



## Section 1

(a) In the event of a dispute between the HKB, Inc. dba Southwest Industrial Rigging ("SWIR") and Customer ("Customer" or "Lessee" hereafter all referred to as "Customer") arising out of or relating to this Agreement, the work to be performed by SWIR or Customer, or the breach of this agreement by any party, which involves (a) a claim asserted by the Owner against SWIR, (b) SWIR asserting a claim against Owner or any other tier agreement which involves Customer's Work, the dispute(s) shall be decided in accordance with these conditions. All Contractors, Subcontractors, vendors or Customers, subcontractors, guarantors and sureties shall be bound to the dispute clause to the same extent SWIR is bound to the Owner by the terms of the General Contract and by any decisions or determinations made under the General Contract by an authorized person, board, court, arbitration, or other tribunal. Such disputes include, but are not limited to, any claim the Customer may have related in whole or in part concerning the conduct of the Owner, SWIR, Subcontractor, Architect, Engineer, or any SWIR of any tier and their employees or agents. Customer shall be afforded a reasonable opportunity to present information and testimony involving its rights and shall be solely responsible for the presentation of any information or testimony concerning its claims. SWIR shall cooperate with Customer and Customer's attorneys, employees and agents in the presentation of Customer's information and testimony including producing documents and witnesses at any hearing or trial.

(b) Any dispute between SWIR and Customer (other than the type of dispute described in Section 1 (d) below), not involving a claim asserted by the Owner against SWIR or SWIR against Owner involving Customer's Work, shall be governed and decided pursuant to Section 2 of this Dispute Agreement.

(c) SWIR and Customer agree to continue performance of all Work and payments on all not disputed amounts despite the existence of disputes with SWIR. The existence of a dispute with SWIR shall not be sufficient cause or justification for any failure by SWIR or Customer to comply with this agreement.

(d) Notwithstanding anything in this Agreement to the contrary, if SWIR or Customer is sued in state court, federal court, arbitration or any other venue by any person or entity, other than the Owner or Subcontractor, for any claim caused in whole or in part by Customer or SWIR, then SWIR or Customer agrees that SWIR or Customer, in its sole discretion, may join SWIR or Customer as a party in said action. SWIR and Customer further agree that it is their intention that this provision be lawful and enforceable, and SWIR and Customer agrees that it will not challenge the enforceability and validity of this provision. SWIR or Customer may seek to compel arbitration of the claim against the other Party. The prevailing party in any such action shall be entitled to an award of all reasonable attorney's fees and costs. It is all parties' intention that all disputes be resolved in a cost effective manner.

## Section 2 Arbitration.

**Negotiation Prior to Arbitration ("Mediation"):** Prior to any arbitration and/or litigation arising from the work performed or to be performed by SWIR or Customer or arising from this Agreement, the parties shall each appoint a corporate officer (someone other than and higher in rank than the project manager responsible for the Project) to meet to negotiate the claim/dispute. Such corporate officer shall have full settlement authority to resolve the claim/ dispute. This in person settlement meeting shall be a condition precedent to the filing of any arbitration and shall be in compliance with Section 2 (b).

**Submission of Itemized Claims by the Parties:** Within Thirty (30) business days of the SWIR or Customer filing a demand for Mediation, the party filing the Mediation demand ("Claimant") shall provide the other party ("Respondent") with a written, itemized statement of its claim, that shall include copies of all documents supporting its liability statement and damages along with citations to specific provisions of the Agreement that support Claimant's position ("Claimant's Itemized Statement of Claim). The Claimant shall make all requests for documents from the Respondent when the demand for Mediation is filed. The Respondent shall have 15 days to respond and turn over the requested documents. If the Respondent fails to turn over all reasonably requested documents, the arbitrator may take this into account when determining liability and damages. Claimant's Itemized Statement of Claim shall be served via Federal Express or equivalent overnight delivery service that provides proof of delivery and shall be deemed served as of the date of Respondent's receipt from Federal Express records or equivalent overnight delivery service of the Itemized Statement of Claim. Within Thirty (30) business days after Respondent receives Claimant's Itemized Statement of Claim, Respondent shall provide the Claimant with its counterclaim, if it intends to pursue any claims against Claimant, that shall include a written, itemized statement of its claim along with copies of all documents supporting its damages and citations to specific provisions of the Agreement. (Respondent's Itemized Statement of Claim).

(c) **Scope and Venue of Arbitration:** All claims, counterclaims or disputes between SWIR and Customer arising out of or related to the Subcontract, whether based on contract or tort, which are not resolved pursuant to Section 2(a), shall be decided by binding arbitration The Federal District Court of Arizona in Maricopa County, Arizona in accordance with the Construction Industry Rules of the American Arbitration Association ("AAA") then existing subject to the requirements and limitations set forth below.



(d) Offers of Settlement for Purpose of Determining the Prevailing Party: Within thirty (30) days of receiving Respondent's Itemized Statement of Claim, or if Respondent does not serve one, within thirty (30) days from when Respondent's Itemized Statement of Claim was due, Claimant shall serve Respondent with a written settlement offer that will include both Claimant's Itemized Statement of Claim and Respondent's Itemized Statement of Claim, if any. Claimant's settlement offer shall be served via Federal Express or equivalent overnight delivery service that provides proof of delivery and shall be deemed sent upon Respondent's receipt of Claimant's settlement offer. Claimant's settlement offer shall state the amount it will accept from or pay to Respondent to settle all claims asserted in the arbitration.

(e) Within thirty (30) business days of Respondent's receipt of Claimant's settlement offer, Respondent shall serve a written settlement offer to Claimant that will include both Claimant's Itemized Statement of Claim and Respondent's Itemized Statement of Claim, if any. Respondent's settlement offer shall be served via Federal Express or equivalent overnight delivery service that provides proof of delivery and shall be deemed served upon Claimant's receipt of Respondent's settlement offer. Respondent's settlement offer shall state the amount it will accept from or pay to Claimant to settle all claims asserted in the arbitration. Claimant's filing of an amended demand for arbitration or Respondent's filing of an amended counterclaim shall in no way alter the timing requirements set forth herein for purposes of determining the prevailing party.

(f) The prevailing party shall be the party whose last written settlement offer, served in accordance with the time periods set forth herein, is closer to the initial arbitration award, prior to considering costs (including AAA and arbitrator costs), interest, attorney fees and/or expert fees. If Claimant does not serve a written settlement offer to Respondent as provided herein, then for purpose of determining the prevailing party, Claimant's settlement offer shall be the greater of: (i) Claimant's Itemized Statement of Claim, (ii) the amount requested in Claimant's initial demand for arbitration or (iii) the amount requested by Claimant at the final arbitration hearing.

(g) If Respondent does not submit a written settlement offer to Claimant as provided herein, then Respondent's settlement offer for purpose of determining the prevailing party shall be considered the greater of: (i) Respondent's Itemized Statement of Claim, (ii) the amount requested in Respondent's initial counterclaim, (iii) the amount requested by Respondent at the final arbitration hearing, or (iv) \$0.00. If the difference between the initial arbitration award and the parties' last settlement offers are equal, then neither party shall be the prevailing party for purposes of an award of attorneys' fees and costs.

(h) Nondisclosure of Settlement Offers to the Arbitrator: Settlement offers shall only be disclosed to the arbitrator after the initial arbitration award has been entered and shall only be used to determine the prevailing party for purposes of the award of fees and costs. The arbitrator is required to enforce the terms of this Subcontract, including but not limited to, the determination of the prevailing party for purposes of awarding attorney's fees and costs. The arbitrator shall not be authorized to award any punitive damages and shall only be permitted to award consequential damages if the parties have not waived consequential damages and only to the extent permitted under the express terms of this Agreement.

### **Section 3 Choice of Law and Venue**

(a) Choice of Law and Venue (a) Choice of Law and Venue: This Agreement shall be construed according to the laws of the State of Arizona without regard to any conflict of laws issue. Any dispute arising from or concerning this Agreement which does not involve the rights or conduct of the Owner or a non-party and is not, therefore, controlled by Section 1 above, or which the parties have waived their right to arbitrate under this agreement, or should litigation ensue after Arbitration, the courts in Phoenix, Maricopa County, Arizona or the Federal District Court of Arizona shall have exclusive jurisdiction and venue over any lawsuits arising under this Subcontract, including any motion to confirm an arbitration award. The prevailing party in any such action shall additionally be entitled to an award of all attorneys' fees and costs.

(b) Waiver of Right to Jury Trial: SWIR AND CUSTOMER FURTHER AGREE THAT SHOULD ANY LITIGATION OR ARBITRATION ARISE DIRECTLY OR INDIRECTLY, THE PARTIES HEREBY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL, AND THE PARTIES HEREBY STIPULATE THAT ANY SUCH TRIAL SHALL OCCUR WITHOUT A JURY.

(c) Transfer of Venue: Should either party file any action against the other party arising out of a dispute as defined in this agreement, said Party agrees to transfer the action to the arbitrator to make any and all decisions concerning any dispute including the authority stated in Section 3 (d) including if the action is a dispute covered by this agreement. If the arbitrator decides that the dispute should be decided in accordance with this agreement, the party that filed the action shall pay all costs incurred by the other party, including attorneys' fees, incurred in dismissing and/or transferring the venue of such matter to the Arbitrator.



(d) **Arbitrator's Authority:** The arbitrator shall have full and complete authority to decide any and all claims that have been properly noticed and preserved in accordance with this agreement. Should either party assert that a claim(s) submitted to arbitration has not been properly noticed and/or has been waived or released, then the Arbitrator shall first decide such issue(s) (Declaratory Action) by way of a declaratory judgment action decided by solely by the arbitrator, with both parties waiving any right to a trial by jury. Any arbitration between the parties for non-Declaratory Action issues shall be stayed pending any such declaratory judgment action so that the Arbitrator can first decide what claims should proceed forward in arbitration. If the Arbitrator finds that a claim(s) was not properly noticed and preserved and/or was released, then the arbitrator shall dismiss that claim(s) and shall not decide such claim(s). The arbitration shall only proceed after a final decision on any declaratory judgment action brought hereunder and shall only include those claims found to have been properly noticed, preserved and not released. All parties consent to such jurisdiction.

(e) **Discovery in Arbitration:** Discovery in any arbitration hereunder shall be limited to the following:

(i) The production of each side's hard document project files as they are maintained in the ordinary course of business and any file index related to same with all such documents being produced electronically if reasonably feasible or hard copy in the country and state where the contract was being performed;

(ii) The production of each sides electronic documents provided that the party requesting such electronic documents shall be responsible to pay for all costs associated with such production, including attorneys' fees incurred in the review for privilege and relevance, third-party consultant fees and any other costs associated with such electronic production. The payment of all such costs is an express condition precedent to either side's right to any electronic production. These cost associated with obtaining electronic discovery shall not be taxed to the prevailing party as costs/fees and to the extent this conflicts with any provision in the AAA rules, this provision shall control;

(iii) Three (3) fact depositions with one being a corporate representative under the Federal Rules of Civil Procedure if so requested with all such depositions to take place in the county and state where the contract was being performed.

(iv) The deposition of all experts that intend to testify or submit opinions at the arbitration hearing must be concluded sixty (60) days before the scheduled arbitration date. Each side will pay for their own expert time and expenses to appear for deposition in the county and state where the contract was being performed;

(v) Thirty (30) days prior to any expert deposition, all experts that will testify or submit opinions at the final hearing shall provide a report containing all of his/her opinions and information/documents/facts relied upon in arriving at such opinions, along with a current and up to date resume;

(vi) Each party shall be entitled to have the arbitrator issue six subpoenas for documents. The other side shall be entitled to a copy of all documents provided in response to a third party subpoena provided that it has to pay for the copy cost but shall be entitled to use a third party to make such copies; and

(vii) No other discovery shall be permitted by the arbitrator unless mutually agreed to by the parties.

{f} These sections and provisions (including all sub-parts) shall survive the termination of this Agreement and/or completion of the Work required hereunder.