

GENERAL INSTRUCTIONS FOR USE OF SUBCONTRACT AGREEMENT

This document has been prepared to assist you with your use of Selective's recommended Subcontract form. It is a guideline intended to assist you with your completion of the Subcontract and to highlight certain significant provisions. To the extent that there may be any divergence between these instructions and the materials comprising the Subcontract, it is the Subcontract's terms and provisions which govern.

Selective grants you, it's insured, permission to use and copy the Subcontract Agreement. However, Selective's copyright notice may not be removed from any copies made of the Subcontract Agreement.

We strongly recommend that you have these instructions, the Subcontract Agreement, Exhibit E ("Insurance Provisions") and the other attachments referred to in the Subcontract Agreement reviewed by counsel of your choice in order to determine their suitability for specific projects.

Introductory Paragraph:

- Insert the effective date of the Subcontract, which normally should correspond to the day when both Parties have executed the document.
- The names of the Contractor and Subcontractor, the jurisdictions in which they have been organized, and their principal places of business should be inserted in the appropriate spaces provided. Unless otherwise agreed by the Parties, these addresses will be the locations to which all notices as required by the Subcontract should be sent.

Recitals:

- Insert the name of the Owner and the date of the prime contract entered into between the Contractor and the Owner, and a brief description of the nature of the project in this first paragraph.
- The list of the Contract Documents which compose the prime agreement as entered into between the Owner and Contractor should be itemized on **Exhibit A** to be attached to the Subcontract. As written, the Subcontract contemplates that the entirety of these Contract Documents will be made available for examination, but not necessarily copied and furnished to the Subcontractor.

Article 1 – Subcontractor's Work:

- A narrative description of the Work which is to be performed along with reference to applicable specifications and drawings is to be set forth on **Exhibit B**. The Contract Documents should also be identified on this page along with any assumptions, clarifications or additional documentation which is to be part of the Subcontract.

Article 2 – Payment:

- Insert the lump sum amount of the Subcontract Price in paragraph 2.a.
- In the first sentence of paragraph 2.b., insert the percent of the retainage which is to be withheld from the Subcontractor. Ensure that this is consistent with and at least as great as the percentage being withheld by the Owner from the Contractor. In the third sentence of this paragraph, insert the percentage to be paid for stored materials. Again, be certain that this is also consistent with the terms of the Contract Documents.
- Paragraph 2.b. includes a type of "pay when paid" contingent payment provision which obligates the Contractor to make payment within 10 days of receipt from Owner. However, in the event of Owner non-payment for reasons which are not the Subcontractor's fault, then this paragraph contemplates that the Contractor will ultimately have an obligation to pay such funds to the Subcontractor and assume the risk of Owner non-payment. There is a 90-day buffer provided as the reasonable time which the Subcontractor may have to wait for receipt of its monies.

- Paragraph 2.d. identifies the supporting documentation which is expected to be furnished with respect to progress payments and paragraph 2.e. addresses the conditions of final payment.

Article 3 – Subcontractor's Liability

- Paragraph 3.a. confirms that the Subcontractor assumes responsibility for risk of loss to the Work until acceptance of the Work by the Owner.
- Paragraph 3.c. contains an indemnification provision intended to hold the Subcontractor liable for bodily injury or property damage arising from negligence of the Subcontractor and entities for which it is responsible. Care must be taken to consult with legal counsel to determine whether any anti-indemnity statutes or case law in the particular jurisdiction in which the Work is to be performed may affect whether this clause will be fully enforced as written or will need to be modified.

Article 4 – Subcontractor's Insurance:

- The minimum coverages to be furnished by the Subcontractor are to be set forth on the attached **Exhibit E** which can be tailored as necessary to specific project needs or requirements. Please note that this provision must be signed and dated.

Article 5 – Time of Performance:

- Paragraph 5.a contemplates that the Project Schedule will be attached as **Exhibit D**. This schedule must be consistent with any requirements of the Contract.
- Paragraph 5.a also emphasizes that time is of the essence to ensure that the scheduling requirement will be enforceable as written.

Article 6 – Changes and Claims:

- The Contractor maintains the right to issue unilateral written changes to the Subcontract and compel the Subcontractor to immediately comply even if final adjustments arising from any change have not been agreed.
- A distinction is made between Owner Claims for which Subcontractor will be obliged to comply with under the terms of the Contract Documents and those other changes independently ordered by the Contractor.

Article 7 – Failures to Perform

- The Contractor's remedies in the event of a Subcontract default including, but not limited to termination for default, are set forth in this article.
- The effect on the Subcontractor of any Owner termination of the prime agreement is also addressed.

Article 8 – Settlement of Disputes

- Consistent with the Changes and Claims article, a distinction is made between Owner Claims and non-Owner Claims; with the former being handled in strict accordance with the terms of the Contract Documents. Mediation is provided as an option.
- There is a need to indicate in paragraph 8.d. the choice of the Parties as to whether non-Owner Claims will be resolved by arbitration or litigation. If litigation is selected then the venue needs to be set forth; this normally being the location of the Contractor's principal place of business.

Article 9 – Termination for Convenience:

- This very important protection for the Contractor affords it the right to terminate without cause even in the event its prime agreement with the Owner is not terminated.

Article 10 – Assignment

- Explains that the subcontractor may not assign the subcontract without the written consent of the Contractor and the Subcontractor's surety.

Article 11 – Safety:

- The Contractor's disclaimer of any responsibility for physical conditions or safety at the Project site is important in order to minimize potential liability. As the entity responsible for determining the means and methods of performing the Work, the Subcontractor is charged with the primary responsibility for protection of its employees, property, and other individuals affected by the Work.

Article 12 – Bonds:

- The Contractor must decide whether performance or payment bonds, or both, will be required and must indicate its decision in the proper location in this paragraph. If required, the bonds are to be in the form attached as **Exhibit C**.

Article 13 – Cleanup:

- Specifies the Subcontractors obligations related to this aspect of its work.

Article 14 – Governing Law:

- Specifies which state's laws will apply and it needs to be inserted here. This normally is the law of the state where the Contractor's principal place of business is located, unless otherwise agreed to by the parties to the Subcontract.

Article 15 - Presumption Arising from Authorship:

- This paragraph is intended to protect the Contractor, as the drafter of the Subcontract, from being held responsible for any ambiguities which may be subsequently raised by the Subcontractor.

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