

# **SUBCONTRACT AGREEMENT**

## **GENERAL CONDITIONS**

1. **CONTRACT DOCUMENTS.** Subcontractor agrees and warrants that the Work shall be performed in strict accordance with the Project Contract Documents, including but not limited to, plans and specifications, general and special conditions, schedules, shop drawings, change orders, all agreements to which Hemingway Chimney may be bound, including but not limited to the Hemingway Chimney contract with the Owner, General Contractor, or Construction Manager, as the case may be, and any revisions, supplements, or addenda to any of said documents, all of which, including this Subcontract, are collectively herein referred to as the "Contract Documents", and which are incorporated herein by reference as part of this Subcontract Agreement. The Contract Documents will be made available to Subcontractor upon request, with prices deleted. Subcontractor acknowledges that Subcontractor has read all of the terms and provisions hereof and the other Contract Documents, including those terms and provisions which do not relate specifically to the Work. In case of conflict between or among the Project Contract Documents, the most stringent shall govern and be controlling.
2. **CONTRACTUAL DUTIES.** Subcontractor agrees to be bound to Hemingway Chimney by each and all of the terms and provisions of the Contract Documents, including but not limited to, those which relate specifically to the Work, and to assume toward Hemingway Chimney all of the contractual duties, obligations, responsibilities and undertakings that Hemingway Chimney assumes toward the General Contractor/Construction Manager, if any, and the Owner, or either of them, under the Contract Documents, and Subcontractor agrees further that in addition to any rights and remedies Hemingway Chimney has against Subcontractor under this Subcontract, Hemingway Chimney shall have the same rights and remedies as against Subcontractor as the General Contractor/Construction Manager, if any, or Owner under the terms and provisions of the Contract Documents has against Hemingway Chimney, with the same force and effect as though every such duty, obligation, responsibility, right or remedy were set forth herein in full. If Hemingway Chimney and Subcontractor are parties to more than this one Subcontract, then Subcontractor's default under any one such Subcontract shall be a default under all, and Hemingway Chimney may offset amounts otherwise due to Subcontractor under one or more of such Subcontracts against all costs, expenses, claims or liabilities of Hemingway Chimney against Subcontractor under one or more other such Subcontracts.
3. **PERFORMANCE REQUIREMENTS.** Subcontractor warrants that it has investigated the nature, locality and site of the Work and has examined the Contract Documents for, and the building codes and other requirements of law applicable to, the Project. Hemingway Chimney shall not have any control over the construction means, methods, techniques, incidental aspects or operative details employed by Subcontractor in performing the Work, each and all of which shall be the sole responsibility of the Subcontractor. Without limiting the generality of the foregoing, Subcontractor shall:
  - a) Maintain the Project free from debris, trash and unsafe conditions as a result of Subcontractor's Work and upon completion of the Work, remove all debris, trash, construction storage and/or office structures.
  - b) Pay for all materials, labor and equipment used in, or in connection with, the performance of this Subcontract, when and as bills or claims therefore become due, and save and protect the Project, the Owner, and Hemingway Chimney from all claims and mechanic's liens on account thereof, and to furnish satisfactory evidence to Hemingway Chimney when and if required, that Subcontractor has complied with the above requirements.
  - c) Promptly, within three working days (or such shorter time as circumstances warrant) after request by Hemingway Chimney to Subcontractor, at Subcontractor's expense, commence and diligently continue to replace or repair any defective or improper Work provided by Subcontractor and/or redo any of the Work not done in accordance with Contract Documents and/or not done in a workmanlike manner.
  - d) Be responsible for the safety and protection of its own employees, tools, equipment and materials and for obtaining all permits, trade or other licenses required for its equipment and operations within the scope of the Work.
  - e) Not assign or sublet this Subcontract or any portion thereof, or any of the Work (including payments of the Subcontract Price) to any person without the express prior written consent of Hemingway Chimney.

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- f) Pay when due and on a current basis any and all payments, contributions or taxes for unemployment insurance, old age or retirement benefits, pensions or annuities, withholding and payroll taxes, union benefits and other obligations and liabilities now or hereafter imposed by or payable to, the government of the United States and of any State or government entity or agency, and by or to any entity pursuant to a collective bargaining agreement, which are measured by the wages, salaries, or other compensation paid to persons employed by Subcontractor in connection with the Work.

#### 4. PAYMENT TERMS.

- a) Hemingway Chimney reserves the right to issue change orders which increase or decrease the scope of the Work, which shall effect additions or deductions in dollar amounts to the Subcontract price in accordance with the Contract Documents.
- b) Hemingway Chimney's obligation to make payments to Subcontractor is conditional on the Subcontractor's full and satisfactory compliance with all the terms and provisions of the Contract Documents. Subcontractor will receive progress payments, payment for extras and change orders, and final payment and be subject to retainage on the same terms and at the same times as provided in the Contract Documents. Any provision hereof to the contrary notwithstanding, Hemingway Chimney's obligation to make any payments to Subcontractor shall be expressly subject to and conditional upon Hemingway Chimney's receipt of funds therefore from the Owner or General Contractor, the receipt of such funds by Hemingway Chimney being an express condition precedent to Hemingway Chimney's obligation to make any payments to Subcontractor.
- c) No payment made pursuant to this Subcontract shall be conclusive evidence of satisfactory performance of the Work or any portion thereof, and no payment shall be construed as an acceptance of defective or improper work or materials nor shall it release Subcontractor from any of its obligations under the Contract Documents.
- d) Any other provision of this Subcontract or the other Contract Documents to the contrary notwithstanding, the obligation of Hemingway Chimney to make any payment under this Subcontract is subject to the same terms as provided in the Contract Documents, and in any event, receipt of payment by Hemingway Chimney from the Owner or General Contractor for Subcontractor's Work is an express condition precedent to Subcontractor's right to receive payment therefore from Hemingway Chimney.
- e) Subcontractor shall not be entitled to claim any reimbursement, compensation or damages for any delay, obstruction, or interference to the Work as a result of the Owner's, General Contractor's or Hemingway Chimney's actions except to the extent that Hemingway Chimney is entitled to and actually receives any reimbursement, compensation or damages from the Owner or General Contractor for any such delay, obstruction or interference.
- f) Subcontractor shall furnish affidavits and instruments certifying that payment has been made for all labor, materials, and services furnished in the performance of this Subcontract Agreement, releases and indemnities as required at the time for payment, and written guarantees with respect to the labor, materials, and services supplied by Subcontractor. These documents shall be in such form and substance as Hemingway Chimney may require.

- 5. BONDS. At any time on request from Hemingway Chimney Subcontractor shall within 10 days from the date of such request, provide Hemingway Chimney with a good and sufficient surety bond acceptable to Hemingway Chimney for Subcontractor's performance and payment of Subcontractor's obligations.

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### **6. INSURANCE REQUIREMENTS.**

- a) Before commencing the Work and before any tools or equipment are moved to the Project site, and before being entitled to receive any payment, Subcontractor shall furnish Hemingway Chimney with certificates of insurance and copies of policies and appropriate endorsements to Subcontractor's insurance policies which conform to the requirements of the Contract Documents, (each and all of which certificates, endorsements, and Subcontractor's insurance policies are herein referred to collectively as the "Insurance Documents"). The Insurance Documents shall provide coverage, limits of liability and other provisions and terms strictly in accordance with the Contract Documents. Upon Hemingway Chimney's request from time to time, subcontract or shall provide copies of the actual insurance policies providing coverage as required by this Subcontract, including all endorsements to such policies.
- b) If any portion of the Work is sublet with Hemingway Chimney's consent, Subcontractor shall impose upon each lower tier sub-subcontractor the same insurance provisions as are contained in this Subcontract, and documents evidencing such insurance shall be provided to Hemingway Chimney. Subcontractor shall be responsible to ensure that all of its sub-subcontractors or material suppliers provide insurance coverage to Hemingway Chimney in compliance with this Subcontract.
- c) Subcontractor agrees that Hemingway Chimney's and all parties required by the Contract Documents to be named additional insureds (hereafter "Additional Insureds") shall be added by endorsement as additional insureds to Subcontractor's commercial general liability, automobile liability, excess coverage and other Insurance Documents, as required. The insurance coverage to be afforded to the Additional Insureds under Subcontractor's insurers shall be with respect to liability arising out of the Work to be performed under this Subcontract and shall be Primary/Noncontributory to any insurance carried independently by the Additional Insureds or any of them, which shall be excess and noncontributory. To the fullest extent permitted by law, Subcontractor waives all rights of subrogation against the Additional Insureds concerning Subcontractor's insurance and also agrees that all exclusions or limitations applicable to cross liability or severability of interest arising between the Additional Insureds and Subcontractor contained in such policies shall be deleted by endorsements thereto. Subcontractor further agrees to provide Hemingway Chimney certificates of insurance and endorsements, in form acceptable to Hemingway Chimney, which contain a provision that Hemingway Chimney shall receive thirty (30) days prior written notice of any reduction in coverage or material change in or cancellation of policies required to be maintained by Subcontractor under this Subcontract.
- d) The Insurance Documents shall be maintained in full force and effect throughout the Project and thereafter as required by the Contract Documents.
- e) The Insurance Documents must specifically show that the Indemnification Agreements in this Subcontract are specifically covered and Insured.

### **7. INDEMNITY**

- a) Subcontractor shall take all necessary precautions to prevent the occurrence of any injury to person or damage to property during the progress of the Work, and shall assume full responsibility for the activities, conduct and safety of its employees, agents, representatives and sub-contractors, if any. To the fullest extent permitted by law, Subcontractor, and any sub-subcontractor into whose subcontract this clause is incorporated (and Subcontractor hereby agrees to include this clause in any subcontract into which it enters in connection with the Project), shall defend, indemnify and hold harmless Hemingway Chimney and the Owner, General Contractor/Construction Manager, if any, and all others to be listed as Additional Insureds, from and against all liabilities, claims, damages, losses, judgments, and bodily injuries to persons (including death), damage or destruction to tangible property (regardless of the ownership thereof), costs and expenses, including reasonable attorneys' fees, arising out of, resulting from or connected with, either directly or indirectly, a breach by the Subcontractor or the Subcontractor's sub- subcontractors of any term or provision of this Subcontract or the other Contract Documents, or the performance of or failure to perform the Work by Subcontractor, to the extent caused in whole or in part by the acts or omissions of Subcontractor, its agents, employees or the Subcontractors' sub- subcontractors, their agents and employees, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. The indemnity provided by Subcontractor hereby shall also include any liabilities, claims, damages, losses and judgments sustained by or asserted against an Indemnitee in any way related to Subcontractor's Work that do not necessarily concern bodily injury and/or property damage matters.

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- b) Included in the foregoing, and not by way of limitation, Subcontractor agrees to assume and pay the entire liability and all loss for all death or bodily injury claims suffered by its own employees, and waives, without limitation, any defense to or limitation on such liability based on applicable Workers' Compensation laws, which loss or liability may result in any way from any act or omission of Subcontractor, its agents, employees or sub-subcontractors.
  - c) However, any other provision to the contrary notwithstanding, Subcontractor shall not be obligated to defend or indemnify Hemingway Chimney, the Owner, General Contractor/Construction Manager, or any other person, their agents or employees, for such claims or damages which are due solely and directly to any such Indemnitee's own negligent acts or omissions.
  - d) In the event that any of the indemnity provisions described herein are deemed invalid or unenforceable by any court of competent jurisdiction, then the parties agree that the entirety of these provisions should be interpreted to create the greatest degree of valid and enforceable indemnity by Subcontractor as otherwise described herein.
  - e) Should Hemingway Chimney employ an attorney to institute suit or demand arbitration to enforce or interpret any of the provisions of this Subcontract, or to protect its interests in matters arising under or in any way related to this Subcontract, including but not limited to the filing or defense of any action for declaratory judgment relating hereto or to collect damages for the breach of this Subcontract or in connection with any suit or proceeding to which Hemingway Chimney may be made a party relating to this Subcontract, Hemingway Chimney shall be entitled to recover its reasonable attorneys' fees, and all costs, charges and expenses expended or incurred therein or in connection therewith.
8. CONFLICTS IN THE WORK. Should any conflict or controversy exist concerning the interpretation and/or enforcement of any of the terms herein, including but not limited to the definition of the Work to be provided by Subcontractor and/or any change in the Subcontract price related thereto, and Hemingway Chimney and Subcontractor are unable to satisfactorily resolve said conflict or controversy, then Hemingway Chimney shall issue to Subcontractor and Subcontractor shall follow such written orders as Hemingway Chimney may deem necessary to complete the Work. Upon completion of the Subcontractor's Work, if the matter in controversy remains unresolved or arises after such completion, all claims, disputes, and matters arising out of or relating to this Subcontract shall be decided, at Hemingway Chimney's election and within Hemingway Chimney's sole discretion, by binding arbitration or litigation. In the event that Hemingway Chimney elects to resolve the matter by binding arbitration, such arbitration will be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect in Chicago, Illinois by a single arbitrator. No action regardless of form, arising out of or relating to this Subcontract or the Work may be brought or instituted by Subcontractor against Hemingway Chimney more than one (1) year after the claim or cause of action has accrued.
9. LEGAL REQUIREMENTS.
- a) Safety on and at the Project is of paramount importance. Subcontractor shall adhere to all rules, regulations and orders of any and all Federal, State and local entities having jurisdiction, specifically including, but not limited to OSHA. Subcontractor shall be responsible for any and all construction aids as required to complete the Work, and they shall be in compliance with OSHA regulations. Subcontractor agrees to perform its own safety inspections and to participate in the safety inspections and meetings conducted by others, as required. Safe prosecution of this Work is the responsibility of Subcontractor. Subcontractor will abide by all safety policies concerning the Project and shall attend all toolbox meetings and/or other onsite safety meetings.
  - b) Subcontractor shall comply with all Federal, State and local safety rules, regulations, laws, codes, ordinances and orders including all OSHA regulations and standards and OSHA's Expanded Hazard Communication Standards.

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10. SCHEDULE. Subcontractor shall, upon notice to proceed by Hemingway Chimney, forthwith commence the Work at such time and as directed by Hemingway Chimney and shall continue diligently in the performance thereof in accordance with schedules issued as may be modified from time to time. Subcontractor shall employ sufficient crews and work sufficient hours or shifts so as not to hinder or delay the actual progress of the Project.
11. REIMBURSEMENT FOR DAMAGES. Subcontractor shall immediately reimburse Hemingway Chimney for any damages and costs incurred by Hemingway Chimney as the result of Subcontractor's Work.
12. CHANGE ORDERS. Subcontractor shall be bound by all changes made to the Contract Documents concerning the amount or character of the Work to the same extent that Hemingway Chimney is bound. Subcontractor will be notified of any such change and will be consulted with respect to the terms of the change order and will be bound by all terms negotiated in good faith by Hemingway Chimney. Subcontractor will receive additional compensation and/or time extensions concerning any such change only to the extent that Hemingway Chimney receives same from the Owner or General Contractor/Construction Manager, if any. Subcontractor shall notify Hemingway Chimney in writing within 48 hours, or such other shorter time as required by the Contract Documents, of encountering any circumstances during the performance of the Work which give rise to any claims by Subcontractor, and Subcontractor hereby waives any such claims that are not timely made.
13. LABOR RELATIONS. Subcontractor shall comply with, observe, and be bound by all terms and provisions of any collective bargaining agreements applicable to labor to be furnished for the Project.
14. PAYROLLS. If required of Hemingway Chimney by others, payrolls and affidavits covering all labor performed by Subcontractor will be submitted directly to Hemingway Chimney unless otherwise directed by Hemingway Chimney. Weekly payrolls and affidavits of Subcontractor shall be submitted in the format required by the Contract Documents and shall be submitted to Hemingway Chimney within the time set forth in the Contract Documents.
15. EQUAL OPPORTUNITY. During the performance of this Subcontract, Subcontractor agrees not to discriminate against any employee or potential employee because of race, color, sex, age, religion, national origin, marital or family status, or disability and shall otherwise comply fully with all laws prohibiting discrimination or requiring equal employment opportunity.
16. WARRANTY/GUARANTEE. Subcontractor agrees to provide a warranty/guarantee of the Work for such period and to the extent required of Hemingway Chimney by the Contract Documents.
17. TERMINATION FOR CONVENIENCE. Hemingway Chimney may terminate this Subcontract in its sole discretion at any time for the convenience of Hemingway Chimney, but without prejudice to Subcontractor's conditional right to payment for any portion of the Work satisfactorily completed before such termination, but excluding any amounts for demobilization or loss of anticipatory overhead and profits.
18. NONWAIVER. Any failure on the part of Hemingway Chimney to require Subcontractor's strict adherence to any term of this Subcontract shall not constitute a continuing waiver with respect to that or any other term.
19. TIME OF THE ESSENCE. The time of Subcontractor's performance of the Work and of every obligation of Subcontractor hereunder is of the essence of this Subcontract.
20. MATERIAL AND WORKMANSHIP. Unless otherwise specifically provided in the Subcontract, all materials to be incorporated in the Work covered by this Subcontract shall be new, of the most suitable grade for the purpose intended and in compliance with the terms and conditions of the Contract Documents. All Work shall be performed in a skillful and workmanlike manner. Hemingway Chimney may require Subcontractor to remove from the Work any employee of Subcontractor who Hemingway Chimney deems incompetent, careless, or otherwise objectionable.
21. RISK OF LOSS. Until the completion of the Work, and its final acceptance by Owner, Subcontractor shall bear the risk of any loss or destruction of or damage to the Work performed under this Subcontract or any materials,

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equipment or other items incorporated or to be incorporated therein arising from any cause other than a cause against which the Owner undertakes to carry insurance.

22. **DAMAGES.** Hemingway Chimney shall recover all damages, costs, and expenses, including compensation for direct and overhead costs and mark-up, resulting from any breach of this Agreement by Subcontractor.
23. **TERMINATION FOR DEFAULT.** If the Subcontractor refuses or fails to prosecute the Work with such diligence as will insure its completion within the time specified in this Subcontract, or any extension thereof, or fails to complete said Work within such time, or fails to comply with any proper order or demand issued by Hemingway Chimney, or otherwise breaches any material provision of this Subcontract, Hemingway Chimney may, but without being obligated to do so, take over the Work and prosecute the same to completion, by contract or otherwise and may, without notice or opportunity to cure, terminate Subcontractor's right to continue to perform any part of the Work. In such event Hemingway Chimney may take possession of and utilize in completing the Work such materials, appliances, and plant as may be on the site of the Work, and necessary, therefore. The rights and remedies of Hemingway Chimney provided in this paragraph are in addition to any other rights and remedies provided by law or under this Subcontract. Subcontractor will not be entitled to any further payment until Hemingway Chimney's work is completed and the costs for that work are known. Subcontractor is liable for all costs required to complete performance of the terminated Work.
24. **SCOPE OF THE WORK.** The Work includes that Work specifically set forth in this Subcontract, as well as any and all other work reasonably inferable from the Contract Documents which is within the scope of and which is necessary or appropriate to have properly working and totally acceptable systems. The Subcontractor shall take all field measurements necessary to perform its Work. Hemingway Chimney makes no warranty either expressed or implied as to the sufficiency of the Construction Documents furnished. Subcontractor shall furnish all the required samples and drawings, comply with all laws and ordinances, and give governing Authorities timely and proper notices.
25. **PERFORMANCE.** Subcontractor shall proceed towards completion in accordance with the schedule established by Hemingway Chimney which may be adjusted from time to time. Should Subcontractor fail to pursue or complete the Work in accordance with the schedule established by Hemingway Chimney, Subcontractor hereby agrees to Indemnify Hemingway Chimney for any loss or damages caused by such a delay. Extensions of time for delays not caused by the Subcontractor or within the Subcontractors control shall be strictly governed by the terms of the Contract Documents. Subcontractor must give Hemingway Chimney notice of any potential delay within two days after such occurrence with an estimate of the additional time needed to overcome the delay. In no event will Subcontractor be entitled to any extension of time for delays if the Subcontractor fails to notify Hemingway Chimney in writing within said period of the delay and such potential claims shall be deemed waived. Anything in the Contract Documents or in this Subcontract to the contrary notwithstanding, an extension of time thereunder shall be the Subcontractor's exclusive remedy in the event of a delay, no matter how or by whom caused and Subcontractor specifically waives any right it may otherwise have to an increase in contract price or damages because of any delays and/ or disruptions and/or interferences and/or obstructions and/or accelerations of any nature whatsoever to all or any part of the Work whether foreseen or unforeseen, and whether caused by the active interference of any person, including Hemingway Chimney.
26. **DEFAULT.** Should the Subcontractor fail in any manner to perform the Work or default in the:
  - a) performance of any provision of this Subcontract or suffer any delay not accepted by Hemingway Chimney and Owner as authorized under the Contract Documents, or should the Subcontractor suffer any form of financial distress so that it is unable or unwilling to give reasonable assurances to Hemingway Chimney that it is able to continue to perform its obligations under this Subcontract, Hemingway Chimney may give written notice to the Subcontractor to begin with all necessary diligence to cure such defaults

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within a 48-hour period. Failure of Subcontractor to cure such defaults shall be deemed a material breach of this Subcontract and without terminating this Subcontract, Hemingway Chimney may provide through itself or through others any labor, materials, equipment, tools, plans, facilities, and services for the performance of Subcontractor's Work, or any portion thereof and deduct the cost thereof from any money due or thereafter to become due to the Subcontractor under the Subcontract. Hemingway Chimney may also, in its sole discretion, in addition to or in lieu of the exercise of the aforesaid rights, after forty-eight (48) hours written notice as aforesaid, without prejudice to any other remedies it may have under the law or in equity, terminate this Subcontract and look to the Subcontractor for payment of all damages which it incurs.

- b) Notwithstanding anything contained in the foregoing paragraph, in the event the contract between the Owner, the General Contractor or Construction Manager, as the case may be, and Hemingway Chimney is terminated for any reason or for no reason, this Subcontract may be correspondingly terminated by and for the convenience of Hemingway Chimney, without any liability to the Subcontractor except for work performed and material installed by Subcontractor prior to the date of termination
27. **CLAIMS.** No claims for additional time for delays due to any cause will be considered by Hemingway Chimney, unless the Subcontractor notifies Hemingway Chimney of the delay in writing within two (2) days of the occurrence of the delay and furnishes details thereof, and then only to the extent recognized or approved by the Owner or General Contractor/Construction Manager as provided in the Contract Documents. As provided above, no claims for additional compensation or damages are permitted.
28. **OVERTIME.** When ordered in writing by Hemingway Chimney, the Subcontractor shall perform base contract work during overtime hours. In the event overtime work is required because of Subcontractor's own delays to the project schedule, no additional compensation will be granted. In the event overtime is requested by Hemingway Chimney for other reasons, the Subcontractor shall be compensated for the net increased labor costs only. No overtime is to be performed on this Project without prior written consent of Hemingway Chimney.
29. **ASSESSMENT OF DAMAGES.** Any liquidated, direct, indirect, special, incidental, and/or consequential damages incurred by Hemingway Chimney or which may be assessed or asserted against it, which are caused by the Subcontractor or its Sub-Subcontractors, agents, vendors, etc. will be assessed against the Subcontractor and deducted from the Subcontract price.
30. **AS-BUILT DRAWINGS.** Complete as-built drawings are to be provided prior to final payment in such quantities and in such format as may be directed by Hemingway Chimney.
31. **ENFORCEABILITY AND INTERPRETATION.** If any term or provisions hereof is declared by a court of competent jurisdiction to be void or unenforceable, it is agreed that such provision is and shall be severable from the balance hereof, and this Subcontract shall be construed and enforced as if such void or unenforceable provisions did not originally appear herein. Although this Subcontract was prepared by Hemingway Chimney, the parties agree that this Subcontract shall not be construed more strongly for or against either party. This Subcontract contains the entire agreement of the parties with respect to the Work and Subcontractor's involvement with the Project and supersedes all prior and contemporaneous agreements. This Subcontract is not binding and enforceable until signed by Hemingway Chimney and no modification of any term herein shall be valid unless agreed to by the parties in a writing executed by them. No representations, understandings or agreements have been made or relied upon in the making of this Subcontract other than those specifically set forth herein. Custom, usage and trade practices shall not be considered in the construction, interpretation or enforcement of this Subcontract. The headings have been inserted for convenience only and are not to be considered when interpreting the provisions of this Subcontract.