



**BARTON MALOW COMPANY**  
**DOCUMENT NO. 1-CA**  
**TERMS AND CONDITIONS**

for Subcontract Order  
May 9, 2011

1. **Definitions** For purposes of these Terms and Conditions and the Insurance Requirements:
  - 1.1. "Change Order" means a written document signed by Contractor and Subcontractor to change the scope, price, time for performance or other terms of the Subcontract. A Change Order is subject to approval by Owner, its Architect, or other persons where the Prime Contract so requires.
  - 1.2. "Claim" means any demand or request by Subcontractor for extra payment, extension of time, damages, or other relief in connection with the Subcontract.
  - 1.3. "Contractor" means the entity issuing this Subcontract, which is Barton Malow Company, unless a different entity is identified as Contractor in the Subcontract Order. The term "Contractor" shall be used regardless of whether the actual role of the entity issuing this Subcontract is General Contractor, Construction Manager, Design Builder, or otherwise.
  - 1.4. "Default" has the meaning stated in section 20.1.
  - 1.5. "Dispute" has the meaning stated in section 23.1.
  - 1.6. "Drawings" means the graphic and pictorial portions of the Prime Contract and/or Subcontract showing the Work.
  - 1.7. "Hazardous Material" means asbestos; asbestos containing material; lead (including lead-based paint); PCB; molds; any other chemical, material, or substance subject to regulation as a hazardous material, hazardous substance, toxic substance, or otherwise, under applicable federal, state, or local law; and any other chemical, material, or substance that may have adverse effects on human health or the environment.
  - 1.8. The words "include," "including," and their variants shall be interpreted to mean including without limitation.
  - 1.9. "Insurance Requirements" means the attached Document No. 2.
  - 1.10. "Lien" means a lien, claim, or demand against the Project, the Work, Owner's funds, or any payment bond furnished by Contractor or Owner.
  - 1.11. "Notice to Proceed" means a written document signed by Contractor directing Subcontractor to undertake specifically described work prior to execution of a Change Order.
  - 1.12. "Owner" means the party with whom Contractor has entered into the Prime Contract with respect to the Project, even if such party does not own the Project.
  - 1.13. "Prime Contract" means the contract between Contractor and Owner with respect to the Project, including all changes or modifications thereto through the date of this Subcontract and all Contract Documents which are defined by the Prime Contract to be a part thereof. The Prime Contract is available from Contractor upon written request except that, if Contractor removes pricing or other portions from the copy provided, Subcontractor shall not be bound by the removed portions. Failure of Subcontractor to request the Prime Contract shall not excuse Subcontractor from compliance with obligations set forth in the Prime Contract.
  - 1.14. "Professional Services" has the meaning stated in section 11.
  - 1.15. "Project" means the project identified in the Subcontract Order for construction, renovation, or other services.
  - 1.16. "Schedule" means the schedule information provided to Subcontractor with or prior to the Subcontract, together with any updates, adjustments, or refinements to the schedule of which Subcontractor receives written notice thereafter. Any change in Schedule must be issued or approved in writing by the Contractor.
  - 1.17. "Specifications" means the portions of the Prime Contract and/or Subcontract consisting of the written scope and other requirements for the Work and performance of related services.
  - 1.18. "Subcontract" has the meaning stated in section 2.1.
  - 1.19. "Subcontractor" means the entity to which this Subcontract is issued, as defined in the Subcontract Order, including its Subordinate Parties.
  - 1.20. "Subcontract Order" means the Subcontract Order form to which these Terms and Conditions are attached, and which identifies, among other things, Subcontractor and the Order Number.
  - 1.21. "Subcontract Price" means the amount to be paid to Subcontractor under the Subcontract, from funds received from or on behalf of Owner, for proper performance of the Work.
  - 1.22. "Subordinate Parties" means all of Subcontractor's employees, workers, laborers, agents, consultants, suppliers or subcontractors, at any tier, who perform, assist with, or otherwise are involved in any of the Work.
  - 1.23. "Terms and Conditions" means this Document No. 1.
  - 1.24. The "Work" includes all work and responsibilities performed or to be performed by Subcontractor or Subordinate Parties under the Subcontract.
2. **Subcontract**
  - 2.1. This Subcontract includes only the following:
    - 2.1.1. The Subcontract Order attached to or provided with these Terms and Conditions;
    - 2.1.2. These Terms and Conditions (Document No. 1);
    - 2.1.3. The Insurance Requirements (Document No. 2);
    - 2.1.4. Any project manual or bid package pursuant to which Subcontractor has bid or proposed on the Work, including any general conditions, supplementary general conditions, and/or special conditions therein;
    - 2.1.5. The Drawings and Specifications (and all addenda) defining the Work;
    - 2.1.6. The Prime Contract;
    - 2.1.7. Any post-bid review memo(s) provided by Contractor before the Subcontract is executed; and
    - 2.1.8. Any other documents expressly incorporated by the documents in sections 2.1.1 through 2.1.7.

- 2.2. The Subcontract does not include Subcontractor's bid or proposal. Nor does it include any terms or conditions furnished by Subcontractor unless Contractor specifically agrees in writing to incorporate them.
- 2.3. The various provisions of the Subcontract are intended to complement each other and shall, where reasonably possible, be so interpreted. If there is an irreconcilable conflict between provisions of the Subcontract, the provision granting greater rights or remedies to Contractor, or imposing the greater duty, standard, responsibility or obligation on Subcontractor shall govern.
- 2.4. Headings in the Subcontract are for convenience only. Singular terms shall include the plural and vice versa.
3. **General Duties of Subcontractor**
  - 3.1. Subcontractor shall commence the Work when directed by Contractor. Subcontractor shall diligently perform and complete the Work in strict accordance with the Subcontract.
  - 3.2. As to Subcontractor's Work:
    - 3.2.1. Subcontractor assumes toward Contractor all the obligations, including administrative and procedural, which Contractor assumes toward Owner or other persons under the Prime Contract.
    - 3.2.2. Contractor shall have all the rights and remedies against Subcontractor which Owner or other persons have against Contractor under the Prime Contract.
    - 3.2.3. Except as specifically set forth in the Subcontract, Subcontractor shall not have any rights against Contractor which Contractor does not have against Owner under the Prime Contract.
  - 3.3. Subcontractor shall be responsible for the layout and correctness of the Work.
  - 3.4. Subcontractor shall furnish daily reports in the time and form requested by Contractor.
  - 3.5. Subcontractor shall participate in meetings as requested by Contractor.
  - 3.6. Subcontractor shall be solely responsible to Contractor for all means, methods, techniques, sequences and procedures for, and for coordinating with others all portions of, the Work.
  - 3.7. Subcontractor shall provide Owner and Contractor with access to the Work and the premises of the Work at all reasonable times.
  - 3.8. Subcontractor represents that it is familiar with and has examined the entire Subcontract and the Project site, and has considered all of the conditions surrounding and relating to the performance of Subcontractor's Work under this Subcontract. Any and all variations resulting from this examination that affect the Subcontract price have already been noted by Subcontractor and are accounted for in the Subcontract price. In the event Subcontractor's Work includes installation of materials or equipment furnished by others or work to be performed in areas to be constructed or prepared by others, it shall be the responsibility of Subcontractor to examine such items, areas and conditions under which Subcontractor's Work is to be performed and promptly notify the Contractor in writing, prior to commencement of Subcontractor's Work, of conditions detrimental to the proper and timely completion of Subcontractor's Work. Commencement of work in a particular area will constitute acceptance by Subcontractor of the items, surfaces and conditions within that particular area. Loss or damage due to acts of Subcontractor shall be charged to Subcontractor and deducted from monies otherwise due Subcontractor under this Subcontract.
4. **Subordinate Parties**
  - 4.1. Subcontractor shall be fully responsible to Contractor for all actions, omissions, or other conduct of Subordinate Parties arising from or in connection with the Work or the Project. Obligations imposed upon Subcontractor shall be binding on Subordinate Parties.
  - 4.2. Subcontractor shall maintain good control and discipline over Subordinate Parties, including full-time supervision by Subcontractor on site while Work is being performed. Subcontractor shall take all reasonable measures to maintain labor harmony. Subcontractor shall remove from the Project any Subordinate Party deemed objectionable by Contractor or Owner.
  - 4.3. Subcontractor shall pay Subordinate Parties promptly.
  - 4.4. By appropriate agreement, written where legally required for validity, Subcontractor shall require its Subordinate Parties, to the extent of Work to be provided by the Subordinate Party, to be bound to Subcontractor by the terms of the Subcontract, and to assume towards Subcontractor, all obligations and responsibilities that Subcontractor by this Subcontract assumes towards Contractor.
5. **Laws, Permits, Taxes** Subcontractor shall comply strictly with all applicable federal, state and local laws, rules and regulations. Subcontractor shall obtain all necessary licenses and permits and pay all fees, taxes and other charges relating to the Work. Subcontractor shall furnish, upon Contractor's request, evidence of compliance with any law and the payment of any fee, tax or charge.
6. **EEO** Subcontractor shall not discriminate against any individual with respect to hire, discharge, compensation, terms, conditions or privileges of employment, or segregation of facilities because of such person's race, color, religion, sex, age, handicap, national origin, or other status protected by applicable law.
7. **Safety**
  - 7.1. Subcontractor is fully responsible for, and shall ensure, the safety of persons and property in connection with the Work. Subcontractor will cooperate with Contractor on any overall safety program for the Project (including prevention and reporting of substance abuse) and submit its own safety program, which shall be at least as stringent as Contractor's safety program. Subcontractor shall provide a safe workplace and shall otherwise take all precautions for the safety of Subordinate Parties and persons and property in or near the premises where Work is being performed, and shall supply any requested safety information. Subcontractor shall not create or allow, and shall promptly report to Contractor and be fully responsible for, any unsafe conditions relating to the Work. Subcontractor shall actively undertake the prevention of accidents or injury to persons or property in or near the premises where Work is being performed, and shall comply with all applicable safety laws, regulations, and ordinances.

- 7.2. Subcontractor shall comply with all requirements of any state or federal Right-to-Know laws, including: (1) maintaining where designated by Contractor, a copy of all Material Safety Data Sheets (MSDS) for each Hazardous Material, and having a copy of same available for its employees; (2) providing required training of its employees pursuant to such laws; (3) submitting a copy of its written Hazard Communication Program to Contractor; and (4) Properly labeling all containers of Hazardous Materials that are brought on the job site or used in the performance of this Subcontract.
- 7.3. Subcontractor is fully responsible for all Hazardous Materials it creates or releases in connection with, or brings to, the Project. Subcontractor shall immediately report to Contractor any Hazardous Materials which it discovers or which are released at the Project.
8. **Process Control** Subcontractor will furnish, before Work begins, evidence of ISO certification or documented procedures for control of drawings, submittals, inspection/surveillance, and training, which meet or exceed any process control requirements set forth in the Prime Contract. If Subcontractor fails to do so, Subcontractor will follow Contractor's documented procedures for process control.
9. **Schedule**
- 9.1. Subcontractor shall provide Contractor with any requested scheduling or productivity information for the Work. Subcontractor shall perform and complete the Work in accordance with the Schedule, when and in such sequence as directed by Contractor, so as not to conflict or interfere with the work of others or the activities of Owner. Time is of the essence in this Subcontract.
- 9.2. Subcontractor shall indemnify and hold harmless Contractor from and against any increased costs and expenses, including any penalty, liquidated damages, or liability of Contractor to Owner or others, arising or resulting from Subcontractor's failure to comply with the Schedule. Changes to the Schedule resulting from Subcontractor's failure to perform to an earlier version of the Schedule shall not excuse this indemnification obligation.
- 9.3. If Subcontractor's performance is delayed or interfered with by Owner, Contractor, other subcontractors to Contractor, acts of God or other causes beyond Subcontractor's control, Subcontractor may present a Claim for an extension of time in accordance with this Subcontract, but Subcontractor shall not be entitled to any resulting increase in the Subcontract Price or additional compensation or damages except as follows: (a) in the event of a delay or interference caused by Contractor or another subcontractor, Subcontractor will be entitled to an equitable adjustment of the Subcontract Price; and (b) in the event of a delay or interference caused by the Owner, acts of God or other causes beyond Subcontractor's control, Subcontractor will be entitled to an equitable adjustment of the Subcontract Price only to the extent the Prime Contract entitles Contractor to compensation from Owner for such delays, and only to the amount Contractor actually recovers from Owner on behalf of Subcontractor. Subcontractor expressly waives and releases any other right to damages or additional compensation related to delays or interference.
- 9.4. In no event will Subcontractor be entitled to time or monetary relief related to delay, including acceleration costs, productivity losses, lost profits, unabsorbed overhead, or other damages or costs resulting directly or indirectly from delay, unless: (a) Subcontractor gives Contractor notice of the delay in writing in accordance with the Subcontract, including the time limits in section 22; (b) the cause of such delay was extraordinary and unforeseeable and without the fault of Subcontractor or Subordinate Parties; and (c) Subcontractor and Subordinate Parties have used all reasonable diligence to prevent, avoid, remove, and mitigate the delay and its impacts.
10. **Clean-up** Subcontractor will, at all times, keep the job clean and clear of all debris and rubbish relating to its Work (including that of Subordinate Parties) and, upon completion of the Work, will promptly remove all tools, equipment and excess material and any such debris or rubbish. Subcontractor will protect all of its materials and Work from hazards, including theft or damage, and shall be fully responsible for their condition until completion of the Project, unless accepted earlier by Owner, and shall also be responsible for any damage caused by it to the work or property of others, including the property of Owner or Contractor. Subcontractor will reimburse Contractor for any expenses incurred to keep the job clean and clear of all debris and rubbish resulting from Subcontractor's failure to comply with this section, including any reasonable portion of costs allocated by Contractor for unidentifiable clean-up.
11. **Professional Services** If the Subcontract calls for Subcontractor to provide architecture, engineering, or design services, the following additional requirements shall apply with respect to such services ("Professional Services"):
- 11.1. Subcontractor shall cause all Professional Services to comply with the requirements of the Subcontract and all laws, regulations, ordinances and requirements of governmental authorities and agencies having jurisdiction over the design, construction, existence or use of the Project. Subcontractor shall cause all such services 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. Owner, the Architect, and Contractor shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professional.
- 11.2. Subcontractor will cause all Professional Services to be provided with all due care that would be followed for a comparable project by a skilled professional in the same field, working in the same region where the Project is located. Subcontractor shall be responsible to Contractor and Owner for loss, damage and expense suffered by either on account of any error or omission of Subcontractor in the Professional Services. To the fullest extent permitted by law, and without limiting Subcontractor's indemnification obligations elsewhere in the Subcontract, Subcontractor shall defend, indemnify and hold harmless Contractor and Owner from and against any and all liabilities, obligations, damages, penalties, claims, injuries, costs, charges and expenses (including attorney fees and costs), which may be imposed upon, incurred by or asserted against any of them arising from any actual or alleged negligent act, error, or omission in connection with the Professional Services; provided, however, that

Subcontractor's indemnity obligation under this section shall not extend to any liabilities, obligations, damages, penalties, claims, injuries, costs or expenses determined through adjudication to result from the sole negligence or willful misconduct of any party to be indemnified.

- 11.3. Subcontractor shall cause the design and installation of all Subcontractor-designed work to interface properly with the design and construction of the entire Project and the Drawings and Specifications prepared by the Architect and the other consultants engaged by Owner.
- 11.4. Subcontractor shall maintain, at its own expense, all licenses and certifications necessary to perform the Professional Services.
- 11.5. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to Contractor for submission to the Architect.
- 11.6. Unless otherwise provided under the Prime Contract, Contractor shall retain all rights, including copyright, to the drawings, specifications and other documents prepared by Subcontractor under this Subcontract.

## **12. Changes**

- 12.1. No changes to the Work, the Subcontract Price, the Schedule, or other terms of the Subcontract are authorized unless approved in a Change Order or Notice to Proceed signed by an authorized representative of Contractor. No course of dealing or course of performance between the parties shall be the basis for an increase in the Subcontract Price or extension of the Schedule.
- 12.2. Any Change Order issued by Contractor and signed by Subcontractor, unless otherwise expressly stated therein, is a complete settlement regarding the amount of labor, materials, equipment, overhead, and profit, and any extension of time, that may relate directly or indirectly to that Change Order. Subcontractor will have no claim in connection with changes to the Work for additional time or monetary recovery (for delay, interference, acceleration, inefficiency, cumulative effect, extension of overhead cost or any other theory) unless included in the signed Change Order.
- 12.3. Subcontractor shall quote the price and time impact of proposed changes within 14 days of receipt, unless otherwise directed or agreed in writing by Contractor.

## **13. Payment**

- 13.1. Contractor agrees to pay Subcontractor, from funds received from Owner, for the satisfactory performance of the Work, the Subcontract Price.
- 13.2. Subcontractor will submit to Contractor applications for payment in triplicate on or before the 25th of the month, or as otherwise provided in the Subcontract, in order that Contractor may apply for payment from Owner under the Prime Contract. Subcontractor shall furnish to Contractor such certificates, waivers, releases, sworn statements, and other documentation, as Contractor may request, in form satisfactory to Contractor and Owner. Contractor shall have the right, at its sole option, to hold from pay applications, until Contractor's receipt of final payment from Owner, retention of up to 10% (or such lesser amount as otherwise established in the Subcontract or applicable law).
- 13.3. Contractor agrees to pay to Subcontractor monthly progress payments, less retention, if any, for labor and materials which have been placed in position, with funds received by Contractor from Owner for the Work performed by Subcontractor as reflected in Contractor's applications for payment. Such monthly progress payments shall be made after receipt of payment from Owner by Contractor. If Owner delays making payment to Contractor from which payment to Subcontractor is to be made, Contractor and its sureties shall have a reasonable time to make payment to Subcontractor. "Reasonable time" shall be determined according to the relevant circumstances, but in no event shall be less than the time Contractor and/or Contractor's sureties require to pursue to conclusion their legal remedies against Owner or other responsible party to obtain payment including, but not limited to, mechanic's lien remedies.
- 13.4. Payment for stored material shall be at the discretion of Contractor and Owner and subject to such documentation and insurance as they may require.
- 13.5. No payment shall be taken as an admission by Contractor of the amount of work done, its classification, quality, sufficiency or the sum due Subcontractor or as an acceptance or release of Subcontractor from responsibility under the Subcontract.
- 13.6. Subcontractor will receive and hold the payments by Contractor as a trust fund to be applied first to the payment of Subordinate Parties.
- 13.7. Contractor may issue backcharges against the Subcontract Price for increases in Contractor's costs that result from Subcontractor's failure to comply with the Subcontract, or other costs which are chargeable to Subcontractor under the Subcontract. Contractor will provide written notice of any such backcharge.
- 13.8. Contractor shall have the right to withhold payment for defective work not remedied; claims of Contractor, Owner or any other person against Subcontractor arising out of or in any way connected with the Work; failure to pay Subordinate Parties; Liens; failure to supply required documentation; anticipated inability of Subcontractor to complete the Work for the balance of the Subcontract Price; or any other breach of this Subcontract. If any such deficiencies are not promptly corrected or remedied after written notice, Contractor may rectify the same at Subcontractor's expense and deduct all costs and expenses incurred from such withheld payments.
- 13.9. If Contractor has cause for concern of whether all payments have been made or will be made as required to Subordinate Parties or creditors, Contractor, in its sole discretion and without limiting its other remedies, after 72 hours written notice to Subcontractor, has the right to issue payments either by joint check, payable to both Subcontractor and the Subordinate Party or creditor, or directly to the Subordinate Party or creditor. Such payments shall be applied against the Subcontract Price to the same extent as if the payment were made solely to Subcontractor. Contractor's right to issue joint checks or direct payments shall in no event create an obligation on the part of Contractor to exercise this right on behalf of a Subordinate Party or creditor.

- 13.10. Should Subcontractor be in debt to Contractor for any reason, whether in connection with this Subcontract or a separate agreement, Contractor shall have the right to apply funds due under this Subcontract against the debt owed.
- 13.11. Contractor shall have the right, at reasonable times, to audit Subcontractor's books relative to claims, Change Orders, cost-based pricing, and performance under the Subcontract.
- 13.12. Subcontractor shall not recover interest or late fees on late or delayed payments except (a) to the extent interest is recovered by Contractor from Owner under the Prime Contract, or (b) as otherwise required by applicable law.
- 13.13. Subcontractor's right to final payment, including retention, is expressly conditioned (a condition precedent) on Subcontractor's final completion of the Work in accordance with the Contract Documents and acceptance of the same by Owner, including submission in form satisfactory to Contractor, of all documents required by the Subcontract or reasonably requested by Contractor, including invoices, certificates, waivers, releases, sworn statements, as-built documents, warranties, instruction manuals, test reports, and consent of surety. Final payment shall be made with funds received by Contractor from Owner in final payment for work under the Prime Contract. If Owner delays making payment to Contractor from which payment to Subcontractor is to be made, Contractor and its sureties shall have a reasonable time to make payment to Subcontractor. "Reasonable time" shall be determined according to the relevant circumstances, but in no event shall be less than the time Contractor and/or Contractor's sureties require to pursue to conclusion their legal remedies against Owner or other responsible party to obtain payment including, but not limited to, mechanic's lien remedies.
- 13.14. Receipt of final payment waives and releases all claims by Subcontractor against Contractor and Owner relating to the Subcontract except those expressly preserved by written agreement concurrent with final payment.
- 13.15. If money is owed from Subcontractor to Contractor under the Subcontract for any reason, including overpayments or legitimate backcharges, Subcontractor shall pay such money to Contractor within 14 days after written demand.
14. **Liens** Owner's funds, the Work, the Project, and any payment bond furnished by Contractor or Owner shall be kept by Subcontractor free of all Liens by itself or Subordinate Parties. Within ten days after written demand, Subcontractor will discharge or bond off any such Liens. If it fails to do so, Contractor, at its sole discretion, may use any means necessary to remove the Liens, and Subcontractor shall indemnify Contractor for any related costs and attorney fees. The obligations of this section 14 shall not apply to the extent a Lien is caused by Contractor's wrongful failure to pay Subcontractor in breach of this Subcontract, without fault of Subcontractor.
15. **Assignments and Sub-subcontracting**
  - 15.1. Subcontractor shall make no assignment in whole or in part of its rights with regard to this Subcontract without the prior express written consent of Contractor, and no assignment is valid without such consent and adequate assurances in writing that the assignee is fully ready, willing, and able to perform the Subcontract. Neither an assignment nor Contractor's consent relieves Subcontractor from its liabilities under the Subcontract. Upon Contractor's consent to an assignment, Subcontractor surrenders its rights in regard to the distribution of payments under the Subcontract from the effective date of the assignment.
  - 15.2. Subcontractor shall notify Contractor in writing of any subcontracts it proposes to award to Subordinate Parties. Any such sub-subcontracts are subject to Contractor's approval, which shall not be unreasonably withheld. Subcontractor shall bind all of its Subordinate Parties to the provisions of this Subcontract.
16. **Indemnification**
  - 16.1. To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless Contractor and its agents, employees, owners, officers, members, partners, affiliates, and successors from and against any and all liabilities, claims, causes of action, lawsuits, or expenses arising from (a) Subcontractor's actual or alleged breach or failure to comply with this Subcontract, including any Default, or (b) personal injury or death to any person (including employees of Subcontractor or Subordinate Parties) or property damage (including claims for loss of use), which arise out of or result from, or are in any way connected with, the Work or the operations or acts of commission or omission of Subcontractor, including those of its Subordinate Parties, unless the injuries or damages are determined through adjudication to have been caused by the sole negligence or willful misconduct of the party seeking to be indemnified.
  - 16.2. Subcontractor's indemnity obligations shall include, but are not limited to:
    - 16.2.1. Indemnity for all damages and judgment interest, all costs and fees, including all defense costs, expenses and attorney fees, and all settlement payments relating to or arising out of, resulting from or in any way connected with any claim, cause of action or lawsuit, or proceeding requiring indemnity by Subcontractor.
    - 16.2.2. All expenses, including costs, expenses and attorney fees, incurred in securing indemnity from Subcontractor if Subcontractor fails or refuses promptly to fulfill any of the indemnity obligations under this Subcontract.
    - 16.2.3. The obligation to indemnify Contractor for any liability imposed upon Contractor to indemnify and/or defend any and all persons, including but not limited to Owner, from liabilities, claims, causes of action, lawsuits, or expenses arising from or in connection with the Subcontract.
    - 16.2.4. The obligation to indemnify Owner to the same extent and in the same manner as Subcontractor is obligated to indemnify Contractor.
    - 16.2.5. Indemnification for any penalties or fines arising or resulting from Subcontractor's failure to comply with laws or regulations applicable to its Work.
    - 16.2.6. Indemnification for any cost or expense arising or resulting from Subcontractor's infringement of intellectual property rights of others.

- 16.3. Subcontractor's obligation to indemnify shall not include any obligation to indemnify which is prohibited by applicable law. In the event an arbitration panel or court of competent jurisdiction determines any of the indemnification obligations of this Subcontract are unenforceable, in whole or in part, Subcontractor's obligation to indemnify shall be replaced with the strictest enforceable indemnification provision in the governing jurisdiction. Subcontractor's obligations of defense and indemnification under this Subcontract are severable from Subcontractor's obligations set forth in the Insurance Requirements.
- 16.4. The indemnification rights in this Subcontract shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist.
- 16.5. Contractor, at its option, may select counsel to defend any claim, cause of action or lawsuit brought against it without impairing any obligation of Subcontractor to provide indemnification.
- 16.6. The indemnification provisions contained in this Subcontract shall survive the completion or termination of this Subcontract.
- 16.7. These indemnification obligations shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for any Subcontractor under Workers' or Workmen's Compensation Acts, Disability Acts or other Employee Benefit Acts.
17. **Insurance** Subcontractor will comply with the Insurance Requirements (Document No. 2). Before any Work is started, certificates of insurance and additional insured endorsements for Subcontractor's liability policies required by Document No. 2 must be supplied to Contractor. Receipt of a non-conforming insurance certificate by Contractor without objection, or failure to collect an insurance certificate, does not constitute a waiver of the Insurance Requirements.
18. **Bonds**
- 18.1. Contractor shall have the right to require Subcontractor to furnish surety bonds to secure the faithful performance of the Subcontract and the payment of all Subcontract obligations. Bonds shall be submitted on the form specified in the project manual or elsewhere in the Subcontract and, if no form is specified, on an unmodified version of either AIA form A311 or A312, unless otherwise specifically agreed in writing by Contractor. If A311 or A312 is used, Contractor shall be deemed "Owner" and Subcontractor shall be deemed "Contractor" under the terminology used in the bond form.
- 18.2. The surety must be:
- 18.2.1. Licensed in the state in which the work is to be performed;
- 18.2.2. Listed in the latest version of the Department of the Treasury's Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies," with the bond amount less than or equal to the underwriting limitation;
- 18.2.3. Rated by A.M. Best at A- VII or better; and
- 18.2.4. Otherwise reasonably acceptable to Contractor.
- 18.3. If at any time after acceptance of Subcontractor's bond, the surety fails to meet the criteria stated above, Subcontractor must as a pre-condition to continue the Work and receive further payments, replace the bond with a bond that meets the stated criteria or other security acceptable to Contractor.
- 18.4. Receipt of a bond by Contractor without objection or failure to collect a bond required by the Subcontract does not constitute a waiver of the requirements.
- 18.5. If the Subcontract indicates that bonding is required, Subcontractor's reasonable bond premium is included in the Subcontract Price.
- 18.6. The bonds shall provide that no change or alteration of this Subcontract, extension of time, premature payment or overpayment to Subcontractor will release the surety.
19. **Warranty and Correction of Work**
- 19.1. In addition to all other warranties set forth in the Subcontract or imposed by applicable law, Subcontractor warrants to Owner and Contractor that the Work will be free from defects and performed in strict conformity with the requirements of the Subcontract. This warranty survives the termination of the agreement and shall only be extinguished by limitation periods imposed by applicable law and shall not be limited by any other provisions contained in the Subcontract.
- 19.2. Subcontractor shall promptly correct Work that is defective or fails to conform to the Subcontract, whether it receives notice before the effective date of the Certificate of Substantial Completion, or within a period of one year thereafter, or within the time period that Contractor is obligated to correct Work under the Prime Contract, whichever is longer. Nothing in this paragraph 19.2 establishes a period of limitation or otherwise restricts obligations which Subcontractor may have under section 19.1, other provisions of the Subcontract, or applicable law.
20. **Default**
- 20.1. Subcontractor shall be in Default if it fails or refuses to:
- 20.1.1. Supply a sufficient number of properly skilled workers, or sufficient materials of proper quality;
- 20.1.2. Staff or prosecute the Work diligently or maintain progress in accordance with the Schedule;
- 20.1.3. Make payment to all Subordinate Parties promptly;
- 20.1.4. Provide waivers of Liens or other documentation required under the Subcontract;
- 20.1.5. Provide adequate assurances in writing, within 72 hours after written request by Contractor, that Subcontractor is ready, willing, and able to perform the requirements of the Subcontract, including proof of the financial and other resources necessary to comply with the Schedule;
- 20.1.6. Correct, replace and/or re-execute faulty, damaged, or defective Work;
- 20.1.7. Supply or maintain required bonds or insurance;
- 20.1.8. Comply promptly with a written directive issued by Contractor pursuant to the Subcontract;
- 20.1.9. Maintain satisfactory financial standing. It shall be judged unsatisfactory, without further proof, if

Subcontractor files an arrangement proceeding, or is insolvent or commits any act of insolvency, or makes an assignment for benefit of creditors, or turns over its assets per a trust chattel mortgage, or files or has filed against it a petition for bankruptcy, liquidation, reorganization, or receivership, or has appointed against it a receiver over a substantial part of its assets, or has a creditors committee appointed, or consents to the formation of a creditors committee, or has a creditor foreclose upon a substantial part of its assets, or has a creditor issue an execution or garnishment, or has a levy issued against it by any taxing authority; or

- 20.1.10. Perform fully, in other respects, any or all of the requirements of the Subcontract.
- 20.2. In the event of any such Default, Contractor shall be entitled to employ any or all of the following remedies:
  - 20.2.1. Require Subcontractor to increase manpower or equipment, work overtime, or work extra shifts, at Subcontractor's expense;
  - 20.2.2. Supplement or replace Subcontractor's forces with other manpower, materials, or equipment, at Subcontractor's expense;
  - 20.2.3. Suspend Subcontractor's right to proceed with the Work, in whole or in part, for such time as Contractor deems advisable;
  - 20.2.4. Take possession of and use any materials, equipment, tools, or appliances necessary to carry out the Work;
  - 20.2.5. Terminate all or any portion of the Subcontract for Default; and/or
  - 20.2.6. Pursue any other relief available under the Subcontract or applicable law.
- 20.3. Prior to relying on the remedies identified in section 20.2, Contractor shall provide Subcontractor 72 hours written notice and opportunity to cure, unless emergency circumstances make such notice impracticable.
- 20.4. If a bankruptcy petition is filed by or against Subcontractor, and Subcontractor is otherwise in default, Contractor shall have the right to prompt relief from the automatic stay and a prompt decision assuming or rejecting the Subcontract.

## **21. Termination**

- 21.1. Contractor reserves the right to terminate all or any part of the Subcontract at any time for its convenience, upon 72 hours written notice. If it is determined that Contractor's attempted termination of the contract for Default was invalid for any reason, such attempt will be automatically converted to a termination for convenience, without further notice, and Subcontractor shall be limited to the remedy provided in this section 21.1. In the event of a termination of the Subcontract for convenience, Contractor will pay Subcontractor for the Work properly performed to the effective date of termination, together with supplier termination charges or other demobilization expenses necessarily incurred by Subcontractor as a direct result of the termination. If Owner has terminated the Prime Contract for convenience, Contractor's liability to Subcontractor shall be fully extinguished by Contractor awarding and paying to Subcontractor any recovery obtained from Owner on Subcontractor's behalf. In no event will Subcontractor be entitled to recover anticipated profit or overhead on Work not performed, or any other indirect or consequential expenses or damages.
- 21.2. Contractor has the right to terminate the Subcontract for Default under the conditions provided in section 20. In such event, Subcontractor shall not be entitled to receive any further payments under the Subcontract until the Work under the Subcontract is completely finished. At that time, if the unpaid balance of the amount to be paid under the Subcontract exceeds the expenses incurred by Contractor finishing Subcontractor's Work, such excess shall be paid by Contractor to Subcontractor, but, if such expense shall exceed such unpaid balance, then Subcontractor shall pay to Contractor the amount by which such expense exceeds such unpaid balance.

22. **Claims** Any Claim by Subcontractor must be submitted to Contractor, in writing, by the earlier of: (a) seven calendar days after Subcontractor is first aware or should be aware of the event(s) giving rise to the Claim; or (b) within a reasonable time (at least three business days if available) before Contractor is required to give Owner notice of the Claim. Claims shall be submitted in such form and manner as will enable Contractor to submit them promptly to Owner in conformance with the Prime Contract. The timely and proper submission of the Claim is a condition precedent to any liability by Contractor to Subcontractor for same. Subcontractor agrees to indemnify Contractor for all costs and expenses it incurs, including attorneys' fees and litigation expenses, if Contractor elects to advance Subcontractor's Claims against Owner.

## **23. Disputes and Remedies**

- 23.1. Any dispute relating to this Subcontract which the parties have been unable to resolve after a reasonable time by negotiation ("Dispute") shall be submitted to mediation upon written request of either party. The mediation shall be conducted using such mediator and procedures as the parties may agree. If agreement on the mediator or procedures has not been reached within 14 days after the request for mediation, the Construction Mediation Rules then in force for the American Arbitration Association shall be followed.
- 23.2. If after 90 days the parties have not resolved the Dispute by mediation, except as provided below in section 23.3, the matter shall be submitted to mandatory arbitration at the request of either party. The arbitration shall be conducted using such arbitrator(s) and procedures as the parties may agree. If they are unable to reach agreement within 30 days of the demand, the matter shall be submitted to the American Arbitration Association in accordance with its Construction Industry Arbitration Rules then in force. The arbitrator's authority will include the ability to order payment of costs and attorney fees as justice may require, but no punitive or exemplary damages. Judgment on the arbitration award may be entered by any court having jurisdiction. However, the arbitration award shall be supported by law and substantial evidence, and for arbitration awards over \$1.0 million, the arbitrator(s) shall not have the power to commit errors of law or legal reasoning or the power to ignore substantial evidence, and any such award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error of law or any such ignorance of substantial evidence.

- 23.3. If Contractor is or expects to become a party to any litigation or arbitration with Owner or a third party relating to the Project, Contractor may elect to join Subcontractor as a party to such litigation or arbitration. Subcontractor is bound by the procedures, decisions and determinations resulting from any dispute resolution process in the Prime Contract.
- 23.4. Nothing in this Subcontract precludes Contractor from applying to a court for equitable relief when threatened with irreparable harm for which there is no adequate remedy at law.
- 23.5. In no event shall Contractor be liable to Subcontractor for consequential, punitive, exemplary, or indirect damages of any kind.
- 23.6. Pending resolution of a Dispute, Subcontractor shall continue diligent performance of the Work and Contractor shall continue with payment of amounts not genuinely in dispute.
24. **Notices** Notices shall be provided in writing, through mail, courier, fax, e-mail, or hand delivery, to an officer or management employee of the party being notified. Notices to Contractor shall be confirmed with a copy sent, return receipt, to the address listed for Contractor on the Subcontract Order. Either party may change its address by providing written notice of the new address.
25. **General Provisions**
  - 25.1. This Subcontract constitutes the entire understanding of the parties and supersedes any prior proposal or agreement, and shall not be modified, amended or revoked except in writing executed by an authorized representative of Contractor. In entering into this Subcontract, Subcontractor has not relied on any promises or representations unless stated herein. Should any portion of this Subcontract be held invalid or unenforceable, the remainder of the Subcontract shall be valid and enforceable to the fullest extent permitted by law. The failure of Contractor to enforce at any time any of the provisions of this Subcontract shall in no way be construed to be a waiver, nor in any way to affect the validity of this Subcontract or any part thereof or the right of Contractor to enforce each and every provision.
  - 25.2. Except where expressly stated, there are no third party beneficiaries to this Subcontract.
  - 25.3. This Subcontract shall be governed by the laws of the state where the Project is located.





**BARTON MALOW COMPANY**  
**DOCUMENT NO. 2-CA**  
**INSURANCE REQUIREMENTS**  
for Subcontract Order  
**May 9, 2011**

1. As a condition of performing work under the Subcontract, Subcontractor will keep in force, at all times during performance of the Work, policies of insurance covering all Basic Insurance Requirements and any applicable Supplemental Insurance Requirements. The requirements identified below are minimum requirements. If the Prime Contract imposes additional or higher standards, Subcontractor shall meet those as well. Where a Controlled Insurance Program ("CIP") is specified in the Prime Contract, these Insurance Requirements shall not apply to coverages supplied by the CIP, but shall apply to coverages which Subcontractor is required to carry outside the scope of the CIP.

**2. Basic Insurance Requirements**

2.1. Workers' Compensation covering Subcontractor's statutory obligations in the State(s) in which the Work is to be performed or Federal statutory obligations, if applicable to the Project, and Employers' Liability insurance with limits of liability of \$1,000,000 per accident. Where applicable, a US Longshore and Harbor Workers' Compensation Act endorsement must be included.

2.1.1. If Subcontractor employs the services of leased employees for the Work or for a portion of the Work, it will be required to submit evidence, to the satisfaction of Contractor, that such leased employees are fully covered by the minimum limits of Workers' Compensation and Employers' Liability Insurance. Such evidence shall include, but not be limited to, submission of the applicable leasing agreement.

2.2. Automobile Liability insurance with the limit of \$1,000,000 per accident covering Subcontractor's owned, non-owned and hired automobiles.

2.3. Commercial General Liability insurance written on the 1988 ISO OCCURRENCE policy form or subsequent versions with limits of liability as follows:

General Aggregate	\$ 2,000,000
Products-Completed Operations Aggregate	\$ 2,000,000
Personal/Advertising Injury	\$ 2,000,000
Each Occurrence	\$ 2,000,000

This coverage shall include coverage for premises-operations, independent contractors' protective, products and completed operations, personal injury and broad form property damage (including coverage for explosion, collapse, and underground hazards), and Contractual Liability protection with respect to Subcontractor's indemnification obligations under the Subcontract. Products-completed operations coverage must be maintained for at least four years after final completion of the Project.

**3. Supplemental Insurance Requirements**

3.1. Watercraft Protection and Indemnity Liability insurance if any of the Work is on or over navigable waterways or involves use of any vessel. Limits are to be approved by Contractor in writing.

3.2. Aircraft Liability insurance if any aircraft is used in performance of the Work. Limits are to be approved by Contractor in writing.

3.3. Railroad Protective Liability insurance if any of the Work is on or within 50 feet of any railroad or affects railroad property, including but not limited to tracks, bridges, tunnels, and switches. Limits are to be approved by Contractor in writing.

3.4. Professional Liability insurance, if Professional Services are provided, with limits of liability as follows:

Each Claim	\$ 5,000,000
Aggregate	\$ 5,000,000

Provided, however, that if the Subcontract Price is \$10,000,000 or less, then the following limits of liability shall apply:

Each Claim	\$ 2,000,000
Aggregate	\$ 2,000,000

Subcontractor shall keep such Professional Liability insurance in force during the Subcontract, and for four years after final completion of the Project.

3.5. Pollution Liability insurance, which must be on an occurrence basis, if Environmental Services are provided. "Environmental Services" means any abatement, removal, remediation, transporting, or disposal of a Hazardous Material, or any assessments or consulting relating to same. At the sole discretion of Contractor, Pollution Liability Insurance will also be required for Subcontractors performing services involving materials or areas where the risks of encountering a Hazardous Material are likely. Limits of liability for Pollution Liability insurance shall be as follows:

Each Occurrence	\$ 5,000,000
Aggregate	\$ 5,000,000

**4. General Provisions**

4.1. Every policy must be written by an insurance company licensed in the state where work is being performed and is reasonably acceptable to Contractor.

4.2. Limits for Employer's Liability, Commercial General Liability and Automobile Liability may be attained by a combination of an underlying policy with an umbrella or excess liability policy, provided, however, that in the event an umbrella excess liability policy is used, it must also be endorsed to provide primary and non-contributory coverage to any other valid, applicable, and collectible insurance or self-insurance in force for

- Contractor, Owner, or other additional insured, regardless of whether such other insurance is written on a primary, excess or contributory basis.
- 4.3. "Barton Malow Company," Contractor (if other than Barton Malow Company) and Contractor's members and partners (if applicable), Owner, and all other entities as required in the Prime Contract shall be endorsed as additional insureds on Subcontractor's liability insurance (including general liability, excess liability, automobile liability and pollution liability, where applicable) with respect to liability arising out of activities, "operations" or "work" performed by or on behalf of Subcontractor, including Contractor's general supervision of Subcontractor, products and completed operations of Subcontractor, and automobiles owned, leased, hired or borrowed by Subcontractor. The coverage provided by the additional insured endorsement shall be at least as broad as the Insurance Service Office, Inc.'s Additional Insured, Form B CG 20 10 11 85 or CG 20 26 11 85 as determined by Contractor. Forms that do not provide additional insured status for completed operations will not be accepted. In no case shall any additional insured endorsement exclude coverage for Barton Malow Company's or Contractor's own negligence nor limit coverage for Barton Malow Company or Contractor only to potential liability incurred solely as a result of Subcontractor's acts or omissions. Furthermore, nothing in the additional insured endorsement shall limit Barton Malow Company's or Contractor's products-completed operations coverage to only those liabilities arising from Subcontractor's "ongoing operations".
  - 4.4. Subcontractor will furnish, before any work is started, certificates of insurance and copies of any additional insured endorsements showing the required coverages. Receipt by Contractor of a non-conforming certificate of insurance without objection, or Contractor's failure to collect a certificate of insurance, shall not waive or alter Subcontractor's duty to comply with the insurance requirements. Modifications to these Insurance Requirements will not be effective unless made in a writing executed by an authorized representative of Contractor. Upon written request by Contractor, Subcontractor will provide copies of its insurance policies.
  - 4.5. Evidence of the required insurance is to be provided to Contractor on an ACORD Certificate Form or other certificate form that is acceptable to the Contractor. The certificate must indicate:
    - 4.5.1. Any coverage exclusions or deviations from the 1988 ISO commercial general liability form or subsequent versions;
    - 4.5.2. A Best's rating for each insurance carrier at A- VII or better;
    - 4.5.3. That additional insured endorsements have been provided as required under the Subcontract; and
    - 4.5.4. Any deductibles over \$10,000 applicable to any coverage.
  - 4.6. All coverage must be primary and not excess over or contributory with any other valid, applicable, and collectible insurance or self-insurance in force for Contractor, Owner, or other additional insureds, regardless of whether such other insurance is written on a primary, excess, or contributory basis. Each policy shall be endorsed so that the issuing insurance company will provide thirty (30) days written notice of cancellation to the Contractor and any additional insureds. Subcontractor also agrees to provide Contractor with written notice, in accordance with Section 24 of the Subcontract, of any cancellation, non-renewal or material modification to any of the policies required under this Subcontract.
  - 4.7. Subcontractor will provide full coverage for all of Subcontractor's equipment, property and tools used in the Work.
  - 4.8. Subcontractor shall waive, and shall require (by endorsement or otherwise) its insurers providing the coverage required by these Insurance Requirements to waive, subrogation rights against Contractor, Owner, and all other additional insureds for losses and damages incurred and/or paid under the insurance policies required by these Insurance Requirements or other insurance applicable to Subcontractor or its Subordinate Parties, and will include this same requirement in contracts with its Subordinate Parties. If the policies of insurance referred to in this paragraph require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.
  - 4.9. Subcontractor will send or fax a copy of these insurance requirements to its agent when an insurance certificate is requested to assure that the policies comply with the Insurance Requirements.
  - 4.10. If Subcontractor requires its Subordinate Parties to provide additional insured endorsements in favor of Subcontractor, those endorsements shall be extended to Contractor, Owner and all other required additional insureds.
  - 4.11. Subcontractor's duty to provide the insurance coverage set forth in these Insurance Requirements is a severable obligation from Subcontractor's indemnification obligations as set forth in Article 16 of Document No. 1. Nothing in these Insurance Requirements shall be deemed to limit Subcontractor's liability under this Subcontract.