

Job Number:  
Cost Code:

## DESIGN-BUILD SUBCONTRACT

THE KROG GROUP, LLC  
4 Centre Drive  
Orchard Park, NY 14127  
(716) 667-1234  
Fax (716) 667-1258

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The Subcontract made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_ (Subcontractor) and The Krog Group, LLC, a limited liability company organized and existing under the laws of the State of New York, with its principal office in the Town of Orchard Park, NY (KROG)

### WITNESSETH:

WHEREAS, KROG on \_\_\_\_\_, \_\_\_\_\_, entered into an Agreement with \_\_\_\_\_ (“Owner”), to construct \_\_\_\_\_ (Project), for Owner at or near \_\_\_\_\_ in accordance with plans and specifications, prepared by \_\_\_\_\_ (“Architect/Engineer”) (“Contract or Prime Contract”); and

WHEREAS, the parties agree that Subcontractor shall in place of KROG perform part of the Agreement between KROG and Owner;

NOW, THEREFORE, the parties mutually agree as follows:

### ARTICLE 1

#### GENERAL DESCRIPTION

The Contract between KROG and Owner includes Drawings, Conditions, (General, Supplementary and other), Specifications, Addenda, Modifications and other documents (collectively “Contract Documents”), THE CONTRACT DOCUMENTS ARE INCORPORATED BY REFERENCE INTO THIS SUBCONTRACT AND ARE MADE A PART HEREOF. Some or all of the Contract Documents may be set forth on the attached Schedule of Contract Documents (**Exhibit A**). The attached Schedule is not exclusive and does not relieve Subcontractor of responsibility for, or limit the scope of, all aspects of the work to be performed by Subcontractor as set forth in Article 2 of this Subcontract. Subcontractor acknowledges that it has read the Contract Documents, is familiar with their terms and conditions, and agrees to be bound to all such terms and conditions and to assume toward KROG all of the obligations and responsibilities that KROG by the Contract Documents has assumed toward Owner, except as may otherwise be provided in this Subcontract. In the event of a conflict between the terms of the Subcontract and the terms of any of the Contract Documents, the terms of the Contract Documents shall control.

*January 11, 2017 Edition*

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## ARTICLE 2

### **SUBCONTRACTOR'S WORK**

The Subcontractor agrees to perform and complete, in accordance with the terms and conditions of this Subcontract, the work described below ("Work"). As used in this Subcontract, the Work shall include, without limitation, the furnishing of all labor, materials, machinery, equipment, scaffolding and other items and services required expressly or by implication by the Plans and Specifications, this Subcontract and the Contract Documents. All incidental work (including labor and materials) necessary to complete this Subcontract shall be performed by the Subcontractor as part of the Work, notwithstanding that the same may have been omitted from the Plans and Specifications. It is the intent of this Subcontract that all work usually performed by the trades covered by this Subcontract and required by the Contract between KROG and the Owner shall be performed by the Subcontractor.

The Work to be performed shall include the following:

TIME OF COMPLETION: Start                      Complete

Subcontractor shall perform its Work in a good and workmanlike manner to the satisfaction of Owner, Architect/Engineer and KROG. Subcontractor acknowledges that it has investigated the nature, locality and site of its Work and the conditions and difficulties under which its Work is to be performed, and that it enters into this Subcontract on the basis of its own examination, investigation and evaluation of all such matters and not in reliance upon any opinions or representations of KROG, Owner, or any of their respective officers, agents, employees or representatives.

## ARTICLE 3

### **SUBCONTRACTOR'S RESPONSIBILITIES AND CONDUCT OF WORK**

3.1 **List of Materials, Equipment, and Subcontractors:** Progress Schedule. Subcontractor shall submit to KROG within thirty (30) days of Subcontractor's execution of this Subcontract, or within such lesser time as may be provided in the Contract Documents, a list of proposed materials, equipment, tools, machinery, appliances, and subcontractors necessary for the completion of its Work, with names and addresses of all proposed vendors, suppliers, and subcontractors, together with a schedule of deliveries and a detailed progress schedule in a form acceptable to KROG, made to meet KROG's overall Project progress schedule ("Progress Schedule"). KROG reserves the right to reject any proposed vendors, suppliers or subcontractors, and such rejection shall be at the sole discretion of KROG.

**3.2 Qualifications of Subcontractor; Qualified Work Force; Superintendent.**

Subcontractor represents that it is fully experienced and properly qualified as an expert to perform its Work provided for herein and that it is properly equipped, organized and financed to execute its Work. Subcontractor shall finance its own operations hereunder and shall operate as an independent contractor, and not as an agent or employee of KROG. KROG may require Subcontractor to remove from the Project any of Subcontractors employees whom KROG, Owner, or Architect/Engineer, in their sole discretion, may deem incompetent or a hindrance to the completion of Subcontractor's Work or the Project. Subcontractor shall provide a qualified superintendent to supervise its Work, will not change its superintendent without prior written permission of KROG, and such superintendent shall have full authority to receive and execute all field orders and other instructions of KROG.

**3.3 Shop Drawings.** Subcontractor shall prepare and submit to KROG, when and as directed, all shop drawings deemed necessary by KROG to completely describe the details and construction of Subcontractor's Work, and the relationship of such Work to the Project.

3.3.1 At the time of submitting shop drawings to KROG Subcontractor shall notify KROG in writing of any deviations in the shop drawings from the requirements of the Contract Documents and shall also note any deviations on the shop drawings.

3.3.2 The submission of shop drawings to KROG by Subcontractor shall be a representation by Subcontractor that it has checked and coordinated each shop drawing with the requirements of its Work, or related work by others, and the Contract Documents.

3.3.3 Subcontractor shall make any corrections to the shop drawings required by KROG or Architect/Engineer and shall resubmit the shop drawings until such time as they are acceptable to KROG and approved by Architect/Engineer. Subcontractor shall direct specific attention in writing on resubmitted shop drawings to revisions not requested by Architect/Engineer or KROG on previous submissions.

3.3.4 KROG's review or the Architect/Engineer's approval of Subcontractor's shop drawings shall not relieve Subcontractor of responsibility for any deviation from the requirements of the Contract Documents unless Architect/Engineer has given written requests therefore, and KROG's review or Architect/Engineer's approval of the shop drawings shall not relieve Subcontractor from responsibility for errors or omissions in the shop drawings.

3.3.5 Subcontractor shall be responsible for obtaining and verifying all field dimensions required before material for its Work is fabricated, to insure a proper fit between its Work and contiguous work by itself or others. In the event material delivery schedules preclude obtaining and verifying required field dimensions before Material is fabricated, such that KROG's Project Progress Schedule would be affected by a delay in commencing fabrication, Subcontractor is nevertheless solely responsible for insuring such a proper fit between its Work and contiguous work by itself or others without affecting KROG's Project Progress Schedule. Notwithstanding the dimensions given on the plans, specifications and other Contract Documents it shall be the

obligation and the responsibility of the Subcontractor to take such measurements as will assure the proper matching and fitting of the Work covered by this Subcontract with contiguous work.

3.4 **Defects in the Work.** Subcontractor, at its sole cost and expense, shall remove and replace any and all portions of its Work or materials furnished which fail to meet the requirements of the Contract Documents or this Subcontract.

3.5 **Overtime or Additional Shifts.** If Subcontractor is not in default in any of the provisions herein and, in order to expedite the completion of the Project, KROG requests Subcontractor to work overtime or additional shifts, Subcontractor shall work such overtime or additional shift time. KROG shall be obligated to reimburse Subcontractor for such overtime or additional shift time only to the extent of Subcontractor's actual out-of-pocket cost representing the difference between Subcontractor's overtime rate or shift rate, as the case may be, and Subcontractor's regular rate. Time slips covering overtime or additional shift time must be checked and approved daily by KROG's Superintendent at the Project. No overhead or profit is to be charged or allowed to Subcontractor for, or on account of, overtime or additional shift time. If, however, Subcontractor, in KROG's sole opinion, is behind schedule in its Work or delays the progress of work by others necessary to complete the Project on schedule, then, upon direction by KROG, Subcontractor at its sole cost and expense shall use such overtime or shift time, or increase its manpower, as may be necessary to meet KROG's Project schedule.

3.6 **Protection of the Work.** Subcontractor shall secure and protect its Work and assume full responsibility for the condition thereof until final written acceptance by Owner, Architect/Engineer and KROG. Subcontractor shall also be liable for any loss or damage to all work of others and to any equipment and materials on the Project caused directly or indirectly by Subcontractor's agents, employees, or representatives.

3.7 **Clean Up.** On a daily basis, Subcontractor shall remove waste materials and debris from the Project site resulting from its Work. Upon completion of its Work, Subcontractor shall remove from the Project and legally dispose of all temporary structures, debris, and waste and clean all surfaces, fixtures, equipment and materials pertaining to or affected by its Work. If Subcontractor fails to perform such clean-up functions within one (1) working day after notification by KROG to do so, whether written or oral, KROG may perform the function(s), charge the costs thereof to Subcontractor and deduct such charge from monies due Subcontractor under this Subcontract.

3.8 **Other Contractors.** Owner or KROG may employ other contractors, persons, or firms to do other work on or about the Project. Subcontractor shall not in any way interfere with or molest such other contractors, persons, or firms and shall cause no interruption in the progress of their work. Subcontractor shall not withhold from such contractors, persons, or firms any permission to work as may be required under any union or trade agreements.

3.9 **Associated Work.** Subcontractor agrees to do all work associated with its work deemed necessary by KROG or Architect/Engineer for the completion thereof. Such associated work shall be in compliance with the Contract Documents and this Subcontract. Subcontractor further

agrees that its Work shall match, be compatible with, and properly fit with all work by others performed under or pursuant to the Contract Documents.

**3.10 Layout and Dimensions.** KROG shall establish principal axis lines and levels whereupon Subcontractor shall lay out and be strictly responsible for the accuracy of its Work. Subcontractor shall be responsible for any loss or damage to others engaged in work on the Project by reason of failure of Subcontractor to lay out or perform its Work correctly. Subcontractor shall perform its Work so that the actual final conditions and details shall result in proper alignment of finished surfaces. In using any lines, grades, or levels furnished by KROG, or others. Subcontractor shall independently verify such lines, grades, or levels and use them upon its own responsibility and without reliance upon their accuracy. All dimensions and elevations indicated by the Contract Documents are to be independently verified in the field by Subcontractor, and KROG assumes no responsibility for any errors or discrepancies in any such dimensions and elevations.

**3.11 Use of KROG's Facilities.** In the event Subcontractor shall use KROG's facilities, equipment, materials, employees, or any personal property belonging to KROG, with or without KROG's authorization, Subcontractor assumes sole responsibility for any and all losses, claims, actions, demands, damages, liabilities, or expenses, including but not limited to attorneys' fees, caused by Subcontractor, its agents, employees, or representatives and arising out of such use.

**3.12 Labor and Material Cost Breakdowns and Reports.** Within thirty (30) days of Subcontractor's execution of this Subcontract, or within such lesser time as may be provided in the Contract Documents, Subcontractor shall provide cost breakdowns of labor and material and quantities of its Work covered by this Subcontract, in a form acceptable to KROG, showing the breakdowns of the sum(s) to be paid by KROG as set forth in Article 4.1 of this Subcontract. Subcontractor further agrees to file with KROG, daily written reports, no later than 12 o'clock noon on the following working day, showing the number of men in each trade on Subcontractor's Work and the specific work each performed, such reports being in a form acceptable to KROG.

**3.13 Attendance at Meetings.** Subcontractors shall have a competent representative, familiar with its work, attend all meetings that may be called relating to the Project by KROG, Owner, or Architect/Engineer.

**3.14 Temporary Facilities; Storage of Materials and Equipment.** Subcontractor shall furnish, at its sole expense, all temporary facilities necessary to the performance of its Work, including but not limited to, temporary offices, sheds, tool houses, hoisting, heat, power, water and sanitary facilities, except as may be expressly provided otherwise in this Subcontract. Subcontractor shall obtain the approval of KROG for the appearance and location of such temporary facilities and for the storage of materials and equipment on or about the project site.

## ARTICLE 4

### PAYMENT OF SUBCONTRACTOR

4.1 **Total Sum.** The total sum to be paid by KROG to Subcontractor for the Work to be performed hereunder, including all applicable sales and use taxes, shall be Dollars (\$ ) (“Subcontract Price”) in current U.S. funds, subject to additions or deductions as herein provided, and payable in monthly progress payments as herein provided as the Work progresses.

4.2 **Monthly Progress Payments.** On or about the twenty-fifth (25<sup>th</sup>) day of each month, unless provided for otherwise in the Contract Documents or otherwise mutually agreed in writing between Subcontractor and KROG, Subcontractor shall submit to KROG a written requisition for payment in a form acceptable to KROG showing the proportionate value of the Work performed to the end of the current month, from which shall be deducted:

- (a) A reserve of            percent (            %)
- (b) All previous payments.
- (c) All charges for materials or services furnished by KROG to Subcontractor.
- (d) Any other sums KROG is entitled to retain or deduct under the terms of this Subcontract.

4.2.1 The balance of the amount of each monthly requisition, as approved by KROG and Architect/Engineer, shall be paid to Subcontractor within fifteen (15) days after receipt of Owner’s payment of KROG’s requisition to Owner for the same month as that covered by Subcontractor’s requisition, provided, further, that KROG shall have received an executed monthly Waiver of Lien and Claim (and Affidavit of Payments of Debts) from Subcontractor in the form attached (**Exhibit B**) to this Subcontract for the month covered by Subcontractor’s requisition. KROG may, at its sole option, require the same form of monthly Waiver from any or all of Subcontractor’s suppliers, subcontractors, or materialmen for the month covered by Subcontractor’s requisition as a further condition to payment to Subcontractor by KROG. In the event Owner or Architect/Engineer shall at any time determine that KROG has been overpaid for Subcontractor’s Work under prior monthly progress payment requisitions, Subcontractor shall remit to KROG the sum of such overage within fifteen (15) days after receipt of KROG’s written demand to do so..

4.3 **Final Payment.** Final Payment consisting of the unpaid balance of the Subcontract Price shall be made within ten (10) working days after the last of the following to occur: (a) full and final completion of the Work by Subcontractor, (b) final acceptance of the Work by Owner, Architect/Engineer and KROG, (c) the furnishing of satisfactory evidence by Subcontractor that Subcontractor has paid in full all persons furnishing labor, materials or services in connection with the Work, that all taxes have been paid, and that Subcontractor neither has filed, nor has right to maintain, a lien against the Owner, KROG, KROG’s surety, if any, or the Project, (d) delivery of all guarantees, warranties, bonds, instruction manuals, as-built drawings and similar items required by the Subcontract, (e) certification that insurance required by the Contract Documents to remain in effect beyond final payment is in effect and will not be

canceled or allowed to expire without at least thirty (30) days' written notice to KROG unless a longer period is stipulated in this Subcontract, and (f) release of retention and payment by the Owner in respect of Subcontractor's Work.

4.3.1 Acceptance by Subcontractor of the Final Payment shall constitute a release of the Owner, KROG, and the Architect/Engineer from all uninsured liability for all things done or furnished in connection with the Work, and for every uninsured act or omission or neglect by the Owner, KROG and the Architect/Engineer relating to or arising out of the Work.

4.4 **Owner's Payments to KROG.** All payments called for in this Subcontract by KROG to Subcontractor, including reserves, due or alleged to be due to Subcontractor, are contingent upon Owner's acceptance of all of Subcontractor's Work performed and materials furnished. Progress payments, final payment, and retainage payments to the Subcontractor, otherwise due under the terms of the Subcontract for satisfactory performance of the Work, shall be made no later than fifteen (15) days after receipt by KROG of corresponding payment from the Owner which includes payment for Subcontractor's Work, provided that Subcontractor is in compliance with the terms of this Subcontract. No payment shall be due to Subcontractor until payment has been received by KROG for Subcontractor's Work. It is specifically agreed and understood that Payment to the Subcontractor is dependent upon KROG receiving contract payments, including retainage, from the Owner. Accordingly, payments by Owner to KROG shall determine the amount and timing of payment to be made by KROG to the Subcontractor. Nothing contained herein shall preclude or prohibit the Subcontractor from filing a mechanic's lien.

4.5 **Owner Retention's and Reserves.** Notwithstanding the foregoing Article 4.4, if Owner retains or reserves any monies due or to become due to KROG allocable to the Work performed by Subcontractor, then to the extent of such retention or reservation and until payment thereof to KROG by Owner, KROG shall not be obligated to make monthly progress payments or final payment to Subcontractor. The reserve provided for in Article 4.2(a) here is separate and independent of any percentage for a reserve or retainage provided for in the Contract Documents. Any change in the percentage of reserve or retainage withheld by Owner from KROG shall not affect in any way the percentage or time of payment of the reserve provided for in Article 4.2(a) herein, unless agreed to otherwise by KROG in writing and consented to in writing by Subcontractor's surety.

4.6 **Effect of Payments.** No certificate given or payment made hereunder, including final payment, shall be conclusive evidence of proper performance of this Subcontract, either wholly or in part, and no payment, including final payment, shall be construed to be an acceptance of defective work or improper materials.

4.7 **Subcontractor's Payment for Labor, Materials, and Services.** Subcontractor agrees to promptly pay any and all sums due for labor, materials, and services, including insurance and taxes, furnished in connection with Subcontractor's performance of its Work and KROG shall have the right to receive, as a condition precedent to making any payment hereunder, satisfactory evidence, including substantiating vouchers of payment by Subcontractor and those working under Subcontractor of all indebtedness incurred for labor, materials, and services furnished up



to the time of any payment hereunder, and Subcontractor and those working under Subcontractor shall, upon request by KROG furnish certificates showing such payments (Exhibit B). Subcontractor further agrees to furnish to KROG, whenever requested, an affidavit of any subcontractor, supplier, or materialman of Subcontractor, attesting to full payment for any labor, material, equipment, or services provided for performance of Subcontractor's Work and a Waiver of Lien and Claim up to the amount paid. In the event of non-payment of any such sums as aforesaid, KROG may retain and pay to the parties entitled thereto, including KROG and Owner, out of any payments then due or thereafter to become due to Subcontractor, an amount sufficient to fully reimburse such parties. Should there be any deficiency after such payments are made, Subcontractor shall refund such deficiency to KROG within fifteen (15) days after receipt of KROG's written demand to do so.

**4.8 Payments for Materials Delivered or Ready for Delivery: No Consignments to KROG.** KROG may, at its sole option, from time to time, in order to expedite the Work, make payments to Subcontractor for materials delivered or prepared and ready for delivery. If such payments are made before delivery of materials to the Project site, a bill of sale, and fire and extended coverage insurance policies protecting KROG and Owner against any loss, and, at the option of KROG, a lease upon the premises in or upon which material paid for is stored, all in form satisfactory to KROG, shall be furnished by Subcontractor at Subcontractor's sole cost and expense. Subcontractor in making or ordering shipments shall not consign or have consigned materials, equipment or any other items in KROG's name. KROG is under no obligation to make payment for charges on shipments made by or to Subcontractor but may, at its option, pay such charges and deduct them from monies owed to Subcontractor under this Subcontract, together with a service charge of Ten percent (10%) of the amount of such charges paid.

**4.9 Advancing Dates of Payment.** KROG reserves the right to advance the dates of any payments to Subcontractor hereunder, including final payment, in KROG's sole discretion. No such advanced payment date shall in any way accelerate or otherwise affect KROG's obligation as to the date of any other payment to Subcontractor under this Subcontract.

**4.10 Non-Performance.** If Subcontractor should fail to perform any of the terms and conditions of this Subcontract for any reason, KROG shall have the right to withhold any and all further payments until such non-performance is remedied to KROG's satisfaction.

**4.11 Quantity Variances.** Subcontractor agrees that it will accept payment for its Work at the unit prices or lump sum(s) specified in this Subcontract, regardless of whether the final quantities are more or less than the estimated quantities set forth in the Contract Documents or this Subcontract, where applicable. Subcontractor shall have no claims for damages of any type whatsoever because of differences between actual and estimated quantities.

**4.12 Interest.** No interest shall accrue or be due Subcontractor on any funds or payments described in this Article 4, including reserves, paid within the time periods set forth herein, nor shall interest accrue or be due Subcontractor for any funds withheld to protect the interests of KROG or Owner or third parties as set forth elsewhere in this Subcontract.

## ARTICLE 5

### **PROGRESS OF THE WORK**

5.1 **Time and Schedule.** Time is of the essence in this Subcontract. Subcontractor shall furnish all information requested by KROG to prepare, update, and expedite Progress Schedules, including manpower requirements. Subcontractor agrees to conform to KROG's Project Progress Schedule, as amended from time to time, which is incorporated herein by reference and made a part hereof. Such conformance shall include, without limitation, timely submission of shop drawings as provided in Article 4 herein. Subcontractor shall coordinate its Work covered by this Subcontract with that of all other contractors and subcontractors in a manner that will facilitate timely completion of the Project. KROG shall have complete control of the Project site on which the Work is to be performed and shall have the right to decide the time and order in which the various portions of Subcontractor's Work shall be installed and the priority of the work of all subcontractors. Subcontractor agrees to furnish and have available sufficient and satisfactory equipment, materials, supplies, and workmen to perform its Work in accordance herewith and with KROG's Project Progress Schedule.

5.2 **Dispute Between the Parties.** If the parties are unable to arrive at an agreement with regard to any change in Subcontractor's Work directed by KROG, the interpretation of this Subcontract, or any matter relative to the performance or time of Subcontractor's Work, Subcontractor shall nevertheless proceed with its Work if so ordered in writing by KROG.

5.3 **Discontinuance of Project work by KROG.** If KROG should discontinue work on the Project at Owner's discretion or due to government restriction or any other cause without KROG's fault or beyond KROG's control, this Subcontract may be terminated, in which event Subcontractor shall not have any other or larger claims against KROG than KROG may have against Owner with respect to this Subcontract.

5.4 **Delay and Time Extension.** Should Subcontractor be obstructed or delayed in the commencement, prosecution, or completion of its Work because of conditions not attributable to Subcontractor, and which by the terms of the Contract Documents may be grounds for an extension of time, Subcontractor shall make a claim therefore in writing within seven (7) days of the date of commencement of such claimed obstruction or delay, or within such lesser period of time as may be provided in the Contract Documents, and KROG shall award and certify the amount of additional time to be allowed, if any. Such additional time shall not exceed the time allowed by Owner to KROG under the Contract Documents for such delay. Subcontractor's failure to make a written claim as hereinbefore described shall constitute a waiver of any claim for an extension of time. Subcontractor agrees to make no claim for damages for delay in the performance of this Subcontract occasioned by any act or omission to act of KROG or Owner or any of their representatives, and agrees that any such claim shall be fully compensated by an extension of time to complete performance of Subcontractor's Work. KROG shall have the right at any time to delay or suspend the commencement or execution of the whole or part of Subcontractor's Work without compensation or obligation to Subcontractor other than to extend the time for completing the work for a period equal to that of such delay or suspension.

Subcontractor represents that in agreeing to complete its Work in accordance with KROG's Project Progress Schedule, it has taken into consideration and made allowance for the ordinary delays and hindrances incident to such Work. If Owner for any cause stops or suspends construction of the Project or any part thereof, KROG may order Subcontractor to stop or suspend Subcontractor's Work hereunder and KROG shall not be liable to Subcontractor in any way for such stoppage or suspension, but shall pay to the Subcontractor, after KROG has been paid by Owner, for the portion of the Work Subcontractor shall have performed before the Work was stopped or suspended, in the same proportion as paid by Owner to KROG for Subcontractor's Work. If any provision of this Article 5.4 is made void or otherwise impaired by any law controlling the construction thereof, such provision shall be deemed to conform to the limits permitted by such law.

**5.5 Changes in the Subcontractor's Work, Change Order Requests.** Subcontractor shall make all changes in its Work, whether such changes increase or diminish its Work, when ordered to do so in writing by KROG. Subcontractor shall, within three (3) working days after receipt of a change order request from KROG, notify KROG in writing if Subcontractor claims that such change order increases or decreases the cost or time for performance of its Work. If no additional time or money is so indicated within such time period, Subcontractor agrees that there is no additional time or money to be allowed. Subcontractor agrees to furnish KROG with written quotations for changes in the Work within a mutually agreeable time after such notification. Any change in the cost or time of performance shall be agreed upon in writing before such changes in Subcontractor's Work commences and no payment shall be made to Subcontractor for such changes unless such changes are properly authorized by written change order. Any changes to Subcontractor's work performed by Subcontractor without a written change order shall be at Subcontractor's sole risk and expense. If the parties are unable to agree as to any proposed changes in Subcontract amount or performance time, Subcontractor shall nevertheless proceed with the change if so ordered in writing by KROG and may do so under written protest. The value of the work to be changed, added, or omitted shall be determined by the lump sum or unit prices provided in this Subcontract for such work. If no such prices are so provided, such value shall be determined by the method provided for determining such value in the Contract between KROG and Owner. If no such method is provided in the Contract between KROG and Owner, such value shall be determined by whichever of the following methods or combination thereof KROG may elect:

- (1) By adding or deducting a lump sum or an amount determined by a unit price agreed upon between KROG and Subcontractor.
- (2) By adding (A) the actual net cost of Subcontractor for labor in accordance with established rates, including required union benefits, premiums Subcontractor is required to pay for worker's compensation and liability insurance, and payroll taxes on such labor, (B) the actual cost to Subcontractor for materials and equipment and such other direct costs as may be approved by KROG, less all savings, discounts, rebates, and credits, (C) an allowance of ten percent (10%) for overhead on items (A) and (B) above, and (D) an allowance of five percent (5%) for profit on items (A), (B), and (C) above. Provided however, that costs to Subcontractor for the work of its subcontractors shall be subject to an allowance of five percent (5%) combined overhead and profit.

5.5.1 In the event it is necessary to ascertain actual costs for the foregoing calculations, Subcontractor shall produce and permit KROG to examine any books, records, invoices, receipts, and other substantiation that KROG may request to verify Subcontractor's actual costs. In the case of omitted work, KROG shall have the right to withhold from payments due or to become due to Subcontractor an amount which, in KROG's opinion, is equal to the value of such work until such time as the value thereof is determined by agreement or otherwise as hereinabove provided. All changes, additions, or omissions in Subcontractor's Work ordered in writing by KROG shall be deemed a part of Subcontractor's Work hereunder and shall be performed and furnished in strict accordance with all terms and conditions of this Subcontract and the Contract Documents. Within thirty (30) days of the change Subcontractor shall arrange for an increase in the penal sum of any surety bond due to additions to the Work if the amount of the increase is \$20,000 or greater.

5.5.2 No work done or materials furnished of any description, whether growing out of modifications or changes or otherwise, shall be considered as extra nor paid as extra, unless a separate order in writing and signed on behalf of KROG shall have been made before the commencement of such work or the furnishing of such materials. Subcontractor agrees that obtaining such written authorization is a condition precedent to payment, and that Subcontractor's failure to obtain a written order authorizing such extra work shall operate as a complete, final and conclusive waiver of any claim for extra compensation therefor. Any such written authorization shall be valid **only** if made by an officer of KROG.

5.5.3 If extra work was ordered by KROG and the Subcontractor performed same but did not receive a written Extra Work Order or other written directive therefor, the Subcontractor shall be deemed to have waived any claim for extra compensation regardless of any written or oral protests or claims by the Subcontractor, unless provided for or otherwise addressed by Paragraph 5.5.2 above. Subcontractor specifically agrees that KROG's field personnel do not have the authority to order extra work either orally or in writing.

5.5.4 Notwithstanding any other provision, if the Work for which the Subcontractor claims extra compensation is determined by the Owner or Architect/Engineer not to entitle KROG to a Change Order, extra compensation or a time extension, then KROG shall have no obligation or duty to pay Subcontractor for any extra compensation or time extension for such work, unless KROG specifically agrees in writing to do so.

5.6 **Default in Performance; Termination.** In the event Subcontractor at any time, in KROG's sole opinion, refuses or neglects to supply a sufficient number of properly skilled workmen or a sufficient quantity or quality of materials, or fails to make prompt payment to its employees, suppliers, materialmen, or subcontractors, or fails in any respect to properly and diligently prosecute its Work covered by this Subcontract, becomes involved in a Labor Dispute or otherwise fails to perform fully any of the terms and conditions herein contained. KROG may, at its sole option, after giving forty-eight (48) hours written notice to Subcontractor, provide any such labor and materials and do all things as may be necessary and deduct the cost thereof from any monies due, or thereafter to become due, under this Subcontract. KROG may, at its sole option, after Subcontractor's failure to cure its default to KROG's satisfaction within

the time period set forth above, terminate Subcontractor's right to proceed with its Work, in whole or in part, and, in that event, KROG shall have the right to enter upon the premises of Subcontractor's facilities at the Project, and take possession, for the purpose of completing Subcontractor's Work, of all materials, tools, and appliances therein, and may employ any other person or persons to finish the Work and provide the materials therefore. In case of such discontinuance of Subcontractor's right to proceed with its Work, Subcontractor shall not be entitled to receive any further monies under this Subcontract until all Project work undertaken by KROG under the Contract Documents is completely finished and accepted by Architect/Engineer and Owner. At that time, if the unpaid balance of the amount to be paid Subcontractor under this Subcontract exceeds the cost incurred by KROG in finishing Subcontractor's Work, such excess shall be paid by KROG, to Subcontractor. If the aforementioned costs exceed the unpaid balance due Subcontractor, then Subcontractor shall pay to KROG the amount by which such costs exceed such unpaid balance within thirty (30) days after receipt of KROG's written demand to do so. The costs incurred by KROG, as herein provide, either for furnishing materials or for finishing Subcontractor's Work, and any damages incurred by KROG by reason of Subcontractor's default, shall be chargeable to and paid by Subcontractor. Such costs and damages shall include, but are not limited to, reasonable attorneys' fees and interest on sums due KROG from Subcontractor. Such interest shall be computed at one hundred percent (100%) of the prime rate as published in the Wall Street Journal, for the periods during which costs and damages are incurred and unpaid by Subcontractor. Any and all rights and remedies of KROG under this Subcontract shall be cumulative. Notwithstanding the foregoing, KROG also has the same rights to terminate this Subcontract as Owner's rights to terminate the Contract between KROG and Owner. If it is determined that KROG did not properly terminate Subcontractor's right to proceed for cause, then such termination shall be deemed a termination for convenience.

**5.6.1 Termination for Convenience.** KROG, in its sole and absolute discretion, shall have the right at any time to terminate for its convenience the Subcontractor's right to proceed with the Work in whole or in part upon twenty four (24) hours written notice. Upon receipt of such a notice, Subcontractor shall stop the Work. If this Subcontract is terminated for KROG's convenience, KROG shall pay to Subcontractor the reasonable and properly documented costs for the Work which has been satisfactorily completed, for materials, supplies and equipment fabricated, incorporated or installed in the Work. In no event shall Subcontractor be entitled to payment of anticipated profits or overhead on work not performed or materials or equipment not furnished.

**5.7 Subcontractor's Bankruptcy; Termination.** In the event a petition shall be filed either by or against Subcontractor, in any court or pursuant to any statute, whether in bankruptcy, insolvency, or any other such similar proceeding, or if Subcontractor shall make an assignment for the benefit of its creditors without KROG's consent, or if a receiver of any property of Subcontractor shall be appointed in any suit or proceeding, it is recognized by Subcontractor and KROG that occurrence of any such event could impair or frustrate Subcontractor's performance of its Work. Accordingly, it is agreed that, upon occurrence of any such event, KROG shall be entitled to request of Subcontractor, or its successor in interest, adequate assurance, in a form acceptable to KROG, of future performance of Subcontractor's Work in accordance with the terms and conditions of this Subcontract. Failure to comply with KROG's written request for

such assurance within ten (10) days after delivery of the request to Subcontractor, or its successor in interest, shall entitle KROG to terminate this Subcontract upon the same terms and conditions as set forth in Article 5.6 above. In the event Subcontractor, or its successor in interest, provides such assurance to KROG's satisfaction within the ten (10) day time period set forth above, then the potential cause of termination shall be deemed waived and this Subcontract shall continue in effect in the same manner as though such potential cause of termination had not existed. KROG, however, reserves its right to damages for breach of any other provision of this Subcontract. Furthermore, pending receipt of adequate assurance of performance and actual performance in accordance therewith. KROG shall be entitled to proceed with Subcontractor's Work with KROG's own forces or with other parties on a time and material or other appropriate basis, the cost of which shall be charged against Subcontractor or its successor in interest.

## **ARTICLE 6**

### **TAXES; PERMITS AND LICENSES**

Subcontractor assumes full and exclusive liability for the payment of any tax imposed by any law, the federal government, any state or subdivision thereof, or any local government on any materials, articles, or services required to be furnished by Subcontractor to perform its Work hereunder and the payment of all contributions, taxes, or other sums due to or for benefit of its employees that may be payable or required under any law, collective bargaining agreement, or employment contract, including but not limited to the Unemployment Insurance Act or Federal Social Security Act. Subcontractor assumes full liability for payment of sales and use taxes, where applicable. Subcontractor agrees to pay any and all taxes, excise assessments, or other charges levied by any governmental authority on or because of the Work to be performed hereunder. Subcontractor shall obtain and pay for all necessary permits and licenses pertaining to its Work. At no time shall there be any increase in Subcontract price set forth in Article 4 herein on account of any of the items described in this Article 6. Upon demand by KROG, Subcontractor shall substantiate that all such taxes and charges are being or have been properly paid and all necessary permits and licenses are being or have been properly obtained.

## **ARTICLE 7**

### **INSURANCE AND LIENS**

7.1 **Insurance.** Upon execution of this Subcontract by Subcontractor and prior to performing any work, Subcontractor shall submit certificates of insurance, in DUPLICATE, satisfactory to KROG, of the types and at a minimum in the amounts specified in Paragraph 7.2 below. Such certificates shall name KROG, Owner and all other parties as required by the Contract Documents as additional insureds on a primary and non-contributory basis. All insurance provided hereunder shall be provided by insurance companies that are acceptable to KROG and which are A or A+ Best Rated and licensed and admitted in the State of New York, unless otherwise authorized in writing by KROG. All such insurance shall be maintained for at least two (2) years from the date of final written acceptance of the Project as a whole by Architect/Engineer and Owner. Such certificates shall provide that KROG will receive at least

thirty (30) day's advance written notice of any material alteration, cancellation, or non-renewal of such coverage. Should any of its Work be sublet by Subcontractor under this Subcontract, Subcontractor shall carry contingent liability coverages on its subcontractors in the same types and amounts carried by Subcontractor to cover that portion of its Work so sublet.

The carrying of the required certified coverage shall not relieve Subcontractor of any obligations assumed under this Subcontract. Subcontractor shall also be responsible for carrying any and all additional insurance coverage required by the Contract Documents and the laws of the geographic territory within which the Project is located. All insurance coverage set forth in this Article 7 shall be at the sole expense of Subcontractor. At no time shall there be any increase in the Subcontract price set forth in Article 4 herein on account of any insurance described in this Article 7.

**7.2 Insurance Requirements.** The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:

Combined Single Limit Auto Liability	\$1,000,000
Comprehensive General Liability	\$1,000,000 Each Occurrence \$2,000,000 General Aggregate including Products
Workers' Compensation	Statutory
Umbrella Liability	\$5,000,000

Subcontractor shall provide a total of \$6,000,000 liability limit, with a minimum of \$1,000,000 per occurrence and \$2,000,000 general aggregate limit under the Comprehensive General Liability. The total coverage can be achieved through a combination of CGL and Umbrella Policies.

The CGL policy shall be written as primary coverage on ISO Occurrence from CG00 01 10/01 or a substitute form providing equivalent coverage. Additional Insured status on the Subcontractor's policy shall use ISO Additional Insured Endorsement CG2010 11/85 or both CG2010 10/01 and CG2037 10/01, or substitute form providing equivalent coverage including both ongoing and completed operations coverage. Policies shall state that there is a per project aggregate.

Coverages shall be written on an occurrence form basis, unless otherwise approved in writing by KROG, and shall be maintained without interruption from the date of commencement of the Subcontractor's work until two years following completion of the project as a whole.

There shall be no exclusions or modifications to the requirements set forth herein without prior written approval by KROG.

**7.3 Builder's Risk Insurance.** Subcontractor shall procure and pay for, at its sole expense, "all risk" property coverage with insurance companies acceptable to KROG, covering Subcontractor's Work and all materials, supplies and equipment on the Project site, in transit, or

in storage to be used in the Work, in amounts sufficient to protect Subcontractor, unless to the extent relieved from this obligation by KROG in writing or by provisions of the Contract between KROG and Owner. Such insurance shall be payable to KROG, Owner and Subcontractor as their interests may appear. In the event Subcontractor is relieved of the obligation to provide such insurance, Subcontractor assumes sole responsibility for any deductible amounts that may be applied in an insurance claim satisfaction or settlement for damages to Subcontractor's Work.

**7.4 Waiver of Subrogation.** KROG and Subcontractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Owner, the Architect/Engineer, the Architect/Engineer's consultants, separate contractors, and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other causes of loss to the extent covered by insurance provided under the Contract Documents, this Subcontract, or any other property insurance applicable to the Work, except such rights as they may have to proceeds of such insurance. Subcontractor shall require of the Subcontractor's sub-subcontractors, agents and employees similar waivers in favor of the parties enumerated herein. 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.

**7.5 Liens.** In the event of the filing of a lien or claim by any of Subcontractor's materialmen, suppliers, subcontractors, or persons working for Subcontractor relative to work for which Subcontractor has been paid, Subcontractor agrees to immediately satisfy or bond such lien or claim or to cause the discharge of such lien. In the event Subcontractor shall fail to do so, KROG may at its option and at the sole expense of Subcontractor, including but not limited to attorneys' fees, bond such lien or claim pending its disposition. If at any time there shall be evidence of any lien or claim for which it is established, KROG or Owner might become liable, and which is chargeable to Subcontractor, KROG shall have the right to retain out of any monies then due or thereafter to become due to Subcontractor under this Subcontract, an amount sufficient to protect and reimburse itself or Owner from any loss or damage that either or both may sustain in discharging such lien or claim. Should there prove to be any such lien or claim after all payments hereunder to Subcontractor are made, Subcontractor shall refund to KROG all monies KROG or Owner may be compelled to pay on such lien or claim or in discharging any lien on the Project or premises made obligatory in consequence of Subcontractor's default.

## **ARTICLE 8**

### **INDEMNITY**

**8.1 Personal Injury and Property Damage.** The Work shall be performed at the risk of the Subcontractor exclusively. To the fullest extent permitted by law, the Subcontractor shall indemnify, defend and hold harmless the Owner, KROG, Architect/Engineer, and Architect/Engineer's consultants from and against all allegations, investigations, claims,



damages, loss, liability or expense of any kind, which is in any way connected with the Work, to the extent such arises or results from (i) any breach of any term or condition of this Subcontract or any representation or warranty contained herein, or (ii) any negligent act, omission, breach of statutory duty or obligation, on the part of Subcontractor or any other person. This indemnity does not extend to that part of any claims, damages, loss, liability or expenses arising from the negligent acts or omissions of KROG. The foregoing obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity, which would otherwise exist to any party or person described in this paragraph.

8.2 This indemnification includes, but is not limited to, any claims, damages, loss, liability or expense of any kind, which is in any way connected with the Work and which is based upon a breach of statutory duty or obligation on the part of KROG where KROG is not found to have committed a negligent act or omission. Subcontractor agrees to purchase and maintain such insurance as will protect it and KROG including contractual coverage. If the foregoing indemnity is made void or otherwise impaired by any law controlling the construction thereof, such indemnity shall be deemed to conform to the fullest indemnity permitted by law.

8.3 In claims against any person or entity indemnified under this Article by an employee of the Subcontractor, the Subcontractor's subcontractor(s), anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for the Subcontractor or the Subcontractor's subcontractors(s) under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts or by the amount of insurance available to Subcontractor under any policies of insurance required or provided pursuant to this Subcontract.

8.4 **Patent Infringement.** Subcontractor shall indemnify and hold KROG and Owner harmless against all losses, claims, actions, demands, damages, liabilities, or expenses, including but not limited to attorneys' fees, resulting from any infringement or alleged infringement or any patents or for the misuse of any patented article by Subcontractor in the performance of its Work.

8.5 **No Limitation of Common Law Indemnity.** The indemnity provided by the requirements contained herein shall be in addition to and not in limitation upon any rights of common law indemnity.

8.6 **Tools and Equipment.** Subcontractor, agrees to indemnify KROG against and shall hold KROG harmless from any and all claims, actions, suits, damages, losses, costs, expenses and liabilities of whatsoever kind and nature on account of injury or death of any person or persons (including employees of subcontractor), or damage to property caused by, resulting from, a happening in connection with the erection, use and dismantling of pipe type scaffolding, power scaffolding, suspended scaffolding, scaffolding accessories, staging equipment, ladders, aerial personnel lifts, power tools, hand tools or any other tools and equipment owned, rented or in control of KROG when such tools and equipment are borrowed or on loan from KROG, whether such tools and equipment are used in conjunction with other tools or equipment pieces

owned by subcontractor or used totally by themselves, except to the extent that such incidents are caused by the negligence or willful misconduct of KROG. It is understood that Subcontractor will employ such tools and equipment on the jobsite at various times up through the projects conclusion.

8.6.1 Subcontractor agrees to erect, use or dismantle borrowed tools and equipment in accordance with appropriate safety standards, including those issued by the Occupational Safety and Health Administration (OSHA) and the Department of Labor. Subcontractor also agrees that where such tools and equipment are defective or are not complete to meet appropriate safety standards, Subcontractor will advise KROG and not use such tools and equipment until all defects are cured and tools and equipment meet such safety standards before using them.

8.6.2 Subcontractor agrees to return tools and equipment in the same condition as when borrowed. If any tools and equipment are returned in a lesser condition, Subcontractor agrees to be liable for the cost of any and all repairs.

8.6.3 This indemnity shall remain in full force and effect until the project has ended, or such earlier time when it is expressly cancelled in writing by subcontractor or KROG, but in no case until all borrowed or loaned tools and equipment have been returned to KROG. The indemnification required by this Article or elsewhere shall survive after a termination of this Subcontract and shall remain in full force and effect thereafter.

## **ARTICLE 9**

### **SAFETY LAWS**

Subcontractor, its subcontractors, and its suppliers shall strictly observe and comply with all applicable safety laws, rules, and regulations, and with any accident prevention programs of Owner, Architect/Engineer, and KROG. Subcontractor further agrees to provide such protection as is necessary to protect its workmen and those of KROG and other subcontractors from its operations. In the event that additional safety measures should be required of Subcontractor, Subcontractor agrees that it shall install or procure such additional safety measures at its sole expense. Subcontractor, its subcontractors, and its suppliers agree to adhere strictly to all provisions of the Federal Occupational Safety and Health Act (PL91-596). Subcontractor shall hold harmless and indemnify KROG and Owner against all losses, claims, actions, demands, damages, liabilities, fines, or expenses, including but not limited to attorneys' fees, resulting from enforcement of this law and for related acts of its officers, employees, subcontractors, suppliers and materialmen.

## **ARTICLE 10**

### **RIGHT OF INSPECTION**

It is understood that Owner, Architect/Engineer, or KROG shall at any time have the right to inspect all materials and workmanship at the Project site or at any other place whether Subcontractor's Work is in the course of preparation, processing, manufacture, or treatment.

## **ARTICLE 11**

### **NON-ASSIGNMENT**

Assignment or subletting by Subcontractor of this Subcontract or any interest therein or of any money due or to become due by reason of the terms hereof without prior written consent of KROG shall be void and without effect and such assignment or subletting shall give KROG the right, at its sole option, to terminate this Subcontract without any further obligation to Subcontractor.

## **ARTICLE 12**

### **WORK IN HARMONY**

Subcontractor agrees that all labor employed by Subcontractor for its Work shall be in harmony with, and be compatible with, all other labor being used by KROG or other subcontractors on the Project. In the event of any strike, lockout, picketing, walkout, or other work stoppage or slowdown caused by any labor dispute at the Project involving employees, contractors or subcontractors of Subcontractor, or in the event of action taken by others to interfere with or interrupt the work of KROG, its employees, contractors, subcontractors, suppliers or deliverymen (collectively, "Labor Dispute"), Subcontractor will immediately take whatever action is necessary to cause all such activity to stop. Should Subcontractor's Work for any reason be stopped or materially delayed, in the sole judgment of KROG, because of a Labor Dispute, then KROG shall have the right, after twenty four (24) hours written notice to Subcontractor, with or without terminating this Subcontract, to directly or through others employ such personnel as are necessary to complete Subcontractor's Work, and the cost of completing the unfinished part of Subcontractor's Work shall be charged to the Subcontractor.

## **ARTICLE 13**

### **EQUAL EMPLOYMENT OPPORTUNITY**

13.1 Subcontractor agrees to comply with all State and Federal Equal Opportunity Laws and Regulations and Federal Regulation 31 CFR, Part 51 (collectively "Laws") and shall submit documentation regarding Equal Opportunity upon KROG's request.

13.2 Subcontractor agrees to use its best efforts to comply with any and all MBE, WBE and DBE employee, sub-subcontractor and supplier contract percentages required by or outlined in

the Contract Documents. Subcontractor shall document those efforts and furnish proof of same to KROG upon request.

13.3 Subcontractor agrees to not discriminate against any employee for employment because of race, color, religion, sex, age, national origin, or handicap status as defined in 31 CFR Part 51 and other Laws. Subcontractor shall make a good faith effort to employ minority group persons and females and that in hiring of an employee for performance of work under this Subcontract or any subcontracting hereunder. Subcontractor, and its subcontractor(s), if any, shall not, by reason of age, race, creed, color, sex, national origin, or handicap status as defined in 31 CFR Part 51 and other Laws, discriminate against any person who is qualified and available to perform the work to which the employment relates. Subcontractor agrees to take affirmative action to insure that applicants are employed and that employees are treated during their employment, without regard to their race, color, religion, sex, age, national origin, or handicap status as defined in 31 CFR Part 51 and other Laws.

#### **ARTICLE 14**

#### **VOUCHING IN**

In the event of any proceeding between or among KROG, Owner, or other persons that pertains to the Work under this Subcontract or any obligation of Subcontractor to KROG hereunder, Subcontractor shall be bound by any decision rendered by arbitrators acting under the provisions for arbitration of disputes in the Contract between KROG and Owner applying to Subcontractor's Work, or in any action at law or in equity, by any decision rendered pursuant thereto; provided in each case Subcontractor is given an opportunity to present Subcontractor's position before such arbitrators or court of law or equity, as the case may be.

#### **ARTICLE 15**

#### **GUARANTEES**

Subcontractor hereby guarantees its Work to the full extent provided in the Contract Documents. Subcontractor shall remove, replace, or repair at its sole expense and at the convenience of Owner any faulty, defective, or improper work, materials, or equipment discovered within one (1) year from the date of final written acceptance of the Project as a whole by Architect/Engineer and Owner or for such longer period as may be provided in the Contract Documents. In addition, Subcontractor shall pay for all damages to the Project resulting from defects in its Work and all costs and expenses necessary to correct, remove, replace, or repair such Work and any other work or property that may be damaged in correcting, removing, replacing, or repairing such Work.

#### **ARTICLE 16**

#### **PERFORMANCE AND LABOR AND MATERIAL PAYMENT BONDS**

Subcontractor shall provide a performance bond and a labor and material payment bond in the total sum of this Subcontract in a form as set forth by the attached Bond Forms and with a company acceptable to KROG. Such bonds shall be provided prior to or concurrent with execution of this Subcontract by Subcontractor. The cost of such bonds is included in the total Subcontract Price of this Subcontract as set forth in Article 4 herein. If bonds are required to be provided subsequent to the signing of this subcontract, Subcontractor will be compensated for its actual out of pocket costs in procuring the bonds.

## **ARTICLE 17**

### **POSSESSION BY KROG PRIOR TO COMPLETION**

Whenever it may be necessary for KROG or its other subcontractors to do so, they may use or occupy any portion of the Work either fully or partially completed by Subcontractor prior to final inspection and acceptance thereof by Owner and Architect/Engineer. Such use or occupation shall not relieve Subcontractor of its guarantee of its Work, nor of its obligation to make good at its own expense any defect in materials or workmanship that may occur or develop prior to Subcontractor's release from responsibility to Owner and KROG, nor shall such use or occupation constitute acceptance of Subcontractor's Work by KROG, Owner, or Architect/Engineer.

## **ARTICLE 18**

### **DISPUTE RESOLUTION AND VENUE**

18.1 The laws of the State of New York shall govern all matters arising from this Subcontract. Subcontractor hereby accepts New York's jurisdiction and agrees to accept service of process as if it were personally served within New York.

18.2 At KROG's election, in matters where the Owner is or may be a party, the forum selection and/or dispute resolution provisions in KROG's Contract with Owner shall govern and apply to the resolution of disputes between KROG and Subcontractor. In such a case, and if KROG so elects, Subcontractor consents to be bound by the aforesaid provisions in the Prime Contract and agrees to litigate any and all disputes arising under this Subcontract, to which Owner is or may be a party, in the manner and in the forum specified in KROG's Contract with the Owner. KROG will provide Subcontractor with written notice of its election, if any, to proceed as set forth above in this paragraph; such election shall be binding on Subcontractor.

18.3 Subcontractor agrees to indemnify KROG for any and all costs, including attorneys' fees, incurred in defending a claim by the Owner or any other party in disputes resolution procedure if such claim relates to or arises from the Subcontractor's Work.

18.4 At the sole option of KROG, all claims, disputes and other matters in question between the Subcontractor and KROG arising out of or related to the Subcontractor's Work, the Subcontract or the breach thereof, shall be decided by arbitration in accordance with the

Construction Industry Arbitration Rules of the American Arbitration Association then obtaining, unless (i) KROG has otherwise elected under paragraph 18.2 above or 18.5 below, or (ii) such claims have been waived by the making and acceptance of final payment. If a demand for arbitration is filed by the Subcontractor, KROG will advise the Subcontractor, within thirty (30) days after receipt of such a demand for arbitration, if KROG exercises the option to arbitrate or rejects arbitration; such election, once made, shall be binding. The filing of a demand for arbitration by KROG shall be deemed an election to arbitrate and shall constitute the exercise of the option of KROG to proceed with arbitration. KROG may join or consolidate arbitration with the Owner, Architect/Engineer, any other subcontractor, or any other party having an interest in the proceeding. This agreement to arbitrate shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award rendered by the arbitrators shall be final and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof.

18.5 Nothing contained in this Article 18 or elsewhere in this Subcontract shall prohibit KROG from commencing an action (lawsuit) against the Subcontractor or its Surety, if any, for any non-performance or breach of a term or condition of this Subcontract. If such action is commenced by KROG, Subcontractor shall pay KROG any and all costs, expenses and attorneys' fees which KROG may suffer, incur or become liable for by reason of KROG's enforcing, or attempting to enforce, the terms and provisions of this Subcontract. Any such action, and all actions by either party hereto, shall be venued and heard exclusively in Supreme Court, Erie County, by a justice sitting without a jury.

18.6 Subcontractor acknowledges that its representatives have read and are familiar with any and all provisions in the Contract Documents which relate to waivers or limitation on claims or damages, time extensions, no damages for delay and the time periods for notice or submission of claims, and further agrees that all such provisions are INCORPORATED HEREIN BY REFERENCE and are applicable to this Subcontract.

18.7 Pending final decision of a dispute hereunder, Subcontractor shall proceed diligently with the performance of the Subcontract Work. In no event will the existence of a dispute between KROG and Subcontractor, including a dispute over payment, form the basis for Subcontractor to stop the Work required under this Subcontract.

## **ARTICLE 19**

### **PUBLICITY**

Subcontractor agrees that it shall not publish, cause to be published, or be instrumental in publishing any information in any form in newspapers, periodicals, magazines, or other publications concerning its Work or this Subcontract without prior written permission from KROG. Subcontractor further agrees that it shall not display any signs or posters in or upon the Project or the Project site without prior written permission from KROG.

## **ARTICLE 20**

### **SUBCONTRACTS**

Subcontractor hereby agrees to incorporate into subcontracts, purchase orders, or other such agreements with any other party furnishing labor, materials, or services for Subcontractor's Work, this Subcontract and the Contract Documents. Neither this Subcontract nor the Contract Documents, , however, shall create a contractual relationship between KROG and Subcontractor's subcontractors or suppliers or any other third parties.

## **ARTICLE 21**

### **MISCELLANEOUS**

21.1 The partial or complete invalidity or unenforceability of any one or more provisions of this Subcontract shall not affect the validity or continuing force and effect of any other provision, but such remaining provisions shall be construed as though such illegal or unenforceable provision had not been included herein. The failure of KROG to insist, in any one or more instances, upon the performance of any of the terms, covenants or conditions of this Subcontract, or to exercise any right, shall not be construed as KROG's waiver or relinquishment of such term, covenant, condition or right as respects further performance.

21.2 Notwithstanding any other provision, KROG may withhold any payment or payments due or to become due to Subcontractor if and to the extent that KROG deems it necessary or desirable to protect itself against possible loss or damages for any reason, including but not limited to Subcontractor's failure to pay its bills when due. Additionally, KROG may take such steps as it deems necessary to ensure that money paid with any progress payment will be utilized to pay such bills.

21.3 Should the plans, specifications, addenda, general conditions and supplementary general conditions conflict, or should a question arise as to whether any material is included in this Subcontract, then a decision by KRGO concerning the responsibility for performing any work under the Contract Documents or any subcontracts shall be final and binding on the Subcontractor unless such decision is found to be arbitrary and capricious.

21.4 Any backcharges by KROG, including attorneys' fees, overhead and administrative costs are hereby agreed to be properly deductible from monies which might otherwise be due to Subcontractor and , therefore, do not become Subcontractor's property.

21.5 Subcontractor shall pay KROG any and all costs, expenses and attorneys' fees which KROG may suffer, incur or become liable for by reason of any breach of this Subcontract or KROG's enforcing, or attempting to enforce, the terms and provisions of this Subcontract. This provision applies in all situations when KROG incurs attorneys' fees as a result of Subcontractor's non-performance or breach of this Subcontract including, but not limited to, when a dispute proceeds in the forum determined by KROG's Contract with the Owner, or in

arbitration, or in litigation, and whether the same be commenced by KROG or Subcontractor or by another party.

21.6 Notwithstanding any provision of contract or law, Subcontractor hereby agrees that any lawsuits or actions by Subcontractor against Owner, KROG, or its Surety, arising from or relating to this Subcontract, must be commenced no later than one (1) year after the last day of Subcontractor's performance of substantial labor or supplying substantial materials to the Project. Any lawsuit not so commenced shall thereafter be forever barred by the limitation of time.

21.7 Should one or more other contract, now or hereafter, exist between the parties hereto or with an affiliated corporation or company of the parties, concerning this or any other construction project, then a breach by the Subcontractor of any contract may, at the option of KROG, be considered a breach of all contracts; and in that event, KROG may terminate any or all of the contracts so breached, or may withhold moneys due or to become due on any such contracts, and apply the same toward payment of any damages suffered on that or any other such contracts.

21.8 All notices shall be delivered in one of the following ways: certified mail, return receipt request; telefax between the hours 8:30 a.m. and 5:30 p.m. Monday – Friday with originating machine confirmation notice attached to the original hardcopy and produced upon demand; or hand-delivered with either a signed receipt or affidavit of service retained by the party giving notice. Notices shall be sent to the Subcontractor at the address on the Subcontract Form or to such other locations where Subcontractor is or does business.

21.9 Captions are inserted only as a matter of convenience and in no way define, limit, or describe the scope of this Subcontract or the intent of any provision contained herein.

21.10 This Subcontract constitutes the entire agreement between the parties hereto and shall not be amended or modified except as provided herein. There are no agreements or understandings between the parties concerning the Work which are not set forth herein. The Subcontract and the Contract Documents are the sole evidence of the meaning and contents hereof. No provision of this Subcontract may be waived except by written instrument signed by both parties hereto.

21.11 Except as otherwise provided herein, no provision of this Subcontract shall in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person a third-party beneficiary of this Subcontract or of any one or more of the terms hereof or otherwise give rise to any cause of action in any person not a party hereto.

## **ARTICLE 22**

### **SUPPLEMENTAL PAGES**

Supplemental pages attached hereto are made a part of this Subcontract, in addition to all other attached documents referenced elsewhere herein. Such supplemental pages are as follows:





DESIGN-BUILD SUBCONTRACT  
AMENDMENT NO. 1  
Exhibit F

WITNESSETH:

WHEREAS, KROG on \_\_\_\_\_, \_\_\_\_\_, entered into an Agreement with \_\_\_\_\_ (Owner), to construct \_\_\_\_\_ (Project), for Owner at or near \_\_\_\_\_ in accordance with plans and specifications, prepared by \_\_\_\_\_ (Architect/Engineer); and

WHEREAS, The parties have entered into a Subcontract agreement made this \_\_\_\_\_ day of \_\_\_\_\_, 2007, by and between \_\_\_\_\_ (Subcontractor) and The Krog Group, LLC, a limited liability company organized and existing under the laws of the State of New York, with its principal office in the Town of Orchard Park, NY (Krog)

WHEREAS, the parties agree that Subcontractor shall in place of KROG perform part of the Agreement between KROG and Owner;

WHEREAS, the parties agree that Subcontractor shall in place of KROG provide professional services associated with the design of the Work set forth in Article 2 of the Design-Build Subcontract

NOW, THEREFORE, the parties mutually agree as follows:

- .1 The design professionals and consultants engaged by the Subcontractor shall be persons or entities duly licensed to practice their professions in the jurisdiction where the Project is located and are listed as follows:

<u>Name &amp; Address</u>	<u>License Number</u>	<u>Relationship to Subcontractor</u>
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- .2 The Subcontractor's designated representative is: \_\_\_\_\_.

- .3 The Subcontractor's designated representative shall not be changed without ten days written notice to Krog.

- .4 When applicable law requires that services be performed by licensed professionals, the Design-Builder shall provide those services through the performance of qualified persons or entities duly licensed to practice their professions.
- .5 The Subcontractor shall be responsible to Krog and the Owner for acts and omissions of the Subcontractors employees, engineers, subcontractors, subconsultants and their agents and employees, and other persons or entities, including other design professionals, performing any portion of the Subcontractor's obligations under the Design-Build Subcontract.
- .6 With respect to the Work of this Subcontract, Subcontractor, their heirs, successors and assigns, shall, to the fullest extent permitted by law, defend, indemnify and hold harmless KROG and Owner, their officers, directors, members, consultants, agents employees and other subcontractors or anyone else employed directly or indirectly by any of them or anyone for whose acts and of them may be liable from all claims, liabilities, penalties, costs, losses, damages, demands, and expenses, including but not limited to attorneys' fees, arising out of or in any way related to the work of the Subcontractor.
- .7 In addition to insurance required elsewhere under this Subcontract, Subcontractor shall obtain, either itself or through their sub consultant, professional liability insurance for claims arising from the negligent performance of professional services under this Subcontract. Such professional liability insurance shall be written for not less than \$2,000,000 per claim in the aggregate with a deductible not to exceed \$15,000. The Professional Liability Insurance shall include prior acts coverage sufficient to cover all services rendered by the Subcontractor and by its subconsultants. This coverage shall be continued in effect for a period of one (1) year after the Final Completion of the Project.
- .8 The Subcontractor shall provide to Krog and the Owner for their review design documents sufficient to establish the size quality and character of the Project, or applicable portion thereof under this Design-Build Subcontract; its mechanical and/or electrical systems; and the materials and such other elements of the Project to the extent required by the Design-Build Subcontract. Deviations, if any, from the Design-Build Subcontract requirements or the Plans and Specifications shall be disclosed in writing to Krog by the Subcontractor.
- .9 Krog and the Owner shall review the Subcontractor's preliminary design documents, however such review shall not relieve the Subcontractor of their obligations for design under this Subcontract. Upon review of preliminary design documents, Subcontractor shall provide construction documents for final review by Krog and the Owner. The construction documents shall set forth in detail the requirements for construction of the Project, or applicable portion thereof under this Subcontract. The construction documents shall include drawings and specifications that establish the quality levels of materials and systems required. Deviations, if any, shall be disclosed by the Subcontractor in writing. Construction documents may include drawings, specifications and other documents and electronic data setting forth in detail the requirements for construction of the Work, and shall (a) be consistent with the reviewed preliminary

design documents; (b) provide information for the use of those in the building trades; and (c) include documents customarily required for regulatory agency approvals.

- .10 The Subcontractor shall meet with Krog, the Owner and other parties as Krog may require to review the progress of the design and construction documents and to coordinate the design and work of Subcontractor with other trades employed by Krog and/or the Owner.
- .11 Upon authorization from Krog, the Subcontractor shall, with the assistance of Krog and/or the Owner, prepare the filing documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.
- .12 The Subcontractor shall obtain from each of the Subcontractor's professionals and furnish to Krog and/or the Owner certifications with respect to the documents and services provided by such professionals (a) that, to the best knowledge, information and belief, the documents or services to which such certifications relate (i) are consistent with the project criteria set forth in the Subcontract, except to the extent specifically identified in such certificate, (ii) comply with applicable professional practice standards, and (iii) comply with applicable laws, ordinances, codes, rules and regulations governing the design of the Project; and (b) that Krog and the Owner, and their subcontractors and consultants shall be entitled to rely upon the accuracy of the representations and statements contained in such certifications.
- .13 The Subcontractor shall perform no construction Work prior to Krog and/or the Owner's review of the construction documents. The Subcontractor shall perform no portion of the Work for which the documents require Krog and/or the Owner's review of submittals, such as shop drawings, product data and samples, until such time as Krog and/or the Owner have reviewed such submittals.
- .14 The construction Work shall be in accordance with reviewed submittals, except that the Subcontractor shall not be relieved of responsibility for deviations from requirements of the Subcontract documents by Krog and/or the Owner's review of design and construction documents or other submittals such as shop drawings, product data, samples or other submittals unless the Subcontractor has specifically informed Krog in writing of such deviation at the time of submittal and (1) the Krog has provided written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Subcontractor shall not be relieved of responsibility for errors or omissions in design and construction documents or other submittals such as shop drawings, product data or other submittals by Krog and/or the Owner's review thereof.
- .15 The Subcontractor shall direct specific attention, in writing or on resubmitted design and construction documents or other submittals such as shop drawings, product data, samples or similar submittals, to revisions other than those requested by Krog and/or the Owner on previous submittals. In the absence of such written notice, Krog and/or the Owner's review of a resubmission shall not apply to such revision.

- .16 The Subcontractor shall cause professional design services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, shop drawings and other submittals prepared by such professional. Shop drawings and other submittals related to the Work designed or certified by such professionals, if prepared by others, shall bear such design professional's written approval. Krog and/or the Owner shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals by such design professionals.
- .17 The Subcontractor shall keep Krog informed of the progress and quality of the Work.
- .18 The Subcontractor shall be responsible for the supervision and direction of the Work, using the Subcontractor's best skill and attention. If the Subcontract documents, design or construction documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Subcontractor shall evaluate the jobsite safety thereof and shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures.
- .19 The Subcontractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.
- .20 Subcontractor, upon execution of this subcontract, grants to Krog a non-exclusive license to reproduce and use the design and construction documents prepared under this agreement and to use such documents in connection with the Project, including the Project's further development by Krog and/or the Owner and others retained by Krog and/or the Owner for such purposes, including other design professionals.
- .21 If this Subcontract is terminated for any reason, the Subcontractor and each of the Subcontractor's design professionals shall be contractually required to convey to Krog a non-exclusive license to use that design professional's Instruments of Service for the completion, use and maintenance of the Project.
- .22 With respect to the design requirements set under this Subcontract, the Subcontractor and their heirs, successors, and assigns, shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Krog, its officers, directors, members, consultants, agents, and employees, subcontractors or anyone else employed directly or indirectly by any of them or anyone for whose acts any of them may be liable from all claims, liabilities, penalties, costs, losses, damages, demands, and expenses, including but not limited to attorneys' fees, arising out of or in any related to the work of Subcontractor, whether sustained before or after completion thereof. Subcontractor's indemnification obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity that otherwise would exist under the law of New York State.

THE KROG GROUP, LLC

SUBCONTRACTOR

BY \_\_\_\_\_  
(signature)

BY \_\_\_\_\_  
(signature)

PRINT NAME Paul R. Neureuter

PRINT NAME \_\_\_\_\_

TITLE President

TITLE \_\_\_\_\_

DATE \_\_\_\_\_

DATE \_\_\_\_\_