



# Subcontract Agreement

4725 Enterprise Way, Suite 1, Modesto, CA 95356  
License # 794642

<b>Contractor</b> Simile Construction Svc., Inc. 4725 Enterprise Way Ste. #1 Modesto CA 95356-8967	<b>Subcontractor</b>
<b>Project</b>	<b>Architect</b>

THIS SUBCONTRACT AGREEMENT (the "Agreement" or "Contract") is made and entered into on \_\_\_\_\_, by and between SIMILE CONSTRUCTION SERVICE, INC., a California Corporation, designated as "Contractor" and Subcontractor, respectively.

The Project is to be constructed in accordance with all general, supplementary, special conditions, plans, drawings, and specifications, as well as all modifications, supplements, and addenda thereto (collectively the "Plans and Specifications") which have been prepared on behalf of the Owner by \_\_\_\_\_

### 1.Scope of Work.

Subcontractor shall, without limitation, furnish and pay for all materials, labor, supervision, scaffolding, equipment, tools, appliances, transportation, storage, sales tax, and any all other taxes and/ or permits required to complete the following work for the Project(the "Work") in accordance with the Contract Documents:

In the event of any dispute between Contractor and Subcontractor over the scope of Subcontractor's Work under the Contract Documents, Subcontractor will not stop the Work but will prosecute the Work diligently to completion, the dispute to be submitted for resolution in accordance with Section 21 of the Standard Conditions of Contract attached.

### 2. Contract Documents.

The term "Contract Documents" is defined to mean the Prime Contract, the Plans and Specifications, this Agreement, and other documents attached to or incorporated into the Prime Contract and/or this Agreement.

Subcontractor certifies that it is fully familiar with all the terms of the Contract Documents, the location of the Project Site, and the conditions under which work is to be performed and that it entered into this Agreement based upon its investigation of all such matters and is not relying on any opinions or representations of Contractor. This Agreement represents the entire agreement between Contractor and Subcontractor, and supersedes any prior oral or written agreements or representations. The Contract Documents are incorporated in this Agreement by reference, and Subcontractor, its subcontractors, suppliers and/or materialmen will be and are bound by the Contract Documents insofar as they relate in any way, directly or indirectly, to the work covered by this Agreement. Subcontractor agrees to be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the Contract Documents, including, but not limited to, all applicable terms and provisions thereof. Where, in the Contract Documents, reference is made to Contractor and the work or specifications therein pertain to the Subcontractor's trade, craft or type of work, including, but not limited to any general and special conditions and applicable administrative requirements, such work or specifications shall be interpreted to apply to Subcontractor instead of Contractor.

### 3. PRICE AND PAYMENT

\$: \_\_\_\_\_ (the "Contract Amount") pursuant to the Payment Schedule attached to this Agreement.

### 4. COMMENCEMENT AND COMPLETION OF WORK

Subcontractor acknowledges that time is of the essence of this Agreement. Subcontractor shall commence the Work within ten (10) days after

written notice to proceed from the Contractor and shall thereafter complete the Work in accordance with the Subcontractor's Work Schedule that Subcontractor has submitted to the Contractor and that the Contractor has approved, a copy of which is attached as Exhibit "A" (the "Work Schedule"). Pursuant to the Work Schedule, the Work shall be completed to the satisfaction of the Contractor on or before \_\_\_\_\_, 20\_\_\_\_ (the "Completion Date").

**5. PRICE AND PAYMENT**

SUBCONTRACTOR acknowledges having read the Payment Schedule Standard Conditions of Contract, Subcontract and Billings, Subcontractor Insurance Requirements and the Additional Owners Requirements as Needed attached hereto as Exhibits "B", "C", "D", "E" and "F" respectively, and agrees to be bound by each and every one of those conditions.

**6. INCORPORATION OF EXHIBITS**

- Exhibit "A" - Work Schedule
- Exhibit "B" - Payment Schedule
- Exhibit "C" - Standard Conditions of Contract
- Exhibit "D" - Subcontract and Billings
- Exhibit "E" - Subcontractor Insurance Requirements
- Exhibit "F" - Additional Owners Requirements as Needed

**7. COUNTERPARTS**

This Agreement may be executed in any number of counterparts which together shall constitute the agreement of the parties, and the parties shall initial the exhibits attached hereto, if any.

**EXHIBIT "B" PAYMENT SCHEDULE**

The Subcontractor shall become entitled to receive monthly progress payments for its Work performed during the payment periods established in the Prime Contract and subject to Contractor's payment from the owner for Work performed by Subcontractor as reflected in Contractor's application for payment to Owner. Progress payments shall be made as follows:

- a. Original invoices for labor and/or materials satisfactorily provided and/or performed through the end of each month and physically received by the Contractor at its principal office no later than the 1st day of the following month will be paid on or about the 25th day of the month thereafter, subject, however to receipt of funds by the contractor from the Owner, agreement of percent complete with SCSJ superintendent or Project Manager and receipt of all required paperwork. Send invoices to:  
4725 Enterprise Way Suite 1  
Modesto, CA 95356  
Subcontractor's Foreman or Superintendent must meet onsite with SCSJ Superintendent and/or Project Manager to discuss schedule and agree to the projection of percent complete, through the end of the month, no later than the 20th day of that billing month. Faxed and or e-mailed invoices are due to SCSJ no later than the twenty-fifth day of the month for the current month's billing.

**FAILURE TO MEET THE ABOVE DEADLINES WILL RESULT IN THE BILLING BEING PROCESSED THE FOLLOWING MONTH.**

- b. No payment shall be made by the Contractor to the Subcontractor of any invoice for Work that is not in fact complete as of that particular invoice date. Payment of any invoices may, at the option of the Contractor, be made by joint check or any other payment method deemed necessary by contractor to Subcontractor and any supplier or subcontractor. Additionally, no payment shall be made by the Contractor to the Subcontractor for any invoice that is not accompanied by a duly executed Conditional Waiver and Release Upon Progress Payment. Should a Preliminary Lien Notice be filed by any supplier or subcontractor to the Contractor, then a joint check or any other payment method deemed necessary by contractor shall be issued by Contractor to Subcontractor and the supplier or subcontractor that has filed a Preliminary Lien Notice unless Contractor has received a full, final, and unconditional release from any such supplier or subcontractor prior to the issuance of any checks to the Subcontractor. When a Preliminary Lien Notice has been filed an unconditional release must be provided to the Contractor on a monthly basis regards of whether work/supplies have been provided. In the event the Contractor must process a payment for the subcontractor for an amount under \$1,000.00, a \$50.00 processing fee will be assessed for each payment made.
- c. All payments to the Subcontractor for any particular period shall not exceed ninety percent (90%) of the amount invoiced by the Subcontractor to the Contractor.
- d. Final payment to the Subcontractor shall be due and payable ten (10) days after receipt by Contractor of final payment by owner for Subcontractor's work and on the condition that the Work is one hundred percent (100%) complete, including all corrective and repair work commonly referred to as "punch list" items. Final payment is subject to the Contractor's receipt of conditional lien releases upon final payment from all of Subcontractor's subcontractors and material suppliers, or Contractor's withholding an amount reasonably necessary to fully protect and insure itself against liens and any actual or potential liability or damage directly or indirectly relating to this Contract or the Subcontractor's breach or threatened breach of any other contract. All documents necessary from the Subcontractor for completion of the Project must be provided to Contractor prior to Subcontractor's entitlement to final payment. Final payment will not be authorized or released until warranties and operation maintenance manuals, as-built drawings, etc. have been received and approved by Contractor and the Owner or the Owner's representative. Any withholding of monies from the Subcontractor by the Contractor shall be interest free.
- e. The acceptance of any progress payments by the Subcontractor shall constitute a release of the Contractor and Owner from any other liability,

except retainage, due to any reason, arising or incurred during the payment period. Acceptance of final payment by the Subcontractor constitutes a general release of all claims in favor of the Contractor and Owner. No payment, including final payment, shall be evidence of the performance of this contract by the Subcontractor, either in whole or in part, and no payment shall be construed as an acceptance of defective or incomplete Work, for which the Subcontractor shall remain responsible and liable for its performance in strict compliance with this contract and the Contract Documents.

f. The Contractor is authorized to withhold from any payments due or to become due under this Contract a reasonable amount, as determined by Contractor, as may be necessary in Contractor's opinion to protect Contractor and/or the Owner from loss for any reasons arising out of Subcontractor's responsibility for performance under this Contract, including but not limited to, (a) defective work not remedied; (b) filing of lawsuit, claim, or arbitration proceeding or reasonable evidence indicating a probably filing of such proceeding; (c) failure of the Subcontractor to make payments properly for materials or other items used on the Project for which a California 20 day preliminary lien notice was filed; (d) reasonable doubt that the Work can be completed for the unpaid balance of the Contract Amount; (e) damage to another contractor or subcontractor; (f) costs incurred by Contractor resulting from Subcontractor's failure to complete the Work in accordance with the Work Schedule; (g) penalties of any kind whatsoever assessed against Owner or Contractor for failure by Subcontractor to comply with laws; (h) unsatisfactory prosecution of the Work by the Subcontractor with respect to Subcontractor's warranty work; or (i) any other ground for withholding permitted by law. If funds are withheld because of the filing of a lawsuit, claim, or arbitration proceeding or because of the reasonable expectation of such filing, Contractor may withhold sufficient funds as are necessary in the Contractor's opinion to cover attorneys' fees and other costs recoverable by Contractor under the provisions of the Contract.

#### **EXHIBIT "C" STANDARD CONDITIONS OF CONTRACT**

1. **Performance of Work.** The Work shall be done under the direction of the Contractor, and to the satisfaction of the Contractor and Owner. Said Work shall be performed in strict accordance with the Contract Documents. The Work shall be performed in a skillful and workmanlike manner with material, equipment, etc., being both new and of the best kind and grade for the purpose intended. The Subcontractor shall provide at its own expense, all temporary and permanent tools, implements, storage space, tests, samples, services, supplies, and all other items necessary for the proper performance of the Contract and acceptance of the Work by the Owner.

2. **Subcontractor's Duty to Inspect Related Work.** The Subcontractor, before proceeding with any of the Work under this Agreement, shall accurately check and verify all previous and surrounding work done by others and determine the correctness of same. The Subcontractor shall make a field inspection of all work relating to its Work. The failure of the Subcontractor to detect and disclose any existing discrepancies or non-conformities and report same to the Contractor, in writing, before commencing its Work shall relieve the Contractor of any and all responsibility for same, and the Subcontractor shall be responsible and liable for all resulting damages, costs and expenses arising as a result of discrepancies and non-conformities which should have been discovered by the Subcontractor.

3. **Compliance With Laws and Regulations.** All work, labor, services and materials to be furnished, supplied or performed by the Subcontractor must strictly comply with all Federal, State, Local, Municipal, as well as any and all other governing jurisdictions' and authorities' Laws, Rules, Regulations, Statutes, Ordinances and Directives, hereinafter designated as "Laws". All work, labor, services or materials, in addition to that specifically required by the Contract, but necessary to fully comply with said Laws; will be furnished by the Subcontractor as part of this Agreement and without any additional compensation. If the Subcontractor discovers or should have discovered any variance between the Contract and any laws, the Subcontractor shall promptly notify the Contractor, in writing, and request resolution of any such variance before proceeding with the Work. The Subcontractor agrees to indemnify and save the Contractor and Owner harmless from and against any and all claims, loss or expense caused or occasioned directly or indirectly by its failure to fully comply with all laws.

#### **4. Changes in Work.**

a. The Contractor may order changes in the Work. However, the Subcontractor shall make no changes in the Work required to be performed by the Subcontractor pursuant to the Contract without prior written approval from the Contractor. Subcontractor shall not be compensated for any change made in the Work without the prior written direction of the Contractor. All requests for changes in the Work shall be made by the Subcontractor to the Contractor directly. Subcontractor shall not be permitted to have any direct contact with the Owner without the prior written consent of the Contractor. Written approval for any change in the Work must be signed by the authorized representative of the Contractor, hereby designated to be (Contractor's designated representative) and an authorized representative of the Subcontractor hereby designated to be (Subcontractor's designated representative). The Subcontractor shall not be entitled to nor shall it receive any increase or upward adjustment in its Contract Amount unless said amount and liability are acknowledged, in writing, by Contractor's authorized representative.

b. Prior to the issuance of any change order, the Contractor may require the Subcontractor to furnish to the Contractor a detailed breakdown showing the difference in value of the Work, labor, services, and materials altered, added, omitted or changed by the proposed change order.

c. If an agreement as to monetary allowance or other terms in the change order cannot be reached, the Contractor, by an authorized representative, may direct, in writing, the Subcontractor to perform the Work with the final adjustment reserved until final completion of both this Agreement, and the Prime Contract.

d. Change orders are subject to the terms of this Agreement and all other Contract Documents. Contractor shall not be entitled to any monetary or time allowance for delays, suspensions, escalations, impact or other cost factors, directly or indirectly incurred, other than what is specifically provided for in an approved Change Order.

e. The failure of the Subcontractor to immediately commence performance of any change order, when so directed, in executed written form by the Contractor, whether or not all terms have been agreed upon, may be deemed a material breach and the Subcontractor held in default of this Agreement. Any extension of time needed as a result of a proposed change order shall be requested by the Subcontractor, in writing, prior to the issuance of the change order, and shall be incorporated therein.

f. The approval of any change order and payment thereof, prior to completion and acceptance of the Project, shall not preclude the Contractor from questioning the validity thereof and recouping payment therefore, where, on final settlement, it appears that the change order work was neither extra nor additional work under a proper interpretation of this Agreement or the Prime Contract.

g. No approved change order shall vary, abrogate, avoid, or otherwise affect the terms, conditions and provisions of this Agreement except as specifically set forth in the change order.

#### **5. SUBCONTRACTOR'S INSPECTION, STORAGE AND APPROVAL OF LABOR & MATERIALS**

a. The Subcontractor shall be responsible for the receipt, delivery, unloading, storage, warehousing, protection, insurance coverage, and all other risks of loss relating to any materials or equipment it is to furnish, install, or provide under this Contract.

b. If the Contractor furnished material to the Subcontractor, then the Subcontractor shall be obligated to inspect all material and equipment at time of receipt or delivery. The Subcontractor shall be responsible to immediately notify the Contractor, in writing, of any defects or non-conformity in the material or equipment so received or delivered. Failure to notify the Contractor shall be deemed an acknowledgment and acceptance of the material as being in accord with this Agreement. The Subcontractor shall be liable for any damages incurred by the Contractor as a result of its failure to so notify the Contractor.

c. It is the Subcontractor's obligation, upon direction by the Contractor, to take all necessary steps to obtain any and all required approvals necessary or required under this Agreement or the Prime Contract for the Subcontractor's Work.

d. The Subcontractor shall, within twenty-four (24) hours after receiving specific written notice from the Contractor, commence to take down and remove any designated portion of its Work which is condemned, disapproved, or is questioned as not being in strict compliance and conformity with the requirements of this Agreement or the Prime Contract. The Subcontractor shall promptly, at its own expense, correct and rectify same. If the Contractor determines that it will accept non-conforming work, the Contractor shall be entitled to a credit for the non-conformity, plus all other costs incurred.

e. The Subcontractor shall, at its own expense, fully protect, insure and secure the Work from injury or damage. Any damage prior to final acceptance and payment for the Project shall be immediately corrected and rectified by the Subcontractor at its sole expense. Inspection or supervision by the Contractor shall not relieve the Subcontractor of its obligations herein.

f. The Subcontractor shall promptly perform any and all punch list work submitted to it by the Contractor.

#### **6. Cleanup.**

a. The Subcontractor shall continuously maintain the Project free from all rubbish, debris and any other waste materials generated from the Work. Upon the completion of the various portions of the Work, the Subcontractor shall broom clean its work areas. The Subcontractor shall immediately cleanup and/or remove any unsafe or hazardous Project Site condition caused or created by Subcontractor.

b. Unless otherwise agreed upon in writing between Contractor and Subcontractor, Contractor will furnish a construction bin for trash disposal at the Project Site. Contractor shall have the right to apportion the cost and use of this bin between all subcontractors performing work on the project and Contractor shall have the right to charge Subcontractor for its proportionate cost of the use of this bin in an amount to be determined in Contractor's sole and absolute discretion.

#### **7. Job Progress and Performance.**

a. The Subcontractor acknowledges that the time specified for the completion of the Contract in the Work Schedule is a material provision of this Agreement, and that time is of the essence.

b. Within fourteen (14) calendar days following execution of this Agreement, the Subcontractor shall provide the Contractor with complete and accurate submittals and/or shop drawings applicable to the Work for Contractor's approval. For purposes of this Contract, the term "submittals" shall mean and refer to catalog cut sheets, shop drawings, engineering schedules and designs, color samples, etc. that each subcontractor is required to submit to the Project Architect via the Contractor as a package in order to permit the Project Architect to confirm that each subcontractor is installing that subcontractor's work and materials in accordance with the Contract Documents. Failure by the Subcontractor to timely provide submittals to the Contractor will result in delay of the Project by the Subcontractor and shall entitle Contractor to liquidated damages in accordance with the provisions of subparagraph c hereinafter.

c. The Subcontractor shall furnish sufficient forces to assure proper performance of this Contract in strict compliance with the Work Schedules. Subcontractor shall, from time to time, on demand of the Contractor, give adequate evidence to the Contractor to substantiate the planned performance and progress of the Work. The Subcontractor shall immediately increase its work force, accelerate its performance, work overtime, work Saturdays, Sundays, and holidays, all without additional compensation, if, in the opinion of the Contractor, and following verbal or written

notice from the Contractor, such work is necessary to maintain proper job progress. Subcontractor shall, at all times, commence any and all work to be performed pursuant to the Contract within forty-eight (48) hours after receipt of verbal or written notice from Contractor. Subcontractor and Contractor agree that the Subcontractor's failure to commence any and all work to be performed pursuant to the terms of the Contract within this forty-eight (48) hour period shall constitute a material breach of the Agreement and shall entitle Contractor to terminate this Agreement in accordance with provisions of Paragraph 12 hereinafter. Additionally, by placing their initials here ( ) ( ). Subcontractor and Contractor agree that in this event Contractor shall be entitled to liquidated damages from the Subcontractor at a rate equivalent to twice the amount specified in the Contract Documents commencing on the third (3rd) day following Subcontractor's receipt of notice to commence any and all work to be performed pursuant to this Agreement. In the absence of a rate specified in the Contract Documents, the amount of liquidated damages to which the Contractor shall be entitled shall be the sum of Five Hundred Dollars (\$500.00) per day.

Please initial here

d. From the time of commencement of all the Work to be performed pursuant to this Agreement, the Contractor shall proceed with each and every part of this Agreement in a prompt and diligent manner. The Subcontractor, without additional compensation, shall maintain the Work Schedule, and shall perform this Agreement at such times, in such order, and in such manner as the Contractor may direct. If required by the Contract Documents, Subcontractor shall order materials immediately following receipt of approved submittals from the Contractor, Owner, or architect. Subcontractor shall commence, continue, and complete its performance of the Project so as not to delay the Contractor or other subcontractors and so as to insure timely completion.

e. Prior to the commencement of all the Work, Subcontractor shall furnish Contractor with a written list of all suppliers and/or subcontractors Subcontractor intends to utilize in conjunction with Subcontractor's Work on the Project. Subcontractor further agrees to notify the Contractor, in writing, of any substitutions or modifications to the list of suppliers and/or subcontractors provided to the Contractor. Subcontractor shall be solely responsible and liable for any and all claims by any materialmen, suppliers, or subcontractors not listed on the written list furnished to Contractor and Subcontractor agrees to indemnify and hold Contractor harmless from any and all claims asserted directly or indirectly against Contractor by any such materialmen, suppliers, or subcontractors not listed by Subcontractor.

f. To insure timely performance, Subcontractor shall have a foreman and a complete set of Plans and Specifications on the Project Site while Subcontractor's work is in progress. The name and home phone number of Subcontractor's foreman shall be provided to Contractor and Contractor's job superintendent, prior to the commencement of Subcontractor's Work.

g. The Subcontractor shall conform to the Contractor's hours of work. No premium time will be acknowledged or paid unless pursuant to a written authorization by the Contractor. The Subcontractor shall neither delay nor adversely affect the performance of the Contractor or any other contractor or subcontractor working on or related to the Project. If the Subcontractor should so delay or threaten to delay the progress or performance of the Project, or cause any actual or potential damage or liability to the Contractor, then Subcontractor may be deemed in breach of this Agreement, and shall indemnify and hold the Contractor harmless.

h. The Subcontractor will fully cooperate and coordinate its Work with the Contractor and any other contractor or subcontractor on the Project Site. The Subcontractor shall bear the costs of all damages done to other contractors and shall be directly responsible to such other contractors or subcontractors for any damages caused by or resulting from acts or omissions of the Subcontractor. The liability of the Subcontractor shall not be deemed waived by any assent or acquiescence by the Contractor to the Subcontractor's late performance.

i. In addition to liquidated damages, the Contractor shall be entitled to terminate the Contract due to late or threatened late performance. In the event any other contractor, testing facility, or governmental entity should damage the Subcontractor, the Subcontractor shall neither seek nor be entitled to any compensation from the Contractor, but will seek its damages directly from such other party.

j. The Subcontractor will not interfere with Contractor's contract with any other party. The Subcontractor acknowledges that the Contract Amount is based on the fact that the Contractor is not liable to the Subcontractor, absent any actual fraud or intentional and active tortious act, for any damages or costs due to delays, accelerations, non-performance, interferences with performance, suspension or changes in the performance or sequence of the Subcontractor's Work.

k. Should the Subcontractor's performance of the Work, in whole or part, be interfered with or delayed, or be suspended in the commencement, prosecution or completion, for reasons beyond the Subcontractor's control and without its fault or negligence, the Subcontractor shall be entitled to an extension of time in which to complete the Work; but only if it shall have notified, in writing, the Contractor of the cause of delay within two (2) days of the occurrence of the event, and provided a similar extension of time, if needed is allotted to the Contractor by the Owner. The Contractor owes no damage, duty, obligation, or liability to the Subcontractor as a result of any delay, interference, suspension, or other event, except for seeking an extension of time from the Owner. Events beyond the Subcontractor's control do not include work stoppages resulting from labor organizing activities or picketing of the job site.

**8. HOLD HARMLESS AND INDEMNITY.** To the fullest extent permitted by California law, Subcontractor shall indemnify and hold harmless Contractor, Owner, and their officers and employees, arising from all claims, loss, damage, injury, death, and liability (collectively "claims") of every kind, nature, and description, including injury or death of the employees of the Subcontractor, directly or indirectly arising from the performance of this Subcontract Agreement, regardless of whether or not such claim is caused in part by an indemnified party. This Hold Harmless and Indemnity Agreement also includes claims for product liability and strict liability. Subcontractor shall defend and hold harmless and indemnify the Contractor and Owner from any and all liability, including costs and expenses, penalties, suits, damages, claims, or judgments arising from any

injury to any person or entity and any damages to property as a result of any accident or occurrence, arising from any act or omission, or alleged act or omission, of the Subcontractor or its employees, Subcontractor's materialmen or equipment suppliers, or any officers, agents or employees of same, from the use, occupation, operations or completed operations performed on or away from the premises. These obligations of the Subcontractor will survive the completion of the Work or termination of this Subcontract Agreement. Subcontractor shall indemnify for:

(a) Bodily injury, emotional injury, sickness, disease, loss of earnings, death, pollution remediation or property damage (including the loss of use of property) to any person or entity, including but not limited to any employees or agents of Subcontractor, caused or alleged to be caused in whole or in part by any negligent act or omission of Subcontractor or anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable including the indemnified parties.

(b) Penalties imposed on account of the violation of any law, order, citation, rule, regulation, standard, ordinance or statute, caused by the action or inaction of Subcontractor.

(c) Infringement of any patent rights which may be brought against the Contractor or Owner arising out of Subcontractor's work.

(d) Any violation or infraction by Subcontractor of any law, order, citation, rule, regulation, standard, ordinance or statute in any way relating to the occupational health or safety of employees including, but not limited to, the use of Contractor's or other party's equipment, hoist, elevators or scaffolds.

(e) Claims and liens for labor performed or materials used or furnished to be used on the premises by the subcontractor, including all incidental or consequential damages resulting to Contractor or Owner from such claims or liens.

(f) Economic loss or damage including, but not limited to, consequential damages, delay damages and/or liquidated damages caused by or resulting from any negligent act or omission of Subcontractor or agents of Subcontractor.

The above Hold Harmless and Indemnity Agreement is not applicable to any penalty, loss, damage, expense or liability for damages, death or injury to persons or property caused by the active negligence or willful misconduct of the Contractor or Owner.

**DUTY TO DEFEND:** To the fullest extent permitted by California law, the Subcontractor shall defend all claims as defined in the Hold Harmless and Indemnity Agreement. At Subcontractor's expense, Subcontractor shall hire independent defense counsel for the Contractor and Owner, including their officers, agents, employees, affiliates, parents and subsidiaries, to defend any and all actions, suits, arbitration or administrative proceedings of any kind whatsoever. Subcontractor's expense shall not extend to those defense fees and costs to directly defend the active negligent acts or willful misconduct of the Contractor or Owner.

If the Subcontractor does not voluntarily defend the Contractor and Owner, Subcontractor will reimburse the Contractor and Owner for all legal expenses as provided by California law. The Contractor and Owner reserve the right to select defense counsel that will be appointed by Subcontractor for their defense.

**9. Insurance.** Subcontractor shall, at its expense, procure and maintain insurance on all of its operations, with carriers acceptable to Contractor, and in an amount acceptable to Contractor including the following coverage's: Per Exhibit E & F Additional Owner Requirements as needed.

a. For projects where design services are rendered in conjunction with the performance of work (Design Build), Subcontractor must provide an endorsement which includes Professional Liability/Errors & Omissions insurance.

b. Contractor may take such steps as necessary to assure Subcontractor's compliance at all times with its obligations under this Section 9. In the event Subcontractor fails to maintain any insurance coverage required under this Agreement, Contractor may maintain such coverage and charge the expense to the Subcontractor, or terminate this Agreement.

**10. Non-Liability of Contractor for Subcontractor's Tools, Materials, and Equipment.** The Contractor shall not be liable to the Subcontractor for theft, vandalism, or damage to Subcontractor's equipment, tools, store materials, or work in progress at the Project Site. The Subcontractor is solely responsible for storage, fencing, and securing Subcontractor's equipment, tools, materials, supplies, and Work in progress while working at the Project Site.

**11. Prohibition Against Assignment.** This Agreement is for the personal services of Subcontractor in completing the Work. Subcontractor may not assign this Agreement, Subcontractor's right to monies becoming due under this Agreement, or Subcontractor's duties under this Agreement to any other person without the prior written consent of Contractor, which consent may be withheld in the sole and absolute discretion of the Contractor.

**12. Termination.**

a. Should the Subcontractor fail to perform in strict accordance with the Contract Documents or as the Contractor may so direct; or should the Subcontractor become insolvent, unable to or fail to pay its obligations as they mature; or if the Subcontractor in any other respect, fails, in the opinion of the Contractor, to properly prosecute and perform any part of the Work, fails to exert its best performance efforts, be involved in labor disputes, or be terminated under any other contract with the Contractor; then Subcontractor may be deemed by the Contractor to have materially breached this Agreement.



**b.** In case of a breach, as indicated herein or as might otherwise be determined by law, then the Contractor may, at its discretion, terminate this Agreement, or any part thereof, by giving written notice thereof to the Subcontractor. In case of such termination, the Contractor may use any and all materials, equipment, tools or chattels furnished by or belonging to the Subcontractor either at the Project Site or for the Project. The Subcontractor, upon termination, will be deemed to have offered to the Contractor an assignment of all of its subcontracts and purchase orders relating to this Project. Title to all materials, tools, equipment, and Work in progress shall be deemed to have been transferred to Contractor upon termination. The Contractor may, at its discretion, do whatever is necessary to assure performance of any terminated Work, and to take such action, if necessary, in the Subcontractor's name. The Contractor may withhold from Subcontractor

any monies due or to become due under this or any other contract to offset the damages incurred or possibly incurred as a result of the breach. In case of a breach, the Subcontractor shall be liable to the Contractor for any and all additional costs, expenses, court costs, attorney's fees, and other damages, both liquidated and unliquidated, which directly or indirectly result from the Subcontractor's breach or threatened breach.

**13. GOVERNING LAW.** This Agreement shall be governed by the laws of the State of California.

**14. SEVERABILITY.** If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the rest of the Agreement shall remain in full force and effect, and shall in no way be affected, impaired or invalidated.

**15. AMENDMENT.** This Agreement, including any exhibits hereto, shall not be amended except in writing, signed by the parties. Any amendment or addendum to this agreement shall expressly refer to this agreement.

**16. LANGUAGE CONSTRUCTION.** The language of each and all paragraphs, terms and/or provisions of this Agreement, shall, in all cases and for any and all purposes, and in way and all circumstances whatsoever, be construed as a whole, according to its fair meaning, and not for or against any party hereto and with no regard whatsoever to the identity or status of any person or persons who drafted all or any portion of this Agreement.

**17. ATTORNEY FEES.** Should any litigation be commenced between the parties hereto, or their personal representatives, concerning any provisions of this Agreement, or the rights and duties of any person in relation thereto, the party or parties prevailing in such litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for his attorney fees in such litigation, which shall be determined by the court in such litigation, or in a separate action brought for that purpose

**18. CONDITIONAL CONTRACT.** This Agreement is made conditional upon the approval of the Subcontractor by the Owner.

**19. GUARANTY AND WARRANTY.** The Subcontractor, in addition to all other guarantees and warranties contained in the Contract Documents and not in limitation of the Contractor's other legal rights, warrants and guarantees that the Work shall be performed in strict and absolute accord with the Contract Documents, and that it shall, for a period of one (1) year or such other period of time prescribed by California law perform any maintenance or corrective work, without cost, as directed by the Contractor. The Contractor may demand assurance, by bond or otherwise, from the Subcontractor that it will abide by its guarantee and warranty as specified herein and as might otherwise be specified to a greater extent in the Contract Documents.

**20. SUBCONTRACTS BY SUBCONTRACTOR.** The Subcontractor hereby agrees to incorporate into any subcontracts or purchase orders it has with any other party, all those provisions required by law to be incorporated therein, and all those provisions of this Agreement, which affect the rights of the Contractor. This Agreement shall neither create a contractual relationship between Contractor and the Subcontractor's subcontractors or suppliers; nor between the Subcontractor and the Owner.

**21. ARBITRATION.** The parties hereto will attempt to settle any claim or controversy arising out of or relating to this Agreement through consultation and negotiation in good faith and a spirit of mutual cooperation. However, at any time before or during such negotiations, or following any unsuccessful negotiations, either party may be written notice to the other demand that the dispute be submitted to mediation. When such a demand is made, the parties shall within ten (10) days jointly make arrangements for the mediation of the dispute through the auspices, and pursuant to the then current mediation rules and procedures, of the Judicial Arbitration and Mediation Services ("JAMS"), except to the extent such rules and procedures are modified by agreement of the parties. If the dispute has not been resolved within sixty (60) days of any written demand for mediation, or within a longer time period to which the parties may agree, the dispute shall be submitted to binding arbitration in accordance with the commercial arbitration rules of J.A.M.S. In all cases submitted to JAMS for arbitration, the arbitration proceedings shall be conducted at a location mutually agreed upon by the parties and, if they cannot agree, then in Modesto, California. The arbitration shall be conducted by a single arbitrator. If the parties cannot agree on a single arbitrator within ten (10) days following submission of a dispute to JAMS for arbitration, then the arbitrator shall be selected in accordance with JAMS' commercial arbitration rules. The parties shall advance their respective administrative fees, and advance in equal shares the arbitrator's fee. Notwithstanding any rules or procedures of JAMS to the contrary, the arbitrator shall be bound to render a decision in accordance with applicable state and federal laws and shall issue written findings of fact and conclusions of law (the "written opinion"). In any petition to confirm, correct or vacate the arbitration award, the arbitrator's written opinion shall be subject to judicial review for limited the purpose of insuring that it conforms to applicable state and federal laws. Except for this limited right of judicial review and other statutory grounds for correcting or vacating the arbitrator's award, the parties agree that the decision of the arbitrator shall be final and binding upon them. Any arbitration award shall include the cost of arbitration and reasonable attorney's fees to the prevailing party, if the arbitrator determines that there is a prevailing party in any such dispute. Judgment may be entered on the award in the Stanislaus County Superior Court.

Any negotiation or mediation which takes place pursuant to this Agreement shall be confidential and shall be treated as a compromise and settlement negotiation for purposes of applicable rules of evidence.

**22. NOTICES.** All notices, requests, demands and other communications given or required to be given hereunder shall be in writing and sent by nationally recognized courier service such as Federal Express, by United States registered or certified mail with return receipt requested, or by fax machine duly addressed to the Parties as follows:

**CONTRACTOR:**

**SIMILE CONSTRUCTION SERVICE, INC., a California Corporation**

**Attn: Guy Simile, President**

**4725 Enterprise Way Suite 1**

**Modesto, California 95356**

**Telephone: (209) 545-6111**

**Facsimile: (209) 545-6112**

**SUBCONTRACTOR: Refer to subcontractor on page 1 of Subcontract Agreement**

A notice sent by fax machine will be presumed received on the date sent if transmitted and received during or prior to normal business hours and on the next business day if sent after normal business hours.

Delivery of any notice or other communication hereunder shall be deemed made on the date indicated in the return receipt or courier's records as the date of delivery or first attempted delivery to the address of the addressee set forth above. Any party may change its address for purposes of this Section by giving notice to the other party as provided in this Section.

**23. AUTHORITY OF THE PARTIES.** Each individual executing this Agreement on behalf of the respective parties represents and warrants that he is duly authorized to execute this Agreement on behalf of the respective parties.

**24. NO CONTRACTUAL RELATIONSHIP BETWEEN SUBCONTRACTOR AND OWNER.** Notwithstanding any language or provision in this Agreement to the contrary, this Agreement shall under no circumstances be construed to create a privity of contract by and between the Owner and the Subcontractor.

**EXHIBIT "D" SUBCONTRACT AND BILLING (PLEASE READ)**

**PLEASE DO NOT MAKE CHANGES TO YOUR SUBCONTRACT. IF A CHANGE MUST BE MADE, THEN PLEASE CONTACT THE PROJECT MANAGER TO REQUEST A REVISED SUBCONTRACT.**

**MSDS Sheets: Provide (1) set of any Material Safety Data Sheets required for your portion of work. Please forward these to our office with your signed subcontract. Please note your company name and job name on the front page of the MSDS report.**

**Form W-9: Subcontractor: Required if you have not subcontracted with Simile Construction Service within the last year or if you have had a recent name/owner change.**

**Information Sheet: Required if you have not subcontracted with Simile Construction Service within the last year or if you have had a recent name/owner change.**

**Insurance: General liability, auto and worker's compensation for the limits stated in the job specifications/contract. All general liability certificates of insurance must list Simile Construction Service, Inc., Property Owner and Client as additional insured, and must be job specific listing the project name and location. Worker's Comp must include a waiver of subrogation in favor of Simile Construction Service, Inc. the Property Owner & Client and either be job specific or a blanket waiver. (See Exhibit C, Item #9 of subcontract for more information)**

**Business License: A copy of your current city business license ( must be from the city where the work is to be performed )**

**Billing:** We must receive your contract billing, via fax or e-mail, no later than the twenty-fifth day of the month for work through the last day of the same month. Please discuss your percentage complete with your Project Superintendent and/or Project Manager and forward the agreed upon percentage to the Project Administrator by the 20th day of each month.

**FAILURE TO MEET THE ABOVE DEADLINES WILL RESULT IN THE BILLING BEING PROCESSED THE FOLLOWING MONTH.**

**Lien Releases:** Your billing must be accompanied by a conditional release, (Release forms are available upon request). If you have subcontractors or suppliers who have filed a preliminary notice, you must enclose conditional or unconditional releases from them as well. Once a preliminary notice has been filed, an unconditional release must be received by SCSI each month whether work was performed or not.



**Joint Checks:** Joint checks will be issued to any preliened subcontractor or supplier based on the amount stated in their conditional progress release unless unconditional releases are submitted with your billing. On specific projects, releases will be required of 2nd and 3rd tier subs or suppliers even if a pre-lien was not filed. Any joint checks issued, in the amount of less than \$1,000, will be subject to a \$50 processing fee.

**Warranty:** Warranty and operation manuals must be submitted to our office before your work is 80% complete. (A warranty form is enclosed for your use.)

**Payments:** Original invoices for labor and/or materials satisfactorily provided and/or performed through the last day of each month and submitted to the contractor no later than the first day of the following month will be paid on or about the 25th day of the following month subject, however, to receipt of funds by the contractor from the owner.

## Exhibit E

### SUBCONTRACTOR INSURANCE REQUIREMENTS

#### 1.0 **Mandatory Insurance Requirements**

Prior to commencing work, and until all obligations under this Contract are fulfilled, Subcontractor shall, at its sole expense, procure and maintain not less than the following coverage and limits of insurance. Such insurance shall be under forms of policies and from insurance companies satisfactory to Contractor. Insurance shall be placed with insurers with an A.M. Best rating of at least A- IX, and insurers must be authorized to do business in the state in which the work is being performed.

- 1.1 Workers' Compensation and Employers Liability Insurance as required by applicable law or regulations.
  - 1.1.1 Employers Liability with a \$1,000,000 limit.
  - 1.1.2 Waiver of subrogation endorsement in favor of the Contractor and Owner.
  - 1.1.3 U.S. L&H and Jones Act coverage is required if any exposure exists.
  - 1.1.4 Programs underwritten by any Self Insured Group require Contractor's prior written approval.
  - 1.1.5 If Subcontractor leases employees through an employment management, PEO or other such company, evidence of insurance must be provided through an Alternate Employer/Leased Employee endorsement naming Subcontract on the employment company's workers' compensation policy.
  
- 1.2 Commercial General Liability Insurance on a coverage form at least as broad as 2001 ISO Occurrence form CG 0001.
  - 1.2.1 The minimum limits of liability shall be as listed below, or as required in the prime contract, or as carried by the subcontractor, *whichever is greater*:
    - \$1,000,000** each occurrence
    - \$1,000,000** personal and advertising injury
    - \$1,000,000** general aggregate
    - \$1,000,000** products and completed operations aggregateThese limits can be provided in combination with an umbrella or excess policy.
  - 1.2.2 Coverage shall include:
    - Per project general aggregate endorsement
    - Broad form property damage including Completed Operations
    - Coverage for claims arising out of subsidence or earth movement
    - Contractual Liability insuring obligations assumed in this agreement
  - 1.2.3 Subcontractor shall maintain general liability and completed operations coverage through the expiration off the construction statute of repose period established by the state civil code where the project is located.
  - 1.2.4 Claims made or modified occurrence policy forms are not acceptable.
  - 1.2.5 A waiver of subrogation endorsement in favor of Contractor and Owner must be provided.
  
- 1.3 Additional Insured and Primary Insurance Requirements:
  - 1.3.1 The subcontractor and any lower tier subcontractors shall endorse its Commercial General Liability policy to add all parties required to be named as additional insured in the prime contract including without limitation Contractor, its directors, officers and employees and Owner.
  - 1.3.2 The form of the Additional insured Endorsement shall be ISO CG 20 10 11 85 or unmodified equivalent, or ISO CG 20 10 07 04 in conjunction with CG 20 37 07 04.
  - 1.3.3 A separate Primary and Noncontributory endorsement stating that Subcontractor's insurance shall apply as primary and any other insurance carried by Contractor or Owner will be excess only and will not contribute with this insurance. The form of the Primary and Noncontributory endorsement shall be ISO CG 20 01 04 13 or unmodified equivalent.
  - 1.3.4 Additional insured endorsements shall be provided through the end of the construction period and for the warranty term following project completion.
  
- 1.4 Automobile Liability Insurance on a coverage form at least as broad as ISO CA 0001, including:
  - 1.4.1 \$1,000,000 Combined Single Limit for bodily injury and property damage

- 1.4.2 Coverage on any automobile basis, including all owned, non-owned and hired auto
- 1.4.3 Any subcontractors subject to the Motor Carrier Act of 1980 must provide a MCS-90 endorsement with a primary limit of \$1,000,000 each accident
- 1.5 Umbrella or Excess Liability Insurance:
  - 1.5.1 If higher limits of coverage are required by the Prime Contract, the subcontractor will comply with such limits by providing evidence of an umbrella or excess liability policy. This policy shall be subject to all the requirements of the general liability policy as stated in section 1.2 and 1.3
- 1.6 Certificates of Insurance
  - 1.6.1 Subcontractor shall furnish certificates of insurance and required endorsements acceptable to Contractor before commencing any work on the project, and before payment of final retention.
  - 1.6.2 Payment may be withheld or work suspended, at the option of Contractor, until such acceptable certificates and endorsements have been furnished. Failure to provide acceptable certificates and endorsements shall be considered a material breach of contract. Copies of subcontractor's insurance policies shall be furnished upon reasonable request.
  - 1.6.3 Subcontractor shall immediately notify Contractor in writing after receiving a notice of cancellation of any insurance policy applicable to this Agreement. Payment may be withheld or work suspended until withdrawal of cancellation or reinstatement of the canceled policy.
  - 1.6.4 Acceptance of certificates of insurance by Contractor shall in no way limit Subcontractor's duties and responsibilities under this Agreement, including the duty to indemnify Contractor and Owner.
- 1.7 Insurance Requirements for Sub-Subcontractors, Truckers, Trucking Brokers, Sub-Haulers, Vendors and Suppliers:
  - 1.7.1 Subcontractor is responsible for verifying that its' Subcontractors, Truckers, Trucking Brokers, Sub-Haulers, Vendor and Suppliers of any tier maintain insurance in like form and amounts, including the Additional Insured requirements stated in Section 1.5, and will provide Contractor evidence of such insurance before allowing the lower tier subcontractors to begin work on the project.
- 1.8 Builder's Risk Insurance:
  - 1.8.1 Subcontractor shall satisfy itself as to the existence and extent of Builder's Risk insurance prior to commencing work.
  - 1.8.2 If Builder's Risk insurance purchased by Owner or Contractor covers loss or damage to Subcontractor's work, Subcontractor shall be responsible for the insurance policy deductible.
  - 1.8.3 If Owner or Contractor has not purchased Builder's Risk insurance covering the full insurable value of subcontractor's work, Subcontractor may procure such coverage at its own expense. Such insurance shall also apply to Owner's or Contractor's property in the care, custody or control of Subcontractor.
  - 1.8.4 Contractor and Subcontractor waive all rights against each other and against all other Subcontractors and Owner for loss or damage to the extent reimbursed by Builder's Risk or any other property or equipment insurance applicable to the work, except such rights they may have to the proceeds of such insurance.

**Exhibit F Additional Coverage if Required by Owner [If Checked]**

- 1.9 Other Requirements:
  - 1.9.1 Insurance coverage in the minimum amounts set forth herein shall not relieve Subcontractor for liability in excess of such coverage, nor shall it preclude Contractor from taking other available actions under any other provision of this Agreement or law.
  - 1.9.2 Subcontractor's obligations for loss or damage arising out of Subcontractor's work are not limited to the types or amounts of insurance set forth above. To the extent Subcontractor maintains insurance greater than these minimum requirements, Subcontractor agrees that such insurance shall be applicable to any of Subcontractor's liability obligations arising out of this Agreement.
  - 1.9.3 Subcontractor shall be responsible for any deductible amount or any loss arising out of coverage denials by its insurance carrier.
  - 1.9.4 Contractor makes no representation as to the amount of insurance coverage required to protect Subcontractor's interests.
  - 1.9.5 Should any insurance policy lapse or be canceled during the contract period, Subcontractor shall, prior to the effective expiration or cancellation date, furnish Contractor with evidence of renewal or replacement of the policy. Failure of the Subcontractor to provide timely notice of pending cancellation shall be considered a material breach of contract.
- 2.1 Professional Liability Insurance:
  - 2.1.1 Professional Liability insurance in the amount of \$1,000,000 per claim/aggregate shall be carried by Subcontractor if work under this Agreement includes any professional services, design assist, design-build, stamped drawings or LEED certification services.

- 2.1.2 Evidence of coverage in the form of a certificate of insurance shall be provided prior to the start of the project.
- 2.1.3 Claims-made policies must have a retroactive date prior to the first date design services were performed under the Scope of Work, and coverage must extend a minimum of five (5) years beyond Consultant's completion of Scope of Work, or end of this Agreement, whichever is later.
- 2.1.4 If Claims-made coverage is canceled or non-renewed, and not replaced with another claims-made policy with a retroactive date prior to the Agreement effective date, the Consultant must purchase Extended Reporting Tail coverage for a minimum of five (5) years beyond completion of Scope of Work or end of this Agreement, whichever is later.

2.2 Pollution Liability Insurance

- 2.2.1 Contractor's Pollution Liability insurance with limits no less than \$1,000,000 per occurrence and \$2,000,000 aggregate is required if Subcontractor or their Subcontractors or Suppliers of any tier:
  - 2.2.1.1 bring pollutants to the job site, or;
  - 2.2.1.2 if their operations create a pollution exposure, or;
  - 2.2.1.3 if they are performing work on or penetrating or sealing the building envelope, or dealing with water. Coverage for mold and bacteria is required in these cases.
  - 2.2.1.4 if their work could in any way contribute to or cause airborne silica to be released. Coverage for silica is required in this case.
- 2.2.2 The Owner and Contractor must be named Additional Insured on this policy.

2.3 Hazardous Materials Abatement

- 2.3.1 Contractor's Pollution Liability with limits no less than \$5,000,000 per occurrence and \$5,000,000 annual aggregate is required if Subcontractor or their Subcontractors or Suppliers of any tier are required to perform remediation of hazardous materials as those terms are defined in federal, state or local law; or if their operations involve an exposure to hazardous materials.
- 2.3.2 The Owner and Contractor must be named Additional Insured on this policy.
- 2.3.3 If Subcontractor or their Subcontractors or Suppliers haul hazardous materials, the policy must extend pollution coverage to the transportation of hazardous materials or pollutants by waste hauling vehicles. If Subcontractor is subject to the Motor Carrier Act of 1980, the Motor Carrier Act endorsement MCS-90 must be obtained and attached to the policy.

2.4 Riggers Liability

- 2.4.1 Subcontractor shall carry Rigger's Liability Insurance with limits no less than \$1,000,000 per occurrence if Subcontractor's work involves moving, lifting, lowering, rigging or hoisting of property or equipment belonging to others. Such insurance shall insure against physical loss or damage to the property or equipment. Deductibles greater than \$50,000 require Contractor's prior written approval.

2.5 Work Near Railroads

- 2.5.1 If Subcontractor or their Subcontractors or Suppliers performs any work or conducts any operations within fifty feet of any railroad (including light rail, fixed rail or any other rail system), Subcontractor Commercial General Liability policy shall be endorsed to delete any exclusion, including the Contractual Liability exclusion, for work performed within fifty feet of a railroad. A copy of such endorsement shall be provided to Contractor before work within fifty feet of the railroad commences.

2.6 Aircraft/Helicopter Insurance

- 2.6.1 Aircraft Liability insurance with limits no less than \$10,000,000 per occurrence, including Passenger Liability, shall be provided if the Subcontractor or their Subcontractors use any owned, leased, chartered or hired aircraft of any type in the performance of this Agreement.
- 2.6.2 Subcontractor or their Subcontractor shall name Contractor and Owner as Additional Insured as respects aircraft liability and provide a Waiver of Subrogation endorsement of Contractor and Owner as respects physical damage to the aircraft or helicopter hull.
- 2.6.3 Evidence of coverage in the form of a certificate of insurance and acceptable endorsements shall be provided prior to the start of the project.

**SIGNATURE**

This agreement entered into as of the date written above.

\_\_\_\_\_  
**Simile Construction Service, Inc.** *(Signature)*

\_\_\_\_\_  
**Subcontractor** *(Signature)*

\_\_\_\_\_  
Printed Name and Title

\_\_\_\_\_  
Printed Name and Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

## Exhibit A Work Schedule

Project:

Subcontractor:

Job #:

No.	Description	Cost per item	Days/Weeks
			PER SCSI SCHEDULE
	<b>Insurance &amp; Tax</b>	<b>Included</b>	
	<b>TOTAL CONTRACT</b>	<b>\$</b>	

