

**PRIVATE ARBITRATION:
FORMS AND PRACTICE TIPS**

Tennessee Association of Construction Counsel - Fall 2021

TACC Private Arbitration Subcommittee:

Adrienne Anderson

David Draper

Joe Getz

Wearen Hughes

Bridgett McMahan

David Taylor

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Considerations for Private Arbitration Agreement

1. Submission/agreement to arbitrate

Gibbs v. Capital Resorts, No. E2019-00295-COA-R3-CV (2/24/20) re: fraud in the inducement ruling – a threshold issue and seemingly increasingly used defense by those seeking to avoid arbitration.

AtriCure, Inc. v. Meng, 12 F.4th 516 (6th Cir. 2021): Federal policy favoring arbitration applies only when both parties have consented to and are bound by an arbitration clause; it does not apply when determining arbitration claims by or against nonparties. Intended third-party beneficiary analysis.

How to deal with existing administered arbitration clause (AAA, JAMS)?

2. How to deal with any pending litigation (stay? bifurcation?)

3. Scope of arbitration: claims and issues to be arbitrated.

4. Applicable law: substantive and arbitration law

5. Applicable arbitration rules: Be careful about wholesale adoption of other's rules

6. Selection of arbitrators:

- Number
- Qualifications
- Method of selection
- Process for disclosures (including by parties and attorneys)
- Process for objections to arbitrator (who decides objections?)
- Process for filling vacancy or proceeding with fewer than 3 arbitrators

7. Arbitrator compensation:

- Amount
- How and when paid
- Deposits
- Who administers funds?
- What happens if a party does not timely pay?

8. Communications with arbitrator(s)

9. Timing/deadlines : any overarching schedule for above and other items in this list (or reserve for later)

10. Whether and how to deal in agreement with items and deadlines in usual scheduling order

11. Whether and how to deal in agreement with other tasks or deadlines not in usual scheduling order

- subpoenas
- preliminary witness lists
- witness disclosures
- revised statements of claims and defenses

Authority of arbitrator to issue subpoenas: *Am. Fed'n of Tel. & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999)

12. Discovery:

- what is allowed or not
- any limitations on what is allowed
- whether to require privilege logs
- how discovery disputes are to be resolved

13. Document production:

- Scope
- Process
- ESI protocol

14. Protective order: confidentiality or other protection of information **and proceeding**

15. Expert disclosures/reports: including any limitations on expert discovery

16. Pre-hearing and dispositive motion practice

- Arbitrator authority to grant interim relief

17. Any particular provisions regarding final hearing and hearing protocol

- Location
- Limitations on length of hearing
- Limitations on proof
- Limitations on form of proof, e.g. by affidavit
- Pre-hearing stipulation of exhibits
- Arbitrator's authority / duty to control hearing
- Covid and other safety protocols
- Whether to utilize court reporter and generate transcript
See, Jamoua v. CCO Investments, USDC Eastern Dist Michigan, Case 2:09-cv-13604-PDB-PJK (6th Cir. 2010) "Where, as here, the party moving to vacate the award provides no transcript or record evidence, but presents only self-serving and conclusory allegations unsupported by any record evidence, it is impossible for this Court to determine that the Panel was guilty of misconduct."

18. Scope of relief that can/must be granted

- Injunctive relief
- Binding award
- Conditional relief?
- Award of costs and attys' fees

19. Form of Award: Simple, itemized, reasoned, or findings of fact and conclusions of law.

See, Green v. Ameritech Corp., 200 F.3d 967 (6th Cir. 2000) re: motion to vacate based on failure to provide reasoning. Attorneys need to be aware of the burden they are imposing, and potential grounds for vacatur, by requiring a “reasoned award.”

See, Muskegon Cent. Dispatch 911 v. Tiburon, Inc., 462 F. App'x 517, 526 (6th Cir. 2012):

In neither his opinion on liability nor his opinion on damages did the Arbitrator address the merits of MCD's breach of contract claim. Indeed, the arbitrator never made any findings on whether Tiburon breached its own contractual obligations, as MCD claimed, and as Tiburon's own project manager believed. Instead, the Arbitrator treated what he found as MCD's failure to comply with the DRP, coupled with the termination provisions, as essentially a forfeiture of MCD's right to assert breach. The Arbitrator's decision resulted in MCD losing entirely and Tiburon winning entirely, without any finding on whether Tiburon was in material breach of substantive obligations.

20. Normal “boilerplate” provisions for an agreement

See, Day v. Fortune Hi-Tech Marketing, Inc., 2013 WL 4859781 (6th Cir. 2013) re: arbitration clause was found unenforceable where underlying contract was found void for lack of consideration (ignores separability)

The primary aim of boilerplate provisions is to save drafters and parties the trouble and time with language that's commonly understood and used. Moreover, the provisions enforce your rights within the contract and may either deduct or establish vital rights. The language is meant to save additional time by regarding common meanings, but it is worth noting that the impact and meaning of such provisions are vital to the contract itself.

Even though boilerplate terms are standard, they can still be tailored according to contract requirements. Each clause of the contract must be negotiated, including the boilerplate provisions. With that, not every single boilerplate provision needs to be in the contract. You should include important provisions, and you can determine the important provisions according to the transaction type outlined in the contract.

Boilerplate provisions should include:

- Rules on agreement interpretation
- Rules governing the subject matter of the contract
- Contingencies if a Court deems certain provisions invalid
- If third parties are intended to benefit from the Agreement

21. What else to include in agreement or leave for later: deal in agreement with whatever would determine if client should or will agree to private arbitration

22. Signatures by parties

23. Guarding against vacation of award

Section 10 of the FAA sets forth the statutory grounds to vacate an arbitration award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where an arbitrator evidenced partiality or corruption;
- (3) where the arbitrators were guilty of misconduct; and
- (4) where the arbitrators exceeded their power.

9 U.S.C. § 10(a)(1)-(4).

ARBITRATION AGREEMENT

This Arbitration Agreement (“Agreement”) is made and entered into as of the last date signed below, by and between _____ (“Plaintiff”) and _____ (“Defendant”):

WHEREAS, Plaintiff and Defendant entered into a Contract dated _____, including various change orders (collectively “Contract”), to perform certain work and furnish certain materials (collectively “Work”) at the real property known as _____ (“Property”);

WHEREAS, the Contract contains an arbitration clause (copy attached as Exhibit 1) (“Original Arbitration Clause”), which the parties have elected to bypass as set forth in this Agreement;

WHEREAS, disputes arose between Plaintiff and Defendant related to payment, timing and performance under the Contract (“Dispute”);

NOW, THEREFORE, the parties do hereby agree as follows:

1. All claims, counterclaims, disputes, setoffs, defenses, damages and causes of action (collectively “Claims”) between Plaintiff and Defendant which arise from or relate to the Contract, the Work, the Property or the Dispute will be resolved through private, binding arbitration with _____ (or any Replacement Arbitrator appointed in accordance with Paragraph 2), serving as the sole arbitrator (hereinafter “Arbitrator”). The parties stipulate and agree that this Agreement, and the parties’ agreement to arbitrate, is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (“FAA”). The award of Arbitrator (or any Replacement Arbitrator) shall be binding upon the parties and may be enforced and confirmed by a court of competent jurisdiction.

2. In the event Arbitrator becomes unable or unwilling to serve as the arbitrator under this Agreement, the parties shall mutually endeavor for a period of thirty days thereafter to select a replacement arbitrator with construction law experience to serve under this Agreement. In the event the parties are unable to mutually agree upon a replacement arbitrator within said timeframe, either party may petition a court of competent jurisdiction for the appointment of a replacement arbitrator pursuant to the provisions of the FAA. The replacement arbitrator appointed pursuant to this Paragraph 2 is referred to herein as the “Replacement Arbitrator”.

3. The parties have appointed Arbitrator (and any Replacement Arbitrator) as arbitrator in lieu of proceeding under the Original Arbitration Clause. This Agreement shall take precedence over all of the terms, conditions and requirements of the Original Arbitration Clause. In other words, the Original Arbitration Clause shall not govern Arbitrator’s (or any Replacement Arbitrator’s) service under this Agreement.

4. By signing this Agreement, the parties each agree that Plaintiff and Defendant have

made a “demand for arbitration” in accordance with this Agreement and the Original Arbitration Clause. All conditions precedent to arbitrate a Claim under this Agreement and the Original Arbitration Clause have been satisfied, including any pre-arbitration requirement of settlement discussions or mediation.

5. The fees of Arbitrator (and any Replacement Arbitrator) shall be advanced 50% by Plaintiff and 50% by Defendant. Fees advanced to or owed to Arbitrator shall be assessed in accordance with this Agreement.

6. Arbitrator (and any Replacement Arbitrator) shall decide any Claims arbitrated hereunder in accordance with the Construction Industry Rules of the American Arbitration Association (“AAA”) in effect as of the execution of this Agreement, including the assessment of any fees of Arbitrator associated with the Arbitration. This arbitration shall not, however, be administered by the AAA, but shall instead be administered by Arbitrator (or any Replacement Arbitrator), it being the intent of the parties to avoid those administrative and filing fees charged by the AAA. It is the parties’ intent in entering into this Agreement to avoid the time and expense of protracted litigation and discovery, which Arbitrator (and any Replacement Arbitrator) shall consider when ruling on requests related to discovery and other similar matters.

7. Nothing contained herein shall void, supersede or in any way terminate any other provision of the Contract, except with respect to the Original Arbitration Clause as modified expressly herein.

8. This Agreement may be executed in counterparts, each of which when executed shall be deemed to be an original, but all of which shall constitute one in the same agreement. This Agreement may also be executed by facsimile, or scanned and e-mail signatures, which shall constitute binding and original signatures. This Agreement constitutes the complete and integrated agreement of the parties with respect to the arbitration of claims and disputes between them, all prior agreements and negotiations regarding arbitration being merged herein. This Agreement is the product of mutual drafting and shall not be construed more strongly for or against any party.

Entered into by and between the Parties as set forth below.

[SIGNATURES]

ARBITRATION AGREEMENT
[with ancillary arbitrator]

This Arbitration Agreement (“Agreement”) is made and entered into as of _____, 2020 by and between _____, _____, and XXXXX (“Arbitrator”) and _____ (“Ancillary Arbitrator”):

WHEREAS, ___ and _____ entered into a Contract dated _____, including various change orders (collectively “Contract”), to perform certain work and furnish certain materials (collectively “Work”) at the real property known as _____ and located at _____ (“Property”);

WHEREAS, the Contract contains an arbitration clause (“Original Arbitration Clause”), which the parties have agreed to revise as set forth in this Agreement;

WHEREAS, disputes have arisen between ___ and _____ related to payment, timing and performance under the Contract (“Dispute”);

NOW, THEREFORE, the parties do hereby agree as follows:

1. All claims, counterclaims, disputes, setoffs, defenses, damages and causes of action (collectively “Claims”) between ___ and _____ that have arisen or arise from or relate to the Contract, the Work, the Property or the Dispute will be resolved through private, binding arbitration with Arbitrator (or any replacement arbitrator appointed in accordance with Paragraph 2) serving as the arbitrator; provided, however, the arbitrator of any matter specified in Section 2 below shall be Ancillary Arbitrator (Arbitrator and Ancillary Arbitrator are collectively referred to herein as the “Arbitrators”). The parties stipulate and agree this Agreement and the arbitration proceeding are governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (“FAA”), and the underlying Dispute and Claims are governed by Tennessee law. The award of the Arbitrator and any and all lawful decisions by the Arbitrators shall be binding upon the parties and may be enforced and confirmed by a court of competent jurisdiction.
2. All claims, disputes, assertions, and other matters in the arbitration concerning (a) the potential conflict of interest, disqualification, or recusal of the Arbitrator, (b) the propriety or reasonableness of the fees and expenses assessed by the Arbitrator, (c) consolidation or joinder of parties or arbitrations, or (d) any other matter which would be decided by the AAA and not by the Arbitrator if this arbitration was being administered by the AAA shall be decided by the Ancillary Arbitrator. The parties agree, and instruct the Ancillary Arbitrator, not to disclose which of the parties brought any matter before the Ancillary Arbitrator. The Arbitrator hereby agrees that any and all lawful decisions of the Ancillary Arbitrator shall be binding upon the Arbitrator and may be enforced and confirmed by a court of competent jurisdiction.
3. In the event either of the Arbitrators becomes unable or unwilling to serve under this Agreement, the parties shall mutually endeavor for a period of thirty days thereafter to select a replacement with construction law experience to serve under this Agreement. In the event the parties are unable to mutually agree upon a replacement within said timeframe, either party may

petition a court of competent jurisdiction for the appointment of a replacement pursuant to the provisions of the FAA.

4. The parties have appointed the Arbitrators in lieu of proceeding under the Original Arbitration Clause. This Agreement shall take precedence over all of the terms, conditions and requirements of the Original Arbitration Clause. In other words, the Original Arbitration Clause shall not govern the Arbitrators' services under this Agreement.

5. The parties each agree ___ and _____ have made a "demand for arbitration" in accordance with this Agreement and the Original Arbitration Clause. All conditions precedent to arbitrate a Claim under this Agreement and the Original Arbitration Clause have been satisfied, including any pre-arbitration requirement of settlement discussions or mediation.

6. The fees and expenses of the Arbitrators shall be deposited and paid 50% by _____ and 50% by _____. The Arbitrators may request or bill for payments for deposits, or the actual fees and expenses, and the parties shall be responsible for and make those payments within the time(s) requested. The Arbitrators may suspend or terminate their services if any requested payment is not timely made in full. The Arbitrator shall charge \$XX per hour for his time, including for time spent administering and conducting the arbitration. The Ancillary Arbitrator shall charge \$XX per hour for his time, including for time spent administering and conducting any arbitration proceedings under this Agreement. Deposits may be used to pay for fees and expenses, and if there are any unused deposits after the conclusion of the arbitration, those amounts will be returned to the parties.

7. The Arbitrators shall decide any Claims arbitrated hereunder in accordance with the Construction Industry Rules of the American Arbitration Association ("AAA") in effect as of the date of this Agreement, including the assessment of any fees of the Arbitrators associated with the arbitration, except for Rules R-1(a), 2, 3, 4, 5, 7(a), 7(g), 10, 11, 14, 15, 16, 17, 18, 22, 45, 55, and 57. This arbitration shall not, however, be administered by the AAA, but shall be administered by the Arbitrators, and anywhere in the AAA Rules where reference is made to the AAA or the R-7 arbitrator, the parties replace such references with "Arbitrator" or "Ancillary Arbitrator," as applicable. It is the parties' intent to avoid the time and expense of protracted litigation and discovery, which the Arbitrators shall consider when ruling on requests related to discovery and other similar matters.

8. Nothing contained herein shall void, supersede or in any way terminate any provision of the Contract, other than the Original Arbitration Clause as modified herein.

9. This Agreement may be executed in counterparts, each of which when executed shall be deemed to be an original, but all of which shall constitute one and the same agreement. This Agreement may also be executed by facsimile, or scanned and e-mail signatures, which shall constitute binding and original signatures. This Agreement constitutes the complete and integrated agreement of the parties with respect to the arbitration of the Dispute, all prior agreements and negotiations regarding arbitration being merged herein. This Agreement is the product of mutual drafting and shall not be construed more strongly for or against any party by reason of who drafted a particular provision.

Entered into by and between the Parties, the Arbitrator, and the Ancillary Arbitrator as set forth below.

XXXXXXXX, Arbitrator

Date:

XXXXXXXX, Ancillary Arbitrator

Date:

By:

_____, _____ [typed name and title]

Date:

By:

_____, _____

Date:

IRREVOCABLE AGREEMENT TO SUBMIT TO ARBITRATION

1. Parties: The parties to this Agreement are as follows:

- (a) _____; and
- (b) _____.

This Agreement shall be binding upon, and shall inure to the benefit of, the successors, assigns, and predecessors in interest of the parties.

2. Recitations:

- (a) Pursuant to a written agreement entered into between the parties dated _____ (the "Contract") which the Parties agree includes a binding requirement to arbitrate disputes between them arising out of or relating to the Contract; and
- (b) WHEREAS, disputes have arisen between the parties arising under the Contract and subject to the arbitration requirements therein; and
- (c) WHEREAS, the parties wish to submit to binding arbitration any and all disputes between them arising from or related to the Contract;
- (d) THEREFORE, the parties hereby agree as hereinafter set forth, in consideration of the mutual covenants hereinafter appearing, as follows:

3. Submission to Arbitration:

- (a) The parties agree to and hereby do, irrevocably submit all their existing claims arising out of or related to the Contract, including but not limited to all claims arising under or relating to the execution, interpretation and/or breach of the Contract, to binding arbitration pursuant to the Contract and to this Agreement. To the extent that the dispute resolution provisions of the Contract conflict with the provisions of this Agreement, the parties agree that the provisions of this Agreement control. All other provisions of the Contract remain in full force and effect, and the parties do not intend that this Agreement shall alter in any way their substantive rights under the Contract.
- (b) The parties agree that such arbitration will be conducted in accordance with this Agreement, the provisions of the Contract, and the Construction Industry Rules of the American Arbitration Association in effect at the time of this Agreement (collectively referred to herein as the "Rules"). However, notwithstanding any contrary provision of the Contract or the Construction Industry Rules of the American Arbitration Association, the Parties agree that they will not use the administrative services of the American Arbitration Association. The Parties agree to privately select an arbitrator as provided herein and to empower that arbitrator with the authority to apply and enforce the arbitrator functions as well as any administrative functions provided under the Rules. In the event of any conflict within the Rules, the provisions of this Agreement shall control, and the Parties empower the arbitrator to resolve any conflicts within the Rules in a manner which the arbitrator determines to be consistent with the intent of this Agreement.

(c) The Parties agree that this Agreement shall be interpreted and enforced in accordance with the provisions of the Federal Arbitration Act (the “Act”) which the Parties intend to apply and adopt by contract regardless of whether an action is brought in State or Federal court and without regard to the presence of interstate commerce. Judgment on any award of the Arbitrator made pursuant to this Agreement may be entered in any court of competent jurisdiction.

4. Selection of Arbitrator: The Parties agree that arbitration pursuant to this Agreement shall be submitted to a single arbitrator. The parties further agree that _____ has been selected as Arbitrator. By his/her signature hereunder, the Arbitrator accepts the appointment of the parties.

5. Duties of Arbitrator: The parties and the Arbitrator agree that the Arbitrator will perform the following services:

- (a) Review of all pre-hearing submittals from the parties, including evidentiary materials and memoranda of law.
- (b) Conduct one or more appropriate pre-hearing conferences, including a scheduling conference and any necessary hearings incident to the resolution of discovery disputes or the making of interim awards in accordance with the applicable Rules.
- (c) Conduct of an evidentiary hearing on the merits of the issues and the claims of the Parties.
- (d) Analyze the issues and claims of the Parties submitted at the hearing; and
- (e) Render a final award, which shall be an “itemized award,” unless the Parties both specify otherwise in writing.

6. Limitation of Liability: The Parties agree that the Arbitrator shall not be liable to either Party for any damages or expense arising out of or relating to acts or omissions in the performance of Arbitrator’s duties under this Agreement so long as Arbitrator acts in good faith. The Parties shall have no cause of action against Arbitrator arising out of or relating to any act or omission of Arbitrator under this Agreement. So long as Arbitrator has acted in good faith, both Parties agree to compensate Arbitrator for any time spent by Arbitrator and any legal fees and expenses incurred by Arbitrator responding to any claim or legal action asserted by either Party, whether such claim is asserted against Arbitrator or the other Party.

7. Arbitrator is Not Attorney for Either Party: Both Parties acknowledge that the Arbitrator is not being engaged to provide, and will not be providing, legal advice or representation to either Party. No comment or statement of the Arbitrator shall be considered to be legal advice to either Party. The Arbitrator will serve as a neutral entity, and both Parties shall seek such legal advice as they may desire from counsel of their choosing.

8. Timing of Submission:

- (a) Each Party will submit its claims in writing to the Arbitrator, specifying specifically the dollar amount of any relief that each party requests, on or before _____ (__) days prior to any scheduled hearing on the merits of any claim. The dollar amount of any claim may be changed thereafter upon written notice, but if objection is made thereto by the opposing party, only as allowed by the Arbitrator.
- (b) Promptly after this Agreement is executed by both Parties and provided to the Arbitrator, the Arbitrator shall schedule and conduct a scheduling conference, at which time a schedule for the evidentiary hearing and the completion of pre-hearing discovery shall be specified by the Arbitrator. Unless otherwise agreed in writing by the Parties or directed by the Arbitrator for good cause shown, the hearing shall be conducted on the dates agreed to by the Parties and the Arbitrator, and the Arbitrator's award shall be due within thirty (30) days from and after conclusion of the evidentiary hearing;
- (c) Pre-hearing discovery shall be permitted pursuant to the agreement of the Parties as set forth herein, and in the event of any disagreement related thereto, in the sole discretion of the Arbitrator in accordance with the Rules.

9. Compensation of Arbitrator:

- (a) The parties will reimburse the Arbitrator for all fees and out-of-pocket expenses relating to the Arbitrator's preparation for, conduct of, and issuance of any orders following the arbitration, including but not limited to travel expenses and meals for hearings more than 30 miles from Arbitrator's city of residence.
- (b) The Arbitrator's fees will be billed and paid on an hourly basis at the rate of \$XXX per hour for services performed by the Arbitrator (travel time will be billed at a rate of \$XXX per hour for travel to any hearings more than XX miles from Arbitrator's city of residence).
- (c) Within thirty (30) days of the execution of this Agreement, the Parties will pay to the Arbitrator a retainer in an amount to be determined by the Arbitrator as sufficient to cover Arbitrator's estimated fees and expenses under this Agreement. Each Party is responsible for paying one-half of the retainer. The Arbitrator will hold unused portions of the retainer in trust and will draw on those funds to pay expenses and fees in accordance with this Agreement until the retainer is exhausted. If this matter is concluded by settlement or otherwise prior to the exhaustion of the retainer, the unexpended balance remaining at that time will be refunded equally to the parties. If the retainer is exhausted prior to the conclusion of the case, the Arbitrator may require the submission of additional deposits in equal amounts from each Party. The Parties agree that the Arbitrator reserves the right to withdraw from providing any further services at any time if fees/expenses owed by either Party are not promptly paid. In the event that one Party fails to pay fees/expenses when due, the other Party may at its option deposit such fees/expenses with the Arbitrator who shall proceed with the arbitration. In that event, the Arbitrator may include in any award an amount in favor of the paying Party, and against the non-paying Party, equal to the non-paying Party's obligation plus interest at the highest rate allowed by law.
- (d) The Arbitrator will submit to the parties a summary of hours worked and an itemized statement of expenses upon the conclusion of the Arbitrator's services under this Agreement.

(e) Arbitration costs may be allocated by the Arbitrator in the award in accordance with the Rules.

8. Discovery:

(a) Each party will promptly produce all its non-privileged project documents, including electronically stored documents, to the other within thirty (30) days of the execution of this Agreement and at least 60 days prior to the hearing;

(b) Depositions may be taken upon mutual agreement of the Parties so as to be concluded thirty (30) days prior to the hearing.

(c) At least thirty (30) days prior to the hearing, each Party shall exchange with the other and publish to the Arbitrator a list of proposed fact witnesses with a brief summary of the scope of expected testimony. The Parties shall also supply at that time a list of all anticipated expert witnesses along with a CV and summary of expected expert opinions to be offered at hearing. Testimony at hearing should conform to the disclosures under this section with the Arbitrator to determine whether and under what conditions additional testimony may be presented.

9. Mediation: To the extent that the Contract requires mediation as a condition precedent to an arbitration hearing, the Parties represent that they consider such condition to have been waived or satisfied.

10. Construction and Severability: This Agreement, and all its terms and conditions, shall be construed in accordance with the laws of the State of Tennessee, except the laws of the United States of America shall control to the extent it becomes necessary to interpret the provisions of the Federal Arbitration Act or the Federal Rules of Civil Procedure, as applied to this Agreement. In the event any provision of this Agreement should be invalid or unenforceable, the parties intend that the remainder of this Agreement shall remain in full force and effect, as though such valid or unenforceable provision had not been contained therein. All questions of the construction, interpretation, and validity of this Agreement shall be resolved by the Arbitrator.

11. Section Captions: The section captions appearing at the beginning of each numbered section of this Agreement are intended for the convenience of the Parties. In the event this Agreement must be construed by the Arbitrator or by a Court, the Parties intend that the text of each section, and not the caption, shall be controlling.

12. Counterparts: The parties agree that this Agreement may be executed in one or more identical counterparts, all of which shall be deemed one and the same agreement. A facsimile copy of this Agreement, executed by one or more of the Parties, shall be as valid as an original so executed.

13. Entire Agreement: This Agreement, together with the Contract, constitute the entire agreement of the Parties with respect to the subject matter hereof. No statement by any party, or by any agent or attorney of any party, which differs from the terms of this written Agreement, shall be given any force or effect whatsoever. This Agreement may not be modified except in writing signed by the parties.

Effective this _____ day of _____, 20__.

Date: _____

Date: _____

ARBITRATOR

Date: _____

ADDITIONAL PROVISIONS FOR CONSIDERATION

- A. Arbitrator Selection and Qualifications**
- B. Arbitrator Procedures**
- C. Compensation of the Arbitrator**
- D. Scheduling**
- E. Covid / Safety Provisions**
- F. Discovery**
- G. Boilerplate Provisions**

ARBITRATOR SELECTION AND QUALIFICATIONS

1. The Parties hereby agree to submit all Claims to binding private arbitration to be conducted by a sole Arbitrator/Three (3) Person Arbitration Panel.

2. The Arbitrator will be selected as follows:
 - A. Each Party will identify and exchange a ranked list of five (5) possible arbitrators, listing the arbitrators in order of preference numbering each individual from one (1) to five (5), with one being the highest ranking, within ten (10) business days of the execution of the Agreement. The exchange of the list shall take place via email communication between the Parties' counsel.

 - B. Each Party will have seven (7) business days to review and analyze the Opposing Party's list of arbitrators for the following qualifications:
 - (i) The Arbitrator shall have an active Tennessee law license/Contractor/Architect license in good standing for at least ten (10) years;

 - (ii) The Parties will make a good faith attempt to include arbitrators who have either construction law or construction experience in the construction industry;

 - (iii) The prospective Arbitrator shall have no substantive discussions with either Party or Party's counsel regarding the merits of the case, no business relationship with either Party or Party's counsel, and there shall be no apparent conflicts of interest as defined by the Tennessee Rules of Professional Conduct; and

 - (iv) The prospective Arbitrator will confirm his/her availability and willingness to serve in capacity of Arbitrator, and willingness to execute an affidavit and provide to each Party all relevant disclosures agreed to by the Parties acknowledging that the arbitrator meets the above criteria and has complied with the items set forth above.

 - C. The individual who meets the requirements under Paragraph B (i) – (iv) shall be designated a "Qualified Arbitrator."

 - D. If the list of arbitrators includes one common name, then that person shall be selected as the arbitrator, provided that the common arbitrator is a Qualified Arbitrator, and the arbitrator selection process ends here. If there is more than one commonly identified Qualified Arbitrator, then the arbitrator shall be selected by summing the Parties' ranked position for each commonly identified Qualified Arbitrator. The Qualified Arbitrator with the lowest total sum of its ranked positions shall be the Arbitrator.

- E. If there are no Qualified Arbitrators in common, on the fifth business day following the review period, no later than 4:30 CDT, the Parties may elect to choose one of the other parties' nominated arbitrators by submitting their selection of the arbitrator by e-mail to the opposing Party. Any arbitrator selected by either party must be a Qualified Arbitrator.
- F. If neither Party elects to select an arbitrator from the Opposing Party's list, the names of the highest ranked Qualified Arbitrator on each party's list shall be considered by each Party in an attempt to mutually agree on the arbitrator selection.
- G. In the event a mutually agreed upon selection in accordance with Paragraph F, the Parties shall petition a court of competent jurisdiction in accordance with T.C.A. §29-5-304.

ARBITRATOR PROCEDURES

1. The arbitration procedures will be governed by the Tennessee Rules of Civil Procedure and the evidentiary issues will be governed by the Tennessee Rules of Evidence.
2. The arbitration shall be administered by the Arbitrator. As part of the administration of the arbitration, the Arbitrator shall maintain a complete file of all documents and correspondence received by the Arbitrator during the course of the proceedings (the "Arbitrator's Record"). Upon conclusion of the arbitration, the Arbitrator shall return the documents made part of the record to the party who presented and/or introduced such item or documents.
3. The Arbitrator selected by the Parties shall have the authority to resolve the Claims between the Parties as set forth in their arbitration statements or any subsequent amendments, to resolve any discovery disputes in the arbitration, and to issue subpoenas for the production of documents and witnesses for depositions and the arbitration hearing utilizing a form subpoena to which the Parties agree, in accordance with the Tennessee Rules of Civil Procedure.
4. The proceedings, including the hearing on the merits, will be transcribed and the Parties will split equally the court reporter's cost and expenses unless the costs and expenses are assessed in accordance with Paragraph 8 herein.
5. The Arbitrator shall issue a written, reasoned award which includes but it not limited to a statement with respect to each of the Claims presented, the analysis and conclusion on which the award is based, and amounts, if any, awarded to the Parties. Consistent with the Contract, the Arbitrator may assess and apportion any and all arbitration fees, costs and expenses including but not limited to court reporter's costs and expenses as he/she determines appropriate. All expenses shall be shared equally unless otherwise apportioned by the Arbitrator.
6. The arbitration proceeding and the Arbitrator's Record, including without limitation, all discovery and the award and position statements submitted to the Arbitrator, shall be kept confidential and not disclosed to anyone other than the Parties to this arbitration, except to the extent that disclosure is necessary to (a) comply with a subpoena or order of a court of competent jurisdiction or (b) enforce an arbitration award in a court of competent jurisdiction. Provided, however, such disclosure must be limited to the minimum disclosure necessary to accomplish such compliance or enforcement, the disclosing party must give the other adequate notice of the proposed disclosure and either of the Parties may seek a protective order in connection therewith.
7. Preliminary hearings and conferences and the final hearing on the merits of the Parties claims and defenses shall take place in a manner and location as deemed appropriate by the Arbitrator.

COMPENSATION OF THE ARBITRATOR

(a) The Parties agree that the Arbitrator's compensation shall be \$ ____ .00 per hour which shall be filled in an itemized format using 0.10 hour increments. Any expenses of the Arbitrator shall be billed at cost and copies billed at \$.10 per page. The Arbitrator shall be compensated for the conduct of hearings, the review of documents submitted by the Parties, the preparation of orders and the final award, and the conduct of an inspection of the project in dispute if requested by a Party and ordered by the Arbitrator. Any travel time of the Arbitrator exceeding travel in a thirty (30) mile radius from _____ [insert arbitrator's address _____], _____, Tennessee, shall be billed at \$ ____ /hour. The Arbitrator's compensation shall be shared equally by the Parties unless otherwise agreed by the Parties or ordered by the Arbitrator pursuant to applicable law.

(b) Within thirty (30) days from the conclusion of the Preliminary Conference, the Parties shall provide a refundable retainer in equal amounts made payable to the Arbitrator or as the Arbitrator directs and said payments shall be held in the Arbitrator's trust account for payment of the Arbitrator's fees and expenses. The initial amount of the retainer will be an estimate of the total fees and expenses to be incurred by the Arbitrator and shall be determined at the Preliminary Conference based on the then apparent complexity of the case and the expected time required for a hearing on the merits. Thereafter, the initial retainer amount may be increased or reduced at the final prehearing conference if the perceived nature of the case has changed significantly. The Arbitrator may bill monthly or at the conclusion of the arbitration as may be appropriate given case activity. The Parties will be provided a copy of all arbitrator bills and a list of charged expenses.

(c) The Arbitrator may withdraw from further services by providing written notice to the Parties if the Arbitrator's compensation, including any retainer, is not paid pursuant to this Agreement. If a party fails or refuses to pay its share of the Arbitrator's compensation, the other party may pay the non-paying party's share and the Arbitrator shall proceed with the arbitration. In addition to any award based on hearing evidence and applicable law, the Arbitrator shall award the payment party double the amount paid for the non-paying party's obligation.

SCHEDULING

As soon as practical after the Arbitrator is selected, the Arbitrator will conduct a preliminary scheduling conference with all counsel in order to set a schedule for the arbitration proceeding, including all deadlines and other restrictions, if any, for discovery, depositions, document productions, exchanges of exhibits and witness lists and submission of any briefs in accordance with Rule 16 of the Tennessee Rules of Civil Procedure. The Arbitrator shall prepare and issue a scheduling order in writing after the conclusion of the preliminary conference.

COVID / SAFETY PROVISIONS

The necessary provisions will vary depending upon the circumstances; therefore, the following items should be considered:

1. Hearing
 - a. In person
 - b. Remote
 - c. Hybrid

2. If in person:
 - a. Compliance with local and facility protocols
 - b. Proof of health or vaccine status
 - c. Accommodation of special requests or circumstances of individuals
 - d. Number of rooms (perhaps with Zoom or similar means to connect the rooms)
 - e. Size of room(s)
 - f. Configuration of room(s)
 - i. Set up of tables/chairs
 - ii. Social distancing
 - iii. Ventilation
 - g. Number of people in a room
 - h. Masks
 - i. Yes or no
 - ii. Who will wear and when
 - i. Hand sanitizer or not
 - j. Ways to minimize touching common surfaces or materials: Presentation of exhibits and other evidence.
 - k. Handling of food and drinks

DISCOVERY

Sample Clauses

- In any arbitration proceeding, discovery will be permitted in accordance with the Rules. All discovery shall be expressly limited to matters directly relevant to the dispute being arbitrated and must be completed no later than 20 days before the hearing date. Any requests for an extension of the discovery periods, or any discovery disputes, will be subject to final determination by the arbitrator upon a showing that the request for discovery is essential for the party's presentation and that no alternative means for obtaining information is available.
- Pursuant to Section _____ of _____ (Contract for Work/Discovery Agreement/Arbitration Rules), the parties agree that discovery shall be conducted as follows: _____.
- Discovery permitted in any arbitration proceeding commenced hereunder is limited as follows: No later than thirty (30) days after the filing of a claim for arbitration, the parties will exchange detailed statements setting forth the facts supporting the claim(s) and all defenses to be raised during the arbitration, and a list of all exhibits and witnesses. No later than twenty-one (21) days prior to the arbitration hearing, the parties will exchange a final list of all exhibits and all witnesses, including any designation of any expert witness(es) together with a summary of their testimony; a copy of all documents and a detailed description of any property to be introduced at the hearing. Under no circumstances will the use of interrogatories, requests for admission, requests for the production of documents or the taking of depositions be permitted. However, in the event of the designation of any expert witness(es), the following will occur: (a) all information and documents relied upon by the expert witness(es) will be delivered to the opposing party, (b) the opposing party will be permitted to depose the expert witness(es), (c) the opposing party will be permitted to designate rebuttal expert witness(es), and (d) the arbitration hearing will be continued to the earliest possible date that enables the foregoing limited discovery to be accomplished.
- The parties will be entitled to discovery as if the arbitration were a civil suit in the _____ Court. The arbitrator may limit the scope, time, and issues involved in discovery.
- To help prepare for the arbitration, each party shall be entitled, at their own expense, to learn about the facts of a claim before the arbitration begins. Each party shall have the right to take the deposition of one (1) individual and any expert witness designated by another party. Each party also shall have the right to make requests for production of documents to any party. Additional discovery may be had only where the Arbitrator so orders, upon a showing of substantial need. At least thirty (30) days before the

arbitration, the parties must exchange lists of witnesses, including any expert witnesses, and copies of all exhibits intended to be used at the arbitration.

- Unless the parties mutually agree in writing to some additional and specific pre-hearing discovery, the only pre-hearing discovery shall be (a) reasonably limited production of relevant and non-privileged documents, and (b) the identification of witnesses to be called at the hearing, which identification shall give the witness's name, general qualifications and position, and a brief statement as to the general scope of the testimony to be given by the witness. The arbitrators shall decide any disputes and shall control the process concerning these pre-hearing discovery matters. Pursuant to the Rules of AAA, the parties may subpoena witnesses and documents for presentation at the hearing.
- The parties may obtain discovery in aid of the arbitration to the fullest extent permitted under law. All discovery disputes shall be resolved by the arbitrator.
- Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. Each party also shall have the right to make requests for production of documents to any party. The subpoena right specified below shall be applicable to discovery pursuant to this paragraph. Additional discovery may be had only where the Arbitrator selected pursuant to this Agreement so orders, upon a showing of substantial need.
- The parties shall be entitled to conduct reasonable discovery and the arbitrator shall have the authority to determine what constitutes reasonable discovery. The arbitrator shall hear motions for summary judgment/adjudication as provided in the Federal Rules of Civil Procedure.
- Each party shall, upon the written request of the other party, provide the other with copies of documents relevant to the issues raised thereby. Other discovery may be ordered by the arbitrators to the extent the arbitrators deem additional discovery appropriate, and any dispute regarding discovery, including disputes as to the need therefor or the relevance or scope thereof, shall be determined by the arbitrators, which determination shall be conclusive.
- The arbitrator or arbitrators, as the case may be, shall set a limited time period and establish procedures designed to reduce the cost and time for discovery while allowing the parties an opportunity, adequate in the sole judgment of the arbitrator or majority of the three arbitrators, as the case may be, to discover relevant information from the opposing parties about the subject matter of the dispute. The arbitrator, or a majority of the three arbitrators, as the case may be, shall rule upon motions to compel or limit discovery and shall have the authority to impose sanctions for discovery abuses,

including attorneys' fees and costs, to the same extent as a competent court of law or equity, should the arbitrators or a majority of the three arbitrators, as the case may be, determine that discovery was sought without substantial justification or that discovery was refused or objected to without substantial justification.

- The Arbitrators, upon a showing of good cause, may require and facilitate such limited discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties, the burden on the parties, and the desirability of making discovery limited, expeditious, and cost-effective. The Arbitrators shall issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.
- The arbitrators shall decide any disputes and shall control the process concerning these pre-hearing discovery matters. Pursuant to the Rules of AAA, the parties may subpoena witnesses and documents for presentation at the hearing.
- The arbitrator shall have the power to authorize all forms of discovery (including depositions, interrogatories and document production) upon the showing of (a) a specific need for the discovery, (b) that the discovery likely will lead to material evidence needed to resolve the controversy, and (c) that the scope, timing and cost of the discovery is not excessive.
- In addition to any other procedures provided for under the rules of the AAA, upon written request, each party shall, at least 14 days prior to the date of any hearing, provide to the opposite party a copy of all documents relevant to the issues raised by any claim or counterclaim and a list of all witnesses to be called by that party at the hearing and each party shall be permitted to take at least one deposition at least 14 days prior to any hearing.
- Discovery shall be allowed only to the extent permitted by the Rules.
- In arbitration proceedings hereunder, discovery shall be permitted in accordance with Code of Civil Procedure §1283.05.
- The provisions of _____ Code of Civil Procedure Section _____ or its successor section(s) are incorporated herein and made a part of this Agreement. Depositions may be taken and discovery may be obtained in any arbitration under this Agreement in accordance with said section(s).

- During the period beginning with the selection of the third arbitrator and ending upon the conclusion of the arbitration proceedings, the arbitrators will have the authority to permit the Parties to conduct such discovery as the arbitrators consider appropriate.
- The arbitrator(s), consistent with the expedited nature of arbitration, shall permit discovery only if there is clear and convincing evidence that discovery is necessary. If the arbitrator(s) so determine, they may permit limited document discovery and no more than three depositions per party of no more than 8 hours each. Notwithstanding the foregoing, each Party will, upon the written request of the other Party, promptly provide the other with copies of documents on which the producing Party may rely in support of a claim or defense or which are relevant to the issues raised in the Agreement Dispute. All discovery, if any, shall be completed within 90 days following the appointment of the arbitrator(s). Adherence to formal rules of evidence shall not be required and the arbitrator(s) shall consider any evidence and testimony that the arbitrator(s) determine to be relevant, in accordance with the Rules and procedures that the arbitrator(s) determine to be appropriate. In resolving any Agreement Dispute, the Parties intend that the arbitrator(s) shall apply the substantive Laws of the State of Tennessee, without regard to any choice of law principles thereof that would mandate the application of the laws of another jurisdiction. The Parties intend that the provisions to arbitrate set forth herein be valid, enforceable and irrevocable, and any award rendered by the arbitrator(s) shall be final and binding on the Parties. The Parties agree to comply and cause the members of their applicable Group to comply with any award made in any such arbitration proceedings and agree to enforcement of or entry of judgment upon such award, in any court of competent jurisdiction.
- The discovery process shall proceed and be governed, consistent with the standards of the Federal Rules of Civil Procedure, as follows:
 - Five (5) days prior to the start of an arbitration hearing under this Article, the parties shall deliver the names of all witnesses to each other. Where either party will make an issue of "intent," that party will notify the other party ten (10) days prior to the hearing.
 - No discovery shall be permitted, absent a showing of good cause. Any discovery request should be reviewed with the knowledge that this dispute resolution process was mutually agreed upon and bargained for by the parties with the intent to provide a cost-effective and timely method of resolving disputes. Any discovery granted by the arbitrator should be limited to that necessary to protect the minimum due process rights of the parties.
 - Each party shall attempt, in good faith, to agree on a plan for document discovery. Should they fail to agree, either party may request a joint meeting or conference call with the Arbitrator. The Arbitrator shall resolve any disputes between the parties, and such resolution with respect to the scope, manner, and timing of discovery shall be final and binding.

- The arbitrator shall order the Parties to promptly exchange copies of all exhibits and witness lists, and, if requested by a Party, to produce other relevant documents, to answer up to ten (10) interrogatories (including subparts), to respond to up to ten (10) requests for admissions (which shall be deemed admitted if not denied) and to produce for deposition and, if requested, at the hearing all witnesses that such Party has listed and up to four (4) other persons within such Party's control. Any additional discovery shall only occur by agreement of the Parties or as ordered by the arbitrator upon a finding of good cause.
- The parties have selected arbitration to expedite the Evidence; resolution of disputes and to reduce the costs and burdens Presumptions associated with litigation. The parties agree that the Arbitrator should take these concerns into account when determining whether to authorize discovery and, if so, the scope of permissible discovery and other hearing and pre- hearing procedures. The Arbitrator may permit reasonable discovery rights in preparation for the arbitration, provided that it should accelerate the scheduling of and responses to such discovery so as not to unreasonably delay the arbitration. Exhibits must be marked and left with the Arbitrator until it has rendered a decision. Either party may elect, at its expense, to record the proceedings by audiotape or stenographic recorder (but not by video). The Arbitrator may conclude that the applicable law of any foreign jurisdiction would be identical to that of Tennessee on the pertinent issue(s), absent a party's providing the Arbitrator with relevant authorities (and copying the opposing party) at least five business days before the arbitration hearing.
- The parties shall be entitled to discovery of all documents and information reasonably necessary for a full understanding of any dispute raised in the arbitration relating to this _____ Agreement. The parties may use all methods of discovery available under the Federal Rules of Civil Procedure, including depositions, requests for admission and requests for production of documents. The time periods applied to these discovery methods shall be set by the panel so as to permit compliance with the scheduling provisions.
- Discovery shall be available, prior to any pre-disciplinary hearing, of evidence to be presented at said hearing. Should any new evidence develop during the hearing, a continuance may be granted to the employee upon receipt so that the new evidence may be reviewed by the employee and the employee's grievance representative and/or attorney.
- **IN ANY ARBITRATION PROCEEDING, DISCOVERY WILL BE PERMITTED IN ACCORDANCE WITH THE RULES. ALL DISCOVERY SHALL BE EXPRESSLY LIMITED TO MATTERS DIRECTLY RELEVANT TO THE DISPUTE BEING ARBITRATED AND MUST BE COMPLETED NO LATER THAN 20 DAYS**

BEFORE THE HEARING DATE. ANY REQUESTS FOR AN EXTENSION OF THE DISCOVERY PERIODS, OR ANY DISCOVERY DISPUTES, WILL BE SUBJECT TO FINAL DETERMINATION BY THE ARBITRATOR(S) UPON A SHOWING THAT THE REQUEST FOR DISCOVERY IS ESSENTIAL FOR THE PARTY'S PRESENTATION AND THAT NO ALTERNATIVE MEANS FOR OBTAINING INFORMATION IS AVAILABLE.

- Each party to an arbitration shall be entitled to such discovery as the Panel shall determine is appropriate.
- The arbitrators shall determine what discovery will be permitted, consistent with the goal of limiting the cost and time that the Parties must expend for discovery; provided the arbitrators shall permit such discovery as they deem necessary to permit an equitable resolution of the dispute. The arbitrators shall have sole discretion with regard to the admissibility of any evidence.
- The arbitrator shall have the power, in addition to determining the merits of the dispute submitted, to permit discovery regarding the subject matter of arbitration and to enforce the rights, remedies, procedures, duties, liabilities and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions and penalties as may be imposed in like circumstances by the _____ Court under the Tennessee Rules of Civil Procedure. All discovery must be completed thirty (30) days prior to the date set for the arbitration hearing.
- Any party shall be permitted to engage in any discovery permitted under the rules of the AAA. However, all discovery shall be completed within 90 days following the initial filing of the Statement of Claim.
- The arbitrators shall have the discretion to order a pre-hearing exchange of information by the Parties, including without limitation, production of requested documents, exchange of summaries of testimony of proposed witnesses, and examination by deposition of the Parties.
- Each party shall have discovery rights as provided by the Federal Rules of Civil Procedure; provided, however, that all such discovery shall be commenced and concluded within ninety (90) days of the initiation of arbitration.
- The Parties shall have the right to undertake limited and focused documentary discovery and, as may be expressly authorized by the arbitrator(s) limited depositions of no more than five per party and of limited duration, upon a determination that such depositions are

reasonably necessary to enable the requesting Party to prepare and present its claims and/or defenses at the hearing.

- The parties to this Agreement expressly waive their right to engage in any discovery with the exception of depositions and requests for the inspection, production and copying of documents. Interrogatories, requests for admissions and depositions upon written interrogatories shall not be permitted. The Arbitrator shall be authorized to issue subpoenas requiring attendance at hearings and/or trial. All discovery permitted by this Agreement shall be completed no later than fifteen (15) days before the first hearing date established by the Arbitrator. The Arbitrator may extend such period in the event of a party's refusal to provide requested discovery for any reason whatsoever, including legal objections raised to such discovery or unavailability of a witness due to absence or illness. No party shall be entitled to "priority" in conducting discovery. Depositions may be taken by either party upon seven (7) days written notice. Request for production or inspection of documents shall be responded to within ten (10) days after service. All disputes relating to discovery shall be submitted to the Arbitrator whose decision shall be final and binding upon the parties.

BOILERPLATE

Sample Clauses

Contract Interpretation. A. This Agreement is subject to and will be governed by and interpreted in accordance with, the laws of the State of Tennessee, excluding conflicts of laws principles, and of the United States of America. Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement may only be brought in the courts of the State of Tennessee in _____ County, or, if it has or can acquire jurisdiction, in the United States District Court for the _____ District of Tennessee, and each of the parties hereto irrevocably consents to the exclusive jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives, to the fullest extent permitted by law, any objection to venue laid therein. Process in any action or proceeding referred to in the proceeding sentence may be served on any party anywhere in the world. Each party further agrees to waive any right to a trial by jury.

The parties acknowledge that they have caused this Agreement to be reviewed and approved by legal counsel of their own choice. This Arbitration Agreement has been specifically negotiated, and any presumption that an ambiguity contained in this Agreement shall be construed against the party that caused this Agreement to be drafted shall not apply to the interpretation of this Agreement.

The Contract Documents completely describe the Services to be provided. Contractor will provide any Services that may reasonably be inferred from the Contract Documents or from prevailing custom or trade usage as being required to produce the intended result whether or not specifically called for or identified in the Contract Documents. Words or phrases which have a well-known technical or construction industry or trade meaning and are used to describe Services will be interpreted in accordance with that meaning unless a definition has been provided in the Contract Documents.

Ambiguities, inconsistencies, or conflicts in this Agreement shall not be strictly construed against the drafter of the language but will be resolved by applying the most reasonable interpretation under the circumstances, giving full consideration to the Parties' intentions at the time this Agreement is entered into.

The headings of these clauses are inserted for convenience of reference and shall be ignored in the interpretation and construction of this Agreement. This agreement constitutes the entire agreement among the parties and supersedes any earlier agreements and discussions. Any amendments to this Agreement must be in writing from authorized persons.

The parties have jointly negotiated this Agreement and, thus, neither this Agreement nor any provision will be interpreted for or against any party on the basis that it or its attorney drafted the Agreement or the provision at issue. When this Agreement requires approval of one or more parties, such approval may not be unreasonably withheld or delayed. Words, regardless of the number and gender specifically used, will be construed to include any other number, singular or plural, and any gender, masculine, feminine, or neuter, as the context requires. "And" includes

“or.” “Or” is disjunctive but not necessarily exclusive. “Including” means “including but not limited to.” Unless other specifically stated, the term “days” means calendar days.

Each party hereto acknowledges that it has had ample opportunity to review and comment on this Agreement. This Agreement shall be read and interpreted according to its plain meaning and an ambiguity shall not be construed against either party. It is expressly agreed by the parties that the judicial rule of construction that a document should be more strictly construed against the draftsperson thereof shall not apply to any provision of this Agreement.