

## **SUBCONTRACTOR AGREEMENT (OPEN SHOP - STIPULATED SUM)**

The terms and conditions set forth herein are entered into and agreed by and between Frankoski Construction and Subcontractor to establish the terms and conditions under which Subcontractor will perform work on the Project awarded to the Subcontractor by Contractor pursuant to a written Purchase Order or otherwise. Defined terms herein shall have the meaning prescribed in the Purchase Order.

### **1. Subcontractor Work.**

The scope of work to be performed by Subcontractor shall be established by the Purchase Order (“Subcontract Work”), and shall be done under the direction of the Contractor, and to the satisfaction of the Contractor, Owner and Architect/Engineer. Subcontractor shall perform the Subcontract Work diligently, continuously and with the highest standards in the industry to the satisfaction of the Contractor, Owner and Architect/Engineer. The Subcontract Work to be performed by the Subcontractor includes that work specifically set forth in the Purchase Order, as well as any and all other work incident or related thereto, or reasonably inferable therefrom, including but not limited to that work reasonably necessary for the Subcontract Work to be complete, properly working and totally acceptable as required by the Contract Documents. It is the express intent of the parties that all work usually performed by the trade covered by the Purchase Order and required by the Contract Documents shall be performed by the Subcontractor, in addition to the work specifically set forth in the Purchase Order. The Subcontract Work includes, without limitation, the construction, labor, materials and services required by the Contract Documents or reasonably inferable therefrom and includes all supervision, transportation, mobilization expenses, tools, equipment, machinery, hoisting, rigging, appliances, surveying and layout, taxes, permits, incidentals and all other things necessary for the safe, proper and timely performance of the Subcontract Work to the satisfaction of the Contractor, Owner and/or Architect/Engineer.

### **2. Prime Contract.**

The Subcontractor agrees to be bound to the Contractor by the terms and conditions of the Prime Contract and any modifications or amendment thereto, including but not limited to specifications, plans, terms and conditions, insurance requirement(s), indemnification provision(s), choice of law provision(s), venue provision(s), liquidated and/or consequential damage(s) provision(s) and/or supplemental general conditions referred to therein, to the extent applicable to the performance of the Subcontractor Work, and that the Prime Contract is incorporated herein by reference. The Subcontractor further agrees that all conditions and requirements imposed, or to be imposed, upon the Contractor by the Prime Contract shall be performed by the Subcontractor insofar as applicable to the Subcontractor Work, and the Subcontractor hereby assumes toward the Contractor all obligations and responsibilities that the Contractor, has assumed or will assume under the Prime Contract toward the Owner with respect to the Subcontractor Work. A copy of the Prime Contract (from which compensation amounts may be deleted) has been made available to the Subcontractor. In the event of any conflict between the terms and conditions of this Agreement and the Prime Contract, the more strict provisions in favor of the Contractor shall govern as determined by Contractor in its sole discretion.

### **3. Contract Sum**

The Contractor shall pay the Subcontractor for the performance of the Subcontractor Work, the sum set forth in the Purchase Order (“Subcontract Price”). The Subcontract Price may be adjusted by differences between estimated and actual quantities for unit price items to the extent of any adjustment Contractor receives from Owner. The Subcontract Price includes all Federal, State, County, Municipal and other taxes imposed by law and based upon labor, services, materials, equipment or other items acquired, performed, furnished or used by or levied or assessed with respect to the Subcontract Work, including but not limited to sales, use and personal property taxes payable by or levied or assessed against the Owner, the Contractor or the Subcontractor. The Subcontract Price is not subject to escalation due to any increase in labor rates, material costs, or any other costs unless the Contractor receives additional compensation due to escalation from the Client for the Subcontract Work. The Subcontract Price is based on Subcontractor’s agreement that Contractor is not liable, absent actual fraud or intentional misconduct, for any damages due to delays, accelerations, impact, non-performance, interferences with performance, suspension or changes in the performance or sequence of the Subcontract Work, whether or not caused by the Contractor. The Contractor has the right to vary the sequence, delay, accelerate or suspend the execution of the whole or any part of the Subcontract Work without compensation to the Subcontractor. Notwithstanding anything contained herein, Contractor, in its sole discretion, may submit a claim to the Owner for additional compensation in the event the Owner delays the Subcontractor and/or the Owner delays the Contractor and the Subcontractor is thereby delayed. In the event such claim is submitted to the Owner on behalf of Subcontractor, Subcontractor shall accept the Contractor’s prosecution of such claims, at the Subcontractor’s expense, and any money that Contractor may receive from the Owner therefor, in full and complete satisfaction and liquidation of Contractor’s obligation

to Subcontractor, it being understood and agreed that the Contractor shall not have any other liability or responsibility to the Subcontractor by reason of delays or any other matter identified herein.

#### **4. Completion Period**

4.1 Subcontractor will provide a sufficient competent trade force in order to complete the Subcontractor Work in a continuous and timely fashion as related to the Contractor's overall schedule. Failure to staff the job with adequate resources to achieve schedule requirements will result in termination without reimbursement. Time is of the essence with respect to the commencement, progress, and completion of the Subcontract Work. The Subcontractor shall, at its sole expense, work overtime, including Saturdays and Sundays, and/or hire additional labor or Sub-subcontractors, at the direction of Contractor, if, in the judgment of Contractor, such overtime, Saturday/Sunday work and/or additional labor or Sub-subcontractors are necessary to meet progress requirements due to any delays caused by the Subcontractor or the failure by the Subcontractor to commence or progress its work timely or the failure by the Subcontractor to be in conformity with the job progress. Contractor shall have the right to backcharge Subcontractor for any costs incurred by Contractor, including but not limited to, all costs associated with the supervision of overtime work. In the event Subcontractor fails to proceed with the Subcontract Work as directed by the Contractor or, in a prompt and diligent manner or, in the sole opinion of Contractor, jeopardizes the progress schedule in any manner, Contractor, after providing Subcontractor with notice and 24 hours to cure, shall have the right to take any and all action deemed necessary (e.g., adding additional manpower) by Contractor, in its sole discretion, to safeguard the project schedule and backcharge Subcontractor for all costs and associated mark-up associated with such action including, without limitation, supplementing Subcontractor's manpower. Nothing contained herein shall limit Contractor's rights and remedies against Subcontractor. Any delays in the project schedule shall result in backcharges to the Subcontractor for any and all liquidated or other damages that may be assessed against, or incurred by, Contractor, which are directly or indirectly attributable to Subcontractor's failure to perform in accordance with the Contract documents, as well as any extra costs or damages incurred by Contractor directly or indirectly resulting from Subcontractor's failure including, without limitation, recovery of Contractor's overhead and expenses. Failure to continue work until completion shall subject Subcontractor to penalty. Subcontractor understands there may be both union and open shop labor utilized on the project and is responsible for maintaining the schedule. Subcontractor and its workforce shall not participate in work stoppages, slowdowns or protests on this site. Notwithstanding any dispute, controversy or question between Contractor and Subcontractor, the Subcontractor agrees that it will not stop or delay any portion of the Subcontract Work. Such stoppage or delay shall be a default and material breach entitling Contractor to terminate this Subcontract even if the Subcontractor's position in the underlying dispute is ultimately determined to be correct.

4.2 In the event the Subcontractor is delayed in the performance of its work, for any reason whatsoever, Subcontractor shall only be entitled to an extension of time provided, however, Contractor received additional time from the Owner. In no event shall Contractor or Owner be liable to Subcontractor for prospective or speculative profits, or special, indirect or consequential damages, including, but not limited to, a claim for delay damages, extended field conditions, unabsorbed home office overhead, interference or any other additional expenses claimed by the Subcontractor in connection with its work. Any claims for delay must be made in writing with 24 hours of the incident causing supposed delay and must be accompanied by a detailed list of expenses or damage relating to the delay as well as a clear explanation of how the delay impacts the critical path of the project or they will not be considered.

#### **5. Payment**

5.1 Upon signing of this contract, Subcontractor shall submit to the Contractor's project superintendent (the "Project Superintendent") an AIA G703 – Schedule of Values to be used as the basis for payment requisitions for the duration of the Project. Project Superintendent shall review and advise of any required changes prior to the first payment requisition.

5.2 Contractor shall make payment to the Subcontractor for the Subcontract Work actually performed and approved by the Client for payment. The estimate or determination of the Contractor and Owner of the value of work performed or any deduction thereto shall be binding on the Subcontractor. To the fullest extent permitted by law, Subcontractor agrees that Contractor shall be under no obligation to pay the Subcontractor for any Subcontract Work done until and unless Contractor has been paid therefor by the Owner. Contractor's receipt of payment from Owner is a condition precedent to any amount due from Contractor to Subcontractor irrespective of the Owner's basis of nonpayment. The time when such payments shall be due the Subcontractor shall be postponed until one week after Contractor has received same from the Owner, and the Subcontractor hereby expressly accepts the risk that it will not be paid for Subcontract Work performed in the event that Contractor, for whatever reason, is not paid by the Owner for such work. The Subcontractor further agrees and acknowledges that it relies exclusively for payment of the Subcontract Work performed on the credit and ability to pay of the Owner, and not that of Contractor or its surety. Retainage shall be withheld from all payments to the Subcontractor where withheld

pursuant to the Contract, and will be paid when the Contractor receives final payment and retainage from the Owner. The Subcontractors' acceptance of any payment shall be and operate as a release to the Contractor of any and all claims the Subcontractor has relating to the Subcontract excepting only claims for retainage. Notwithstanding anything contained herein and regardless of the Contractor's receipt of payment from the Owner, if the Contractor determines, in its sole and exclusive discretion, that the Subcontractor has performed deficient or non-compliant Subcontract Work, failed to perform any of its obligations under the Subcontract, or is otherwise in breach or has threatened to breach the Subcontract then the Contractor may withhold payment from the Subcontractor in the greater of: (i) the amount the Contractor, in its sole discretion, reasonably determines to be necessary to fully protect and insure itself against any actual or potential liability or damage directly or indirectly relating to the Subcontractor's failures, defaults, breach or threatened breach; or (ii) twice the value for the item(s) of Subcontract Work that is incomplete, defective or non-compliant as set forth in the Schedule of Values contemplated in section 5.1 of this Agreement. The Subcontractor's right to payment shall not be enlarged or modified by reason of the existence of any labor and material payment bond, mechanic's lien discharge bond or other security that may exist.

5.3 Any and all funds payable to the Subcontractor hereunder are declared to constitute trust funds in the hands of the Subcontractor, to be applied first to payment of claims of sub-subcontractors, architects, engineers, surveyors, laborers and suppliers arising out of the work, to claims for utilities furnished and taxes imposed, and to the payment of premiums on surety bonds and other bonds before application to any other purpose.

5.4 In addition to all other remedies available to the Contractor under the Subcontract or law, the Contractor may withhold payment to the Subcontractor because of (i) defective work not remedied; (ii) claims filed, or reasonable evidence of probable filing of claims, by third parties relating to the Subcontractor's work; (iii) failure of the Subcontractor to make payment properly to sub-subcontractors and/or suppliers; (iv) reasonable evidence that the work cannot be completed for the unpaid balance of the Subcontract price; (v) failure to maintain the schedule; (vi) persistent offsets or backcharges arising out of any request for work issued by the Contractor to the Subcontractor. The amount the Contractor may withhold shall be the greater of: (i) the amount the Contractor, in its sole discretion, reasonably determines to be necessary to fully protect and insure itself against any actual or potential liability or damage directly or indirectly relating to the Subcontractor's failures, defaults, breach or threatened breach as set forth herein; or (ii) twice the value for the item(s) of Subcontract Work that is incomplete, defective or non-compliant as set forth in the Schedule of Values contemplated in section 5.1 of this Agreement. The Contractor shall have the right but not the obligation to pay the Subcontractor's sub-subcontractors and suppliers directly upon satisfactory proof of non-payments by the Subcontractor.

## **6. Progress Payments:**

6.1 On the 21st day of each month the Subcontractor shall submit to the Project Superintendent a pencil copy of the requisition for payment for all labor and materials incorporated in the work up to the last day of the month of the requisition minus % of retainage as per the contract documents and purchase order. Following approval by the Project Superintendent, the Subcontractor shall submit a formal copy to the Contractor's Main Office and to the Project Superintendent by the 21st day of each month. All payment requisitions must be presented along with a schedule of values using AIA documents G702 and G703 and a Release of Liens for Progress Payment as applicable and an AIA Form G706A – Affidavit of Release of Liens and an AIA Form G706 – Affidavit of Payment of Debts and Claims and all other documents required for the Contractor to receive payment from the Owner in connection therewith. All trade PMs will submit a monthly safety meeting and record to the FCC PM along with their monthly pay application. Payment will not be processed without accompanying safety document. The Contractor will pay the amount of the requisition within forty five (45) days provided payment has been received from the Owner. Incomplete or inaccurate Payment Requisitions or Release of Liens forms, or absence of safety documents will cause payment to be deferred to the following month as will failure to submit payment requisitions by the required due dates.

6.2 When submitting the second payment requisition package, the Subcontractor shall also submit a list of all major sub-subcontractors and suppliers being used on the Project along with contact names, addresses and phone numbers. Any additions to this list must be provided with each subsequent payment requisition.

**7. Final Payments:** Final payments constituting the entire unpaid balance of the contract sum excluding retainage shall be made by the Contractor to the Subcontractor when the Subcontractor Work has been completed, the Agreement fully performed and approved by the Owner and Contractor, and all closeout documents required by the project scope and specifications have been delivered to the Contractor including but not limited to as-built drawings, guarantees/warranties/maintenance and pertinent literature. No final requisition will be accepted by the Contractor prior to submission of all closeout documents by the Subcontractor. The Subcontractor shall submit to the Contractor's Project

Superintendent a pencil copy of the requisition for payment for the balance of labor and materials incorporated in the work by the 21st day of the month. Following approval by the Project Superintendent, the Subcontractor shall submit a formal copy to the Contractor's Main Office and to the Project Superintendent by the 1st day of the following month. All final payment requisitions must be presented along with a schedule of values using AIA documents G702 and G703, a Release of Liens for Final Payment, an AIA Form G706A – Affidavit of Release of Liens and an AIA Form G706 – Affidavit of Payment of Debts and Claims. All completed payment requisitions and Release of Liens documents must be submitted to the Contractor's main office in addition to the project site. The Contractor will pay the amount of the requisition within forty five (45) days, provided payment has been received from Owner.

**8. Retainage Payments:** Retainage payments shall be made by the Contractor to the Subcontractor upon final acceptance of the work by the Owner and in accordance with the terms of the Prime Contract. Contractor shall notify Subcontractor when Retainage Requisitions will be accepted. Subcontractor shall submit to the Contractor's Project Superintendent a pencil copy of the retainage requisition for payment. Following approval by the Project Superintendent, the Subcontractor shall submit a formal copy to the Contractor's Main Office and to the Project Superintendent within five days of approval of the pencil copy. All retainage payment requisitions must be presented along with a schedule of values using AIA documents G702 and G703, a Release of Liens for Retainage Payment, an AIA Form G706A – Affidavit of Release of Liens and an AIA Form G706 – Affidavit of Payment of Debts and Claims. All completed payment requisitions and Release of Liens documents must be submitted to the Contractor's main office in addition to the project site. Retainage payment will be made within forty five (45) days of invoice presentation, provided payment has been received from Owner.

## **9. Other Conditions and Provisions**

**9.1 Safety** – Subcontractor shall follow all standard safety procedures as required and set forth by Contractor and by local, state and Federal safety regulators. The Subcontractor shall provide all necessary safety equipment and supplies to its employees and agents, take all necessary safety precautions with respect to performance of this Agreement, shall comply with any additional safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons or property in accordance with the requirements of the Prime Contract. The Subcontractor shall immediately report accidents to the Contractor and shall report to the Contractor within twenty-four (24) hours any injury to an employee or agent of the Subcontractor which occurred at the site. The Subcontractor designates \_\_\_\_\_ as the qualified person from his/her staff as safety officer who will make weekly inspections of his/her workforce for adherence to safety guidelines as listed above and who is responsible for educating its own trade force for safety protocols for each project. All costs of any kind relating to injury of a member of the subcontractor trade force are the sole responsibility of the subcontractor. All trade PMs will submit a monthly safety meeting and record to the FCC PM along with their monthly payment application. Violations of safety rules will result in disciplinary action up to and including a \$100 per incident backcharge. Repeat offenders (individuals) will be subject to discharge from project site.

**9.2 Quality Control** – The Subcontractor is responsible for total quality control of its work. Prior to performing work, Subcontractor shall verify field conditions and conformance with drawings and specifications. Subcontractor shall also inspect any prior trade's work for non-conformance (e.g., level, plumb, square, finish, etc.) as related to its work and will notify Project Superintendent in writing a detailed account of deficiencies. Failure to verify conditions prior to arrival of work crews on site shall in no case be justification for a delay claim. Under no circumstances will "good work over bad" be accepted. Subcontractor will implement a quality control plan that meets or exceeds the procedures outlined in the FCC Subcontractor Quality Control Plan, a copy of which can be viewed at <http://frankoski.com/subcontractors-vendors.html> . The Owner, Architect/Engineer and Contractor shall have the right to inspect the Subcontract Work and, from time to time, in their discretion, to take samples from and perform testing on any part of the Subcontract Work.

**9.3 Coordination of Work-** The Subcontractor is responsible to coordinate work with that of other trades as required by the Project Superintendent and/or as otherwise necessary to avoid interferences, conflicts and/or re-routing of work. The Subcontractor shall overlay their work through direct communications with other trades and the Project Superintendent. Subcontractor must have their own full set of conformed construction documents on site at all times. Subcontractor shall participate in the preparation of coordinated drawings as required by the Contractor, specifically noting and advising the Contractor of any interference. Any conflicts or inconsistencies shall be brought to the immediate attention of the Project Superintendent. Failure to do so will result in reimbursement by the Subcontractor to the affected trade(s) for labor, material and profit associated with any required corrective measures that need to be taken. Should the proper and accurate performance of the Subcontract Work hereunder depend upon

the proper and accurate performance of other work not covered by this the Purchase Order, the Subcontractor shall carefully examine such other work, determine whether it is in fit, ready and suitable condition for the proper and accurate performance of the Subcontract Work, use all means necessary to discover any defects in such other work, and before proceeding with the Subcontract Work, report promptly, but before any work is commenced, any improper conditions and defects to Contractor in writing and allow Contractor a reasonable time to have such improper conditions and defects remedied. Upon the commencement of work by the Subcontractor, the Subcontractor shall have conclusively accepted such contiguous work as fit, ready and in a condition suitable and sufficient for the proper and accurate performance of the Subcontract Work hereunder.

**9.4 Insurance** - The Subcontractor will maintain insurance coverage as per the project specifications and the Prime Contract and as required in Exhibit A attached hereto. In the event of a conflict between Exhibit A and the requirements of the Prime Contract, the higher level of requirements shall apply. Upon the signing of this Agreement, Subcontractor shall furnish a Certificate of Insurance to Contractor's Main Office indicating all applicable coverages and naming "Frankoski Construction Company" as Certificate Holder, and "Frankoski Construction Company" and any others as required under the Prime Contract as additional insureds. Coverage must remain effective during current and completed operations. All insurance certificates are required prior to the commencement of the Subcontractor Work. If this requirement is not met, this Agreement will automatically become null and void. Likewise, any insurance coverage that expires prior to completion of all Subcontractor Work (including change orders), will be considered a breach of contract and will also subject the Subcontractor to fees and backcharges. Insurance coverage shall extend through the specified warranty period. In all cases Contractor shall comply with the Insurance Provisions set forth in Exhibit A, provided that if the Prime Contract imposes higher limits or other or more restrictive obligations on Contractor which Contractor is required to "flow down" to Subcontractor, Subcontractor shall comply with the provisions in the Prime Contract.

**9.5 Staffing** – The Subcontractor Project Executive shall be \_\_\_\_\_ and the Subcontractor will have a designated Site Foreman for the duration of the Project on site who shall be \_\_\_\_\_. He /She must speak fluent English and be capable of all layout per plan and specification interpretation. Contractor retains the right to request change of foreman at no additional cost if for any reason the trade foreman does not follow the guidelines of this contract. The foreman shall be replaced within 5 working days with a foreman meeting all the qualifications as outlined in the contract. All tradespeople must be qualified in their trade and job description. The Subcontractor will work from a complete set of plans and specifications and will include reproduction costs in his/her contract. Subcontractor responsible to provide competent workforce with legal immigration status. Any legal action, fines, etc. relating to the immigration status of the workforce is the responsibility of the Subcontractor. Subcontractor is also responsible for any labor disputes or issues that may arise involving their respective trade(s) and will ensure there is no interruption in progress or scheduling.

**9.6 Meetings** - Project scheduling and progress meetings will be held on site as required by the Project Superintendent. The Subcontractor's Project Executive shall attend all required meetings and shall be authorized to make decisions regarding the schedule, scope of work and contract terms. Advance notice will be in writing at least five days prior to the meeting date. Failure to attend a meeting will result in a minimum penalty of \$ 500.00 per occurrence.

**9.7 Submittals** - The Subcontractor will submit a schedule of values on AIA form G703 to the Contractor upon the signing of this Agreement. Within two weeks of signing this Agreement, the Subcontractor will submit a submittal schedule for its phase of the work on AIA Document G712 or similar, listing all required submittals as per specifications and drawings and a time line for his/her phase of the work as it relates to the Contractor's schedule.

**9.8 Minor Changes in Work** - Changes in the scope of work not affecting cost or schedule must be issued in writing by the Contractor before performance of change. Any needed clarifications or changes must be submitted in writing as a Request for Information for approval by the Contractor. Any dispute arising from changes in the work shall be resolved separately through negotiation with the Contractor without delaying the project schedule. If agreement cannot be reached then the decision will be made through binding arbitration in accordance with this Agreement.

**9.9 Change Orders** – The Contractor reserves the right to make changes in, additions to and/or deletions from the Subcontract Work, as it may deem necessary, upon written order. The Subcontractor agrees to comply with all such written orders. The Subcontractor acknowledges and agrees that it will not be entitled to claim or receive additional compensation related to any additional work or change unless Subcontractor first obtains a written order from the Contractor authorizing the performance of the work and setting forth the additional payment that will be made for

such work. The foregoing, however, must be approved in writing from one of the following entities of Contractor, specifically Stan Frankoski, Joseph Frankoski, Anthony Frankoski, Stan Frankoski Jr., Greg Frankoski, Ian Frankoski, Dawn Forgione, or Brett Wilson. In the event that Contractor directs the Subcontractor to perform any item of work, which the Subcontractor claims involves extra or additional work, it shall, within two (2) calendar days after receipt of such direction, and before proceeding therewith, make written claim to Contractor, giving in detail the basis of its contention that the work is extra or additional, together with a detailed breakdown showing the additional cost of each item of labor and material. The Subcontractor shall then proceed with the work and keep contemporaneous records related to costs incurred on a time and material basis unless the Contractor directs otherwise in writing. A failure to make written notice of claim within the time specified, and in the manner as herein provided, shall constitute a waiver of such claim and no recovery may be had by the Subcontractor. In addition, a failure of the Subcontractor to perform this work, immediately after giving written notice of its claim, or on the third day subsequent to being directed to perform this work, whichever is less, shall constitute a material breach of this Subcontract. Subcontractor will only be entitled to an increase in the Subcontract Price if a change is also made to the Contract and Contractor receives additional payment from Client. Subcontractor acknowledges that the only means by which any Contractor employee or agent is authorized to procure services from the Subcontractor is in writing by Contractor's main office and as otherwise set forth herein. Any oral request for services is expressly not authorized by Contractor's corporate officers and Subcontractor may not rely upon any representations by any Contractor employee or agent to the contrary. Change Orders must be submitted and approved in writing by the Contractor before performance of the work. All proposed Change Orders must be broken down into Labor (man hours) and Materials (Cost per Line Item) organized by Trade and itemized by CSI Division and Section format indicating quantity take-offs and unit pricing. No other forms of proposals will be accepted. Change Orders can include a maximum markup of fifteen percent (15%) for overhead and profit over and above the bare cost for materials and labor. Approved Change Orders should then be added as separate line items on the G703 form for the next payment requisition. Any dispute arising from change orders shall first be resolved separately through negotiation with the Contractor without delaying the performance of the change order work or project schedule. If agreement cannot be reached then the decision will be made through binding arbitration in accordance with this Agreement. This same process shall apply to any and all claims or disputes that may arise between Contractor and Subcontractor. Any discovery of discrepancies between the plans and specifications and field conditions shall be brought to the attention of the Contractor in writing within three days of discovery, or no compensation shall be considered. It is the responsibility of the Subcontractor to take measurements and verify field conditions prior to installing any work.

**9.9.1** All work performed by the Subcontractor during the course of this Project shall be done through the Contractor.

**9.9.2** Subcontractor represents and warrants it will make no claims for additional compensation on account of performing extra work unless, prior to performing any such work, Subcontractor was issued a written authorization as noted above. Subcontractor hereby waives any claim(s) against Contractor, its surety, and/or the Owner for compensation or equitable adjustment of its contract value or contract time, changed conditions or extra work, except to the extent that same is allowed by the Owner.

**10. General** - All Trade foremen, workers, visitors, drivers, etc. will check in/out at main entrance via sign-in sheet. If required, all workers and visitors must wear name badges. Trade foreman must be available daily to meet and coordinate with the FCC site manager and other trades as necessary whenever requested by the FCC site manager to meet the schedule and complete each phase of the work.

**10.1** All workers will wear hard hats, vests and safety glasses while working - NO EXCEPTIONS. Smoking is prohibited in all areas of the project site - NO EXCEPTIONS. Playing of radios is prohibited. No eating or drinking on the project site. Appropriate clothing shall be worn at all times.

**10.2** Subcontractor shall provide each of its employees a Photo ID using the individual's photo Driver's License or other valid photo ID to be worn by the employee and clearly visible at all times while on the project site.

**10.3** The subcontractor's available space for equipment and logistics will be dictated solely by the FCC site manager without exception.

**10.4** Workers will only use portable toilet supplied by the Contractor.

**10.5** All debris created by the Subcontractor will be removed by its own work force at the end of each working day

and the work area left broom clean. The subcontractor must allocate a minimum of 15 minutes at the end of each workday for its trade force to clean up work areas and deposit trash in the dumpster supplied on site. Each subcontractor will provide broom, shovel, and plastic garbage container on wheels for its trade force to implement their own clean up. The subcontractor must be diligent and consistent in this practice. The workspace must be clean and safe for the start of each day. The Subcontractor will be charged at Contractor's current labor rate plus 20% at a minimum 4 hour charge for any debris created by the Subcontractor and removed and carried to the dumpster by the Contractor.

**10.6** Contractor has a Zero Tolerance Policy on theft. Anyone caught stealing or borrowing any materials or equipment without authorization by the Project Superintendent will not only be discharged from the project site, but will also be prosecuted to the fullest extent of the law.

**10.7** Contractor has a Zero Tolerance Policy on Drug and Alcohol use. Possession or use of these substances will be immediate cause for discharge of the individual from the project site.

**10.8** It is the responsibility of the Subcontractor to have an agent present during all material and equipment deliveries during specified project hours. Neither the Contractor nor Owner will sign for any deliveries.

**10.9** It is the responsibility of the Subcontractor to have an agent present during all inspections pertaining to the Subcontractor Work. If no one is present to represent Subcontractor, there will be a back charge of \$500 plus FCC management time billed at a rate of \$175/hour issued per absence.

**10.10** If for any reason due to the actions of the Subcontractor, its employees, any firm, or individual on its behalf, cause the Project to be shut down by any organization, or individual with authority to do so, all closure costs, fines, fees, and project overhead will be the responsibility of the Subcontractor. In addition a weekly back charge equaling 1% of the total cost of this Agreement will be deducted from the total contract amount until the project is reopened.

**10.11** Should Subcontractor at any time fail (i) to supply a sufficient number of properly skilled workers or sufficient material and equipment of the proper quality and quantity; (ii) to prosecute the work with promptness and diligence; or (iii) to promptly correct defective work; Contractor may, after two (2) days' written notice, mailed or delivered to Subcontractor's last known address, provide such labor, materials and equipment and deduct the cost thereof, together with all loss or damage occasioned thereby, including actual attorney's fees and other professional fees incurred, from any money then due or thereafter to become due Subcontractor and take possession of and finish the work by whatever method Contractor may deem expedient. In such event, Subcontractor shall not be entitled to receive any further payments until the work is complete. If the cost of finishing the work exceeds the unpaid balance of the contract amount, Subcontractor shall pay such difference to Contractor.

**10.12** Subcontractor shall be liable for any damages incurred by Contractor, including legal fees, as a consequence of the failure by the Subcontractor to comply with the terms and conditions of this Agreement.

**11. Damage Claims** - In the event that claim(s) for damage(s) are made by the Owner relating to Subcontractor Work, such as failure of the Subcontractor to perform in accordance with the Contractor's schedule, claims for lost revenue, costs related to relocation during construction, leasing of temporary space, inconvenience, etc., such claim(s) shall be passed along to the Subcontractor for their respective portion(s) of the claim(s). Pending final resolution of a Claim, the Subcontractor shall proceed diligently with performance of the Contract and the Contractor shall continue to make payments in accordance with the Contract Documents.

**12. Indemnification** - To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless Contractor, Owner any other person or entity required to be indemnified by Contractor under the Contract, and the officers, directors, employees, agents, insurers, successors and assigns of each, from and against any and all actual, threatened or alleged claims, citations, fines, forfeitures, penalties, liens, causes of actions, suits, demands, damages, liabilities, losses, costs and expenses, including, but not limited to, attorney's fees (the "Claim") that: (i) arise from Subcontractor's breach of a term of the Contract Documents, (ii) are caused or alleged to have been caused by Subcontractor, a Sub-subcontractor or any person for whose acts or omissions Subcontractor or Sub-subcontractor may be responsible (including, but not limited to, violations of Owner' and Contractor's health and safety requirements); (iii) arise from, relate to or otherwise are connected with or incidental to the Subcontract Work, as defined in the Purchase Order, whether or not caused or alleged to be caused in part by Owner or Contractor; or (iv) arise from actual or alleged contamination, pollution, or public or private nuisance, arising directly or indirectly out of the Subcontract or any acts or omissions of Subcontractor, its sub-subcontractors,

including but not limited to, handling, transportation, treatment, storage or disposal of hazardous materials, substances, samples or residue or out of Subcontractor's failure to comply with any warranty contained in the Subcontract; (v) arising from, related to, or are otherwise connected to any product or material installed by or incorporated in any way in the Subcontract Work of the Subcontractor; (vi) personal injury to or death of any person, or damage to or destruction of property of any person directly or indirectly arising out of or related to the performance of the Subcontract to the extent that such injury or death or property damage or destruction is caused by the negligence, gross negligence, or willful misconduct of Subcontractor, a sub-subcontractor, or any person for whose acts or omissions Subcontractor or sub-subcontractor may be responsible; (vii) claims by any governmental entity or instrumentality as a result of a failure by Subcontractor or its sub-subcontractors to pay taxes as required by the Subcontract or any applicable law; and (viii) failure of Subcontractor or sub-subcontractor to make payments to any consultant or subcontractor in accordance with the respective consulting or subcontract agreement. This indemnity shall include, but in no way be limited to, claims, damages, liability, loss or expense attributable to bodily injury, sickness, disease or death, or physical injury to tangible property including loss of use of that property, or loss of use of tangible property that is not physically injured, and caused in whole or in part by any actual or alleged:

- Act or omission of the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable, regardless of whether or not it is caused in whole or in part by any act, omission, or default of a party indemnified hereunder; or
- Violation of any statutory duty, regulation, ordinance, rule or obligation by an Indemnitee provided that the violation arises out of or is in any way connected with the Subcontractor's performance or lack of performance of the work under the Subcontract.

Nothing herein shall require Subcontractor to indemnify Owner or Contractor for claims caused by Owner's or Contractor's sole negligence. This indemnity shall survive completion or termination of the Subcontract for whatever reason.

In claims against any person or entity indemnified under this Section by an employee of Subcontractor, or a sub-subcontractor or anyone directly or indirectly employed by either of them, the indemnification obligation under this section shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Subcontractor or any sub-subcontractor, under workers' compensation acts, disability benefit acts or other employee benefit acts.

The Subcontractor agrees that the obligation to defend, indemnify and hold harmless, as described above, specifically includes the obligation to defend, indemnify and hold harmless the indemnitees for the indemnitees' own negligence or fault, excepting from the foregoing the sole negligence of the indemnitees if prohibited by law.

The Subcontractor agrees that the obligation to defend commences when a claim is made against the indemnitee, even if the Subcontractor disputes its obligation to indemnify and hold harmless. The defense shall be provided through counsel chosen by the indemnitee. The Subcontractor agrees to pay for the defense of the indemnitees upon demand.

The obligation to defend, indemnify and hold harmless, as described above, survives completion or acceptance of the Subcontractor Work. This indemnification clause supersedes any other indemnification clause in the contract documents, including those that are incorporated by reference, that conflict with it in any way, provided that if the Prime Contract requires indemnification more beneficial to the Owner, the subcontractor shall comply with the Prime Contract. Subcontractor also agrees to contractually bind its subcontractors (if any) to defend, indemnify and hold harmless the indemnitees to the same extent as the Subcontractor is obligated. This indemnification clause, irrespective of any other choice of law provision, shall be interpreted according to New Jersey law.

**13. Termination** - The Contractor shall have the right to terminate this Subcontract for its convenience for any reason whatsoever, or for no reason, by sending two (2) calendar days written notice of such termination to the Subcontractor. Any termination of the Subcontract by the Contractor for the Subcontractor's default, which is subsequently held to be improper and/or wrongful, shall be deemed to be a termination for convenience, and the Subcontractor's recovery therefor shall be limited accordingly. In the event of a termination for convenience, and provided that the Subcontractor is not in default, subcontractor shall be entitled to receive only the amount due for Subcontract Work actually performed and paid by the Owner. The Subcontractor waives all claims for any anticipated profit on the uncompleted portion of the Subcontract Work and/or for any other damages whatsoever. In the event the Subcontractor (i) fails to supply a sufficient number of skilled workers or sufficient materials or



equipment, (ii) fails promptly and timely to prosecute the Subcontract Work, (iii) delays, interferes with or damages the work of the Contractor or of any of the other contractors on the Project, (iv) fails timely to pay for labor, materials and equipment used in the performance of the Subcontract Work, or (v) fails to perform or is otherwise in breach of any other terms and provisions of the Subcontract, each of which events shall constitute a default by the Subcontractor, the Contractor shall have the right, in addition to any other rights or remedies otherwise provided by contract or law, after three (3) calendar days written notice to the Subcontractor: (a) perform and furnish through itself or through others the Subcontract Work and to deduct the cost thereof from any monies due or to become due to the Subcontractor under the Subcontract, and/or (b) to terminate the Subcontract, enter upon the premises and take possession for the purpose of completing the Subcontract Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, all of which the Subcontractor hereby transfers, assigns and sets over to Contractor for and until the completion of such Subcontract Work, and to employ any person or persons to complete the Subcontract Work and provide all the labor, services, materials, equipment and other items required therefore. In case of such termination, the Subcontractor shall not be entitled to receive any further payment under this Subcontract until the Subcontract Work shall be wholly completed to the satisfaction and acceptance of Contractor and Owner, at which time, if the unpaid balance of the amount to be paid under this Subcontract shall exceed the cost and expense incurred by Contractor in completing the Subcontract Work, such excess shall be paid by Contractor to the Subcontractor; but if such cost and expense shall exceed such unpaid balance, then Subcontractor shall immediately upon receipt of notice of the amount thereof pay the difference to Contractor. Such cost and expense shall include the cost of completing the Subcontract Work to the satisfaction of Contractor and Owner, and all other items required therefore; a reasonable charge for Contractor's overhead; and all losses, damages, costs and expenses, including legal fees and disbursements sustained, incurred or suffered by reason of or resulting from the Subcontractor's default.

**14. Warranty** - The Subcontractor warrants that all materials and equipment furnished by it and incorporated by it into the Project shall be new and of merchantable quality unless otherwise specified, and that all work under the Purchase Order shall be of first quality and workmanship, free from faults and defects, and in conformance with the Contract Documents. All materials, equipment and work not conforming to these standards may be considered defective and, if so directed by the Owner, Architect, or Contractor, shall be replaced at the Subcontractor's expense. The warranty provided in this paragraph shall be in addition to and not in limitation of any other warranty or remedy imposed by law or by the Contract Documents. All Subcontract Work shall also be performed and warranted as called for in the Contract. If the Contract contains warranty provisions, then Subcontractor will comply with those provisions at Subcontractor's expense. Subcontractor shall guarantee the Subcontract Work for the longer of the warranty time period prescribed in the Contract or two (2) years year after Client's written, final acceptance of Subcontractor's Subcontract Work. Upon seven (7) days written notice from Contractor, Subcontractor shall repair and/or replace, at Contractor's sole option, any defective or non-contract compliant Subcontract Work and any damages caused thereby. Said warranty period shall be extended for two (2) years from the date of any repair or replacement of the Subcontract Work within the warranty period. In the event Subcontractor fails to comply with the provisions contained herein, Contractor shall have the right to, without prejudice to any other rights or remedies available to it, take any and all action deemed necessary by Contractor, in its sole discretion, including, without limitation, repairing or replacing the defective or non-contract compliant Subcontract Work and any damages caused thereby, and seek reimbursement from Subcontractor or its surety for all costs associated therewith.

**15. Liens** - Subcontractor shall keep the Project free from liens arising out of labor, material or other things contributed to the Project by Subcontractor or a Sub-subcontractor. Subcontractor shall deliver the Work free from all liens, claims and encumbrances. To the fullest extent permitted by law, the Subcontractor shall not suffer or permit any Construction Lien, Mechanics Lien, Notice of Unpaid Balance and Right to File Lien ("NUB") or any other form of encumbrance (hereafter collectively referred to as a "Construction Lien") to be filed or to remain of record as a claim against the Subcontract Work, the Premises or the Project or against any monies due or to become due for any work performed or materials furnished by, to or on behalf of Subcontractor, or any of its sub-subcontractors or suppliers; nor shall the Subcontractor suffer or permit any such Construction Lien to be so filed because of any claim or demand against, or any action or non action of the Subcontractor or any of its sub-subcontractors or suppliers. If the Subcontractor files a Construction Lien, NUB or any other form of encumbrance, which is ultimately judged to be invalid or overstates the amount properly subject to a Construction Lien, NUB or any other form of encumbrance, then the Subcontractor shall, in addition to all liabilities resulting from the provisions of the law, be liable to the Contractor and Owner for all bonds, deposits or costs of removal of the invalid Construction Lien, NUB or any other form of encumbrance and/or the overstated portion of such Construction Lien, NUB or any other form of encumbrance (including without limitation all attorneys fees and litigation expenses).

**16. Contract Deadlines** - Where time periods are provided in the Contract Documents for notice, approval,

response or action of any kind, the time period under this Subcontract for such notice, approval, response or action shall expire two (2) business days prior to the corresponding time periods under the Contract irrespective of the terms contained herein.

**17. Assignment** - Subcontractor shall not assign this Agreement without the prior written consent of Contractor. If required by the Prime Contract, the Agreement shall be automatically assigned upon termination of the Prime Contract to the Owner or such other party as specified in the Prime Contract.

**18. Dispute Resolution** - Any dispute or claim arising out of or relating to this contract, or breach thereof, that cannot be settled between the parties shall be settled by binding arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The losing party shall be responsible to pay all reasonable attorney fees and costs of the arbitration. Contractor's liability under the Purchase Order and Contract Documents is expressly limited to the Subcontract Price. Subcontractor waives any and all consequential and incidental damages arising out of or relating to the Subcontract Work and/or this Subcontract, including a breach thereof.

**19. Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey, disregarding its conflicts of laws provisions which may require application of the law of another jurisdiction.

**20. Drafting Consideration; Entire Agreement** - The Purchase Order and these terms and conditions have been drafted, negotiated and entered into by each party with each having the opportunity to seek the advice of independent legal counsel, and the Contract Documents shall not be construed against one party or the other based on which party drafted any portion thereof. The Contract Documents contain the entire and integrated agreement between Subcontractor and Contractor with respect to the subject matter hereof, and supersede any other proposal, quotation, terms and conditions, bids, agreement or other representation, whether oral or written, of Subcontractor or Contractor. Any different or additional terms and conditions proposed by Subcontractor or that which may be contained in any proposal, quotation, terms and conditions, bids or other documents including, without limitation, delivery or time and material tickets are rejected and shall have no effect on the Contract Documents unless executed by the Contractor and Subcontract as a change order pursuant to the Contract Documents. Delivery and time and material tickets shall be for verification of date and time only. No agent or employee of any company has authority to bind Contractor by any promise, representation or statement not contained in this Subcontract. The Subcontract may not be altered except by a written amendment or Change Order signed by an authorized representative of Contractor.

**21. Severability** - In one or more provisions of this Subcontract shall be declared to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained in this Subcontract shall not in any way be affected or impaired thereby.

## Exhibit A: Insurance Provisions

### SUBCONTRACTOR'S INSURANCE

Prior to commencing the Subcontractor Work, Subcontractor shall procure, and thereafter maintain, at its own expense, until final acceptance of the Subcontractor Work or later as required by the terms of this Agreement or any individual Work Order, insurance coverage required by this Agreement. At a minimum, and subject to modification in individual Work Orders, the types of insurance and minimum policy limits specified shall be maintained in a form and from insurers acceptable to Contractor as set forth below. All insurers shall have at least an A-(excellent) rating by A.M. Best and be qualified to do business in the state where the project is located.

This insurance will provide a defense and will indemnify the Contractor, but only with respect to liability for bodily injury, property damage and personal and advertising injury caused in whole or in part by the Subcontractor's acts or omissions or the acts or omissions of those acting on the Subcontractor's behalf.

Proof of this insurance shall be provided to the Contractor before the Subcontractor Work commences, as set forth below. To the extent that the Subcontractor subcontracts with any entity or individual to perform all or part of the Subcontractor Work, the Subcontractor shall require all sub-subcontractors to furnish evidence of equivalent insurance coverage, in all respects, terms, and conditions as set forth herein, prior to the commencement of work by the sub-subcontractor. In no event shall the failure to provide this proof, prior to the commencement of the Subcontractor Work, be deemed a waiver by the Contractor of Subcontractor's or the sub-subcontractor's insurance obligations set forth herein.

In the event that the insurance company(ies) issuing the policy(ies) required by this exhibit deny coverage to the Contractor, the Subcontractor or the sub-subcontractor will, upon demand by the Contractor, defend and indemnify the Contractor at the Subcontractor's or sub-subcontractor's expense.

The Subcontractor and all sub-subcontractors shall maintain the following insurance, provided that if the Prime Contract requires higher limits, such higher limits shall apply.

#### Commercial General Liability Insurance

\$1,000,000 Each Occurrence Limit (Bodily Injury and Property Damage)  
\$2,000,000 General Aggregate per Project  
\$2,000,000 Products & Completed Operations Aggregate  
\$1,000,000 Personal and Advertising Injury Limit

#### Business or Commercial Automobile Liability Insurance

\$1,000,000 combined single limit per accident

#### Workers' Compensation and Employers' Liability Insurance

\$100,000 Each Accident  
\$100,000 Each Employee for Injury by Disease  
\$500,000 Aggregate for Injury by Disease

#### Excess or Umbrella Liability

\$1,000,000 occurrence/aggregate

The Contractor, Owner, Architect and Architect's consultants, along with their respective officers, agents and employees, shall be named as additional insureds for Ongoing Operations and Products/Completed Operations on the Subcontractor's and any sub-subcontractor's Commercial General Liability Policy, which must be primary and noncontributory with respect to the additional insureds.

It is expressly understood by the parties to this Subcontract that it is the intent of the Parties that any insurance obtained by the Contractor is deemed excess, non-contributory and not co-primary in relation to the coverage(s) procured by the Subcontractor, the sub-subcontractor or any of their respective consultants, officers, agents, subcontractors, employees or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of the aforementioned may be liable by operation of statute, government regulation or applicable case law.

To the fullest extent permitted by applicable state law, a Waiver of Subrogation Clause shall be added to the General

Liability, Automobile and Workers Compensation policies in favor of Contractor and Owner and this clause shall apply to the Contractor's and Owner's officers, agents and employees, and any others as required under the Prime Contract with respect to all Projects during the policy term.

Prior to commencement of Subcontractor Work on any individual Project, Subcontractor shall submit a Certificate of Insurance in favor of Contractor and an Additional Insured Endorsement (in a form acceptable to the Contractor) as required hereunder. The Certificate shall provide for thirty (30) days' notice to Contractor for cancellation or any change in coverage. Copies of insurance policies shall promptly be made available to the Contractor upon request.

## **NO LIMITATION ON LIABILITY**

In any and all claims against the additional insureds by any employee of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, the indemnification obligation shall not be limited in 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.

## **CANCELLATION, RENEWAL AND MODIFICATION**

The Subcontractor shall maintain in effect all insurance coverages required under this Agreement at the Subcontractor's sole expense and with insurance companies acceptable to the Contractor. The policies shall contain a provision that coverage will not be cancelled or not renewed until at least thirty (30) days prior written notice has been given to the Contractor. Certificates of insurance showing coverage required to be in force hereunder must be delivered to the Contractor prior to commencement of the Subcontract Work. In the event the Subcontractor fails to obtain or maintain any insurance coverage required under this Agreement, the Contractor may, at its sole discretion, purchase such coverage as desired for the Contractor's benefit and charge the expense to the Subcontractor, or, in the alternative, terminate this Agreement.

## **CONTINUATION OF COVERAGE**

The Subcontractor shall continue to carry Completed Operations Liability Insurance for at least three years after either ninety (90) days following Substantial Completion of the Work or final payment to the Contractor, whichever is later. The Subcontractor shall furnish the Contractor evidence of such insurance at final payment and in each successive year during which the insurance coverage must remain in effect.

## **ACKNOWLEDGMENT OF REFERRAL OF THIS PROVISION TO SUBCONTRACTOR'S INSURANCE AGENT OR BROKER**

The Subcontractor represents that he has provided a copy of the "Insurance Provision" to his insurance agent and /or broker, and that the Subcontractor has instructed the agent/broker to provide insurance in full compliance with the terms and conditions herein.

The Contractor and Subcontractor hereby acknowledge that this Exhibit is considered a material term of their contract.

Frankoski Construction Company

Subcontractor:

By: \_\_\_\_\_

- Joseph C. Frankoski, President
- Anthony M. Frankoski, Vice President
- Stanley Frankoski, Sec'y/Treasurer