

# MASTER TRADE AGREEMENT

This Agreement is made as of \_\_\_\_\_, between

BRUMBAUGH CONSTRUCTION, INC.  
3520 State Route 49  
PO Box 309  
Arcanum, OH 45304  
Phone (937) 692-5107  
Fax (937) 692-5678

and the Subcontractor:

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## 1. Intent and Term of this Agreement; Project-Specific Terms.

- 1.1 **Intent.** This Agreement establishes the terms of the contractual relationship between the Parties in connection with all Subcontract Work that the Subcontractor provides to Brumbaugh during the term of this Agreement unless otherwise agreed by the Parties in a writing which contains an explicit reference to this Agreement.
- 1.2 **Non-exclusivity.** The existence of this Agreement does not guarantee an exclusive relationship between the Parties or that Brumbaugh will hire the Subcontractor to perform any Subcontract Work.
- 1.3 **Term.** The term of this Agreement is one year and it commences as of the date written above. The term automatically renews for successive one-year terms on an annual basis.
- 1.4 **Termination of this Agreement.** Either Party may terminate this Agreement without cause upon seven days' written notice to the other Party. The Subcontractor's termination of this Agreement will not be effective until the Subcontractor has properly completed all Subcontract Work required under a Work Order that the Subcontractor accepted prior to giving the notice of termination.
- 1.5 **Project-Specific Terms.** If the Parties agree on a Project's scope of Subcontract Work, Subcontract Price, and other Project-specific terms, Brumbaugh will prepare a Work Order and deliver it to the Subcontractor. The form of the Work Order is attached to this Agreement as Exhibit A. Subcontractor shall sign and return the Work Order to Brumbaugh within three (3) days after the Subcontractor receives it. When the Subcontractor accepts a Work Order by signing it or beginning the Subcontract Work, the related Subcontract will be formed.

## 2. Subcontractor's Responsibilities.

- 2.1 The Subcontract Work includes, but is not limited to, such of the following as may be necessary to perform and complete the Subcontract Work: all plant, materials, tools, equipment (whether for temporary or permanent use), scaffolding, supplies, transportation cartage, loading, hoisting, forms, patterns, models, shop drawings, measurements and other facilities; all labor, work, supervision, cutting; patching, cleaning, temporary construction, protection and other services; and all insurance, taxes, benefits, royalties, temporary utilities and other related costs except as otherwise provided in this Agreement. It is intended that the Subcontract Work include all work and things necessary to produce a completed job in all respects; no Claim shall be made by Subcontractor based upon a change in the scope of the Subcontract Work if such work was set forth in or reasonably implied by this Agreement or the Subcontract Documents.
- 2.2 Subcontractor shall perform the Subcontract Work in accordance with the requirements of this Agreement and the Subcontract Documents. Subcontractor is bound to Brumbaugh by all of the terms and provisions of the Subcontract Documents and assumes toward Brumbaugh all of the duties, obligations and responsibilities that Brumbaugh by the Subcontract Documents assumes toward the Owner. Subcontractor further agrees that Brumbaugh shall have the benefit of all

rights, remedies and redress against Subcontractor that the Owner under the Prime Contract, has against Brumbaugh.

- 2.3** Subcontractor shall not deviate from the Subcontract Documents or substitute materials (including "or equal" materials) without the issuance of a written change order by Brumbaugh. Subcontractor shall be liable for any additional cost to Brumbaugh or others resulting from any deviations or substitutions.
- 2.4** If the Subcontract Documents **(A)** require Subcontractor to provide design services or **(B)** specify design and performance criteria relating to the Subcontract Work, Subcontractor shall provide the design services necessary to satisfactorily complete the Subcontract Work. Design services provided by Subcontractor shall be procured from licensed design professionals retained by Subcontractor as permitted by the law of the place where the Project is located (the "Designer"). The Designer's signature and seal shall appear on all drawings, calculations, specifications, certifications, shop drawings and other submittals prepared by the Designer. Shop drawings and other submittals related to the Subcontract Work designed or certified by the Designer, if prepared by others, shall bear Subcontractor's and the Designer's written approvals when submitted to Brumbaugh. Brumbaugh shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by the Designer.
- 2.5** If the Designer is an independent professional, Subcontractor shall notify Brumbaugh in writing, prior to the commencement of the Designer's services, of the name and address of the Designer. Such design services shall be procured pursuant to a separate agreement between Subcontractor and the Designer. The Subcontractor-Designer agreement shall not provide for any limitation of liability or exclusion from participation in the multiparty proceedings requirement of Section 30. Subcontractor shall notify Brumbaugh in writing if it intends to change the Designer. In all events Subcontractor shall be responsible for conformance of the Subcontract Work with the information given and the design concept expressed in the Subcontract Documents.
- 2.6** Unless otherwise provided in the Subcontract Documents and except for emergencies, Subcontractor shall direct all communications related to the Project to Brumbaugh.

### **3. Subcontract Price.**

- 3.1** Subject to all of the terms and conditions of the Subcontract Documents, Subcontractor shall receive, for performing the Subcontract Work, the Subcontract Price. The Subcontract Price is firm and includes all federal, state, county and municipal taxes imposed by law and based upon labor, services, materials, equipment or other items acquired, performed, furnished or used in connection with the Subcontract Work, including, but not limited to, sales, use, gross receipts, excise, unemployment and personal property taxes payable by or levied or assessed against Owner, Brumbaugh or Subcontractor. Where the law requires any such taxes to be stated and charged separately, the total price of all items included in the Subcontract Work plus the amount of such taxes shall not exceed the Subcontract Price.

### **4. Time of Performance; Project Schedule; Project Meetings.**

- 4.1** Subcontractor shall commence the Subcontract Work at the earlier of instruction to proceed from Brumbaugh or as set forth in the associated Work Order. Subcontractor shall diligently and continuously prosecute and complete the Subcontract Work and coordinate the Subcontract Work with the other work being performed on the Project, in accordance with the Project Schedule, any revisions to the Project Schedule, and any other scheduling requirements listed in the Subcontract Documents, so as not to delay, impede, obstruct, hinder or interfere with the commencement, progress or completion of the whole or any part of or other work on the Project. **TIME IS OF THE ESSENCE OF THIS AGREEMENT AND ALL RESULTING SUBCONTRACTS.**
- 4.2** If Subcontractor fails to perform any phase of the Subcontract Work in accordance with the start, finish, duration, phasing or sequence provisions of the Project Schedule, Subcontractor shall, at its

expense, upon notice from Brumbaugh, schedule such overtime work and make such increases in its working forces, or either, as Brumbaugh may require in order for Subcontractor to promptly cure its failure to comply with the Project Schedule. If the progress of the Project or any component thereof is delayed, obstructed, hindered or interfered with by any fault, neglect, or failure to act of Subcontractor or any of its officers, agents, employees, subcontractors or suppliers so as to cause any additional cost, expense, liability or damage to Brumbaugh, Owner or the Architect/Engineer, Subcontractor shall compensate Brumbaugh, the Owner and the Architect/Engineer for, and indemnify them against, all such costs, expenses, liabilities or damages.

- 4.3** If Brumbaugh directs Subcontractor to schedule overtime work or other work not otherwise required by the Subcontract Documents and not pursuant to Section 4.2, Subcontractor shall be granted an increase in the Subcontract Price equal to the premium time component of wages paid to its employees, plus taxes and insurance payable thereon, but excluding, unless specifically authorized by the Owner, any allowance for overhead, profit, impact costs or any other costs or expenses.
- 4.4** If requested by Brumbaugh, Subcontractor shall participate and cooperate in the development of the Project Schedule and any revisions thereto. Subcontractor shall, at any time within forty-eight (48) hours after receipt of notice from Brumbaugh, furnish such information as may be requested by Brumbaugh for the scheduling of the start, finish, duration, phasing and sequence of operations required for the Subcontract Work, including reasonable allowances for out of sequence work, weather and usual construction delays, and to coordinate the same with Brumbaugh's overall schedule requirements. Subcontractor shall continuously monitor the Project Schedule so as to be fully familiar with the start, finish, duration, phasing and sequence of operations of the Subcontract Work and of other work on the Project. Subcontractor acknowledges that the Project Schedule will be periodically revised to reflect Project progress and agrees to comply with such revisions. Subcontractor shall coordinate the Subcontract Work with all other contractors' work in such manner as Brumbaugh may direct to avoid conflict or interference of such work with others, shall participate in the preparation of coordination drawings and shall conform the Subcontract Work to the work of other contractors to prevent discrepancies (and to avoid unnecessary cutting or patching) with contiguous work.
- 4.5** At Brumbaugh's request, Subcontractor shall inform Brumbaugh about materials on hand, progress made in the manufacturing and fabricating of materials for the Subcontract Work, or any other matters relating to the condition or progress of the Subcontract Work. Brumbaugh, Owner's representatives and the Architect/Engineer at all times shall have free access to the office, shops and yards of Subcontractor and its subcontractors and material suppliers to verify any information about the Subcontract Work.
- 4.6** Subcontractor, in person or by duly authorized representative having power to act and acceptable to Brumbaugh, shall attend, at its own expense, all meetings or conferences that Brumbaugh may call at the Construction Site or elsewhere, for the purpose of discussing progress of the Project, safety at the Construction Site, ways to expedite the completion of the Project, or other matters bearing on the performance of the Subcontract Work. When reasonably possible, Subcontractor will be given at least forty-eight (48) hours notice of such meetings.

## **5. Examination of Documents and Investigation of Site; Concealed or Unknown Conditions.**

- 5.1** By accepting a Work Order, Subcontractor represents that it has carefully studied, understands, and has compared the Subcontract Documents with each other and reported to Brumbaugh any errors, inconsistencies or omissions discovered. Subcontractor shall also review carefully any changes in the Subcontract Documents and within five (5) days after receipt of such changes, report to Brumbaugh any errors, inconsistencies or omissions discovered. Subcontractor shall be liable to Brumbaugh or the Owner for damage resulting from errors, inconsistencies or omissions within or between the Subcontract Documents which Subcontractor in the exercise of reasonable diligence should have recognized and reported to Brumbaugh.

- 5.2** By accepting a Work Order, Subcontractor represents that it has made such investigations and inspections (including without limitation any required by the Subcontract Documents) of the nature and location of the Subcontract Work, the Project, and the conditions of the Construction Site (including, if relevant, the character of the surface and subsurface conditions or obstacles to be encountered on, under and around the Construction Site, access thereto, impact of safety and health requirements and storage and work areas available to Subcontractor thereon) as are necessary to determine the difficulty and cost to Subcontractor of properly performing the Subcontract Work. By accepting a Work Order, Subcontractor represents that it has had full opportunity to view, sample, inspect or test the conditions on the Construction Site, that it can satisfy all requirements of the Subcontract Documents, and it is not relying upon any opinions or representations of Brumbaugh, the Owner, or any of their respective officers, agents or employees. Brumbaugh is not responsible for any interpretations or conclusions with respect to the Subcontract Work or the Construction Site made by Subcontractor on the basis of information made available to Subcontractor by Brumbaugh, unless in a Work Order, Brumbaugh specifically assumes liability to Subcontractor with respect to such information.
- 5.3** If conditions are encountered at the Construction Site which are **(A)** subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Subcontract Documents or **(B)** unknown physical conditions of an unusual nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Subcontract Documents, then Subcontractor shall give Brumbaugh notice promptly before conditions are disturbed and in no event later than forty-eight (48) hours after first observance of the conditions, or, if sooner, the date Brumbaugh is required to report the conditions pursuant to the Prime Contract. Subcontractor shall not be entitled to any increase in the Subcontract Price or damages by reason of any such conditions unless Owner is liable for and pays the same to Brumbaugh, nor shall Subcontractor be entitled to a time extension unless Owner grants such extension of time for the performance of Subcontract Work to Brumbaugh pursuant to the provisions of the Prime Contract. Brumbaugh shall not be obligated to apply to Owner for an increase in the Subcontract Price or for damages on behalf of Subcontractor or for an extension of time unless such application is permitted by the Prime Contract, and Subcontractor, at its expense, does all things necessary in order to process such claim. Brumbaugh, upon receipt of any payment by Owner to Brumbaugh based upon such claim for Subcontractor, will pay the same to Subcontractor less costs, expenses and attorney fees incurred by Brumbaugh on account of or relating to such claim. Except to the extent provided in this Section 5.3, Subcontractor waives the right to make any Claims based upon conditions encountered at the Construction Site.

## **6. Permits; Licenses; Compliance with Laws and Patents.**

- 6.1** Unless otherwise agreed by Brumbaugh in writing, Subcontractor shall secure, pay for and keep in effect all licenses, permits, fees, assessments and inspection certificates necessary for the proper execution and completion of Subcontract Work and shall deliver all certificates of inspection and other certificates and permits to Brumbaugh. When inspections (or inspectors) require tests or demonstrations, the subcontractor shall pay for all costs associated with testing and demonstrations and restoring the product or system to ready condition.
- 6.2** Subcontractor agrees to be bound by, and at its own costs comply with, all federal, state and local laws, ordinances and regulations (the "Laws") applicable to the Subcontract Work, including but not limited to those relating to safety, health, discrimination in employment, fair employment practices or equal employment opportunity. Subcontractor shall be liable to Brumbaugh and the Owner for all loss, cost and expense attributable to any acts of commission or omission by Subcontractor, its subcontractors, employees and agents resulting from the failure to comply with Laws, including, but not limited to, any fines, penalties or corrective measures.
- 6.3** Royalties, license fees and costs arising from the use of patented or copyrighted material, equipment, devices or processes used on or incorporated in Subcontract Work are included in the Subcontract Price. Whenever Subcontractor is required by the Subcontract Documents or desires

to use any invention, design, device, material, or process covered by a patent or copyright, the right for such use shall be obtained from the appropriate copyright owner(s) or patentee(s) in writing and a copy of such agreement shall be filed with Brumbaugh. Regardless of whether such agreement is made or filed as provided above, however, Subcontractor shall indemnify and save harmless Brumbaugh, the Architect/Engineer and the Owner from any and all claims for infringement because of the use of any such patented or copyrighted invention, design, device, material or process, and from any costs, expenses and damages, including attorney fees, arising there from.

## **7. Taxes; Shipments.**

- 7.1** Subcontractor shall timely file all tax returns and reports with, and pay when due all taxes and contributions owing to each governmental entity or subdivision thereof applicable to the Subcontract Work and to the wages of its employees for services in connection with the Subcontract Work, including, but not limited to, all contributions, taxes or premiums (including interest and penalties thereon) which may be payable under the unemployment insurance law of any state, the federal Social Security Act, federal, state, county and/or municipal tax withholding laws, or any other law, measured upon the payroll of or required to be withheld from employees engaged in the Subcontract Work; all sales, use, personal property and other taxes (including interest and penalties thereon) required by any federal, state, county, municipal or other law to be paid or collected by Subcontractor or any other person or persons acting for, through or under Subcontractor by reason of the performance of the Subcontract Work; and all pension, welfare, vacation, annuity and other union benefit contributions payable under or in connection with labor agreements with respect to any persons engaged in the Subcontract Work. There shall be no increase in the Subcontract Price resulting from any new or additional taxes or contributions unless the Prime Contract specifically provides for an additional payment to Brumbaugh, which provides funds for an additional payment to Subcontractor with respect to any such increases.
- 7.2** Subcontractor shall advise Brumbaugh in writing in advance of major shipments of Subcontractor's materials and equipment and shall coordinate with Brumbaugh the arrival, unloading and release of each carrier. Subcontractor shall promptly unload its shipments and promptly release each carrier. In the event that Subcontractor does not promptly unload its shipment, Brumbaugh, at its option, may unload or make arrangements for others to unload such shipments for the account and risk of Subcontractor. Brumbaugh shall have no liability for any loss of or damage to such materials and equipment and Subcontractor shall be liable to Brumbaugh for all costs and expenses of unloading.
- 7.3** Subcontractor in making or ordering shipments shall not consign or have consigned materials, equipment or any other items in the name of Brumbaugh.

## **8. Workers' Compensation.**

- 8.1** Subcontractor, at its expense, shall fully comply with the workers' compensation laws for each state in which Subcontract Work is performed by its employees, and with the safety, health and other regulations of the governmental authorities that administer such laws. Before commencing the Subcontract Work on a Project, Subcontractor shall deliver to Brumbaugh certificates evidencing such compliance with respect to each applicable state. Renewal certificates shall be provided to Brumbaugh at least thirty (30) days prior to the expiration of any certificates.
- 8.2** Subcontractor, at its expense, shall procure and maintain in full force and effect for the duration of this Agreement, Employer's Liability Coverage of \$500,000 per occurrence including Stop Gap endorsement with intentional tort coverage. The policy shall contain "other states" coverage, be endorsed to provide a waiver of subrogation in favor of Brumbaugh, and be placed with an insurance company acceptable to Brumbaugh. Before starting the Subcontract Work on a Project, upon renewal of any policy, and upon a change of any insurance carrier, the Subcontractor must deliver to Brumbaugh certificates evidencing that the required insurance is in force.

- 8.3** Brumbaugh, without notice to Subcontractor, may pay any Workers' Compensation premiums, wage deficiencies or other payments charged against Brumbaugh based on Subcontractor's payrolls. Subcontractor shall repay any sums so advanced by Brumbaugh upon demand.

## **9. Insurance.**

- 9.1** General Requirements. Throughout the performance of the Subcontract Work on a Project or longer as may be described below, the Subcontractor must obtain, pay for, and keep in force, the minimum insurance coverage described in this Section 9. Before starting the Subcontract Work on a Project, upon renewal of any policy, and upon a change of any insurance carrier, the Subcontractor must deliver to Brumbaugh certificates evidencing that the required insurance is in force. This Section 9 shall not be construed to eliminate or any way reduce any other rights which Brumbaugh or the Owner have by law or through the Subcontract Documents. For all policies required under this Section 9:

- (A) Subcontractor must place the insurance with companies that (1) are satisfactory to Brumbaugh, (2) hold an A.M. Best Rating of A-, VII, or higher, and (3) are authorized to conduct business in the state where the Project is located.
- (B) All policies and the certificate(s) of insurance must provide that coverage will not be cancelled or not renewed until at least 30-days' prior written notice has been given to Brumbaugh.
- (C) Within 30 days of Brumbaugh's request, the Subcontractor must provide insurance-company certified copies of the policies and all policy endorsements.
- (D) If Subcontractor fails to obtain and keep in full force and effect any of the insurance required of it under the Subcontract, Brumbaugh may purchase the coverage and Subcontractor shall repay any sums so advanced by Brumbaugh upon demand.

- 9.2** Commercial General Liability. The Subcontractor shall maintain commercial general liability ("CGL") coverage with a limit of not less than \$2,000,000 General Aggregate that applies on a per project basis, and \$2,000,000 Products/Completed Operations Aggregate (Ongoing/Completed Ops), and \$1,000,000 Personal & Advertising Injury.

- (A) The CGL insurance shall be written on ISO occurrence form CG 00 01 10 01 or a substitute form providing at least equivalent coverage for liability arising from premises, operations, independent contractors, products/completed operations, personal and advertising injury, and liability assumed under an insured contract. The policy shall have no modifications limiting coverage for contractual liability, damage to work performed by subcontractors, residential construction, earth movement, explosion, collapse, or underground damage and may not include square footage (either project size or total building size) or height/story limitations or exclusion that invalidate or restrict coverage for the project performed under this subcontract agreement.
- (B) Subcontractor shall include Brumbaugh, the Owner, and their respective officers, employees, and agents as additional insureds under the CGL policy using ISO endorsement CG 20 10 04 13 and CG 20 37 04 13 or a substitute form providing equivalent coverage.
- (C) The CGL policy shall be endorsed using ISO endorsement CG 25 03 or a substitute form providing equivalent coverage to provide that the general aggregate limit applies separately to each Project.
- (D) The CGL insurance shall apply as primary insurance with respect to any other insurance or self-insurance programs which cover the additional insureds.

- (E) The CGL policy shall not be endorsed or modified to make it excess over other available insurance. If the policy states that it is excess or pro rata, the policy shall be endorsed to be primary with respect to the additional insureds.
  - (F) The CGL policy shall not exclude coverage to the additional insureds for bodily injury or property damage arising out of the products-completed operations hazard.
  - (G) The Subcontractor shall maintain the CGL insurance in effect for no less than the shorter of (A) the period of the applicable statute of repose (if any) or (B) ten years after final payment to the Subcontractor.
- 9.3 Business Auto.** The Subcontractor shall maintain business automobile coverage (“Auto”) with a limit of not less than \$1,000,000.00 each accident.
- (A) The Auto policy shall be written on ISO form CA 00 01 10 01 or a substitute form providing at least equivalent coverage.
  - (B) The Auto insurance shall extend to any auto (including owned and non-owned).
  - (C) Subcontractor shall include Brumbaugh, the Owner, and their respective officers, employees, and agents as additional insureds under the Auto policy using ISO endorsement CA 20 48 or a substitute form providing equivalent coverage.
  - (D) The Auto insurance shall apply as primary insurance with respect to any other insurance or self-insurance programs which cover the additional insureds.
  - (E) The Auto policy shall not be endorsed or modified to make it excess over other available insurance. If the policy states that it is excess or pro rata, the policy shall be endorsed to be primary with respect to the additional insureds.
- 9.4 Excess/Umbrella Liability.** The Subcontractor shall maintain excess/umbrella liability (“Excess”) coverage with a limit of not less than \$2,000,000 Combined Single Limit, except when the Subcontract Price exceeds \$1,000,000, in which event the policy(ies) shall be written with a limit of not less than \$5,000,000 Combined Single Limit. The policy(ies) shall be endorsed in the same form and manner as the CGL, Auto, and the Employer's Liability coverages.
- 9.5 Professional Liability Insurance.** If the Subcontract Documents (A) require Subcontractor to provide design services or (B) specify design and performance criteria relating to the Subcontract Work, Subcontractor shall maintain professional liability (“PL”) coverage with a limit of not less than \$1,000,000 per claim and in the aggregate. The Designer(s) procured by the Subcontractor (as defined in Section 2.4 and 2.5) shall require the Designer(s) to maintain the same coverage.
- (A) The PL policy shall be Project specific and include contractual liability coverage against the liability assumed in Sections 2.4 and 2.5, including coverage for any professional liability caused by any Delegated Designer(s) or its consultants.
  - (B) The PL insurance shall contain prior acts coverage sufficient to cover all the Subcontract Work on any Project.
  - (C) The deductible on the PL policy shall not exceed \$25,000 per occurrence. The Subcontractor or Designer(s) shall pay the deductible. Brumbaugh is not responsible for the deductible.
  - (D) Subcontractor and Designer(s) shall maintain the PL insurance in effect the shorter of (A) the period of the applicable statute of repose (if any) or (B) ten years after final payment to the Subcontractor.

- 9.6** Other Insurance. Subcontractor shall provide any other insurance Brumbaugh or the Subcontract Documents require to cover the Subcontract Work including, but not limited to, design and architectural professional services insurance.
- 9.7** Mutual Waiver of Subrogation. Brumbaugh and Subcontractor waive all rights against **(A)** each other and their officers, employees and agents, and **(B)** Owner, Architect/Engineer, Architect's/Engineer's consultants and their officers, employees and agents for damages caused by fire or other perils to the extent waived between Brumbaugh and the Owner and to the extent covered by property insurance provided under the Subcontract Documents or other property insurance applicable to the work, except such rights they may have to proceeds of insurance. Subcontractor shall require of its lower tier subcontractors, agents and employees, by appropriate agreements, written where legally required for validity, similar waivers in favor of the parties listed in this Section 9.7. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

## **10. Indemnity.**

- 10.1** Subcontractor is aware of the immunity afforded to it, protecting it from suits by its employees or third parties for damages relating to injuries suffered by its employees in the course of and arising out of their employment for the Subcontractor which may be brought outside of the workers' compensation system in the state in which it is performing its services for Brumbaugh. Subcontractor, for purposes of this Agreement, waives that immunity. To the fullest extent permitted by law, Subcontractor shall indemnify, defend, and hold harmless Brumbaugh (including its owners, affiliates and subsidiaries), its officers, directors, agents, shareholders, successors and employees (the "Indemnitees") from and against any and all claims, liability, actions, causes of actions, complaints, costs, expenses (including prejudgment interest), and demands whatsoever, in law or in equity, including without limitation those for bodily injury, personal injury, sickness, disease, death or property damage (including but not limited to the Subcontract Work itself), arising out of, or alleged to arise out of, or as a result of, or alleged to be the result of the performance of Subcontract Work under this Agreement. Subcontractor, at Subcontractor's sole expense, shall promptly dispose of all such claims, defend all lawsuits filed against Brumbaugh on the account thereof, pay all judgments rendered against Brumbaugh in such lawsuits (including any prejudgment interest assessed against any Indemnitee), and reimburse Brumbaugh in cash upon demand for all reasonable expenses incurred by Brumbaugh on the account thereof including, but not limited to, attorney fees, expert witness fees and court costs. Subcontractor shall indemnify Brumbaugh and hold Brumbaugh harmless from the above referenced claims regardless of whether such claim is caused or alleged to be caused in part by any joint or concurrent negligent act (either active or passive) or omission by an Indemnitee; provided however, that Subcontractor shall not be obligated to indemnify for those claims to the extent that the same is proximately caused by the sole negligence or willful misconduct of Brumbaugh or Brumbaugh's agents, servants or independent contractors who are directly responsible to Brumbaugh, excluding Subcontractor. Notwithstanding anything to the contrary contained herein, Brumbaugh at its option shall have the right to participate in the defense of any claims asserted against it, approve the selection of counsel and approve the terms of any settlements made in its name or on its behalf.
- 10.2** In any and all claims against the Indemnitees by any employee of Subcontractor, anyone directly or indirectly employed by Subcontractor or anyone for whose acts the Subcontractor may be liable, Subcontractor's indemnification obligation shall not be limited in anyway by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.



**10.3** If any part of the indemnity provisions set forth in this Agreement is adjudged to be contrary to law, the remaining parts of the provisions shall, in other respects, be and remain legally effective and binding. These indemnity provisions shall not be construed to eliminate or any way reduce any other indemnifications or rights which Brumbaugh or the Owner have by law or through this Agreement or the Subcontract Documents.

## **11. Performance and Payment Bonds.**

- 11.1** If required, Subcontractor, at its expense, shall keep in effect until final acceptance of the Subcontract Work and thereafter until the expiration of Subcontractor's warranties required under the Subcontract Documents, performance and labor and material payment bonds in the principal amount of the Subcontract Price or such greater amount as is required by the Subcontract Documents, with a corporate surety approved by Brumbaugh and with a Best rating of at least "A" and financial Size Category XI. The bonds shall be on forms furnished by Brumbaugh. Such bonds shall provide that the surety waives notice of any change, alteration or extension under the Subcontract Documents including but not limited to a change in the Subcontract Price, scope or time. Any increase in the Subcontract Price shall automatically result in a corresponding increase in the penal amount of the bonds; decreases in the Subcontract Price shall not however reduce the penal amount of the bonds unless specifically provided in a written change order. Subcontractor's performance bond shall be deemed to include within its scope design services to be provided pursuant to this Agreement.

## **12. Preceding Work; Shop Drawings; Dimensions.**

- 12.1** Subcontractor, before beginning any Subcontract Work on any Project, shall carefully examine the work of others which may affect the Subcontract Work, determine whether it is in a fit, ready and suitable condition for the proper and accurate performance of the Subcontract Work, use all means necessary to discover defects in such other work, and notify Brumbaugh in writing of any claimed deficiencies which may affect the Subcontract Work. If such notice is not so given, all such work shall be deemed acceptable to Subcontractor. In case of a dispute as to whether such other work is deficient, Subcontractor nevertheless shall proceed immediately with the Subcontract Work when notified by Brumbaugh to proceed.
- 12.2** Subcontractor shall prepare and submit to Brumbaugh in accordance with the Subcontract Documents such submittals as may be necessary to completely describe the details and construction of the Subcontract Work. Submittals shall be made within the time periods specified by the Subcontract Documents or, if not otherwise specified, within thirty (30) days after the date of the associated Work Order. Subcontractor shall be responsible to Brumbaugh for the accuracy and conformity of its submittals to the Subcontract Documents. Review and/or approval of such submittals by Brumbaugh and/or the Architect/ Engineer shall not relieve Subcontractor from its obligation to perform the Subcontract Work in strict accordance with the plans, specifications and other provisions of the Subcontract Documents, nor of its responsibility for the proper matching and fitting of the Subcontract Work with contiguous work and the coordination of Subcontract Work with other work being performed on the Construction Site, which obligation and responsibility shall continue until completion of Subcontract Work.
- 12.3** Notwithstanding the dimensions on the plans, specifications, approved submittals and other Subcontract Documents, it shall be the obligation and responsibility of Subcontractor to take such measurements as will ensure the proper matching and fitting of the Subcontract Work with contiguous work.

## **13. Claims for Damages; Extensions of Time.**

- 13.1** A Claim is a demand or assertion by Brumbaugh or Subcontractor seeking, as a matter of right, adjustment or interpretation of this Agreement or the Subcontract Documents, payment of money, extension of time or other relief with respect to the terms of this Agreement or the Subcontract Documents. The term Claim also includes other disputes and matters in question between Brumbaugh and Subcontractor.
- 13.2** Subcontractor shall give Brumbaugh written notice of all Claims affecting or relating to the Subcontract Price or time for which the Owner is or may be liable under the Subcontract Documents no later than forty-eight (48) hours after Subcontractor's first observance of the facts giving rise to the Claim, or, if sooner, within the time limits provided in the Subcontract

Documents for like claims by Brumbaugh upon the Owner and in sufficient time for Brumbaugh to initiate such claims against the Owner in accordance with the Prime Contract. At Brumbaugh's sole option and discretion, Brumbaugh may require Subcontractor to prosecute such a Claim in the name of Brumbaugh for the use and benefit of Subcontractor in the manner provided in the Prime Contract for like claims by Brumbaugh upon the Owner. Regardless of whether a Claim is prosecuted by Brumbaugh or through Brumbaugh by Subcontractor, the Claim shall proceed in the manner provided in the Prime Contract. Subcontractor shall be responsible for substantiating any Claim submitted to the Owner on Subcontractor's behalf. Subcontractor shall be responsible for all costs, expenses and attorney fees incurred itself and by Brumbaugh on account of or relating to such Claim.

- 13.3** Should Subcontractor be delayed, obstructed, hindered or interfered with in the commencement, prosecution or completion of a critical element of the Subcontract Work by any cause beyond Subcontractor's reasonable control, including but not limited to any act, omission, negligence or default of Brumbaugh or anyone employed by Brumbaugh, or by any other contractors or subcontractors on the Project, or by the Architect/Engineer, the Owner or their contractors, subcontractors, agents or consultants, or by damage caused by fire or other casualty or by labor dispute or by governmental directive or order, or by any extraordinary conditions arising out of war or governmental regulations, or by any other cause beyond the reasonable control of and not due to the fault, neglect, act or omission of Subcontractor, its officers, agents, employees, subcontractors or suppliers, then **(A)** Subcontractor shall be entitled to an extension of time for a period equivalent to the time lost by reason of any and all of such causes; provided, however, that Subcontractor shall not be entitled to any such extension of time unless **(1)** Subcontractor gives Brumbaugh notice in writing of such delay, obstruction, hindrance or interference within forty-eight (48) hours of Subcontractor's first observance of the facts giving rise thereto, **(2)** Subcontractor demonstrates that it could not have anticipated or avoided such delay, obstruction, hindrance or interference and has used all available means to minimize the consequences thereof, and **(3)** Owner grants such an extension of time for the performance of Subcontract Work to Brumbaugh pursuant to the provisions of the Prime Contract; and **(B)** Subcontractor shall be entitled to an adjustment in the Subcontract Price to the extent provided in Section 13.4.
- 13.4** Subcontractor shall not be entitled to nor claim any cost reimbursement, compensation or damages **(A)** attributable to delay, obstruction, hindrance or interference to the Subcontract Work as set forth in Section 13.3, or **(B)** on account of any Claim for which the Owner is or may be liable under the Prime Contract as set forth in Section 13.2, except to the extent that Brumbaugh is entitled to a corresponding cost reimbursement, compensation or damages from Owner under the Prime Contract on account thereof, and then only to the extent of the amount, if any, which Brumbaugh on behalf of Subcontractor actually receives from Owner on account thereof, less any costs, expenses and attorney fees incurred by Brumbaugh on account or relating thereto. Nothing herein shall be deemed to preclude Subcontractor's recovery of damages for delay or to constitute a waiver of Subcontractor's right to recover damages for delay, it being the intention of the Parties to entitle Subcontractor to recover delay damages, but only to the extent provided in this Section.
- 13.5** Subcontractor shall give Brumbaugh written notice of all Claims affecting or relating to the Subcontract Work not addressed in Section 13.2 or 13.3 within forty-eight (48) hours of Subcontractor's first observance of the facts giving rise to the Claim. All such Claims shall be resolved in the manner provided in Section 30.
- 13.6** Nothing said or written in the prosecution of any claim against the Owner shall: **(A)** constitute or be regarded as an admission or declaration against interest of either party; or **(B)** be admissible in evidence in any arbitration, litigation or other proceeding between Brumbaugh and Subcontractor.
- 13.7** Subcontractor's failure to assert a Claim in the manner and within the time provided in this Section 13 shall result in a complete and final waiver of such Claim.

## 14. Work Changes.

- 14.1** Within ten (10) days after a written request from Brumbaugh (or within such other time as is specified in such request), Subcontractor shall submit to Brumbaugh the Subcontractor's proposal (with computations and supporting data in such detail as may be requested by Brumbaugh or required by the Subcontract Documents) for eliminations of, changes in, and additions to Subcontract Work or for any deviations from the Subcontract Documents or substitution of materials (including "or equal" materials) thereby requested, stating, as directed by Brumbaugh:
- (A) a lump sum amount for such work;
  - (B) unit prices for such work, in addition to any unit prices applicable thereto specified in a Work Order, including estimated quantities and computations;
  - (C) the fixed fee proposed if Brumbaugh elects that the work is to be done on the basis of cost of direct labor and material plus a fixed fee;
  - (D) the percentage of cost proposed for overhead and profit if Brumbaugh elects that the work is to be done on the basis of cost of direct labor and material plus a percentage thereof for overhead and profit, which percentage shall not be in excess of any percentage specified by the Prime Contract;
  - (E) deductions to be allowed from the Subcontract Price for work, if any, eliminated or substitutions made; and
  - (F) additional time, if any, requested for the completion of such additional or changed work.
- 14.2** On receipt of such proposal, Brumbaugh may issue a written order directing Subcontractor to proceed with the work, and either (A) authorizing an adjustment in the Subcontract Price on any one of the bases set forth in clauses (A) to (D) of Section 14.1 (or partly on a unit price and partly on a fee basis), or (B) directing that the work be done at Subcontractor's cost of direct labor and of materials plus 10% thereof (or, if the authorized change is also part of a change order between Brumbaugh and the Owner, such other percentage as is specified in the Prime Contract) for overhead and profit combined. Such order shall also specify the deduction, if any, from the Subcontract Price for eliminations or substitutions and additional time, if any, allowed. All changes in the Subcontract Work ordered by Brumbaugh shall be deemed to be part of the Subcontract Work and shall be performed and furnished in accordance with all of the terms and conditions of the Subcontract Documents.
- 14.3** If Subcontractor notifies Brumbaugh in writing within forty-eight (48) hours after such order is issued objecting to any determinations of price adjustment or time adjustment which is not in accordance with its proposal (or any revised proposal submitted at Brumbaugh's request) and the Parties do not agree upon the order within thirty (30) days thereafter, such objection shall be resolved pursuant to the provisions of Section 30. If no written objection is made within forty-eight (48) hours after the order is issued, the order shall be final and binding upon Subcontractor.
- 14.4** If Subcontractor does not submit its proposal within the time specified in Section 14.1, Brumbaugh may issue an order directing the work to be done on the cost plus percentage basis specified in clause (B) of Section 14.2, and specifying the amount of any deduction from the Subcontract Price for eliminations or substitutions and any additional time allowed for the work. Such order shall be final and binding upon Subcontractor.
- 14.5** Subcontractor shall proceed immediately with the work in accordance with each such order, regardless of whether Subcontractor objects to the Subcontract Price adjustments or time allowance, if any, specified therein.

- 14.6** If the order requires the work to be done on a cost plus either percentage or fixed fee basis, cost shall include only the net cost of material and equipment and the net cost of direct labor physically performing the Subcontract Work at the Construction Site at the lowest applicable hourly rate, including taxes and workers' compensation and liability insurance premiums thereon, and Subcontractor shall deliver daily a statement of such net costs charged to the work performed during the preceding day, to Brumbaugh's Project Manager or his designee, for his approval or correction. Such statement as approved or corrected shall be used as the basis for progress payments to Subcontractor for such work. If Subcontractor notifies Brumbaugh in writing within five (5) days after such statement is returned to Subcontractor by Brumbaugh objecting to the Project Manager's correction thereof and the Parties do not agree upon an adjustment within thirty (30) days thereafter, the matter shall be resolved pursuant to the provisions of Section 30. If no written objection is made within five (5) days after return of the statement to Subcontractor, the Project Manager's determination shall be final and binding upon the Subcontractor.
- 14.7** Subcontractor shall not proceed with a change in the Subcontract Work unless and until **(A)** a change order has been executed by Brumbaugh and Subcontractor or **(B)** Brumbaugh has directed the Subcontractor to proceed with the change in accordance with this Section 14.
- 14.8** After a change order has been executed by Brumbaugh and Subcontractor, there shall be no subsequent adjustment based upon the effect or impact of the change contemplated thereby, nor shall Subcontractor be entitled to any further time or compensation based upon the cumulative effect of multiple change orders.

#### **15. Charge-backs by Brumbaugh.**

- 15.1** Brumbaugh, from time to time, may deliver to Subcontractor invoices for amounts owed (herein called chargebacks) to Brumbaugh by Subcontractor pursuant to any provision of the Subcontract Documents, and Subcontractor shall pay that amount not later than ten (10) days after delivery. Without limiting Subcontractor's obligation to make payment, Brumbaugh may require the amount of any charge-back to be deducted from the amount shown due to Subcontractor on its next payment application (progress or final), until paid in full. Any charge-back remaining unpaid at the time of Subcontractor's final payment application on a Project shall be included as a deduction in such application. The amount of each chargeback shall bear interest at the rate of twelve percent (12%) per annum.

#### **16. Subcontractor's Schedule of Values.**

- 16.1** Subcontractor, prior to delivering its first progress payment application or within such shorter time as is required by the Subcontract Documents, shall deliver to Brumbaugh a Schedule of Values, allocating the total Subcontract Price to the separate phases of Subcontract Work, stating separately amounts for labor and materials and prorating overhead and profit among such separate phases. The Schedule of Values shall be subject to such adjustments as Brumbaugh or the Owner may require. Subcontractor from time to time shall deliver to Brumbaugh for similar approval such supplements thereto as Brumbaugh requires in order to reflect approved changes in the Subcontract Price.

#### **17. Progress Payments.**

- 17.1** Subcontractor, on or before five (5) days prior to the end of each calendar month, or on such other billing date as may be required by the Subcontract Documents, shall deliver to Brumbaugh a progress payment application, together with an accurate estimate (based upon, and not in excess of, the amounts shown on the approved Schedule of Values) of the value of the material furnished and work done during the preceding 30-day period. Such application shall include charge-backs then due Brumbaugh and such detailed statements of payments made by Subcontractor as Brumbaugh or the Owner may require, together with sworn statements of Subcontractor's subcontractors who have performed any part of the Subcontract Work and appropriate mechanics' lien waivers of Subcontractor and its subcontractors and materialmen for work and materials paid

for by Subcontractor, all in form acceptable to Brumbaugh. Brumbaugh reserves the right to require full waivers of lien for the amounts included in the current month's application for payment. Such documentation shall evidence that all subcontractors and materialmen of Subcontractor have been paid in full for the current month or (if approved by Brumbaugh) that they have waived their lien rights with respect to the work performed or materials furnished to the date of the application for payment, contingent only upon receipt of payment of the amounts indicated thereon. No amount shall be included in Subcontractor's application for payment (A) for additional or changed work unless authorized by a written change order issued by Brumbaugh; or (B) for materials stored off-site, unless (1) Brumbaugh in its discretion approves the payment for off-site materials, and (2) Subcontractor has complied with all conditions of the Subcontract Documents so that Brumbaugh will be entitled to receive payment from the Owner for such off-site materials.

- 17.2** Brumbaugh shall include in its next progress payment application to Owner the amount claimed due by Subcontractor in Subcontractor's last progress payment application which has been approved by Brumbaugh, before deduction of any amount of charge-backs owed Brumbaugh as included therein. On or before twenty (20) days (or such other time as is required by the Prime Contract) after and subject to receipt of payment by Owner, Brumbaugh shall pay to Subcontractor the amount owed to Subcontractor, less the retained percentage thereof, if any, provided for in Section 17.3 and less charge-backs owed to Brumbaugh included in Subcontractor's application. All payments to Subcontractor, whether progress payments or the final payment, are subject to the condition precedent that Brumbaugh be in receipt of payment from the Owner for the Subcontract Work. If the Owner does not pay Brumbaugh for any reason whatsoever, including the Owner's financial inability to pay, Subcontractor agrees that Brumbaugh shall not be liable for the payment, nor be indebted to Subcontractor. Subcontractor assumes the credit risk of the Owner.
- 17.3** If the Prime Contract provides that Brumbaugh is required to provide a bond, the retained percentage to be deducted by Brumbaugh from each progress payment application submitted by the Subcontractor shall be 10% until the completion of the project. If the subcontractor provides a bond to Brumbaugh with the same coverage and protection as the bond specified in the Prime Contract, the retained percentage to be deducted by Brumbaugh from each progress payment application submitted by the Subcontractor will be the same percentage of retainage as the Owner has deducted from its progress payment to Brumbaugh, without reduction, until the completion of the project. If the Prime Contract provides that the percentage retained by Owner shall be reduced or eliminated after Brumbaugh has completed a specified proportion of the Project, then at Brumbaugh's sole discretion, for so long as Brumbaugh deems appropriate, Brumbaugh may reduce or eliminate accordingly any retained percentage from Subcontractor after Brumbaugh has completed such percentage of the Project and Subcontractor has completed a similar percentage of the Subcontract Work.
- 17.4** Brumbaugh shall have the right to withhold all or any portion of each progress payment to Subcontractor until (A) payment for it has been received by Brumbaugh from Owner, (B) Subcontractor has corrected improper and rejected work, (C) any mechanics' liens filed or claims made by any employee, subcontractor of any tier or materialmen of any tier of Subcontractor have been released, and (D) Subcontractor has delivered to Brumbaugh a receipt on Brumbaugh's standard form acknowledging such payment to be in full (except for retained percentage, if any) for all amounts owed or claimed to be owed as a part of the Subcontract Price and under any change order included in such application and Subcontractor's lien waivers, certificates and releases with respect thereto. Without limiting the foregoing, Brumbaugh shall have the right to withhold twice the amount necessary to complete any portion of the Subcontract Work included on a punch list supplied by Brumbaugh, the Owner or the Architect/Engineer.
- 17.5** No payment of the Subcontract Price, whether a partial payment or the final payment, shall be deemed an acceptance of the Subcontract Work covered thereby.
- 17.6** Brumbaugh shall be entitled to deduct as a set-off to any money due Subcontractor any amount which Subcontractor or any of its affiliates owes Brumbaugh or any of its affiliates arising out of

this Agreement or otherwise. Brumbaugh shall also have the right to advance the payments (including the final payment) due to Subcontractor on any Project if Brumbaugh in its judgment deems it desirable to do so. For the purposes hereof, the term "affiliates" includes any individual, corporation, limited liability company, partnership, joint venture, or other entity controlled by, controlling or under common control with Subcontractor or Brumbaugh, as the case may be.

## **18. Final Payment.**

- 18.1** Subcontractor promptly upon completion of the Subcontract Work on a Project shall deliver to Brumbaugh its final payment application, which shall include a schedule of materials furnished and work done but not paid for (including amounts claimed due for additional and changed work) in prior progress payments and of all charge-backs owed to Brumbaugh not previously paid or deducted from prior progress payments, and such detailed statements of payments by Subcontractor as Brumbaugh may require. In addition, and as conditions precedent to final payment, Subcontractor shall furnish to Brumbaugh **(A)** such sworn statements, and mechanics' lien waivers as Brumbaugh deems necessary to protect Owner and Brumbaugh against liens by Subcontractor's laborers, materialmen and subcontractors of Subcontractor; **(B)** copies of all manuals, "as-built" drawings, warranties and guarantees required by the Subcontract Documents; **(C)** the written consent of Subcontractor's sureties to final payment, in form acceptable to Brumbaugh; **(D)** certificates of such insurance as may be required hereunder; and **(E)** all other documents required by this Agreement or the Subcontract Documents.
- 18.2** Upon approval of such final application with such corrections therein as Brumbaugh may require in order to reflect settlement of **(A)** all Subcontractor's Claims for additional and changed work and for delays and damages, if any, with respect to which Subcontractor has complied with the requirements hereof, **(B)** deductions from the Subcontract Price for eliminations from the Subcontract Work and **(C)** deductions for Claims against Subcontractor by Brumbaugh, Owner, the Architect/Engineer and other contractors, subcontractors and materialmen, and upon approval of the other documents required under Section 18.1, Brumbaugh shall make application to Owner for payment thereof as a part of the amount then owed to Brumbaugh. Upon acceptance of the Subcontract Work by Owner and after and subject to receipt of payment by Brumbaugh from Owner of the balance so owed to Subcontractor (including any retained percentage theretofore withheld by Owner and paid to Brumbaugh), Brumbaugh shall pay to Subcontractor the remaining net balance owed to it (including any retained percentage withheld by Brumbaugh from progress payments) against receipt of Subcontractor's acknowledgement that said payment is in full for all sums owed to it under this Subcontract, together with all other documents required hereby. The final payment shall be due within thirty (30) days, or within such shorter time as is required by the Prime Contract, after all of these express conditions have been met.
- 18.3** Application for final payment by Subcontractor shall constitute a waiver of Claims by Subcontractor except those previously made in writing and identified by Subcontractor as unsettled at the time.

## **19. Payments by Subcontractor; Mechanics' Liens.**

- 19.1** Subcontractor shall pay promptly when due its labor payrolls and sums from time to time owed by it to its subcontractors, equipment suppliers and materialmen. If Subcontractor does not pay the same as hereby required, Brumbaugh with or without notice to Subcontractor may pay the same and charge the same together with expenses incurred by Brumbaugh to Subcontractor.
- 19.2** If any liens are filed with respect to a Project arising out of the Subcontract Work, Subcontractor promptly shall cause the same to be removed, and if it does not do so within thirty (30) days, or such shorter time as is required by the Prime Contract, after filing, Brumbaugh may **(A)** take such action and make such payments as may be necessary or appropriate in Brumbaugh's sole and absolute discretion in order to remove such lien and charge the cost thereof together with all expenses incurred by Brumbaugh to Subcontractor or **(B)** withhold from any amounts then or

thereafter becoming due to Subcontractor an amount equal to twice the amount of the liens until such liens are fully satisfied or discharged.

- 19.3** Subcontractor, upon Brumbaugh's request, promptly shall furnish to Brumbaugh satisfactory evidence as to the status of its accounts, including sworn affidavits setting forth the names of all its subcontractors, equipment suppliers and materialmen, the original amounts of its subcontracts and purchase orders and the amounts paid and due thereon.
- 19.4** Brumbaugh shall have the right at its discretion following five (5) day written notice to Subcontractor to issue checks directly to any unpaid subcontractors of Subcontractor, equipment suppliers, materialmen or laborers for amounts owed to them by Subcontractor relating to any application for payment from Subcontractor, or to issue joint checks to Subcontractor and such unpaid persons or entities for such amounts. The amount of such payments shall then be deducted from Subcontractor's application for payment. No such payment by Brumbaugh, or the right to make payment, shall be deemed to create a contractual or other relationship between Brumbaugh and any subcontractor, supplier, materialmen, or laborer claiming under Subcontractor.
- 19.5** If Brumbaugh receives a Notice of Furnishing from any supplier, sub-subcontractor, equipment supply/rent/lease company, or any other affiliate on the Subcontractor's behalf, the Subcontractor shall provide Brumbaugh a completed and certified affidavit titled "Statement of Subcontractor's Account", with every progress payment application. A copy of the affidavit is available on request.

**20. Use of Brumbaugh's Equipment and Services.**

- 20.1** Subcontractor shall promptly pay, upon receipt of invoices therefor, for the use of Brumbaugh's equipment (whether operated by Brumbaugh or not, and including scaffolding), public utility facilities, facilities for employees and supplies (collectively, "Equipment") on the basis charged by Brumbaugh in accordance with its standard practices, unless the amount to be charged is otherwise agreed upon prior to such use. The Subcontractor (at its expense) shall provide all protection, heating, hoisting, power, and water the Subcontractor needs for the execution of the Subcontract Work and the Subcontractor's use of Equipment regardless of whether the Equipment is the subject of an invoice.
- 20.2** Subcontractor hereby represents and warrants that any use of Brumbaugh's Equipment, regardless of whether the Equipment is the subject of an invoice, shall be in compliance with all federal, state and local laws, rules, regulations and ordinances relating to the health and safety of workers. In addition Subcontractor represents and warrants that it shall have the sole responsibility for becoming aware of and communicating to its employees all relevant rules, laws and regulations relating to the usage of the Equipment, including but not limited to all state and federal OSHA regulations. Subcontractor hereby releases Brumbaugh from any obligation to advise Subcontractor as to the condition of the Equipment or any operating policies and procedures. Subcontractor shall use the Equipment at its sole risk and shall have full responsibility for inspecting the Equipment.
- 20.3** Brumbaugh does not make any representations or warranties nor does it guarantee the safety or suitability of any Equipment for the purposes of the Subcontractor, nor does it agree to leave in place or to put in place any particular Equipment at any particular time for Subcontractor's use.
- 20.4** Subcontractor shall be responsible for and shall reimburse Brumbaugh for any loss in value or damage to the Equipment during the period when the Equipment is being used by Subcontractor. In accordance with Section 10 and to the fullest extent permitted by law, Subcontractor shall indemnify, defend, and hold harmless the Indemnitees from and against any and all claims, liability, actions, causes of actions, complaints, costs, expenses (including prejudgment interest), and demands whatsoever, in law or in equity, including without limitation those for bodily injury, personal injury, sickness, disease, death or property damage (including but not limited to the



Subcontract Work itself), arising out of, or alleged to arise out of, or as a result of, or alleged to be the result of the existence, maintenance or use of the Equipment by Subcontractor.

## **21. Clean-up and Protection of Work of Others.**

- 21.1** Subcontractor at all times shall keep the Construction Site free from rubbish, debris and obstructions caused by its operations (including surplus materials, crates and packing, etc. brought to the Construction Site by Subcontractor or by others for the benefit of Subcontractor), and shall complete the Subcontract Work in such manner as to permit the next succeeding work to start without further cleaning. At the time of completion of the Subcontract Work in each area, Subcontractor shall leave the area "broom clean" and shall remove all of its tools, equipment, scaffolding and surplus materials.
- 21.2** Subcontractor shall not damage the work of others by its operations, and shall repair or pay the cost of repairing any such damage done by it.
- 21.3** Brumbaugh shall have the right to cause to be done any such clean-up or repair work which Subcontractor fails to do promptly. Subcontractor shall immediately upon demand, reimburse Brumbaugh all of the resulting costs Brumbaugh incurs plus 10% for Brumbaugh's overhead. Those costs may include, but shall not be limited to, the services of Brumbaugh's employees and the use of its Equipment, both at the rates Brumbaugh customarily charges its customers, plus any other related expenses Brumbaugh incurs.

## **22. Subcontractor's Responsibility for its Work and Materials; Damage or Destruction.**

- 22.1** Subcontractor promptly shall check all quantities of materials delivered at the Construction Site for its use, and shall immediately report all damages and shortages to Brumbaugh.
- 22.2** Subcontractor shall cover and at all times adequately protect the Subcontract Work and materials from damage until final acceptance by Owner, and shall properly store and protect all materials furnished to it by others.
- 22.3** Except to the extent provided in the Subcontract Documents, Subcontractor shall be responsible for any damage to or destruction of the Subcontract Work and the Subcontractor's equipment, tools, materials and personal property at the Construction Site, whether owned, rented or used by Subcontractor or anyone performing any of the Subcontract Work, including the Subcontract Work incorporated in the structure. Subcontractor at its expense shall, as directed by Brumbaugh, replace, repair or restore any such items which are destroyed or damaged, whether such destruction or damage results from acts of God, fire, public enemy, civil commotion, vandalism, acts of omission or commission by any person, firm or corporation. Except to the extent provided in the Subcontract Documents, damage or destruction of the Subcontract Work, however caused, shall be made good by Subcontractor at no extra charge or cost to Brumbaugh. Such rework at Subcontractor's expense shall not preclude Subcontractor from sharing in the proceeds of an insurance claim or making a Claim as provided in Section 13, but the right to make or the pendency of such claims shall not give cause to Subcontractor to delay the commencement or completion of such rework, nor shall Subcontractor make any claim for recovery of any insurance deductible. In the event of an insured loss, Subcontractor shall be bound by any adjustment between or among Brumbaugh, the Owner and the insurance company or companies. Loss, if any, shall be payable to Brumbaugh and/or the Owner, as their interests may appear, for the account of whom it may concern. Brumbaugh shall have no obligation to protect or defend the Subcontract Work.

## **23. Rejected Work.**

- 23.1** If Owner or Brumbaugh rejects or orders to be removed and replaced any of the Subcontract Work which Owner or Brumbaugh determines does not comply with the requirements of the Subcontract Documents, Subcontractor, within forty-eight (48) hours after receipt of such notice, shall proceed

to take down the rejected work, remove the rejected materials from the Construction Site, repair (or pay the cost of repairing) damage to the work of others caused thereby, and replace the same with work and materials complying with the requirements of the Subcontract Documents. If Subcontractor does not commence such replacement work promptly or does not diligently complete such removal and replacement, Brumbaugh by written notice may take over the completion of such removal and replacement. Subcontractor shall immediately upon demand, reimburse Brumbaugh all of the resulting costs Brumbaugh incurs plus 10% for Brumbaugh's overhead. Those costs may include, but shall not be limited to, the services of Brumbaugh's employees and the use of its Equipment, both at the rates Brumbaugh customarily charges its customers, plus any other related expenses Brumbaugh incurs.

## **24. Safety; Accident Reports**

- 24.1** Subcontractor is required to perform the Subcontract Work in a safe and reasonable manner. Subcontractor shall seek to avoid injury, loss or damage to persons or property by taking reasonable steps to protect:
- (A) employees and other persons at the Construction Site;
  - (B) materials and equipment stored at the Construction Site or at off-site locations for use in performance of the Subcontract Work; and
  - (C) all property and structures located at the Construction Site and adjacent to work areas, whether or not said property or structures are part of the Project or involved in the Subcontract Work.
- 24.2** Subcontractor shall give all required notices and comply with all applicable rules, regulations, orders and other lawful requirements established to prevent injury, loss or damage to persons or property.
- 24.3** Subcontractor shall implement appropriate safety measures pertaining to the Subcontract Work and the Project, including establishing safety rules, posting appropriate warnings and notices, erecting safety barriers, addressing fall protection and establishing proper notice procedures to protect persons and property at the Project Site and adjacent to the Construction Site from injury, loss or damage.
- 24.4** Subcontractor shall exercise extreme care in carrying out any of the Subcontract Work which involves explosive or other dangerous methods of construction or hazardous procedures, materials or equipment. Subcontractor shall use properly qualified individuals or entities to carry out the Subcontract Work in a safe and reasonable manner so as to reduce the risk of bodily injury or property damage.
- 24.5** Subcontractor is required to designate an individual at the Construction Site in the employ of Subcontractor who shall act as Subcontractor's designated safety representative with a duty to prevent accidents. Unless otherwise identified by Subcontractor in writing to Brumbaugh, the designated safety representative shall be Subcontractor's project superintendent or lead field representative.
- 24.6** Subcontractor shall not overload the structures or conditions at the Construction Site and shall take reasonable steps not to load any part of the structures or Construction Site so as to give rise to an unsafe condition or create an unreasonable risk of bodily injury or property damage.
- 24.7** Subcontractor shall give prompt written notice to Brumbaugh of any accident involving bodily injury requiring a physician's care, any property damage exceeding Five Hundred Dollars (\$500.00) in value, or any incident that could have resulted in serious bodily injury, whether or not such an injury was sustained. A detailed written report shall be furnished to Brumbaugh within twenty-four (24) hours of the accident.

**24.8** Neither the provisions nor existence of Brumbaugh's safety program shall relieve Subcontractor or other parties of their safety responsibilities. Subcontractor shall establish its own safety program implementing safety measures, policies and standards conforming to those required or recommended by governmental and quasi-governmental authorities having jurisdiction and by Brumbaugh and the Owner, including, but not limited to, requirements imposed by the Subcontract Documents. Subcontractor shall comply with the reasonable recommendations of insurance companies having an interest in the Project, and shall stop any part of the Subcontract Work, including any practice by employees or subcontractors of Subcontractor, which Brumbaugh deems unsafe until corrective measures satisfactory to Brumbaugh shall have been taken. Brumbaugh's failure/inability to stop Subcontractor's unsafe practices shall not relieve Subcontractor of the responsibility for those unsafe practices. If Brumbaugh observes an unsafe condition during an inspection, the violation will be brought to the attention of the Subcontractor and the Subcontractor shall take immediate corrective action to prevent injury, loss, or damage to persons or property. Subcontractor shall indemnify Brumbaugh and the Owner from and against fines or penalties imposed as a result of safety violations arising out of or relating to the operations of Subcontractor or its employees, agents or subcontractors.

**24.9** Firearms and Weapons Prohibited. No person, including any person licensed to carry a concealed weapon, shall bring or possess a firearm or any other weapon on the Construction Site or at any Brumbaugh work place or Project-related function or activity.

- (A) The foregoing prohibition does not apply to firearms or weapons while a hunting season is in, only if (1) the firearm or weapon may legally be used for hunting during a then-current hunting season in the state in which the Project is located; (2) the firearm or weapon remains locked in a vehicle at all times, (3) the ammunition or projectile (e.g., bolt or arrow), if any, for the firearm or weapon remains locked in a separate compartment of the vehicle at all times, (4) the vehicle is not used in the performance of the Subcontractor's Work; and (5) the person responsible for the firearm or weapon gives Brumbaugh advance notice of the presence of the firearm or weapon.
- (B) To monitor compliance with this Section 24.9, Brumbaugh may conduct reasonable, unannounced searches of the Construction Site, Brumbaugh work places, and all people and personal property entering, on, or leaving those locations or a Project-related Brumbaugh function or activity. Refusal to allow an inspection is a violation of this Section 24.9. A person who refuses to allow an inspection will not be detained or forced to submit to an inspection.
- (C) Any employee of Subcontractor or any of its subcontractors or materialmen, regardless of tier, who violates this Section 24.9, shall be subject to immediate and permanent removal from the premises and may be subject to prosecution for criminal trespass.
- (D) Subcontractor is primarily responsible for the enforcement of this Section 24.9 to the extent of Subcontractor's Work. Brumbaugh may terminate this Agreement for cause if Subcontractor or any of its subcontractors or materialmen, regardless of tier, or any of their respective employees, (1) repeatedly violates this Section 24.9, or (2) fails to cure any violation of this Section 24.9 within three hours after being notified of the violation.
- (E) The term "firearm" means a weapon, a pistol or rifle, whether loaded or unloaded, capable of firing a projectile and using an explosive as a propellant; but does not include powder-actuated tools manufactured to fasten building materials. The term "weapon" means an instrument of attack or defense.
- (F) Subcontractor and its subcontractors or materialmen, regardless of tier, shall include all of this Section 24.9 in every contract they enter into in furtherance of Subcontractor's Work. Subcontractor shall communicate the provisions of this Section 24.9 to every person employed in furtherance of Subcontractor's Work.

- 24.10** Prescription Drugs. No one shall enter the site if they are under the influence of prescription drugs that hinder their ability to safely perform their assigned tasks, operate equipment, etc. No one entering the project site shall possess or be under the influence of medical marijuana, regardless of prescription.

## **25. Labor and Material Supply.**

- 25.1** Brumbaugh may give written notice to Subcontractor if Subcontractor is not **(A)** employing an adequate number of properly skilled workers and supervisors, **(B)** using an adequate amount of equipment, or **(C)** delivering to the Construction Site adequate amounts of material of the required quality as are necessary to enable Subcontractor to meet the applicable time schedule. If Subcontractor fails to provide additional workers, supervisors, equipment, and materials of the required quality or does not otherwise comply with Brumbaugh's directions in such notice, Brumbaugh may supplement Subcontractor's performance of the Subcontract Work. Subcontractor shall immediately upon demand, reimburse Brumbaugh all of the resulting costs Brumbaugh incurs plus 10% for Brumbaugh's overhead. Those costs may include, but shall not be limited to, the services of Brumbaugh's employees and the use of its Equipment, both at the rates Brumbaugh customarily charges its customers, plus any other related expenses Brumbaugh incurs.
- 25.2** Subcontractor's employees shall be skilled in their trades. Any employee of Subcontractor may be refused admittance to the Construction Site or may be requested to leave the Construction Site at any time by Brumbaugh and Brumbaugh shall not be required to have or to state any reason for such action. In the event that any employee or employees of the Subcontractor are so barred from the job, Subcontractor shall immediately replace such employee or employees with employees satisfactory to Brumbaugh.

## **26. Termination Without Fault of Subcontractor.**

- 26.1** If Brumbaugh or the Owner terminates the Contract between them for any cause permitted thereby (except a default by Brumbaugh), Brumbaugh by notice to Subcontractor may terminate the related Subcontract. In addition, Brumbaugh shall have the right at any time and without cause by written notice to Subcontractor to terminate any Subcontract and require Subcontractor to cease related Subcontract Work. In either such event, Subcontractor, as directed by Brumbaugh, shall discontinue the Subcontract Work, remove its equipment, materials and employees from the Construction Site and take such action as may be necessary to terminate its agreements with its subcontractors, and to minimize its losses resulting from such termination.
- 26.2** If a Subcontract is terminated pursuant to Section 26.1, Subcontractor, promptly upon Brumbaugh's written request, shall deliver to Brumbaugh a statement covering the balance owed under the Subcontract for Subcontract Work completed prior to the termination and additional costs for which it is liable by reason of such termination.
- 26.3** If Brumbaugh terminates a Subcontract without cause as described in Section 26.1 and the Owner is not liable with respect to the same, the statement provided by Subcontractor pursuant to Section 26.2 shall be the maximum amount for which Brumbaugh may be liable by virtue of such termination.
- 26.4** If the Owner has terminated the Prime Contract as described in Section 26.1, Brumbaugh, subject to its approval of Subcontractor's statement, shall include the statement provided by Subcontractor pursuant to Section 26.2 in its claim against the Owner by reason of such termination. Subcontractor shall be responsible for proving the losses suffered by it and shall indemnify or repay Brumbaugh for any costs incurred by Brumbaugh in presenting such claim to the Owner. Upon resolution with the Owner as to the amount to which Subcontractor is entitled by reason of the termination of the Prime Contract and after and subject to receipt of payment by Brumbaugh of such amount, Brumbaugh shall pay to Subcontractor the balance, if any, to which it is entitled, less

any charge-backs or other sums owed by Subcontractor to Brumbaugh, against the delivery by Subcontractor to Brumbaugh of the documents required by Section 18 to be delivered or filed before final payment, or Subcontractor shall pay to Brumbaugh any net balance owed Brumbaugh. Brumbaugh shall not be liable to Subcontractor for termination based on the Owner's termination of the Contract for any amount in excess of that provided in this Section 26.4.

- 26.5** Subcontractor shall include a similar right of termination in its agreements with its own subcontractors and require subcontractors and materialmen of every tier to include similar provisions in their agreements with others.

## **27. Subcontractor's Records; Confidentiality**

- 27.1** Subcontractor shall maintain for a period of two years after final payment under a Subcontract, or such longer period as is required by the Subcontract Documents, all records and accounts pertaining to the Subcontract Work performed for a unit price, cost of work basis, a reimbursable price or otherwise authorized in writing by Brumbaugh for performance on a reimbursable basis. Brumbaugh and the Owner shall have the right to audit, copy and inspect such records and accounts at all reasonable times during the course of the Subcontract Work and for the two year period for the purpose of verifying units furnished or costs incurred. Subcontractor shall also make such additional records available to Brumbaugh and the Owner as is required by the Subcontract Documents.
- 27.2** To the extent that the Prime Contract provides for the confidentiality of any of the Owner's proprietary or otherwise confidential information disclosed in connection with the performance of the Subcontract Work, Subcontractor shall be equally bound by the Owner's confidentiality requirements.

## **28. Warranties; Correction of Work.**

- 28.1** Subcontractor warrants and guarantees that all materials and equipment furnished under this Agreement shall be new unless otherwise specified, and that all of the Subcontract Work will be of first quality, free from faults or defects in materials or workmanship, and in strict accordance with requirements of the Subcontract Documents. All work not conforming to these requirements, including substitutions not properly approved and authorized, shall be considered defective. If required by Brumbaugh or the Owner, Subcontractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty and guaranty is not limited by the provisions of Section 28.2
- 28.2** Subcontractor shall promptly correct all of the Subcontract Work rejected as defective or as failing to conform to the requirements of the Subcontract Documents whether observed before or after substantial completion of the Project and whether or not fabricated, installed or completed. Subcontractor shall bear all costs of correcting such rejected work, including compensation for Brumbaugh's additional services made necessary thereby. Work rejected before final completion shall be corrected prior to final completion. If, within the later of: one year of the date of final payment by Owner to Brumbaugh, or such other period as is required by the Subcontract Documents, or such period of time as may be prescribed by law or by the terms of any applicable special warranty or guaranty required by the Subcontract Documents, any of the Subcontract Work is found to be defective or not in accordance with the requirements of the Subcontract Documents, Subcontractor shall correct it promptly after receipt of notice from Brumbaugh or the Owner. If the defective or non-conforming work or Subcontractor's correction of such work destroys or damages completed or partially completed work of the Owner, Brumbaugh or any other contractors or subcontractors, Subcontractor shall be responsible for the cost of correcting such destroyed or damaged work. The expiration of any guaranty or any obligation of Subcontractor to correct the Subcontract Work shall not relieve Subcontractor of the obligation to correct, at its own expense, any latent defect in the Subcontract Work or deficiencies which are not readily ascertained, including, but not limited to, defective materials and workmanship, defects attributable to the substitutions for specified materials, and substandard performance of any of the

Subcontract Work otherwise not in compliance with the Subcontract Documents. Following the correction or replacement of any of the Subcontract Work as specified in this Section 28.2, the warranties provided herein shall be fully reinstated with respect to such corrected or replaced Subcontract Work, and Subcontractor shall correct any defects or deficiencies in the corrected or replaced materials and workmanship which are found within one (1) year after the date of correction or replacement or such longer period as set forth in the Subcontract Documents or in any special warranty or guaranty.

## **29. Liquidated and Consequential Damages.**

- 29.1** If the Prime Contract allows for liquidated or other damages for delay beyond one or more milestone dates set forth in the Prime Contract, and such damages are assessed, Brumbaugh may assess a share of the damages against Subcontractor in proportion to the Subcontractor's share of the responsibility for the delay. This Section 29.1 shall not limit Subcontractor's liability to Brumbaugh for Brumbaugh's actual delay damages caused by Subcontractor's delay.
- 29.2** Subcontractor waives any and all Claims against Brumbaugh for consequential damages arising out of or relating to this Agreement, including damages for principal office expenses (which include unabsorbed principal office expenses) and the compensation of personnel stationed there; for loss of financing, business and reputation; and for loss of profit. Similarly, Subcontractor shall obtain from Subcontractor's subcontractors waivers of consequential damages that correspond to Subcontractor's waiver of consequential damages herein. To the extent applicable, this waiver applies to consequential damages due to termination by Owner or Brumbaugh in accordance with the Prime Contract or the Subcontract Documents.

## **30. Disputes and Settlement.**

- 30.1** At Brumbaugh's option and in Brumbaugh's sole and absolute discretion, all Claims, except for any that are governed by Section 13.2 and any that have been waived pursuant to other terms of the Subcontract Documents, shall be decided by arbitration in Dayton, Ohio, in accordance with the Construction Industry Rules of the American Arbitration Association then obtaining. Brumbaugh and Subcontractor agree that all decision(s) of the arbitrator(s) shall be based upon the Subcontract Documents, applicable law and judicial precedent as applied to the facts presented by the Parties.
- 30.2** In the event that Brumbaugh elects not to submit to arbitration as permitted in Section 30.1, all Claims, except for any governed by Sections 13.2 and any that have been waived or otherwise barred pursuant to the Subcontract Documents, shall be brought only in a court of the jurisdiction in which the Brumbaugh office shown on page one of this Agreement is located or in a court in Darke County, Ohio. Brumbaugh and the Subcontractor consent to the exclusive jurisdiction and venue of those courts. Subcontractor shall include a similar jurisdiction and forum provision in each of its agreements with Subcontractor's subcontractors, regardless of tier.
- 30.3** Brumbaugh and Subcontractor agree that to the extent permitted by the Subcontract Documents, all parties necessary to resolve a Claim shall be parties to the same dispute resolution proceeding. To the extent Claims between Brumbaugh and Subcontractor involve in whole or in part claims between the Owner and Brumbaugh, Claims between Brumbaugh and Subcontractor shall be decided by the same tribunal and in the same forum as claims between the Owner and Brumbaugh.
- 30.4** In the event that the provisions for resolution of claims between the Owner and Brumbaugh contained in the Prime Contract do not permit consolidation or joinder with Claims of third parties such as Subcontractor, resolution of Claims between Brumbaugh and Subcontractor involving in whole or in part claims between the Owner and Brumbaugh may be stayed, at the sole option and discretion of Brumbaugh, pending conclusion of any claim resolution proceeding between the Owner and Brumbaugh.

- 30.5** All costs, expenses or attorney fees incurred by Brumbaugh or Subcontractor as part of or relating to a Claim resolution proceeding shall be borne by the party incurring them, except as set forth in Section 13.2.
- 30.6** Unless otherwise agreed in writing or explicitly directed by Brumbaugh in writing, Subcontractor shall continue the Subcontract Work and maintain the Progress Schedule during any dispute resolution proceedings.
- 30.7** In no event may litigation or arbitration be instituted after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations.
- 30.8** Subcontractor hereby knowingly, voluntarily and intentionally waives (to the extent permitted by applicable law) any right it may have to a trial by jury of any Claim.

### **31. Default by Subcontractor; Termination.**

- 31.1** If Subcontractor fails **(A)** to maintain at the Construction Site a sufficient skilled work force, including supervisors, and sufficient equipment in good working order to meet the requirements of the Subcontract Work, or **(B)** to cause to be delivered to it at the Construction Site sufficient materials of the required quality to enable it to comply with its time and sequence schedule, or **(C)** to meet the requirements of such time and sequence schedules or the Project Schedule **(D)** to pay when due its laborers or its subcontractors or its material, fuel or equipment suppliers, **(E)** to furnish payment and performance bonds, if required, or **(F)** to comply with any of its other agreements herein contained, or **(G)** to comply with Brumbaugh's safety suggestions or directions by taking immediate corrective action, Brumbaugh, at any time during such failure, by written notice to Subcontractor, may terminate Subcontractor's right to proceed with Subcontract Work in whole or in part.
- 31.2** If Subcontractor becomes insolvent, or makes an assignment for the benefit of creditors, or applies to any tribunal for the appointment of a trustee or receiver of Subcontractor or for any substantial part of its assets, or commences any proceedings relating to Subcontractor under any bankruptcy, reorganization, insolvency, readjustment of debt or liquidation law, or if any such petition or application is filed and any such proceedings are commenced against Subcontractor and Subcontractor by any act or failure to act consents thereto, or an order is entered appointing any such trustee or receiver or adjudicating Subcontractor bankrupt or insolvent or approving the petition in any such proceedings and such order remains in effect for more than thirty (30) days, or if an order is entered in any proceedings against Subcontractor decreeing its dissolution and such order remains in effect for more than thirty (30) days, Brumbaugh, by notice to Subcontractor, may terminate Subcontractor's right to proceed with the Subcontract Work in whole or in part.
- 31.3** In the event of any such termination, Brumbaugh shall have the right to notify Subcontractor's surety of any default by Subcontractor and to exercise any other rights or remedies available pursuant to the Subcontract Documents, at law, in equity, or by statute. In addition, Brumbaugh shall have the right to finish the Subcontract Work by whatever method it may deem expedient, including, without limitation, the taking over of Subcontractor's outstanding subcontracts and purchase orders and taking possession of and using in completing the work, Subcontractor's tools, equipment, scaffolding, materials and supplies at the Construction Site or in transit to or connection with the Subcontract Work.
- 31.4** In the event of any such termination, Subcontractor shall not be entitled to any further payment until the entire Project shall have been accepted by Owner, at which time Brumbaugh shall pay to Subcontractor the excess, if any, of the balance of the Subcontract Price, after deduction of costs incurred by Brumbaugh (including reasonable overhead and profit) to complete the Subcontract Work and all other damages of Brumbaugh and others resulting from such default, including but not limited to any liquidated damages provided for in the Subcontract Documents, attorney fees, expert witness fees and court costs, against the delivery of waivers and other documents required

hereunder for final payment, or Subcontractor shall pay to Brumbaugh the excess of Brumbaugh's costs of completion and any damages incurred by Brumbaugh and others by reason of Subcontractor's default over the balance otherwise owed on the Subcontract Price, promptly upon submission of an invoice for the same. Brumbaugh shall have the right to withhold from such final payment a reasonable reserve to cover any unexpired warranties applicable to the Subcontract Work.

- 31.5** In the event that any termination for default by Subcontractor is determined to have been wrongful or made in error, then the termination shall be deemed to be a termination without fault of Subcontractor and the provisions of Section 26 shall apply.

### **32. Prevailing Wages.**

- 32.1** If the Project is subject to a legal requirement to pay "prevailing wages" or similar restrictions applicable to laborers or mechanics employed on the Project, or if the Prime Contract or a labor agreement entered into with respect to the Project contains requirements pertaining to the wages of laborers or mechanics employed on the job, Subcontractor shall pay the prevailing wages and comply with any and all such restrictions, requirements or agreements with respect to the laborers and mechanics employed by it for the performance of the Subcontract Work and shall require all of its subcontractors to pay prevailing wages and comply with any and all such restrictions, requirements or agreements with respect to their laborers and mechanics employed for the performance of their work.

### **33. Nonperformance Due to Labor Disputes.**

- 33.1** Subcontractor shall at all times supply a sufficient number of skilled workers to perform the Subcontract Work with promptness and diligence. Should any workers performing the Subcontract Work engage in a strike or other work stoppage or cease to work due to picketing or a labor dispute of any kind, Brumbaugh may, at its option and without prejudice to any other remedies it may have, after forty-eight (48) hours written notice to Subcontractor, provide any such labor and deduct the cost thereof from any payment then due or thereafter to become due Subcontractor.
- 33.2** Brumbaugh may also, at its option, without prejudice to any other remedies it may have, terminate the right of Subcontractor to perform the Subcontract Work, and shall have the right to enter upon the Construction Site and take possession, for the purpose of completing the Subcontract Work, of all of Subcontractor's materials, tools and equipment thereon and to finish the Subcontract Work either with its own employees or other subcontractors; and in case of such termination of Subcontractor, Subcontractor shall not be entitled to receive any further payments under this Subcontract or otherwise but shall nevertheless remain liable for any damages which Brumbaugh incurs. If the expenses incurred by Brumbaugh in completing the Subcontract Work exceed the unpaid balance due Subcontractor, Subcontractor shall pay the difference to Brumbaugh together with any other damages incurred by Brumbaugh as a result of Subcontractor's default.

### **34. Assignment; Subcontracting.**

- 34.1** Subcontractor shall not assign this Agreement or any right or liability relating to it or subcontract the whole or any part of the Subcontract Work without the written consent of Brumbaugh. At Brumbaugh's option and in Brumbaugh's sole and absolute discretion, any assignment made without the written consent of Brumbaugh is void. No consent to or acceptance by Brumbaugh of any assignment or subcontract shall relieve Subcontractor of any of its responsibilities under this Agreement.

### **35. Notices.**

- 35.1** Except as otherwise specifically provided, all notices, requests, demands and proposals given hereunder by either party shall be in writing and (A) mailed by first class mail, (B) delivered in person, (C) sent by telecopy with confirmed receipt thereof, or (D) sent by a nationally recognized



overnight courier service. Notice shall be given to Brumbaugh or Subcontractor at its office at the address shown on page one of this Agreement or to such other address as may be furnished for such purpose. In the case of notice to Brumbaugh under this Agreement, notice shall be marked to the attention of the individual who signed this Agreement. In the case of notice to Brumbaugh under a Subcontract, notice shall be marked to the attention of the individual who signed the related Work Order. Any notice given in the manner provided in this Section shall be deemed given when sent.

### **36. Interpretation of Documents.**

- 36.1** This Agreement and the provisions of the Subcontract Documents are intended to supplement and complement each other and shall, where possible, be so interpreted. If, however, any provision of this Agreement conflicts or is inconsistent with a provision of the Subcontract Documents, or if there is a conflict or inconsistency within this Agreement or within any of the Subcontract Documents, the provision imposing the higher quality, greater quantity or greater duty or obligation on Subcontractor shall govern.
- 36.2** Subcontractor shall be bound by all interpretations of the Subcontract Documents made by the Owner or the Architect/Engineer and furnished to it by Brumbaugh that are binding upon Brumbaugh.

### **37. Divisibility.**

- 37.1** The provisions of this Agreement are divisible. If any provision of this Agreement is held by a court or arbitrator(s) of competent jurisdiction invalid or unenforceable in whole or in part, such provision shall be ineffective only to that extent without invalidating or rendering unenforceable any other provision of this Agreement.

### **38. Applicable Law.**

- 38.1** This Agreement shall be construed in accordance with and governed by the internal substantive law of the State of Ohio regardless of the laws that might otherwise govern under principles of conflict of laws.

### **39. Non-waiver.**

- 39.1** The waiver by either party hereto of any breach of any provision of this Agreement or the Subcontract Documents shall not be construed as, or constitute, a continuing waiver, or a waiver of any other breach of any provision of this Agreement.

### **40. Joint Drafting.**

- 40.1** The Parties expressly agree that this Agreement was jointly drafted, and that they both had opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms prior to execution. Therefore, this Agreement shall be construed neither against nor in favor of either party, but shall be construed in a neutral manner.

### **41. Entire Agreement.**

- 41.1** This Agreement constitutes the entire agreement between the Parties hereto and supersedes any and all prior or contemporaneous written or oral agreements between the Parties hereto with respect to the subject matter hereof. Nothing in this Agreement shall be construed to create a contractual relationship between persons or entities other than Brumbaugh and Subcontractor. This Agreement may not be amended or modified except by a written change order duly executed by the Parties hereto.

## **42. Definitions.**

- 42.1** The definitions set forth in this Section 43 shall apply to this Agreement unless the context otherwise clearly requires.
- 42.2** “Architect/Engineer” means the design professional entity designated as such in a Work Order for a Project. The term “Architect/Engineer” includes the Architect/Engineer and the designated representatives, successors, assigns, consultants, agents, employees of the Architect/Engineer.
- 42.3** The term "contractor" means any entity (other than Brumbaugh) with a direct contract with the Owner to furnish work or services at the Construction Site.
- 42.4** “Construction Site” means the premises on which a Project is being built.
- 42.5** The phrase "Brumbaugh’s other subcontractors" means any person (other than Subcontractor and subcontractors of Subcontractor), who furnishes work or services which include labor for the performance of any of the work to be performed by Brumbaugh pursuant to the Prime Contract other than Subcontract Work.
- 42.6** “Designer” has the meaning provided in Section 2.4.
- 42.7** “Owner” means the entity designated as such in a Work Order for a Project. The term “Owner” includes Owner and Owner’s designated representatives, consultants, agents, employees, successors, assigns, and as appropriate, the Architect/Engineer.
- 42.8** “Parties” means Brumbaugh and the Subcontractor,
- 42.9** The term "person" means and includes an individual, a partnership, a limited liability company or partnership, a joint venture or corporation.
- 42.10** “Prime Contract” means the contract between Brumbaugh and the Owner for the construction of a Project including, but not limited to: general, supplementary and other conditions; plans and specifications; addenda; modifications; and any other documents which form the entire Prime Contract.
- 42.11** “Project” means the particular construction project identified in a Work Order in relation to which Brumbaugh has hired the Subcontractor to perform Subcontract Work.
- 42.12** “Subcontract” means the specific contract between the Parties in relation to a particular Project.
- 42.13** “Subcontract Documents” means this Agreement and the Work Order and Prime Contract associated with a particular Project. The Subcontract Documents form the Subcontract.
- 42.14** “Subcontract Price” has the meaning provided in Section 3.1.
- 42.15** "Subcontract Work" has the meaning provided in Section 2.
- 42.16** The term "subcontractor" means any entity (other than Owner, Brumbaugh, Subcontractor, or a contractor) with a contract to furnish work or services at the Construction Site.
- 42.17** The phrase "subcontractor of Subcontractor" or "Subcontractor's subcontractor" means any person (other than Brumbaugh or another person furnishing labor pursuant to a contract between such person and Brumbaugh) who furnishes work or services which include labor for the performance of any of Subcontract Work.

**42.18** "Work Order" means a document which Brumbaugh prepares and issues to the Subcontractor to establish the scope of Subcontract Work, Subcontract Price, and other Project-specific terms.

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

SUBCONTRACTOR:

\_\_\_\_\_

By \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title \_\_\_\_\_  
Authorized Representative

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

BRUMBAUGH:

BRUMBAUGH CONSTRUCTION, INC.

By \_\_\_\_\_

Printed Name: Jason M. Willis

Title VICE PRESIDENT

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