten Percent (10%) to be held as retainage) of the value of labor and materials incorporated by Second Tier Subcontractor in the Work and where authorized, of materials stored in a manner acceptable to Owner, Architect, Contractor and Subcontractor, less the aggregate of previously paid amounts, if any.

6.3 In addition to any other requirements of the Second Tier Subcontract, each progress payment (hereinafter "Progress Payment"), in amounts consistent with the approved Application for Payment, shall not be due unless and until the following conditions precedent to each such Progress Payment have been satisfied: (1) approval and acceptance of Second Tier Subcontractor's Work by Owner, Contractor and Subcontractor; (2) receipt of payment, in accordance with the approved Second Tier Subcontractor's Application for Payment, by Subcontractor from Contractor and by Contractor from Owner; (3) furnishing to Subcontractor satisfactory evidence by Second Tier Subcontractor that all labor and material accounts incurred by Second Tier Subcontractor in connection with its Work have been paid in full; (4) furnishing to Subcontractor by Second Tier Subcontractor a partial waiver of lien, in the form of that attached hereto as Exhibit "B"; (5) furnishing to Subcontractor payment and performance bonds as called for in Article 8; (6) furnishing to Subcontractor proof of required insurance coverage in accordance with Article 11; and (7) furnishing Subcontractor applicable permit, business license and sales tax numbers.

6.4 The amount of each Progress Payment to Second Tier Subcontractor, if due, shall not exceed the amount approved by Architect and Owner, and paid to the Subcontractor by the Contractor and to the Contractor by Owner, for the Work of Second Tier Subcontractor.

6.5 Progress Payments, if due in accordance with paragraphs 5.3 and 6.3 above, will be made on or about thirty (30) days following the submission of the Application for Payment.

6.6 Payments otherwise due, either Progress Payments, if any, or final payment under Article 7 herein, may be withheld by Subcontractor on account of: (1) defective Work not remedied, claims filed, reasonable evidence indicating probability of filing claims; or (2) failure of Second Tier Subcontractor to make payment properly to its lower tier subcontractors or suppliers for material or labor, or applicable taxes, fees, and fringe benefits; or (3) reasonable doubt that the Work can be completed for the balance of the Subcontract Amount then unpaid; or (4) any other breach of the Subcontract Documents. If these deficiencies are not removed, Subcontractor may rectify the same at Second Tier Subcontractor's expense. Subcontractor may offset against the Subcontract Amount any liquidated or unliquidated obligations of Second Tier Subcontractor to Subcontractor, whether or not arising out of the Subcontract Documents.

6.7 No payment to Second Tier Subcontractor, either Progress Payments or final payment under Article 7 herein, shall operate as an approval of the Work or any part thereof, or Second Tier Subcontractor's obligations under the Subcontract Documents.

6.8 Acceptance by the Second Tier Subcontractor of any payment made after the receipt by Subcontractor of its final payment, or any part thereof, from the Owner, shall be and shall operate as a release to the Subcontractor of all claims and liability by the Second Tier Subcontractor for all things done or furnished or relating to the Work and for every act or alleged neglect of the Subcontractor arising out of the Subcontract except for claims for retained percentages withheld by the Subcontractor in accordance with this Subcontract and except as to such claims which the Second Tier Subcontractor may have as provided for in Article 9 of this Subcontract.

6.9 If Subcontractor receives information, or has reason to believe, that Second Tier Subcontractor has not paid for labor, services, equipment or materials used on, to be used on, incorporated into or to be incorporated into the Project, then Subcontractor reserves the right (but is not obligated), to make payments to Second Tier Subcontractor in the form of checks payable jointly to Second Tier Subcontractor and its laborers, suppliers or subcontractors.

## **ARTICLE 7 FINAL PAYMENT**

7.1 Second Tier Subcontractor's final Application for Payment shall be submitted in the same form specified in Article 6 and no later than thirty (30) days following the final completion of the Work required by the Subcontract Documents.

7.2 In addition to any other requirement of this Subcontract, final payment shall not be due unless and until the following conditions precedent to final payment have been satisfied: (1) approval and acceptance of Second Tier Subcontractor's Work by Owner, Architect, Contractor and Subcontractor, including "punch-list" work and other work required to bring the Work into compliance with this Subcontract; (2) delivery to Subcontractor of all manuals, "as-built," guarantees and warranties, including those for material and equipment furnished by Second Tier Subcontractor, and any other documents required by federal, state or local laws or regulations; (3) receipt of final payment for Second Tier Subcontractor's Work by Subcontractor from Contractor and by Contractor from Owner; (4) furnishing to Subcontractor satisfactory evidence by Second Tier Subcontractor that all labor and material accounts incurred by Second Tier Subcontractor in connection with its Work have been paid in full; (5) furnishing to Subcontractor a complete general release and a final waiver of lien, in the form of that attached hereto as Exhibit "C" by Second Tier Subcontractor; and (6) furnishing to Subcontractor the written consent to surety to final payment.

7.3 The final payment amount, if due, will be the difference between the Subcontract Amount, as modified and adjusted in accordance with the Subcontract Documents, and the aggregate sum of the amounts previously paid under the Subcontract, if any.

**ARTICLE 8  
PAYMENT AND PERFORMANCE BONDS**

8.1 Second Tier Subcontractor shall provide payment and performance bonds from a Treasury listed surety.

8.2 The premiums for these bonds shall be paid by Second Tier Subcontractor and the cost thereof is included in Subcontract Amount.

8.3 Second Tier Subcontractor shall include the cost of any increase in bond premium in any Change Order Requests as defined in Article 9 herein submitted to Subcontractor and shall pay the increase premium applicable to an approved Change Order as defined in Article 9 herein.

8.4 Any material breach as defined in paragraph 14.1 of this Subcontract shall entitle Subcontractor to declare Second Tier Subcontractor in default of this Subcontract and request the surety to perform under the payment and performance bonds.

**ARTICLE 9  
CHANGES**

9.1 A "Change Order Request" is a detailed cost estimate submitted by the Second Tier Subcontractor to the Contractor outlining a change in the Work and costs associated with the change, including detailed documentation justifying any proposed adjustment in time. This estimate shall be computed using costs for labor and materials at prevailing rates in the Project area. A "Change Order" is a written order from Subcontractor accepting a Change Order Request, or directing a modification, alteration, addition or deletion to the Work.

9.2 The Work to be performed under this Subcontract may be modified by changes required by Owner, Architect, Contractor or Subcontractor and the Subcontract Amount as set forth in Article 5 shall be adjusted by written change order (hereinafter "Change Order") in accordance with the terms and conditions of the Subcontract.

9.3 No alteration, addition or deletion shall be made to the Work as shown or described by the Subcontract Documents except by Change Order, and when so made, the value of the alteration, addition or deletion shall be computed and determined in accordance with this Subcontract, subject to the written approval and acceptance by Subcontractor, and the amount so determined shall be added or deducted from the Subcontract Amount. Second Tier Subcontractor shall have no claim for additional work or change work unless such work has been done in pursuance of a Change Order from Subcontractor. Any extra work performed without such Change Order will be at Second Tier Subcontractor's expenses.

9.4 For changes in the Work that affect the Subcontract Amount or construction time, Second Tier Subcontractor shall notify Contractor of the scope of any change in cost or time within five (5) days after receipt of the proposed change and shall submit the actual Change Order Request within ten (10) days. The estimate procedure shall be in accordance with the terms of this Subcontract, and the costs of labor and materials shall be in accordance with appropriate provisions of this Subcontract.

9.5 If Owner or Contractor disputes the validity or amount of a Change Order Request submitted by Second Tier Subcontractor, but instructs Second Tier Subcontractor to proceed with the Work pending resolution of the dispute, Second Tier Subcontractor shall promptly commence such disputed work and expeditiously complete it. Subcontractor solely reserves the right to pursue a claim. Second Tier Subcontractor agrees to permit Subcontractor to decide whether to pursue a claim and Second Tier Subcontractor shall be bound by Subcontractor's decision.

**ARTICLE 10**  
**TEMPORARY FACILITIES AND SERVICES**

10.1 Second Tier Subcontractor shall be responsible for unloading and hoisting all of its materials, supplies, tools and equipment in order to ensure the timely completion of Second Tier Subcontractor's Work.

10.2 After obtaining Subcontractor's approval, Second Tier Subcontractor shall have free use of any temporary roadways, equipment pads and scaffolding provided by Subcontractor whenever these temporary facilities are necessary for performance of the Work.

**ARTICLE 11**  
**INSURANCE**

Second Tier Subcontractor shall maintain at all times during the course of the Work at Second Tier Subcontractor's cost and expense the types of insurance, including the requisite coverages, terms, riders, amendments and waivers of subrogation, required by the insurance provisions of Article 11 of the General Conditions, Exhibit "A". Such insurance shall be maintained with insurance companies acceptable to Subcontractor and Contractor. Second Tier Subcontractor shall name the Subcontractor, Contractor and Owner as additional named insureds on each policy, except workers' compensation policy, maintained by Second Tier Subcontractor in accordance with the Subcontract Documents. Prior to commencing the Work Second Tier Subcontractor shall have such insurance companies prepare and execute the form set forth in Exhibit "F". In addition, the Second Tier Subcontractor and such insurance companies shall agree, and so acknowledge on Exhibit "F", to provide written notice of cancellation to Subcontractor at least thirty (30) days prior to cancellation of any insurance policy or coverage. In the event Second Tier Subcontractor fails or neglects to obtain the required insurance and furnish evidence thereof to Subcontractor with the executed Certificate of Insurance form, Subcontractor shall have the right, but not the obligation, to declare Second Tier Subcontractor in material breach of this Subcontract and proceed as provided in Article 14.1.

**ARTICLE 12**  
**SUSPENSION OF WORK**

12.1 Subcontractor shall have the authority to suspend the Work wholly or in part, for such period of time as it may deem necessary, due to conditions unfavorable for the satisfactory prosecution of the Work, or conditions which in its opinion warrant such action. No additional compensation will be paid to the Second Tier Subcontractor for any costs caused by such suspensions for weather conditions, utility adjustments, or work by other contractors on or near the Work covered by the Subcontract Documents. If it becomes necessary to stop Work for an indefinite period of time, the Second Tier Subcontractor shall store all materials in such manner that they will not obstruct or impede the traveling public unnecessarily or become damaged in any way, take every precaution to prevent damage or deterioration of the Work performed, provide suitable drainage of the Site, and erect temporary structures where necessary.

12.2 The Second Tier Subcontractor shall not suspend Work for any reason including, without limitation, disputes or disagreements with the Subcontractor, without written authority from Subcontractor.

12.3 When the Subcontractor suspends the Work, the completion date for the Work shall be extended by a time period equal to the time period of suspension, provided such suspension is not a result of the Second Tier Subcontractor's failure to comply with the provisions of the Subcontract Documents.

**ARTICLE 13**  
**DISPUTE RESOLUTION**

13.1 As a condition precedent to filing a claim or lawsuit as provided in subparagraph 13.2, the Second Tier Subcontractor hereby agrees to seek arbitration, as its sole and exclusive remedy to resolve any dispute, controversy or claim arising out of or relating to this Agreement, or the breach thereof, and judgment upon the award rendered by the arbitrator may

be entered in any court having jurisdiction thereof. Arbitration of any dispute shall be at the sole discretion of the Subcontractor and subject to the Contractor's provision of written consent. The arbitration shall be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, provided, however, that:

(i) The claim shall be decided by one arbitrator who shall be selected by mutual agreement of the parties. If the parties cannot agree, such arbitrator shall be selected by the American Arbitration Association; and

(ii) No provision of, or the exercise of any rights under, this subparagraph 13.1 shall limit a party's right to obtain provisional or ancillary remedies, including, without limitation, injunctive relief, attachment, the appointment of a receiver, or enforcement of this arbitration provision from a court having jurisdiction before, during or after the pendency of any arbitration; and

(iii) Second Tier Subcontractor expressly agrees that it can be joined in any dispute between Contractor and Subcontractor at the discretion of the Contractor or Subcontractor.

#### **ARTICLE 14 DEFAULT AND TERMINATION**

14.1 If the Second Tier Subcontractor: (1) fails to begin the Work under the Subcontract Documents within the time specified; or (2) fails to perform the Work with sufficient supervision, workmen, equipment or materials to ensure the completion of said Work within the specified time; or (3) neglects or refuses to remove materials or correct unsuitable; Work or (4) discontinues the prosecution of the Work; or (5) breaches any obligation or representation in the Subcontract Documents; or (6) becomes insolvent or is declared bankrupt, or commits an act of bankruptcy, or insolvency, or makes an assignment for the benefit of creditors; or (7) for any other cause whatsoever, does not carry on the Work in accordance with the Subcontract Documents, the Schedule or as directed in writing by the Subcontractor or Contractor, the Subcontractor or Contractor shall give notice in writing to the Second Tier Subcontractor of such deficiency, and require Second Tier Subcontractor to cure the deficiency and to specify how the deficiency shall be cured. Any of the above enumerated occurrences shall be considered a material breach of the Subcontract Documents.

If the Second Tier Subcontractor within a period of forty-eight (48) hours after receipt of said notice from Subcontractor or Contractor shall not cure the above deficiencies, Subcontractor and Contractor shall have the right to any one or any combination of the following remedies: (1) supply the quantity of material, equipment or labor as the Subcontractor or Contractor deem advisable to complete the Work and charge the cost thereof, together with all reasonable expenses and attorneys' fees to the Subcontractor and Contractor; (2) terminate this Subcontract or any part thereof and the Second Tier Subcontractor shall be entitled to no monies of any kind, but, shall nevertheless remain liable for any damages and attorneys' fees that the Subcontractor and Contractor has suffered or may suffer; (3) relet the Work covered under this Subcontract to any other persons by one or more contracts, and any associated costs plus reasonable expenses and overhead of the Subcontractor and Contractor and Subcontractor's and Contractor's attorneys' fees shall be charged against the Second Tier Subcontractor; (4) declare the Second Tier Subcontractor in default and to call upon the surety, as provided in Article 8, to undertake and perform the obligations of the Second Tier Subcontractor in accordance with the payment and performance bonds provided therein; (5) immediately suspend performance of all the Second Tier Subcontractor's obligations under this Subcontract; and (6) seek any and all relief available at law or in equity.

Upon termination, the Subcontractor and Contractor shall have the right to enter upon the Project and take possession of all materials, appliances and equipment in the possession of Second Tier Subcontractor and to arrange for the performance of Second Tier Subcontractor's obligations. The Subcontractor and Contractor's expenses arising from such termination shall include, in addition to the expense of arranging for the performance of Second Tier Subcontractor's obligations, all of Subcontractor's and Contractor's additional expenses, consequential damages flowing from the default and attorneys' fees. Such expenses of the Subcontractor and Contractor shall be the responsibility of the Second Tier Subcontractor or its surety, and to the extent such expenses exceed the unpaid Subcontract balance, the Subcontractor and Contractor shall have the right to make claim against Second Tier Subcontractor or its surety for the excess.

14.2 Subcontractor and Contractor may, at its discretion, without prejudice to any other right or remedy, and upon giving written notice to the Second Tier Subcontractor, immediately terminate Second Tier Subcontractor's employment under the Subcontract Documents for any reason without specifying or requiring cause, in whole or in part, and finish the terminated Work by whatever method Subcontractor and Contractor may deem expedient. On receipt of such notice, Second Tier Subcontractor, except as and to the extent directed, immediately shall discontinue the services and the placing of subcontractor or supplier orders for materials, facilities, and supplies in connection with the performance of the Work, and if requested, shall make every reasonable effort to procure termination of existing subcontracts upon terms satisfactory to Subcontractor and Contractor. Second Tier Subcontractor hereby releases Subcontractor and Contractor from any liability, including, without limitation, lost profits or incidental, consequential or special damages of any kind, in connection with or related to the Subcontract Documents or any alleged breach thereof, in connection with such termination.

14.3 Upon completion of the Work, as accepted by Subcontractor and Contractor, or upon receipt of the notice of termination, Second Tier Subcontractor shall deliver within thirty (30) days to Subcontractor the following:

(i) All Drawings, documents, reports, supplies and other material relating in any way to any portion of the Work. All Work and all drawings, documents, reports and other material related thereto remain the property of Contractor and may not be used by the Subcontractor, except by written agreement of Contractor on any other project or for any other person, firm or corporation.

(ii) Executed Release of Liens and Claims, in an acceptable form, stating that all bills have been paid and no claims exist against Subcontractor or Contractor.

(iii) Final itemized invoice for payment. Second Tier Subcontractor shall be paid for Work performed in accordance with the Subcontract Documents to the date of termination.

Acceptable materials, obtained by the Second Tier Subcontractor for the Work, that have been inspected, tested, and accepted by Subcontractor or Contractor, and that are not incorporated in the Work may, at the option of Subcontractor or Contractor, be purchased from the Subcontractor at actual costs as shown by receipted bills, that will be supplied to the Subcontractor or Contractor, and actual cost records at such points of delivery as may be designated by Subcontractor or Contractor.

Termination of the Second Tier Subcontractor's employment, as stated above, will not relieve the Second Tier Subcontractor or its surety of the responsibility of replacing defective Work or other responsibilities as required by the Subcontract Documents.

## **ARTICLE 15 MISCELLANEOUS PROVISIONS**

15.1 This Subcontract and the Second Tier Subcontractor are subject to the approval of the Contractor and Owner. If Second Tier Subcontractor or the Subcontract is not approved, then in such event, this Subcontract shall be null, void and of no effect.

15.2 The caption, titles and paragraph headings used in this Subcontract are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this Subcontract or any paragraph, article or provision herein.

15.3 The Subcontract Documents contain the entire agreement between the parties. Any executory agreement hereafter made shall be ineffective to change, modify or discharge it in whole or in part, unless such executory agreement is in writing and signed by both Subcontractor and Second Tier Subcontractor. All negotiations and agreements prior to the date of this Subcontract not included herein are hereby voided.

15.4 Any provision or part of the Subcontract Documents held to be void or unenforceable under any law or regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Subcontractor and Second Tier Subcontractor, who agree that the Subcontract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

15.5 The rights of the parties shall be construed in accordance with the laws of the state in which the Project is located.

15.6 Second Tier Subcontractor hereby releases Subcontractor from liability for lost profits or incidental, underabsorbed overhead, delay damages, attorneys' fees, consequential or special damages of any kind in connection with or related to the Subcontract Documents or any alleged breach thereof.

IN WITNESS WHEREOF, the parties have executed this Agreement this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

**SECOND TIER SUBCONTRACTOR:**

**SUBCONTRACTOR:**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Name: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

