

## HAGERMAN, INC.

### ARTICLE XA<sup>1</sup>:

- I. EXTENSION OF TIME. If for any reason beyond its control, Subcontractor shall be materially delayed at any time in the progress of the Work under such circumstances as would entitle Contractor to an extension of time under the Contract Documents, Subcontractor shall be entitled to a corresponding extension of time for completion of Work; provided Subcontractor shall have filed with Contractor written claim for such extension that complies with the requisites for making a claim under the Contract and in sufficient time to permit Contractor to file such a claim against Owner for an extension or other relief under the Contract. If Subcontractor shall be materially delayed by the negligence, wrongful act or omission of Contractor, the time for the completion of Work shall be extended for a period equal to the reasonably estimated period of delay, as determined by Contractor. The time extension granted to Subcontractor shall be the sole remedy or relief available to Subcontractor. Anything herein to the contrary notwithstanding, no extension of time shall be granted unless a written claim therefor shall be presented to Contractor within forty-eight (48) hours after the commencement of the delaying event or condition.
- II. COORDINATION. The Subcontractor agrees as follows:
- A. The Work constitutes only a part of the work being performed for Owner by Contractor and other subcontractors. Subcontractor thus shall perform the Work in such manner that Subcontractor will not injure or damage:
1. work being performed by others, or
  2. the ability of others to perform their work promptly and efficiently.
- Subcontractor agrees to pay Contractor for any damage that may be caused to such other work.
- B. Subcontractor shall coordinate its operations with all other trades having work in the same area of the jobsite. Before commencing Work, Subcontractor will report in writing to Contractor any defective prior work by others, which would prevent proper completion of the Work. Adequate advance notice shall be given Contractor's Project Manager to assure the opportunity for other trades to accomplish work which must precede or build into the Work.
- C. Subcontractor shall commence the Work and diligently and continuously prosecute the Work and coordinate the Work with that being accomplished by others so Contractor shall not be delayed by any act or omission of Subcontractor

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<sup>1</sup> Article XA is to be used in conjunction with AIA Document A401 Standard Form of Agreement Between Contractor and Subcontractor (2007 Edition). Except as noted herein, in the event of any conflict between Article XA and said AIA Document A401, the terms and conditions of Article XA control (updated December 4, 2009).

in completion of the Contract within the time specified in the Contract Documents.

III. PAYMENT. Subcontractor agrees that Contractor shall be under no obligation to pay the Subcontractor for any work done on the Project, until Contractor has been paid therefor by Owner and the provisions hereof, stating the time of progress and final payments and the amount thereof are subject to the condition that Contractor shall receive from Owner progress or final payments in at least the amounts payable Subcontractor on account of work done by Subcontractor on this construction project; otherwise the time when such payments shall be due the Subcontractor shall be postponed until the Contractor has received same from the Owner. The Subcontractor expressly contemplates that payments to it are contingent upon Contractor's receiving payment from Owner, the Subcontractor expressly agreeing to accept the risk that it will not be paid for work performed by him in the event that Contractor is not paid by Owner for such work. The Subcontractor states that it relies primarily for payment for work performed on the Owner's credit and ability to pay, and not of the Contractor's and thus the Subcontractor agrees that payment by the Owner to the Contractor for work performed by the Subcontractor shall be a condition precedent to any payment obligation of the Contractor to the Subcontractor. The Subcontractor agrees that the liability of the surety on Contractor's payment bond, if any, for payment to Subcontractor, is subject to the same conditions precedent as are applicable to Contractor's liability to Subcontractor.

IV. INSURANCE.

A. This article establishes minimum levels of coverage. In the event that this article conflicts with insurance requirements for Subcontractor set forth in the Owner/Hagerman Contract, the stricter or more stringent provision shall apply.

B. Prior to starting work, the Subcontractor shall furnish satisfactory evidence to Hagerman and to other parties upon request, that the Subcontractor has insurance as required by the Contract Documents. All such insurance, including general liability and umbrella/excess liability except Workers' Compensation/Employer's Liability, shall name Contractor, Owner and Contractor's and Owner's agents, servants and employees as additional insureds and shall provide primary coverage (including Completed Operations) for all claims and losses against Contractor, Owner and Contractor's and Owner's agents, servants and employees, including but not limited to, those claims that arise out of injuries to the employees of the Contractor, employees of the Contractor's subcontractors or injuries to third parties, from your work under this agreement, or as a result of the Subcontractor's performance. Any other insurance in force for said additional insured's shall not contribute in the payment of any claim made hereunder to the extent of the limits of liability afforded hereunder. Any coverage provided by Contractor, Owner and Contractor's and Owner's agents, servants and employees shall be excess coverage.

C. Subcontractor shall maintain in full force and effect throughout the entire term of this Agreement, insurance coverage insuring Subcontractor's, Contractor's, and

their agents, servants' and employees' liability to pay for any property damage, bodily injuries or death received or sustained by any person or persons, including employees of Contractor or Subcontractor, in any manner caused by, arising from, incident to, connected with, or growing out of the work governed by this Agreement.

- D. The policies of insurance shall designate Contractor, Owner and Contractor's and Owner's agents, servants and employees (hereafter "Additional Insureds") as additional named insureds and the insurance carrier shall promise to defend Additional Insureds and provide insurance coverage of not less than specified in paragraph (D) below. Such insurance policies shall provide a defense and coverage to Additional Insureds for alleged bodily injury, death, or property damage caused or alleged to be caused in part by the conduct, fault, or negligence of Additional Insureds' activities.
- E. Subcontractor hereby agrees that before commencing said Work it shall present, in a form acceptable to Contractor, Certificates of Insurance evidencing the maintenance of the following insurance coverages of the Subcontractor and that the (i) Contractor, Owner and Contractor's and Owner's agents, servants and employees have been added to each such insurance contract as "Additional Insureds," (ii) each said insurer shall waive its subrogation rights against the Additional Insureds, (iii) each such insurance contract shall maintain said insurance coverage in force at all times during the performance of any Work (including Extra Work and Change Order Work), and (iv) coverage for the Additional Insureds shall include claims relating to Additional Insureds' own acts and omissions, even if negligent. Subcontractors of the Subcontractor must provide these same limits of insurance. This insurance is primary insurance with respect to the interests of the Additional Insureds and any other insurance maintained by these Additional Insureds is excess and not contributory with this insurance:
1. Workmen's Compensation and Occupational Disease insurance policy including Employer's liability insurance coverage subject to a limit of coverage not less than the greater of (i) any statutorily required amount, or (ii) Five Hundred Thousand Dollars (\$500,000.00) per occurrence.
  2. Commercial General Liability insurance providing limits of \$1,000,000.00 each occurrence, and \$2,000,000.00 aggregate for personal injury and property damage, on an occurrence form policy (not a "claims made" policy). The policy aggregate will apply on a "per project" basis. The policy must include the Additional Insureds and must provide Premises-Operations, Independent Contractors, Contractual Liability, Products and Completed Operations coverages (which shall be maintained in force for a period of two years after substantial completion of the project or for such longer period of time as is described in the Contract Documents). The insurance afforded the Additional Insureds must be endorsed as primary and non-contributory to any other insurance afforded the Additional

Insureds. The additional insured status shall be endorsed using ISO Form CG 20 10 11 85 or its equivalent.

Such insurance shall include the following:

- (i) Completed Operations and Product Liability insurance coverage which shall be maintained in effect for a period of two (2) years following acceptance of the Work by Owner;
  - (ii) Contractual Liability insurance shall be included in the Commercial General Liability insurance policy and shall apply to any insurable liability assumed by Subcontractor under the Contract Documents.
3. Business Auto policy on occurrence basis with bodily injury and property damage limits no less than One Million Dollars (\$1,000,000.00) per occurrence. This insurance policy shall cover owned, non-owned, and hired vehicles;
4. Commercial Umbrella Liability Insurance providing limits of \$1,000,000 each occurrence, and \$1,000,000 aggregate for personal injury and property damage, on an occurrence form policy (not a “claims-made” policy). The policy shall include a self-insured retention no greater than \$10,000.
5. The Subcontractor agrees to insure all loss to its owned or leased tools and equipment and agrees to obtain endorsements from its insurance carrier waiving its right to subrogation against Contractor and its officers, employees, agents, guests, subcontractors or suppliers, and Owner.
6. It is understood and agreed that the insurance coverages and limits, required above, shall not limit the extent of the Subcontractor’s responsibilities and liabilities specified within the Contract Documents or by law.
7. Contractor may furnish, erect or provide equipment, appurtenances and devices, motorized or otherwise, for its use to complete its Contract with the Owner. Should the Subcontractor use such items, the Subcontractor agrees to insure against any claims of injury or damage caused by items while in its care, custody or control naming Contractor as an insured party. Liability limits shall be the same as in (D) above. Physical Damage insurance against damage to the items themselves shall be on a “Replacement Cost” basis waiving subrogation.
8. Contractor may withhold payments to the Subcontractor until a properly executed Certificate of Insurance providing insurance as required herein, accompanied by a signed subcontract or purchase order is received by Contractor.

9. Subcontractor's Safety, Indemnity and Insurance Requirements set forth herein shall become and be part of any purchase order or subcontract issued by Contractor to Subcontractor as though fully set forth in said purchase order or subcontract.
  10. The insurance afforded to the Contractor as an Additional Insured on the Subcontractor's policies is primary insurance over any other valid or collectible insurance that Contractor may have with respect to the loss. Contractor's insurance shall be excess over the Subcontractor's policies and the amount of the subcontractor's insurance company's liability shall not be reduced by the existence of any other insurance.
  11. Waiver of Workers' Compensation Lien, Rights of Subrogation or Recovery of Workers' Compensation Benefits. To the fullest extent permitted by law, Subcontractor for itself and on behalf of its workers' compensation insurer who may be obligated to pay workers' compensation benefits to Subcontractor's employee, hereby waives and releases any and all rights and/or claims for subrogation, workers' compensation statutory lien or other rights and/or claims of recovery for workers' compensation benefits against Owner, General Contractor, Construction Manager, Contractor, Architect and Engineer, who are liable or alleged to be liable for work-related injury to Subcontractor's employee, arising out of Subcontractor's contract with the Contractor. Subcontractor will obtain a waiver of any subrogation rights or workers' compensation lien that its insurers may acquire against Owner, General Contractor, Construction Manager, Contractor, Architect and Engineer by virtue of payment of any workers' compensation benefits.
- F. All of the above insurance shall be written through an insurance company or companies satisfactory to Contractor, and the Certificates of Insurance shall be a type that unconditionally obligates the insurer to deliver written notice to Contractor at least thirty (30) days in advance of effective date in the event of cancellation. Notwithstanding any other provision of this Agreement to the contrary, no officer, employee or agent of the Contractor is authorized to cause, suffer or permit Subcontractor or any of its employees, guests, agents, subcontractors or suppliers to commence or perform any Work or otherwise enter upon the Project site unless and until all of the conditions of this paragraph have been conformed to and performed.
- G. To save harmless the Contractor and all other subcontractors from any and all losses or damages (including without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph) occasioned by the failure of the Subcontractor to carry out the provisions of this Subcontract.
- H. Increased Limits of Liability. The coverages and limits of liability set forth in this section (IV. INSURANCE) are minimum requirements. Subcontractor agrees to

secure additional coverage and higher limits of liability as provided by Contract Documents. Subcontractor agrees to secure additional coverage and increase limits of liability consistent with coverages and limits of liability required to be maintained by Contractor as set forth in Contract Documents.

- V. INDEMNIFICATION. To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, the Architect/Engineer, General Contractor, Contractor, and Construction Manager and their agents and employees from and against all claims, damages, causes of action, losses and expenses, including attorney's fees, arising out of or resulting from the performance of the work, provided that such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting therefrom; and (2) is caused in whole or in part by any negligent act or omission of Subcontractor or any of Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by any of them or for anyone whose acts any of them may be liable, regardless of whether it is caused in part by a party indemnified hereunder.
- VI. SUBCONTRACTOR CAUSED DAMAGES. Subcontractor agrees to accept responsibility for all damage caused by the Subcontractor, to clean all surfaces soiled by the Subcontractor, and to protect the work performed by the Subcontractor, it being understood that the standards of protection shall not be less than those specified in the General Contract or required by law, and to be responsible for any defective or improper work or material caused by its failure so to do. If any dispute arises between the Subcontractor and another subcontractor as to which is responsible for any item of damage, the dispute shall be submitted to the Contractor for decision and its determination as to responsibility.
- VII. ASSIGNMENT. Subcontractor shall not assign or sublet this Contract or any part thereof nor assign any money due or to become due hereunder without first obtaining the written consent of the Contractor herein.
- VIII. INSPECTION AND REPORT. If any part of the Subcontractor's work depends for proper execution or results upon the work of the Contractor, any other subcontractor or any other separate contractor on the project, the Subcontractor shall inspect and promptly report to the Contractor any apparent discrepancies or defects in such work that renders it unsuitable for such proper execution and results. Failure of the Subcontractor so to inspect and report shall constitute an acceptance of the work of the Contractor, other subcontractors or other separate contractors as fit and proper to receive his work.
- IX. SAFETY.
- A. This article establishes minimum levels of safety requirements. In the event that this article conflicts with safety requirements for Subcontractors set forth in the Owner/Hagerman Contract, the stricter or more stringent provision shall apply. Subcontractor agrees that it is responsible for ensuring the safety of its employees, its subcontractor's employees and others on the jobsite arising out of any aspect

of the Subcontractor's performance of the work under this Agreement. Subcontractor has the duty to provide a safe work place for the performance of the Subcontractor's work under this Agreement, including but not limited to, provision of general and safety supervision of the performance of Subcontractor's work, ensuring that the safe use and condition of all equipment used in connection with the performance of Subcontractor's work, implementation of procedures intended to ensure the safe performance of Subcontractor's work, implementation of procedures intended to ensure the safe performance of Subcontractor's work, implementation of safety precautions regarding the use of or exposure to any hazardous materials in the performance of the Subcontractor's work, and compliance with any and all Federal, state, and/or local laws, ordinances or regulations regarding jobsite safety including all OSHA requirements.

Subcontractor acknowledges that it is the sole party responsible for the safe performance of the Subcontractor's work, *even if Contractor and Owner have implemented any safety program or regulations at the project or jobsite.*

- B. The Subcontractor shall take all safety precautions with respect to its work, shall comply with all safety measures required by the Contract Documents and with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority for the safety of persons or property.
- C. Subcontractor shall comply with all Federal and State laws, codes, and regulations and all municipal ordinances and regulations effective where the work under this Subcontract is to be performed, and to pay all costs and expenses connected with such compliance, to pay all fees and taxes, including sales and use taxes, and also pay all taxes imposed by any State or Federal law for any employment insurance, pensions, old age retirement funds or any similar purpose and to furnish all necessary reports and information to the appropriate federal, state and municipal agencies, with respect to all of the foregoing the same as though the Subcontractor was in fact the Contractor, and to hold the Contractor, each other subcontractor and the Owner harmless from any and all losses or damage occasioned by the failure of the Subcontractor to comply with the terms of this paragraph.
- D. The Subcontractor, its agents, employees, materialmen and subcontracts will perform all work on the project in a safe and responsible manner. In particular, Subcontractor shall, at its own expense, conform to the safety policies and regulations and all specific safety requirements of the Occupational Safety and Health Act of 1970 and the Construction Safety Act of 1969 and all standards and regulations which have been or shall be promulgated by the parties or agencies which administer the Acts. Subcontractor shall comply with said requirements, standards and regulations, and required and be directly responsible for its subcontractor's compliance; and shall directly receive, respond to, defend and be responsible for all citations, assessments, fines or penalties which may be incurred by reason of the failure on the part of its agents, employees, materialmen or subcontractors to comply.

- E. Subcontractor agrees to defend Contractor against any and all losses, claims, damages and expenses arising from the Work performed under the Subcontract including, but not limited to, work relating to the erection, construction, placement or operation of any scaffold, hoist, crane, stay, ladder, support, or any other mechanical contrivance in connection with such Work. Further, the Subcontractor agrees that it is solely responsible for its compliance with all safety laws applicable to the Work performed under the Subcontract. Subcontractor warrants and represents to Contractor that it is familiar with all safety laws applicable to the Work provided under its Subcontract and that it has the knowledge, experience, and capacity to fully comply with all such safety laws including safety requirements of OSHA and the Construction Safety Act of 1969 and all standards and regulations which have been or shall be promulgated by the parties or agencies which administer safety standards, rules and regulations.
- F. The Subcontractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of its Subcontract.
- G. The Subcontractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
  - 1. Subcontractor's employees on the Work and other persons who may be affected thereby;
  - 2. The Work and materials and equipment to be incorporated therein, whether in storage or off the site, under care, custody or control of the Subcontractor or the Subcontractor's subcontractors;
  - 3. Other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction; and
  - 4. Construction or operation by the Owner, Contractor or other subcontractors.
- H. The Subcontractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on the safety of persons or property.
- I. The Subcontractor shall erect and maintain, as required by existing conditions and performance of the Subcontract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.
- J. Subcontractor will take all precautions which are necessary to protect against any conditions created during the progress of Subcontractor's activities which involve any risk of bodily harm to persons or a risk of damage to any property. Subcontractor shall reasonably inspect the Work, materials and equipment to

discover and determine any such conditions and shall be solely responsible for discovery, determination and correction of any such conditions which affect the safety and health of persons coming upon the construction site or persons involved in any fashion with Subcontractor's work.

- K. Subcontractor, in signing this Agreement, represents that it has studied all of the OSHA Safety and Health Regulations for Construction, and further, Subcontractor agrees that it will observe such regulations and be liable for any violation thereof by Subcontractor and/or its agent or employees. Subcontractor further agrees that, in the event that an action is undertaken against Contractor for violations created by Subcontractor or its subcontractors, regardless of tier, Subcontractor shall become responsible for all costs or damages assessed related to this action, including attorney's fees incurred in the defense or appeal of such action.
- X. **INDEPENDENT CONTRACTOR.** The Subcontractor warrants to Contractor that work and services provided by the Subcontract will be undertaken as an independent contractor. Subcontractor acknowledges that Contractor shall not have direct control over or charge of the acts or omissions of the Subcontractor, the agents or employees of the Subcontractor or any other persons performing portions of Subcontractor's Work and not directly employed by the Contractor.
- XI. **TIME OF COMPLETION.** Subcontractor warrants and acknowledges that it has fully reviewed the Work required under the Subcontract and other factors relating to completion including Contract Documents, availability of labor and materials, and the construction site. Subcontractor represents and warrants to Contractor that the Work required to be completed under the Subcontract can be completed in a timely fashion within the period of time designated in the Subcontract.
- XII. **ACCELERATION OF WORK.** Subcontractor acknowledges that time is of the essence in completing its Subcontract Work and that Contractor is relying upon Subcontractor to complete the Subcontract Work in a timely fashion.
- If, in the opinion of Contractor, the Subcontractor is not proceeding with the prosecution of the Work in a timely fashion, and such failure to proceed is due to the act, omission, or negligence of the Subcontractor, its agents, employees or Sub-Subcontractors, then Subcontractor shall, immediately and at no additional cost, work such overtime, additional shifts, Sundays, or holidays, as may be required to correct said delays and to ensure no further delays to the completion of the Work called for by this subcontract. In the event that Contractor orders such acceleration of work, Subcontractor shall comply without any additional costs or expenses charged to Contractor.
- XIII. **TERMINATION.** If Subcontractor defaults by failing or refusing to perform properly or abide by any terms, covenants, conditions, or provisions contained in this Subcontract, all of which are agreed to be material to this Subcontract, Contractor may, at any time thereafter, terminate Subcontractor's right to proceed under this Subcontract, upon compliance with the procedures set forth in the balance of this section. Furthermore, it is

recognized that if Subcontractor becomes insolvent, is adjudged bankrupt, or makes a general assignment for the benefit of creditors, or if a receiver is appointed for the benefit of its creditors, or if a receiver is appointed on account of its insolvency, such could impair Subcontractor's performance of this Subcontract. Accordingly, it is agreed that upon the occurrence of any such event, Contractor shall be entitled to request of Subcontractor or its successors in interest adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to provide such adequate assurance within five (5) days of delivery of the request shall be a default hereunder, entitling Contractor to terminate Subcontractor's right to proceed under this Subcontract, upon compliance with the procedures set forth in the balance of this section.

If Contractor determines that Subcontractor is in default for any of the reasons set forth in this Section, and Subcontractor fails to remedy and cure the default within two (2) working days following receipt by Subcontractor of written notice from Contractor of said default or defaults, then Contractor may, at its option, without releasing or waiving its rights and remedies against the Subcontractor's sureties and without prejudice to any other right he may be entitled to hereunder or by law, terminate Subcontractor's right to proceed with all or any part of this Subcontract and take possession of the work and all materials, tools, equipment, and appliances of Subcontractor, take assignment of all of Subcontractor's sub-subcontracts and purchase orders, and complete Subcontractor's work by whatever means, method or agency which Contractor may, in its sole discretion, choose.

In the event the Contractor deems any of the foregoing remedies necessary, Subcontractor shall not be entitled to receive any further payment until after the Project shall have been completed. Moreover, all monies expended and all of the costs, losses, damages and extra expenses, including all management, administrative, and other direct and indirect expenses (including attorney's fees) incurred by Contractor incident to such completion, shall be deducted from the Subcontract Amount, and if such expenditures, together with said costs, losses, damages and extra expenses, exceed the unpaid balance of the Subcontract amount, Subcontractor agrees to pay promptly to Contractor, on demand, the full amount of such excess, including costs of collection, attorney's fees and interest thereon at the maximum legal rate of interest until paid.

Contractor's determination of Subcontractor's default or defaults and Contractor's decision as to Subcontractor's failure to remedy and cure said default or defaults upon notification of their existence, made by Contractor in good faith under the belief that a default or defaults existed under the terms hereof and that Subcontractor failed to remedy and cure said default or defaults, shall be conclusive as to Contractor's right to proceed as herein provided. The liability of Subcontractor hereunder shall extend to and include the full amount of any and all sums paid, expenses and losses incurred, damages sustained, and obligations assumed by Contractor in good faith under the belief that such payments or assumptions were necessary or required, (a) in completion of the work and providing labor, materials, equipment, supplies and other items thereto or reletting the Subcontract, and (b) in settlement, discharge or compromise of any claims, demands, suits, and judgments pertaining to or arising out of the work hereunder. A sworn itemized

statement thereof or checks or other evidence of payment shall be prima facie evidence of the fact and extent of Subcontractor's liability.

If, after notice of termination of Subcontractor's right to proceed pursuant to the preceding portions of this Section, it is determined for any reason that Subcontractor was not in default, or that its delays were excusable, or that Contractor is not entitled to the remedies against Subcontractor provided herein, then Subcontractor's remedies against Contractor shall be the same as and limited to those afforded Subcontractor under the next paragraph of this Section, dealing with termination for convenience.

In addition to the preceding portions of this Section, Contractor shall have the right to terminate this Subcontract, in whole or in part, without cause upon seven (7) calendar days' written notice to Subcontractor. In the event of such termination for convenience, Subcontractor's recovery against Contractor shall be limited to that portion of the Subcontract Amount earned through the date of termination, together with any retainage withheld, and Subcontractor shall not be entitled to any other recovery against Contractor, including, but not limited to, anticipated profit on work not performed.

- XIV. VENUE. In the event that Subcontractor has complied with all contractual provisions in reference to resolution of disputes including provisions set forth in the Subcontract, Subcontractor agrees that any suit brought for any breach of the Subcontract and any litigation arising under the Subcontract is agreed to be maintained in any court of competent jurisdiction in either Marion County, Indiana or Allen County, Indiana, as determined by Contractor.
- XV. GOVERNING LAW. This agreement shall be governed by the laws of the State of Indiana.
- XVI. DISPUTE RESOLUTION. In the event that disputes arise between the parties, it is agreed and stipulated that the following dispute resolution procedures shall be followed in the order provided:
- A. Phase I (Negotiation). After compliance with the provisions of this Agreement, the parties shall attempt in good faith to resolve any controversy or dispute arising out of or relating to this Agreement promptly by negotiations between executives of the parties who have authority to settle the controversy and dispute and are not directly involved with the construction project in question. These negotiations shall be undertaken within thirty (30) days of a written request filed by either party to proceed with Phase I.
  - B. Phase II (Mediation). In the event that the controversy or dispute in question is not resolved pursuant to Phase I, the parties shall proceed to mediation as a condition precedent to the initiation of litigation or equitable proceedings by either party. A Request for Mediation shall be submitted in writing by either party to the contract. The parties shall share the mediator's fee and any related mediation fees equally. The mediation shall be held in Fort Wayne, Indiana, Indianapolis, Indiana, or any other location mutually agreeable to the parties.

Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

1. Mediation Conferences.

- a. The parties and their attorneys shall be present at all mediation sessions. At the discretion of the mediator, non-parties to the dispute may also be present.
- b. All parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of the dispute or controversy.
- c. Mediation sessions are not open to the public.

2. Confidentiality. The attorney for each side may submit to the mediator a confidential statement of the case, not to exceed ten (10) pages, prior to a mediation conference which shall include:

- a. the legal and factual contentions of the respective parties as to both liability and damages;
- b. the factors considered in arriving at the current settlement posture; and
- c. the status of the settlement negotiations to date.

A confidential statement of the case may be supplemented by damage brochures, videos, and other exhibits or evidence. The confidential statement of the case shall at all times be held privileged and confidential from other parties unless agreement to the contrary is provided to the mediator. In the mediation process, the mediator may meet jointly or separately with the parties and may express an evaluation of the case to one or more of the parties or their representatives. This evaluation may be expressed in the form of settlement ranges rather than exact amounts. The mediator may share revealed settlement authority with other parties or their representatives. If the mediation process does not result in settlement, any submitted confidential statement of the case shall be returned to the submitting attorney or party.

Mediation shall be regarded as settlement negotiations. Mediation sessions shall be closed to all persons other than the parties of record, their legal representatives, and other approved persons. Mediator shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediators.

3. Termination of Mediation. The mediator shall terminate mediation whenever the mediator believes that continuation of the process would harm or prejudice one or more of the parties or whenever the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely. At any time after two (2) sessions have been completed, any party may terminate mediation. The mediator shall not state the reason for termination except when the termination is due to conflict of interest or bias on the part of the mediator, in which case another mediator may be assigned.
  4. Mediation Rules of Evidence. With the exception of privileged communications, the rules of evidence do not apply in mediation, but factual information having a bearing on the question of damages should be supported by documentary evidence whenever possible.
- C. Phase III (Litigation). In the event that Phase I (negotiation) and Phase II (mediation) fail to resolve the dispute or controversy in question, the parties may proceed to litigation subject to the terms and conditions of this Agreement, including venue provisions. The provisions of Phase I (negotiation) and Phase II (mediation) do not alter, waive, or toll any applicable statute of limitations unless any such agreement is reached in writing between the parties.
- XVII. LEGAL FEES. In the event that Subcontractor breaches to any degree any condition of the Subcontract whereby Contractor incurs legal fees, attorney's fees, and related costs and expenses (hereafter "Legal Fees") then Subcontractor agrees to fully reimburse Contractor for any and all such Legal Fees.
- XVIII. MODIFICATION. The Subcontract shall not be orally changed, altered or modified in any manner other than by written agreement signed by the parties hereto.
- XIX. NON-WAIVER; PARTIAL INVALIDITY. The failure of Contractor to enforce at any time or for any period of time one or more of the provisions of the Subcontract including Contract Documents shall not be construed to be and shall not be a waiver of any such provisional provisions or of Contractor's rights thereafter to enforce each and every such provision. If any part of the Subcontract, including Contract Documents is declared invalid under the governing law, the balance of the Subcontract and Contract Documents remain in full force and effect.
- XX. CONTROLLING PROVISIONS. Except as noted herein, in the event of any conflict between the terms and conditions of this Article and the AIA Document A401 Standard Form of Agreement Between Contractor and Subcontractor (2007 Edition), the terms and conditions of this Article have priority and are controlling.

**HAGERMAN, INC.**

**ARTICLE XB:**

It is further agreed between the Contractor and the Subcontractor that the following administrative provisions shall be binding upon both parties:

1) INSURANCE

If a party other than Hagerman, Inc. ("Contractor") provides the Builders' Risk Insurance, and if the Contractor is responsible for any deductible provisions of said Insurance, then all claims shall be submitted through the Contractor on a per occurrence basis, with each claimant bearing a proportionate share of the total deductible, proportionate share being defined as a percentage of the total claim.

If Hagerman, Inc. ("Contractor") provides the Builders' Risk Insurance, then all claims shall be submitted through the Contractor on a per occurrence basis, with each claimant bearing a proportionate share of the total deductible, proportionate share being defined as a percentage of the total claim.

A copy of the Builders' Risk Insurance Certificate or a copy of the Binder for said coverage is provided herein for reference. If a copy has not been provided as stated, same will be sent upon receipt of written request.

2) PAYROLL INFORMATION (Check appropriate blanks)

This project is subject to the following:

\_\_\_\_\_ Prevailing Wages (see specifications)

\_\_\_\_\_ Weekly Certified Payroll Reports (WH-347)

\_\_\_\_\_ Monthly Manpower Utilization Reports (CC-257)

If Payroll reports are required to be submitted, they must be submitted through the Contractor's office for proper verification and processing. Monthly Manpower Utilization Reports (if required) shall be submitted on the basis of a calendar month, with the report being due in the Contractor's office no later than the fifth day of the following month.

**FAILURE TO SUBMIT PAYROLL REPORTS IN A TIMELY FASHION SHALL CONSTITUTE GROUNDS FOR WITHHOLDING OF PAYMENTS FROM THE SUBCONTRACTOR**

**HAGERMAN, INC.**

**ARTICLE XC:**

It is further agreed and understood between the Contractor and the Subcontractor that the following administrative provisions shall be binding upon both parties regarding Invoicing procedures:

All invoices for work completed and materials stored shall be submitted only on the forms provided herein. An initial copy is included for your use - make additional photocopies as required. *Please note that all invoices must be submitted in duplicate and must be accompanied by an AIA G703 Continuation Sheet giving a sufficient breakdown of labor and materials.*

**FAILURE TO SUBMIT INVOICES ON THE PROPER FORMS SHALL CONSTITUTE REJECTION OF SAME BY THE CONTRACTOR. IMPROPERLY SUBMITTED INVOICES SHALL BE RETURNED TO THE SUBCONTRACTOR FOR CORRECTION AND RESUBMISSION.**

Please note that per the Specifications, payment for off-site storage of materials:

\_\_\_\_\_ will be made for materials stored off-site with proper documentation and proof of insurance

\_\_\_\_\_ will not be made for materials stored off-site.

**HAGERMAN, INC.**

**ARTICLE XD:**

**NOTE: THE FOLLOWING MUST BE SUPPLIED BY THE SUBCONTRACTOR:**

Taxpayer Identification Number: \_\_\_\_\_;  
or submit IRS Form W-9. In the event the subcontractor fails to supply this information, the contractor is required by law to withhold 20% of the gross amount of work completed to date and remit same to the Internal Revenue Service. Payment to the Internal Revenue Service under the conditions outlined herein shall constitute payment to the subcontractor. This withholding shall be in addition to all other retainages specified herein.

**THE FOLLOWING PARAGRAPH APPLIES ONLY TO SUBCONTRACTORS  
DOMICILED OUTSIDE THE STATE OF INDIANA:**

Are you lawfully registered in the Secretary of State of Indiana to conduct business in the State of Indiana?

YES \_\_\_\_\_ NO \_\_\_\_\_

If yes, please supply a copy of your Certificate of Authority as issued by the Secretary of State. Lack of the necessary certifications by an out-of-state subcontractor or failure to supply copies of the necessary certifications by an out-of-state subcontractor shall required the Contractor to withhold 1 % of the gross amount of work completed to date (following an annual \$1,000.00 exclusion) and remit same to the Indiana Department of Revenue on the subcontractor's behalf as Gross Income Tax. Payment to the Indiana Department of Revenue under the conditions as outlined herein shall constitute payment to the subcontractor. This withholding shall be in addition to all other retainages specified herein.