Indiana Department of Transportation

[Request for Proposals

to undertake t]/[T] he progressive design and construction of the

[___] Project

[NTD: adjust above for final contract]

(Agreement)

a Project of the Indiana Department of Transportation

Issued: [_____]

[Amendment #[___] Issued: [_____]]

Contract ID: [___]*[NTD: to be filled in prior to execution]*

Indiana Department of Transportation
100 North Senate Avenue, IGCN 758
Indianapolis, Indiana 46204

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AGREEMENT

RECITALS

This Agreement ("Agreement") is entered into as of [_____], between the Indiana Department of Transportation, an agency of the State of Indiana (the "Department"), and [_____], a[n] [_____]***[NTD: Insert Progressive Contractor SPE and entity place of organization/type or name of would-be Lead Contractor (see note at definition of "Identified Contractor")]*** (the "Progressive Contractor").

1. The Department issued a Request for Proposals for the [_____] (the "Project") on [___]***[NTD: date]***.

2. Following receipt and evaluation of the Proposals and Interview, the Department selected the Progressive Contractor for the Agreement.

NOW, THEREFORE, in consideration of the sums to be paid to the Progressive Contractor by the Department and the covenants and agreements set forth within the Contract Documents, the Parties hereby agree as follows.

SECTION 1 GENERAL

1.1 General Scope of Work

The Project includes [_____]***[NTD: describe scope, location, and status of Project; ensure matches descriptions in RFP and whatever technical documents that have been circulated]***.

The Progressive Contractor, in addition to performing all other requirements of the Contract Documents, shall:

(a) Provide all design and other services (including construction management services), as well as all goods, materials, equipment, and labor, and undertake all efforts necessary or appropriate (excluding only those services, materials, and efforts which the Contract Documents specify will be undertaken by other Persons) to develop, design, construct, and otherwise deliver the Project and maintain it during construction in accordance with the requirements of the Contract Documents, the Project Schedule, all Laws, all Governmental Approvals, all Other Approvals, applicable Utility Agreements, the Approved Plans, the Released for Construction Documents and all other applicable safety, environmental and other requirements, taking into account the Right-of-Way plans and all necessary Utility Adjustments and other constraints affecting the Project, so as to achieve each of the milestones identified within Pricing Package Amendments by the corresponding Completion Deadlines. The word "provide" includes and requires the Progressive Contractor to design, furnish, install, construct, and perform all Work necessary for a final, complete, in-place, and fully functional Project which meets all the requirements of the Contract Documents.

(b) At all times provide a [Project Manager]***[NTD: conform to RFP Key Personnel role]***, who will:

(i) have full responsibility for the prosecution of the Work;

(ii) act as agent and be a single point of contact in all matters on behalf of the Progressive Contractor;

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(iii) be present (or an Approved designee will be present) at the Site at all times (a) with respect to Preconstruction Phase Work, as the Department may reasonably require; and (b) with respect to Construction Work, as required under the applicable Pricing Package Amendment;

(iv) be available to execute instructions and directions from Department or otherwise agreed as between the Parties; and

(v) have authority to make binding decisions for the Progressive Contractor on all matters relating to the Project;

(c) Obtain and pay the cost of obtaining all (a) Governmental Approvals (except for Department-Provided Governmental Approvals), and (b) Other Approvals (except for Department-Provided Other Approvals);

(d) Comply with all conditions imposed by and undertake all actions required by and necessary to maintain in full force and effect, all Governmental Approvals and Other Approvals, including implementation of all environmental mitigation measures required by the Contract Documents, except to the extent that such responsibility is expressly assigned in the Contract Documents to another Person;

(e) Coordinate with Third Parties regarding the Work and assist the Department in its coordination efforts;

(f) Provide such assistance as is reasonably requested by the Department in dealing with any Person and/or in prosecuting and defending claims or lawsuits in any and all matters against the Department by third parties relating to the Project, which may include providing information and reports regarding the Project, executing declarations and attending meetings and hearings, but which shall in no event be deemed to require the Progressive Contractor to provide legal services. This obligation is not intended to address and shall not limit the Progressive Contractor's indemnification obligation under Section 27 (*Indemnification*);

(g) Comply with, and cause all members of the Progressive Contractor and all Subcontractors to comply with, all requirements of all Governmental Approvals, all Other Approvals, and all applicable Laws;

(h) Cooperate fully with (i) the Department, (ii) Department-Related Entities, and (iii) other Governmental Persons having jurisdiction over the Work, the Project, or the Site, in each case, in the review and oversight of the Project and other matters relating to the Work;

(i) Make payments to Third Parties required by the Contract Documents, if any;

(j) Supervise and be responsible to the Department for acts and omissions of all Progressive Contractor-Related Entities, as though the Progressive Contractor directly employed all such Persons;

(k) Take prompt action and measures to mitigate effectively potential loss or damage, including mitigation of delay to the Project and damages due to delay in all circumstances, to the extent reasonably possible, including by re-sequencing, reallocating, redeploying forces to other portions of the Work or Site or to other activities unrelated to the Work, as appropriate;

(l) Pay all applicable federal, State and local sales, consumer, use and similar taxes, and property taxes and any other taxes, fees, charges or levies imposed by a Governmental Person, whether direct or indirect, relating to, or incurred in connection with, the performance of the Work;

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(m) Use the Persons identified in Exhibit C (*Progressive Contractor Team*) in such roles and for such purposes so identified to perform allocated portions of the Work (or such other Persons approved by Department in accordance with this Agreement);

(n) Ensure labor harmony at the Site during all stages of the project, including taking steps to prevent strikes, walkouts, Work stoppages, slowdowns, curtailments, or interruptions of production due to labor disputes;

(o) At all times required under the Contract Documents, provide all Key Personnel and other Person, each of which are to be present (or his/her/its designee, as approved by the Department) and at such place(s) as may be required under the Contract Documents;

(p) Ensure the Site is kept in a neat, clean, and orderly condition at all times;

(q) Timely submit all submittals, and ensure that all such submittals are accurate, compliant, and complete when submitted to Department; and

(r) Observe, and cause all members of the Progressive Contractor and all Subcontractors to observe, Good Industry Practice; and

(s) Otherwise perform the Work so as to ensure that the Project satisfies each of the purposes, objectives, functions, uses, and requirements set forth in, or reasonably inferable from, the Contract Documents, as amended by the Agreement Amendment(s), Preconstruction Phase Change Orders, and Construction Phase Change Orders.

1.2 Term

Without limiting Section 33.6.2 (*Survival*) and post-termination obligations under Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*), this Agreement shall take effect on the Effective Date and will remain in effect until the earlier of:

(a) The Department issues a Notice of Final Acceptance described in Section 17.4 (*Department Issued Notice of Final Acceptance*).

(b) Earlier termination in accordance with the terms of the Contract Documents.

1.3 Certain Definitions

Exhibit A (*Definitions and Submittals*) contains the meaning of various terms used in the Contract Documents.

1.4 Phases and Order of Precedence

1.4.1 Phases

This Agreement includes requirements for two Project phases: the Preconstruction Phase and the Construction Phase. For avoidance of doubt, following execution of the Construction Phase Amendment, and any initial Pricing Package Amendment to which the entire Project is not subject, the Preconstruction Phase shall remain in effect for any portions of the Project not subject to such Pricing Package Amendment.

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Preconstruction Work shall be performed in accordance with the requirements of this Agreement, including Exhibit B (*Preconstruction Phase Requirements*). During performance of Preconstruction Work, any provisions of the Contract Documents that pertain solely to Construction Work shall not apply to Preconstruction Work.

The Parties anticipate that Exhibit B (*Preconstruction Phase Requirements*) may need to be modified as the Progressive Contractor advances the Preconstruction Work. The Department may, on its own initiative or at the request of the Progressive Contractor, determine that modification of Exhibit B (*Preconstruction Phase Requirements*) is needed and notify the Progressive Contractor in writing of the modification. Without limiting Section 2.1 (*Preconstruction Phase*):

(a) Any modification to Exhibit B (*Preconstruction Phase Requirements*) or change to the Preconstruction Phase Compensation Cap (or other compensation due Progressive Contractor during the Preconstruction Phase) shall be via Preconstruction Phase Change Order, agreed and executed by the Parties in accordance with the procedures set forth in Section 2.1 (*Preconstruction Phase*).

(b) For purposes of evaluating compliant performance of the Preconstruction Work, the Parties shall keep record of prior versions of Exhibit B (*Preconstruction Phase Requirements*), as may be modified by Preconstruction Phase Change Orders from time to time, such that performance on a given date is considered relative to the then in-effect Exhibit B (*Preconstruction Phase Requirements*), except as may otherwise be agreed by the Parties.

1.4.2 Preconstruction Work Order of Precedence

In the event of any conflict among the Contract Documents applicable to Preconstruction Work, the order of precedence shall be as follows:

(a) Preconstruction Phase Change Orders;

(b) the Agreement, as executed by the Parties or amended pursuant to Section 33.1.1 (*General Agreement Amendments*); and

(c) Exhibit B (*Preconstruction Phase Requirements*).

1.4.3 Construction Work Order of Precedence

All Construction Work shall be performed in accordance with the requirements of this Agreement, excluding Exhibit B (*Preconstruction Phase Requirements*), and including any additional requirements in the Construction Phase Amendment or a Pricing Package Amendment.

In the event of any conflict among the Contract Documents applicable to Construction Work, the order of precedence shall be as follows:

(a) Construction Phase Change Orders;

(b) the Agreement, as executed by the Parties or amended pursuant to Section 33.1.1 (*General Agreement Amendments*);

(c) the Construction Phase Amendment including the Construction Phase Requirements;

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(d) with respect to Work subject to a Pricing Package Amendment, the Pricing Package Amendment, including any Pricing Package Amendment-specific Construction Phase Requirements, and the then-current Risk Register appended to the Pricing Package Amendment; and

(e) the Standard Specifications.

1.4.4 Additional Interpretive Matters Regarding Order of Precedence

In interpreting the obligations of the Parties under Section 1.4.2 (*Preconstruction Work Order of Precedence*) or Section 1.4.3 (*Construction Work Order of Precedence*), additional details and more stringent requirements contained in lower precedence Contract Document shall control, except to the extent they irreconcilably conflict with the requirements of the Contract Document with higher precedence, as determined by the Department in good faith.

If a Contract Document itself contains differing provisions on the same subject matter, the provisions that establish the higher standard, quantum, quality, manner, or method of performing the work or that use more stringent standards shall prevail. In the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications, or other provisions applicable to the Project established by reference to a described manual or publication within a Contract Document or set of Contract Documents, then that which uses more stringer standards or prescribed better performance will apply, except as the Department may approve otherwise in writing.

If either Party becomes aware of any such conflict, it shall promptly provide written notice thereof to the other Party, and the Department shall issue its written determination, issued in good faith, respecting which of the conflicting items is to apply promptly after it becomes aware of any such conflict.

The "Construction Phase Requirements" appended to the Construction Phase Amendment may be supplemented or superseded, in whole or in part, by the "Construction Phase Requirements" (or similarly-named exhibit) appended to each Pricing Package Amendment as to such Pricing Package Amendment's scope of Work, as is expressly set forth in such Pricing Package Amendment. Absent any such expression of the Parties' intent, and in addition to (but without superseding) the provisions in this Section 1.4.4 (*Additional Interpretive Matters Regarding Order of Precedence*), the "Construction Phase Requirements" appended to the Construction Phase Amendment and that which is appended to each such Pricing Package Amendment will be construed as complementary and read together, giving maximum effect to all provisions, and construed so as to fit the context of the Work and the Project, in each case except as otherwise agreed, by the Department, in writing and in advance of application.

1.5 Potential Funding Constraints and Project Authorization

[This Agreement includes requirements for the entire Project. Pursuant to Section 1.1 (*General Scope of Work*), the Project's scope includes all Work necessary to deliver the Project in accordance with the Contract Documents. To manage potential funding constraints, the Project will be authorized incrementally. Any requirements in Exhibit B (*Preconstruction Phase Requirements*) that are not applicable to authorized Preconstruction Work shall be considered not in effect until Preconstruction Work subject to those requirements is authorized. Authorization of Work as described in this Section 1.5 is subject to FHWA concurrence.]***[NTD: this section should generally be tailored to set forth any project-specific funding or pre-development work constraints, if applicable, to include federal imposition (i.e., search "federal" and "FHWA")]***

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1.6 Preconstruction Phase Compensation Cap

Compensation to the Progressive Contractor for proper and complete performance of the Preconstruction Work authorized under all Preconstruction Phase Change Orders shall not exceed the Preconstruction Phase Compensation Cap, as may be expressly modified by Preconstruction Phase Change Order(s).

SECTION 2 PROGRESSIVE DESIGN-BUILD PROCESS

2.1 Preconstruction Phase

The initial scope of the Preconstruction Work and Preconstruction Phase Compensation Cap is set forth in Exhibit E (*Preconstruction Phase Scope and Compensation Cap*). The Department may elect, in its sole discretion, to propose one or more Preconstruction Phase Change Orders to manage progression of the Preconstruction Phase, following which determination the Parties shall negotiate to finalize any Preconstruction Phase Change Order on a timely basis (provided that issuance of any such Preconstruction Phase Change Order shall be in the Department's sole discretion). Each Preconstruction Phase Change Order shall replace all prior Preconstruction Phase Change Orders as to the provisions of this Agreement modified therein. Each Preconstruction Phase Change Order shall include:

(a) a description of the scope of Preconstruction Work;

(b) an anticipated completion date for the Preconstruction Work; and

(c) the Preconstruction Phase Compensation Cap, hourly rates (which, for the avoidance of doubt, is fully-loaded, inclusive of overhead, management, and profit), distribution of hours, allowable direct costs.

The Preconstruction Phase shall continue until either:

(i) the Department exercises its right to terminate under Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*); or

(ii) the Preconstruction Phase Compensation Cap for the Preconstruction Phase is reached, upon which the Department shall deliver a Notice of Termination under Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*).

2.2 Construction Phase

2.2.1 Construction Phase Amendment

Without requiring conclusion of the Preconstruction Phase, for insurance, Key Personnel, and other Construction-related purposes, the Construction Phase shall begin upon the execution of the Construction Phase Amendment.

Development of the Construction Phase Amendment shall be part of the Preconstruction Work. The Parties shall negotiate to finalize the Construction Phase Amendment on a timely basis.

The Construction Phase Amendment shall include the requirements specified in Exhibit B, Section 10 (*Construction Phase Amendment*) and generally apply to all Pricing Package Amendments (except as

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may be expressly stated otherwise in a Pricing Package Amendment). The executed Construction Phase Amendment shall not be modified except through a Construction Phase Change Order.

For avoidance of doubt, Construction Work is not authorized, nor specifically authorized to commence, by virtue of execution and delivery by the Parties of the Construction Phase Amendment; Construction Work is only authorized via execution and delivery of one or more Pricing Package Amendments, as more fully addressed in Section 2.2.2 (*Pricing Package Amendments*).

2.2.2 Pricing Package Amendments

A "Pricing Package" is a specified portion of the Construction Work, the exact scope of which will be negotiated between the Department and the Progressive Contractor during the Preconstruction Phase.

Construction Work shall be authorized by the execution of one or more Pricing Package Amendments. In addition to other conditions described in the Contract Documents, execution of the Construction Phase Amendment shall be a condition precedent to the execution of a Pricing Package Amendment, except as may be waived by Department in its sole discretion (e.g., long-lead acquisition of materials).

It is the Department's intent that the Progressive Contractor construct the Project through as few Pricing Package Amendments as practicable. If the Progressive Contractor intends to perform Construction Work through more than one Pricing Package Amendment, the Progressive Contractor shall comply with the requirements of Exhibit B, Section 5 (*Pricing Package Plan*) related to the submittal of a Preliminary Pricing Package Plan and Final Pricing Package Plan. If the Progressive Contractor intends to perform Construction Work through more than one Pricing Package Amendment, then approval of the Final Pricing Package Plan shall be a condition precedent to execution of the Construction Phase Amendment. The intent of the Preliminary and Final Pricing Package Plans are to confirm that the Project can be completed within the available Project budget.

Development of Pricing Package Amendments shall be part of the Preconstruction Work. Requirements related to the process for developing a Pricing Package Amendment are described in Exhibit B, Section 5 (*Pricing Package Plan*).

Without limiting any other right of the Department under this Agreement, the Department may condition its execution of the Construction Phase Amendment or any Pricing Package Amendment on the Progressive Contractor's furnishing to the Department of one or more Guaranty(ies) satisfying the requirements of Section 29.2 (*Guaranties*).

The Parties shall negotiate to finalize each Pricing Package Amendment on a timely basis. If the Parties are unable to come to agreement on a Pricing Package Amendment, then the Department may, in its sole discretion, do any combination of the following:

(a) For all executed Pricing Package Amendments, direct the Progressive Contractor to complete the Construction Work identified in the Pricing Package Amendment, but contract with another Person to construct the balance of the Project;

(b) Direct the Progressive Contractor only to complete production of the Design Documents for all or any portion of the Project, under which circumstances the Department may, in its good faith discretion, adjust the Preconstruction Phase Compensation Cap amount to reflect any increase in such portion of the Work via Preconstruction Phase Change Order pursuant to Section 1.4.1 (*Phases*); or

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(c) Terminate this Agreement pursuant to Section 25.2 (*Termination for Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*).

2.2.2.1 Pricing Package GMPs

Each Pricing Package Amendment shall have a Pricing Package Guaranteed Maximum Price (GMP). The Project's Total Construction GMP shall be the sum of all Pricing Package GMPs. Each Pricing Package GMP shall be computed as the sum of the following and any other components agreed to in the Pricing Package Amendment by the Parties:

(a) The Progressive Contractor's reasonable, good faith estimate of the cost of the Construction Work for the Pricing Package;

(b) The Progressive Contractor's Fee; and

(c) The cumulative total of Provisional Sums specific to the Pricing Package documented in the Risk Register in respect of the scope of the Construction Work contemplated by the Pricing Package, which shall include other details relating to relief for each Provisional Risk (e.g., quantities, unit prices). See Section 2.4 (*Risk Register*) for more information.

Pricing Package GMPs shall be developed on an Open Book Basis (i.e., allowing the Department to review all underlying assumptions, information, documents, and data associated with the issue in question, including assumptions as to costs of the Work (including extra work), delay costs, changes in cost, composition of equipment spreads, equipment rates (including rental rates), labor rates and benefits, quotes, estimates, proposals, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, gross commercial revenues, insurance rates, insurance proceeds, credits and refunds, letter of credit fees, overhead, profit, and other items reasonably required by the Department to satisfy itself as to the reasonableness and accuracy of any amount). The Department shall have the right to access and copy, as well as audit, any records, accounts, and other data used by the Progressive Contractor in connection with the preparation of any Pricing Package GMP. For avoidance of doubt, except as authorized pursuant to an Approved Subcontracting Plan for Construction Work under Section **Error! Reference source not found.** (*Subcontracting Plan for Construction Work*), the Progressive Contractor's obligation under this paragraph shall extend, and be deemed to extend, to Subcontractor pricing (i.e., lump-sum Subcontracts, without the Department's prior Approval, would not suffice for Open Book Basis compliance in preparing Pricing Package GMPs).***[NTD: Subcontracting Plan for Construction Work anticipated to include access to such pricing and related information for those Subcontractors proposed as well as competitive bidding for post-let Subcontracts]***

Upon reaching the Pricing Package GMP for any given Pricing Package, the Progressive Contractor shall not have recourse to the Pricing Package GMP of other Pricing Packages without documenting the Department's prior Approval via Construction Phase Change Order.

2.2.2.2 Schedule of Values and Baseline Schedule

Each Pricing Package Amendment shall include a Schedule of Values and a Baseline Pricing Package Schedule that meets the Construction Phase Requirements.

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2.3 No Liability for Partial Design

If the Department elects to terminate the Progressive Contractor prior to completion of Final Design Documents, the Progressive Contractor shall be released from all liability (under contract, tort, or any other legal theory) that may arise in relation to any Department use of the partial or incomplete Design Documents produced by the Progressive Contractor or any member of its team; provided, however, that for the avoidance of doubt, any completed, stamped Design Documents, as well as work product that is not a Design Document (e.g., geotechnical work, site surveys, Phase 1 environmental site assessments, etc.) are not subject to the foregoing release from liability.

2.4 Risk Register

The Parties shall develop a risk register with respect to the entire Project in accordance with the guidelines and principles described in this Section 2.4 and Exhibit B (*Preconstruction Phase Requirements*) (the "Risk Register").

The Department, or one of its designees, shall be responsible for maintaining and updating the Risk Register. The Risk Register shall identify potential risk issues related to Construction Work (each, a "Risk Register Event") and in each case which risks are not Relief Events. All Risk Register Events shall be categorized as either a Department Risk, Provisional Risk, or a Progressive Contractor Risk.

The Risk Register shall include dates on which the Department gives its Approval of a particular Risk Register Event (including its associated relief), and the Risk Register Event shall be deemed as being in effect as a Risk Register Event, eligible for the agreed and Approved relief listed, should one occur, as of that date.

All Pricing Package Amendments shall include the most-current Risk Register as of the effective date of the Pricing Package Amendment updated with all Risk Register Events reasonably expected to be applicable to the Pricing Package.

The Risk Register shall also define mitigation strategies to be used with respect to Risk Register Events and identify any probable cost and/or time impacts to the Project.

Refer to the definition of "Contract Documents" as relates to the contractual nature of the Risk Register.

2.4.1 Department Risks

All Risk Register Events that are a Department Risk shall describe the types and extent of relief that the Progressive Contractor shall be entitled to seek upon occurrence of the Risk Register Event. Risk Register Events that are Department Risks may also include requirements for cost sharing, determination of time impacts, payment requirements, and other terms and conditions.

If a Risk Register Event occurs while performing Construction Work, and the Risk Register Event is a Department Risk, then the Progressive Contractor shall be entitled to seek a Construction Phase Change Order in accordance with Section 21 (*Construction Phase Change Orders*).

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2.4.2 Provisional Risks

In addition to all requirements in respect of the Risk Register Events under Section 2.4 (*Risk Register*) and as required in Exhibit B (*Preconstruction Phase Requirements*), all Risk Register Events that are Provisional Risks shall also specify:

(a) the amount of any Provisional Sum;

(b) whether the Provisional Sum is a Shared Provisional Sum, and if a Shared Provision Sum, how the Parties are to share;

(c) whether the Provisional Sum is capped or uncapped;

(d) a description of how the Risk Register Event is triggered;

(e) payment requirements for Provisional Sums (e.g., time and manner for payment, constraints on amounts included/excluded, "deductibles" or other payment calculations and mechanics, etc.);

(f) any required mitigation efforts to be taken by the Progressive Contractor; and

(g) such other details as the Parties may agree.

When a Provisional Risk Register Event occurs, the Progressive Contractor shall coordinate with the Department and obtain Department Approval of all Provisional Sum payment amounts and other applicable relief.

2.4.2.1 Provisional Risks with Capped Provisional Sums

If a Risk Register Event occurs while performing Construction Work, and the Risk Register Event is a Provisional Risk with a capped Provisional Sum, then the Progressive Contractor shall not be entitled to seek any additional costs or schedule relief for occurrence of the Risk Register Event beyond the capped Provisions Sum amount identified in the Risk Register.

2.4.2.2 Provisional Risks with Uncapped Provisional Sums

If a Risk Register Event occurs while performing Construction Work, the Risk Register Event is a Provisional Risk with an uncapped Provisional Sum, and the Provisional Sum or other relief provided in the Risk Register is exhausted, then the Progressive Contractor shall be entitled to seek relief in accordance with Section 20 (*Relief & Compensation*) and Section 21 (*Construction Phase Change Orders*).

2.4.2.3 Shared Provisional Sums

For all Risk Register Events that identify a Shared Provisional Sum, upon achievement of Final Acceptance, or such other date determined by the Department in its sole discretion, any unused Shared Provisional Sums across all Pricing Packages shall be allocated to the Department or the Progressive Contractor as described in the Risk Register, and the Progressive Contractor's share shall be included as a separate line item on the Application for Final Payment.

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SECTION 3 DEPARTMENT OVERSIGHT

3.1 Oversight, Audit, Inspection, and Testing by the Department and Others

The Work shall be subject to oversight, spot checks, audits, reviews, tests, inspections, acceptances, Approvals, and approvals by the Department or the Department's designee. When any Third Party is to accept or pay for a portion of the cost of the Work, it and its respective representatives have the right to oversee, spot check, audit, review, test, and inspect the Work. The Progressive Contractor hereby consents to such oversight, spot checking, audits, reviews, tests, inspections, and testing by the Department or the Department's designee and where applicable by any such Third Party and its representative(s). Upon request from the Department, the Progressive Contractor shall furnish information to the Department's designee identified in such request and shall permit the Department's designee access to the Site and all parts of the Work.

The Progressive Contractor shall not be relieved of any of its obligations under the Contract Documents by virtue of the oversight, spot checks, audits, reviews, tests, inspections, acceptances, Approvals, or approvals by any Persons, or by any failure of any Person to take any such action. The oversight, spot checks, audits, reviews, tests, inspections, acceptances, Approvals, and approvals by any Person do not constitute Final Acceptance of the material or Work, or waiver of any legal or equitable right with respect thereto.

Except as otherwise expressly set forth in the Agreement, the Department may carry out its obligations, or exercise its rights, through one or more Department-Related Entities.

3.2 Standards for Approval

In all cases where approvals, consents, determinations, acceptance, decisions or other action are required to be provided or made by the Department under the Contract Documents, including with respect to submittals, such approvals, consents, determinations, acceptance, decisions or other actions shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. If the approval, consent, determination, acceptance, decision or other action is subject to the good faith discretion of the Department, then its approval, consent, determination, acceptance, decision or other action shall be binding, unless it is finally determined through the Dispute Resolution Procedures that such approval, consent, determination, acceptance, decision or other action (including a failure to act which constitutes a disapproval) or matter was arbitrary or capricious. In cases where sole discretion is specified, the decision shall not be subject to the Dispute Resolution Procedures or other legal challenge.

3.3 Submittals

3.3.1 General Submittal Requirements

Except as otherwise may be set forth in the Construction Phase Amendment or (as to the Work contemplated within) any Pricing Package Amendment, the Department shall have 10 Business Days to respond to a timely, complete, and properly-submitted and properly-notified submittal. If the Department does not respond substantively within any required timeframe (or if non, within such 10 Business Day period), the Progressive Contractor shall send to the Department a written notice reminding the Department that it is awaiting the Department's response and disposition as a condition precedent to submission of a Request for Construction Phase Change Order for a Relief Event, if any.

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As part of each Pricing Package Amendment, the Progressive Contractor shall prepare a submittals requirements list with dispositions for the scope of Work contemplated thereby for the Department's Approval.

3.3.2 Submittal Review and Approval

When the Progressive Contractor is required to submit an item to the Department for Approval, the Progressive Contractor shall obtain the Department's written approval of such item and may not proceed to incorporate that item into the Work or the Project without the Department's written Approval.

Any time that the Department does not Approve a submittal, it shall provide comments explaining the denial to the Progressive Contractor. The Progressive Contractor shall address the comments in revisions or shall explain why it believes it cannot or should not address the comments. Once all comments have been fully resolved to the reasonable satisfaction of the Department, any revised submittal shall then be resubmitted to the Department for Approve.

The Department may, at its discretion, conditionally Approve a submittal, allowing the Progressive Contractor to proceed with the Work related to the submittal, provided that the Progressive Contractor addresses minor clarifications or edits identified in such Approval and provides evidence of such clarifications or edits having been addressed to Department promptly thereafter.

3.3.3 Submittal Review and Comment

Without limiting Section 3.3 (*Submittals*), when the Progressive Contractor is required to submit an item to the Department for review and comment, the Department shall have an opportunity to provide comments. If the Department does not provide any comments within any required timeframe set forth in the Contract Documents, or within 10 Business Days if the Contract Documents do not provide a timeframe, then the Progressive Contractor shall notify the Department that it has not received comments and may proceed to advance the Work without Department review and comment. Upon receipt of notice by the Progressive Contractor, the Department shall provide comments or notify the Progressive Contractor in writing that the Department has no comments within two Business Days or other time frame agreed to by the Parties.

SECTION 4 [FEDERAL REQUIREMENTS

The Project will be funded in part with federal funds. Notwithstanding anything to the contrary in the Contract Documents, if any conflict is identified between any Federal Requirement and the requirements of the Contract Documents, the Federal Requirements shall prevail over any such conflicting provisions.

The Progressive Contractor shall comply, and cause its team members and all Subcontractors of all tiers to comply, with all Federal Requirements. The Progressive Contractor shall include the Federal Requirements in all Subcontracts on the Project, so that such provisions will be binding upon each Subcontractor working on the Project. The Progressive Contractor shall take such action with respect to any Subcontract or purchase order as the Department may direct as means of enforcing such provisions.]***[NTD: to be included on any federally-funded projects]***

The Progressive Contractor agrees and acknowledges that FHWA concurrence must be obtained prior to certain progressions of the Work as may be required under 23 C.F.R. § 635, including, but not limited to, FHWA concurrence prior to any Preconstruction Phase Change Order, Construction Phase Amendment, Pricing Package Amendment, and Construction Phase Change Order.

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4.1 Compliance with 23 CFR 636.109

The Department has initiated planning activities and environmental document preparation under the National Environmental Policy Act of 1970 (NEPA). The Department will retain NEPA decision-making responsibilities for the Project.

Pursuant to 23 CFR 636.109, the comparative merits of all alternatives presented in the NEPA document, including the no-build alternative, will be evaluated and fairly considered. Until the final NEPA disposition and approval is obtained by the Department, no commitment will be made as to any alternative under evaluation in the NEPA process, including the no-build alternative. To comply with the requirements of 23 CFR 636.109, this Agreement includes the ability to incorporate any environmental commitments identified as part of the NEPA process that the Department determines should be performed by the Progressive Contractor in the Construction Phase Amendment or one or more Pricing Package Amendments. The Department reserves the right to terminate this Agreement, without further compensation to the Progressive Contractor, in the event the no-build alternative is selected.

The Progressive Contractor understands and agrees that during the Preconstruction Phase before the NEPA process is concluded, it shall be strictly limited to preliminary design engineering and activities and analyses that do not materially affect the objective consideration of alternatives in the NEPA process in accordance with all applicable restrictions and FHWA policies and rules, including FHWA Order 6640.1A.

The Progressive Contractor understands and agrees that the Construction Phase Amendment shall not be executed, nor shall "Final Design" activities (as described in of Exhibit B, Section 1.4 (*Design Submittals & Milestones*)) be performed until such NEPA disposition and approval.]***[NTD: to be included on any federally-funded projects with respect to which NEPA approval has not been obtained as of the date of commercial close]***

4.2 Disadvantaged Business Enterprises

4.2.1 DBE General Requirements.

This Agreement and the Progressive Contractor are subject to the provisions of 49 CFR Part 26 and 23 CFR Part 230. The purpose of these provisions is to ensure that DBEs shall have an equal opportunity to participate in the performance of [design, supply and]***[NTD: passim/global; determined on a project-specific basis]*** construction contracts for the Project. The Progressive Contractor shall comply with all applicable requirements set forth herein, including compliance with applicable Federal Requirements and Laws, and the provisions in the DBE Performance Plan. The foregoing shall be collectively the "DBE Performance Requirements". The Progressive Contractor shall include, and cause to be included, the obligation to comply with the DBE Performance Requirements in every Subcontract at every tier.

4.2.2 DBE Goal

4.2.2.1 The aggregate DBE goal for the Project is [___]% of the Contract Price, such aggregate amount being subject to automatic adjustment upon issuance of the final Pricing Package Amendment (for avoidance of doubt, without further amendment to this Agreement).

4.2.2.2 The DBE goal for each Pricing Package Amendment shall be agreed upon by the Parties as a percentage of the Pricing Package GMP applicable to such Pricing Package Amendment.

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Achievement of such DBE goals shall be subject to the procedures, rules and regulations outlined in Title 49 CFR Parts 23 and 26. The Progressive Contractor shall exercise all necessary and reasonable steps to meet each DBE goal, and shall demonstrate that it will make good faith efforts to meet the DBE goals for the Project in accordance with applicable federal laws.

For purposes of clarity, assessment as to whether the Progressive Contractor has achieved a DBE goal will be measured against the aggregate [design, supply, and] construction costs, and not separately as to each category of the [design, supply, and] construction costs.

Pursuant to the "Agreement Between the Indiana Department of Transportation and the Kentucky Transportation Cabinet Concerning Reciprocity of DBE Certifications," dated July 12, 2019, Kentucky-certified DBEs shall be eligible to work as a certified DBE on the Project without seeking further DBE certification.

4.2.3 DBE Performance Plan

4.2.3.1 The Progressive Contractor shall provide and maintain a DBE Performance Plan (to be updated as necessary to cover the DBE goal specific to each Pricing Package) that shall include the following:

(a) Methods, procedures, and demonstrated ability to meet or exceed each DBE goal, inclusive of how it will identify Indiana or Kentucky-certified DBEs who perform/provide professional services, equipment, materials and supplies; their potential scope of Work; potential dollar amount; and the percentage of the total Contract Price. In addition to identifying certified DBEs, the Progressive Contractor shall provide a DBE subcontracting plan that includes, but may not be limited to: examples of sub-agreements to be utilized with certified DBEs, example of a DBE subcontracting plan procurement and utilization report; a dispute resolution process; a process for effective and timely communications with DBE Subcontractors; assistance with insurance and bonding; a process for managerial and technical performance reviews, feedback and improvement; a process for the accurate tracking of hauling dollars for DBE and non-DBE Subcontractors; and an explanation of the invoice and payment process;

(b) Estimated time frames for achieving DBE participation (i.e., in what years of the Project will DBE participation be realized);

(c) The name of Progressive Contractor's "DBE Compliance Manager," a resume and explanation regarding that individual's qualifications for the position and description of such role's reporting structure and responsibilities;

(d) A list of Indiana or Kentucky-certified DBEs to be contacted prior to the selection of a potential Subcontractor for the particular pay items within the capabilities of the subject DBEs. This list shall include, without limitation, the following:

(i) The name of each Subcontractor[or Supplier]***[NTD: passim/global; part of project-specific DBE scoping]*** and a notation as to their DBE certification status.

(ii) The type of work or services to be performed by each Subcontractor[or Supplier]; and

(e) Commitment to communicate and fully cooperate with the Department on DBE participation and compliance efforts throughout the Term.

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4.2.3.2 The DBE Performance Plan shall respond to any comments of the Department (which may be offered with respect to each Pricing Package) and comply with the DBE Performance Requirements, applicable Law, and all Governmental Approvals.

4.2.3.3 The Progressive Contractor shall exercise good faith efforts to achieve the DBE goal for each Pricing Package through implementation of the Progressive Contractor's approved DBE Performance Plan.

4.2.3.4 The Progressive Contractor shall report payments made to DBE Subcontractors on a monthly basis. Monthly reports shall be made using the Project's EDMS and shall identify any payments outstanding to DBE Subcontractors, track any payment issues identified by DBE Subcontractors, and report the resolution of any payment issue, and confirm that the prompt payment provisions required by federal law (49 CFR 26.29) [and any DBE-specific portions of Section 108.01 of the Standard Specifications have been adhered to by the Progressive Contractor]***[NTD: subject to continuing INDOT review and comment]***. DBE Subcontractor payments shall also be reported to the Department as reasonably requested for any purpose and in a format to be determined by the Department.

4.2.3.5 The Progressive Contractor shall comply in all respects with 25 IAC 5 (including any Indiana Department of Administration determination as to the applicable requirements for this Project) and Exhibit L *(INDOT DBE Requirements)*.

4.3 On-the-Job Training

This Agreement is subject to federal on-the-job training participation provisions as set forth in Title 23 CFR, Part 230 and FHWA Form 1273 as set forth in Attachment 2 to Exhibit G (*Federal Requirements*). The Progressive Contractor shall be signatory to the Department's "On-the-Job Training Program and Partnership Agreement" and shall make good faith efforts to achieve the training goal established therein (see Attachment 6 to Exhibit G (*Federal Requirements*).

SECTION 5 EMPLOYEE PERFORMANCE REQUIREMENTS; KEY PERSONNEL

5.1 Employee Performance Requirements

All employees shall have the skill, experience, and any licenses or certifications required to perform the Work assigned to them. If the Department determines in its reasonable discretion that any Person employed by the Progressive Contractor or any Subcontractor is not performing the Work properly and skillfully, or is intemperate or disorderly, then, at the written request of the Department, the Progressive Contractor or such Subcontractor shall remove such Person and such Person shall not be re-employed on the Project without the prior written Approval of the Department. With respect to individual persons in Key Personnel positions specifically, the Department's determination as to failure to perform the Work properly includes the Department's judgment, in its sole discretion, that the individual person filling such Key Personnel position is not sufficiently available, at reasonable times, and with reasonable durations, to perform its Key Personnel position, such determination to be made by written notification from the Department to the Progressive Contractor (for itself or on behalf of any Subcontractor furnishing the Key Personnel). If the Progressive Contractor or any Subcontractor fails to remove such Person or fails to furnish skilled and experienced personnel for the proper performance of the Work, then the Department may, in its sole discretion, suspend the affected portion of the Work by delivery of written notice of such suspension to the Progressive Contractor in accordance with Section 23.2 (*Suspension for Cause*). Such suspension shall in no way relieve the Progressive Contractor of any obligation contained in the Contract Documents or entitle the Progressive Contractor to a Preconstruction Phase Change Order or a Construction Phase Change Order.

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5.2 Design, Engineering, and Surveying Personnel

All design, engineering, and surveying Work furnished by the Progressive Contractor shall be performed by or under the supervision of Persons licensed to practice architecture, engineering, or surveying (as applicable) in the State, and by personnel who are skilled, experienced, and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents, and who shall assume professional responsibility for the accuracy and completeness of the Design Documents in accordance with all Laws.

5.3 Key Personnel

Exhibit C (*Progressive Contractor Team*) identifies certain Key Personnel positions for the Project, each of which are deemed Approved by the Department hereunder.

The Department shall have the right to review the qualifications of, and Approve each individual person not identified in Exhibit C (*Progressive Contractor Team*) who the Progressive Contractor proposes to assign to a Key Personnel position. No proposed Key Personnel may commence any Work until Approved by the Department.

The Progressive Contractor shall not change any Key Personnel without the prior written Approval of the Department, given in its sole discretion.

If Progressive Contractor fails to cause each individual filling a Key Personnel position to be available to perform its designated Key Personnel position, including as described under Section 5.1 (*Employee Performance Requirement*), or fails to propose and make available a replacement Key Personnel of equal or better experience than his/her predecessor and otherwise meeting the requirements of this Agreement within 30 days after notifying the Department of a Key Personnel vacancy pursuant to subsection (b) of this paragraph), then such failure shall be subject to Key Personnel Liquidated Damages in accordance with Section 14 (*Liquidated Damages*); on a recurring basis (i.e., each 30 days). If the Department requests removal of a non-performing individual person filling a Key Personnel position under Section 5.1 (*Employee Performance Requirement*), and an equal-or-better replacement individual person to fill such Key Personnel position is not Approved and in place within such 30 day period, then the Department may nevertheless assess Key Personnel Liquidated Damages even if the original Key Personnel has not yet been removed from the Project.

The foregoing notwithstanding, Progressive Contractor is not liable for Key Personnel Liquidated Damages under this Section 5.3 if (a) Progressive Contractor removes or replaces such individual at the direction of the Department for reasons other than the Department's determination that the individual person filling the Key Personnel is not sufficiently available, at reasonable times, and with reasonable durations, to perform its Key Personnel position, pursuant to Section 5.1 (*Employee Performance Requirement*); or (b) such individual is unavailable due to retirement, death, disability, incapacity, injury or voluntary or involuntary termination of employment with the applicable Progressive Contractor-Related Entity (provided that moving to an Affiliate of a Progressive Contractor-Related Entity is not considered grounds for avoiding Key Personnel Liquidated Damages), provided that Progressive Contractor proposes and makes available a replacement of equal or better experience than his/her predecessor and otherwise meeting the requirements of this Agreement within 30 days after notifying the Department of the subject Key Personnel vacancy.

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5.4 Prequalification

The Progressive Contractor shall ensure that any Party identified in the Proposal as being prequalified for certain work types shall maintain their prequalified status until the completion of the Project. All prequalified Parties shall possess a Certificate of Eligibility for the Work. In the event additional prequalifications are required for certain work types for Pricing Package Amendments, the Progressive Contractor shall identify and provide a prequalified Party to perform the Work. The Progressive Contractor shall, specifically as part of its obligation under Section 32.2 (*Applicable Laws*) comply with, and ensure its Progressive Contractor-Related Entities comply with, all applicable Laws relating to State Certificates of Qualification.

5.5 Identified Contractors

The Progressive Contractor shall not add, delete, or change the role of any Identified Contractor without the prior written Approval of the Department.

5.6 Subcontracts for Preconstruction Work

Engagement and selection of Subcontractors (other than Identified Contractors already selected as of the Effective Date) performing Preconstruction Work shall be coordinated with and Approved by the Department. Prior to the award of any such Subcontract, the Department may require the Progressive Contractor to solicit qualifications and proposals from multiple firms for professional services or other work required.

Subject to the Department's Approval and the requirements of Section 4 (*Federal Requirements*), the Progressive Contractor shall negotiate price and terms for each Preconstruction Work Subcontract that conform to standard industry practice for work of similar scope and complexity.

5.7 Affiliate Subcontracts

The Progressive Contractor shall have the right to have Work performed by Affiliates only under the following terms and conditions:

(a) the Progressive Contractor shall execute a written Subcontract with the Affiliate;

(b) the Subcontract shall comply with all applicable provisions of Section 4 (*Federal Requirements*), be consistent with the Contract Documents and the performance standards identified in Section 6.1.2 (*Performance Standards*), and be in form and substance similar to Subcontracts being used by the Progressive Contractor for similar Work with unaffiliated Subcontractors;

(c) the Subcontract shall set forth the scope of Work and all pricing, terms, and conditions;

(d) the pricing, scheduling, and other terms and conditions of the Subcontract shall be no less favorable to the Progressive Contractor than those that the Progressive Contractor could reasonably obtain in an arm's length, competitive transaction with an unaffiliated Subcontractor. The Progressive Contractor shall bear the burden of proving that the same are no less favorable to the Progressive Contractor;

(e) no Affiliate shall be engaged to perform any Work that any Contract Document indicates shall be performed by an independent or unaffiliated party; and

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(f) no Affiliate shall be engaged to perform any Work that would be inconsistent with the requirements of the Contract Documents.

Before entering into a written Subcontract, supplement, or amendment with an Affiliate, the Progressive Contractor shall submit a true and complete copy of the proposed Subcontract to the Department for Approval with a cover memorandum orienting the Department to all pricing terms. The Department shall have 20 Business Days after receipt to deliver its comments to the Progressive Contractor.

The Progressive Contractor shall make no payments to Affiliates for Work in advance of performance thereof, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope. Advance payments in violation of this provision shall be excluded from the calculation of termination compensation under Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*).

5.8 Subcontracting for Construction Work

(a) The Progressive Contractor and Lead Contractor shall collectively self-perform no less than [30%]***[NTD: 30% for federally funded projects]*** of the Construction Work.

(b) The Progressive Contractor shall prepare the Subcontracting Plan for Construction Work, pursuant to Exhibit B (*Preconstruction Phase Requirements*) in compliance with the requirements of Section [4.1 (*Compliance with 23 CFR 636.109*) and]***[NTD: 4.1 if federal]***[Section 5.5 (*Identified Contractors*) to Section 5.10 (*General Responsibility for Work by Others*). The Progressive Contractor shall comply with the Approved Subcontracting Plan.

5.9 Required Subcontract Terms

Each Subcontract, excluding material purchase orders and any other contracts solely for materials entered into with Subcontractors that will not be performing any Work on the Site, shall include terms and conditions sufficient to ensure compliance by the Subcontractor with all applicable requirements of the Contract Documents, and shall include provisions addressing the following requirements as well as any other terms that are specifically required by the Contract Documents to be included therein:

(a) Each Subcontract of any tier shall include terms substantially similar to the terms in this Agreement to the extent that such terms are relevant to such Subcontract. Terms substantially similar in all instances shall include:

(i) grants of Intellectual Property Rights;

(ii) access constraints and requirements pertaining to the Site;

(iii) maintenance of books and records;

(iv) joinder to, obligation to offer evidence in, Dispute resolution, if necessary, in the Department's sole judgment, to resolve a Dispute; and

(v) compliance with all Federal Requirements, including the attachment of FHWA Form 1273 in the exact form as provided in Exhibit G (*Federal Requirements*).

(b) Each Subcontract of any tier shall include a provision that states that the Subcontractor is not a third party beneficiary to the Agreement.

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(c) Each Construction Phase Subcontract of any tier shall require that the Progressive Contractor or the applicable Subcontractor make prompt and full payment of any retainage to any Subcontractor within 30 days after satisfactory completion of the applicable Work by such Subcontractor.

(d) Each Subcontract of any tier shall include payment (including prompt payment) and other terms in compliance with this Agreement and applicable Laws, including specifically no pay if paid clauses, or words of similar effect.

(e) Each Subcontract of any tier shall include language acknowledging the timing of payments from the Department to the Progressive Contractor hereunder and the process set forth herein for the submission and review of invoices or Requests for Monthly Progress Payment, as applicable.

(f) Each Subcontract of any tier shall expressly include a covenant to require the Subcontractor to participate, at the Progressive Contractor's request, in meetings between the Progressive Contractor and the Department concerning matters pertaining to such Subcontractor, its work, or the coordination of its work with other Subcontractors and contractors to the Department.

(g) Each Subcontract of any tier shall expressly require the Subcontractor to stop Work on the date and to the extent specified in a Notice of Contract Termination in accordance with Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*).

(h) Each Subcontract of any tier shall expressly permit assignment to the Department of all Progressive Contractor rights under the Subcontract in the event of termination pursuant to Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*).

(i) Each Subcontract shall provide that the Department is a third party beneficiary of the Subcontract and shall have the right to enforce all terms of the Subcontract for its own benefit.

(j) Each Subcontract shall provide that all guarantees, indemnities, professional responsibility, and warranties, express and implied, shall inure to the benefit of the Department as well as the Progressive Contractor.

(k) Each Subcontract of any tier shall expressly provide that any purported amendment with respect to any of the foregoing matters without the prior written consent of the Department will be null and void *ab initio*.

5.10 General Responsibility for Work by Others

The retention of Subcontractors by the Progressive Contractor will not relieve the Progressive Contractor of its responsibilities under the Contract Documents or for the quality of the Work, materials, or services provided by Subcontractors.

The Progressive Contractor shall supervise and be fully responsible for the acts and omissions of any Progressive Contractor-Related Entity in connection with the Work, the Site, or the Project, as though the Progressive Contractor directly employed all such individuals.

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5.11 Subcontractor Payment Tracking

The Progressive Contractor shall submit payment records through the Department's Subcontractor Payment Tracking System (http://itap.indot.in.gov) of all payments made to Subcontractors. Reports shall be submitted no later than 10 days after the end of each month in which a Subcontractor is paid for the Work it performs under its Subcontract. Reports shall include any release of retainage payments made to Subcontractors.

SECTION 6 PERFORMANCE REQUIREMENTS

6.1 Performance Requirements

6.1.1 Performance of Work

All Work necessary to achieve Final Acceptance and to meet the Final Acceptance Deadline shall be the Progressive Contractor's sole responsibility, except as otherwise specifically provided in the Contract Documents. Subject to the terms of Section 2.1 (*Preconstruction Phase*) and Section 21 (*Construction Phase Change Orders*), the costs of all such materials, services, and efforts are included in the Contract Price.

6.1.2 Performance Standards

Without limiting the obligations with respect to the standard of care under Section 7.1 (*Standards for all Non-Construction Work*) and Section 11.1 (*Standards for all Construction Work*), the Progressive Contractor shall perform the Work as necessary to meet the terms, conditions, and requirements of the Contract Documents.

6.1.3 Performance as Directed

During the course of the Work and notwithstanding the existence of any Dispute, the Progressive Contractor shall perform as directed by the Department in a diligent manner and without delay, shall abide by the Department's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a Dispute arises regarding such performance or direction, the Dispute shall be resolved in accordance with Section 22 (*Partnering & Disputes*). If the Progressive Contractor receives direction from the Department in a form other than a Department-Directed Change and the Progressive Contractor believes that such direction constitutes a change to the Work, the Progressive Contractor shall request a Department-Directed Change confirming such direction.

SECTION 7 DESIGN; CONSTRUCTION MANAGEMENT

7.1 Standards for all Non-Construction Work

7.1.1 Standard of Care, Responsibility for Design Work

The Progressive Contractor shall furnish the design of the Project in accordance with the standard of care and diligence normally practiced by recognized professional firms performing professional services of a similar nature in the State at the same time and under similar circumstances, consistent with the requirements of the Contract Documents, in no case less than in accordance with Good Industry Practice.

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7.1.2 Standard of Care, Responsibility for Construction Management Work

The Progressive Contractor shall furnish and perform the construction management services as part of the Work in accordance with the standard of care and diligence normally practiced by recognized construction contractors performing professional construction management services of a similar nature in the United States at the same time and under similar circumstances, consistent with the requirements of the Contract Documents, in no case less than in accordance with Good Industry Practice.

7.1.3 Standard of Care, Responsibility for Balance of the non-Construction Work

The Progressive Contractor shall furnish and perform all other Work in accordance with a reasonable standard of care and diligence, consistent with the requirements of the Contract Documents, in no case less than in accordance with Good Industry Practice.

7.1.4 Standard for Design Work, all Non-Construction Work

The Progressive Contractor shall furnish all aspects of the design Work and all Design Documents in accordance with Good Industry Practice in such a manner that the Project is fit for purpose and use and is constructible as designed.

Furthermore, the Progressive Contractor shall perform the balance of the non-Construction Work in accordance with (a) the requirements, terms and conditions set forth in the Contract Documents, (b) all Laws, (c) the requirements, terms and conditions set forth in all Governmental Approvals, (d) the requirements of the Approved quality-related plans, if any, in each case taking into account the limits of the Site and constraints affecting it and the Project.

7.2 Reference Information Documents

The Progressive Contractor understands and agrees that:

(a) the Department nor any Department-Related Entity is or shall be deemed to be responsible or liable in any respect for any use by a Progressive Contractor-Related Entity of any information included in the Reference Information Documents (RIDs) provided by the Department in connection with the procurement for the Agreement, or any information provided by the Department after execution of the Agreement;

(b) if and to the extent that any Progressive Contractor-Related Entity uses any RID in any way, such use is made on the basis that the Progressive Contractor is responsible for accuracy of the RID; and the Progressive Contractor is capable of and obligated to confirm that its use of RID is appropriate and acknowledges that any use is entirely at the Progressive Contractor's own risk and at its own discretion;

(c) notwithstanding clauses (1) and (2) above, during the Preconstruction Phase the Department and the Progressive Contractor may determine that reliance on certain information included in the RIDs is appropriate. This reliance shall be documented in a Preconstruction Phase Change Order, Construction Phase Amendment, or Pricing Package Amendment and specifically identified information documented within the applicable amendment shall not be considered RID.

7.3 Professional Licensing Laws

The Progressive Contractor is fully responsible for furnishing the design of the Project, although the fully licensed design firms or individuals designated herein will perform the design services required

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by the Contract Documents. Any references in the Contract Documents to the Progressive Contractor's responsibilities or obligations to perform the design portions of the Work shall be deemed to mean that the Progressive Contractor shall furnish the design for the Project. The terms and provisions of this Section 7.3 shall control and supersede every other provision of the Contract Documents.

7.4 Prerequisites for Start of Design of the Project

The Progressive Contractor shall not start design of the Project until all the following events have been fully satisfied and remain so:

(a) all insurance policies and bonds, as applicable, that are required to be delivered to the Department hereunder have been submitted to the Department in compliance with the requirements of the Contract Documents and remain in full force and effect;

(b) the Preconstruction Phase Quality Management Plan has been Approved;

(c) the Progressive Contractor has made available all Key Personnel and other personnel required to be made available;

(d) The Progressive Contractor has delivered to the Department an original Guaranty, as may be required under Section 29.2 (*Guaranties*), and such Guaranty is in full force and effect;

(e) the Progressive Contractor is not in breach of this Agreement; and

(f) all representations, warranties, and covenants of the Progressive Contractor remain true and correct in all material respects.

SECTION 8 ACCESS & RIGHT-OF-WAY

8.1 Right-of-Way Plans

The Department and the Progressive Contractor shall jointly produce Right-of-Way plans during the Preconstruction Phase which identify the Right-of-Way needed to construct the Project.

8.2 Right-of-Way Acquisition

The Department and the Progressive Contractor will identify which Party shall acquire those portions of the Right-of-Way identified on the Right-of-Way plans in connection with each Pricing Package Amendment. The Parties shall manage risks related to the Right-of-Way acquisition through the Risk Register.

8.3 Nature of Progressive Contractor's Rights

The Department grants to the Progressive Contractor a non-exclusive right of access, ingress, and egress to all real property comprising the Site (revocable only in accordance with this Agreement). If additional real property will be acquired during the Preconstruction Phase, the foregoing grant shall be construed to extend to those real property rights as and when thereafter acquired. The Progressive Contractor acknowledges that the Department and any Department-Related Entity, acting within its delegated or legal authority, may enter the Site and any other location where the Work is being carried out at any time and for any reason.

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The Parties agree that this Agreement will in no way be deemed to constitute a lease to the Progressive Contractor or a grant of any right, title, interest or estate in the Project or Site. The Parties agree that the Progressive Contractor will not be treated as or deemed to be the legal or equitable owner of the Site for any purpose under this Agreement. The Progressive Contractor's rights under this Agreement are derived solely from its status as an independent contractor to the Department, and not as a tenant, lessee, easement holder, optionee, lienor, mortgagee, purchaser, or owner of any other interest in real property.

8.4 Temporary Interests

Unless otherwise agreed to by the Parties, if additional working room is needed by the Progressive Contractor to construct the Project, the Progressive Contractor shall acquire such rights, licenses or real property interests as required to perform the Work. In no case shall the Progressive Contractor negotiate with any owners or occupants of property under color of agency of the Department or otherwise the Uniform Relocation Assistance and Real Property Acquisitions Policies Act, P.L. 91-646, as may be amended.

Department will not be obligated to acquire or exercise any of its power, including any power of eminent domain, nor be obligated or responsible with respect to the maintenance, compliance by any Progressive Contractor-Related Entity with the terms and conditions of, or the disposition of any such right, license, or real property interest for such additional working room.

The Progressive Contractor shall be responsible for obtaining and maintaining any Governmental Approvals required in connection with acquisition, use, and disposition of any such rights, licenses or real property interests.

The Progressive Contractor shall be responsible for compliance with all applicable local, state, and federal laws and may consult with the US Fish and Wildlife Service to seek protection under Section 10 of the Endangered Species Act for these activities. The Progressive Contractor shall likewise complete and document compliance with the Uniform Relocation Assistance and Real Property Acquisitions Policies Act, P.L. 91-646, as may be amended, and applicable State laws and Department policies.

The Progressive Contractor shall be responsible for any damage to any road used to haul materials to and from the property.

Department reserves the right to supervise the Progressive Contractor's activities in respect of this Section 8.4 (*Temporary Interests*).

[_____]***[NTD: insert any Project-specific constraints regarding involvement of the additional rights, licenses, or real property interests in the Risk Register processes.]***

SECTION 9 UTILITY WORK

9.1 Generally

The Progressive Contractor acknowledges and agrees that the Progressive Contractor is responsible for all Utility Work necessary to accommodate the design and construction of the Project pursuant to the Contract Documents.

If any Pricing Package includes Work that would afford the Department the right to pay Utility Owners directly for amounts to which they are entitled under Utility Agreements, then the Progressive Contractor shall identify the direct allowable payment within each Request for Monthly Progress Payment.

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9.2 Utility-Specific Progressive Contractor Obligations

The Progressive Contractor shall take all reasonable steps to avoid Relocations and to minimize costs to Utility Owners and the Department.

Except to the extent multiple relocations of the same Utility may be necessitated by a Relief Event or Department-initiated Construction Phase Change Order, or otherwise approved by the Department in its sole discretion, the Progressive Contractor shall not perform (or cause to be performed by a Utility Owner or by any member of the Progressive Contractor's team) more than one relocation of any Utility.

9.3 Utility-Related Risk Register Events

9.3.1 Utility-Relocations

The Parties intend that each Relocation itself with respect to each Utility (and with respect to each respective Utility Owner) be identified separately as a Provisional Risk and managed and paid for through the Risk Register. The Parties likewise intend that those portions of the Work not directly involving the actual Relocations not be part of each such Provisional Risk (e.g., all of the Progressive Contractor's Construction Phase administrative efforts under the Utility and Third Party Work Plan, all Utility Owner-specific coordination efforts) and instead be included within each relevant Pricing Package GMP. For avoidance of doubt, all Preconstruction Phase Work with respect to Utilities, including specifically any anticipated or planned Relocations, is not to be included within the Risk Register. The Department reserves the right to allocate amounts proposed as a Pricing Milestone Estimate (PME) for proposed Pricing Package Amendments from the proposed Pricing Package GMP to a Relocation or Utility Owner-specific Provisional Risk during negotiations under Section 2.2.2 (*Pricing Package Amendments*) and in furtherance of the Parties' and the ICE's evaluation of Work and risk pricing under Exhibit B, Section 6 (*Cost Estimating*).

This notwithstanding, as a threshold matter to eligibility for relief under the Risk Register, the Progressive Contractor shall bear the burden of proving that the Relocation cannot reasonably be avoided.

9.3.2 Utility-Owner Acts or Omissions

The adverse effects of any acts or omissions of each Utility Owner in contravention of its obligations under a Utility Agreement and as relates to each Utility's Relocation, including Utility Owner Delays, shall be identified as a Provisional Risk and managed and paid for through the Risk Register.

9.3.3 Unidentified, Misidentified Utilities

Without limiting the Progressive Contractor's general mitigation duty under Section 2.4 (*Risk Register*), Relocations required for an Unidentified Utility shall be identified as a Provisional Risk, and managed and paid for through the Risk Register. If only a portion of an Unidentified Utility to be Relocated is encountered, then any relief afforded the Progressive Contractor shall be allowed only for that portion of the additional Utility Work.

9.3.4 Constraints on all Utility-Related Risk Register Events

The Progressive Contractor shall not be entitled to any additional compensation hereunder for any costs of coordinating with Utility Owners or for assisting the Department in coordinating with Utility Owners.

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If the Progressive Contractor elects to make payments to Utility Owners or to undertake any other efforts that are not required by the terms of the Contract Documents, the Progressive Contractor shall not be entitled to a Construction Phase Change Order in connection therewith.

9.4 Betterments

The Progressive Contractor shall not perform any Betterments in connection with the Work unless Approved by the Department and documented in a Pricing Package Amendment. Any Betterment performed with respect to the Project shall be subject to the same standards and requirements as if it were a necessary Utility Work, and shall be addressed in the applicable Utility Agreement. As between the Department and the Progressive Contractor, the Progressive Contractor is solely responsible for the cost of, and collecting directly from the Utility Owner any amount due in connection with, any Betterment.

9.5 Failure of Utility Owners to Cooperate

9.5.1 Notice and Information of Utility Owner Failures

The Progressive Contractor shall make diligent efforts to obtain the cooperation of each Utility Owner as necessary for the Project. The Progressive Contractor is responsible for verifying the progress of each Utility Owner's work. The Progressive Contractor shall provide to the Department Notice within five days after the occurrence of any of the following: (a) the Progressive Contractor is unable (or anticipates that it will be unable), after diligent efforts, to reach agreement with a Utility Owner on a necessary Utility Agreement within a reasonable time, (b) the Progressive Contractor reasonably believes for any reason that any Utility Owner would not undertake or permit Utility Work in a manner consistent with the timely completion of the Project or in accordance with applicable Law, Governmental Approvals, Other Approvals, or the Contract Documents, (c) the Progressive Contractor becomes aware that any Utility Owner is not cooperating in a timely manner to provide agreed-upon work or approvals in accordance with the Contract Documents, or (d) any other dispute arises between the Progressive Contractor and a Utility Owner with respect to the Project, in each case despite the Progressive Contractor's diligent efforts to obtain such Utility Owner's cooperation or otherwise resolve such dispute. Such Notice may include a request that the Department assist in resolving the dispute or in otherwise obtaining the Utility Owner's timely cooperation. The Progressive Contractor shall provide the Department with such information as the Department requests regarding the Utility Owner's failure to cooperate and the effect of any resulting delay on the Project Schedule. After delivering to the Department any Notice or request for assistance, the Progressive Contractor shall continue to use diligent efforts to pursue the Utility Owner's cooperation.

9.5.2 Conditions to Assistance

If the Progressive Contractor requests the Department's assistance pursuant to Section 9.5.1 (*Notice and Information of Utility Owner Failures*), the following provisions apply:

(a) The Progressive Contractor shall provide evidence reasonably satisfactory to the Department that (i) the subject Utility Work is necessary, (ii) the time for completion of the Utility Adjustment in the Project Schedule was, in its inception, a reasonable amount of time for completion of such work, (iii) the Progressive Contractor has made diligent efforts to obtain the Utility Owner's cooperation, and (iv) the Utility Owner is not cooperating (clauses (i) through (iv) above are referred to herein as the "Conditions to Assistance").

(b) Following the Department's receipt of satisfactory evidence, the Department shall take such reasonable steps as the Department may reasonably determine to obtain the cooperation of the Utility Owner or resolve the dispute; provided, however, the Department shall have no obligation to prosecute

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eminent domain or other legal proceedings, or to exercise any other legal remedy available to it under applicable Laws or existing contract, unless the Department elects to do so in its sole discretion. The Department may, at its sole discretion, participate in the resolution of any dispute between the Progressive Contractor and a Utility Owner, whether or not requested to do so by the Progressive Contractor.

(c) Without limiting the Department's obligations under clause (b) above, if the Department holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate, the Department shall have the right not to exercise those rights. The decision not to exercise those rights shall be in the sole discretion of the Department.

Any assistance provided by the Department shall not relieve the Progressive Contractor of its sole and primary responsibility for the satisfactory compliance with its obligations under the Contract Documents and its obligations with respect to timely completion of all necessary Utility Adjustments.

SECTION 10 ENVIRONMENTAL COMPLIANCE

10.1 Governmental Approvals; Other Approvals

10.1.1 Governmental Approvals

The Progressive Contractor shall: (a) obtain all Governmental Approvals that are not Department-Provided Governmental Approvals, including those that must formally be issued in the name of the Department; and (b) assist and coordinate with the Department in obtaining any Department-Provided Governmental Approvals.

10.1.2 Other Approvals

The Progressive Contractor shall (a) obtain all Other Approvals (except for Department-Provided Other Approvals) required in connection with the Project, the Site and the Work (except as may be expressly specified otherwise in this Agreement); and (b) assist and coordinate with the Department in obtaining any Department-Provided Other Approvals. The Progressive Contractor shall not obtain any Other Approval or otherwise enter into any agreement with any Governmental Entity, Utility Owner, railroad, property owner or other third party relating to the Project that in any way purports to obligate the Department or states or implies that the Department has an obligation to the third party to carry out any installation, design, construction, maintenance, repair, operation, control, supervision, regulation or other activity after the expiration or termination of this Agreement, unless the Department otherwise approves such agreement prior to execution, in writing, and in its sole discretion. The Progressive Contractor has no power or authority to act as an agent or representative of the Department or to enter into any such agreement with a third party in the name or on behalf of the Department.

10.1.3 Compliance with Governmental Approvals and Other Approvals

Unless otherwise expressly assigned in the Contract Documents to another person, the Progressive Contractor shall comply with all requirements necessary to maintain in full force and effect all Government Approvals and Other Approvals. The Progressive Contractor acknowledges and agrees that it will be responsible for all fines and penalties that may be assessed in connection with any failure by any Progressive Contractor-Related Entity to comply with such requirements.

The Progressive Contractor shall furnish the Department with fully-executed copies of all Governmental Approvals (except for Department-Provided Governmental Approvals) and Other Approvals

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(except for Department-Provided Other Approvals) for which the Progressive Contractor (and not the Department) is obligated or responsible hereunder promptly following full execution.

10.1.4 [NEPA Modifications *[NTD: consider IN-specific requirements here; if none, then reserve if non-federal]*

The Department will be responsible for obtaining any NEPA Modifications necessitated by a Relief Event.

If a NEPA Modification becomes necessary for any reason other than a Relief Event, the Progressive Contractor shall be fully responsible for the cost and the risk of:

(a) obtaining the NEPA Modification;

(b) all resulting requirements; and

(c) any litigation arising in connection therewith and any related schedule impact.

All required information for a NEPA Modification shall be prepared and submitted to the Department to obtain the NEPA Modification.

The Progressive Contractor shall not contact any agencies or Persons regarding the NEPA Modification without the prior consent and participation of the Department.

10.1.5 Special Provision Regarding Asbestos Removal Permits

Regarding asbestos removal permits, the Progressive Contractor shall notify the Department of any required structure (bridge or building) removal. The Department will be responsible for administering the inspection of the structure, compiling the asbestos report, and removing the asbestos from the structure if necessary. Demolition of the structure, if necessary, shall be coordinated with the Progressive Contractor.

10.2 Hazardous Materials Report; Applicable Laws

The Progressive Contractor shall comply with all applicable Laws pertaining to environmental compliance. The Progressive Contractor shall comply with all requirements of the Hazardous Materials Report. The Progressive Contractor acknowledges and agrees that it will be responsible for all fines and penalties that may be assessed in connection with any failure by any Progressive Contractor-Related Entity to comply with such requirements.

10.3 Mitigation Requirements

The Progressive Contractor shall perform all environmental mitigation measures for the Project, including all mitigation measures required by any Governmental Approvals and Other Approvals, and any mitigation measures identified as a Progressive Contractor responsibility pursuant to Section 10.1.4 (*NEPA Modifications*).

10.4 Generator, Arranger Status - Hazardous Materials

Hazardous Materials encountered on the Site in the performance of the Work shall be disposed of, if at all, utilizing an "EPA Identification Number" or other appropriate legal device obtained by and carried in the name of the Department or another Person designated by the Department.

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The Department has exclusive decision-making authority regarding selection of the destination facility for Hazardous Material disposal.

As between the Progressive Contractor and the Department, generator and arranger status with respect to Hazardous Materials shall be as set forth below:

(a) The Department shall be considered the generator and arranger and assume generator and arranger responsibilities for Hazardous Materials other than those Hazardous Materials for which the Progressive Contractor is responsible under Section 27.1.1(g) (*General Indemnities*).

(b) The Progressive Contractor shall be considered the generator and assume generator responsibility for those Hazardous Materials for which the Progressive Contractor is responsible under Section 27.1.1(g) (*General Indemnities*).

The foregoing allocation of generator and arranger status shall not be construed to preclude or limit any rights, remedies, or defenses that the Department or the Progressive Contractor may have against any Governmental Person or other third person or party.

The Parties acknowledge and agree that the allocation regarding generator and arranger status set forth in this Section 10.4 may be amended under the Risk Register, under the Construction Phase Amendment, and any Pricing Package Amendment.

SECTION 11 CONSTRUCTION

11.1 Standards for all Construction Work

11.1.1 Standard of Care, Responsibility for Construction Work

The Progressive Contractor shall furnish and perform the Construction Work in accordance with the standard of care and diligence normally practiced by recognized construction contractors performing construction work of a similar nature in the States at the same time and under similar circumstances, consistent with the requirements of the Contract Documents, in no case less than in accordance with Good Industry Practice.

11.1.2 Standard for Construction Work

[Without limiting the Warranty itself, t/[T]he Progressive Contractor shall construct the Project and perform the Construction Work as designed (in accordance with the Contract Documents and as reflected in the Design Documents), free from Defects, and in accordance with Good Industry Practice. The Progressive Contractor shall perform the Construction Work as the Project is designed, in a good, safe, and workmanlike manner.

Furthermore, the Progressive Contractor shall perform the Construction Work in accordance with (a) the requirements, terms and conditions set forth in the Contract Documents, (b) all Laws, (c) the Project Schedule, as refined for the Construction Work (as may be further refined with each Pricing Package Amendment), (d) the requirements, terms and conditions set forth in all Governmental Approvals, and (e) the requirements of the Approved quality-related plans, if any, in each case taking into account the limits of the Site and constraints affecting it and the Project.

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11.2 Prerequisites for Start of Construction of Any Portion of the Project

The Progressive Contractor shall not start or recommence suspended construction of any portion of the Project until all the following events have been fully satisfied and remain:

(a) the Department and the Progressive Contractor have executed a Pricing Package Amendment;

(b) all Governmental Approvals and Other Approvals necessary for Construction Work for the Pricing Package have been obtained and all conditions of such Governmental Approvals and Other Approvals that are a prerequisite to commencement of such Construction Work have been performed;

(c) all insurance policies and bonds, as applicable, that are required to be delivered to the Department hereunder have been submitted to the Department in compliance with the requirements of the Contract Documents and remain in full force and effect;

(d) all necessary rights of access for such portion of the Project have been obtained;

(e) the Progressive Contractor has made available all Key Personnel and other personnel required to be available;

(f) the Progressive Contractor has issued Released for Construction Documents for such portion of the Project and:

(i) the Review and Comment process for such documents has been completed; or

(ii) pursuant to Section 3.2 (*Standards for Approvals*), the Department has conditionally allowed the Progressive Contractor to continue with the Work related to the documents;

(g) the Department has Approved those portions of the Construction Phase Requirements (e.g., specific plans) required as a condition precedent to Construction Work;

(h) the Progressive Contractor is not in breach of this Agreement; and

(i) all representations, warranties, and covenants of the Progressive Contractor remain true and correct in all material respects.

11.3 Control and Coordination of Work

The Progressive Contractor shall be solely responsible for and have control over the construction means, methods, techniques, sequences, procedures, and shall be solely responsible for coordinating all portions of the Work under the Contract Documents.

11.4 Site Safety and Security; Adjacent Properties

The Progressive Contractor shall provide appropriate safeguards and security for the Site during the performance of the Construction Work and shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to all individual Persons on the Site, or who would reasonably be expected to be affected by the Work (including workers, Department employees/consultants, visitors, etc.), the Work itself and materials and equipment to be incorporated into the Work, as well as all other property at the Site, whether owned by the Progressive Contractor, the Department, or any other Person. The Progressive Contractor's obligation to provide for safety on and security for the Site shall, at any given time, only extend

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to those parts of the Site to which the Progressive Contractor has been provided access pursuant to Section 8.3 (*Nature of Progressive Contractor's Rights*).

The Progressive Contractor shall at all times comply with the Approved Safety Management Plan referenced in Exhibit B, Section 7 (*Safety Management Plan*).

The Progressive Contractor shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to property adjacent to the Site or likely to be affected by the Work. The Progressive Contractor shall restore damaged, injured, or lost property caused by an act or omission of any Progressive Contractor-Related Entity to a condition at least similar or equal to that existing before the damage, injury, or loss occurred.

11.4.1 Obligation to Uncover Finished Work

If a portion of the Work has been covered contrary to the request of the Department or contrary to the requirements of the Contract Documents, it shall be uncovered at the written request of the Department for its observation and replaced at the Progressive Contractor's sole cost and expense, and the Progressive Contractor shall not be entitled to any Construction Phase Change Order in connection therewith.

If a portion of the Work has been covered that the Department has not specifically requested to observe prior to its being covered or which the Approved Construction Phase Quality Management Plan does not require to be observed prior to its being covered, the Department may request to see such Work and it shall be uncovered by the Progressive Contractor. If such Work is in accordance with the Contract Documents and the uncovering and restoring of such Work causes an increase in the cost or time of performing the Work, the Progressive Contractor shall be entitled to seek a Construction Phase Change Order for a Relief Event in accordance with Section 20 (*Relief & Compensation*) and Section 21 (*Construction Phase Change Orders*). If the Work exposed or examined is not in conformance with the requirements of the Contract Documents, then the cost of uncovering, removing, and restoring the Work or making good the parts removed and recovery of any delay to the performance of the Work occasioned thereby shall be at the Progressive Contractor's expense.

11.5 Instructions for Excess Material Sites and Borrow Sites

Identifying and securing access to excess material sites and borrow sites shall be the responsibility of the Progressive Contractor, in collaboration with Department. The Progressive Contractor shall be responsible for compliance with all applicable local, state, and federal laws and may consult with the US Fish and Wildlife Service to seek protection under Section 10 of the Endangered Species Act for these activities. The Progressive Contractor shall be responsible for any damage to any road used to haul materials to and from the Site.

SECTION 12 TIMELY PERFORMANCE

12.1 Preconstruction Work

Approval of the final Preconstruction Phase Project Schedule under Exhibit B, Section 1.3 (*Preconstruction Phase Project Schedule*) is a condition to any obligation of the Department to make any payment to the Progressive Contractor hereunder, including specifically, any payment with respect to the Preconstruction Work.

The Progressive Contractor hereby commits, and the Department relies upon the Progressive Contractor's commitment, to perform the Preconstruction Work in accordance with such Approved

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Preconstruction Phase Project Schedule, as may be updated, subject to the Department's Approval of any such update.

12.2 Construction Work, Collateral Estoppel

As a material consideration for entering into each Pricing Package Amendment, the Progressive Contractor hereby commits, and the Department relies upon the Progressive Contractor's commitment, to perform the Construction Work described in the Pricing Package, ultimately and cumulatively so as to construct the entire Project, meeting each of the Completion Deadlines in each Baseline Pricing Package Schedule as set forth in the Contract Documents.

12.3 Adherence to Baseline Pricing Package Schedule

Without limiting the generality of the foregoing Section 12.1 (*Construction Work; Collateral Estoppel*), the Progressive Contractor shall:

(a) perform the Construction Work described in each Pricing Package in accordance with its Baseline Pricing Package Schedule; and

(b) perform the Construction Work described in each Pricing Package so as to achieve each milestone by its Completion Deadline reflected in the Baseline Pricing Package Schedule.

12.4 Time is of the Essence

Time is of the essence with respect to:

(a) the time periods and limitations pertaining to notices and submittals;

(b) the time periods, limitations, and milestones in each Baseline Pricing Package Schedule; and

(c) all other time periods and limitations otherwise identified under the Contract Documents, and in each case, except where this Agreement expressly provides for extension of time due to a Relief Event or where delays are subject to payment of Liquidated Damages, Key Personnel Liquidated Damages, or other compensation to the Department, the Progressive Contractor hereby waives any right at law or in equity to tender or complete delivery, response, or performance, as applicable, beyond the applicable time period, or to require the Department to accept such delivery, response, or performance.

12.5 Completion Deadlines

The Progressive Contractor shall achieve:

(a) Each Project Completion of a Pricing Package by the applicable Project Completion Deadline;

(b) Final Acceptance by the Final Acceptance Deadline; and

(c) Any other applicable Project milestone by the applicable Completion Deadline.

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12.5.2 No Time Extensions

Except as otherwise specifically provided in Section 20 (*Relief & Compensation*) and Section 21 (*Construction Phase Change Orders*), the Department shall have no obligation to extend any Completion Deadline and the Progressive Contractor shall not be relieved of its obligation to perform the Construction Work in accordance with each Baseline Pricing Package Schedule, and to achieve the Completion Deadlines for any reason.

12.5.3 Float

All Float contained in each Baseline Pricing Package Schedule shall be considered a jointly owned and shared resource by the Progressive Contractor and the Department, available to the Project, and shall not be considered as time for the exclusive use or benefit of either the Department or the Progressive Contractor (subject to the restriction set forth in the definition of Department-Caused Delay).

All Float shall be shown as such in each Baseline Pricing Package Schedule on each affected schedule path. The Progressive Contractor shall monitor and account for Float in accordance with the Critical Path Method.

12.5.4 Monthly Schedule Updates

The Progressive Contractor shall prepare and deliver each Monthly Schedule Update with every Request for Monthly Progress Payment. For avoidance of doubt, Monthly Schedule Updates do not serve to revise or amend, nor shall be deemed to revise or amend, a Baseline Pricing Package Schedule.

12.5.5 Estoppel for Acceptance of Schedule Submittals

The Progressive Contractor's obligations under this Section 12.5 (*Final Acceptance Deadline*), and, with respect to any claim for additional time or costs in performance of the Construction Work, any acceptance by the Department of a Baseline Pricing Package Schedule, any Revised Baseline Pricing Package Schedule thereafter, or Monthly Schedule Update shall not, and shall not be construed to bind the Department to any improper logic, improper activity durations, or errors in the expression of the Critical Path or otherwise be used as a defense by or on behalf of the Progressive Contractor in any Dispute hereunder.

Without limiting the Progressive Contractor's other obligations under the Contract Documents, the Progressive Contractor shall correct any improper logic, improper activity durations, or errors in the Baseline Pricing Package Schedule, any Revised Baseline Pricing Package Schedule, or succeeding Monthly Schedule Update, as applicable.

12.5.6 Use of Schedule in Relief Event Process

For avoidance of doubt, Baseline Pricing Package Schedules only (not any Monthly Schedule Update) are relevant to measuring the duration of any delay hereunder; provided, however, that Monthly Schedule Updates may be relevant to determining whether the Progressive Contractor mitigated any such delay and may be relevant in determining whether a portion of the Work identified on a Baseline Pricing Package Schedule was completed. Also for the avoidance of doubt, Relief Events shall be evaluated on a Pricing Package-by-Pricing Package basis, and in no case shall use of any then-existing consolidated CPM Schedule as to the entire Project be relevant in determining what, if any, relief the Progressive Contractor may claim as to each such Pricing Package(s) by virtue of any such Relief Event.

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SECTION 13 QUALITY MANAGEMENT

The Progressive Contractor shall perform the quality management necessary for the Progressive Contractor to comply with the Approved Preconstruction Phase Quality Management Plan, the Construction Phase Requirements, and otherwise meet all requirements of the Contract Documents.

SECTION 14 LIQUIDATED DAMAGES

14.1 Failure to Meet the Requirements of the Contract Documents

The Progressive Contractor understands and agrees that if the Progressive Contractor fails to complete the Preconstruction Work and the Construction Work in accordance with the Contract Documents, the Department will suffer substantial losses and damages. The cost to the Department of the administration of the Agreement will be increased as the time occupied in the Work is lengthened. Losses will also accrue to the public due to delays in access to the Project. The Progressive Contractor agrees that it shall be liable for all such losses and damages as Liquidated Damages.

14.2 Liquidated Damages

14.2.1 Completion, Other Incident Liquidated Damages

The Progressive Contractor and the Department will agree upon and set forth in each Pricing Package Amendment the amount payable by the Progressive Contractor in the event of (a) its failure to achieve each Completion Deadline under each Pricing Package Amendment, or (b) other events mutually agreed upon by the Parties (in each case, "Liquidated Damages").

Without limiting the Department's rights under Section 26.1 (*Offset; Withholding; Waiver*), if the Progressive Contractor fails to achieve Completion Deadlines, the Progressive Contractor shall pay to the Department Liquidated Damages in the amounts agreed to in the Pricing Package Amendment.

The Progressive Contractor acknowledges and agrees that such Liquidated Damages are intended to compensate the Department solely for the Progressive Contractor's failure to meet Completion Deadlines. Payment of Liquidated Damages shall not excuse the Progressive Contractor from liability from any other breach of the Contract Documents.

14.2.2 Key Personnel Liquidated Damages

Except for under those circumstances where the Progressive Contractor is not liable under Section 5.3 (*Key Personnel*), if the Department is entitled to assess Key Personnel Liquidated Damages under such under Section 5.3 (*Key Personnel*), then the amount of Liquidated Damages will be determined under Table 3 to Exhibit C (*Progressive Contractor Team*).

The Progressive Contractor acknowledges and agrees that such Key Personnel Liquidated Damages are intended to compensate the Department solely for the Progressive Contractor's failure to staff the Project with those individual persons proposed or thereafter agreed by the Department as Key Personnel. Payment of Key Personnel Liquidated Damages shall not excuse the Progressive Contractor from liability from any other breach of the Contract Documents.

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14.3 Maximum Liquidated Damages

Cumulative Liquidated Damages assessed under Section 14.2.1 (*Completion, Other Incident Liquidated Damages*) with respect to any Pricing Package Amendment shall not exceed any cap on Liquidated Damages identified in the applicable Pricing Package Amendment (if any), as may be adjusted by Construction Phase Change Order.

14.4 Multiple Assessments of Liquidated Damages

Liquidated Damages (and Key Personnel Liquidated Damages) may be assessed simultaneously under more than one subsection of this Section 14 (*Liquidated Damages*) as well as simultaneously under more than one Pricing Package.

14.5 Reasonableness of Liquidated Damage Amounts

The Progressive Contractor acknowledges and agrees that Liquidated Damages (and Key Personnel Liquidated Damages) shall have been set based on an evaluation and estimation by the Department of damages that it will incur. The Progressive Contractor understands and agrees that any Liquidated Damages (and Key Personnel Liquidated Damages) payable are not a penalty and that such sums are reasonable under the circumstances existing as of the date of execution and delivery of this Agreement. The Progressive Contractor further acknowledges and agrees that Liquidated Damages (and Key Personnel Liquidated Damages) may be owing even though no Progressive Contractor Default has occurred. The Progressive Contractor and the Department agree that the Parties have agreed or shall agree to such charges in order to fix the Progressive Contractor's costs and to avoid later Disputes over which items are properly chargeable to the Progressive Contractor.

SECTION 15 NONCONFORMING WORK

15.1 Replacement of Nonconforming Work

The Progressive Contractor shall correct any Nonconforming Work in the manner and within the time frames required by the Contract Documents. The Department may reject or require the Progressive Contractor to remedy any Nonconforming Work and/or identify additional Work that shall be done to bring the Project into compliance with Contract Document requirements at any time prior to Final Acceptance, whether or not previous oversight, spot checks, audits, reviews, tests, inspections, acceptances, approvals, or Approvals were conducted by any Person.

15.2 Nonconforming Work Pay Adjustment

The Department may, in its sole discretion, accept any Nonconforming Work without requiring it to be fully corrected, and shall be entitled to a reduction in the applicable Pricing Package GMP in an amount determined by the Department, equal, at the Department's election, to:

(a) the amount allocated to such Work in the Schedule of Values;

(b) the Progressive Contractor's cost savings associated with its failure to perform the Work in accordance with the Contract Document requirements; or

(c) the amount deemed appropriate by the Department to provide compensation for impacts to affected parties such as future maintenance and/or other costs relating to the Nonconforming Work.

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SECTION 16 DIFFERING SITE CONDITIONS; ITEMS OF ARCHAEOLOGICAL OR BIOLOGICAL SIGNIFICANCE; HAZARDOUS MATERIALS

What follows in this this Section 16 is the process the Parties agree to observe upon, and associated responsibilities regarding discovery of Differing Site Conditions, Items of Archaeological or Biological Significance, and discovery or release of Hazardous Materials. For avoidance of doubt, if the Progressive Contractor encounters a Differing Site Condition, an Item of Archaeological or Biological Significance, or Hazardous Materials for which it is not responsible in accordance with this Section 16, then the Progressive Contractor shall refer to Section 20 (*Relief & Compensation*).

16.1 Notification to the Department; Department Response

If the Progressive Contractor becomes aware of any Item of Archaeological or Biological Significance, any Differing Site Conditions, or the presence of Hazardous Materials that are not disclosed to the Progressive Contractor in the Contract Documents, the Hazardous Materials Report, or otherwise in writing prior to execution of the Construction Phase Amendment or any applicable Pricing Package Amendment, or any release of Hazardous Materials, then, as a condition precedent to any Progressive Contractor right to any relief under this Agreement, if any, the Progressive Contractor shall promptly notify the Department thereof by telephone or in person followed by written notification within 7 days.

The Progressive Contractor shall immediately stop Work and secure the area. Operations within the area shall be temporarily suspended and shall not be resumed at that location until authorized by the Department.

As to any Differing Site Conditions, Items of Archaeological or Biological Significance, or Hazardous Materials, the Department will view the location within 10 Business Days after receipt of notification or notice, as applicable, and will advise the Progressive Contractor at that time whether to resume Work or whether further investigation is required. For notifications regarding Hazardous Materials, the Department will first confirm (itself or through designees) whether an alleged condition is in fact a Hazardous Material.

16.2 Further Investigation

Within five Business Days after its initial written notice to the Department, the Progressive Contractor shall advise the Department what course of action the Progressive Contractor proposes to take. The Department then will either Approve or require modification of the Progressive Contractor's proposed actions. The Parties shall so proceed until the Department Approves the Progressive Contractor's proposed actions, and upon Approval, the Progressive Contractor shall implement the proposed actions.

16.3 Recommence Work

In the case of a Differing Site Condition or Item of Archaeological or Biological Significance, the Department may require the Progressive Contractor to recommence Work in the area at any time, even though an investigation may be ongoing (so long as such Work is not in violation of any Laws, Governmental Approvals, or Other Approvals). The Progressive Contractor shall promptly recommence Work in the area upon receipt of the Department's notification to recommence Work.

In the case of Hazardous Materials, the Progressive Contractor shall resume Work at the affected area of the Project only after the Department has issued a clearance, the Hazardous Materials have been removed or rendered harmless, and all necessary Governmental Approvals and Other Approvals have been obtained, as reasonably determined by the Department.

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16.4 Obligation to Minimize Impacts

The Progressive Contractor shall ensure that all activities undertaken pursuant to this Section 16 (*Differing Site Conditions; Items of Archaeological or Biological Significance; Hazardous Materials*) are done in a manner that will minimize, to the maximum extent practicable, the effect on surrounding property and on the public.

16.5 Responsibility for Hazardous Materials

Without limiting Section 10.4 (*Generator, Arranger Status – Hazardous Materials*), the Progressive Contractor shall be responsible for and shall remediate or render harmless all Hazardous Materials disclosed in the Hazardous Materials Report.

If confirmed as a Hazardous Material under Section 16.1 (*Notification to the Department; Department Response*), the Department shall take the necessary measures required to ensure that Hazardous Materials are remediated or rendered harmless or shall direct the Progressive Contractor to do so.

Except to the extent provided otherwise in this Section 16.5, the Progressive Contractor is not responsible for any Hazardous Materials encountered at the Site that are not disclosed to the Progressive Contractor in the Construction Phase Amendment, applicable Pricing Package Amendment, the Hazardous Materials Report, or otherwise in writing prior to execution of the applicable Pricing Package Amendment. Notwithstanding the preceding sentence, the Department is not responsible for any spill or release, threatened spill or release, or exacerbation of Hazardous Materials attributable to any Progressive Contractor-Related Entity. If the Department reasonably determines that any Progressive Contractor-Related Entity has spilled or released, threatened to spill or release, or exacerbated Hazardous Materials on the Site, then any response, removal, cleanup, or other remedial action required by applicable Laws shall be performed by the Progressive Contractor at its sole cost and expense. Except as to the Progressive Contractor's initial response to an emergency, any such remedial actions shall require the prior Approval of the Department.

SECTION 17 PROJECT ACCEPTANCE

17.1 Project Completion of a Pricing Package

As a pre-requisite to achievement of Project Completion of a Pricing Package, the Progressive Contractor shall provide a written certificate to the Department that the following have occurred, with such supporting documents as the Progressive Contractor determines as appropriate or otherwise as may be required by the Department:

(a) the Department and the Progressive Contractor have agreed upon a Punch List of items, as to such Pricing Package, to be completed for Final Acceptance;

(b) the Progressive Contractor has completed all Work within the Pricing Package (excepting only for Punch List items), and the Progressive Contractor represents that the Pricing Package has been performed in accordance with the requirements of the Contract Documents;

(c) if completion of a Pricing Package affords use of that portion of the Project by the Department, then, in writing, the Progressive Contractor certifies that such portion of the Project is ready to be opened for its intended use, all points of entry and exit are in their final configuration, and no further Work will require any lane or shoulder closure or temporary traffic controls;

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(d) all commitments related to the Pricing Package as required pursuant to the NEPA document have been completed in accordance therewith and the Contract Documents;

(e) the Progressive Contractor has satisfied all requirements under all other applicable Governmental Approvals and all Other Approvals required for Project Completion of a Pricing Package;

(f) the Progressive Contractor has furnished to the Department certifications from the Progressive Contractor's Design Quality Assurance Manager, in form and substance satisfactory to the Department, certifying that the Design Documents meet the requirements of the Contract Documents;

(g) all Relocations associated with the Pricing Package have been completed in accordance with all Utility Agreements, and utility clearances in respect of Utility Work have all been received;

(h) all submittals required by the Contract Documents to be submitted to the Department as a condition to Project Completion of a Pricing Package (including all supporting information) have been submitted to and accepted by the Department;

(i) the Progressive Contractor has obtained all applicable Third Party and Utility Owner approvals relating to the Pricing Package, and all Third Parties and Utility Owners have completed all work that involves obligations by the Progressive Contractor;

(j) the Progressive Contractor has achieved or completed all other conditions identified in the Contract Documents as a condition to Project Completion of a Pricing Package, if any;

(k) the Progressive Contractor had completed or satisfied all provisions in the CAP Report;

(l) the Progressive Contractor has paid in full all amounts due and owing to the Department pursuant to the Contract Documents that are not in Dispute;

(m) there exist no uncured breaches that with the giving of notice or passage of time, or both, could become a Progressive Contractor Default (except any Progressive Contractor Default for which Final Acceptance will affect its cure); and

(n) the Progressive Contractor has certified to the Department in writing that no overdue amounts owing to any Subcontractor remain unpaid (except for amounts relating to good faith disputes).

The Department shall have the sole discretion to allow the Progressive Contractor to submit more than one Notice of Project Completion of a Pricing Package.

17.2 Department Issued Notice of Project Completion for a Pricing Package

Within 10 Business Days following receipt of the Progressive Contractor's certificate under Section 17.1 (*Project Completion of a Pricing Package*), the Department will either:

(a) issue a Notice of Project Completion for the Pricing Package; or

(b) notify the Progressive Contractor of any prerequisites to Project Completion of the Pricing Package that have yet to be corrected or satisfied.

If the Department notifies the Progressive Contractor under clause (b), then the Progressive Contractor shall resubmit its Notice of Project Completion of a Pricing Package upon correction or satisfaction of outstanding prerequisites, and the Parties shall continue this process until the Department

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issues a Notice of Project Completion of a Pricing Package, the Parties proceed under the Dispute Resolution Procedures, or the Agreement is otherwise terminated.

17.3 Certificate of Final Acceptance of the Project

As a pre-requisite to achievement of Final Acceptance of the Project, the Progressive Contractor shall provide a written certificate to the Department that the following have occurred, with such supporting documents as the Progressive Contractor determines as appropriate or otherwise as may be required by the Department (the Certificate of Final Acceptance):

(a) all Work has been performed in accordance with the requirements of the Contract Documents, and specifically all requirements for Project Completion of all Pricing Packages have been and remain satisfied;

(b) the Project is ready to be opened for its intended use, all points of entry and exit are in their final configuration, and no further Work will require any lane or shoulder closure or temporary traffic controls;

(c) all Punch List items for all Pricing Packages have been completed in accordance with their respective Pricing Package Amendments and the Contract Documents;

(d) all Progressive Contractor and Subcontractor personnel, supplies, equipment, waste materials, rubbish, and temporary facilities not incorporated into the Work have been removed from the Site, the Progressive Contractor has restored and repaired all damage or injury arising from such removal to the satisfaction of the Department, and the Site is in good working order and condition;

(e) the Department has received a complete set of Record Drawings from, or on behalf of, the Progressive Contractor, in form and substance required by the Agreement, all Governmental Persons with jurisdiction requiring any form of certification of design, engineering, or construction with respect to the Project have been provided such certifications, and all warranties, manuals, and other deliverables required as a condition to Final Acceptance have been provided to the Department;

(f) all submittals and other Federal Requirements have been satisfied;

(g) all Progressive Contractor obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance as determined by the Department) have been satisfied in full or waived in writing by the Department;

(h) are no overdue amounts owing to any Subcontractor or Supplier that remain unpaid, and the Progressive Contractor has resolved all, and there are no outstanding claims; actual, pending, or threatened claims against the Surety Bonds; Liens on any materials, supplies, or equipment; or stop notices relating to the Project, including claims by Utility Owners;

(i) the Progressive Contractor has no reason to believe that any other Person has a valid Claim against the Progressive Contractor, the Department, or the Project which has not been communicated in writing by the Progressive Contractor to the Department as of the date of the certificate;

(j) the Progressive Contractor has paid in full all amounts due and owing to the Department pursuant to the Contract Documents;

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(k) there is no existing default by the Progressive Contractor under any Utility Agreement, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a Claim relating to the Work or event of default under any Utility Agreement;

(l) there exist no uncured breaches that with the giving of notice or passage of time, or both, could become Progressive Contractor Defaults; and

(m) all guarantees, warranties, and the Surety Bonds are in full force and effect.

17.4 Department Issued Notice of Final Acceptance

Within 10 Business Days following receipt of the Certificate of Final Acceptance, the Department will either issue a Notice of Final Acceptance or notify the Progressive Contractor of any prerequisites to Final Acceptance that have yet to be corrected or satisfied. If the Department notifies the Progressive Contractor of outstanding prerequisites, then the Progressive Contractor shall resubmit its Certificate of Final Acceptance upon correction or satisfaction of outstanding prerequisites, and the Parties shall continue this process until the Department issues a Notice of Final Acceptance, the Parties proceed under the Dispute Resolution Procedures, or the Agreement is otherwise terminated.

17.5 Opening of Sections of Project to Traffic; No Waiver

Opening of portions of the Project to the public prior to Final Acceptance does not constitute acceptance of the Work or a waiver of any provisions of the Contract Documents.

SECTION 18 TITLE; RISK OF LOSS

18.1 Department-Furnished Materials

The Contract Documents may provide that certain materials for the Project are to be provided by the Department. All Department-furnished materials will be made available during normal business hours at Department-designated sites. The Progressive Contractor shall be responsible for arranging pick up, inspection, determinations of acceptability, loading, and transportation of all such materials from Department-designated sites and shall bear the risk of loss during such activities.

The Progressive Contractor shall be responsible for any defects or deficiencies discovered after any Department-furnished materials are removed from Department-designated sites.

18.2 All Other Goods, Consumables, Materials, Supplies, Equipment, and Tools

Title to all other goods, consumables, materials, supplies, equipment, and tools which shall have been delivered to the Site shall pass to the Department, free and clear of all Liens, upon the sooner of incorporation into the Project or payment by the Department to the Progressive Contractor of invoiced amounts for such goods, consumables, materials, supplies, equipment, or tools.

Notwithstanding passage of title, the Progressive Contractor shall retain sole care, custody, control, and risk of loss of such goods, consumables, materials, supplies, equipment, and tools and shall exercise due care with respect thereto as part of the Work until expiration of the Term.

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18.2.1 Rebuilding, Repair, and Restoration of Damaged Work

Until the end of the Term or such other date identified in the Construction Phase Amendment or a Pricing Package Amendment (and with respect to any such items that are the subject of Warranty Work, through the Warranty Period), the Progressive Contractor shall rebuild, repair, and restore all damaged Work at the Site or on any parcel owned by any other Person. If such damage was caused by any Person other than any Progressive Contractor-Related Entity, then after exhausting any available insurance coverage required to be carried by the Progressive Contractor (including the Progressive Contractor's obligation to pay any deductibles or self-insured retentions), the Department shall pay to the Progressive Contractor the costs of rebuilding, repairing, and restoring the damage in excess of the policy limits of the insurance coverage by appropriate Construction Phase Change Order.

If the Progressive Contractor fails to satisfy its obligations to rebuild, repair, or restore any damaged Work then after five Days' notice (or such other period as the Department may agree, in its sole discretion), the Department may to take all steps it deems necessary to satisfy such obligations. The Progressive Contractor shall reimburse the Department for any costs related to such activities.

18.2.2 Maintenance During Construction

The Department will be responsible for the operation and maintenance of the Right-of-Way and the Work until a date or dates certain to be set forth in the Construction Phase Amendment or any Pricing Package Amendment (provided that such date shall be no later than the commencement of Construction Work under any subject Pricing Package), whereupon the Progressive Contractor shall assume full responsibility for maintenance of that portion of the Site. Maintenance will be defined in either the Construction Phase Amendment or a Pricing Package Amendment.

Without limiting Section 30 (*Warranties*)), at the end of the Term, the Department will assume responsibility for the operation and maintenance of the entire Project.

SECTION 19 PAYMENT

19.1 Preconstruction Phase Compensation

The Progressive Contractor's compensation for Preconstruction Work performed during the Preconstruction Phase shall be an amount ("Preconstruction Phase Compensation") equal to:

(a) the hourly rates set forth in Exhibit D (*Hourly Rates*), as amended, for the personnel performing the Preconstruction Work multiplied by number of hours worked by such personnel on the Preconstruction Work; plus

(b) actual and documented direct costs incurred in performing Preconstruction Work (plus mark-up for overhead, management, and profit consistent with the Department's policy provided to the Progressive Contractor pursuant to Section 3.7 of the RFP).

In no event shall the Preconstruction Phase Compensation exceed the Preconstruction Phase Compensation Cap. The rates in Exhibit D (*Hourly Rates*) shall be the rates identified in Form D (*Hourly Rates*) in the Proposal subject to adjustment by the Department through Preconstruction Phase Change Orders. The Progressive Contractor may submit for Approval a revised Exhibit D (*Hourly Rates*) to the Department that adds staff and rates without requiring a Preconstruction Phase Change Order if the changes do not result in an increase to the Preconstruction Phase Compensation Cap. Any annual update of the hourly rates, pursuant to the Department's "Preconstruction Phase Hourly Rate Policy", shall likewise be

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effected by "zero cost" Preconstruction Phase Change Order, and Preconstruction Work performed thereafter will be invoiced under such revised rates.

The invoice form shall be as prescribed, or as agreed, by the Department, and shall include such reasonable and customary certifications from the Progressive Contractor to the Department, as representations and warranties hereunder, as the Department shall require (e.g., Work completed to the level represented has been performed in compliance with the Agreement; information supporting the invoice is true, complete, and correct in all material respects, no double-counting, etc.).

19.1.2 Payment of Preconstruction Phase Compensation

No later than the 25th day of each calendar month during the Preconstruction Phase, the Progressive Contractor shall invoice the Department for payment of Preconstruction Phase Compensation earned in the prior month.

Each monthly invoice shall be supported by such information substantiating the Progressive Contractor's right to payment as the Department shall reasonably require, in a form Approved by the Department. The invoice shall include:

(a) costs of labor;

(b) progress of the Preconstruction Work; and

(c) duly executed conditional waivers of rights to make claim against the Surety Bonds from the Progressive Contractor and all Subcontractors, establishing timely payment or satisfaction of the payment requested by the Progressive Contractor in the previous invoice.

If the Department disagrees with any of the information in the invoice, the Department shall notify the Progressive Contractor, in writing, identifying the deficient or disputed information. In the event of a disputed invoice, the Department, within 10 days, shall identify the amount the Department intends to withhold and the specific measures the Progressive Contractor must take to rectify the Department's concerns. The Progressive Contractor and the Department will attempt to resolve the Department's concerns prior to the date payment is due. Payment will be made for all undisputed amounts within 35 days of the approval of the invoice.

If an invoice is received after the date for such invoice set forth in this Section 19.1.2, then payment shall be made by the Department as part of the subsequent payment.

19.2 Total Construction GMP

19.2.1 Generally

The Progressive Contractor shall only be entitled to compensation for Construction Work to the extent such Construction Work has been authorized pursuant to an executed Amendment. Each Pricing Package shall have a Pricing Package GMP and the Total Construction GMP shall be the sum of the Pricing Package GMPs for all executed Pricing Packages.

19.2.1.1 Nature of the Pricing Package GMP

At the sole discretion of the Department, each Pricing Package GMP may be a lump sum that is paid for progressed work by reference to an Approved Schedule of Values, or other process agreed to by

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the Parties in the Construction Phase Amendment or Pricing Package Amendment, where if elected, will not exceed each such Pricing Package GMP. Payment as a lump sum shall exclude any Shared Provisional Sums included in the Risk Register.

At the sole discretion of the Department, each Pricing Package GMP may be a maximum price with all costs, including costs payable pursuant to the Risk Register, paid based on Actual Cost, plus markup as agreed to by the Parties in the Construction Phase Amendment or Pricing Package Amendment. The Parties shall also agree to how savings will be allocated in the event that costs for a Pricing Package are below the Pricing Package GMP.

19.2.2 Construction Phase Progress, Invoicing, and Payment

19.2.2.1 Request for Monthly Progress Payment

On or before the 25th day of each month following execution of the applicable Pricing Package Amendment, the Progressive Contractor shall submit a Request for Monthly Progress Payment in both hard copy and electronic formats (Microsoft Excel or another similar format acceptable to the Department) in a form corresponding to the Approved Schedule of Values and to be agreed upon by the Parties and attached as an exhibit to the Construction Phase Amendment (and as may be adjusted as necessary on a Pricing Package-specific basis within any Pricing Package Amendment), including all of the information required by the Department under the Construction Phase Amendment, applicable Pricing Package Amendment, and this Section 19.2 (*Total Construction GMP*). The Request for Monthly Progress Payment shall identify the amount claimed to be payable for Construction Work, which amount shall be based upon the percentage of Construction Work for each Pricing Package completed since the previous Monthly Progress Payment (determined based upon the applicable Approved Schedule of Values as demonstrated within the Request for Monthly Progress Payment), plus Department Approved amounts due under Provisional Sums in the Risk Register.

If Construction Work advances under multiple Pricing Packages, then the Progressive Contractor shall itemize all amounts payable by reference to the respective Pricing Package, but submit only one Request for Monthly Progress Payment.

The agreed-upon form of Request for Monthly Progress Payment shall include such reasonable and customary certifications from the Progressive Contractor to the Department, as representations and warranties hereunder, as the Department shall require (e.g., Work completed to the level represented has been performed in compliance with the Agreement; information supporting the invoice is true, complete, and correct in all material respects, no double-counting, etc.).

The Department and Progressive Contractor shall meet to review the Request for Monthly Progress Payment to resolve any outstanding issues regarding activities for which payment is sought. The Progressive Contractor shall submit a revised Request for Monthly Progress Payment to address any outstanding issues identified by the Department.

The Department will pay the amount ultimately agreed under each Request for Monthly Progress Payment within 35 days after the approval of Request for Monthly Progress Payment.

19.2.2.2 Certification of Monthly Progress Payment

Each Request for Monthly Progress Payment shall be certified by the Progressive Contractor [Project Manager]***[NTD: conform to RFP Key Personnel role designated for this duty]***, and with respect to a Request for Monthly Progress Payment relating to design Work, the [Design Manager]***[NTD: conform***

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to RFP Key Personnel role designated for this duty]. Without limiting Section 19.2.2.1 (*Request for Monthly Progress Payment*) as pertains to adjustments for Pricing Package Amendments, such certification shall be on a form agreed upon by the Parties as part of, and attached as an exhibit to, the Construction Phase Amendment, and shall provide at a minimum that all amounts being requested are true and correct, the required level of testing and inspection is complete, all certifications of compliance are submitted, the Work is completed in accordance with the Contract Documents, and there is no outstanding Nonconforming Work for which payment is being requested. No Request for Monthly Progress Payment will be processed without such certification.

19.2.2.3 Documents Required to be Provided with the Request for Monthly Progress Payment

All documents reasonably requested by the Department shall be submitted with each Request for Monthly Progress Payment application. No Request for Monthly Progress Payment will be processed without all such documents including:

(a) conditional waivers of right to make claims against the Surety Bonds from each Subcontractor;

(b) a Progress Report;

(c) documentation, including certified payroll, material certifications, equipment charges and payment records, supporting the direct allowable payments by the Department to Utility Owners pursuant to Section 9.1 (*Generally*), and

(d) a Monthly Schedule Update.

19.2.3 Withholding

No payment will be made for activities that are incomplete, except as provided in Section 19.2.2.1 (*Request for Monthly Progress Payment*). Payment will not be made for Nonconforming Work unless the Department agrees that a pay adjustment may be made for Nonconforming Work in accordance with Section 15.2 (*Nonconforming Work Pay Adjustment*).

19.3 Payments to Subcontractors

19.3.1 Prompt Payment

The Progressive Contractor agrees to pay each Subcontractor under this Agreement for satisfactory performance of its contract no later than 10 Business Days from the receipt of each payment the Progressive Contractor receives from the Department. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the Department. The explanation from the Progressive Contractor shall be made in writing to the Department. This clause applies to both DBE and non-DBE Subcontractors. Failure to comply with this clause shall constitute a material breach of this Agreement and (without limiting any other remedy available to the Department under this Agreement) may result in sanctions under this Agreement.

19.3.2 Retainage

The Progressive Contractor shall make prompt and full payment of any retainage to any Subcontractor within 30 days after satisfactory completion of the applicable Work by such Subcontractor.

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19.4 Final Payment

19.4.1 Application for Final Payment

Following the Department's issuance of a Notice of Final Acceptance pursuant to Section 17.4 (*Department Issued Notice of Final Acceptance*), the Progressive Contractor shall prepare and submit an Application for Final Payment to the Department showing the proposed total amount due the Progressive Contractor.

In addition to meeting all other requirements for invoices hereunder, the Application for Final Payment shall include the written consent by the Surety to such payment and such other documentation as the Department may reasonably require, including all Final Design Documents and Record Drawings. Prior applications and payments shall be subject to correction in the proposed Application for Final Payment.

It is the Parties' intent that the amount of the Final Payment consists almost entirely in the value of the Work on the Punch Lists across all Pricing Packages, modest administrative charges to finalize and deliver the Record Drawings, and other Project close-out documentation, at-cost demobilization expenses, and final accounting of Shared Provisional Sums under Section 2.4.2 (*Provisional Risks*).

The Department will review the Progressive Contractor's proposed Application for Final Payment, responding with changes, corrections, or requests for additional information or documentation. The Progressive Contractor shall resubmit its proposed Application for Final Payment upon responsive changes, corrections, or documentation, and the Parties shall continue this process until the Department Approves the Application for Final Payment. The Department shall make the payment to the Progressive Contractor not later than 35 days after the Department issues the Approval of the Application for Final Payment.

The Progressive Contractor's receipt of Final Payment shall constitute a waiver and release of Claims by the Progressive Contractor, for itself and for all Progressive Contractor-Related Entities, against the State, and in particular the Department, and any of its Constituents, except for Claims the Progressive Contractor has already submitted to the Department.

19.5 Right to Stop Work if Undisputed Payment is Not Made

The Progressive Contractor shall have the right to stop Work if the Department fails to make an undisputed payment due hereunder within 30 Days after receipt of a written notice of nonpayment. Any such Work stoppage shall be deemed a suspension for purposes of Section 23.1 (*Suspension for Convenience*).

19.6 Appropriations

The Department may terminate (or "cancel" under State law) this Agreement in accordance with Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*) if for any reason the Department's funding from State and/or federal sources is not appropriated or is withdrawn, limited or impaired. In the event the Department's funding is not appropriated or is withdrawn, limited or impaired and the Department is unable to access other funds to satisfy the Department's obligations under this Agreement, the Department will provide prompt notice to the Progressive Contractor upon obtaining actual knowledge thereof. The obligation of the Department to make payments pursuant to this Agreement does not constitute an indebtedness of the State or any political subdivision thereof within the meaning or application of any constitutional provision or limitation. The obligation of the Department to make payments pursuant to this Agreement does not constitute a pledge of the faith, credit or taxing power of the State or any political subdivision thereof within the meaning or

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application of any constitutional provision or limitation. The Department has no taxing power. The Progressive Contractor shall have no right to have taxes levied or compel appropriations by the General Assembly of the State for any payments required by the Department pursuant to this Agreement. For avoidance of doubt, determinations by or on behalf of the Department as to the sufficiency of funds being appropriated, budgeted, and otherwise made available for the Project shall be final and conclusive and not subject to the Dispute Resolution Procedures.

SECTION 20 RELIEF & COMPENSATION

20.1 Relief Events

20.1.1 Relief Event Defined

The occurrence of any of the following events during the Construction Phase shall constitute a Relief Event for which the Progressive Contractor shall be entitled to seek adjustments to the Baseline Pricing Package Schedule or the applicable Pricing Package GMP, as may be allowed under the Risk Register or otherwise pursuant to this Section 20 (*Relief & Compensation*) and Section 21 (*Construction Phase Change Orders*):

(a) the occurrence of a Risk Register Event that is identified as a Department Risk;

(b) the occurrence of a Provisional Risk Register Event with an uncapped Provisional Sum;

(c) a Change in Law;

(d) a Department-Caused Delay;

(e) unavoidable delays arising from a suspension order pursuant to Section 23.1 (*Suspension for Convenience*);

(f) uncovering, removing, and restoring Work, to the extent additional costs or time are provided for in Section 11.4.1 (*Obligation to Uncover Finished Work*); and

(g) Force Majeure Events.

For avoidance of doubt, the Progressive Contractor is not entitled to, nor shall the Progressive Contractor seek, any relief under this Agreement for any Relief Event as relates to the Preconstruction Work, it being the Parties' intent that Relief Events apply only to the Construction Work.

20.1.2 Limitations on Relief Events

None of the foregoing events described in Section 20.1.1 (*Relief Event Defined*) shall be deemed a Relief Event to the extent that performance of the Work would have been suspended, delayed, or interrupted by any other cause (other than any other Relief Event), including the negligence, reckless or willful misconduct, act or omission, or breach or violation of applicable Law, Governmental Approval, Other Approval, or contract (including any Contract Document) by the Progressive Contractor or any Progressive Contractor-Related Entity on any part of the Project.

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For those Relief Events for which the Progressive Contractor is afforded additional time for performance (or excuse from performance for a period of time), delays are measured as direct delays to the Critical Path on the affected Baseline Pricing Package Schedule.

For those Relief Events for which the Progressive Contractor is afforded an increase in a Pricing Package GMP, the amount of the additional compensation shall equal the increased Actual Costs incurred by and necessary for Progressive Contractor's performance in accordance with the Contract Documents, or actual time or quantities under unit prices for the same, if so identified.

Without limiting the Progressive Contractor's general duty of mitigation under Section 2.4 (*Risk Register*) or those criteria expressed in any of the foregoing events described in Section 20.1.1 (*Relief Event Defined*) themselves, Relief Events shall be limited to the extent that the adverse effects of the Relief Event could have been avoided by the exercise of caution, due diligence, or reasonable efforts by the Progressive Contractor or any Progressive Contractor-Related Entity acting in accordance with the performance standards identified in Section 6.1.2 (*Performance Standards*) in all circumstances to the extent possible, including by resequencing, reallocating, or redeploying forces to other portions of the Work or Site or to other activities unrelated to the Work.

If the Progressive Contractor seeks relief for Force Majeure Events or Relief Events that are caused, extended, exacerbated, or otherwise informed by the occurrence of a Force Majeure Event, or if any costs are covered by insurance required to be placed under this Agreement (regardless of whether the Progressive Contractor has actually obtained such insurance), then the Progressive Contractor shall only be entitled to seek adjustments to the Baseline Pricing Package Schedule and not to any increase in a Pricing Package GMP; provided, however, that nothing in this Section 20.1.2 shall be construed to preclude the Progressive Contractor's recourse to any insurance policy or coverages.

20.2 Relief Event Claims

20.2.1 Relief Event Notice

The Progressive Contractor shall provide notice to the Department within 15 Days after the date on which the Progressive Contractor first knew or should have known that a Relief Event occurred or is imminent (the Relief Event Notice). The Relief Event Notice shall include a reasonably detailed description of the Relief Event, relevant circumstances, an initial estimate of the approximate number of Days of delay to the Critical Path of affected Baseline Pricing Package Schedules, if any, and the approximate additional costs the Progressive Contractor will incur as a result of the Relief Event. The Relief Event Notice shall also describe the efforts of the Progressive Contractor that have been (or are going to be) undertaken to overcome, remove the Relief Event, or to mitigate the adverse effects of the Relief Event.

If the Progressive Contractor fails to deliver the Relief Event Notice within such 15 Days, then the Progressive Contractor shall have irrevocably and forever waived and released the portion of any Claim or right to relief for the adverse effect attributable to the Relief Event occurring before the date of actual delivery of a Relief Event Notice.

20.2.2 Request for Construction Phase Change Order

The Progressive Contractor shall submit to the Department a Request for Construction Phase Change Order (RCPCO) within 30 Days after submitting the Relief Event Notice. The RCPCO shall include:

(a) all requirements of Section 21.2 (*Contents of Construction Phase Change Orders*); and

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(b) to the extent not repetitive of clause (a):

(i) the Relief Event, including a detailed description, whether it is a Risk Register Event (with annotation to the Risk Register, if yes), the date of its occurrence, and its duration;

(ii) the adverse effect of the Relief Event on the Progressive Contractor's ability to perform any of its obligations under this Agreement;

(iii) analysis of the effects of the Relief Event on the relevant Baseline Pricing Package Schedule's Critical Path; and

(iv) the specific relief sought (including, where applicable, by reference to the Risk Register).

If the Progressive Contractor fails to deliver the RCPCO within such 30 Days, the Progressive Contractor shall have irrevocably and forever waived and released any Claim or right to relief for the adverse effect attributable to the Relief Event occurring before the date of actual delivery of a Relief Event Notice.

The Department and the Progressive Contractor may mutually agree to extend the deadline for submission of the RCPCO.

20.2.3 Documentation

Once the Parties have mutually agreed as to the Progressive Contractor's entitlement to cost, schedule, or performance relief, as applicable, as a result of any such Relief Event, the Parties shall enter into a Construction Phase Change Order reflecting their agreement as to the adjustment in the applicable Pricing Package GMP pursuant to Section 21 (*Construction Phase Change Orders*).

20.3 Waiver

The rights and remedies set forth in this Section 20 (*Relief & Compensation*) shall be the Progressive Contractor's sole and exclusive rights and remedies upon the occurrence or due to the effects of a Relief Event, and the Progressive Contractor hereby waives all other rights and remedies at law and/or in equity that it might otherwise have against the Department on account of a Relief Event.

20.4 Assumption of Risk

Except as otherwise expressly provided in the Contract Documents, the Progressive Contractor:

(a) acknowledges and accepts all risks, responsibilities, obligations, and liabilities in connection with performance of the Work and delivery of the Project; and

(b) is not entitled to make any Claim under the Contract Documents, at law, or in equity against the Department, or the State, for any losses suffered in connection with the Project, the Work, or the Contract Documents.

SECTION 21 CONSTRUCTION PHASE CHANGE ORDERS

This Section 21 sets forth the requirements for obtaining all Construction Phase Change Orders under this Agreement. The Progressive Contractor hereby acknowledges and agrees that the Total

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Construction GMP constitutes full compensation for performance of all Construction Work, subject only to those exceptions specified in Section 20 (*Relief & Compensation*) and this Section 21.

21.1 Construction Phase Change Order Constraints

A Construction Phase Change Order shall not be effective for any purpose unless executed by the Department. Construction Phase Change Orders may be issued only during the Construction Phase and only for the following purposes (or combination thereof):

(a) to modify the Construction Work;

(b) to revise a Completion Deadline; or

(c) to revise a Pricing Package GMP.

21.2 Contents of Construction Phase Change Orders

The Progressive Contractor shall prepare a form of Construction Phase Change Order for the Department's Approval, conforming in all respects to the requirements and constraints in this Section 21 (*Construction Phase Change Orders*) and, as it pertains to Construction Phase Change Orders due to Relief Events, Section 20 (*Relief & Compensation*).

Each RCPCO and Construction Phase Change Order shall document the following, at a minimum:

(a) Scope of Work: The scope of work shall describe in detail satisfactory to the Department all additional or changed (or both) activities to be authorized by the Construction Phase Change Order.

(b) Cost Estimate: The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made, acceptable to the Department, consistent with the cost estimating principles described in Exhibit B, Section 6 (*Cost Estimating*).

(c) Time Impact Analysis: For Construction Phase Change Orders contemplating Construction Work, if the Progressive Contractor claims that such event, situation, or change affects the Critical Path affecting a Completion Deadline, it shall provide a time impact analysis as to each affected Baseline Pricing Package Schedule, indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in a form satisfactory to the Department, which compares the proposed new schedule to the then-current Baseline Pricing Package Schedule (statused as to Construction Work completed and not in Dispute), as appropriate. The time impact analysis shall only propose to modify the activities that have been impacted by the event, situation, or change to justify the extension.

(d) Justification. Each RCPCO shall include a justification detailing all causes of the proposed change, making specific reference to the applicable provisions of this Section 21 (*Construction Phase Change Orders*) which permit a Construction Phase Change Order to be issued, and describing the data and documents which establish the necessity of such proposed change.

(e) Other Supporting Documentation: The Progressive Contractor shall provide other supporting documentation as required by the Department.

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21.2.2 Disposition; Incomplete Request for Construction Phase Change Orders

The Department may reject the Progressive Contractor's RCPCO at any point in the process. The Department's failure to respond to any RCPCO within 14 Days of delivery shall be deemed rejected.

The Department shall have no obligation to review the supporting documentation associated with any RCPCO until a complete RCPCO is provided.

Excepting only amendments to the Agreement, only complete Construction Phase Change Orders executed by the Department shall change the Total Construction GMP, adjust any Pricing Package GMP, or extend any Completion Deadline.

21.2.3 Performance of Changed or Extra Work without a Construction Phase Change Order

If the Progressive Contractor undertakes any extra or changed work without receiving a Construction Phase Change Order executed by the Department, the Progressive Contractor shall be deemed to have performed such work voluntarily, without right to a Construction Phase Change Order. In addition, the Progressive Contractor may be required to remove or otherwise undo any such work at its sole cost.

21.2.4 Procedure for Department Initiated Construction Phase Change Orders

If the Department desires to evaluate whether to initiate a Construction Phase Change Order, the Department may, at its discretion, issue a Request for Change Proposal.

Within seven Days after the Progressive Contractor's receipt of a Request for Change Proposal, the Department and the Progressive Contractor shall consult to define the proposed scope of the change, including rough order of magnitude of cost and time impacts, if any, as relates to Construction Work.

Promptly after the consultation meeting (and not to exceed 10 Business Days thereafter unless additional time is reasonably warranted under the subject circumstances), the Department shall notify the Progressive Contractor whether the Department desires the Progressive Contractor to prepare a Construction Phase Change Order. The Department may require the Progressive Contractor to account for impacts on Baseline Pricing Package Schedules or to keep the Baseline Pricing Package Schedules but reflect additional Acceleration Costs to meet existing Completion Deadlines.

If requested by the Department, the Progressive Contractor shall prepare and submit to the Department for Approval a Construction Phase Change Order within 21 Days after receipt of the Department's notification seeking a Construction Phase Change Order, complying with all applicable requirements of Section 21.4 (*Pricing of Construction Phase Change Orders*), and incorporating all requests made by the Department. The Progressive Contractor shall bear the cost of developing the Construction Phase Change Order form, including any modifications requested by the Department.

If the Department and the Progressive Contractor agree that a change in the requirements relating to the Work has occurred but disagree as to whether the change justifies additional compensation or time, or disagree as to the amount of any change to be made to a Pricing Package GMP or a Completion Deadline, the Department may, in its sole discretion, issue a Department-Directed Change to the Progressive Contractor to proceed with the performance of the Work requested.

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21.3 Certain Limitations for all Construction Phase Change Orders

21.3.1 Limitation on Pricing Package GMP Increases

Any increase in a Pricing Package GMP pursuant to Section 20 (*Relief & Compensation*) and this Section 21 (*Construction Phase Change Orders*) shall exclude:

(a) costs caused by a breach of contract or fault or negligence, or act or failure to act of any Progressive Contractor-Related Entity;

(b) costs that could reasonably have been avoided by the Progressive Contractor, including by resequencing, reallocating, or redeploying forces to other portions of the Work or Site or to other activities unrelated to the Work; and

(c) costs for any rejected Work which failed to meet the requirements of the Contract Documents and any necessary remedial Work.

21.3.2 Limitation on Time Extensions

Any extension of a Completion Deadline pursuant to Section 20 (*Relief & Compensation*) and this Section 21 (*Construction Phase Change Orders*) shall exclude any delay to the extent that it:

(a) did not impact the Critical Path affecting a Completion Deadline;

(b) was due to the fault or negligence, or act or failure to act of any Progressive Contractor-Related Entity; or

(c) could reasonably have been avoided by the Progressive Contractor, including by resequencing, reallocating, or redeploying forces to other portions of the Work or Site or to other activities unrelated to the Work.

The Progressive Contractor shall demonstrate to the Department's satisfaction that the change in the Work (or other event or situation which is the subject of the Construction Phase Change Order request seeking a change in a Completion Deadline) has caused or will result in an identifiable and measurable disruption of the Work, impacting a Critical Path activity affecting a Completion Deadline.

21.3.3 Limitation on Delay Costs

Before the Progressive Contractor may obtain any compensation for delay costs, the Progressive Contractor shall have demonstrated to the Department's satisfaction that:

(a) the Baseline Pricing Package Schedule in fact sets forth a reasonable method for completion of the Work;

(b) the damages giving rise to the delay costs could not reasonably have been avoided by the Progressive Contractor, including by resequencing, reallocating, or redeploying forces to other portions of the Work or Site or to other activities unrelated to the Work; and

(c) the Progressive Contractor has suffered or will suffer Actual Costs due to such delay, each of which costs shall be justified and documented in a manner satisfactory to the Department.

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21.3.4 Limitation on Acceleration Costs

Acceleration Costs shall be compensable hereunder only with express, written direction by the Department to the Progressive Contractor to accelerate its efforts and evidenced by Construction Phase Change Orders issued by the Department.

21.4 Pricing of Construction Phase Change Orders

The Department and the Progressive Contractor (on its own behalf and on behalf of its Subcontractors) shall negotiate a reasonable cost for each Construction Phase Change Order. If compensation amounts or methodologies for compensation for a particular Relief Event is provided for in the Risk Register, then such compensation shall be determined in such amount or by such methodology. If the Risk Register does not address compensation or compensation methodologies for a particular Relief Event, and the Department and the Progressive Contractor cannot agree on the terms of pricing of a Construction Phase Change Order, then compensation, if any, for such Relief Event shall be determined pursuant to the cost estimating principles described in Exhibit B, Section 6 (*Cost Estimating*); provided, however, that for Department-Directed Changes, and Relief Events under clauses (e) and (f) of its definition, the Department may, in its sole discretion, price such resulting Construction Phase Change Order under the "force account" principles set forth in Section 109.05(b) of the Standard Specifications.

21.5 No Release or Waiver

21.5.1 Extension of Time for Performance

No extension of time granted hereunder shall release the Progressive Contractor's Surety from its obligations. The Department shall not be deemed to have waived any rights under this Agreement as the result of any grant of an extension of any Completion Deadline, any acceptance of performance of any part of the Work after a Completion Deadline, or the making of any payments to the Progressive Contractor after such date.

21.5.2 No Construction Phase Change Order Based on Course of Conduct or Order by Unauthorized Person

No course of conduct or dealings between the Parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that the Department has been unjustly enriched shall be the basis for any claim, request for additional compensation, or extension of a Completion Deadline. Further, the Progressive Contractor shall undertake, at its risk, work included in any request, order, or other authorization issued by a Person in excess of that Person's authority as provided herein or included in any oral request. The Progressive Contractor shall be deemed to have performed such work as a volunteer and at its sole cost. In addition, the Department may require the Progressive Contractor to remove or otherwise undo any such work, at the Progressive Contractor's sole cost.

SECTION 22 PARTNERING & DISPUTES

22.1 Partnering

Partnering shall be conducted in accordance with Exhibit J, Section 1 (*Partnering*).

22.2 Dispute Resolution

Dispute resolution shall be conducted in accordance with the Dispute Resolution Procedures.

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SECTION 23 SUSPENSION

23.1 Suspension for Convenience

The Department may, at any time and for any reason, by written notice, order the Progressive Contractor to suspend all or any part of the Work required under the Contract Documents for the period of time that the Department deems appropriate for the convenience of the Department. The Progressive Contractor shall promptly comply with any such written suspension order. The Progressive Contractor shall promptly recommence the Work upon receipt of written notice from the Department directing the Progressive Contractor to resume Work.

23.2 Suspension for Cause

The Department has the authority by written order to suspend the Work without liability to the Department wholly or in part for the Progressive Contractor's failure to:

(a) correct conditions unsafe for the Project personnel or the general public;

(b) comply with any Governmental Approval, Law, Other Approval, or otherwise carry out the requirements of this Agreement;

(c) carry out directives or orders of the Department;

(d) comply with environmental requirements within the Construction Phase Requirements; or

(e) remove an employee whom the Department has requested be removed pursuant to Section 5.1 (*Employee Performance Requirements*).

23.3 Progressive Contractor Responsibilities During Suspension

(a) During periods that Work is suspended, the Progressive Contractor shall continue to be responsible for the Work, including maintenance of all Progressive Contractor-provided insurance and Surety Bonds[as well as any Guaranty/ies]***[NTD: delete if no Guaranty]***.

(b) As pertains to the Construction Phase, during such periods, the Progressive Contractor shall prevent damage or injury to the Project and other facilities in the Project vicinity, provide for drainage, obtain and maintain compliance with all Governmental Approvals and Other Approvals, and erect necessary temporary structures, signs, or other facilities required to maintain the Project and other facilities in the Project vicinity. Also during the Construction Phase, during any suspension period, unless otherwise directed by the Department, the Progressive Contractor shall continue to be responsible for maintenance of traffic in accordance with the Construction Phase Requirements and any additional requirements in the Construction Phase Amendment or applicable Pricing Package Amendment, and for maintenance during construction in accordance with the Agreement.

(c) If only part of the Work is suspended, the Progressive Contractor shall be entitled to payment for the costs allocated to the Work not suspended.

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SECTION 24 BREACH OF CONTRACT

24.1 Progressive Contractor Default: Termination for Cause/Default

24.1.1 Breaches; Progressive Contractor Defaults

The Progressive Contractor shall be in breach under the Agreement upon the occurrence of any one or more of the following events or conditions:

(a) The Progressive Contractor fails following authorization by the Department to begin the Work under the Contract Documents.

(b) The Progressive Contractor fails to satisfy any Completion Deadline.

(c) The Progressive Contractor fails to perform the Work with sufficient resources to ensure the prompt completion thereof.

(d) The Progressive Contractor fails to perform the Work in accordance with the Contract Documents, refuses to remove and replace rejected materials or Nonconforming or unacceptable Work, or fails to remove and replace workers as directed by the Department under Section 5.1 (*Employee Performance Requirements*).

(e) The Progressive Contractor discontinues, suspends, or abandons the prosecution of the Work wrongfully or for reasons not permitted in the Agreement.

(f) The Progressive Contractor fails to resume performance of Work, which has been suspended or stopped, within a reasonable time after receipt of notice from the Department to do so or (if applicable) after cessation of the event preventing performance.

(g) The Progressive Contractor breaches any other agreement, representation, or warranty contained in the Contract Documents, or the Progressive Contractor fails to perform any other obligation under the Contract Documents.

(h) The Progressive Contractor fails to provide and maintain the required insurance, Surety Bonds, [Guaranty/ies,]***[NTD: delete if no Guaranty]*** or other required securities.

(i) The Progressive Contractor makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of the Contract Documents or any right or interest therein (except as expressly permitted under Section 33.4.2 (*Assignment by the Progressive Contractor; Changes of Control; Change of Organization*)).

(j) The Progressive Contractor fails, without good cause, to make payment when due for labor, equipment, or materials in accordance with the Contract Documents, its agreements with Subcontractors, and applicable law; fails to comply with any Law, Governmental Approval, or Other Approval; or fails to comply with the instructions of the Department consistent with the Contract Documents.

(k) The Progressive Contractor fails to discharge or obtain a stay within 10 Days of any final judgment or order for the payment of money against it in excess of $100,000 in the aggregate arising out of the prosecution of the Work (provided that, for purposes hereof, posting of a bond in the amount of 125 percent of such judgment or order shall be deemed an effective stay).

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(l) [The Progressive Contractor, the Lead Contractor[, or any Guarantor] becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes an assignment for the benefit of creditors.

(m) Insolvency, receivership, reorganization, or bankruptcy proceedings have been commenced by or against the Progressive Contractor[,]/[or] the Lead Contractor[, or any Guarantor] and not dismissed within 60 Days.]***[NTD: adjust based upon whether there is a Guarantor]***

(n) Any representation or warranty made by the Progressive Contractor in the Contract Documents or in any certificate, schedule, instrument, or other document delivered pursuant to the Contract Documents shall have been false or materially misleading when made.

(o) The Progressive Contractor is a party to fraud.

(p) The Progressive Contractor fails to pay Liquidated Damages (and Key Personnel Liquidated Damages) due and owing to the Department.

(q) The Progressive Contractor changes or substitutes any Identified Contractor or Key Personnel without Department approval.

(r) (i) there occurs any disqualification, suspension, or debarment (distinguished from ineligibility due to lack of financial qualifications), or other exclusion from bidding, or proposing or contracting with a federal or a State department or agency of (A) the Progressive Contractor; (B) any Progressive Contractor-Related Entity (excluding Subcontractors), or (C) any Affiliate of the Progressive Contractor for whom transfer of ownership would constitute a Change of Control, or (ii) the Progressive Contractor has not dismissed any Subcontractor whose work is not substantially complete and who it is aware of (exercising all reasonable diligence) is determined disqualified, suspended or debarred, or otherwise excluded from bidding, or proposing or contracting with a federal or a State department or agency.

(s) The Progressive Contractor fails to comply with the Department's written suspension of Work order issued in accordance with Section 23 (*Suspension*) within the time reasonably allowed in such order.

(t) A levy under execution or attachment has been made against all or any part of the Project or any interest therein (including the Progressive Contractor's interest in this Agreement) as a result of any Lien created, incurred, assumed or suffered to exist by the Progressive Contractor or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 days, unless such levy resulted from actions or omissions of the Department

24.1.2 Right to Cure

The Department agrees to provide the Progressive Contractor and Surety 10 Days' notice and opportunity to cure any breach before declaring any breach a Progressive Contractor Default, provided that no such notice and opportunity to cure is required for any breach which by its nature cannot be cured or for any breach that poses an immediate and imminent danger to public health or safety. If a breach is curable, but by its nature cannot be cured within 10 Days, as reasonably determined by the Department, the Department agrees not to declare a Progressive Contractor Default provided that the Progressive Contractor commences such cure within such 10-Day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event will such cure period exceed 60 Days (or 30 Days with

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respect to any Progressive Contractor Default under Section 24.1.1 (*Breaches; Progressive Contractor Defaults*) clause (b)) in total, unless mutually agreed upon by the Parties. The Progressive Contractor hereby acknowledges and agrees that the events described in Section 24.1.1 (*Breaches; Progressive Contractor Defaults*) clauses (l) and (m) are not curable. If the Progressive Contractor does not cure any breach or if the breach is not curable, the Progressive Contractor will be in Default and the Department may provide the Progressive Contractor and Surety notice of Default.

Notwithstanding the foregoing, if the Department believes a condition affecting the Project poses an immediate and imminent danger to public health or safety, the Department may rectify the condition at the Progressive Contractor's cost (excluding costs that would otherwise have been the Department's responsibility under the express terms of the Agreement, if any), without notice and without awaiting lapse of any cure period. So long as the Department undertakes to rectify a condition in good faith, even if under a mistaken belief in the occurrence of such Progressive Contractor Default, such action shall not expose the Department to liability to the Progressive Contractor and shall not entitle the Progressive Contractor to any other remedy, it being acknowledged that the Department has a paramount public interest in providing and maintaining safe public use of and access to the Project. The Department's good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

24.2 Remedies

24.2.1 Rights of the Department

If a Progressive Contractor Default occurs, then, in addition to all other rights and remedies provided by law or equity or available under the Agreement or otherwise, including the rights to recover Liquidated Damages (and Key Personnel Liquidated Damages) and to seek recourse against the Surety Bonds[, Guaranty/ies]***[NTD: eliminate if no Guaranty]***, or other performance security required hereby, the Department shall have the following rights and remedies, without further notice, and without prejudice to any of its other rights or remedies, and without waiving or releasing the Progressive Contractor and its Surety from any obligations, and the Progressive Contractor shall have the following obligations (as applicable):

(a) The Department may order the Progressive Contractor to suspend or discontinue the Work or any portion of the Work.

(b) The Department may terminate the Agreement or a portion thereof, in which case, the provisions of Section 25.3 (*Progressive Contractor Responsibilities Upon Termination*) and Section 25.4 (*Responsibility After Notice of Contract Termination*) shall apply.

(c) If and as directed by the Department, the Progressive Contractor shall withdraw from the Site; and shall remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, any Progressive Contractor-Related Entity in the performance of the Work.

(d) The Progressive Contractor shall deliver to the Department possession of any or all facilities of the Progressive Contractor located on the Site, as well as any or all Design Documents and all other completed or partially completed drawings (including plans, elevations, details, and diagrams), specifications, records, information, schedules, samples, shop drawings, and other documents, that the Department deems necessary for completion of the Work.

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(e) The Progressive Contractor shall confirm assignment to the Department of Subcontracts requested by the Department, and the Progressive Contractor shall terminate, at its cost, all other Subcontracts.

(f) The Department may deduct from any amounts payable by the Department to the Progressive Contractor such amounts payable by the Progressive Contractor to the Department, including Liquidated Damages, Key Personnel Liquidated Damages, or other damages payable to the Department under the Contract Documents.

(g) The Department, without incurring any liability to the Progressive Contractor, shall have the rights to:

(i) If the Progressive Contractor or Surety has not proceeded satisfactorily within the cure period described in Section 24.1.2 (*Right to Cure*), take the performance of all or a portion of the Work from the Progressive Contractor (without the use of the Progressive Contractor's equipment, tools, and instruments) and enter into an agreement with another Person for the completion of such Work;

(ii) require the Surety to take the performance of all or a portion of the Work from the Progressive Contractor (without the use of the Progressive Contractor's equipment, tools, and instruments) and enter into an agreement with another Person for the completion of such Work; or

(iii) use such other methods, as in the opinion of the Department, will be required for the completion of the Project.

(h) If the Department exercises any right to perform any obligations of the Progressive Contractor, in the exercise of such right the Department may, but is not obligated to, among other things:

(i) perform or attempt to perform, or cause to be performed, such Work;

(ii) spend such sums as the Department deems necessary and reasonable to employ and pay such architects, engineers, consultants, and contractors, and obtain materials and equipment as may be required for the purpose of completing such Work;

(iii) execute all applications, certificates, and other documents as may be required for completing the Work;

(iv) modify or terminate any contractual arrangements;

(v) take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and

(vi) prosecute and defend any action or proceeding incident to the Work.

24.2.2 Liability of Progressive Contractor

If a breach and subsequent Progressive Contractor Default has occurred, the Progressive Contractor and Surety shall be liable to the Department (in addition to any other damages under the Contract Documents other than those costs intended to be covered by Liquidated Damages (and Key Personnel Liquidated Damages) payable hereunder) for all costs reasonably incurred by the Department or any party acting on the Department's behalf in completing the Work or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of the completed Work, and

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increased financing costs). Upon the occurrence of a Progressive Contractor Default, the Department shall be entitled to withhold all or any portion of further payments to the Progressive Contractor until such time as the Department is able to determine how much (if any) remains owing to the Progressive Contractor. Promptly upon such determination, the Department shall notify the Progressive Contractor in writing of the amount, if any, that the Progressive Contractor shall pay the Department or that the Department shall pay the Progressive Contractor with respect thereto. All costs and charges incurred by the Department, including attorneys', accountants', and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any monies due or which may become due to the Progressive Contractor. If such expense exceeds the sum which would have been payable under the Agreement, then the Progressive Contractor and its Surety shall be liable and shall pay to the Department the amount of such excess.

If a Progressive Contractor Default under Section 24.1.1(l) (*Breaches; Progressive Contractor Defaults*) or Section 24.1.1(m) (*Breaches; Progressive Contractor Defaults*) occurs, the Department shall be entitled to request of the Progressive Contractor, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within 10 Days of delivery of the request shall entitle the Department to terminate the Agreement and to enforce the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, the Department shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be credited against and deducted from the Department's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Agreement and the Surety Bonds.

In lieu of the provisions of this Section 24.2.2 for terminating the Agreement and completing the Work, the Department may pay the Progressive Contractor for the Work already done according to the provisions of the Contract Documents and may treat the Work remaining undone as if it had never been included or contemplated by the Agreement. The Progressive Contractor will not be allowed to claim prospective profit on, or any other compensation relating to, Work uncompleted by the Progressive Contractor under this provision.

If the Agreement is terminated for grounds that are later determined not to justify a termination for Progressive Contractor Default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 25.1 (*Termination for Convenience*).

If the Department suffers actual damages as a result of the Progressive Contractor's breach or failure to perform an obligation under the Contract Documents, then the Department shall be entitled to recovery of such damages from the Progressive Contractor, regardless of whether the breach or failure that gives rise to the damages ripens into a Progressive Contractor Default.

The exercise or beginning of the exercise by the Department of any one or more rights or remedies under this Section 24.2.2 shall not preclude the simultaneous or later exercise by the Department of any or all other rights or remedies, each of which shall be cumulative, and not exclusive.

The Progressive Contractor and Surety shall not be relieved of liability for continuing Liquidated Damages (and Key Personnel Liquidated Damages) on account of a Progressive Contractor Default or by the Department's declaration of a Progressive Contractor Default, or by actions taken by the Department under this Section 24.2.2.

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SECTION 25 TERMINATION FOR CONVENIENCE; FAILURE TO AGREE ON CONSTRUCTION PHASE AMENDMENT OR PRICING PACKAGE AMENDMENT

25.1 Termination for Convenience

The Department may terminate the Agreement and the performance of the Work by the Progressive Contractor for its own convenience if the Department determines, in its sole discretion, that a termination is in the best public, state, or national interest. The Department shall notify the Progressive Contractor of its decision to terminate by delivering to the Progressive Contractor a written Notice of Contract Termination specifying the extent of termination, its effective date, and any remaining Work necessary to place the Project in an acceptable condition, as determined by the Department in its sole discretion. Termination of the Agreement shall not relieve any Surety [or Guarantor]***[NTD: delete if no Guaranty]*** of its obligation for any claims arising out of the Work performed. Termination may occur before or after Work has begun.

25.2 Termination for Failure to Agree on Construction Phase Amendment or Pricing Package Amendment

In the event the Parties are unable to agree upon a Construction Phase Amendment pursuant to Section 2.2.1 (*Construction Phase Amendment*) or any Pricing Package Amendment pursuant to Section 2.2.2 (*Pricing Package Amendments*), the Department may terminate the Agreement and the performance of the Work by the Progressive Contractor. The Department shall notify the Progressive Contractor of its decision to terminate by delivering to the Progressive Contractor a written Notice of Contract Termination specifying the extent of termination, its effective date, and any remaining Work necessary to place the Project in an acceptable condition, as determined by the Department in its sole discretion. Termination of the Agreement shall not relieve any Surety of its obligation for any claims arising out of the Work performed. Termination may occur before or after Work has begun.

25.3 Progressive Contractor Responsibilities Upon Termination

After receipt of a Notice of Contract Termination pursuant to Section 25.1 (*Termination for Convenience*) or Section 25.2 (*Termination for Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*), and except as otherwise directed by the Department, the Progressive Contractor shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*):

(a) Stop Work as specified in the notice.

(b) Communicate to all affected Subcontractors such notice of termination and that their Subcontracts are not to be further performed unless otherwise authorized in writing by the Department.

(c) Place no further Subcontracts or orders for materials, services, or facilities, except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.

(d) Terminate all Subcontracts to the extent that they relate to the Work terminated.

(e) Assign to the Department in the manner, at the times, and as and to the extent directed by the Department, all of the right, title, and interest of the Progressive Contractor under the Subcontracts so terminated, in which case the Department will have the right, in its sole discretion, to accept performance, settle, or pay any or all claims arising out of the termination of such Subcontracts.

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(f) Settle all outstanding liabilities and claims arising out of such termination of Subcontracts, with the Approval or ratification of the Department, to the extent it may be required, which Approval or ratification shall be final.

(g) Provide the Department with an inventory list of all materials previously produced, purchased, or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder, which is either in the process of development or previously completed but not yet delivered to the Department, and such other information as the Department may request; and transfer title and deliver to the Department, in the manner, at the times, and as and to the extent, if any, directed by the Department of:

(i) fabricated or unfabricated parts, the Work in process, completed Work, supplies, and other material produced or acquired for the Work terminated; and

(ii) the Design Documents and all other completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to the Department if the Work had been completed.

(h) Complete performance, in accordance with the Contract Documents, of all Work not terminated.

(i) Take all action that may be reasonably necessary, or that the Department may direct, for the safety, protection, and preservation of:

(i) the public, including public and private vehicular movement;

(ii) the Work; and

(iii) the equipment, machinery, materials, and property related to the Contract Documents that is in the possession by the Progressive Contractor and in which the Department has or may acquire an interest.

(j) As authorized by the Department in writing, use its best efforts to sell, in a manner, at the times, to the extent, and at the price or prices directed or authorized by the Department, any property of the types referred to in clause (g); provided, however, that the Progressive Contractor:

(i) is not required to extend credit to any purchaser; and

(ii) may acquire the property under the conditions prescribed and at prices Approved by the Department.

The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Department under the Contract Documents or paid in any other manner directed by the Department.

(k) If requested by the Department, withdraw from the portions of the Site designated by the Department and remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, the Progressive Contractor and any Subcontractor in the performance of the Work as the Department may direct.

(l) Take other actions related to the Termination that are directed by the Department.

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25.4 Responsibility After Notice of Contract Termination

The Progressive Contractor shall continue to be responsible for damage to materials after issuance of the Notice of Contract Termination, except as follows:

(a) The Progressive Contractor's responsibility for damage to materials for which partial payment has been made shall end when the Department certifies that those materials have been stored in the manner and at the locations directed by the Department.

(b) The Progressive Contractor's responsibility for damage to materials purchased by the Department subsequent to the Notice of Contract Termination shall end when title and delivery of those materials has been taken by the Department.

Immediately after the Department determines that the Progressive Contractor has completed the Work directed to be completed in accordance with the Notice of Contract Termination and such other work as may have been ordered to secure the Project for termination, the Progressive Contractor shall not be required to provide for continuing safety, security, or maintenance at the Site. Subsequent to the determination that all materials have been stored in the manner and at the locations directed by the Department, further handling of such materials shall be the responsibility of the Department.

25.5 Termination Compensation

25.5.1 Progressive Contractor Termination Compensation Invoice

After receipt of a Notice of Contract Termination, the Progressive Contractor shall submit a termination compensation invoice to the Department in the form and with the certification prescribed by the Department, and the amount of termination compensation invoiced thereunder being calculated in accordance with the requirements of this Section 25.5 (*Termination Compensation*). The Progressive Contractor shall submit the termination invoice promptly, but no later than 90 Days from receipt of the Notice of Contract Termination, unless the Progressive Contractor has requested a time extension in writing within such 90-Day period and the Department has agreed in writing to allow such an extension. The Department will review the Progressive Contractor's termination compensation invoice and accept it, return it with comments, or reject it. If the Progressive Contractor fails to submit the termination compensation invoice within the time allowed, the Department may determine, on the basis of information available to it, the amount, if any, due to the Progressive Contractor because of the termination and shall pay the Progressive Contractor the amount so determined.

25.5.2 Calculation of Termination Compensation

Subject to the limitations in Section 25.5.3 (*Termination Compensation Cap*), the Department will pay the Progressive Contractor the sum of the following amounts for Work performed prior to the effective date of the Notice of Contract Termination, as such amounts are determined by the Department:

(a) The Progressive Contractor's actual reasonable out-of-pocket cost (without profit and including equipment costs only to the extent permitted by Section 21 (*Construction Phase Change Orders*)) for all Work performed, including mobilization, demobilization, and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits, or similar items, as established to the Department's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by the Progressive Contractor, amounts realized by the sale of materials, and for other appropriate credits. Deductions will also be made for the cost of damaged materials. When, in the opinion of the Department,

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the cost of an item of Work is excessively high due to costs incurred to remedy or replacement of defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents, and the excessive actual cost will be disallowed.

(b) As profit on the actual out-of-pocket cost permitted in clause (a) above, a sum determined by the Department to be fair and reasonable; provided, however, that if it appears that the Progressive Contractor would have sustained a loss on the entire Agreement had it been completed, no profit shall be included or allowed under this Section 25.5.1, and an appropriate adjustment shall be made by reducing the amount of the payment to reflect the indicated rate of loss.

(c) The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 25.3(e) (*Progressive Contractor Responsibilities upon Termination*), exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Contract Termination under the Agreement, which amounts shall be included in the cost on account of which payment is made under clause (a) above.

(d) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 25.3(i) (*Progressive Contractor Responsibilities Upon Termination*), and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Agreement including the reasonable cost to the Progressive Contractor of handling material returned to the vendor, delivered to the Department, or otherwise disposed of as directed by the Department, and including a reasonable allowance for the Progressive Contractor's administrative costs in determining the amount due to the Progressive Contractor as the result of the termination of Work under the Agreement.

25.5.3 Termination Compensation Cap

The Progressive Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 25.5.1 (*Payment Upon Termination*)) plus certain costs attending the wind-down of the Agreement listed above, and that items such as lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs, or consequential or other damages shall not be recoverable by the Progressive Contractor for itself or for its Subcontractors on account of the termination of the Agreement. The total amount to be paid to the Progressive Contractor, exclusive of costs described in Sections 25.5.2(c) and 25.5.2(d) (*Payment Upon Termination*), may not exceed (a) for any termination prior to the execution of the Construction Phase Amendment, the Preconstruction Phase Compensation Cap; (b) for any termination following the Construction Phase Amendment, but prior to issuance of all Pricing Package Amendments, the sum of the Preconstruction Phase Compensation Cost Cap and the Pricing Package GMPs applicable to all then-issued and executed Pricing Package Amendments, and (c) for any termination following the issuance and execution of all Pricing Package Amendments, the Total Construction GMP, in each case as reduced by the amount of payments otherwise made and as further reduced by the cost of the Work not terminated, as determined by the costs allocated to such Work in the Schedule of Values. Furthermore, if any refund is payable with respect to Project-specific insurance or bond premiums, deposits, or similar items which were previously passed through to the Department by the Progressive Contractor, such refund shall be paid directly to the Department or otherwise credited to the Department. The limitations on termination compensation set forth in this Section 25.5.3 shall be the "Termination Compensation Cap".

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25.5.4 Excluded Sums

Except for normal spoilage, and except to the extent that the Department will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to the Progressive Contractor under Section 25.5.1 (*Payment Upon Termination*), the fair value, as determined by the Department, of equipment, machinery, materials, and property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Department, or to a buyer pursuant to Section 25.3(j) (*Progressive Contractor Responsibilities upon Termination*). The amount set forth in the Proposal by the Progressive Contractor for the Work terminated shall be a factor to be analyzed in determining the value of the Work terminated.

25.5.5 Payment Upon Termination Amount

Upon determination of the amount of the termination payment, the Agreement shall be amended to reflect the agreed termination payment, and the Progressive Contractor shall be paid the agreed amount.

25.6 Reduction in Amount of Claim

The amount otherwise due the Progressive Contractor under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*) shall be reduced by:

(a) all unliquidated payments for Work or materials not yet performed on or supplied to the Project at the time of the payment, excluding payments made to or on behalf of the Progressive Contractor applicable to the terminated portion of the Agreement;

(b) the amount of any Claim which the Department may have against any Progressive Contractor-Related Entity in connection with the Agreement;

(c) the agreed price for, or the proceeds of the sale of, any property, materials, supplies, or other things acquired by the Progressive Contractor or sold, pursuant to the provisions of this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*), and not otherwise recovered by or credited to the Department;

(d) amounts that the Department reasonably deems advisable to retain to cover any existing or threatened claims, Liens, and stop notices relating to the Project, including claims by Utility Owners;

(e) the cost of repairing, replacing or otherwise correcting any Nonconforming Work; and

(f) any amounts due or payable by the Progressive Contractor to the Department.

25.7 Partial Payments

The Department may, from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by the Progressive Contractor in connection with the terminated portion of the Agreement, whenever, in the opinion of the Department, the aggregate of such payments shall be within the amount to which the Progressive Contractor will be entitled under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*). If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*), such excess shall be payable

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by the Progressive Contractor to the Department upon demand, together with interest at the Interest Rate for the period from the date such excess payment is received by Progressive Contractor to the date on which such excess is repaid to the Department.

25.8 Inclusion in Subcontracts

The Progressive Contractor shall insert in all Subcontracts a requirement that the Subcontractor shall stop Work on the date and to the extent specified in a Notice of Termination from the Department in accordance with this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*) and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

25.9 Limitation on Payments to Subcontractor

For the purposes of Section 25.5 (*Termination Compensation*), upon termination of Work under any Subcontract, the Progressive Contractor will not be entitled to reimbursement for that portion of the termination payment with any such Subcontractor which constitutes lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs, or consequential or other damages on account of the termination.

25.10 No Unearned Profit or Consequential Damages

Under no circumstances shall the Progressive Contractor be entitled to lost, anticipated or unearned profit, unabsorbed overhead, opportunity costs, or consequential or other damages as a result of a termination under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*). The payment to the Progressive Contractor determined in accordance with this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*) constitutes the Progressive Contractor's sole and exclusive remedy for a termination under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*).

25.11 No Waiver

Anything contained in this Agreement to the contrary notwithstanding, a termination under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*) shall not waive any right or Claim to damages, which the Department may have, and the Department may pursue any cause of action, which it may have at law or in equity or under this Agreement.

25.12 Dispute Resolution

The failure of the parties to agree on amounts due under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*) shall be a Dispute to be resolved in accordance with Section 22 (*Partnering & Disputes*). Under no circumstances shall the Progressive Contractor be entitled to anticipatory or unearned profits, or consequential or other damages as a result of a termination under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*).

25.13 Allowability of Costs

All costs claimed by the Progressive Contractor under this Section 25 (*Termination for Convenience; Failure to Agree on Construction Phase Amendment or Pricing Package Amendment*) shall,

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at a minimum, be allowable, allocable, and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

SECTION 26 DAMAGES

26.1 Offset; Withholding; Waiver

26.1.1 Offset

The Department shall have the right to deduct any amount owed by the Progressive Contractor to the Department hereunder from any amounts owed by the Department to the Progressive Contractor under this Agreement.

26.1.2 Withholding

Without limiting the Department's other remedies hereunder, the Department shall have the right to withhold payment of any amount owed by the Progressive Contractor to the Department hereunder for any Progressive Contractor Default until cured.

26.1.3 No Waiver

Permitting or requiring the Progressive Contractor to continue and finish the Work or any part thereof after a Completion Deadline shall not act as a waiver of the Department's right to receive Liquidated Damages (and Key Personnel Liquidated Damages) hereunder or any rights or remedies otherwise available to the Department.

The Department's failure to offset or to withhold any amount shall not constitute a waiver of the Department's right to such amounts.

26.2 Payment of Liquidated Damages, Key Personnel Liquidated Damages

To the extent Liquidated Damages (and Key Personnel Liquidated Damages) are not deducted from any amount owed to the Department by the Progressive Contractor, the Department may send the Progressive Contractor an invoice and the Liquidated Damages (and Key Personnel Liquidated Damages) shall be payable by the Progressive Contractor to the Department within 10 Days after the Progressive Contractor's receipt of the invoice, subject to the right to Dispute.

26.3 Additional Department Costs Due to Progressive Contractor Default

In exercising its remedies for Progressive Contractor Default, all costs and charges incurred by the Department, including attorneys', accountants' and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any moneys due or which may become due to the Progressive Contractor. If such expense exceeds the Contract Price, then the Progressive Contractor and its Sureties shall be liable and shall pay to the Department the amount of such excess.

26.4 Mutual Waiver of Consequential Damages

To the extent permitted by Law:

(a) neither Party shall be liable to the other for punitive damages, except as may be awarded under the Dispute Resolution Procedures; and

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(b) neither Party shall be liable to the other Party for any indirect, incidental or consequential damages, whether arising out of breach of this Agreement, tort (including negligence) or any other theory of liability, and each Party hereby releases the other Party from any such liability.

The foregoing limitation on the Parties' liability for punitive, indirect, incidental, and consequential damages shall not apply to or limit any right of recovery resulting from the following (which are agreed by the Parties to be direct damages or contractual amounts owing, and are specifically not waived as punitive, consequential, incidental, or indirect damages by the Department):

(i) any Liquidated Damages (and Key Personnel Liquidated Damages) payable by the Progressive Contractor under this Agreement;

(ii) amounts due from one Party to the other Party under the express provisions of the Contract Documents;

(iii) any losses, claims, and amounts (including defense costs) paid under the Surety Bonds[or pursuant to any Guaranty/ies]***[NTD: delete if no Guaranty]***;

(iv) any amounts paid or payable pursuant to the Progressive Contractor's indemnification obligations hereunder;

(v) any amounts paid or payable by the Progressive Contractor that are covered by insurance policies that the Progressive Contractor is required to place or has placed in addition to those required hereunder (including any required or deemed self-insurance);

(vi) Losses arising out of Progressive Contractor releases of Hazardous Materials;

(vii) any Losses arising out of, relating to, or resulting from any Progressive Contractor-Related Entity's gross negligence, reckless or willful misconduct, violation of Law, violation or breach of Governmental Approval, Other Approval, or contract (excluding the Contract Documents), criminal conduct, bad faith, intentional misconduct (which excludes intentional Progressive Contractor Default), arbitrary or capricious acts, or fraud under or relating to this Agreement;

(viii) interest, late charges, fees, transaction fees and charges, penalties and similar charges that the Contract Documents expressly state are due from the Progressive Contractor to the Department; and

(ix) any credits, deductions or offsets that the Contract Documents expressly provide to the Department against amounts owing the Progressive Contractor.

SECTION 27 INDEMNIFICATION

27.1 Indemnifications by Progressive Contractor

27.1.1 General Indemnities

Subject to Section 27.1.2 (*Losses due to Negligence of Indemnified Parties*), the Progressive Contractor shall indemnify and hold harmless (but shall have no duty to defend) the Department, any Department-Related Entity, and either's Constituents (collectively referred to as the "Indemnified Parties") from and against any and all Third Party Claims and Third Party Losses (including those incurred in

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connection with the enforcement of this indemnity) arising out of, relating to or resulting from the following:

(a) The breach of any Contract Document by any Progressive Contractor-Related Entity.

(b) The failure by any Progressive Contractor-Related Entity to comply with any applicable Laws (including Laws regarding handling, generation, treatment, storage, transportation, and disposal of Hazardous Materials), Governmental Approvals, or Other Approvals in performing the Work.

(c) Any patent or copyright infringement, or other improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights, or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to the Department or another Indemnified Party pursuant to this Agreement; provided that this indemnity shall not apply to any infringement resulting from the Department's failure to comply with specific written instructions regarding use provided to the Department by the Progressive Contractor.

(d) any actual negligent; reckless, willful, or intentional misconduct (excluding intentional breach or default of this Agreement); illegal activities (or inaction); fraud; criminal conduct; bad faith; violation of Law; violation or breach of contract (excluding breach of this Agreement); arbitrary or capricious acts on the part of any Progressive Contractor-Related Entity, in each case, arising out of, relating to, caused by, or otherwise associated with performance of the Work by any Progressive Contractor-Related Entity.

(e) Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases, or sales, or the use of any property or income of the Progressive Contractor or any of its Subcontractors or any of their respective agents, officers, or employees with respect to any payment for the Work made to or earned by any Progressive Contractor-Related Entity.

(f) Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys', accountants', and expert witness fees and costs incurred in discharging any stop notice or Lien.

(g) Any spill or release or threatened spill or release of Hazardous Materials (i) attributable to the negligence, willful misconduct, or breach of contract by any Progressive Contractor-Related Entity; or (ii) that was brought onto the Site by any Progressive Contractor-Related Entity.

(h) The Claim or assertion by any contractor of inconvenience, disruption, delay, or loss caused by interference by any Progressive Contractor-Related Entity with or hindering the progress or completion of work being performed by other contractors as described in Section 31.7 (*Coordination with other Contractors of the Department*), or failure of any Progressive Contractor-Related Entity to cooperate reasonably with other contractors in accordance therewith.

(i) Any dispute between the Progressive Contractor and a Utility Owner, or any Progressive Contractor-Related Entity's performance of, or failure to perform, the obligations under any Utility Agreement or Other Approval with respect to such Utility Owner.

(j) Any Progressive Contractor-Related Entity's breach of or failure to perform an obligation that the Department owes to a Third Party, including Governmental Persons, railroads, and Utility Owners, under law or under any agreement between the Department and the Third Party, where (a) the Department has delegated performance of the obligation to the Progressive Contractor under the Contract Documents,

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or (b) the acts or omissions of any Progressive Contractor-Related Entity render the Department unable to perform or abide by an obligation that the Department owes to a Third Party, including Governmental Persons, railroads and Utility Owners, under any agreement between the Department and a Party, where the subject agreement was expressly disclosed to the Progressive Contractor.

(k) Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of: (a) the failure of any Progressive Contractor-Related Entity to comply with Good Industry Practice, requirements of the Contract Documents, Project Management Plan, or Governmental Approvals, (b) the Progressive Contractor's negligence, willful misconduct, or breach of any Law or Governmental Approval, or (c) the actual physical entry onto or encroachment upon another's property by any Progressive Contractor-Related Entity.

(l) The failure of the Progressive Contractor to fully comply with any insurance requirements described in Section 28 (*Insurance*).

(m) Any act, Claim or amount arising or recovered under workers' compensations law.

(n) Any errors, inconsistencies or other defects in the design or construction of the Project and or any non-Project Utility Work. The foregoing shall include any such circumstances traceable to errors in the Design Documents provided by the Progressive Contractor (including those pertaining to Utility Work) regardless of whether such errors were also included in the Reference Information Documents or other design materials prepared by the Department and furnished to the Progressive Contractor during the Project's procurement phase (it being specifically agreed by the Progressive Contractor that because the concepts in any such materials are subject to review and modification by the Progressive Contractor under this Agreement, it is appropriate for the Progressive Contractor to assume liability for errors in the completed Project even though they may be related to errors in such materials).

(o) Any failure to pay any Liquidated Damages (and Key Personnel Liquidated Damages) under the Contract Documents.

(p) Any act or omission of any Progressive Contractor-Related Entity in any way causing, contributing to, relating to or arising out of (a) any bodily injury (including death) to any Person, or (b) any losses to the tangible property of Third Parties.

(q) The Progressive Contractor's responsibility for attorneys', accountants', and expert witness fees and defense costs, but only to the extent caused by a Progressive Contractor-Related Entity, and which arises out of, relates to, or results from any of the foregoing; however, the Progressive Contractor's responsibility for such fees and defense costs will not include fees of attorneys, accountants, and experts retained directly by an Indemnified Party or employed by an Indemnified Party.

27.1.2 Losses due to Gross Negligence of Indemnified Parties

The Progressive Contractor's indemnity obligations under Section 27.1.1 (*General Indemnities*) shall not extend to any Third Party Claims or Third Party Losses to the extent directly caused by:

(a) Gross negligence, recklessness, willful misconduct, bad faith, or fraud the negligence or willful misconduct of an Indemnified Party.

(b) Breach of any of its material obligations under the Agreement by the Department.

(c) An Indemnified Party's violation of any Laws or Governmental Approvals.

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(d) Any material defect inherent in a prescriptive design, construction, operations or maintenance specification included in the Construction Phase Requirements, but only where prior to occurrence of the Third Party Claims or Third Party Losses, the Progressive Contractor complied with such specification and did not actually know, or would not reasonably have known, while exercising reasonable diligence, that it was deficient or, if the Progressive Contractor actually knew of the deficiency, unsuccessfully sought the Department's waiver or approval of a deviation from such specification.

27.1.3 Claims by Employees

In claims by an employee of the Progressive Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under this Section 27.1 (*Indemnifications by Progressive Contractor*) shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Progressive Contractor or a Subcontractor under workers' compensation, disability benefit, or other employee benefits laws.

27.1.4 Reliance on Progressive Contractor's Performance

The Progressive Contractor hereby acknowledges and agrees that it is the Progressive Contractor's obligation to cause the Project to be designed and constructed in accordance with the performance standards identified in Section 6 (*Performance Requirements*) and Section 7 (*Design*) and constructed in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on the Progressive Contractor's performance of such obligation. The Progressive Contractor further agrees that any oversight, spot checks, assessments, tests, inspections, review, acceptance, Approval, and/or approval by the Department and/or others hereunder shall not relieve the Progressive Contractor of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations to provide indemnities hereunder. Such oversight, spot checks, assessments, tests, inspections, reviews, acceptances, Approvals, and/or approvals by the Department's employees and consultants are for the Department's benefit and shall not create a duty to the Progressive Contractor or form the basis for a cause of action or Claim against the Department under any theory of recovery.

27.1.5 Indemnities in Connection with Utilities & Other Third Parties

The Progressive Contractor is advised that each Utility Agreement included in any Pricing Package Amendment may contain provisions for the Progressive Contractor to indemnify, save, and hold harmless the Utility Owner and its authorized representatives with respect to certain matters. The Progressive Contractor hereby agrees to and shall perform and comply with such provisions of the Utility Agreement for the benefit of the Utility Owners, their employees, and agents.

The Progressive Contractor is also advised that other Third Party Agreements included in any Pricing Package Amendment may include certain agreements by the Department to indemnify, defend, and hold harmless the Third Parties with respect to certain matters, including contract performance that the Progressive Contractor performs on the Department's behalf. The Progressive Contractor's obligation under this Section 27.1 (*Indemnifications by Progressive Contractor*) shall automatically apply to require the Progressive Contractor to release, indemnify, and hold harmless (but shall have no duty to defend) the Third Parties, with respect to all such matters as incorporated into this Agreement through Pricing Package Amendments.

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27.2 Responsibility of the Department for Certain Hazardous Materials

27.2.1 Pre-Existing Site Contamination

It is recognized that the Department may assert that certain third persons or parties may rightfully bear the ultimate legal responsibility for any and all Hazardous Materials, which may currently be present on the Site. It is further recognized that certain state and federal statutes provide that individuals and firms may be held liable for damages and claims related to Hazardous Materials under such doctrines as joint and several liability and/or strict liability. It is not the intention of the Parties that the Progressive Contractor be exposed to any such liability arising solely out of:

(a) pre-existing Site contamination, whether known or unknown, except as otherwise provided in Section 10 (*Environmental Compliance*) or Section 27.1.1(g) (*General Indemnities*);

(b) the performance not attributable to the negligence, willful misconduct, or breach of contract by any Progressive Contractor-Related Entity in the handling of such Hazardous Materials; and/or

(c) the activities of any Persons not described in clause (b) above, including the Department.

Accordingly, for the purposes of this Agreement only, the Department shall reimburse the Progressive Contractor for remediation work (through payment of the Contract Price, as it may be increased by Construction Phase Change Order pursuant to Section 21 (*Construction Phase Change Orders*)), and will be responsible for any and all claims, damages, losses, liabilities, costs, and expenses arising out of, or in connection with, bodily injury (including death) to persons, damage to property, or environmental removal or response costs arising out of the presence, release, or threatened release of Hazardous Materials on or from the Site, irrespective of whether such substances were generated or introduced on the Site before or after execution of this Agreement, and irrespective of whether the Department was aware of, or directly involved in, the generation or introduction of such materials, but specifically excluding from any obligation of responsibility for those conditions for which the Progressive Contractor has agreed to be responsible as described in Section 27.1.1(g) (*General Indemnities*).

27.2.2 Generator Number for Hazardous Waste Remediation

Except for Hazardous Materials for which the Progressive Contractor is responsible as described in Section 27.1.1(g) (*General Indemnities*), without contradiction of any assertion by the Department of Third Party liability, and for purposes of this Agreement only:

(a) the Progressive Contractor shall not be required to execute any hazardous waste manifests; and

(b) Hazardous Materials encountered in the performance of the Work shall be disposed of, if at all, to a destination facility Approved by the Department utilizing an EPA Identification Number or other appropriate legal device obtained by and carried in the name of the Department or another Person designated by the Department, but only under the express written direction and permission of the Department.

27.3 Comprehensive Environmental Response, Compensation, and Liability Act Agreement

Without limiting their generality, the indemnities set forth in Section 27.1.1 (*General Indemnities*) are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental

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Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9607(e), to insure, protect, hold harmless, and indemnify the parties indemnified in Section 27.1.1 (*General Indemnities*).

SECTION 28 INSURANCE

28.1 General Insurance Requirements

The Progressive Contractor shall procure and keep in effect the insurance policies required by Exhibit I (*Insurance Requirements*), or as may otherwise be required under the Construction Phase Amendment or any Pricing Package Amendment.

28.2 Verification of Coverage

Each time the Progressive Contractor is required to initially obtain insurance coverage and at each annual renewal, the Progressive Contractor shall provide the Department with evidence of insurance satisfactory to the Department in accordance with Exhibit I (*Insurance Requirements*). No Work shall start or continue until proof of insurance acceptable to the Department has been submitted and approved.

Such evidence of insurance shall provide for:

(a) 10 Days prior written notice to the Department of cancellation to the Department for nonpayment of premiums;

(b) 30 Days prior written notice to the Department of any material change in coverage; and

(c) 30 Days prior written notice to the Department of cancellation if cancelled by the insurer for any reason other than nonpayment of premiums, including non-renewal.

[Each insurance policy shall be endorsed to state that coverage or limits of coverage cannot be canceled, voided, suspended or changed by endorsement or other change in policy language (including for non-payment of premium) except after providing the foregoing notices to the Department and during which time no cure, if susceptible to cure, has been affected by any insured.

The Progressive Contractor shall delete, and shall cause the deletion of, the phrase "will endeavor to" or words of similar effect preceding all references to provisions of notice by the insurance company in the evidence of insurance.]***[NTD: to be considered on an Apparent Successful Proposer-specific basis based upon availability]***

28.3 Deductibles; Self-Insured Retentions

As between the Department and the Progressive Contractor, the Progressive Contractor shall pay all insurance deductibles in connection with any claim against insurances placed or held pursuant to the requirements of this Agreement.

The Progressive Contractor may, upon the Department's prior written consent, use self-insured retentions in lieu of deductibles with respect to insurance policies placed or held pursuant to the requirements of this Contract, so long as the Progressive Contractor disclosed all such insurance policies, on a continuing basis, to the Department.

The Department reserves the right to require commercially reasonable deductibles and self-insured retentions without the Progressive Contractor having recourse to additional compensation hereunder.

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28.4 Application of Insurance Proceeds

All insurance proceeds received for physical property damage to the Project under any insurance policies, other than any business interruption or delay in start-up insurance maintained as part of such insurance policies, shall be first applied to repair, restore or replace each part or parts of the Project or the Work with respect to which such proceeds were received.

28.5 Insurance Unavailability

If the Progressive Contractor demonstrates to the Department's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to procure the insurance policy coverages as and when required hereunder, and if despite such diligent efforts and through no fault of the Progressive Contractor any Insurance Unavailability exists or occurs, the Department will consider in good faith alternative insurance packages and programs that provide coverage as comparable to that contemplated in Exhibit I (*Insurance Requirements*) as is possible under then-existing insurance market conditions.

SECTION 29 PAYMENT AND PERFORMANCE SECURITY

29.1 Surety Bonds

29.1.1 Generally

On or before the Effective Date, the Progressive Contractor shall provide a Surety Bonds in the form of Exhibit F (*Form of Surety Bonds*), or other such form as approved by the Department to the Department with a Penal Sum in accordance with Section 29.1.2 (*Penal Sum*). The Progressive Contractor shall maintain the payment and performance obligations of the Surety Bonds in full force and effect until issuance of the Notice of Final Acceptance. The Surety Bonds shall list the Department as an obligee and shall be provided by a qualified surety.

The Surety Bonds shall be provided by an Eligible Surety. If any Surety Bond becomes ineffective, or if the Surety that provided the Surety Bond no longer is an Eligible Surety, the Progressive Contractor shall, within seven days after such event, deliver to the Department a replacement bond in the required form issued by an Eligible Surety, or other assurance satisfactory to the Department, in its sole discretion.

All appointments of attorneys-in-fact shall contain a provision that the appointment will not be revoked without giving the Department notice in writing at least 30 Days prior to the effective date of the revocation. More than one surety may execute a Surety Bond to meet the requirements of this Section 29.1 (*Surety Bonds*), and, in such event when two or more sureties are provided on such bond, each surety shall be liable and obligated for the full amount required.

The Department reserves the right to copy the Surety on all of its communications with the Progressive Contractor concerning the Progressive Contractor's performance, or performance deficiencies, on the Project.

29.1.2 Penal Sum

During the Preconstruction Phase, the penal sum of the performance bond and payment bond of the Surety Bonds shall be $[____].00 ***[NTD: this figure should correspond to 7% of the estimated total Project design cost]***. Prior to commencement of any Construction Work pursuant to a Pricing Package Amendment, the Progressive Contractor shall provide substitute performance and payment Surety Bonds with a penal sum in the amount of the Pricing Package GMP plus the amount of the initial Surety Bonds and all prior Pricing Package Amendment's Pricing Package GMPs. As condition precedent to each Pricing

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Package Amendment, the Progressive Contractor shall increase the penal sum of the performance and payment Surety Bonds by the amount of the Pricing Package GMP by providing a rider to the Surety Bonds in a form approved by the Department.

29.1.3 Warranty Bond; Release of Surety Bonds

The Progressive Contractor shall, as a condition to Final Acceptance, either (a) furnish, or cause the furnishing of, the Warranty Bond, and deliver the Warranty Bond, in the amount equal to 20% of the Total Construction GMP in the form of Exhibit F (*Form of Surety Bonds*), securing Progressive Contractor's obligations to perform the Warranty Work, or (b) cause the penal sum of the performance bond of the Surety Bonds to be reduced to 20% of the Total Construction GMP, as may have been further adjusted pursuant to this Agreement.

The Warranty Bond or reduced performance bond of the Surety Bonds shall remain in full force and effect until the expiration of the final Pricing Package Warranty Period.

The payment bond of the Surety Bonds shall remain in full force and effect for one year following the Final Acceptance.

29.2 [Guaranties

The Progressive Contractor shall provide a guaranty in the form of Exhibit K (*Form of Guaranty*)[, or other such form as approved by the Department,] to the Department (a "Guaranty") as and when required under this Agreement. The Progressive Contractor shall cause such Guaranty to remain in full force and effect until issuance of the Notice of Final Acceptance. The Department agrees to forbear from its right to compel Guarantor payment or performance of the guaranteed obligations under any such Guaranty so long as Progressive Contractor is diligently pursuing applicable remedial action as required by this Agreement.

If the Progressive Contractor, or any Affiliate, receives from any Person a guaranty of payment or performance of any obligation(s) of any Subcontractor, then the Progressive Contractor shall cause such Person to furnish a guaranty with respect to such Person's obligations under its Subcontract in compliance with this Section 29.2 (*Guaranties*).

Each guaranty furnished pursuant to this Section 29.2 (*Guaranties*) shall:

(a) guaranty the performance and completion of all of the Person's obligations under this Agreement (or the applicable Subcontract, if applicable) (including its warranty and indemnification obligations), with the same protections and rights of notice, enforcement and collection as are available to Progressive Contractor or any Affiliate with respect to such Person's obligations under this Agreement (or the applicable Subcontract, if applicable), subject, in each case, to any limitation of liability and exceptions hereunder (or thereunder) as set forth herein (or in the applicable Subcontract); and

(b) provide that the rights and protections of the Department shall not be reduced, waived, released or adversely affected by the acts or omissions of any other guaranteed party, other than through the rendering of performance and payment to another guaranteed party.]***[NTD: remove if no Guaranty requirement.]***

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29.3 No Relief of Liability

Notwithstanding any other requirements of the Contract Documents, performance by a Surety [or Guarantor, or both]***[NTD: eliminate if no guaranty]***of any of the obligations of the Progressive Contractor shall not relieve the Progressive Contractor of any of its obligations hereunder.

SECTION 30 WARRANTIES

30.1 Warranties by Progressive Contractor

30.1.1 Warranty

The general warranty contained in this Section 30.1.1 is in addition to any express warranties provided for elsewhere in the Contract Documents. The Progressive Contractor warrants to the Department that (a) all design Work furnished pursuant to the Contract Documents shall conform to all professional engineering principles generally accepted as standards of the industry in the State; (b) the Project shall be free of defects, except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents; (c) materials and equipment furnished by or on behalf of any Progressive Contractor-Related Entity under the Contract Documents shall be of good quality and when installed, shall be new; (d) equipment furnished by or on behalf of any Progressive Contractor-Related Entity shall be of modern design and in good working condition; (e) the Work shall meet all of the requirements of the Contract Documents; (f) the Work shall be free of any changes, deviations, modifications, or alterations from the technical requirements of the Contract Documents that have not been approved by the Department; and (g) the Project shall be fit for use for the intended function (collectively, the "Warranty"). The Warranty shall also run to the benefit of the Project.

30.1.2 Warranty Period

The "Warranty Period" for each element of a Pricing Package shall commence upon the Department's issuance of the Notice of Project Completion for the subject Pricing Package, and subject to extension under Section 30.1.6 (*Applicability of Warranties to Re-Done Work*), shall remain in effect until one year thereafter. If the Department determines that any of the Work has not met the standards set forth in this Section 30.1.2 at any time within the Warranty Period, then the Progressive Contractor shall correct such Work as specified below, even if the performance of such corrective Work extends beyond the stated Warranty Period. The Department and the Progressive Contractor shall conduct a walkthrough of the Site prior to expiration of the Warranty Period and shall produce a punch list of those items requiring Warranty Work.

30.1.3 Warranty Work

Within seven days after receipt by the Progressive Contractor of Notice from the Department specifying a failure of any of the Work to satisfy the Warranties, or of any Subcontractor representation, warranty, guarantee or obligation which the Progressive Contractor is responsible to enforce, the Progressive Contractor and the Department shall mutually agree when and how the Progressive Contractor shall remedy such violation; provided, however, that in case of an emergency requiring immediate curative action, the Progressive Contractor shall implement such action as it deems necessary and shall provide to the Department Notice of the urgency of a decision. The Progressive Contractor and the Department shall promptly meet in order to agree on a remedy. If the Progressive Contractor does not satisfy the Warranties or enforce such warranty, guaranty, or obligation within the agreed time, or should the Progressive Contractor and the Department fail to reach such an agreement within such seven-day period (or immediately in the case of emergency conditions) or should the Department disapprove of the actions being

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taken, the Department, after Notice to the Progressive Contractor, shall have the right, but not the obligation, to perform or have performed by third parties the necessary remedy, and the costs thereof and further warranty obligations with respect to such work performed by the Department shall be borne by the Progressive Contractor. Reimbursement therefor (plus an administrative charge equal to 10% of the costs) shall be payable to the Department within 10 days after the Progressive Contractor's receipt of an invoice therefor. Alternatively, the Department may deduct the amount of such costs and expenses (including the administrative charge equal to 10% of the costs) from any sums owed by the Department to the Progressive Contractor pursuant to this Agreement.

30.1.4 Cost of Warranty Work

All costs of Warranty Work, including additional testing and inspections, shall be deemed included in the Pricing Package GMP for the Pricing Package applicable to the Work. The Progressive Contractor shall reimburse the Department and pay the Department's expenses made necessary thereby within 10 Days after the Progressive Contractor's receipt of invoice therefor.

30.1.5 Warranty Work Approvals

The Progressive Contractor shall be responsible for obtaining any required Governmental Approvals or encroachment permits from Governmental Persons (except for Department-Provided Governmental Approvals), Other Approvals (except for Department-Provided Other Approvals), and any other required encroachment permits, access rights, rights of entries, and consents from any other Persons, in connection with Warranty Work. Alternatively, the Department may deduct the amount of such costs and expenses from any sums owed by the Department to the Progressive Contractor pursuant to this Agreement.

30.1.6 Applicability of Warranties to Re-Done Work

The Warranties shall apply to all Work re-done, repaired, corrected or replaced pursuant to the terms of the Contract Documents. The Warranties as to each re-done, repaired, corrected, or replaced element of the Work shall extend beyond the original Warranty Period, if necessary, to provide at least a [two] year Warranty Period regarding all elements of the Project (but not to exceed three years from the Department's issuance of the Notice of Project Completion for the subject Pricing Package), following acceptance by the Department of the re-done, repaired, corrected or replaced Work. In addition to the foregoing extension, if during the Warranty Period (a) two or more of the same type of parts, components or subsystems of the Project require repair, replacement or renewal or re-performance; or (b) any part, component or subsystem fails more than twice after the Progressive Contractor's preceding repair, replacement, renewal or re-performance, then, in each case, the Warranty for that type of part, component or subsystem shall be automatically extended for three years from the Department's issuance of the Notice of Project Completion for the subject Pricing Package.

30.2 Subcontractor Warranties

30.2.1 Assignment

Without in any way derogating the Progressive Contractor's own representations and warranties (including the Warranties) and other obligations with respect to the Work, the Progressive Contractor shall obtain from all Subcontractors and cause to be extended to the Department, appropriate representations, warranties, guarantees, and obligations with respect to the design, materials, workmanship, equipment, tools, and supplies furnished by such Subcontractors, including all such representations, warranties,

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guarantees, and obligations required to be furnished by Subcontractors pursuant to the Contract Documents. All representations, warranties, guarantees, and obligations of Subcontractors shall:

(a) be written so as to survive all the Department and the Progressive Contractor inspections, tests, and approvals; and

(b) run directly to and be enforceable by the Progressive Contractor and/or the Department and their respective successors and assigns.

The Progressive Contractor hereby assigns to the Department all of the Progressive Contractor's rights and interest in all extended warranties for periods exceeding the applicable Warranty period which are received by the Progressive Contractor from any of its Subcontractors.

30.2.2 Enforcement

Upon receipt from the Department of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee, or obligation, the Progressive Contractor shall enforce or perform any such representation, warranty, guarantee, or obligation, in addition to the Progressive Contractor's other obligations hereunder. The Department's rights under this Section 30.2.2 shall commence at the time such representation, warranty, guarantee, or obligation is furnished, and shall continue until the expiration of the Progressive Contractor's relevant Warranty (including extensions thereof under Section 30.1.2 (*Project Warranty Term*)). Until such expiration, the Progressive Contractor shall be responsible for the cost of any equipment, material, labor (including re-engineering), or shipping, and the Progressive Contractor shall be required to replace or repair defective equipment, material or workmanship furnished by any Subcontractor.

30.3 No Limitation of Liability

The foregoing Warranties are in addition to all rights and remedies available under the Contract Documents or applicable law, and shall not limit the Progressive Contractor's liability or responsibility imposed by the Contract Documents or applicable law with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud.

30.4 Warranty Beneficiaries

In addition to benefiting the Department and its successors and assigns, the Warranties and Subcontractor warranties provided under this Section 30 (*Warranties*) shall inure to the benefit of, and shall be directly enforceable by, any local agencies and Utility Owners with respect to those portions of the Work owned or controlled by each such Person.

30.5 Remedies for Breach of Warranty

In addition to the Department's other rights and remedies hereunder, at law or in equity, the Progressive Contractor shall be liable for actual damages resulting from its failure to provide corrective Work in accordance with Section 30.1.3 (*Corrective Work*) and any breach of an express warranty or any defect in the Work, including design defects, latent construction defects, strict liability, negligence, or fraud.

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30.6 Disputes

Any disagreement between the Department and the Progressive Contractor relating to this Section 30 (*Warranties*) shall be subject to the Dispute Resolution Procedures, provided that the Progressive Contractor shall proceed as directed by the Department pending resolution of the Dispute.]

SECTION 31 ADDITIONAL PROGRESSIVE CONTRACTOR OBLIGATIONS

31.1 Maintenance of Records

The Progressive Contractor shall maintain at the [Project Manager's]***[NTD: conform to RFP Key Personnel role designated for this duty]*** office in the State a complete set of Record Drawings and a complete set of all books, records and documents prepared or employed by the Progressive Contractor with respect to the Project.

31.2 Audit and Inspection Rights

The Progressive Contractor and its Subcontractors at all tiers shall grant to the Department, each Department-Related Entity, FHWA, and the U.S. Comptroller General and their respective authorized representatives, access, audit, and inspection rights, with right to copy any books and records of the Progressive Contractor as such Persons may reasonably request from time to time in connection with the issuance of Preconstruction Phase Change Orders, Construction Phase Change Orders, Claims, the resolution of Disputes, and other matters as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Agreement and Laws, including responding to requests pursuant to the Public Records Act. The Progressive Contractor shall grant to Utility Owners and their respective authorized representatives such audit and inspection rights, access and the right to copy such books and records as such Persons may request in connection with the resolution of Disputes or other matters, as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Utility-related contractual or Utility Agreement requirements. The Progressive Contractor shall also allow the Department access to all Subcontracts and records regarding Subcontracts.

The Progressive Contractor shall insert in all Subcontracts a requirement that the Subcontractor shall permit access, audit, and inspection rights in accordance with this Section 31.2 and shall require Subcontractors to insert the same provision in each Subcontract at all tiers.

31.3 Change Order Pricing Data

For cost and pricing data submitted in connection with pricing Preconstruction Phase Change Orders and Construction Phase Change Orders, unless such pricing is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by law or regulation, the Department and its representatives have the right to examine all books, records, documents, and other data of the Progressive Contractor related to the negotiation of or performance of Work under such Preconstruction Phase Change Order or Construction Phase Change Order for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

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31.4 Retention of Records

The Progressive Contractor shall maintain all records and documents relating to the Agreement (i) not verified as uploaded and acknowledged as such under the EDMS and (ii) all original documents delivered to the Department in Marion County, Indiana until five years after the earlier to occur of:

(a) the Department provides written notice that the final reimbursement has been issued by FHWA; or

(b) the termination date.

If Approved by the Department, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents. The Progressive Contractor shall notify the Department where such records and documents are kept.

Notwithstanding the foregoing, all records which relate to Claims being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until three years after such actions and Claims have been finally resolved. Records to be retained include all books and other evidence bearing on the Progressive Contractor's costs and expenses under the Contract Documents. The Progressive Contractor shall make these records and documents available for audit and inspection by the Department and/or FHWA, at the Progressive Contractor's office, during reasonable business times, without charge, and shall allow such Persons to make copies of such documents (at no expense to the Progressive Contractor).

31.5 Public Records Act

31.5.1 Applicability of Public Records Act

The Progressive Contractor acknowledges and agrees that all submittals, records, documents, drawings, plans, specifications and other materials in the possession of the Department, including materials submitted by the Progressive Contractor to the Department, are subject to the provisions of the Public Records Act. If the Progressive Contractor believes information or materials submitted to the Department constitute trade secrets or are otherwise exempt from disclosure under the Public Records Act pursuant to IC § 5-14-3, the Progressive Contractor shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such document or page affected, as it determines to be appropriate. Any specific trade secret or other basis for exemption shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the claim including the specific applicable exemption from disclosure under the Public Records Act. Nothing contained in this Section 31.5 (*Public Records Act*) shall modify or amend requirements and obligations imposed on the Department by the Public Records Act or other applicable Law, and the provisions of the Public Records Act or other applicable Law shall control in the event of a conflict between the procedures described above and the applicable Law. The Progressive Contractor is advised to contact legal counsel concerning such Public Records Act and its application to the Progressive Contractor.

31.5.2 Public Records Act Requests

If the Department receive a request for public disclosure of materials marked "CONFIDENTIAL," the Department will use reasonable efforts to notify the Progressive Contractor of the request and give the Progressive Contractor an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Records Act or other applicable Law within the time period specified in the notice issued by the Department and allowed under the Public Records Act. Under no circumstances, however, will the

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Department be responsible or liable to the Progressive Contractor for the disclosure of any such labeled materials, whether the disclosure is required by applicable Law or court order, or occurs through inadvertence, mistake or negligence on the part of the Department or their officers, employees, contractors or consultants.

31.5.3 Litigation Relating to Public Records Act

In the event of any proceeding or litigation concerning the disclosure of any material submitted by the Progressive Contractor to the Department, the sole involvement of the Department will be as stakeholders retaining the material until otherwise ordered by a court or such other authority having jurisdiction with respect thereto, and the Progressive Contractor shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided, however, that the Department reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as they deem necessary or desirable. The Progressive Contractor shall pay and reimburse the Department within 30 days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs, the Department incur in connection with any litigation, proceeding or request for disclosure.

31.6 Intellectual Property

31.6.1 Proprietary Intellectual Property

The Progressive Contractor shall deliver, or cause to be delivered to the Department copies of all Proprietary Intellectual Property owned by or licensed to Progressive Contractor that it uses in providing the Work. As between the Department and the Progressive Contractor, all Proprietary Intellectual Property shall remain exclusively the property of the Progressive Contractor, notwithstanding any delivery of copies thereof to Department.

Department shall have, and are hereby granted by Progressive Contractor, a perpetual, nonexclusive, transferable (to successor Government Entities only), royalty-free, irrevocable, worldwide, fully paid up right and license to use, reproduce, modify, adapt and disclose, and sublicense others (solely designees and only in connection with the Project and retained by or on behalf of the Department) to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property of or licensed to the Progressive Contractor solely in connection with the Project. The Department's rights to exercise the foregoing license shall commence and endure only at the following times:

(a) from and after expiration or earlier termination of the Agreement, for any reason whatsoever; or

(b) during any time that a receiver is appointed for Progressive Contractor, or during any time that there is pending a voluntary or involuntary proceeding in bankruptcy in which Progressive Contractor is the debtor.

The Department will not at any time sell any Proprietary Intellectual Property of or licensed to the Progressive Contractor, or use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose not consistent with this Section 31.6.1.

Subject to Section 31.5 (*Public Records Act*), the Department will not disclose any Proprietary Intellectual Property of or licensed to the Progressive Contractor to any Person other than authorized transferees and sublicensees who agree to be bound by reasonable confidentiality obligations.

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Notwithstanding the foregoing, in no event shall the Department be liable to the Progressive Contractor or any licensor to the Progressive Contractor for any damages arising out of breach of the confidentiality obligations under this Section 31.6.1 if such breach is not the result of gross negligence or intentional misconduct or is required under the Public Records Act, a court order, or other legal requirement. The Progressive Contractor hereby irrevocably waives all claims to any such damages.

Nothing in this Agreement shall prohibit or limit either Party's use of information:

(a) previously known to it without obligation to keep in confidence;

(b) independently developed by it;

(c) acquired by it from a Third Party that is not, to its knowledge, under an obligation of confidence with respect to such information; or

(d) which is or becomes publicly available through no breach of this Agreement.

With respect to any Proprietary Intellectual Property owned by a Person other than the Progressive Contractor, the Progressive Contractor shall obtain from such owner, concurrently with execution of any Subcontract with such owner, or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, for the Progressive Contractor and the Department, a license of at least identical scope, purpose, duration, and applicability as the license granted under this Section 31.6.1.

31.6.2 Intellectual Property

31.6.2.1 Owner Intellectual Property

Except for Proprietary Intellectual Property, all Intellectual Property ("Owner Intellectual Property") has been specially ordered and commissioned by the Department and shall be considered works made for hire as such term is defined in Section 101 of Title 17 of the U.S. Code, and accordingly for which the Department owns the copyright.

31.6.2.2 Obligation to Assign to Department

If any such work product and related materials are determined by a court of competent jurisdiction, the U.S. Copyright Office, or the U.S. Patent & Trademark Office not to be a work-made-for-hire or where the Department is not the owner or author, the Progressive Contractor agrees to assign to Department, or cause all Subcontractors to assign to the Department, if applicable, all rights, title, and interest in all Intellectual Property, excluding Proprietary Intellectual Property, in such work product and related materials.

31.6.2.3 Creation

Design Documents shall become Owner Intellectual Property upon preparation. Construction Documents shall become Owner Intellectual Property upon delivery to the Department. All other submittals and other documents prepared or obtained by the Progressive Contractor or any Progressive Contractor-Related Entity in connection with the Project shall become Owner Intellectual Property upon the Progressive Contractor's or any such Progressive Contractor-Related Entity's preparation or receipt thereof.

31.6.2.4 Restricted License; Restricted Use

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The Department hereby grants to the Progressive Contractor an irrevocable, non-exclusive, non-transferable, non-sub-licensable (without the Department's prior written consent), fully paid up license to use and implement, solely in connection with the performance of the Work and for the Term (including any period of the Progressive Contractor's performance of post-termination or post-expiration obligations), the Owner Intellectual Property; provided that the Progressive Contractor may sub-license any Owner Intellectual Property solely in connection with the performance of the Work to any Subcontractor performing the Work (but without right to further sub-license).

If the Progressive Contractor or any Progressive Contractor-Related Entity creates or develops any improvements, modifications, enhancements, or derivative works to or of the Owner Intellectual Property, any and all such improvements, modifications, enhancements, or derivative works created or developed by any Progressive Contractor-Related Entity will be deemed to be Owner Intellectual Property under the terms of this Agreement.

31.7 Coordination with Other Contractors of the Department

The Department reserves the right to perform and to contract with others to perform other or additional work on or near the Site. The Progressive Contractor shall coordinate with the Department, such other contractors, any other third-parties working on or adjacent to the Site, and any other contractors working with such parties to the extent reasonably necessary for the performance by the Department and such other contractors of their work, and shall cause its employees, agents, officers, and Progressive Contractor-Related Entities to so coordinate. If other separate contracts are awarded by the Department, the Progressive Contractor shall conduct its Work without interfering with or hindering the progress or completion of the work being performed by other contractors.

If the Department exercises its right under Section 2.2.2 (*Pricing Package Amendments*) to contract with other contractors to perform outstanding Work on the Project, the Progressive Contractor shall coordinate with such other contractors in good faith to facilitate completion of the Project in a timely and effective manner.

31.8 Interference by Other Contractors of the Department

If the Progressive Contractor asserts that any of the Department's other contractors have hindered or interfered with the progress or completion of the Work, then the Progressive Contractor's sole remedy shall be to seek recourse against such other contractors. The Progressive Contractor shall have the right to ask the Department to resolve such dispute, provided the other contractor and its sureties have agreed to submit the dispute to the Department, and provided that such proceeding shall be conducted at no cost to the Department.

31.9 Assignment of Causes of Action

The Progressive Contractor hereby offers and agrees to assign to the Department all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. § 15), arising from purchases of goods, services, or materials pursuant to this Agreement or any Subcontract. This assignment shall be made and become effective at the time the Department tenders Final Payment to the Progressive Contractor, without further action of the Parties.

SECTION 32 REPRESENTATIONS, WARRANTIES, AND COVENANTS

The Progressive Contractor represents, warrants, and covenants for the benefit of the Department the provisions in this Section 32.

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32.1 Maintenance of Professional Qualifications; Performance by Qualified Personnel

The Progressive Contractor and its Subcontractor(s) have maintained, and throughout the Term shall maintain, all required authority, license status, applicable licensing standards, certification standards, accrediting standards and accreditations, professional ability, skills, and capacity to perform the Work, and shall perform the Work in accordance with the requirements of the Contract Documents.

All Work furnished by the Progressive Contractor shall be performed by or under the supervision of Persons that hold all necessary, valid licenses to practice in the State, by personnel who are skilled, experienced, and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall assume professional responsibility for the accuracy and completeness of the Design Documents, construction documents, and other documents prepared or checked by them, as and when applicable.

The Progressive Contractor acknowledges and agrees that the award of this Agreement by the Department to the Progressive Contractor was based, in part, on the qualifications and experience of the personnel listed in the Proposal, and the Progressive Contractor's commitment that such individuals would be available to undertake and perform the Work. In addition to ratifying the representations, warranties, and covenants set forth in the Key Personnel Commitments attached to Exhibit C (*Progressive Contractor Team*), the Progressive Contractor represents, warrants, and covenants that such individuals are available for and will fulfill the roles identified for them in the Proposal in connection with the Work. Key Personnel shall commit the amount of time to their applicable roles as set forth in the Contract Documents.

32.2 Applicable Laws

The Progressive Contractor has familiarized itself with the requirements of any and all applicable Laws prior to entering into this Agreement. The Progressive Contractor has complied and shall comply with the foregoing at its sole cost and without any additional compensation or time extension on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment or materials not expressly provided for in the Contract Documents, except, and only to the extent, of any express entitlement to seek relief hereunder. The Progressive Contractor has not received any communication or notice (written or oral), whether from a Governmental Person, employee, citizens group, or any other Person, that alleges that any non-compliance with all applicable Laws and Governmental Approvals in connection with the Project and, to the knowledge of the Progressive Contractor, there are no circumstance that may prevent or interfere with full compliance in the future.

32.3 Governmental Approvals; Other Approvals

The Progressive Contractor has familiarized itself with the requirements and conditions of any and all required Governmental Approvals and Other Approvals prior to entering into this Agreement. The Progressive Contractor has no reason to believe that any Governmental Approval or Other Approval required to be obtained by the Progressive Contractor will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents. ‘

32.4 Design and Engineering Personnel

All design and engineering Work furnished by the Progressive Contractor shall be performed by or under the supervision of Persons licensed to practice the relevant technical profession of architecture, landscape architecture, engineering, geology, or surveying in the State, and performed by personnel who are careful, skilled, experienced, and competent in their respective trades or professions, and professionally qualified to perform the Work.

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32.5 Power and Authority*[NTD: amend for JV members, as need be]*

The Progressive Contractor [and each joint venture member] has the requisite power (a) to carry on its business as now conducted or proposed, and (b) to own its properties and assets.

The Progressive Contractor [and each joint venture member] has full power, right, and authority to execute and deliver the Contract Documents and to perform all obligations of the Progressive Contractor provided for herein and therein.

The Progressive Contractor [and each joint venture member] has all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted.

32.6 Organization; Authorization/Good Standing*[NTD: amend for JV members, as need be]*

The Progressive Contractor is a [_____], duly organized and validly existing under the laws of the [State]/[Commonwealth] of [_____]].

The Progressive Contractor[, each joint venture member,] and each of the Lead Contractor, Lead Designer, and each Key Personnel Firm is duly qualified to do business, and is in good standing, in the State, and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents.

32.7 Authorization*[NTD: amend for JV members, as need be]*

The execution, delivery, and performance of this Agreement have been duly authorized by all necessary actions of the Progressive Contractor, and, if applicable, the Progressive Contractor's members, and will not result in a breach or a default under the organizational documents of any such Person or any indenture, loan, credit agreement, or other material agreement or instrument to which any such Person is a party or by which its properties and assets may be bound or affected.

32.8 Legal, Valid, and Binding Obligation*[NTD: amend for JV members, as need be]*

This Agreement constitutes the legal, valid, and binding obligation of the Progressive Contractor and, if applicable, of each member of the Progressive Contractor, enforceable against the Progressive Contractor (and, if applicable, each member), in accordance with its terms, subject only to applicable bankruptcy, insolvency, and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

[Each]/[The] individual person executing this Agreement and all other such Project related documents, on behalf of the Progressive Contractor has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of the Progressive Contractor; and the Contract Documents, and all such other Project related documents have been (or will be) duly executed and delivered by the Progressive Contractor.

32.9 No Breach

As of the Effective Date, no event that, with the passage of time or the giving of notice, would constitute a breach hereunder has occurred and has not yet been cured.

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32.10 No Conflicts

Neither the execution and delivery by the Progressive Contractor of the Contract Documents, nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be):

(a) in conflict with, has resulted, or will result in a default under or a violation of the governing instruments of the Progressive Contractor or any agreement, judgment, or decree to which the Progressive Contractor is a party or is bound; or

(b) in conflict with any Laws applicable to the Progressive Contractor that are valid and in effect on the Effective Date.

32.11 No Violation of Law

As of the Effective Date, the Progressive Contractor is not in breach of any applicable Law that would have a material adverse effect on the Work or the performance of any of its obligations under the Contract Documents.

32.12 No Suits*[NTD: amend for JV members, as need be]*

There is no action, suit, proceeding, investigation, or litigation pending and served on the Progressive Contractor that challenges the Progressive Contractor's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents, or that challenges the authority of the Progressive Contractor's official executing the Contract Documents; and the Progressive Contractor has disclosed to the Department prior to the Effective Date any pending and un-served or threatened action, suit, proceeding, investigation, or litigation with respect to such matters of which the Progressive Contractor is aware or should be aware after reasonable inquiry and investigation. The Progressive Contractor has no current, pending, or outstanding criminal, civil, or enforcement actions initiated by the Department or the State, and agrees that it will immediately notify the Department of any such actions.

32.13 No Organizational Conflicts of Interest

The Progressive Contractor has disclosed and will disclose to the Department in writing all organizational conflicts of interest of the Progressive Contractor and any Progressive Contractor-Related Entity of which the Progressive Contractor was actually aware; and the Progressive Contractor has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to the Progressive Contractor or its contractors and subcontractors identified in its Proposal that have not been approved in writing by the Department. For this purpose, organizational conflict of interest has the meaning set forth in the RFP.

32.14 No Debarment, Suspension Ineligibility, Exclusion

As of the Effective Date, neither the Progressive Contractor, nor its principals, contractors, or subcontractors identified in the Proposal are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from entering into this Agreement by any federal agency or by any department, agency, or political subdivision of the State, including the Department. For purposes of this Section 32.15 (*False or Fraudulent Statements and Claims*), the term principal for purposes of this Agreement means a member, manager, officer, director, share/stockholder, partner, employee, Key Personnel, employee, or other individual person with primary management or supervisory responsibilities,

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or an individual person who has a critical influence on or substantive control over the operations of the Progressive Contractor.

32.15 False or Fraudulent Statements and Claims

The Progressive Contractor recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 *et seq*. and the USDOT regulations, Program Fraud Civil Remedies, 49 C.F.R., Part 31, apply to contracts funded with Federal funds. Accordingly, by signing this Agreement, the Progressive Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to this Agreement. In addition to other penalties that may be applicable, the Progressive Contractor also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Progressive Contractor to the extent the Federal government deems appropriate.

32.16 Convictions, Civil Judgements; Indictments; Terminations/Defaults

The Progressive Contractor and the Progressive Contractor-Related Entities have not, in the past three years, been convicted of or had a civil judgment rendered against it for (a) commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or preforming a public (e.g., federal, state or local) transaction or public contract, (b) violation of federal or state antitrust Law, or (c) commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property, and as of the Effective Date are not indicted for or otherwise criminally or civilly charged by any Governmental Person with commission of any of the foregoing offenses.

The Progressive Contractor and the Progressive Contractor-Related Entities have not in the past three years had any public transactions (federal, state or local) terminated for cause or for default.

32.17 Anti-Money Laundering Laws/OFAC

The Progressive Contractor (a) is not in violation of (i) any applicable United States anti-money laundering laws, including those contained in the Bank Secrecy Act and the regulations promulgated thereunder; (ii) any applicable economic sanction laws administered by Office of Foreign Assets Control of the United States Department of the Treasury ("OFAC") or by the United States Department of State; or (iii) any applicable United States anti-drug trafficking, anti-terrorism, or anti-corruption laws, civil or criminal; and (b) is not a Person (i) that is charged with, or has reason to believe that he, she or it is under investigation for, any violation of any such laws; (ii) that has been convicted of any violation of, has been subject to civil penalties pursuant to, or had any of its property seized or forfeited under any such laws; (iii) that is named on the list of "Special Designated Nationals or Blocked Persons" maintained by OFAC (or any successor United States government office or list), or any similar list maintained by the United States Department of State (or any successor United States government office or list); (iv) with whom any United States Person, any entity organized under the laws of the United States or its constituent states or territories, or any entity, regardless of where organized, having its principal place of business within the United States or any of its territories, is prohibited from transacting business of the type contemplated under any applicable Law; (v) that is owned, controlled by, or affiliated with any Person identified in clauses (b)(i) through (iv) above; or (vi) that is in violation of any obligation to maintain appropriate internal controls as required by the governing Laws of the jurisdiction of such Person as are necessary to ensure compliance with the economic sanctions, laundering and anti-corruption laws of the United States and the jurisdiction where the Person resides, is domiciled or has its principal place of business.

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32.18 Errors and Omissions

The Progressive Contractor, prior to submitting the Proposal and in accordance with Good Industry Practice, reviewed the Contract Documents and the Reference Information Documents and has brought to the Department's attention any errors, conflicts and ambiguities therein.

32.19 No Restricted Firms

The Progressive Contractor has not and will not contract in connection with the Project with any party set forth in Section 3.3 (Restricted Firms) of the RFP.

32.20 No Contingent Fees

No individual or selling agency has or will be employed or retained or given anything of monetary value to solicit or secure this Agreement, excepting bona fide employees of the Progressive Contractor or bona fide established commercial or selling agencies maintained by the Progressive Contractor for the purpose of securing business.

32.21 Pricing Package Amendment Representations, Warranties, and Covenants

The Progressive Contractor understands and agrees that the representations, warranties, and covenants listed in this Section 32.21 shall apply and be included in all Pricing Package Amendments in addition to the representations, warranties, and covenants listed in Section 32 (*Representations, Warranties, and Covenants*).

32.21.1 Evaluation of Constraints

The Progressive Contractor has evaluated all constraints affecting delivery of the Pricing Package, including constraints imposed by the Progressive Contractor, right-of-way (ROW), Utilities, and other Third Party facilities, and the conditions of the Governmental Approvals and the Other Approvals, and agrees to construct the Pricing Package within such constraints.

32.21.2 Feasibility of Performance

As of the effective date of each Pricing Package Amendment, the Progressive Contractor has evaluated the constraints affecting delivery of the Project and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints and has reasonable grounds for believing and does believe that performance of the Work is feasible and practicable.

As of the effective date of each Pricing Package Amendment, the Progressive Contractor:

(a) has evaluated the constraints affecting design and construction of the Project, as well as the conditions of the NEPA Approval, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints;

(b) has conducted a reasonable investigation and otherwise examined the Site as well as surrounding locations, and as a result of such review, inspection, examination, and other activities the Progressive Contractor is familiar with, and has satisfied itself as to, the character of the Site, and accepts the physical requirements of the Work, subject only to the Progressive Contractor's express rights and bases to seek relief under this Agreement; and

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(c) has evaluated the feasibility of performing all Work under the Pricing Package Amendment within the time and for the amount set forth therein, accounting for constraints affecting the Project and has reasonable grounds for believing and does believe that such performance (including achievement of all Completion Deadlines for the Pricing Package GMP) is feasible and practicable.

32.21.3 Progression of Construction Work

The Progressive Contractor shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve the Completion Deadlines in accordance with the Project Schedule, including furnishing such employees, materials, facilities, and equipment and working such hours (including extra shifts, overtime operations, Saturdays, Sundays, and Legal Holidays) as may be necessary to achieve the Completion Deadlines, all at the Progressive Contractor's own expense, except as otherwise specifically provided in Section 21 (*Construction Phase Change Orders*).

SECTION 33 MISCELLANEOUS PROVISIONS

33.1 Amendments

33.1.1 General Agreement Amendments

This Agreement may be amended, notwithstanding its terms, only by a written instrument duly executed by the Parties or their respective successors or assigns in the same manner as this Agreement was originally executed.

33.1.2 Phase Amendments and Change Orders

Preconstruction Phase Change Orders, the Construction Phase Amendment, Pricing Package Amendments, and Construction Phase Change Orders shall be executed as described in Section 33.5.2 (*Department's Representative to Execute Change Orders*).

33.2 Waiver

33.2.1 No Waiver of Subsequent Rights

Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of the Contract Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition, or other provision, any course of dealing, or custom of the trade notwithstanding. The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

33.2.2 Custom Does not Constitute Waiver

No act, delay, or omission done, suffered, or permitted by one Party or its agents shall be deemed to waive, exhaust, or impair any right, remedy, or power of such Party under any Contract Document, or to relieve the other Party from the full performance of its obligations under the Contract Documents. No custom or practice between the Parties in the administration of the terms of the Contract Documents shall be construed to waive or lessen the right of a Party to insist upon performance by the other Party in strict compliance with the terms of the Contract Documents.

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33.2.3 Waivers Must be in Writing

No waiver of any term, covenant, or condition of the Contract Documents shall be valid unless in writing and signed by the Party providing the waiver.

33.3 Independent Contractor

Nothing in the Contract Documents shall be construed as constituting any relationship with the Department other than that of Project owner (the Department) and independent contractor (the Progressive Contractor), nor any employer/employee relationship between the Department and the Progressive Contractor's employees. Except as otherwise specified in the Contract Documents, the Progressive Contractor has sole authority and responsibility to employ, discharge, and otherwise control its employees and has complete responsibility as a principal for its agents, for all Subcontractors, and for all other Persons that the Progressive Contractor or any Subcontractor hires or engages to perform or assist in performing the Work. The Contract Documents shall not be construed to create a contractual relationship of any kind between the Department and a Subcontractor or any other Person except the Progressive Contractor.

33.4 Successors and Assigns

The Contract Documents shall be binding upon and inure to the benefit of the Department and its successors and assigns and to the benefit of the Progressive Contractor and its permitted successors, permitted assigns and legal representatives.

33.4.1 Assignment by the Department

The Department may assign all or part of its right, title, and interest in and to this Agreement, including rights with respect to the Surety Bonds and any other performance security provided (including Guaranty/ies]***[NTD: delete if no Guaranty]***, to any Person.

33.4.2 Assignment by the Progressive Contractor; Changes of Control; Change of Organization

Without limiting Section [4.1 (*Compliance with 23 CFR 636.109*)]/[5.5 (*Identified Contractors*)]***[NTD: 4.1 if federal]*** to Section 5.10 (*General Responsibility for Work by Others*), the Progressive Contractor shall not otherwise sublet, transfer, assign, or dispose of any portion of this Agreement, delegate any of its duties hereunder, or suffer a voluntary or involuntary Change of Control, except in each case, with the Department's prior written Approval, in the Department's sole discretion. Except and after any Approval only, any of the foregoing actions shall be null and void ab initio and otherwise ineffective to relieve the Progressive Contractor of its responsibility for the Work assigned or delegated.

The Progressive Contractor shall not change the legal form of its organization in a manner that adversely affects the Department's rights, protections, and remedies under the Contract Documents without the prior written Approval of the Department, in the Department's sole discretion.***[NTD: amend for joint ventures]***

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33.5 Designation of, and Cooperation with Representatives

33.5.1 Designation of Authorized Representatives

Identified below are representatives of the Department and the Progressive Contractor who are authorized to make decisions and bind the parties on matters relating to the Contract Documents. Such designations may be changed by a subsequent written notice delivered to the other Party in accordance with Section 33.9 (*Notices and Communication*). The Parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the construction of the Project and negotiate on behalf of each of the Parties but who do not have authority to bind the Department or the Progressive Contractor.

The "Department Authorized Representative" is:

[●]

[●]

[●]***[NTD: Department to enter name, physical address, and email address for preferred representative]***

The "Progressive Contractor Authorized Representative" is [●].

33.5.2 Department Authorized Representative to Execute Change Orders

Notwithstanding Section 33.5.1 (*Designation of Authorized Representatives*), the only individual person who can execute Preconstruction Phase Change Orders, the Construction Phase Amendment, Pricing Package Amendments, and Construction Phase Change Orders on behalf of the Department is the Department Authorized Representative. Such designation may be changed by a subsequent written notice delivered by the Department to the Progressive Contractor in accordance with Section 33.9 (*Notices and Communication*).

33.6 Indiana State Law Requirements

33.6.1 State Conflicts of Interest Policy

The Progressive Contractor shall comply in all respects with the "Indiana Department of Transportation Consultant Conflict of Interest Policy" set forth in Attachment 1 to Exhibit H (*Department Conflict of Interest Policy*).

33.6.2 State Ethics Law

The Progressive Contractor and its agents shall abide by all ethical requirements that apply to persons who have a business relationship with the Department or the State, as set forth in IC § 4-2-6 et seq., IC § 4-2-7 et seq., the regulations promulgated thereunder and Executive Order 04-08, dated April 27, 2004. If the Progressive Contractor is not familiar with these ethical requirements, the Progressive Contractor should refer any questions to the Indiana State Ethics Commission, or visit the Indiana State Ethics Commission website at http://www.in.gov/ethics/. If the Progressive Contractor or its agents violate any applicable ethical standards, the Progressive Contractor may be subject to penalties under IC §§ 4-2-6, 4-2-7, 35-44-1-3, and under any other applicable Law.

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33.6.3 Assignment of Antitrust Claims

The Progressive Contractor hereby assigns to the Department all right, title and interest in and to any claims the Progressive Contractor now has, or may acquire, under state or federal antitrust laws relating to the Work performed under this Agreement.

33.6.4 Drug-Free Workplace

As required by Executive Order No. 90-5 dated April 12, 1990, issued by the Governor of the State, the Progressive Contractor hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace. The Progressive Contractor will give written notice to the Department within 10 days after receiving actual notice that the Progressive Contractor, or an employee of the Progressive Contractor in the State, has been convicted of a criminal drug violation occurring in the workplace. False certification or violation of this certification may result in sanctions including, but not limited to, suspension of contract payments, termination of this Agreement and/or debarment of contracting opportunities with the Department for up to three years. The Progressive Contractor certifies and agrees that it will provide a drug-free workplace by:

(a) publishing and providing to all of its employees a statement notifying them that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the Progressive Contractor's workplace, and specifying the actions that will be taken against employees for violations of such prohibition;

(b) establishing a drug-free awareness program to inform its employees of (i) the dangers of drug abuse in the workplace; (ii) the Progressive Contractor's policy of maintaining a drug-free workplace; (iii) any available drug counseling, rehabilitation and employee assistance programs; and (iv) the penalties that may be imposed upon an employee for drug abuse violations occurring in the workplace;

(c) notifying all employees in the statement required by subparagraph (a) above that as a condition of continued employment, the employee will (i) abide by the terms of the statement; and (ii) notify the Progressive Contractor of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(d) notifying the Department in writing within 10 days after receiving notice from an employee under subparagraph (c)(ii) above, or otherwise receiving actual notice of such conviction;

(e) within 30 days after receiving notice under subparagraph **(c)(ii)** above of a conviction, imposing the following sanctions or remedial measures on any employee who is convicted of drug abuse violations occurring in the workplace: (i) taking appropriate personnel action against the employee, up to and including termination; or (ii) requiring such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state or local health, law enforcement, or other appropriate agency; and

(f) making a good faith effort to maintain a drug-free workplace through the implementation of subparagraphs (a) through (e) above.

33.6.5 Employment Eligibility Verification

The Progressive Contractor affirms under the penalties of perjury that it does not knowingly employ an unauthorized alien. The Progressive Contractor further agrees that:

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(a) The Progressive Contractor shall enroll in and verify the work eligibility status of all its newly hired employees through the E-Verify program as defined in IC § 22-5-1.7-3. The Progressive Contractor is not required to participate should the E-Verify program cease to exist.

(b) The Progressive Contractor shall not knowingly employ or contract with an unauthorized alien. The Progressive Contractor shall not retain an employee or contract with a person that the Progressive Contractor subsequently learns is an unauthorized alien.

(c) The Progressive Contractor shall require Subcontractors to certify to the Progressive Contractor that the Subcontractor does not knowingly employ or contract with an unauthorized alien and that the Subcontractor has enrolled and is participating in the E-Verify program. The Progressive Contractor agrees to maintain this certification throughout the duration of the term of any Subcontract.

33.6.6 Non-Collusion

To the undersigned's knowledge, neither the undersigned nor any other member, employee, representative, agent or officer of Progressive Contractor, directly or indirectly, has entered into or been offered any sum of money or other consideration for the execution of this Agreement, other than that which appears upon the face hereof. Furthermore, if the undersigned has knowledge that a State officer, employee, or special State appointee, as those terms are defined in IC § 4-2-6-1, has a financial interest in this Agreement, the Progressive Contractor attests to compliance with the disclosure requirements in IC § 4-2-6-10.5.

33.6.7 Penalties, Interest, and Attorney's Fees

Notwithstanding any other provision of this Agreement, the Department does not agree to pay any penalties, liquidated damages, interest, or attorney's fees, except as required by State law in part, IC § 5-17-5, IC § 34-54-8, and IC § 34-13-1. Notwithstanding the provisions contained in IC § 5-17-5, any liability resulting from the Department's failure to make prompt payment shall be based solely on the amount of funding originating from the Department and shall not be based on funding from federal or other sources.

33.6.8 No Investment in Iran

In accordance with IC § 5-22-16.5, the Progressive Contractor represents and warrants that it is not engaged in investment activities in Iran.

33.7 Survival

The Dispute Resolution Procedures; the indemnification provisions contained in Section 27 (*Indemnification*) and elsewhere in the Contract Documents; the Progressive Contractor's obligations post-termination under Section 25.3 (*Progressive Contractor Responsibilities Upon Termination*); the Department's obligation to pay termination compensation, if any; any release or waiver by or on behalf of any Progressive Contractor-Related Entity; the Progressive Contractor's obligations to pay the Department amounts owed hereunder; the Department's rights of offset under Section 26.1 (*Offset; Withholding; Waiver*); the Parties' respective rights and obligations under applicable Law as pertains to this Agreement, the Work, or the Project; the mutual waiver of consequential damages contained in Section 26.4 (*Mutual Waiver of Consequential Damages*); any Department rights with respect to insurance proceeds or claim administration under Section 28 (*Insurance*), the limitation on third party beneficiaries set forth in Section 33.8 (*Limitation on Third Party Beneficiaries*), the audit and inspection requirements set forth under Section 31.2 (*Audit and Inspection Rights*), the retention of records requirements set forth under Section 31.4 (*Retention of Records*), the federal requirements set forth in Section 4 (*Federal Requirements*), the

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generator and arranger status allocation set forth in Section 10.4 (*Generator, Arranger Status – Hazardous Materials*), the assumption of risk provisions set forth in Section 20.4 (*Assumption of Risk*), the Warranty Bond and warranty obligations respectively set forth in Section 29.1.3 (*Warranty Bond; Release of Surety Bonds*) and Section 30 (*Warranties*), and any tax-related obligations under Section 33.10 (*Taxes*), and all other provisions, which by their inherent character should survive termination of this Agreement, shall survive the termination of this Agreement.

33.8 Limitation on Third Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any Third Party beneficiary hereunder, or to authorize any Person not a Party to this Agreement to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the indemnity provisions) expressly identify third persons or parties and state that they are entitled to benefits hereunder. The duties, obligations, and responsibilities of the parties to the Contract Documents with respect to such third persons or parties shall remain as imposed by Law.

33.9 Notices and Communications

Notices and all other communications under the Contract Documents shall be in writing and shall be delivered by e-mail to the Department Authorized Representative identified in Section 33.5.1 (*Designation of Authorized Representatives*).

33.9.1 Delivery of Notices

All correspondence with the Progressive Contractor shall be addressed to the Progressive Contractor Authorized Representative, except as otherwise directed by the Progressive Contractor Authorized Representative.

33.9.2 Receipt of Notices

Notices shall be deemed received at the time and date logged by the e-mail. Notices received after 5:00 p.m. ET shall be deemed received on the first Day (other than Saturday, Sunday, or a Legal Holiday) following delivery.

33.10 Taxes

The Progressive Contractor shall pay, prior to delinquency, all applicable taxes (including all sales taxes) in each case for which the Progressive Contractor is responsible in carrying out the Work and its other obligations hereunder. The Progressive Contractor accepts sole responsibility, and agrees that it shall have no right to a Preconstruction Phase Change Order, Construction Phase Change Order, or to any other Claim, due to its misinterpretation of Laws respecting taxes or incorrect assumptions regarding applicability of taxes. The Department is exempt from state, federal, and local taxes; the Department will not be responsible for any taxes levied on the Progressive Contractor or any other Progressive Contractor-Related Entities as a result of this Agreement.

33.11 No Personal Liability of the Department, its Constituents; No Tort Liability

The Department's Constituents are acting solely as agents and representatives of such respective entities, as applicable, when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable to any Progressive Contractor-Related Entity

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or any of their respective Constituents, either personally or as officers, employees, advisors, consultants, or representatives of the Department for actions in their ordinary course of employment or engagement.

The Parties agree to provide each other with notice of any claim that such Party may receive from any third party relating in any way to the matters addressed in this Agreement, and shall otherwise provide notice in such form and within such period as is required by Law.

33.12 Further Assurances

The Progressive Contractor shall promptly execute and deliver to the Department all such instruments and other documents and assurances as are reasonably requested by the Department to further evidence the obligations of the Progressive Contractor hereunder.

33.13 Construction and Interpretation of the Contract Documents

The language in all parts of the Contract Documents shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Department's final answers to the questions posed during the Proposal preparation processes during the procurement for this Agreement shall not be relevant in interpreting the Contract Documents.

Wherever the word "including," and variants, shall be deemed to be followed by the words "without limitation". Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive. "Or" means the inclusive connotation of "or" (i.e., meaning one, some, or all of a number of possibilities). "May," when used in the context of a power or right exercisable by the Department (or either's designee) means the power to exercise that right or power in its sole discretion, with no obligation to any Progressive Contractor-Related Entity to do so. "May," when used in all other contexts, indicates permission by the Department for the Progressive Contractor to do (or refrain from doing) an action. Unless otherwise indicated, references to sections, appendices or schedules are to this Agreement. Words such as "herein," "hereof" and "hereunder" shall refer to the entire document in which they are contained and not to any particular provision or section. Words in the singular number include the plural number and vice versa. Reference to a right include any benefit, remedy, discretion, authority, or power associated with such right. Words of any gender used herein shall include each other gender where appropriate.

References to a Section is a reference to the Section in the body of this Agreement, Exhibit, Attachment, or other of the Contract Documents in which the reference appears.

References to statutes or regulations (including any orders, by-laws, ordinances, codes of practice, or instruments made under the relevant statute or regulation) include all statutory or regulatory provisions consolidating, amending, extending, or replacing the statute or regulation referred to.

Words not otherwise defined which have well-known technical or construction industry meanings, are used in accordance with such recognized meanings.

References to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions, responsibilities and capacities, and in the case of Persons other than Governmental Persons, such Persons' legal representatives, trustees, executors, and administrators, including any Person taking party by way of novation.

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Reference to an agreement, document, standard, principle, or other instrument includes a reference to that agreement, document, standard, principle, or instrument as amended, supplemented, amended and restated, substituted, novated, or assigned (except where otherwise stated).

All references to time are to prevailing Eastern time.

There shall be no double counting in any calculation of any amount payable by a Party, such that the receiving Party would receive more than owed or payable. All monetary amounts and obligations (including use of the symbol "$") are expressed and payable in U.S. dollars.

The Progressive Contractor acknowledges and agrees that it had the opportunity and obligation, prior to the "Proposal Due Date" under the RFP, to review the terms and conditions of the Contract Documents (including the Reference Information Documents) and to bring to the attention of the Department any conflicts, errors, inconsistencies or ambiguities contained therein. The Progressive Contractor further acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of any such conflicts, errors, inconsistencies or ambiguities in or Dispute regarding the interpretation of the Contract Documents, they shall not be interpreted or construed against the Party that prepared them, and instead other rules of interpretation and construction shall be used. Inconsistent or conflicting provisions of the Contract Documents shall not be treated as erroneous provisions under this Section 33.13, but instead shall be governed by Section 1.4 (*Phases and Order of Precedence*). The Progressive Contractor shall not take advantage of, or benefit from, any apparent or actual error in the Contract Documents. The Progressive Contractor may request in writing an explanation from the Department as to any such apparent or actual error, and if the Department is in error, it shall correct the error. The Progressive Contractor shall accept the explanation, and agrees that a non-material error shall not in itself be the basis for any contractual relief, or other Claim at law or in equity. The fact that the Contract Documents omit or misdescribe any detail of the Work that is otherwise necessary to carry out the intent of the Contract Documents and delivery of the Project, or that are customarily performed, shall not relieve the Progressive Contractor from its obligation to perform such omitted or misdescribed details as if fully and correctly set forth in the Contract Documents, which omissions, correction of misdescriptions, or performance of those aspects customarily performed shall not in itself be the basis for contractual relief, or other Claim at law or in equity.

The Department's interim or final answers to the questions posed during the Proposal process for the Contract Documents shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents.

33.14 Computation of Periods

If the obligation to act or to give notice (including the last date for performance or notice within a specified time period) falls on a non-Business Day, then such act or notice may be timely performed on the next succeeding Business Day. This notwithstanding, requirements relating to actions to be taken in the event of an emergency, requirements under Governmental Approvals, Other Approvals, or Third Party Agreements, and any other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be performed as specified, even though the date may fall on a non-Business Day.

33.15 Severability

If any clause, provision, section, or part of this Agreement is ruled invalid under Section 22 (*Partnering & Disputes*) or otherwise by a court of competent jurisdiction, then the Parties shall:

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(a) promptly meet and negotiate a substitute for such clause, provision, section, or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the applicable Preconstruction Phase Compensation Cap or Pricing Package GMP and Completion Deadline(s); and

(b) if necessary or desirable, apply to the court or other decision maker (as applicable) that declared such invalidity for an interpretation of the invalidated portion to guide the negotiations.

The invalidity or unenforceability of any such clause, provision, section, or part shall not affect the validity or enforceability of the balance of this Agreement, which shall be construed and enforced as if this Agreement did not contain such invalid or unenforceable clause, provision, section, or part.

33.16 Headings

The captions of the sections of the Contract Documents are for convenience only and shall not be deemed part of this Agreement or considered in construing this Agreement.

33.17 Governing Law; Venue

The Contract Documents shall be governed by and construed in accordance with the law of the State. The venue for any legal action in connection with the Agreement shall be the Indiana Commercial Court in Marion County, Indiana, and the Progressive Contractor hereby specifically consents to such jurisdiction.

33.18 Entire Agreement

The Contract Documents contain the entire understanding of the Parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations, and negotiations between the Parties with respect to its subject matter.

33.19 Counterparts and Electronic Signatures

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Signatures may be made and delivered electronically.

33.20 Attestation of Signatory; Authority to Bind Progressive Contractor

The undersigned attests, subject to the penalties for perjury, that the undersigned is the Progressive Contractor, or that the undersigned is the properly authorized representative, agent, member or officer of the Progressive Contractor, has been duly authorized to execute this Agreement on behalf of the Progressive Contractor, and has obtained all necessary or applicable approvals to make this Agreement fully binding upon the Progressive Contractor when his/her signature is affixed and accepted by the Department.

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IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

[Progressive Contractor]***[NTD: insert Progressive Contractor legal name]***

_____
Name:
Title:
Date:_____

STATE OF INDIANA

Indiana Department of Transportation
Recommended for approval by:

_____
[___]
Contract Administration

Date: _____

Executed By:

Approved as to Form and Legality:

_____(For)
[___]
Attorney General of Indiana

_____(For)
[___]
Indiana Department of Transportation
Date: _____

Date Approved: _____

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Exhibit A

DEFINITIONS AND SUBMITTALS

As used in the Contract Documents (unless otherwise specified therein), the following acronyms and abbreviations shall have the meanings set forth below.

As used in the Contract Documents (unless otherwise specified therein), the following terms shall have the meanings set forth below. This notwithstanding, unless otherwise defined below, words that have well-known engineering, technical or construction industry meanings are used in this Agreement or the other Contract Documents in accordance with such recognized meaning.

Definitions	
Term	**Meaning**
[NTD: insert all Key Personnel titles with the definition to the right, interspersed in alphabetical order]	The individual person identified as such in Exhibit C (*Progressive Contractor Team*), subject to revision in accordance with the Contract Documents.
"Acceleration Costs".	Those fully documented increased costs reasonably incurred by the Progressive Contractor (i.e., costs over and above what the Progressive Contractor would otherwise have incurred), which are directly attributable to increasing the performance level of the Work in an attempt to complete necessary activities of the Work earlier than otherwise anticipated, such as for additional equipment, additional crews, lost productivity, overtime and shift premiums, increased supervision, and any unexpected movement of materials, equipment, or crews necessary for resequencing in connection with acceleration efforts.
"Actual Cost"	The Progressive Contractor's actual, reasonable, substantiated, direct cost to provide labor, material, equipment (owned or invoiced rental), and administrative overhead necessary for the Work; excluding profit.
"Affiliate"	1. Any Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the Progressive Contractor, Lead Contractor, Lead Designer, or a Key Personnel Firm; or 2. Any Person for which 10 percent or more of the equity interest in such Person is held directly or indirectly, beneficially or of record by any Affiliate under part (1) of this definition.

Definitions	
Term	**Meaning**
	For purposes of this definition, the term "control" means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, by family relationship, or otherwise.
"Agreement"	The meaning set forth in the Recitals.
"Agreement Amendments"	All of, any of, or any combination of the Construction Phase Amendment and Pricing Package Amendment(s).
"Application for Final Payment"	The application described in Section 19.4.1 (*Application for Final Payment*).
"Approve" or "Approval" (and their variants)	Means approved or approval in accordance with Section 3.2 (*Standards for Approvals*).
"Authorized Representative"	The Progressive Contractor Authorized Representative or the Department Authorized Representative, as the context may require.
"Baseline Pricing Package Schedule"	The initial Approved schedule included in a Pricing Package Amendment. A "Baseline Pricing Package Schedule" generally is a "cost-loaded", Critical Path Method schedule incorporating activities for Work as well as for Provisional Risks (up to the Provisional Sums). References to the "Baseline Pricing Package Schedule" include the Revised Baseline Pricing Package Schedule, if thereafter applicable, unless expressly stated otherwise. Each Pricing Package Amendment has an independent Baseline Pricing Package Schedule.
"Betterment"	As related to Utilities, a Betterment is Utility Work which constitutes upgrading of the adjusted or relocated Utility facility or additional Utility Work that is not required by the Project and is made solely for the Utility Owner's benefit and election or solely for the Progressive Contractor's benefit and election; however, a betterment does not include an addition or improvement that: 1. consists of replacement devices or materials that meet standards equivalent to what is being replaced; 2. consists of replacement devices or materials that are no longer manufactured; 3. is required to comply with existing government codes; or 4. is required by Utility Owner's current design practices and provides a direct benefit to the Project.

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Definitions	
Term	**Meaning**
	As related to Third Parties, other than Utilities, a Betterment is generally defined as an upgrading of the Third Party's facility or additional work that is not required by the Project and is made solely for the Third Party's benefit.
"Buildable Unit"	A specified portion of the Project that may be designed, reviewed, and built with only limited controls and assumptions coming from the design of other portions of the Project.
"Buildable Unit Submittal"	The meaning set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Business Day"	Any day excluding Saturday, Sunday, and Legal Holidays.
"CAP Report"	A report that documents all promises and commitments made to stakeholders and the general public. The report includes a description of the promise, to whom the promise was made, the source of the promise, the date the promise was made, and the location of the work or activities to fulfill the promise.
"Certificate of Final Acceptance"	The meaning set forth in Section 17.3 (*Certificate of Final Acceptance of the Project*).
"Change in Law"	Any Law in effect at the time a Pricing Package Amendment is executed that is subsequently changed, altered, modified, or canceled that would materially affect the Progressive Contractor's rights or obligations pursuant to the Contract Documents.
"Change of Control"	***[NTD: amend for JV participants]*** Any assignment, sale, financing, grant of security interest, transfer of interest, or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation, or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of the Progressive Contractor or a material aspect of its business. A change in the power to direct, control, or cause the direction or control of the management of any member, partner, or shareholder of the Progressive Contractor may constitute a Change of Control of the Progressive Contractor if such member possesses the power to direct or control or cause the direction or control of the management of the Progressive Contractor. Notwithstanding the foregoing, the following shall not constitute a Change of Control:

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Definitions	
Term	**Meaning**
	1. a change in possession of the power to direct or control the management of the Progressive Contractor or a material aspect of its business due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including such transactions involving an initial public offering; 2. a change in possession of the power to direct or control the management of the Progressive Contractor or a material aspect of its business due solely to a bona fide transaction involving securities or beneficial interests in the ultimate parent organization of a member of the Progressive Contractor (but not if the member is the ultimate parent organization), unless the transferee in such transaction is at the time of the transaction suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any federal or State department or agency; 3. an upstream reorganization or transfer of direct or indirect interests in the Progressive Contractor so long as there occurs no change in the Person with ultimate power to direct or control or cause the direction or control of the management of the Progressive Contractor; 4. a transfer of equity interests in the Progressive Contractor, where the transferring equity member and the transferee are under the same ultimate parent organization ownership, management, and control before and after the transfer; or 5. the exercise of minority veto or voting rights (whether provided by applicable Law, by the Progressive Contractor's organizational documents, or by related member or shareholder agreements or similar agreements) over major business decisions of the Progressive Contractor. For purposes of this definition, a Person shall be deemed to own shares or membership interests in another Person if such Person owns the legal, beneficial, and equitable interest in their relevant shares or membership interest of the other Person.
"Claim"	A request by the Progressive Contractor for a time extension disputed by the Department, or payment of money or damages arising from work done by or on behalf of the Progressive Contractor in connection with the Agreement that is disputed by the Department. A Claim will cease to be a Claim upon resolution thereof, including resolution by execution and delivery by the Parties of a Preconstruction Phase Change Order, a Construction Phase Change Order, or Construction Phase Amendment.

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Definitions	
Term	**Meaning**
"Completion Deadline(s)"	The Project Completion Deadline(s), the Final Acceptance Deadline, and any other deadline(s) for completion of any milestone(s) (if any) identified within a Pricing Package Amendment as a "Completion Deadline".
"Constituent"	means, with respect to any entity or group of entities, any or all of its members, managers, officers, directors, share/stockholders, commissioners and officeholders (public Persons only), partners, employees, agents, representatives, consultants, attorneys, contractors, successors, and assigns.
"Construction Phase"	The Project phase beginning upon the execution of the Construction Phase Amendment and expiring upon Final Acceptance of all Pricing Packages, during which all Construction Work will be completed.
"Construction Phase Amendment"	An amendment to this Agreement establishing the commencement of the Construction Phase and satisfying the requirements set forth in Section 2.2.1 (*Construction Phase Amendment*).
"Construction Phase Change Order"	A written amendment to certain terms and conditions of the Contract Documents issued in accordance with Section 21 (*Construction Phase Change Orders*).
"Construction Phase Quality Management Plan"	A document related to Progressive Contractor Quality Assurance and Progressive Contractor Quality Control for Construction Phase Work.
"Construction Phase Requirements"	The "Construction Phase Requirements" or similarly-named exhibit appended to the Construction Phase Amendment, together with the documents developed during or after the Preconstruction Phase. The "Construction Phase Requirements" may also mean the Construction Phase Requirements or similarly-named exhibit appended to each Pricing Package Amendment, which, in which case, govern the Progressive Contractor obligations, duties, and responsibilities during the Construction Phase with respect to the scope of the Work set forth in a Pricing Package Amendment. The "Construction Phase Requirements" generally are the requirements that govern continuing design and construction of the Project during the Construction Phase (and specifically as relates to each Pricing Package).

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Definitions	
Term	**Meaning**
	[NTD: include INDOT form CPRs of "general application" to PDB projects in Construction Phase Amendment; project-specific CPRs should be included in Pricing Package Amendments.]
"Construction Work"	All Work other than Preconstruction Work.
"Contract Documents"	Means the Agreement and all Exhibits, amendments (including all Agreement Amendments), Preconstruction Phase Change Orders, and Construction Phase Change Orders, whether existing initially or created during the Parties' performance of the Agreement. For avoidance of doubt, for Pricing Package Amendments, the appended Risk Register shall be a Contract Document.
"Contract Price"	The total sum of money to be paid to the Progressive Contractor under this Agreement.
"Cost Reconciliation Meeting"	The meeting identified in Exhibit B (*Preconstruction Phase Requirements*).
"Critical Path"	The sequence of Baseline Pricing Package Schedule activities that determine the total minimum duration of the Pricing Package; the precedence of which activities have a total Float of less than or equal to zero. Generally, the Critical Path is the sequence of Baseline Pricing Package Schedule activities that must be completed on schedule for the Project to be completed on time in accordance with the Completion Deadlines. This is the longest duration path (or chain), in terms of time, of logically connected Construction Work activities on the Baseline Pricing Package Schedule, updated in accordance with the Agreement and, where relevant to time impact analyses, statused based upon Construction Work completed, corrected for any improper logic, improper activity durations, and errors.
"Critical Path Method" or "**CPM**"	A scheduling method that utilizes the Precedence Diagram Method to calculate each activity's early dates, late dates, Float values, and establishes the Critical Path through the activity network.
"Day" or "day"	Each and every day shown on the calendar, beginning at 12:01 a.m. and ending at midnight.

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Definitions	
Term	**Meaning**
"DBE Performance Requirements"	The meaning set forth in Section 4.2.1 (*DBE General Requirements*).
"Department"	The meaning set forth in the Recitals.
"Department Authorized Representative"	The party designated as such in Section 33.5.1 (*Designation of Authorized Representatives*), as may be changed from time to time in accordance with the requirements thereof.
"Department-Caused Delay"	Any of the following events, or the cumulative effect of any such delays as set forth below, that directly affects both the Critical Path and a Completion Deadline (as of the date of the event), arising from any of the following matters and no other: 1. a Department-Directed Change; 2. failure of the Department to obtain (but not to maintain) any Department-Provided Governmental Approval or Department-Provided Other Approval; 3. re-evaluation, modification, or supplement to any Department-Provided Governmental Approval issued by the Department acting in its capacity as a Governmental Person, where such re-evaluation, modification, or supplement is not caused by any Progressive Contractor-Related Entity; 4. failure of the Department to provide a response to a complete, compliant Progressive Contractor submittal within the time period committed under Exhibit B (*Preconstruction Phase Requirements*); 5. the occurrence of a Department release of Hazardous Materials; 6. any material damage to the Project directly caused by the Department that requires additional Construction Work; or 7. any other event that the Contract Documents expressly state shall be treated as a Department-Caused Delay; provided that the Progressive Contractor has used commercially reasonable efforts to mitigate the subject Department-Caused Delay; provided, further, that the exercise of any right of the Department hereunder, at law, or in equity is not, nor shall be construed to be, a Department-Caused Delay; and provided, further, that any provision that expressly states that such event or circumstance does not constitute a Department-Caused Delay (or a Department-Directed Change, as relates to this definition of Department-Caused Delay), is not, nor shall be construed to be, a Department-Caused Delay,

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Definitions	
Term	**Meaning**
	provided, however, that in each case each such occurrence or event (or the effects of such occurrence or event) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by any Progressive Contractor-Related Entity. The Department shall not take into account Float in calculating the duration of such Department-Caused Delay.
"Department-Directed Changes"	Any changes in the Work (including changes in the standards applicable to the Work) that the Department has directed the Progressive Contractor to perform as described in Section 21 (*Construction Phase Change Orders*), excepting: 1. any provision that expressly states that such event or circumstances does not constitute a Department-Directed Change; 2. those directives or prerogatives expressly reserved to the Department; and 3. exercise of any right of the Department, in either case, hereunder, at law, or in equity.
"Department-Provided Governmental Approval"	The following Governmental Approvals: 1. NEPA approval (including subject to Section 10.1.4 (*NEPA Modifications*)) any NEPA Modifications); and 2. [_____],***[NTD: to be completed on a Project-specific basis]*** and any other Governmental Approvals that the Parties during the Preconstruction Phase mutually determine shall be obtained by the Department.
"Department-Provided Other Approval"	The following Other Approvals: 1. [_____],***[NTD: to be completed on a Project-specific basis]*** and any other Approvals that the Parties during the Preconstruction Phase mutually determine shall be obtained by the Department.
"Department-Related Entities"	The Department, and all other Persons for whom the Department may be legally or contractually responsible, and each of their Constituents; provided, however, that the Progressive Contractor, when acting under or relating to the Work, shall not be considered (a) "Department-Related Entity/ies".
"Department Risk"	A risk identified as a Department Risk on the Risk Register described in Section 2.4.1 (*Department Risks*).
"Design Documents"	All drawings, specifications, studies, designs, "architectural work" (as such term is defined in the Architectural Works Copyright Protection Act of 1990), reports,

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Definitions	
Term	**Meaning**
	calculations, and records, at any stage of development or revision necessary for design of the Project in accordance with the Contract Documents, including electronic files thereof.
"Design Executive Summary"	A record of engineering decisions related to the Project.
"Design Quality Assurance Manager" or "DQAM"	The person identified by the Progressive Contractor responsible for performance of Progressive Contractor Quality Assurance services, as set forth in the Approved Preconstruction Phase Quality Management Plan.
"Differing Site Conditions"	Subsurface or latent conditions encountered at the Site that differ materially from the information provided in the work product resulting from the Preconstruction Work for such locations; or physical conditions of an unusual nature, differing materially from those ordinarily encountered in the area and generally recognized as inherent in the type of work provided for work product resulting from the Preconstruction Work. The term shall specifically exclude the following: 1. all such conditions of which the Progressive Contractor had, or should have had, actual or constructive knowledge as of the effective date of the Construction Phase Amendment; 2. conditions that could have been discovered by reasonable investigation prior to the effective date of the Construction Phase Amendment; 3. Utility facilities and all conditions arising out of, relating to, or resulting from Utility Work; 4. non-contaminated water; 5. variations in soil moisture content or groundwater levels from that indicated in the work product resulting from the Preconstruction Work; 6. hazardous substances; 7. Force Majeure Events, including conditions caused by Force Majeure Events; and 8. any other such site conditions that would otherwise qualify for other relief expressly stated, under the terms, and subject to the conditions, of the Agreement.

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Definitions	
Term	**Meaning**
"Disadvantaged Business Enterprise"	The meaning set forth in Section 2 of Exhibit L *(INDOT DBE Requirements)*.
"Dispute"	Any disagreement between the Department and the Progressive Contractor arising out of or relating to the Contract Documents, the Work, or the Project. "Disputes" exclude, and the Dispute Resolution Procedures shall not apply to: 1. claims that are not actionable against the Department by the Progressive Contractor; 2. claims arising in tort; 3. claims relating to the scope or applicability of indemnities provided under the Contract Documents; 4. claims for injunctive relief; 5. claims against insurance companies; 6. claims which relate to a Utility Agreement or Utility Work; 7. claims premised upon the Department's exercise of sole discretion, when permitted hereunder; or 8. claims premised upon the Department's exercise of rights expressly reserved to it hereunder.
"Dispute Resolution Procedures"	The procedures set forth in Exhibit J, Section 2 (*Dispute Resolution Procedures*).
"Effective Date"	The date of execution of the Agreement by the Department.
"Electronic Document Management System" or "EDMS"	The [_____] electronic document management system provided or identified by the Department to be utilized in connection with the Project.***[NTD: INDOT to prescribe prior to letting]***
"Eligible Surety"	A Surety licensed in the State and listed on the U.S. Department of the Treasury's "Listing and Approved Sureties" (found at https://www.fiscal.treasury.gov/surety-bonds/list-certifiedcompanies.html, as such website or list may be updated from time to time), rated "A" or higher by at least two nationally-recognized rating agencies (Fitch Ratings, Moody's Investor Service and Standard & Poor's Ratings Services)

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Definitions	
Term	**Meaning**
	or rated at least "A-/VII" or higher according to A.M. Best's Financial Strength Rating and Financial Size.
"Federal Requirements"	All Laws applicable to work financed with federal funds and the provisions required to be included in FHWA-assisted contracts, including the provisions set forth in Exhibit G (*Federal Requirements*).
"Final Acceptance"	Acceptance of the Project as described in Section 17.4 (*Department Issued Notice of Final Acceptance*).
"Final Acceptance Deadline"	The date specified in the Construction Phase Amendment (or final Pricing Package Amendment if more than one Pricing Package Amendment is utilized), as may be adjusted under the terms, and subject to the conditions, of Agreement.
"Final Design Documents"	Plans and other documents that meet requirements set forth in the definition of RFC Documents and Exhibit B, Section 1.4 (*Design Submittals & Milestones*), stamped, where applicable, by the engineer of record in accordance with IC § 25-4-1-13.
"Final Payment"	The amount of the final negotiated Application for Final Payment.
"Final Pricing Package Plan"	The meaning set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Float"	The amount of time that any given activity or logically connected sequence of activities shown on a Baseline Pricing Package Schedule may be delayed before it will affect completion of any Work as required to achieve any Completion Deadline. "Float" generally means the calculated difference between early completion times and late completion times for activities shown on a Baseline Pricing Package Schedule, including any float contained within an activity.
"Force Majeure Event"	Any of the following acts, events, conditions, or occurrences to the extent that the same are beyond the Progressive Contractor's reasonable control, which could not have been avoided by the exercise of due diligence, and which has an adverse effect on the Progressive Contractor's ability to perform its obligations hereunder: 1. Fire (that causes direct physical damage to the Project); 2. Earthquakes 4.0 or higher on the Richter scale and with an epicenter within 100 miles of the Project (that causes direct physical damage to the Project); 3. Tornados classified as EF-2 or greater on the Enhanced Fujita Scale by the National Weather Service (that causes direct physical damage to the Project);

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Definitions	
Term	**Meaning**
	4. A local, state, or federally mandated quarantine restriction occurring within the Site; 5. War, whether foreign or domestic; 6. Acts of terrorists or other public enemies; 7. National or statewide (i.e., Indiana-wide) work stoppages, work slowdowns, strikes, labor disputes, or other labor disruptions, that in each case has a direct, material, and adverse impact on the Progressive Contractor's ability to staff the Work and to perform the Progressive Contractor's express obligations under the Agreement or to obtain materials, equipment or labor for the Project, unless in any case, caused by or otherwise under the control or influence of the Progressive Contractor occurring within the vicinity of the Project; and 8. A blockade or freight embargos.
"Good Industry Practice"	The exercise of the degree of skill, diligence, prudence, and foresight which would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, surveyor, constructor, supplier, or other contractor that (a) is engaged in the same type of undertaking under circumstances and conditions similar to those within the same geographic areas as the Project, and (b) seeks in good faith to comply with its contractual obligations, in conformance with (i) all professional engineering principles and construction practices generally accepted as standards of the industry in the State, and (ii) applicable Law and Governmental Approvals.
"Governmental Approval"	Any approval, authorization, certification, consent, decision, exemption, filing, lease, license, permit, agreement, concession, grant, franchise, registration or ruling, required by or with any Governmental Person in order to design and construct the Project. "Governmental Approvals" include "Department-Provided Governmental Approvals" and "NEPA Modifications". "Governmental Approval" does not include Other Approvals.
"Governmental Person"	Any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public, or statutory instrumentality, administrative agency, authority, body, or entity. The term includes the State and agencies, and subdivisions thereof, other than the Department, except where the Department is acting in its regulatory, policy, or statutory capacity of the State, and not exclusively as counterparty under this Agreement.

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Definitions	
Term	**Meaning**
"Guaranteed Maximum Price"	The maximum amount of compensation due for either a Pricing Package or the Total Contraction of the Project (i.e., the sum of the value of all Pricing Packages).
"Guarantor"	The Person obligated under the Guaranty to the Department.
"Guaranty"	The meaning set forth in Section 29.2 (*Guaranties*).
"Hazardous Materials"	Any of the following: 1. substance, product, waste, or other material of any nature whatsoever which is or becomes listed, regulated, or addressed pursuant to any federal, state, or local statute, law, ordinance, resolution, code, rule, regulation, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning any hazardous, toxic, or dangerous waste, substance, or material, as now or at any time hereafter in effect; 2. any substance, product, waste, or other material of any nature whatsoever which may give rise to liability under any of the above statutes or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, or strict liability or under any reported decisions of a state or federal court; 3. petroleum or crude oil excluding *de minimis* amounts and excluding petroleum and petroleum products contained within regularly operated motor vehicles; 4. asbestos or asbestos-containing materials in structures and or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground); and 5. lead or lead-containing materials in structures and/or other improvements on or in the Site.
"Hazardous Materials Report"	The Hazardous Materials initial site assessment produced as part of the Preconstruction Work.
"Identified Contractor"	The [Lead Contractor]***[NTD: If the Progressive Contractor is a special purpose entity (SPE)]***, Lead Designer, Key Personnel Firms, and any Subcontractor identified in the Proposal, each as identified in Exhibit C (*Progressive Contractor Team*).

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Definitions	
Term	**Meaning**
"Incident Management Plan"	A plan developed prior to any physical presence by the Progressive Contractor on the Project that addresses the Progressive Contractor's procedures and actions when an emergency occurs within or adjacent to the Site.
"Indemnified Parties"	The meaning set forth in Section 27.1 (*Indemnifications by Progressive Contractor*).
"Independent Cost Estimator"	The Person identified by the Department to perform independent cost estimation services.
"Informal Resolution Procedures"	The meaning set forth in Exhibit J, Section 2.3.1(a) (*Notice of Dispute to Designated Agent*).
"Intellectual Property"	All current and future legal and/or equitable rights and interests in know-how (including trade secrets and confidential business information that have been recorded in or on any media), patents (including applications), copyrights (including moral rights), trademarks (registered and unregistered), service marks, trade names, trade dress, trade secrets, trade secret rights, designs (registered and unregistered), other design rights, logos, utility models, circuit layouts, plant varieties, database rights, business and domain names (including fictitious business names), inventions (patentable or not), solutions embodied in technology, other intellectual activity, other proprietary information, all analogous rights in other jurisdictions and applications (drafted or pending) of or for any of the foregoing, subsisting in or relating to the Work, the Project, Project design data or other Project data (including testing data, traffic data and Project Data). "Intellectual Property" includes software used in connection with the Project (including software used for management of traffic on the Project), and Source Code and Source Code Documentation. Intellectual Property is distinguished from submittals, notices, and all such materials generated from the physical construction and from the equipment itself, all data, sketches, charts, calculations, drawings, layouts, plans, depictions, specifications, manuals, electronic files, artwork, records, reports, analyses, studies, correspondence, and other documents and materials created or collected under the terms of, or otherwise under the Contract Documents, and other work product and other related materials that disclose Intellectual Property.
"Intellectual Property Rights"	All patents, copyrights, trademarks, service marks, trade secrets and all similar and related intellectual property rights protected under any Law.

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Definitions	
Term	**Meaning**
"Interest Rate"	The lesser of (a) 10% per annum, or (b) the maximum rate allowable under applicable Law (i.e., the maximum non-usurious interest rate permitted by State law).
"Items of Archeological or Biological Significance"	Any (a) human remains, (b) artifacts, and/or other items of historical, archaeological, paleontological, or geological significance, or (c) any species listed by the United States Fish and Wildlife Service as threatened or endangered pursuant to the Endangered Species Act, as amended, 16 U.S.C. §§ 1531, *et seq.*, in each case to the extent that the existence of such item was not disclosed in any of the reports produced as part of the Preconstruction Work, or provided by, or on behalf of, the Department.
"Key Personnel"	The individual persons identified on Exhibit C (*Progressive Contractor Team*), subject to revision in accordance with the Contract Documents.
"Key Personnel Firm"	Each Person (excluding the Lead Contractor, Lead Designer, and the Progressive Contractor) that employs or contracts with, as relates to the Project, any Key Personnel. If any Key Personnel is self-employed, then such Key Personnel shall also be deemed a Key Personnel Firm.
"Key Personnel Liquidated Damages"	The charges described in Section 14.2.2 (*Key Personnel Liquidated Damages*).
"Laws"	All applicable federal, state, and local laws, codes, ordinances, rules, regulations, judgments, executive orders, decrees, permits, (excluding Governmental Approvals), concessions, grants, franchises, licenses, agreement, directives, guidelines, policy requirements, governmental restrictions or constraints, orders, and decrees, or any similar form(s) of decision or determination by, or any interpretation or administration of, any of the foregoing, by or of any Governmental Person having jurisdiction over the Project or Site, the practices involved in the Project or Site, any Work, or any Utility Work being performed by a Utility Owner, whether now or hereafter in effect. The term "Laws" includes all consolidations, amendments, extension, or replacements, unless otherwise indicated.
"Lead Contractor"	The entity identified in Exhibit C (*Progressive Contractor Team*), subject to revision in accordance with the Contract Documents.
"Lead Designer"	The entity identified in Exhibit C (*Progressive Contractor Team*), subject to revision in accordance with the Contract Documents.
"Legal Holiday"	New Year's Day, Martin Luther King Day, Lincoln's Birthday, Washington's Birthday, Good Friday, Primary Election Day, Memorial Day, Independence Day,

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Definitions	
Term	**Meaning**
	Labor Day, Columbus Day, Election Day, Veteran's Day, Thanksgiving Day, Friday after Thanksgiving Day, Christmas Day; provided, however, that if any such holiday falls on (a) a Sunday, the following Monday shall be considered a Holiday; and (b) a Saturday, the preceding Friday shall be considered a Holiday.
"Lien"	Any pledge, lien, security interest, mortgage, deed of trust, or other charge or encumbrance or attempt to make such an encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing), any conditional sale or other title retention agreement, any lease in the nature of a security instrument, and the filing of or agreement to file any financing statement or other instrument intended to perfect a security interest.
"Liquidated Damages"	The charges described in Section 14.2.1 (*Completion, Other Incident Liquidated Damages*).
"Monthly Schedule Update"	A monthly schedule submittal provided by the Progressive Contractor after a Baseline Pricing Package Schedule is Approved, generally describing and demonstrating progress in the Construction Work since the last Monthly Schedule Update (or for the first, since the Approved Baseline Pricing Package Schedule).
"NEPA Modification"	Any of the following: 1. A new Governmental Approval required pursuant to a reevaluation of some or all of the NEPA environmental documents and environmental decision documents; and 2. A renewal, revision, modification, or amendment to one or more of the Governmental Approvals identified as required within the NEPA environmental documents and environmental decision documents.
"Nonconforming Work"	Work performed that does not meet the requirements of the Contract Documents.
"Notice of Contract Termination"	A notice issued by the Department to terminate the Agreement.
"Notice of Final Acceptance"	The notice delivered to the Progressive Contractor under Section 17.4 (*Department Issued Notice of Final Acceptance*) stating that final Department acceptance of the Project has occurred.

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Definitions	
Term	**Meaning**
"Notice of Project Completion of the Pricing Package"	The notice delivered to the Progressive Contractor under Section 17.2 (*Department Issued Notice of Project Completion for a Pricing Package*) stating that Project Completion of the Pricing Package has occurred.
"Open Book Basis"	The Department's review and access rights described under Section 2.2.2.1 (*Pricing Package GMPs*).
"Other Approval"	Any permit, license, consent, authorization, approval or similar document issued to the Progressive Contractor or a Department-Related Entity by, or agreement entered into between the Progressive Contractor or a Department-Related Entity and any Governmental Entity, Utility Owner, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or Work, or having any property interested affected by the Project or Work that is not a Governmental Approval. Other Approvals include "Department-Provided Other Approvals".
"Owner Intellectual Property"	The meaning set forth in Section 31.6.2 (*Intellectual Property*).
"Party" or "Parties" (whether capitalized, as context may require)	The Department or the Progressive Contractor, as context may require. The "Parties" are both the Department and the Progressive Contractor and no other Person.
"Person"	Any individual, corporation, company, voluntary association, partnership, trust, unincorporated organization, or Governmental Person, including the Department.
"Preconstruction Phase"	The Project phase commencing upon execution of this Agreement and expiring upon execution of the last Pricing Package Amendment, during which the Preconstruction Work will be performed.
"Preconstruction Phase Change Order"	An amendment to the Agreement evidencing a change to the Preconstruction Phase Compensation Cap, extending the duration of the Preconstruction Phase, or modification to Exhibit B (*Preconstruction Phase Requirements*).

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Definitions	
Term	**Meaning**
"Preconstruction Phase Compensation"	The meaning set forth in Section 19.1 (*Preconstruction Phase Compensation*).
"Preconstruction Phase Compensation Cap"	The maximum amount payable by the Department for Preconstruction Work as set forth in Exhibit E (*Preconstruction Phase Scope and Compensation Cap*), as may be modified by Preconstruction Phase Change Order.
"Preconstruction Phase Quality Management Plan"	The meaning set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Preconstruction Phase Schedule Coordination Plan"	The meaning set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Preconstruction Work"	All Work necessary in connection with the preparation and finalization of the Construction Phase Amendment or any Pricing Package Amendment, including any such work described in any Preconstruction Phase Change Order. For clarity, the Preconstruction Work shall not include any Construction Work authorized by a Pricing Package Amendment.
"Preliminary Buildable Unit Submittal"	The meaning set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Preliminary Pricing Package Plan"	The meaning set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Price Facilitator"	The Department or the Department's representative that will receive and review the PMEs submitted by the Progressive Contractor and the ICE in accordance with the process described in Exhibit B, Section 6 (*Cost Estimating*).
"Pricing Milestone Estimate" or "PME"	An estimate of the Project's Total Construction Cost developed at various design milestones utilizing the cost estimating principles identified in Exhibit B, Section 6 (*Cost Estimating*).

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Definitions	
Term	**Meaning**
"Pricing Package"	The meaning set forth in Section 2.2.2 (*Pricing Package Amendments*).
"Pricing Package Amendment"	An amendment establishing the commencement of a Pricing Package and satisfying the requirements set forth in Section 2.2.2 (*Pricing Package Amendments*) and Exhibit B, Section 11 (*Pricing Package Amendments*).
"Pricing Package GMP"	The maximum amount of compensation payable by the Department under any Pricing Package Amendment.
"Progress Report"	A report on progress of the Construction Work (based on the completion of Project Schedule activities and the values distributed to such activities in the Approved Schedule of Values) in form and substance as set forth in the Construction Phase Amendment or Pricing Package Amendment.
"Progressive Contractor"	The meaning set forth in the Recitals.
"Progressive Contractor Authorized Representative"	The party designated as such in Section 33.5.1 (*Designation of Authorized Representatives*), as may be changed from time to time in accordance with the requirements thereof.
"Progressive Contractor Default"	Means any of the events described in Section 24.1.1 (*Breaches; Progressive Contractor Defaults*), following notice and opportunity to cure to the extent permitted by Section 24.1.2 (*Right to Cure*) and issuance by the Department of notice that a Progressive Contractor Default has occurred.
"Progressive Contractor's Fee"	The fee the Progressive Contractor is entitled to for administering the Construction Work which includes overhead, profit margins (which includes management labor above project manager level, audited home office overhead rates, and profit margins) as agreed to by the Parties during the initial approach to construction cost development meeting described in Exhibit B, Section 6.2 (*Initial Approach to Construction Cost Development*).
"Progressive Contractor Quality Assurance"	All planned and systematic actions by the Progressive Contractor necessary to provide confidence and to certify to the Department that all Work complies with the requirements of the Contract Documents.

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Definitions	
Term	**Meaning**
"Progressive Contractor Quality Control"	The activities performed by the Progressive Contractor, designer, producer, or manufacturer to ensure and document that a product meets the requirements of the Contract Documents.
"Progressive Contractor-Related Entities"	The Progressive Contractor, the Lead Contractor, Lead Designer, each Key Personnel Firm, Subcontractors, and all other Persons for whom Progressive Contractor may be legally or contractually responsible, and each of their Constituents; provided, however, that no Department-Related Entity, acting in relation to the Work, shall be considered a Progressive Contractor-Related Entity.
"Progressive Contractor Risk Contingency Sum"	A fixed sum for a specific line item of Work that may be included as a contingency amount in a Pricing Package GMP upon agreement by the Progressive Contractor and the Department. Progressive Contractor Risk Contingency Sums may be used at the Department's discretion to allow the Progressive Contractor to utilize contingency sums for Pricing Packages. Where agreed as reflected in the Risk Register, Progressive Contractor Risk Contingency Sum may include a designation of unit pricing and the estimated number of units making up the Progressive Contractor Risk Contingency Sums.
"Project"	The meaning set forth in the Recitals.
"Project Completion Deadline"	The deadline for any Project Completion of a Pricing Package identified within the applicable Pricing Package Amendment.
"Project Completion of a Pricing Package"	Achievement of all Work with respect to a Pricing Package as described in Section 17.1 (*Project Completion of a Pricing Package*).
"Project Management Plan"	A document required by 23 U.S.C. 106(h) that identifies the procedures and processes that are in effect to provide timely information to the Project decision makers to effectively manage the scope, costs, schedules, and quality of, and the Federal Laws applicable to, the project; and the role of the Department and Progressive Contractor in delivering the Project.
"Project Schedule"	A general schedule of tasks, milestones, and deadlines used to manage progression of the Project. As context may require, "Project Schedule" may also refer to the Preconstruction Phase Schedule and the Baseline Pricing Package Schedule, as relates to each Pricing Package.

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Definitions	
Term	**Meaning**
"Proposal"	Those documents constituting the Progressive Contractor's proposal in response to the RFP, including any supplements to proposals as may have been requested by the Department.
"Proprietary Intellectual Property"	Intellectual Property created, used, applied, or reduced to practice in connection with the Project or the Work that derives commercial value from its protection as a trade secret under applicable Law or from its protection under patent or copyright Laws.
"Provisional Risk"	A risk identified as a Provisional Risk in the Risk Register.
"Provisional Sum"	A fixed sum for a specific line item of Work that is included as an allowance amount in a Pricing Package GMP upon agreement by the Progressive Contractor and the Department. Provisional Sums may be used in instances when the actual price or quantity for such item of work is unknown at the time of agreement on a Pricing Package GMP. Where agreed as reflected in the Risk Register, Provisional Sums may include a designation of unit pricing and the estimated number of units making up the Provisional Sums.
"Public Records Act"	IC § 5-14-3, as amended from time to time.
"Punch List"	The list of Work items with respect to the Project that remain to be completed after achievement of Project Completion of a Pricing Package, generally limited to minor incidental items of Work necessary to correct imperfections that have no adverse effect on the safety or operability of the Project and will not require lane closures to complete.
"Record Drawings"	Documents that depict the final completed Project, all changes from RFC Documents, and all other relevant data, including any operations and maintenance manuals for mechanical and electrical systems.
"Reference Information Documents" or "RIDs"	The collection of information, data, documents, and other materials that the Department has provided to the Progressive Contractor, while a proposer during the procurement for the Agreement, for general or reference information only.
"Released for Construction Documents" or	With respect to any Pricing Package, all drawings, specifications, updated quantities, revisions, and any other items necessary to construct the Construction Work and meeting the requirements of Exhibit B, Section 1.4 (*Design Submittals & Milestones*), stamped by the engineer of record in accordance with IC § 25-4-1-13.

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Definitions	
Term	**Meaning**
"RFC Documents"	
"Relief Event"	The meaning set forth in Section 20.1.1 (*Relief Event Defined*).
"Relief Event Notice"	The meaning set forth in Section 20.2.1 (*Relief Event Notice*).
"Relocation" or "Relocate" and their variants	As related to Utilities, each Removal, transfer of location, abandonment, and/or protection of existing Utilities as necessary to ensure their continued safe operation and structural integrity (including provision of temporary services as necessary) of any and all Utilities that is necessary or advisable in order to accommodate or permit construction of the Project.
"Removal"	Work necessary to remove any Utilities for which leaving the Utilities in-place is not feasible or not permitted, or which the Progressive Contractor otherwise proposes to be removed in order to accommodate or permit construction of the Project, regardless of whether or not replacements for such Utilities are being installed in other locations.
"Request for Construction Phase Change Order" or "RCPCO"	A Progressive Contractor initiated request for a Construction Phase Change Order made pursuant to Section 20 (*Relief & Compensation*) and Section 21 (*Construction Phase Change Orders*).
"Request for Change Proposal"	A proposal issued by the Department under Section 21 (*Construction Phase Change Orders*).
"Request for Monthly Progress Payment"	A request made by Progressive Contractor for payment pursuant to Section 19.2.2.1 (*Request for Monthly Progress Payment*).
"Revised Baseline Pricing Package Schedule"	The adjusted Baseline Pricing Package Schedule (or prior Revised Baseline Pricing Package Schedule), further to time impact analyses when the Progressive Contractor is granted an extension in time under the Contract Documents, or the Parties otherwise agree in writing. References to the "Baseline Pricing Package Schedule" mean to the "Revised Baseline Pricing Package Schedule" if, pursuant to the Agreement, the Baseline Pricing Package Schedule was revised.

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Definitions	
Term	**Meaning**
"Right-of-Way"	Land, property, or interest (including easements) held by the State, via the Department.
"Risk Register"	The meaning set forth in Section 2.4 (*Risk Register*).
"Risk Register Event"	The meaning set forth in Section 2.4 (*Risk Register*).
"Risk Workshop"	The meetings held to develop and update the Risk Register, as more fully set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Schedule Coordination Plan"	The schedule coordination plan identified in Exhibit B (*Preconstruction Phase Requirements*).
"Schedule of Values"	A detailed schedule apportioning a Pricing Package GMP among activities associated with the Work of the applicable Pricing Package Amendment and any Risk Register Event (in the latter case, as may be allocable).
"Service Line"	As related to Utilities, a Utility line, the function of which is to directly connect the improvements on an individual property to another Utility line located off such property, which other Utility line connects more than one such individual line to a larger system. (The term "Service Line" also includes any Utility on public or private property that services structures located on such property.)
"Shared Provisional Sum"	The meaning set forth in Section 2.4.2 (*Provisional Risks*).
"Site"	The parcels of Right-of-Way identified on the Right-of-Way plans or upon which the Project is to be constructed and installed as well as all other areas in the vicinity used by the Progressive Contractor for construction Work.
"Source Code and Source Code Documentation"	Software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer

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Definitions	
Term	**Meaning**
	through study of such documentation to maintain and/or modify the software without undue experimentation. "Source Code and Source Code Documentation" also includes all modifications, revisions, additions, substitutions, replacements, updates, upgrades, and corrections made to the foregoing items.
"Standard Specifications"	The "Indiana Department of Transportation Standard Specifications", in effect as of the Effective Date or, as applicable, the date (as to each) of each Agreement Amendment, in each case, excluding Division 100 (except for (a) any definitions or abbreviations within Section 101 of Division 100 as applied to the balance of the then-applicable Standard Specifications; and (b) any section of Division 100 specifically referenced as applicable within this Agreement), with any references within the balance of the then-applicable Standard Specifications to provisions within such Division 100 being deemed to be analogous provisions within this Agreement, or otherwise as agreed by the Parties.
"State"	The State of Indiana.
"Subcontract"	Any subcontract to perform any part of the Work or provide any materials, equipment, or supplies for any part of the Work between the Progressive Contractor and a Subcontractor, or between any Subcontractor and its lower tier Subcontractor, at any tier, including in each case as such subcontract may be amended or supplemented.
"Subcontracting Plan"	The meaning set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Subcontractor"	Any Person with whom the Progressive Contractor has entered into any Subcontract, and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.
"Submittals Matrix"	The meaning set forth in Exhibit B (*Preconstruction Phase Requirements*).
"Supplier"	Any Person other than employees of the Progressive Contractor not performing work at the Site that supplies machinery, equipment, materials, or systems to the Progressive Contractor or any Subcontractor in connection with the performance of the Work; Persons who merely transport, pick up, deliver, or carry materials, personnel, parts, or equipment or any other items or persons to or from the Site shall not be deemed to be performing Work at the Site.
"Surety"	An individual, partnership, corporation, or other legal entity (not the Progressive Contractor) executing one or both of the Surety Bonds.

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Definitions	
Term	**Meaning**
"Surety Bonds"	The approved security described in Section 29 (*Payment and Performance Security*) in the form of Exhibit F (*Form of Surety Bonds*), executed by the Progressive Contractor and the Surety.
"Term"	The meaning set forth in Section 1.2 (*Term*).
"Termination Compensation Cap"	The meaning set forth in Section 25.5.3 (*Termination Compensation Cap*).
"Third Party"	Any Person other than a Department-Related Entity (and in the context of Section 27 (*Indemnification*), an Indemnified Party) or a Progressive Contractor-Related Entity.
"Third Party Agreement"	An agreement between the Department and any Third Party related to the Project.
"**Third Party Claim"**	Any and all claims, disputes, disagreements, causes of action, demands, suits, actions, judgments, investigations or legal or administrative proceedings brought by a Third Party with respect to Third Party Losses (including attorneys', accountants' and expert witnesses' fees and expenses) sustained or incurred by such Third Party.
"**Third Party Loss**"	Any actual or alleged loss, damage, injury, liability, obligation, cost, response cost, expense (including attorneys', accountants' and expert witnesses' fees and expenses (including those incurred in connection with the enforcement of any indemnity or other provision of the Contract Documents)), fee, charge, deductible or increased premium, demand, investigation, proceeding, action, suit, Claim, judgment, penalty, or fine, in each case whether actual, prospective, or contingent and whether or not currently ascertainable. "Injury" includes injury to or death of persons, damage or loss of property, harm or damage to natural resources, and loss of or damage to valuable papers and records, in each case sustained or incurred by a Third Party.
"Total Construction GMP"	The meaning set forth in Section 19.2 (*Total Construction GMP*).
"Unidentified Utility"	Any existing underground Utility, other than a Service Line, not identified or misidentified in the Construction Phase Amendment or any Pricing Package Amendment.
"United States Department of	United States Department of Transportation or any executive department or agency thereof, or as the context may require, the USDOT Secretary or other individual

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Definitions	
Term	**Meaning**
Transportation" or "USDOT"	person who may at the time be acting in the capacity of Secretary, or an authorized representative or any other person otherwise authorized to perform the functions to be performed hereunder by USDOT.
"Utility" or "utility"	A privately, publicly, or cooperatively owned line, facility and/or system for producing, transmitting, or distributing communications, power, cable television, electricity, light, heat, gas, oil, crude products, water, steam, waste, and other products that directly or indirectly serve the public. The necessary appurtenances to each utility facility shall be considered part of such utility. Without limitation, any Service Line connecting directly to a utility shall be considered an appurtenance to that utility, regardless of the ownership of such Service Line. The term "Utility" shall specifically exclude privately owned irrigation facilities, existing storm water facilities, traffic signals, and street lights without regard to whether or not such items are included in the definition of "Utility" in the Utility Agreements.
"Utility Agreement"	A "Utility Coordination Agreement", and other agreements entered into with Utility Owners in connection with the Project.
"Utility Owner"	The owner or operator of any Utility.
"Utility Owner Delay"	Any failure by a Utility Owner to meet any time parameters for performance by such Utility Owner which are set forth in the applicable Utility Agreement, which unexcused failure by the Utility Owner delays a Completion Deadline.
"Utility Work"	The work associated with Removal, Relocation, and protection of existing Utilities, including the design, construction, installation, manufacture, supply, testing and inspection, adjustments (including manholes and valves), and otherwise required by the Contract Documents, including all labor, materials, equipment, supplies, utilities and subcontracted services provided or to be provided by the Progressive Contractor and/or the Utility Owners, and including any Betterments added to the Work pursuant to Section 9 (*Utility Work*).
"Warranty"	The meaning set forth in Section 30.1 (*Warranty*).
"Warranty Bond"	A Surety Bond furnished by the Progressive Contractor to the Department in the form of Exhibit F (*Form of Surety Bonds*) and satisfying the requirements of Section 29.1.3 (*Warranty Bond; Release of Surety Bonds*), executed by the Progressive Contractor and the Surety.
"Warranty Period"	The meaning set forth in Section 30.1.2 (*Warranty Period*).

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Definitions	
Term	**Meaning**
"Warranty Work"	The meaning set forth in Section 30.1.3 (*Warranty Work*).
"Work"	Depending upon the placement and context of its use, Work shall mean one or more of the Preconstruction Work, Construction Work, or all or any combination of the foregoing. In general, Work shall include, in totality and in each of the Preconstruction Phase, and Construction Phase, as applicable, all duties, services, and items to be furnished and provided by Progressive Contractor as required by the Contract Documents. In certain cases, the term is also used to mean the products of the Work.

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Exhibit B

PRECONSTRUCTION PHASE REQUIREMENTS

SECTION 1. DESIGN AND PROJECT DEVELOPMENT CONSIDERATIONS

1.1. Progressive Contractor Directory and Organization

Following execution of the Agreement, the Progressive Contractor shall submit a directory containing the contact information for all Key Personnel and other appropriate discipline leadership personnel identified by function. The directory shall include the following information for each contact:

(1) Title/role for the Project;

(2) Area of responsibility;

(3) E-mail address;

(4) Mobile telephone number; and

(5) Office information:

a. Location/address; and

b. Main office telephone number.

The Progressive Contractor shall also submit an organization chart in electronic format that includes, at a minimum, personnel responsible for the following positions and/or functions:

(1) Key Personnel;

(2) All Quality Control positions;

(3) Environmental compliance;

(4) Subcontracts and procurement;

(5) Design for each discipline;

(6) Coordination lead for each Third Party;

(7) Safety positions; and

(8) Project controls.

The directory and the organization shall be provided in a location accessible to the Department (e.g., the document management system). The Progressive Contractor shall manage the directory and the organization chart throughout the course of the Project.

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1.2. Standards

The Progressive Contractor shall complete the Work, including the development of Construction Phase Requirements, in accordance with the requirements of the standards in Table 1 (Standards). Modifications to the standards may be requested for:

(1) any portion of the Project where the design does not meet the minimum values or ranges established in the standards provided in Table 1; and

(2) any portion of the Project where the design criteria does not meet minimum values or ranges established for the Project as set by the 10 controlling criteria as defined by "AASHTO – A Policy on Geometric Design of Highway and Streets" (i.e., Design Exceptions). The Department will coordinate FHWA approval of these elements.

The Progressive Contractor shall submit requests for modification as they become aware of a need to deviate from the standards described above. Approval is required prior to incorporating the deviation in the Preliminary Buildable Unit Submittal or the Buildable Unit Submittal as described in Section 1.4 (*Design Submittals & Milestones*). The Progressive Contractor shall incorporate documentation of Approval into the Pricing Package Amendments.

Additional documents may be added to Table 1 during the Preconstruction Phase prior to execution of Pricing Package Amendments. All documents in Table 1 shall be the most recent version unless otherwise identified and shall also include any supplemental, additional, amended, or auxiliary documents.

Author/Agency	**Title**
AASHTO	A Guide for Achieving Flexibility in Highway Design
AASHTO	A Guide for Transportation Landscape and Environmental Design
AASHTO	A Policy on Design Standards – Interstate System
AASHTO	A Policy on Geometric Design of Highways and Streets
AASHTO	An Informational Guide for Roadway Lighting
AASHTO	Bridge Security Guidelines
AASHTO	Guide Design Specifications for Bridge Temporary Works
AASHTO	Guide for the Development of Bicycle Facilities
AASHTO	Guide for the Planning, Design, and Operation of Pedestrian Facilities
AASHTO	Guide Specifications for LRFD Seismic Bridge Design, 2nd Edition, with Interims thru 2022
AASHTO	Highway Safety Design and Operations Guide

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Author/Agency	Title
AASHTO	LRFD Bridge Construction Specifications
AASHTO	LRFD Bridge Design Specifications
AASHTO	LRFD Guide Specifications for Accelerated Bridge Construction
AASHTO	LRFD Specifications for Structural Supports for Highway Signs, Luminaires and Traffic Signals
AASHTO	Manual for Assessing Safety (MASH)
AASHTO	Manual for Bridge Evaluation
AASHTO	Manual on Subsurface Investigations
AASHTO	Roadside Design Guide
AASHTO	Roadway Lighting Design Guide
AASHTO	Standard Specifications for Highway Bridges
AASHTO	Standard Specifications for Transportation Materials and Methods of Sampling and Testing
AASHTO	T88, T194 and T289
AASHTO/AWS	D1.5M/D1.5:2010 Bridge Welding Code
AASHTOWare	Bridge Rating (BrR) Tool for Rating Bridge Superstructures
Access Board	Public Rights-of-Way Accessibility Guidelines (PROWAG)
ADA	Americans with Disabilities Act Accessibility Guidelines
AISC	American Institute of Steel Construction – Steel Construction Manual
ANSI A300 (Part 1)	Tree Care Operations – Tree, Shrub and Other Woody Plant Maintenance – Standard Practices
ANSI A300 (Part 2)	Tree Care Operations – Tree, Shrub and Other Woody Plant Maintenance – Standard Practices – Part 2 – Fertilization
ANSI A300 (Part 3)	Tree Care Operations – Tree, Shrub and Other Woody Plant – Standard Practices – Part 3 – Tree Support Systems
ANSI Z133.1	Safety Requirements for Pruning, Trimming, Repairing, Maintaining, and Removing Trees, and for Cutting Brush

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Author/Agency	Title
ANSI Z60.1	American Standard for Nursery Stock
ANSI/EIA/TIA	American National Standards Institute/Electronic Industries Alliance/Telecommunications Industry Association (ANSI/EIA/TIA) – 222-G Structural Standards for Antenna Supporting Structures and Antennas 568A 568B.3 Optical Fiber Cabling Components Standards 606 Administration Standard for Telecommunications Infrastructure
ANSI/IESNA RP-8-00	American National Standard Practice for Roadway Lighting
ASTM	Annual Books of Standards
Bellcore	Technical Advisories and Technical Requirements
CIE	International Lighting Commission – CIE 127-2007, Technical Report: Measurement of LEDS
CRSI	Concrete Reinforcing Steel Institute Manual of Standard Practice
FAA	Notice of Proposed Construction or Alteration
FHWA	Code of Federal Regulations, Title 23 (Highways), Chapter 1, Part 752 Landscape and Roadside Development
FHWA	FHWA NHI-16-028, Geotechnical Circular No. 13, Ground Modification Methods – Reference Manual Volume II
FHWA	FHWA-HFI-18-031, GEC 9: Design, Analysis, and Testing of Laterally Loaded Deep Foundations that Support Transportation Facilities
FHWA	FHWA-IF-02-054 – Geotechnical Engineering Circular No. 6: Shallow Foundations
FHWA	FHWA-IF-99-015 - Geotechnical Engineering Circular No. 4: Ground Anchors and Anchored Systems
FHWA	FHWA-NHI-00-043 – Mechanically Stabilized Earth Walls and Reinforced Slopes Design and Construction Guidelines

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Author/Agency	Title
FHWA	FHWA-NHI-016-072 - Geotechnical Engineering Circular No. 5: Geotechnical Site Characterization
FHWA	FHWA-NHI-06-088/089, NHI Course No. 132012, Soils and Foundations, Ref. Manual, Vols. I & II
FHWA	FHWA-NHI-10-024 - GEC 11 Design and Construction of Mechanically Stabilized Earth Walls and Reinforced Soil Slopes Volume 1
FHWA	FHWA-NHI-10-025 - GEC 11 Design and Construction of Mechanically Stabilized Earth Walls and Reinforced Soil Slopes Volume II
FHWA	FHWA-NHI-11-032, LRFD Seismic Analysis and Design of Transportation Geotechnical Features and Structural Foundations, NHI Course. No 130094 Reference Manual, Geotechnical Engineering Circular No. 3
FHWA	FHWA-NHI-14-007 - Geotechnical Engineering Circular No. 7: Soil Nail Walls
FHWA	FHWA-NHI-15-004 LRFD Seismic Analysis and Design of Bridges Reference Manual
FHWA	FHWA-NHI-15-004, LRFD Seismic Analysis and Design of Bridges Reference Manual, NHI Course No. 130093 and 130093A
FHWA	FHWA-NHI-16-009 & 010 - Geotechnical Engineering Circular No. 12: Design and Construction of Driven Pile Foundations, Volumes I & II
FHWA	FHWA-NHI-16-027 & 028 - Geotechnical Engineering Circular No. 13 Ground Modification Methods Reference Manual - Volumes I & II
FHWA	FHWA-NHI-16-027, Geotechnical Circular No. 13, Ground Modifications Methods – Reference Manual Volume 1
FHWA	FHWA-NHI-18-024 - Geotechnical Engineering Circular No. 10: Drilled Shafts: Construction Procedures and LRFD Design Methods Manual

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Author/Agency	Title
FHWA	FHWA-RD-03-031: Distress Identification Manual for the Long-Term Pavement Performance Program
FHWA	Flexibility in Highway Design
FHWA	Highway Performance Monitoring System (HPMS) Field Manual
FHWA	Indiana Manual of Uniform Traffic Control Devices (IMUTCD)
FHWA	Manual on Uniform Traffic Control Devices (MUTCD)
FHWA	Program Guide Utility Relocation and Accommodation
FHWA	Railroad-Highway Grade Crossing Handbook
FHWA	Roadway Lighting Handbook
FHWA	Technical Manual for Design and Construction of Road Tunnels – Civil Elements, Report No. FHWA – NHI-10-034
Hortus Third	A Concise Dictionary of Plants Cultivated in the United States and Canada (L. H. Bailey Hortorium, 1976)
IDEM	Indiana Storm Water Quality Manual
IDEM	Isolated Wetlands Permit
IDEM	Rule 5 Permit
IDEM	Section 401 Water Quality Certification
IDNR	Guidelines for the Hydrologic-Hydraulic Assessment of Floodplains in Indiana
IDNR	Indiana Drainage Handbook
IEEE	National Electric Safety Code
IES	DG-5-94, Recommended Lighting for Walkways and Class 1 Bikeways
IES	Roadway Lighting Handbook, RP-8, Addendum: "Designing the Lighting System – Using Roadway Lighting"
IES	RP-8-00, American National Standards for Roadway Lighting

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Author/Agency	Title
IGGA	Guide Specification - Next Generation Concrete Surface (NGCS) Construction on Newly Constructed Roadways
IHPC	Certificate of Appropriateness
INDOT	Approved Materials List
INDOT	Bridge Inspection Manual
INDOT	Construction Memorandums
INDOT	Cost Estimation System (CES) – Designer Instructions
INDOT	Cultural Resources Manual
INDOT	Design Manual (IDM) including Design Memoranda
INDOT	Geotechnical Design Manual, Guidelines, Memoranda, Forms, and Approved Contractors, Consultants, & Materials
INDOT	Indiana Manual on Uniform Traffic Control Devices (IMUTCD)
INDOT	INDOT Bridge Aesthetics Policy
INDOT	INDOT Design Memos
INDOT	INDOT Directives
INDOT	INDOT Public Art and Landscaping Policy
INDOT	INDOT Standard Drawings
INDOT	The "Standard Specifications" (as defined in the Agreement)
INDOT	Interstate Highways Congestion Policy
INDOT	Manual for Frequency of Sampling and Testing and Basis for Use of Materials
INDOT	Procedural Manual for Preparing Environmental Documents
INDOT	Professional Services Contract Administration Manual
INDOT	Public Involvement Policies and Procedures Manual
INDOT	Real Estate Manuals

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Author/Agency	Title
INDOT	Recurring Special Provisions & Plan Details
INDOT	Right-of-Way Engineering Manual, and Revisions
INDOT	Site Assessment & Management Manual
INDOT	Standard Specifications
INDOT	Storm Water Management Field Guide
INDOT	Total Storm Management Manual
INDOT	Traffic Management Strategic Deployment Plan
INDOT	Traffic Noise Analysis Procedure
INDOT	Utility Accommodation Policy
INDOT	Utility Facility Relocations on Construction Contracts (105 IAC 13)
INDOT	Waters of the US Documentation
INDOT	Waterway Permitting Manual
INDOT	Work Zone Safety Mobility Policy
INDOT Aviation	Indiana Tall Structure Permit
ITE	Equipment and Material Standards
ITE	Manual of Transportation Engineering Studies
ITE	Preemption of Traffic Signals Near Railroad Crossings: An ITE Recommended Practice
ITE	Traffic Engineering Handbook
Motorola	R56 Standards and Guidelines for Communication Sites
NCHRP	NCHRP Report 480, A Guide to Best Practices for Achieving Context Sensitive Solutions
NECA	National Electrical Contractors Association Standard of Installation
NEMA	National Electrical Manufacturer Association
NETA	International Electrical Testing Association Standard ATS
NFPA	502-Standard for Road Tunnels, Bridges and Other Limited Access Highways
NFPA	National Electric Safety Code

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Author/Agency	Title
NFPA	NFPA 70 - National Electric Code
NFPA	Standard for the Installation of Lightning Protection Systems, NFPA 780
NTCIP	National Transportation Communication for ITS Protocol Standards
PCI	Bridge Design Manual Volume I & II
PCI	Design Handbook
PCI	Full Depth Deck Panel Guidelines, For Accelerated Bridge Deck Replacement or Construction
Telcordia	GR 196 Core Issue 2, Generic Requirements for Optical Time Domain Reflectometer (OTDR)
TIA/EIA	The Telecommunications Industry Association & Electronic Industries Alliance Standards
TRB	Highway Capacity Manual
TRB	NCHRP Report 529, Guideline and Recommended Standard for Geofoam Application in Highway Embankments
UL	Underwriters Laboratories, Inc., Lightning Protection Components, UL 96 and UL 96A
USACE	Section 404 Permit

1.3. Preconstruction Phase Project Schedule

During the Preconstruction Phase, the Progressive Contractor shall:

(1) Develop an initial Preconstruction Phase Project Schedule, with planning horizon as agreed by the Parties, and submit such Project Schedule to the Department within 30 Days following execution of the Agreement for the Department's Approval. The Preconstruction Phase Project Schedule shall include a schedule of key milestones for the Preconstruction Work and other key milestones with respect to the Construction Work (including specifically geotechnical-related activities, potholing, notably utility involvement, notable Right-of-Way activities, any "task force" meetings, notable cost model/estimating activities, risk workshops, Project-wide completion of all Pricing Packages, Completion Deadlines, and incorporate design package delivery dates and Construction Work activities through Final Acceptance).

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(2) Update the Preconstruction Phase Project Schedule on a monthly basis and submit to the Department for review and Approval throughout the Preconstruction Phase.

1.4. Design Submittals & Milestones

In addition to, or as part of the Preconstruction Phase Schedule (as may be amended by the Parties), the Progressive Contractor shall prepare a list of Buildable Units it intends to prepare for delivery of the Project. In addition to the list of Buildable Units, the Progressive Contractor shall prepare a detailed submittal schedule outlining when it intends to provide each Buildable Unit to the Department for review and comment. The Buildable Units shall correspond with the Right-of-Way clearance dates provided by the Department. The Department will work with the Progressive Contractor to prioritize parcels for execution of Buildable Units. In support of the Pricing Package Plans described in Section 5 (*Pricing Package Plan*), the Progressive Contractor shall identify which Pricing Package each Buildable Unit will be a part of. At a minimum, the Progressive Contractor shall submit Buildable Units to the Department at the milestones described in Table 2 (Design Submittals).

Submittal	**Description of Submittal**	**Department Action**
Stage 1 Documents	Approximately 30 percent complete design. Includes plans and reports that capture all major items, elements, and portions of the Work specific to the Buildable Unit to confirm sufficiency of the NEPA footprint and Right-of-Way limits. Includes documentation for any deviations of design standards as described in Section 1.2 (*Standards*), and any deviations from the approved NEPA footprint. Includes a Design Executive Summary in the submittal.	Review and Comment
Right-of-Way Submittal	Includes a complete set of Right-of-Way plans, proposed deeds, Google Earth KMZ Files, and back source deeds or updated information needed for revisions to the existing Right-of-Way plans, as necessary.	Approval and Right-of-Way Authorization
Stage 2 Documents	Approximately 60-75 percent complete design. Includes plans, specifications, and reports that capture all major items (such as drainage folder), elements, preliminary CPM Schedule, and portions of the Work specific to the Buildable Unit such that the Progressive Contractor can demonstrate a comprehensive understanding of the Project. Includes documentation for any deviations of design standards as described in Section 1.2 (*Standards*).	Review and Comment

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Submittal	Description of Submittal	Department Action
Stage 3 Documents	90 percent complete design. Includes plans, specifications, quantities, updated draft CPM Schedule, and reports for each respective element and discipline of the Buildable Unit.	Review and Comment
RFC Documents	100 percent complete design. Includes plans, specifications, revised quantities, RFC CPM Schedule, and reports for each respective element and discipline of the Buildable Unit.	Approve
As-Built Documents	Plans that meet the requirements of the RFC Documents and reflect the actual condition of the final constructed Work and incorporate all as-built survey reports, including incorporation of all field design changes.	Review and Comment

SECTION 2. PRECONSTRUCTION PHASE QUALITY MANAGEMENT PLAN

The Progressive Contractor is responsible for the quality of the Preconstruction Work, including performance of Progressive Contractor Quality Assurance and Progressive Contractor Quality Control. The Progressive Contractor shall perform Progressive Contractor Quality Assurance independent from production and quality control for all design activities. Progressive Contractor Quality Assurance for design shall include a documented review of the design processes to assure that all required Progressive Contractor Quality Control checks and reviews have been performed, that corresponding records are available, and that Progressive Contractor Quality Control activities were effective to meet Agreement requirements. The Progressive Contractor shall identify a Design Quality Assurance Manager (DQAM) and other staff focused on quality functions.

During the Preconstruction Phase, the Progressive Contractor shall submit a Preconstruction Phase Quality Management Plan to the Department for Approval. At a minimum, the Preconstruction Phase Quality Management Plan shall be prepared on the form set forth in Appendix 1-A to this Exhibit B (*Preconstruction Phase Requirements*) and include a description of the procedures for the following components:

(1) The document management system, including routing; filing records; and naming conventions;

(2) A Submittals Matrix identifying all documents submitted to the Department including the recipient and the date provided;

(3) Design and development planning; and

(4) Progressive Contractor Quality Control and Progressive Contractor Quality Assurance for the Preconstruction Work and the design Work.

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SECTION 3. PRECONSTRUCTION PHASE SCHEDULE MANAGEMENT

The Progressive Contractor shall submit a Preconstruction Phase Schedule Coordination Plan for Approval that is prepared on the form set forth in Appendix 1-B to this Exhibit B (*Preconstruction Phase Requirements*) addresses coordination with the Department and assigns responsibilities to positions within the Progressive Contractor's organization with respect to the Project Schedule during the Preconstruction Phase. The Preconstruction Phase Schedule Coordination Plan shall include:

(1) A workflow outlining how the Progressive Contractor will develop, review, coordinate with the Department for Approvals, and maintain the Project Schedules; and

(2) An organization chart, table, or other appropriate document identifying which positions within the Progressive Contractor's organization (including field personnel) will be responsible for developing and progressing the schedules. For Progressive Contractor Quality Control and Progressive Contractor Quality Assurance of the schedules, the Progressive Contractor shall indicate what each individual will be responsible to perform, and how these efforts will be coordinated with each other and with the Department.

SECTION 4. RISK MANAGEMENT

The Progressive Contractor shall collaborate with the Department and the Department's representatives for the Project in the development and maintenance of the Risk Register for the Project. The Risk Register shall be updated in a Risk Workshop setting at each pricing milestone and periodically during the Preconstruction Phase.

The Progressive Contractor shall participate in one or more Risk Workshops during the Preconstruction Phase to:

(1) identify risks;

(2) consolidate risks identified in other meetings;

(3) assess probability and impact of risks;

(4) prioritize risks;

(5) discuss possible risk mitigation strategies;

(6) explore risk sharing concepts; and

(7) update the Risk Register.

Risk Workshops will focus on risk mitigation and how risks may affect bid items. For high-priority risks, associated bid items will be identified and the affected pricing components (production rates, labor, materials cost, etc.) will be summarized by the Progressive Contractor.

SECTION 5. PRICING PACKAGE PLAN

5.1. Preliminary Pricing Package Plan

The Progressive Contractor shall identify and describe the Buildable Units of the Project that are anticipated to be constructed as part of one or more Pricing Packages to achieve the Project goals. If agreed

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upon by the Parties, the Progressive Contractor shall submit an updated Preliminary Pricing Package Plan to the Department for review and comment whenever the Progressive Contractor believes that additional Pricing Package Amendments will be advantageous for the Project.

5.2. Final Pricing Package Plan

As a condition precedent to execution of the Construction Phase Amendment, the Progressive Contractor shall submit a Final Pricing Package Plan for Approval with additional detail including:

(1) Cost estimate of each Pricing Package and Total Construction Guaranteed Maximum Price (GMP);

(2) Schedule durations;

(3) Summary of any Right-of-Way, utility relocation, permits, Third Party Agreements, or other items needed to obtain authorization of construction for the Pricing Package;

The Progressive Contractor shall submit the Final Pricing Package Plan at least 30 Days prior to submission of the Construction Phase Amendment.

SECTION 6. COST ESTIMATING

This Section 6 is intended to describe cost estimating and pricing requirements to achieve a fair price so that all Parties understand how the cost estimating and pricing strategy will be implemented. The Department's goal is to have less than 5% deviation from estimates developed by the Progressive Contractor and the Department at the time the Total Construction GMP is determined.

6.1. The Progressive Contractor, the Department, and advisors to the Department will work as a team to maximize scope, value, and quality within the Project budget. The Parties will emphasize collaboration and transparency, and create value through integrity, fairness, accountability, innovation, and risk management. The Department's goal is to develop Pricing Package GMPs that represent a fair market price. During the Preconstruction Phase, the Parties will implement the following processes and principles in the development of cost estimates:

(1) A collaborative team environment that fosters communication, accountability, and trust;

(2) An ICE consultant that is familiar with the scope, schedule, and risks of the Project and is involved in key team meetings and aware of decisions;

(3) Effective risk and opportunity/innovation workshops;

(4) Interactive design process to incorporate mitigation strategies and innovations into the design;

(5) Plan and specification reviews and quantity reconciliation meetings at major milestones;

(6) Pre-estimating meetings to discuss and document assumptions for bid items and measurement and payment;

(7) Pricing Milestone Estimates (PMEs) at various milestones where (or if, in the Department's sole election) the ICE is blinded, and a range established to identify items that are in discrepancy;

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(8) Reconciliation meetings to review differences in the assumptions of those items; and

(9) Protect and maintain the independent estimate of the ICE.

6.2. Initial Approach to Construction Cost Development

Before any pricing of the Construction Work begins, the Progressive Contractor, the Department, and advisors to the Department will meet to discuss and agree on how the team will develop and evaluate price for purposes of Pricing Packages. In addition to reviewing the overall pricing strategy, the Progressive Contractor and the Department will seek agreement on how certain elements of price will be handled. The following issues will be discussed:

(1) Definition of fair market price;

(2) Acceptable percentage of price difference between the Progressive Contractor and the Department, which will use an estimate prepared by an ICE procured by the Department;

(3) Expectation of Design-Build cost versus low bid;

(4) Progressive Contractor's Fee;

(5) Labor and equipment rates;

(6) Subcontractor quotes and self-performed work; and

(7) Number of pricing milestones.

6.3. Cost Model

The Progressive Contractor shall develop a cost model on an Open Book Basis. The Progressive Contractor shall submit the cost model to the Department for review and comment at least 30 Days prior to the first Preliminary Buildable Unit submittal. The cost model shall include:

(1) Quantity take-offs;

(2) Material costs, subcontracted work costs, equipment rates, labor rates (labor rates shall include employee benefits, payroll taxes, and other payroll burdens), crew sizes, shifts per day, hours per shift, and production rates for direct costs;

(3) Risk assumptions, assignment of risks, and schedule and cost contingencies associated with each risk;

(4) Costs to mobilize equipment and materials to construct the Project and other facility related costs necessary for the proper execution of the Work;

(5) Copies of quotations from Subcontractors and Suppliers;

(6) Field indirect costs, bonds, taxes, and insurance; and

(7) A written narrative regarding the cost model that identifies the means, methods, assumptions, and risks that were used to price the Work.

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6.4. Construction Cost Estimate Development

In accordance with the cost model, the Progressive Contractor shall develop and submit a PME to the Department's designated Price Facilitator for any Pricing Packages at the Preliminary Buildable Unit Submittal and at other times as determined by the Department during the Preconstruction Phase. The PME shall also be provided with the Pricing Package GMP.

6.5. Construction Cost Estimate Review

The Department, through its ICE consultant, will prepare a production-based cost estimate (the Independent Cost Estimate) for the same scope of work included in each PME submitted in accordance with Section 6.4 (*Construction Cost Estimate Development*). The Independent Cost Estimate will be based on the construction schedule developed by the ICE consultant. Upon receipt of a PME, the Price Facilitator will compare the costs for each item in the Progressive Contractor's PME and develop a PME comparison report that identifies all items that vary from the Independent Cost Estimate by more than the divergence percentage identified in accordance with Section 6.2 (*Initial Approach to Construction Cost Development*). Additionally, the total cost of each PME will be compared by the Price Facilitator to ensure that the PMEs are within the Project budget. The Price Facilitator will provide the PME comparison report to the Progressive Contractor.

6.6. Construction Cost Reconciliation Meetings

The Progressive Contractor shall meet with the Department to discuss the assumptions for items that have a discrepancy greater than the Department-determined divergence factor. Costs will not be discussed. Rather, the factors that contribute to the costs will be shared by the Progressive Contractor and discussed. The goal of the Cost Reconciliation Meeting is to clarify and resolve differences, where possible, between estimates. The goal is that the cost of the Construction Work for the Pricing Package be consistent with the principles described in Section 6.2 (*Initial Approach to Construction Cost Development*) at the time the Pricing Package GMP is determined.

SECTION 7. SAFETY MANAGEMENT PLAN

The Progressive Contractor shall develop and submit its Safety Management Plan on the form set forth in Appendix 1-C to this Exhibit B (*Preconstruction Phase Requirements*), which includes the Incident Management Plan, to the Department for review, comment, and Approval prior to the commencement of any Work that requires a physical presence on the Project. The Progressive Contractor's Safety Management Plan shall address safety in connection with the Project, all Laws, and the Contract Documents.

SECTION 8. SUBCONTRACTING PLAN

8.1. General Subcontracting Plan Requirements

The "Subcontracting Plan" shall identify the Progressive Contractor's subcontracting process for the Construction Phase. The Subcontracting Plan shall be prepared on the form set forth in Appendix 1-D to this Exhibit B (*Preconstruction Phase Requirements*), and include:

(1) Details of the Progressive Contractor's contracting plans and Subcontractor plans;

(2) Progressive Contractor's competitive selection process;

(3) Approach to advertising subcontracting opportunities;

(4) Procurement process; and

(5) Information regarding subcontractor availability and local economic conditions.

Any Subcontracts the Progressive Contractor wishes to select for best value shall be approved by the Department prior to competitive selection. The Department shall approve all Subcontracts, regardless of selection type, prior to award. The Progressive Contractor shall have an Approved Subcontracting Plan from the Department prior to soliciting offers for Subcontractors for Construction Work.

8.2. DBE Performance Plan

The Progressive Contractor shall submit and maintain a DBE Performance Plan pursuant to Section 4.2.3 (*DBE Performance Plan*) of the Agreement on the form set forth in Appendix 1-E to this Exhibit B (*Preconstruction Phase Requirements*).

8.3. CAP Report

The Progressive Contractor shall prepare, submit, and comply with a CAP Report.

SECTION 9. CONSTRUCTION PHASE REQUIREMENTS

The Progressive Contractor shall collaborate with the Department and the Department's representatives for the Project in the development of the Construction Phase Requirements that will be incorporated into the Construction Phase Amendment and any Pricing Package Amendments. The Department will specify those topics that must, at a minimum, be included in each iteration of the Construction Phase Requirements.

SECTION 10. CONSTRUCTION PHASE AMENDMENT

The Construction Phase Amendment shall include Construction Phase Requirements that apply to the Construction Work authorized by all Pricing Package Amendments, including:

(1) Final Pricing Package Plan;

(2) Project Management Plan;

(3) Construction Quality Plan;

(4) Schedule Coordination Plan;

(5) Safety Management Plan;

(6) Subcontracting Plan;

(7) DBE Performance Plan;

(8) Permitting and Environmental Mitigation Plan;

(9) Transportation Management Plan;

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(10) Utility and Third-Party Coordination Plan; and

(11) Such other Plans as the Department may require.

SECTION 11. PRICING PACKAGE AMENDMENTS

All Pricing Package Amendments shall include such additional Construction Phase Requirements that are related to the Construction Work authorized by the Pricing Package Amendment, with details of the scope of such Construction Work, including:

(1) The Pricing Package GMP;

(2) The Risk Register;

(3) The estimated cost of additional Construction Work required to reach Final Acceptance not accounted for in currently-executed Pricing Package Amendments;

(4) A Schedule of Values allocating the applicable Pricing Package GMP;

(5) The current Baseline Pricing Package Schedule;

(6) The Design Documents;

(7) Description of agreed Liquidated Damages, if any;

(8) Any increase to the Surety Bonds' penal sums, policy limits, additional endorsements, or additional insurance as required by the Agreement;

(9) The Basis of Design;

(10) The Basis of Construction;

(11) Any updates to the Construction Phase Requirements; and

(12) Any other documentation and information required by the Department.

Each Pricing Package Amendment shall include the obligation of the Progressive Contractor to prepare (first Pricing Package Amendment) or consolidate and update (each successive Pricing Package Amendment) a consolidated CPM Schedule for the entire Project. The Progressive Contractor shall expressly include this obligation within the Schedule Coordination Plan.

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APPENDIX 1 TO EXHIBIT B

PRECONSTRUCTION WORK TEMPLATE PLANS

Appendix 1-A Preconstruction Phase Quality Management Plan Template

Appendix 2-B Preconstruction Phase Schedule Coordination Plan Template

Appendix 3-C Safety Management Plan Template

Appendix 4-D Subcontracting Plan Template

Appendix 5-E DBE Performance Plan Template

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Exhibit C

PROGRESSIVE CONTRACTOR TEAM

Table 1: Key Personnel

[NTD: Map over from RFP Form F* (Key Personnel Experience)*]

Position	*Name*
Project Manager	
	[NTD: Template; insert name]

Table 2: Key Personnel Liquidated Damages

If the Department is entitled to assess Key Personnel Liquidated Damages under Section 5.3 (*Key Personnel*) and Section 14.2.2 (*Key Personnel Liquidated Damages*), then Liquidated Damages will be calculated as follows:***[NTD: values to be decided prior to letting]***

Key Personnel Position	*Liquidated Damages – Preconstruction Phase*	*Liquidated Damages – Construction Phase*
	$[_____] per occurrence	$[_____] per occurrence
	$[_____] per occurrence	$[_____] per occurrence
	$[_____] per occurrence	$[_____] per occurrence
	$[_____] per occurrence	$[_____] per occurrence
	$[_____] per occurrence	$[_____] per occurrence
	$[_____] per occurrence	$[_____] per occurrence
	$[_____] per occurrence	$[_____] per occurrence

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Attachments: Key Personnel commitments from Proposal*[NTD: insert all Form H submissions for all Key Personnel]*

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Exhibit D

HOURLY RATES

(see attached)

[NTD: TO INCLUDE FULLY LOADED HOURLY RATES ACCEPTED BY INDOT'S DEPARTMENT OF EXTERNAL AUDIT UNDER THE RFP.]

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Exhibit E

PRECONSTRUCTION PHASE SCOPE AND COMPENSATION CAP

[NTD: Insert from post-selection exercise]

The Preconstruction Phase Compensation Cap is $[_____]

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Exhibit F

FORM OF SURETY BONDS

EXHIBIT F-1 FORM OF PERFORMANCE BOND

EXHIBIT F-2 FORM OF PAYMENT (LABOR AND MATERIAL) BOND

EXHIBIT F-3 FORM OF WARRANTY BOND

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EXHIBIT F-1

FORM OF PERFORMANCE BOND

BOND NO. [_____]

FOR

[_____] PROJECT*[NTD – FILL IN PROJECT NAME]*

KNOW ALL WHO SHALL SEE THESE PRESENTS:

THAT WHEREAS, the Indiana Department of Transportation (the "Department" or Obligee") has awarded to ***[NTD: INSERT PROGRESSIVE CONTRACTOR'S NAME]*** (the "Progressive Contractor" or "Principal"), an Agreement (as amended from time to time, the "Agreement"), which Agreement is specifically incorporated by reference in this Bond, for the design and construction of the [_____] Project (the "Project");

AND WHEREAS, as a condition issuance of the Agreement, Principal is required to furnish a performance bond (this "Bond");

NOW THEREFORE, We the undersigned Principal and (the "Surety" or "Co-Sureties") are firmly bound and held unto the Obligee, in the penal sum of Dollars ($)***[NTD: AMOUNT TO BE INSERTED BASED ON 100% OF CONTRACT PRICE]*** good and lawful money of the United States of America for the payment whereof, well and truly to be paid to the Obligee, we bind ourselves, our heirs, successors, executors, administrators, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:

1. If the Principal shall in all things stand to and abide by and well and truly keep, perform and complete all covenants, conditions, agreements, obligations and work under the Agreement, including any and all amendments, supplements, and alterations made to the Agreement as therein provided, on the Principal's part to be kept and performed at the time and in the manner therein specified, if the Principal shall indemnify and save harmless the Obligee, its directors, officers and agents, as therein stipulated, and if the Principal shall reimburse upon demand of the Obligee any sums paid the Principal which exceed the final payment determined to be due upon completion of the Project, then these presents shall become null and void; otherwise they shall remain in full force and effect.

2. The obligations covered by this Bond specifically include liability for liquidated damages and warranties as specified in the Agreement, but not to exceed the bonded sum.

3. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Agreement, or in the work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Agreement, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

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4. The Surety (or Co-Sureties) agree(s) that payments made to contractors and suppliers to satisfy claims on the payment bond do not reduce the Surety's legal obligations under this Bond. Payments made to contractors or suppliers under any agreement where the Surety has arranged for completion of the work to satisfy this Bond will not be considered payment bond claims.

5. Whenever the Principal shall be, and is declared by the Department to be, in default under the Agreement, provided that the Department is not then in material default thereunder, the Surety (or Co-Sureties) shall promptly:

(a) remedy such default, or

(b) complete the work covered by this Bond in accordance with the terms and conditions of the Agreement then in effect, or

(c) select a contractor or contractors to complete all work covered by this Bond in accordance with the terms and conditions of the Agreement then in effect, using a contractor or contractors approved by the Department as required by the Agreement (provided, however, that the Surety may not select the Principal or any affiliate of the Principal to complete the work for and on behalf of the Surety without the Department's express written consent), arrange for a contract meeting the requirements of the Agreement between such contractor or contractors and the Department, and make available as work progresses (even though there should be a default or a succession of defaults under such contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the unpaid balance of the contract price; but not exceeding, including other costs and damages for which Surety (or Co-Sureties) is (are) liable hereunder, the bonded sum.

6. **[*Use in case of multiple or co-sureties*]** The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligee will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligee or claimants to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The designated representative may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative, signed by all of the Co-Sureties. The initial representative shall be [_____].

[signature appears on the succeeding page]

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IN WITNESS WHEREOF, we have hereunto set our hands and seals on this [_____] day of [_____], A.D., 202[_].

Principal (full legal name):

Address:

By:

Contact Name:

Phone: ( )

Surety (full legal name):

Address:

By:

Contact Name:

Phone: ( )

[Note: If more than one surety, then add appropriate number of lines to signature block.]

[Note: The bond shall be signed by authorized persons. Where such persons are signing in a representative capacity (e.g., an attorney-in-fact), but is not a member of the firm, partnership, or joint venture, or an officer of the legal entity involved, evidence of authority must be furnished.]

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EXHIBIT F-2

FORM OF PAYMENT BOND

BOND NO. [_____]

FOR

[_____] PROJECT*[NTD – FILL IN PROJECT NAME]*

KNOW ALL WHO SHALL SEE THESE PRESENTS:

THAT WHEREAS, the Indiana Department of Transportation (the "Department" or Obligee") has awarded to***[NTD: INSERT PROGRESSIVE CONTRACTOR'S NAME]*** (the "Progressive Contractor" or "Principal"), an Agreement (as amended from time to time, the "Agreement"), which Agreement is specifically incorporated by reference in this Bond, for the design and construction of the [_____] Project (the "Project");

AND WHEREAS, as a condition issuance of the Agreement, Principal is required to furnish a payment bond (this "Bond");

NOW THEREFORE, We the undersigned Principal and (the "Surety" or "Co-Sureties") are firmly bound and held unto the Obligee, in the penal sum of Dollars ($)***[NTD: AMOUNT TO BE INSERTED BASED ON 100% OF CONTRACT PRICE]*** good and lawful money of the United States of America for the payment whereof, well and truly to be paid to the Obligee, we bind ourselves, our heirs, successors, executors, administrators, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:

1. If the Principal shall comply with all requirements of law and pay, as they become due, all just claims for labor performed and materials and supplies furnished upon or for the work under the Agreement, whether said labor be performed and said materials and supplies be furnished under the original Agreement, any subcontract, or any and all duly authorized modifications thereto, then these presents shall become null and void; otherwise they shall remain in full force and effect.

2. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Agreement, or in the work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Agreement, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

3. **[*Use in case of multiple or co-sureties*]** The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligee and claimants will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligee or claimants to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The designated representative may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative, signed by all of the Co-Sureties. The initial representative shall be [_____].

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IN WITNESS WHEREOF, we have hereunto set our hands and seals on this [_____] day of [_____], A.D., 202[_].

Principal (full legal name):

Address:

By:

Contact Name:

Phone: ( )

Surety (full legal name):

Address:

By:

Contact Name:

Phone: ( )

[Note: If more than one surety, then add appropriate number of lines to signature block.]

[Note: The bond shall be signed by authorized persons. Where such persons are signing in a representative capacity (e.g., an attorney-in-fact), but is not a member of the firm, partnership, or joint venture, or an officer of the legal entity involved, evidence of authority must be furnished.]

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EXHIBIT F-3

FORM OF WARRANTY BOND

BOND NO. [_____]

FOR

[_____] PROJECT*[NTD – FILL IN PROJECT NAME]*

KNOW ALL WHO SHALL SEE THESE PRESENTS:

THAT WHEREAS, the Indiana Department of Transportation (the "Department" or Obligee") has awarded to***[NTD: INSERT PROGRESSIVE CONTRACTOR'S NAME]*** (the "Progressive Contractor" or "Principal"), an Agreement (as amended from time to time, the "Agreement"), which Agreement is specifically incorporated by reference in this Bond, for the design and construction of the [_____] Project (the "Project");

AND WHEREAS, initially capitalized terms not otherwise defined in this Bond have the meaning given in the Agreement;

AND WHEREAS, upon achieving Final Acceptance, the Progressive Contractor may obtain a release of the Performance Bond and Payment Bond by satisfying the conditions to release set forth in the Agreement, including providing a warranty bond (this "Bond");

NOW THEREFORE, We the undersigned Principal and (the "Surety" or "Co-Sureties") are firmly bound and held unto the Obligee, in the penal sum of _____ Dollars ($_____)***[NTD: AMOUNT TO BE INSERTED BASED ON 20% OF CONTRACT PRICE]*** (the "Bonded Sum"), good and lawful money of the United States of America for the payment whereof, well and truly to be paid to the Obligee, we bind ourselves, our heirs, successors, executors, administrators, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT, if Principal shall promptly and faithfully perform all of its obligations under the Agreement, as they may be amended or supplemented, including, without limitation, the performance of all Warranty Work and payment of claims as described in paragraph 5 below, then the obligations under this Bond shall be null and void; otherwise this Bond shall remain in full force and effect, it being expressly understood and agreed that the liability of Surety for any and all claims hereunder shall in no event exceed the bonded sum.

The following terms and conditions shall apply with respect to this Bond:

1. The Agreement is incorporated by reference into this Bond.

2. If the Principal shall promptly and faithfully perform all of its obligations under the Agreement, as they may be amended or supplemented, including without limitation the performance of all Plant Establishment Work, Warranty Work, enforcement of Subcontractor warranties, and payment of claims as described in paragraph 6 below, then the obligations under this Bond shall be null and void; otherwise this Bond shall remain in full force and effect, it being expressly understood and agreed that the liability of Surety (or Co-Sureties) for any and all claims hereunder shall in no event exceed the bonded sum.

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3. If the above bound Principal, or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by and well and truly keep and perform the covenants, conditions, obligations and agreements in the Agreement, including any and all amendments, supplements, and alterations made to the Agreement as therein provided, on the Principal's part to be kept and performed at the time and in the manner therein specified, and shall indemnify, defend and save harmless the Obligee and all other Indemnified Parties, as therein stipulated, then this obligation shall become and be null and void; otherwise, it shall be and remain in full force and virtue.

4. This Bond shall cover the cost to perform all the obligations of the Principal pursuant to the Agreement, including Warranty Work. The obligations covered by this Bond specifically include all payment obligations, liability for damages and warranties as specified in the Agreement, but not to exceed the bonded sum.

5. Whenever the Principal shall be, and is declared by the Obligee to be, in default under the Agreement, the Surety (or Co-Sureties) shall promptly:

(a) remedy such default;

(b) complete the work and perform the obligations covered by this Bond in accordance with the terms and conditions of the Agreement then in effect; or

(c) select a contractor or contractors to complete the Work and perform the obligations covered by this Bond in accordance with the terms and conditions of the Agreement then in effect, using a contractor or contractors approved by the Obligee in its sole discretion, arrange for a contract that contains substantially the same terms and conditions of the Agreement between such contractor or contractors and the Obligee, and make available as work progresses (even though there should be a default or a succession of defaults under such contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the unpaid balance of the Contract Price; but not exceeding, including other costs and damages for which the Surety (or Co-Sureties) is (are) liable hereunder, the bonded sum.

6. This Bond shall inure to the benefit of anyone required to be paid by law under the Agreement so as to give a right of action to such persons or their assigns in any suit brought upon this Bond. The obligations covered by this Bond specifically include:

(a) payments owing to any of the persons involved in prosecution of the Work, including the design and engineering services or construction services, as provided for in the Agreement;

(b) any amounts required to be deducted, withheld, and paid over to the State from the wages of employees of the Principal and its Subcontractors with respect to such work and labor, and

(c) any other payments owing to anyone required to be paid by law.

In case suit is brought to enforce the provisions of this paragraph 6, the Surety (or Co-Sureties) will pay reasonable attorneys' fees, to be fixed by the court.

7. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Agreement, or in the work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Agreement, or any rescission of this Bond, solely due to acts of Principal, or any fraud practiced by any other person other than the claimant seeking

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to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

8. **[*NTD: Use in case of multiple or co-sureties*]** The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligee will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligee or claimants to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The designated representative may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative, signed by all of the Co-Sureties. The initial representative shall be [_____].

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IN WITNESS WHEREOF, we have hereunto set our hands and seals on this [_____] day of [_____], A.D., 202[_].

Principal (full legal name):

Address:

By:

Contact Name:

Phone: ( )

Surety (full legal name):

Address:

By:

Contact Name:

Phone: ( )

[Note: If more than one surety, then add appropriate number of lines to signature block.]

[Note: The bond shall be signed by authorized persons. Where such persons are signing in a representative capacity (e.g., an attorney-in-fact), but is not a member of the firm, partnership, or joint venture, or an officer of the legal entity involved, evidence of authority must be furnished.]

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Exhibit G

FEDERAL REQUIREMENTS

Exhibit Description	***NO. of Pages***
Attachment 1 – Federal Requirements for Federal Aid Construction Facilities	1
Attachment 2 – Required Contract Provisions, Federal-Aid Construction Contracts – FHWA Form 1273	14
Attachment 3 – Federal Prevailing Wage Rate	1
Attachment 4 – Compliance with Buy America and Build America, Buy America Requirements	4
Attachment 5 – Cargo Preference Act	1
Attachment 6 – On-the-Job Training Program and Partnership Agreement	10

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ATTACHMENT 1 TO EXHIBIT G

FEDERAL REQUIREMENTS FOR FEDERAL-AID CONSTRUCTION FACILITIES

GENERAL.

The work herein proposed will be financed in whole or in part with federal funds, and therefore all of the statutes, rules and regulations promulgated by the federal government and applicable to work financed in whole or in part with federal funds will apply to such work. The "Required Contract Provisions, Federal-Aid Construction Contracts, Form FHWA-1273," are included in Attachment 2 to Exhibit G (*Federal Requirements*) of this Agreement. Whenever in said required contract provisions references are made to:

(a) "contractor," "prime contractor," "bidder" or "prospective primary participant," such references shall be construed to mean the Progressive Contractor or its authorized representative or other members of the Progressive Contractor, as applicable, or their respective authorized representatives, as may be appropriate under the circumstances;

(b) "contract" or "prime contract," such references shall be construed to mean the Agreement;

(c) "subcontractor," "supplier," "vendor," "prospective lower tier participant" or "lower tier subcontractor," such references shall be construed to mean, as appropriate, contractors other than the Lead Contractor; and

(d) "department," "agency" or "department or agency entering into this transaction," such references shall be construed to mean the Department, except where a different department or agency is specified.

NON-COLLUSION PROVISION.

The provisions in this section are applicable to all contracts except contracts for Federal Aid Secondary Projects. Title 23, United States Code, Section 112, requires as a condition precedent to approval by the Federal Highway Administrator of the contract for this work that each bidder file a sworn statement executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with the submitted bid. A form to make the non-collusion affidavit statement required by 23 U.S.C. § 112 as a certification under penalty of perjury rather than as a sworn statement as permitted by 28 U.S.C. § 1746, is included in the Proposal.

RECOVERED MATERIALS

The Progressive Contractor and its contractors (at all tiers) shall comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), including the regulatory provisions of 40 C.F.R., Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 C.F.R., Part 247. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 C.F.R., Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

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ATTACHMENT 2 TO EXHIBIT G

FHWA-1273

Revised October 23, 2023***[NTD: ensure most current version used in letting]***

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REQUIRED CONTRACT PROVISIONS
FEDERAL-AID CONSTRUCTION CONTRACTS

I. General
II. Nondiscrimination
III. Non-segregated Facilities
IV. Davis-Bacon and Related Act Provisions
V. Contract Work Hours and Safety Standards Act Provisions
VI. Subletting or Assigning the Contract
VII. Safety: Accident Prevention
VIII. False Statements Concerning Highway Projects
IX. Implementation of Clean Air Act and Federal Water Pollution Control Act
X. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion
XI. Certification Regarding Use of Contract Funds for Lobbying
XII. Use of United States-Flag Vessels:

ATTACHMENTS

A. Employment and Materials Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts (included in Appalachian contracts only)

I. GENERAL

1. Form FHWA-1273 must be physically incorporated in each construction contract funded under title 23, United States Code, as required in 23 CFR 633.102(b) (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services). 23 CFR 633.102(e).

The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider. 23 CFR 633.102(e).

Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services) in accordance with 23 CFR 633.102. The design-builder shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Contracting agencies may reference Form FHWA-1273 in solicitation-for-bids or request-for-proposals documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract). 23 CFR 633.102(b).

2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract. 23 CFR 633.102(d).

3. A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.

4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. 23 U.S.C. 114(b). The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors. 23 U.S.C. 101(a).

II. NONDISCRIMINATION (23 CFR 230.107(a); 23 CFR Part 230, Subpart A, Appendix A; EO 11246)

The provisions of this section related to 23 CFR Part 230, Subpart A, Appendix A are applicable to all Federal-aid construction contracts and to all related construction subcontracts of $10,000 or more. The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.

In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR Part 60, 29 CFR Parts 1625-1627, 23 U.S.C. 140, Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d et seq.), and related regulations including 49 CFR Parts 21, 26, and 27; and 23 CFR Parts 200, 230, and 633.

The contractor and all subcontractors must comply with: the requirements of the Equal Opportunity Clause in 41 CFR 601.4(b) and, for all construction contracts exceeding $10,000, the Standard Federal Equal Employment Opportunity Construction Contract Specifications in 41 CFR 60-4.3.

Note: The U.S. Department of Labor has exclusive authority to determine compliance with Executive Order 11246 and the policies of the Secretary of Labor including 41 CFR Part 60, and 29 CFR Parts 1625-1627. The contracting agency and the FHWA have the authority and the responsibility to ensure compliance with 23 U.S.C. 140, Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d et seq.), and related regulations including 49 CFR Parts 21, 26, and 27; and 23 CFR Parts 200, 230, and 633.

The following provision is adopted from 23 CFR Part 230, Subpart A, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.

1. Equal Employment Opportunity: Equal Employment Opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (*see* 28 CFR Part 35, 29 CFR Part 1630, 29 CFR Parts 1625-1627, 41 CFR Part 60 and 49 CFR Part 27) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140, shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR Part 35 and 29 CFR Part 1630 are incorporated by reference in this contract. In the execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

a. The contractor will work with the contracting agency and the Federal Government to ensure that it has made every good faith

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effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract. 23 CFR 230.409 (g)(4) & (5).

b. The contractor will accept as its operating policy the following statement:

> "It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, sexual orientation, gender identity, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."

2. EEO Officer: The contractor will designate and make known to the contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active EEO program and who must be assigned adequate authority and responsibility to do so.

3. Dissemination of Policy: All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action or are substantially involved in such action, will be made fully cognizant of and will implement the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:

a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer or other knowledgeable company official.

b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minorities and women.

d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

4. Recruitment: When advertising for employees, the contractor will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be placed in publications having a large circulation among minorities and women in the area from which the project work force would normally be derived.

a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women. To meet this requirement, the contractor will identify sources of potential minority group employees and establish with such identified sources procedures whereby minority and women applicants may be referred to the contractor for employment consideration.

b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe the provisions of that agreement to the extent that the system meets the contractor's compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.

c. The contractor will encourage its present employees to refer minorities and women as applicants for employment. Information and procedures with regard to referring such applicants will be discussed with employees.

5. **Personnel Actions:** Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age or disability. The following procedures shall be followed:

a. The contractor will conduct periodic inspections of project sites to ensure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.

c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with its obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of their avenues of appeal.

6. Training and Promotion:

a. The contractor will assist in locating, qualifying, and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.

b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs (i.e., apprenticeship and on-the-job training programs for the geographical area of contract performance). In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision. The contracting agency may reserve training positions for persons who receive welfare assistance in accordance with 23 U.S.C. 140(a).

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c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.

d. The contractor will periodically review the training and promotion potential of employees who are minorities and women and will encourage eligible employees to apply for such training and promotion.

7. Unions: If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use good faith efforts to obtain the cooperation of such unions to increase opportunities for minorities and women. 23 CFR 230.409. Actions by the contractor, either directly or through a contractor's association acting as agent, will include the procedures set forth below:

a. The contractor will use good faith efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minorities and women for membership in the unions and increasing the skills of minorities and women so that they may qualify for higher paying employment.

b. The contractor will use good faith efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.

c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the contracting agency and shall set forth what efforts have been made to obtain such information.

d. In the event the union is unable to provide the contractor with a reasonable flow of referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability; making full efforts to obtain qualified and/or qualifiable minorities and women. The failure of a union to provide sufficient referrals (even though it is obligated to provide exclusive referrals under the terms of a collective bargaining agreement) does not relieve the contractor from the requirements of this paragraph. In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the contracting agency.

8. Reasonable Accommodation for Applicants / Employees with Disabilities: The contractor must be familiar with the requirements for and comply with the Americans with Disabilities Act and all rules and regulations established thereunder. Employers must provide reasonable accommodation in all employment activities unless to do so would cause an undue hardship.

9. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment: The contractor shall not discriminate on the grounds of race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The contractor shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of this contract.

a. The contractor shall notify all potential subcontractors, suppliers, and lessors of their EEO obligations under this contract.

b. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.

10. Assurances Required:

a. The requirements of 49 CFR Part 26 and the State DOT's FHWA-approved Disadvantaged Business Enterprise (DBE) program are incorporated by reference.

b. The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

(1) Withholding monthly progress payments;
(2) Assessing sanctions;
(3) Liquidated damages; and/or
(4) Disqualifying the contractor from future bidding as non-responsible.

c. The Title VI and nondiscrimination provisions of U.S. DOT Order 1050.2A at Appendixes A and E are incorporated by reference. 49 CFR Part 21.

11. Records and Reports: The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following the date of the final payment to the contractor for all contract work and shall be available at reasonable times and places for inspection by authorized representatives of the contracting agency and the FHWA.

a. The records kept by the contractor shall document the following: The number and work hours of minority and non-minority group members and women employed in each work classification on the project;
(1) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women; and

(2) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minorities and women.

b. The contractors and subcontractors will submit an annual report to the contracting agency each July for the duration of the project indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA-1391. The staffing data should represent the project work force on board in all or any part of the last payroll period preceding the end of July. If on-the-job training is being required by special provision, the contractor will be required to collect and report training data. The employment data should reflect the work force on board during all or any part of the last payroll period preceding the end of July.

III. NONSEGREGATED FACILITIES

This provision is applicable to all Federal-aid construction contracts and to all related construction subcontracts of more than $10,000. 41 CFR 60-1.5.

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As prescribed by 41 CFR 60-1.8, the contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensure that its employees are not assigned to perform their services at any location under the contractor's control where the facilities are segregated. The term "facilities" includes waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees. The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.

IV. DAVIS-BACON AND RELATED ACT PROVISIONS

This section is applicable to all Federal-aid construction projects exceeding $2,000 and to all related subcontracts and lower-tier subcontracts (regardless of subcontract size), in accordance with 29 CFR 5.5. The requirements apply to all projects located within the right-of-way of a roadway that is functionally classified as Federal-aid highway. 23 U.S.C. 113. This excludes roadways functionally classified as local roads or rural minor collectors, which are exempt. 23 U.S.C. 101. Where applicable law requires that projects be treated as a project on a Federal-aid highway, the provisions of this subpart will apply regardless of the location of the project. Examples include: Surface Transportation Block Grant Program projects funded under 23 U.S.C. 133 [excluding recreational trails projects], the Nationally Significant Freight and Highway

Projects funded under 23 U.S.C. 117, and National Highway Freight Program projects funded under 23 U.S.C. 167.
The following provisions are from the U.S. Department of Labor regulations in 29 CFR 5.5 “Contract provisions and related matters” with minor revisions to conform to the FHWA-1273 format and FHWA program requirements.

1. Minimum wages (29 CFR 5.5)

a. Wage rates and fringe benefits. All laborers and mechanics employed or working upon the site of the work (or otherwise working in construction or development of the project under a development statute), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of basic hourly wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. As provided in paragraphs (d) and (e) of 29 CFR 5.5, the appropriate wage determinations are effective by operation of law even if they have not been attached to the contract. Contributions made or costs reasonably anticipated for bona fide fringe benefits under the Davis-Bacon Act (40 U.S.C. 3141(2)(B)) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph 1.e. of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics must be paid the appropriate wage rate and fringe benefits on the wage determination for the classification(s) of work actually performed, without regard to skill, except as provided in paragraph 4. of this section. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided,* That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph 1.c. of this section) and the Davis-Bacon poster (WH–1321) must be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

b. Frequently recurring classifications. (1) In addition to wage and fringe benefit rates that have been determined to be prevailing under the procedures set forth in 29 CFR part 1, a wage determination may contain, pursuant to § 1.3(f), wage and fringe benefit rates for classifications of laborers and mechanics for which conformance requests are regularly submitted pursuant to paragraph 1.c. of this section, provided that:

(i) The work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined;

(ii) The classification is used in the area by the construction industry; and

(iii) The wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination.

(2) The Administrator will establish wage rates for such classifications in accordance with paragraph 1.c.(1)(iii) of this section. Work performed in such a classification must be paid at no less than the wage and fringe benefit rate listed on the wage determination for such classification.

c. Conformance. (1) The contracting officer must require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract be classified in conformance with the wage determination. Conformance of an additional classification and wage rate and fringe benefits is appropriate only when the following criteria have been met:

(i) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(ii) The classification is used in the area by the construction industry; and

(iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(2) The conformance process may not be used to split, subdivide, or otherwise avoid application of classifications listed in the wage determination.

(3) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken will be sent by the contracting officer by email to *DBAconformance@dol.gov.* The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify

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the contracting officer within the 30–day period that additional time is necessary.

(4) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer will, by email to DBAconformance@dol.gov, refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30–day period that additional time is necessary.

(5) The contracting officer must promptly notify the contractor of the action taken by the Wage and Hour Division under paragraphs 1.c.(3) and (4) of this section. The contractor must furnish a written copy of such determination to each affected worker or it must be posted as a part of the wage determination. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraph 1.c.(3) or (4) of this section must be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

d. Fringe benefits not expressed as an hourly rate. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor may either pay the benefit as stated in the wage determination or may pay another bona fide fringe benefit or an hourly cash equivalent thereof.

e. Unfunded plans. If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, in accordance with the criteria set forth in § 5.28, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

f. Interest. In the event of a failure to pay all or part of the wages required by the contract, the contractor will be required to pay interest on any underpayment of wages.

2. Withholding (29 CFR 5.5)

a. Withholding requirements. The contracting agency may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for the full amount of wages and monetary relief, including interest, required by the clauses set forth in this section for violations of this contract, or to satisfy any such liabilities required by any other Federal contract, or federally assisted contract subject to Davis-Bacon labor standards, that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon labor standards requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld. In the event of a contractor's failure to pay any laborer or mechanic, including any apprentice or helper working on the site of the work all or part of the wages required by the contract, or upon the contractor's failure to submit the required records as discussed in paragraph 3.d. of this section, the contracting agency may on its own initiative and after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

b. Priority to withheld funds. The Department has priority to funds withheld or to be withheld in accordance with paragraph 2.a. of this section or Section V, paragraph 3.a., or both, over claims to those funds by:

(1) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(2) A contracting agency for its reprocurement costs;

(3) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(4) A contractor's assignee(s);

(5) A contractor's successor(s); or

(6) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

3. Records and certified payrolls (29 CFR 5.5)

a. *Basic record requirements* (1) *Length of record retention.* All regular payrolls and other basic records must be maintained by the contractor and any subcontractor during the course of the work and preserved for all laborers and mechanics working at the site of the work (or otherwise working in construction or development of the project under a development statute) for a period of at least 3 years after all the work on the prime contract is completed.

(2) Information required. Such records must contain the name; Social Security number; last known address, telephone number, and email address of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid.

(3) Additional records relating to fringe benefits. Whenever the Secretary of Labor has found under paragraph 1.e. of this section that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act, the contractor must maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(4) Additional records relating to apprenticeship. Contractors with apprentices working under approved programs must maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs.

b. *Certified payroll requirements* (1) *Frequency and method of submission.* The contractor or subcontractor must submit weekly, for each week in which any DBA- or Related Acts-covered work is performed, certified payrolls to the contracting agency. The prime

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contractor is responsible for the submission of all certified payrolls by all subcontractors. A contracting agency or prime contractor may permit or require contractors to submit certified payrolls through an electronic system, as long as the electronic system requires a legally valid electronic signature; the system allows the contractor, the contracting agency, and the Department of Labor to access the certified payrolls upon request for at least 3 years after the work on the prime contract has been completed; and the contracting agency or prime contractor permits other methods of submission in situations where the contractor is unable or limited in its ability to use or access the electronic system.

(2) *Information required.* The certified payrolls submitted must set out accurately and completely all of the information required to be maintained under paragraph 3.a.(2) of this section, except that full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals. Instead, the certified payrolls need only include an individually identifying number for each worker (*e.g.*, the last four digits of the worker's Social Security number). The required weekly certified payroll information may be submitted using Optional Form WH–347 or in any other format desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division website at *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347/.pdf* or its successor website. It is not a violation of this section for a prime contractor to require a subcontractor to provide full Social Security numbers and last known addresses, telephone numbers, and email addresses to the prime contractor for its own records, without weekly submission by the subcontractor to the contracting agency.

(3) *Statement of Compliance.* Each certified payroll submitted must be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor, or the contractor's or subcontractor's agent who pays or supervises the payment of the persons working on the contract, and must certify the following:

(i) That the certified payroll for the payroll period contains the information required to be provided under paragraph 3.b. of this section, the appropriate information and basic records are being maintained under paragraph 3.a. of this section, and such information and records are correct and complete;

(ii) That each laborer or mechanic (including each helper and apprentice) working on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR part 3; and

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification(s) of work actually performed, as specified in the applicable wage determination incorporated into the contract.

(4) Use of Optional Form WH–347. The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH–347 will satisfy the requirement for submission of the "Statement of Compliance" required by paragraph 3.b.(3) of this section.

(5) Signature. The signature by the contractor, subcontractor, or the contractor's or subcontractor's agent must be an original handwritten signature or a legally valid electronic signature.

(6) Falsification. The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 3729.

(7) Length of certified payroll retention. The contractor or subcontractor must preserve all certified payrolls during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

c. Contracts, subcontracts, and related documents. The contractor or subcontractor must maintain this contract or subcontract and related documents including, without limitation, bids, proposals, amendments, modifications, and extensions. The contractor or subcontractor must preserve these contracts, subcontracts, and related documents during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

d. Required disclosures and access (1) *Required record disclosures and access to workers.* The contractor or subcontractor must make the records required under paragraphs 3.a. through 3.c. of this section, and any other documents that the contracting agency, the State DOT, the FHWA, or the Department of Labor deems necessary to determine compliance with the labor standards provisions of any of the applicable statutes referenced by § 5.1, available for inspection, copying, or transcription by authorized representatives of the contracting agency, the State DOT, the FHWA, or the Department of Labor, and must permit such representatives to interview workers during working hours on the job.

(2) Sanctions for non-compliance with records and worker access requirements. If the contractor or subcontractor fails to submit the required records or to make them available, or refuses to permit worker interviews during working hours on the job, the Federal agency may, after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, that maintains such records or that employs such workers, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available, or to permit worker interviews during working hours on the job, may be grounds for debarment action pursuant to § 5.12. In addition, any contractor or other person that fails to submit the required records or make those records available to WHD within the time WHD requests that the records be produced will be precluded from introducing as evidence in an administrative proceeding under 29 CFR part 6 any of the required records that were not provided or made available to WHD. WHD will take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD will determine the reasonableness of the request and may consider, among other things, the location of the records and the volume of production.

(3) Required information disclosures. Contractors and subcontractors must maintain the full Social Security number and last known address, telephone number, and email address of each covered worker, and must provide them upon request to the contracting agency, the State DOT, the FHWA, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or other compliance action.

4. Apprentices and equal employment opportunity (29 CFR 5.5)

a. *Apprentices* (1) *Rate of pay.* Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship

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Agency recognized by the OA. A person who is not individually registered in the program, but who has been certified by the OA or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice, will be permitted to work at less than the predetermined rate for the work they perform in the first 90 days of probationary employment as an apprentice in such a program. In the event the OA or a State Apprenticeship Agency recognized by the OA withdraws approval of an apprenticeship program, the contractor will no longer be permitted to use apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(2) Fringe benefits. Apprentices must be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringe benefits must be paid in accordance with that determination.

(3) Apprenticeship ratio. The allowable ratio of apprentices to journeyworkers on the job site in any craft classification must not be greater than the ratio permitted to the contractor as to the entire work force under the registered program or the ratio applicable to the locality of the project pursuant to paragraph 4.a.(4) of this section. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in paragraph 4.a.(1) of this section, must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under this section must be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(4) Reciprocity of ratios and wage rates. Where a contractor is performing construction on a project in a locality other than the locality in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) applicable within the locality in which the construction is being performed must be observed. If there is no applicable ratio or wage rate for the locality of the project, the ratio and wage rate specified in the contractor's registered program must be observed.

b. *Equal employment opportunity.* The use of apprentices and journeyworkers under this part must be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

c. Apprentices and Trainees (programs of the U.S. DOT).
Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. 23 CFR 230.111(e)(2). The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeyworkers shall not be greater than permitted by the terms of the particular program.

5. Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract as provided in 29 CFR 5.5.

6. **Subcontracts**. The contractor or subcontractor must insert FHWA-1273 in any subcontracts, along with the applicable wage determination(s) and such other clauses or contract modifications as the contracting agency may by appropriate instructions require, and a clause requiring the subcontractors to include these clauses and wage determination(s) in any lower tier subcontracts. The prime contractor is responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this section. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and may be subject to debarment, as appropriate. 29 CFR 5.5.

7. **Contract termination: debarment.** A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

8. **Compliance with Davis-Bacon and Related Act requirements.** All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract as provided in 29 CFR 5.5.

9. **Disputes concerning labor standards.** As provided in 29 CFR 5.5, disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10. **Certification of eligibility**. a. By entering into this contract, the contractor certifies that neither it nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of 40 U.S.C. 3144(b) or § 5.12(a).

b. No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of 40 U.S.C. 3144(b) or § 5.12(a).

c. The penalty for making false statements is prescribed in the U.S. Code, Title 18 Crimes and Criminal Procedure, 18 U.S.C. 1001.

11. Anti-retaliation. It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

a. Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the DBA, Related Acts, this part, or 29 CFR part 1 or 3;

b. Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under the DBA, Related Acts, this part, or 29 CFR part 1 or 3;

c. Cooperating in any investigation or other compliance action, or testifying in any proceeding under the DBA, Related Acts, this part, or 29 CFR part 1 or 3; or

d. Informing any other person about their rights under the DBA, Related Acts, this part, or 29 CFR part 1 or 3.

V. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

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Pursuant to 29 CFR 5.5(b), the following clauses apply to any Federal-aid construction contract in an amount in excess of $100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by 29 CFR 5.5(a) or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchpersons and guards.

1. Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek. 29 CFR 5.5.

2. Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph 1. of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages and interest from the date of the underpayment. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchpersons and guards, employed in violation of the clause set forth in paragraph 1. of this section, in the sum currently provided in 29 CFR 5.5(b)(2)* for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph 1. of this section.
* $31 as of January 15, 2023 (See 88 FR 88 FR 2210) as may be adjusted annually by the Department of Labor, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990.

3. Withholding for unpaid wages and liquidated damages

a. Withholding process. The FHWA or the contracting agency may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for any unpaid wages; monetary relief, including interest; and liquidated damages required by the clauses set forth in this section on this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to the Contract Work Hours and Safety Standards Act and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld.

b. Priority to withheld funds. The Department has priority to funds withheld or to be withheld in accordance with Section IV paragraph 2.a. or paragraph 3.a. of this section, or both, over claims to those funds by:

(1) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(2) A contracting agency for its reprocurement costs;

(3) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(4) A contractor's assignee(s);

(5) A contractor's successor(s); or

(6) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

4. Subcontracts. The contractor or subcontractor must insert in any subcontracts the clauses set forth in paragraphs 1. through 5. of this section and a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor is responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs 1. through 5. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and associated liquidated damages and may be subject to debarment, as appropriate.

5. Anti-retaliation. It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

a. Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the Contract Work Hours and Safety Standards Act (CWHSSA) or its implementing regulations in this part;

b. Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under CWHSSA or this part;

c. Cooperating in any investigation or other compliance action, or testifying in any proceeding under CWHSSA or this part; or

d. Informing any other person about their rights under CWHSSA or this part.

VI. SUBLETTING OR ASSIGNING THE CONTRACT

This provision is applicable to all Federal-aid construction contracts on the National Highway System pursuant to 23 CFR 635.116.

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the contracting agency. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635.116).

a. The term "perform work with its own organization" in paragraph 1 of Section VI refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased

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employees from an employee leasing firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions: (based on longstanding interpretation)

(1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;

(2) the prime contractor remains responsible for the quality of the work of the leased employees;

(3) the prime contractor retains all power to accept or exclude individual employees from work on the project; and

(4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid or propose on the contract as a whole and in general are to be limited to minor components of the overall contract. 23 CFR 635.102.

2. Pursuant to 23 CFR 635.116(a), the contract amount upon which the requirements set forth in paragraph (1) of Section VI is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. Pursuant to 23 CFR 635.116(c), the contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract. (based on long-standing interpretation of 23 CFR 635.116).

5. The 30-percent self-performance requirement of paragraph (1) is not applicable to design-build contracts; however, contracting agencies may establish their own self-performance requirements. 23 CFR 635.116(d).

VII. SAFETY: ACCIDENT PREVENTION

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR Part 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract. 23 CFR 635.108.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and
health standards (29 CFR Part 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704). 29 CFR 1926.10.

3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704).

VIII. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, Form FHWA-1022 shall be posted on each Federal-aid highway project (23 CFR Part 635) in one or more places where it is readily available to all persons concerned with the project:

18 U.S.C. 1020 reads as follows:

> "Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or
>
> Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or
>
> Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 11, 1916, (39 Stat. 355), as amended and supplemented;

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Shall be fined under this title or imprisoned not more than 5 years or both."

IX. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT (42 U.S.C. 7606; 2 CFR 200.88; EO 11738)

This provision is applicable to all Federal-aid construction contracts in excess of $150,000 and to all related subcontracts. 48 CFR 2.101; 2 CFR 200.327.

By submission of this bid/proposal or the execution of this contract or subcontract, as appropriate, the bidder, proposer, Federal-aid construction contractor, subcontractor, supplier, or vendor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal Highway Administration and the Regional Office of the Environmental Protection Agency. 2 CFR Part 200, Appendix II.

The contractor agrees to include or cause to be included the requirements of this Section in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements. 2 CFR 200.327.

X. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost $25,000 or more – as defined in 2 CFR Parts 180 and 1200. 2 CFR 180.220 and 1200.220.

1**. Instructions for Certification – First Tier Participants:**

a. By signing and submitting this proposal, the prospective first tier participant is providing the certification set out below.

b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction. 2 CFR 180.320.

c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default. 2 CFR 180.325.

d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. 2 CFR 180.345 and 180.350.

e. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180, Subpart I, 180.900-180.1020, and 1200. “First Tier Covered Transactions” refers to any covered transaction between a recipient or subrecipient of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a recipient or subrecipient of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

f. The prospective first tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction. 2 CFR 180.330.

g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the $25,000 threshold. 2 CFR 180.220 and 180.300.

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. 2 CFR 180.300; 180.320, and 180.325. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. 2 CFR 180.335. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the System for Award Management website (https://www.sam.gov/). 2 CFR 180.300, 180.320, and 180.325.

i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default. 2 CFR 180.325.

* * * * *

2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:

a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:

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(1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency, 2 CFR 180.335;.

(2) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property, 2 CFR 180.800;

(3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification, 2 CFR 180.700 and 180.800; and

(4) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default. 2 CFR 180.335(d).

(5) Are not a corporation that has been convicted of a felony violation under any Federal law within the two-year period preceding this proposal (USDOT Order 4200.6 implementing appropriations act requirements); and

(6) Are not a corporation with any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted, or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability (USDOT Order 4200.6 implementing appropriations act requirements).

c. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant should attach an explanation to this proposal. 2 CFR 180.335 and 180.340.

* * * * *

3. Instructions for Certification - Lower Tier Participants:

(Applicable to all subcontracts, purchase orders, and other lower tier transactions requiring prior FHWA approval or estimated to cost $25,000 or more - 2 CFR Parts 180 and 1200). 2 CFR 180.220 and 1200.220.

a. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances. 2 CFR 180.365.

d. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180, Subpart I, 180.900 – 180.1020, and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. “First Tier Covered Transactions” refers to any covered transaction between a recipient or subrecipient of Federal funds and a participant (such as the prime or general contract). “Lower Tier Covered Transactions” refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). “First Tier Participant” refers to the participant who has entered into a covered transaction with a recipient or subrecipient of Federal funds (such as the prime or general contractor). “Lower Tier Participant” refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated. 2 CFR 1200.220 and 1200.332.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the $25,000 threshold. 2 CFR 180.220 and 1200.220.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the System for Award Management website (https://www.sam.gov/), which is compiled by the General Services Administration. 2 CFR 180.300, 180.320, 180.330, and 180.335.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment. 2 CFR 180.325.

* * * * *

4. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Participants:

a. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals:

(1) is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency, 2 CFR 180.355;

(2) is a corporation that has been convicted of a felony violation under any Federal law within the two-year period preceding this proposal (USDOT Order 4200.6 implementing appropriations act requirements); and

(3) is a corporation with any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted, or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability. (USDOT Order 4200.6 implementing appropriations act requirements)

b. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant should attach an explanation to this proposal.

* * * * *

XI. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts which exceed $100,000. 49 CFR Part 20, App. A.

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

3. The prospective participant also agrees by submitting its bid or proposal that the participant shall require that the language of this certification be included in all lower tier subcontracts, which exceed $100,000 and that all such recipients shall certify and disclose accordingly.

XII. USE OF UNITED STATES-FLAG VESSELS:

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, or any other covered transaction. 46 CFR Part 381.

This requirement applies to material or equipment that is acquired for a specific Federal-aid highway project. 46 CFR 381.7. It is not applicable to goods or materials that come into inventories independent of an FHWA funded-contract.

When oceanic shipments (or shipments across the Great Lakes) are necessary for materials or equipment acquired for a specific Federal-aid construction project, the bidder, proposer, contractor, subcontractor, or vendor agrees:

1. To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels. 46 CFR 381.7.

2. To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (b)(1) of this section to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Office of Cargo and Commercial Sealift (MAR-620), Maritime Administration, Washington, DC 20590. (MARAD requires copies of the ocean carrier's (master) bills of lading, certified onboard, dated, with rates and charges. These bills of lading may contain business sensitive information and therefore may be submitted directly to MARAD by the Ocean Transportation Intermediary on behalf of the contractor). 46 CFR 381.7.

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ATTACHMENT A - EMPLOYMENT AND MATERIALS PREFERENCE FOR APPALACHIAN DEVELOPMENT HIGHWAY SYSTEM OR APPALACHIAN LOCAL ACCESS ROAD CONTRACTS (23 CFR 633, Subpart B, Appendix B)

This provision is applicable to all Federal-aid projects funded under the Appalachian Regional Development Act of 1965.

1. During the performance of this contract, the contractor undertaking to do work which is, or reasonably may be, done as on-site work, shall give preference to qualified persons who regularly reside in the labor area as designated by the DOL wherein the contract work is situated, or the subregion, or the Appalachian counties of the State wherein the contract work is situated, except:

a. To the extent that qualified persons regularly residing in the area are not available.

b. For the reasonable needs of the contractor to employ supervisory or specially experienced personnel necessary to assure an efficient execution of the contract work.

c. For the obligation of the contractor to offer employment to present or former employees as the result of a lawful collective bargaining contract, provided that the number of nonresident persons employed under this subparagraph (1c) shall not exceed 20 percent of the total number of employees employed by the contractor on the contract work, except as provided in subparagraph (4) below.

2. The contractor shall place a job order with the State Employment Service indicating (a) the classifications of the laborers, mechanics and other employees required to perform the contract work, (b) the number of employees required in each classification, (c) the date on which the participant estimates such employees will be required, and (d) any other pertinent information required by the State Employment Service to complete the job order form. The job order may be placed with the State Employment Service in writing or by telephone. If during the course of the contract work, the information submitted by the contractor in the original job order is substantially modified, the participant shall promptly notify the State Employment Service.

3. The contractor shall give full consideration to all qualified job applicants referred to him by the State Employment Service. The contractor is not required to grant employment to any job applicants who, in his opinion, are not qualified to perform the classification of work required.

4. If, within one week following the placing of a job order by the contractor with the State Employment Service, the State Employment Service is unable to refer any qualified job applicants to the contractor, or less than the number requested, the State Employment Service will forward a certificate to the contractor indicating the unavailability of applicants. Such certificate shall be made a part of the contractor's permanent project records. Upon receipt of this certificate, the contractor may employ persons who do not normally reside in the labor area to fill positions covered by the certificate, notwithstanding the provisions of subparagraph (1c) above.

5. The provisions of 23 CFR 633.207(e) allow the contracting agency to provide a contractual preference for the use of mineral resource materials native to the Appalachian region.

6. The contractor shall include the provisions of Sections 1 through 4 of this Attachment A in every subcontract for work which is, or reasonably may be, done as on-site work.

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ATTACHMENT 3 TO EXHIBIT G

FEDERAL PREVAILING WAGE RATE

PROJECT WAGE RATES – FEDERAL

The contractor shall use the appropriate Davis Bacon Act wage determinations that are effective 10 calendar days prior to the execution of the Construction Phase Amendment.***[NTD: Construction Phase Amendment to include DBA wage rates.]*** Applicable project wage determinations can be found at the following link:

SAM.gov | Search

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ATTACHMENT 4 TO EXHIBIT G

COMPLIANCE WITH BUY AMERICA AND BUILD AMERICA, BUY AMERICA REQUIREMENTS *[NTD: reserve if not federalized][NTD2: As a general note, FHWA with jurisdiction in Indiana may later provide additional guidance. From OMB implementation guidance ca. August/2023: "Individual Federal agencies are best positioned to provide more specific information on how BABA, part 184, and their existing requirements apply to specific infrastructure projects or Federal financial assistance programs that they oversee and implement."; check with INDOT legal team on status of Indiana-specific guidance and/or direction]*

Progressive Contractor shall comply with the requirements of 23 U.S.C. § 313 as amended by the Build America, Buy America Act (under the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, Pub. L. 117-58, Nov. 15, 2021), and the federal regulations under 23 C.F.R. § 635.410, 2 C.F.R. § 200.322(c) and 2 C.F.R. § 184.

23 C.F.R. § 635.410 permits federal financial assistance in the Agreement only if (a) all iron and steel used in the Project be produced in the United States (i.e., all manufacturing processes, from the initial melting stage through the application of coatings, to occur in the United States); (b) all manufactured products[1] used in the Project are produced in the United States (i.e., the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product[2], unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation); and (c) all construction materials[3] are manufactured in the United States (i.e., all manufacturing processes for the construction material occurred in the United States and satisfy the material-specific requirements set forth in 2 C.F.R. § 184.6); provided, however, that the following exceptions shall apply:[4]

(i) iron and steel where all manufacturing processes did not occur in the United States may be used so long as the cumulative cost of such steel and iron materials as they are delivered to the Project does not exceed 0.1% of the total contract amount, or $2,500, whichever is greater;

(ii) construction materials and manufactured products[5] ***[NTD: verify waiver still in place; if no, remove footnote]*** not meeting the requirements set forth in subsections (b) and (c) above may be used so long as no more than the lesser of (A) $1,000,000, or (B) 5% of total applicable costs for the Project (defined as the total cost of iron and steel, manufactured

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1 "Manufactured products" is as defined in 2 C.F.R. § 184.3.

2 To be calculated in accordance with 2 C.F.R. § 184.5.

3 "Construction materials" is defined in 2 C.F.R. § 184.3 (as affected by section 70917(c)(1) of the Infrastructure Investment and Jobs Act).

4 A waiver is currently in place for steel, iron, manufactured products, and construction materials in electric vehicle chargers manufactured prior to July 1, 2024 (see: FHWA "Waiver of Buy America Requirements for Electric Vehicle Chargers": https://www.federalregister.gov/documents/2023/02/21/2023-03498/waiver-of-buy-america-requirements-for-electric-vehicle-chargers).

5 A nationwide Buy America waiver that supersedes Build America, Buy America requirements is currently in effect for manufactured products. Manufactured products that are not predominantly steel or iron fall under this waiver and are allowable for use without regard to country of origin. "Predominantly steel or iron" is defined as greater than or equal to 50 percent of the total cost of the manufactured product.

products, and construction materials used in the Project, whether or not within the scope of an existing waiver); and

(iii) no domestic preference requirements under the statutes and regulations covered by this certification shall be applicable where the total amount of federal financial assistance applied to the project, through awards or subawards, is below $500,000.

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure Project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure Project, but are not an integral part of the structure or permanently affixed to the infrastructure Project.

Concurrently with execution, Progressive Contractor has completed and submitted, or shall complete and submit, to the Department a Buy America Certificate and a Build America, Buy America Certificate, each in the format below. After submittal, Progressive Contractor is bound by its original certifications.

A false certification is a criminal act in violation of 18 U.S.C. § 1001. Should the Agreement be investigated, the Progressive Contractor has the burden of proof to establish that it is in compliance.

At the Progressive Contractor's request, the Department may, but is not obligated to, seek a waiver of Buy America requirements if grounds for the waiver exist pursuant to 23 C.F.R. § 635.410(c), as amended by the Build America, Buy America Act (under the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, Pub. L. 117-58, Nov. 15, 2021) and 2 C.F.R. § 184.7. However, Progressive Contractor certifies that it will comply with the applicable Buy America requirements if a waiver of those requirements is not available or not pursued by the Department. A request for a waiver shall be treated as a Request for Construction Phase Change Order under Section 21 (*Construction Phase Change Orders*) of the Agreement.

Capitalized terms used, but not otherwise defined in this Attachment 4 to Exhibit G (*Federal Requirements*) have the meanings ascribed in Exhibit A (*Definitions and Submittals*) to the Agreement.

BUY AMERICA CERTIFICATE

Certificate of Compliance

Progressive Contractor hereby certifies that it is in compliance with the requirements of 23 U.S.C. § 313 as amended by the Build America, Buy America Act (under the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, Pub. L. 117-58, Nov. 15, 2021), and the federal regulations under 23 C.F.R. § 635.410, 2 C.F.R. § 200.322(c), and 2 C.F.R. § 184 for the following project:

Contract ID # [_____]***[NTD: include solicitation's Contract ID #]***

[_____] COUNTY***[NTD: include county/ies]***

Progressive Contractor further certifies that as required, Progressive Contractor will maintain all records and documents pertinent to the Buy America requirement, for not less than three years from the date of Final Acceptance. These files will be available for inspection and verification by the Department and/or the Federal Highway Administration.

Date:_____

Signature:_____

Progressive Contractor's Name:_____

Title:_____

Subscribed and sworn to before me this _day of _____, _____.

_____ My Commission Expires: _____
Notary Public/Justice of the Peace

OR

CERTIFICATE FOR NONCOMPLIANCE

With respect to the following project:

Contract ID # [_____]***[NTD: include solicitation's Contract ID #]***

[_____] COUNTY***[NTD: include county/ies]***

Progressive Contractor hereby certifies that it cannot comply with the requirements of 23 U.S.C. § 313, as amended by the Build America, Buy America Act (under the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, Pub. L. 117-58, Nov. 15, 2021), and the applicable regulations in 23 C.F.R. § 635.410, 2 C.F.R. § 200.322(c), and 2 C.F.R. § 184, but may qualify for a waiver to these requirement(s) pursuant to the foregoing statutes and regulations, and that Progressive Contractor has submitted or will submit, within 15 Days after the date of this certificate, a Request for Construction Phase Change Order under Section 21 (*Construction Phase Change Orders*) of the Agreement.

Progressive Contractor acknowledges, agrees, and further certifies that if the foregoing waiver of requirements sought via submission of a timely Request for Change pursuant to Section 21 (*Construction Phase Change Orders*) of the Agreement is not available or not pursued by the Department, then Progressive Contractor shall comply with, and cause all Subcontractors of any tier to comply with, the applicable Buy America requirements within the foregoing statutes and regulations and submit, and cause to be submitted, promptly following notice from the Department to Progressive Contractor of such unavailability or intent not to pursue such waiver, a Certificate of Compliance in form and substance under this Attachment 4 to Exhibit G (*Federal Requirements*).

References to the "Agreement" (and to sections, exhibits, and attachments thereto) are to the "Agreement", by and between the Department and the Progressive Contractor, with respect to the foregoing project.

Date:_____

Signature:_____

Progressive Contractor's Name:_____

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Title:_____

Subscribed and sworn to before me this _day of _____, _____.

_____ My Commission Expires: _____
Notary Public/Justice of the Peace

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ATTACHMENT 5 TO EXHIBIT G

LEGAL REQUIREMENTS AND RESPONSIBILITY TO THE PUBLIC – CARGO PREFERENCE ACT (CPA).

(REV 12-17-15) (1-16)

SECTION 7 is expanded by the following new Article:

102.10 Cargo Preference Act – Use of United States-flag vessels.

Pursuant to Title 46CFR Part 381, the Contractor agrees

(a) To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

(b) To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph 1 of this section to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

To insert the substance of the provisions of this clause in all subcontracts issued pursuant to this contract.

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ATTACHMENT 6 TO EXHIBIT G

ON-THE-JOB TRAINING PROGRAM AND PARTNERSHIP AGREEMENT

INDIANA DEPARTMENT OF

TRANSPORTATION

ON-THE-JOB TRAINING PROGRAM & PARTNERSHIP AGREEMENT

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1.1 Definitions

Contractor means "prime" contractor.

Disadvantaged Person means an individual or family that meets the Department of Health and Human Services poverty guidelines. These guidelines are updated at least annually and will be utilized as the eligibility criterion for the On-the-Job Training (OJT) Program.

Division Administrator means the chief Federal Highway Administration (FHWA) official assigned to conduct FHWA business in a particular State.

DOT means the U.S. Department of Transportation, including FHWA.

Federal-Aid Contract is any contract between the Indiana Department of Transportation (INDOT) and a contractor that is paid for in whole or in part with DOT assistance.

Journeyman means a person who is capable of performing all the duties within a given job classification or craft.

Minorities mean the following categories for reporting data on race and ethnicity: American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander.

Supportive Services means those services provided in connection with approved on-the-job training programs for highway construction workers and highway contractors which are designed to increase the overall effectiveness of training programs through the performance of various functions necessary to the program, but which are not generally considered part of the actual on-the-job training.

Trainee means a person who received on-the-job training through an approved on-the-job training program.

Training Program means any training or apprentice program that meets the standards set forth in 23 CFR 230 and has been approved by either the FHWA Division Administrator or U.S. Department of Labor.

1.2 Policy Statement

It is the policy of INDOT to require full utilization of all available training and skill-improvement opportunities to assure the increased participation of minorities, women, and disadvantaged persons in all phases of the highway construction industry.

1.3 Nondiscrimination in Programs and Activities

Title VI of the Civil Rights Act of 1964 – Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color or national origin in programs or activities which receive federal financial assistance.

Title VII of the Civil Rights Act of 1964 – Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment and was passed to bring equality in hiring, transfers, promotions, compensation, access to training, and other employment-related decisions.

Form FHWA 1273 – Section II (Nondiscrimination) of Form FHWA-1273 sets forth a contractor's minimum Equal Employment Opportunity requirements. These include acceptance of a general operating policy that prohibits discrimination based on race, color, religion, sex, national origin, age, or disability.

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23 CFR 230 – The provisions of 23 CFR 230 are applicable to all state highway agencies that receive federal financial assistance in connection with highway construction projects.

1.4 Program Objective

The primary objective of the OJT Program is to offer equal opportunity for the training and upgrading of minorities, women, and disadvantaged persons toward journeymen status in the highway construction trades. The OJT Program has been developed in accordance with 23 CFR 230, Appendix B to Subpart A (Training Special Provisions) and is administered by INDOT's Economic Opportunity Division.

1.5 Program Summary

INDOT's OJT Program fulfills its objective by implementing a program that is dynamic and addresses constraints through the following elements:

- The program is contractor-based and affords each contractor flexibility in selecting which projects trainees can be utilized.
- Encourages contractors to select individual trainees who can become members of the contractor's regular workforce upon completion of their program.
- Emphasizes training in skilled-craft classifications using approved apprenticeship programs and other training programs approved by FHWA.
- Monitors the quality of training each individual receives.
- Assists contractors with addressing their EEO goals through training of minorities, women, and disadvantaged individuals.
- Partners with the industry and community-based organizations capable of providing OJT supportive services to trainees.
- Encourages systematic and direct recruitment of trainees through a variety of referral sources.

1.6 Goal Methodology

The Department will establish an annual training goal each year in which the contractor is working on a federal-aid contract in the State of Indiana. This annual training commitment will be calculated by multiplying the current three-year average number of hours worked in the highway construction trades on federal-aid contracts in the State of Indiana (as a prime or subcontractor) by five percent (5%). If a contractor does not have a current 3-year history, the Department will establish the annual training goal at the time the contractor is awarded its first contract for that year.

1.7 Trainee Eligibility

No individual will be employed as a trainee in any classification in which he/she has successfully completed a training program or in which he/she has been employed as a journeyman.

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1.8 Trainee Selection Procedures

The contractor shall make every effort to enroll minorities, women, and disadvantaged persons into their training programs by conducting systematic and direct recruitment through public and private sources (e.g., partnerships with trade groups, minority and women organizations, community-based organizations, and employment agencies) to the extent that such persons are available within a reasonable area of recruitment. The contractor will be responsible for demonstrating the steps taken in pursuance thereof, prior to a determination as to whether the contractor is in compliance with the Training Special Provisions. This training commitment is not intended, and shall not be used, to discriminate against any applicant for training, whether a member of a minority group or not.

1.9 Trainee Wage Rates

Trainees will be paid at the appropriate percentage of the journeyman's rate specified in the federal-aid contract for the job classification involved.

1.10 Training Goal Credit

the Department strongly encourages contractors to utilize trainees on all of their projects. Training credit will be allowed for each eligible trainee employed on any project within the State of Indiana (i.e., federal-aid, municipality, private, etc.). Training may be provided by a subcontractor, provided the contractor retains the primary responsibility for meeting the training requirements.

1.11 Contractor Responsibilities

Contractor responsibilities in implementing the Training Special Provisions include the following:

- The number of trainees shall be distributed among the work classifications on the basis of the contractor's needs and the availability of journeymen in the various classifications within a reasonable area of recruitment.
- The ratio of trainees to journeymen shall not be greater than permitted by the terms of the approved training program.
- The contractor will periodically review the training and promotional opportunities for minorities, women, and disadvantaged employees and will encourage eligible employees to apply for such opportunities.
- The contractor will advise employees and applicants for employment of available training programs and entrance requirements.
- The contractor shall furnish each trainee with a copy of the training program he/she is enrolled.
- If a trainee is terminated, the contractor is required to make good faith efforts to replace the trainee.
- Contractors are required to have an approved training program prior to working on a federal-aid contract.

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1.12 Good Faith Efforts

If a contractor does not or cannot achieve its annual training goal, it must provide adequate Good Faith Efforts documentation. Good Faith Efforts are those efforts designed to achieve equal opportunity through positive, aggressive, and continuous result-oriented measures. Good Faith Efforts should be taken as new trainee opportunities become available.

The Department will consider all contractors' documentation of Good Faith Efforts on a case-by-case basis. Consideration will be given to the following:

- Availability of minorities, females, and disadvantaged persons for training opportunities.
- The potential for effective training.
- Dollar value and length of contract.
- Total workforce that the average bidder could be expected to use.
- Geographic location.
- Type of work.
- The need for journey-level individuals in the area.

Good Faith Efforts may include, but are not limited to:

- Contact minority and female employees to gain referrals on other minority and female applicants.
- Contact minority and female recruitment sources when hiring opportunities arise.
- Upgrade minority and female unskilled workers into the skilled classifications when possible.
- Review and follow up on previously received applications from minorities and females when hiring opportunities arise.
- Maintain documentation of efforts made to achieve diversity in the workforce.

1.13 Program Monitoring and Sanctions for Noncompliance

the Department will continuously monitor contractor compliance with the goal and objectives outlined in the OJT Program. If a contractor can demonstrate that it achieved its annual training goal or that it made adequate Good Faith Efforts to do so, then the Department will make the determination that the contractor is in compliance with the OJT program.

Where a contractor has neither achieved its training goal nor submitted adequate Good Faith Efforts documentation, the Department will issue a Show Cause Notice for noncompliance and require the contractor to explain the deficiency and/or submit a written Corrective Action Plan outlining the actions it will undertake to prevent future recurrence. If a contractor fails or refuses to submit a Corrective Action Plan within 30 calendar days of receiving the Show Cause Notice, the Department may impose

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administrative sanctions. Administrative sanctions for noncompliance may include: liquidated damages, withholding of progress payments, termination or cancellation of contracts, and removal of prequalification status or inability to bid on future contracting opportunities.

1.14 Contractor Reporting Requirements

OJT Trainee Introduction Form – must be submitted to the Project Sponsors at time of hire for approval into OJT Program.

OJT Trainee Termination/Completion Form – must be submitted to the Project Sponsors whenever a trainee is terminated or successfully completes their training program.

Monthly OJT Trainee Report – reflects the number of training hours acquired by the trainee for a given month. The report must be submitted to the Project Sponsors by the 10th day of each month following the month being reported. For example, March reports are due by April 10th.

Monthly Project Report – provides a monthly listing of all projects (i.e., federal-aid, state, and private) the contractor is employed. The report must be submitted to the Project Sponsors by the 10th day of each month following the month being reported. For example, March reports are due by April 10th.

Quarterly OJT Trainee Evaluation Form – provides a quarterly assessment of the trainee. The report must be submitted to the Project Sponsors by the 10th day of each month following the quarter being reported. For example, first quarter (January-March) reports are due by April 10th.

Annual OJT Training Report – provides an annual summary of the contractors OJT performance. The report must be submitted to the Project Sponsors by January 10th.

REPORTS ARE DUE AS INDICATED ABOVE REGARDLESS OF ACTIVITY.

1.15 Records

The contractor shall retain all training and reporting records relating to its annual training commitment for a period of three years. Such records shall be available at reasonable times and places for inspection by authorized representatives of the Project Sponsors and FHWA.

1.16 Annual Training Goal Calculation and Partnership Agreement

Step 1: Determine the total number of hours worked in the highway construction trades on **INDOT federal-aid contracts** (either as a prime contractor or subcontractor) during the past three years. Do not include hours worked on state-funded and private work.

Step 2: Add the total number of hours from each year and divide by three (3):

_____ + _____ + _____ = _____ ÷ 3 = _____

2017	2018	2019	Average Hours

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Step 3: Multiply the "Average Hours" by five percent (5%):

	X	.05	=	
Average Hours				Annual Training Goal

I hereby agree to all of the terms and conditions contained herein and affirm under penalty and perjury that the information stated above is true and accurate.

HOURS WORKED DURING	**2017 HOURS**	**2018 HOURS**	**2019 HOURS**
TOTAL			

FOR CONTRACTOR USE		**FOR DEPARTMENT USE**	
Company Name		Authorized Signature	Date
Authorized Signature	Date	Printed Name and Title	
Printed Name and Title			
Telephone Number Email Address			

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Please detach this annual training goal calculation and return to INDOT c/o Katie Daniels at kdaniels2@indot.in.gov

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FOR MORE INFORMATION CONTACT

Indiana Department of Transportation
Economic Opportunity Division
100 North Senate Avenue
N-750
Indianapolis, IN 46204

Katie Daniels
Contract Compliance Specialist / On-the-Job Training Program Lead
317-233-2412
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Exhibit H

DEPARTMENT REQUIREMENTS

Exhibit Description	***No. of Pages***
Attachment 1 – Department Conflict of Interest Policy	3

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ATTACHMENT 1

DEPARTMENT CONFLICT OF INTEREST POLICY

Vers. 5/20/19

INDIANA DEPARTMENT OF TRANSPORTATION

CONSULTANT CONFLICT OF INTEREST POLICY

Applicability

This policy applies to all contracts for professional services related to INDOT projects. This policy applies to the individual entities that make up a joint venture in the same manner as they apply to the joint venture. Parent and subsidiary entities shall be considered the same entity for the purposes of these guidelines.

INDOT maintains a separate conflict of interest policy for Public-Private Partnership (P3) projects procured under IC 8-15.7-2-14 which will take precedence over this policy for P3 projects. The P3 Conflict of Interest Policy is available in the INDOT P3 Implementation Guidelines document available at https://secure.in.gov/indot/3186.htm.

Goals

This policy is intended to accomplish the following goals:

- Promote integrity, competitiveness and fairness in the procurement and prosecution of consultant contract services;
- Provide guidance to enable consultants to make informed business decisions concerning participation in contracts with INDOT;
- Permit consultants to compete fairly to either work for INDOT or as part of DB construction contract team;
- Protect the interests of INDOT; and
- Permit consultants to work without actual or apparent conflicts of interest.

Responsibilities

The consultant (and any subconsultant), not INDOT, shall reasonably and in good faith anticipate, identify, and disclose to INDOT any actual or potential Conflict.

In addition to complying with the requirements of this Policy, the consultant or subconsultant shall also comply with any other professional responsibilities, ethics code of conduct or law applicable to the consultant or subconsultant.

The consultant shall include a term requiring compliance with this Policy in any agreement or arrangement with any subconsultant in furtherance of any INDOT contract.

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The consultant and any subconsultant shall notify INDOT of any conflict or potential conflict according to this policy in writing (by emailing INDOT at contractsrfp@indot.in.gov), fully explaining the conflict or potential conflict and providing any recommendations or protocol to remedy the conflict prior to (as applicable):

- The completion of any INDOT consultant selection process;
- Any consultant engaging any subconsultant on an INDOT contract; or
- The consultant or subconsultant accepting any work from an entity other than INDOT.

Policy

1. Consultants and subconsultants shall provide independent and uncompromised judgment, counsel, work product and public representation, with respect to every contract with INDOT.

2. Consultants and subconsultants shall support the policies and practices of the State of Indiana.

3. Any conduct or set of facts that could or does compromise or limit the duties in Paragraphs (1) and (2) above shall be considered a Conflict of Interest ("Conflict").

4. INDOT will review conflict of interest disclosures and strictly disallow the existence of conflicts in furtherance of the above goals. Exceptions will only be considered when, in the best interest of INDOT, it is determined that the number of consultants available for a particular activity are inadequate.

Guidelines for Evaluating Conflicts of Interest

- INDOT's Consultant Selection Review Committee will consider the consultant's or subconsultant's notification of a potential Conflict with consultation from the consultant's or subconsultant's project manager and agency Ethics Officer. The Committee will make a recommendation to the Commissioner on whether to object to the Conflict, waive the potential Conflict or require the consultant or subconsultant to remedy the Conflict. The Committee will include an explanation on why a waiver is appropriate for all recommendations to waive a Conflict.
- After receiving the recommendation of the Committee, INDOT's Commissioner or the Commissioner's designee, in his or her sole discretion and with the exercise of reasonableness and good faith, may object to the Conflict, waive the Conflict, or require the Consultant (or subconsultant) to remedy the Conflict to INDOT's satisfaction as a condition of INDOT awarding or continuing any contract or awarding any amendment to, extension or supplement of or additional work under any contract.

Conflict of Interest Examples

The following are activities considered to be Conflicts of Interest.

- Neither consultants nor subconsultants actively engaged in INDOT contracted responsibilities for a project shall perform concurrent services for other clients that impact or depend upon INDOT's project.

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- Neither consultants nor subconsultants actively engaged in INDOT contracted responsibilities for a project shall market to perform future services for other clients that impact or depend upon INDOT's project while under contract to INDOT.

- Neither consultants nor subconsultants actively engaged in INDOT contracted responsibilities for a project shall entertain participation on a DB construction contract team for the same project.

- Neither consultants nor subconsultants who prepare engineering construction plans or construction contract bid documents for a project under contract to INDOT shall entertain participation on a DB construction contract team for the same project.

- Neither consultants nor subconsultants actively engaged on a DB construction contract team for a project shall participate in an INDOT professional services contract for the same project in a different role.

- Neither consultants nor subconsultants shall act as the Project Engineer/Supervisor within the hierarchal chain of command over construction inspection activities associated with construction plans or bid documents they prepared for INDOT projects.

- Neither consultants nor subconsultants who prepare the detailed independent labor hour estimate specified in 23 CFR 172.7(a)(1)(v)(B) to be used as the basis of negotiation for engineering services shall entertain participation in the same services.

The following activities are not considered to be Conflicts of Interest.

- A consultant or subconsultant that collects and reports environmental or geotechnical data, without engineering design recommendations, may participate on a construction contract team at the same project location so long as all contract services have been fulfilled and all work product is made available to all potential construction contract teams on an equal and timely basis such that there is no unfair competitive advantage.

- A consultant or subconsultant that performs real estate acquisition services, may participate on a construction contract team at the same project location so long as all contract services have been fulfilled prior to construction contract bid opening and all work product is made available to all potential construction contract teams on an equal and timely basis such that there is no unfair competitive advantage.

- A consultant or subconsultant contracted to perform specific planning surveys and studies such as asset management plans and biennial bridge inspections may concurrently perform or compete for project specific preliminary engineering, right-of-way and construction engineering services for projects within the study area.

- A consultant or subconsultant that prepares an engineering assessment or similar project report may compete for future project development services so long as the completed report is made publically available to other competing teams at least four weeks prior to the RFP response due date.

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Exhibit I

INSURANCE REQUIREMENTS

1 GENERAL INSURANCE REQUIREMENTS

1.1 Evidence of Insurance

The Progressive Contractor shall (a) obtain insurance and (b) provide evidence of such insurance as proof of compliance for all insurance requirements contained in this Exhibit I (as may be modified under the Construction Phase Amendment or any Pricing Package Amendment) in accordance with Section 28.2 (*Verification of Coverage*).

Unless stated otherwise, these insurance requirements are applicable to the Progressive Contractor.

The Progressive Contractor's insurance shall cover all Work under this Agreement, whether the Work is performed by the Progressive Contractor or its Subcontractors. The Progressive Contractor's insurance shall cover the entire Project.

The Progressive Contractor shall provide a certificate ***[NTD: subject to continuing INDOT review and comment]*** of insurance including key endorsements attached to the certificate of insurance such as additional insured, waiver of subrogation, and primary and noncontributory endorsements to the Department indicating that coverage complying with this Exhibit I is in effect as a condition precedent to execution of this Agreement. The Department reserves the right to request a complete copy of one or more of the policies, at the Department's sole discretion.

When the Progressive Contractor requires a Subcontractor to obtain insurance coverage, the types and minimum limits of coverage may be different than those required in this Exhibit I, so long as any such Subcontractor insurance coverages are at least at the minimum requirements set forth in Section 2.10 (*Subcontractor Insurance Requirements*) of this Exhibit I. The Progressive Contractor shall require each Subcontractor to make the same evidence of insurance available to the Department at the Department's request. If requested, and as to each requested Subcontractor, this evidence shall be furnished to and Approved by the Department prior to the time the Progressive Contractor commences Work on the Site or furnished and Approved by the Department at the time it is requested for a Subcontractor.

1.2 Qualified Insurers

All insurance companies providing policies obtained to satisfy the insurance requirements herein must, at the time coverage under the applicable policy commences, be authorized to conduct business in the State and have an A.M. Best's rating of at least "A-, VII".

If any insurance company loses its rating, having previously satisfied such rating upon placement of relevant insurance policies, or is the subject of bankruptcy proceedings or otherwise becomes solvent, then the Progressive Contractor shall replace such insurer, and their policies, under the requirements of this Agreement within 45 days, ensuring no break in coverages.

1.3 Full Force and Effect

All insurance policies required under this Exhibit I shall remain in full force and effect until Final Acceptance at which time the Progressive Contractor shall maintain completed operations insurance throughout the later of the term of all warranties and the end of the duration of the State's statute of repose, or as otherwise required by the Contract Documents.

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1.4 Waiver of Subrogation

Progressive Contractor agrees to waive all rights against the Indemnified Parties for any claims to the extent covered by insurance required herein, to include where the Progressive Contractor is deemed to self-insure a claim or loss, where the Progressive Contractor's waiver shall apply as if it carried the required insurance. Progressive Contractor shall attach the waiver of subrogation endorsement to the certificate of insurance when providing evidence of insurance to the Department. Except for professional liability and cyber liability insurance policies, each insurance policy required herein shall include a waiver of subrogation or the insurer's consent to the insured's waiver of recovery in advance of loss. This provision shall also apply to insurance policies required of Subcontractors hereunder.

1.5 Project-Specific Coverages

The Progressive Contractor may comply with these Project insurance requirements under this Agreement within or under a Progressive Contractor-Related Entity/ies corporate or insurance program, so long as the program affords the Project dedicated policy limits and sublimits, as applicable, under each insurance policy, with the Progressive Contractor as the first named insured. This notwithstanding, the Department may direct that certain insurance policies/coverages required hereunder be purchased specifically and exclusively for, and devoted solely to, the Project with coverage limits, on a Project term basis, to include any warranty period and any extended discovery or reporting period prescribed.

1.6 Additional Insureds; Separation of Insureds; Primary and Noncontributory

Each policy of Commercial General Liability, Commercial Auto Liability, Excess Liability (Umbrella), and Contractor's Pollution Liability Insurance shall name the Indemnified Parties as additional insureds. All endorsements adding additional named insureds to required insurance policies shall:

(a) contain no limitations, conditions, restrictions or exceptions to coverage other than those that apply to all other named insureds, including the first named insured, under the insurance policy;

(b) state that the interests and protections of each such named insured shall not be affected by any misrepresentation, act or omission of another named insured or any breach by another named insured of any provision in the policy which would otherwise result in forfeiture or reduction or limitation of coverage;

(c) include additional insured coverage for both ongoing operations and completed operations through the period described in Section 1.3 above; and

(d) be attached to the certificate of insurance when providing evidence of insurance to the Department.

If, in connection with the Project, the Progressive Contractor procures any additional or other insurance or expressly self-insures beyond the specifications in the Contract Documents, then the Indemnified Parties shall be named as an additional insured.

Each of such policies shall also contain a separation of insureds condition such that the insurance policy shall be written or endorsed so that:

(i) no acts or omissions of an insured shall cancel or diminish coverage of any other insureds; and

(ii) insurance shall apply separately to each named insured, except with respect to the erosion of the specified limits of the insurer's liability.

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Each of such insurance policies shall provide expressly that its coverage is primary and noncontributory with respect to all insureds, except for coverage that is specifically denominated as excess coverage to a specified insurance policy required under the Contract Documents. Primary and noncontributory coverage shall be evidenced and attached to the certificate of insurance when providing evidence of insurance to the Department.

This provision shall also apply to insurance policies required of Subcontractors hereunder.

1.7 No Recourse

There shall be no recourse against the Department for payment of premiums or other amounts with respect to the insurance provided by the Progressive Contractor, or for deductibles under these policies. This provision does not affect any rights the Progressive Contractor is entitled to pursuant to Section 20 (*Relief & Compensation*) and Section 21 (*Construction Phase Change Orders*).

1.8 Indemnification

The insurance coverage provided hereunder shall support, but is not intended to limit, the Progressive Contractor's indemnification obligations under Section 27 (*Indemnification*).

1.9 Occurrence Basis

Each insurance policy shall provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of any professional liability and cyber liability insurance policies), except as otherwise may be agreed, in advance, by the Department.

1.10 Insurance No Limit of Liability; Insurance as Minimum

Any requirement for insurance imposed upon the Progressive Contractor is not intended to be construed as any limit of liability of the Progressive Contractor under this Agreement. No insurance policy or coverage shall otherwise not contain exclusions or gaps that reduce coverage below the minimum levels and required limits set forth herein.

1.11 Insurance Requirements May be Adjusted by Construction Phase Amendment or Pricing Package Amendment

The coverages, policy limits, endorsements, forms, and other insurance requirements in the Agreement may be changed, as the Department determines in its sole discretion, in connection with preparation of the Construction Phase Amendment or an Pricing Package Amendment.

2 PROGRESSIVE CONTRACTOR-PROVIDED INSURANCE

The Progressive Contractor shall procure insurance acceptable to the Department, as identified in this Exhibit I (or under the Construction Phase Amendment or any Pricing Package Amendment) and as described in the Contract Documents. The Progressive Contractor shall include all insurance costs in each Pricing Package GMP. When through one or more claims or pending claims, the remaining coverage or potential remaining coverage of any insurance policy required in this Section 2 and its subsections is or may be reduced to $1 million or less in any policy period, the Progressive Contractor shall provide written notice to the Department of such remaining coverage or potential remaining coverage. The Progressive Contractor shall provide this notice within 15 Days after the Progressive Contractor has knowledge of the claim that reduces or may reduce the remaining coverage or potential remaining coverage to $1 million or less.

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2.1 Workers' Compensation and Employer's Liability Coverage

The Progressive Contractor shall furnish evidence to the Department that, with respect to the Work, the Progressive Contractor carries workers' compensation insurance and carries insurance for employer's liability sufficient to comply with all obligations under State laws relating to workers' compensation and employer's liability. Coverage will be extended, if needed, to cover any claims under the United States Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950) and the Jones Act (46 U.S.C. § 30104.

2.2 Commercial General Liability Insurance

The Progressive Contractor shall obtain and maintain commercial general liability coverage for bodily injury, death, property damage, personal injury, and advertising liability written on an occurrence form that shall be no less comprehensive or more restrictive than the coverage provided by Insurance Services Office (IS0) for CG 00 01 10 01.

(a) Limits of liability; general liability:

(i) $1 million - each occurrence.

(ii) $2 million - general annual aggregate.

(iii) $2 million - personal and advertising injury.

(iv) $2 million - products/completed operations aggregate.

(b) Such insurance shall include, by its terms or appropriate endorsements, bodily injury, death, property damage, legal liability, personal injury, blanket contractual, independent Progressive Contractor, premises, operations and products, and completed operations. Such insurance shall also include coverage for explosion, collapse, and underground (XCU) hazards.

(c) Products and completed operations coverage shall be continued for the duration of the applicable State statute of repose, measured commencing at Final Acceptance.

(d) The Department shall be an additional insured with respect to liability caused in whole or in part out of acts or omissions of the Progressive Contractor or its Subcontractors, whether on or off the Site during both construction operations as to completed operations.

The commercial general liability insurance shall be primary and non-contributory coverage, rather than excess coverage or contributing to any insurance maintained by any other Person. The limits of the commercial general liability insurance may be satisfied with a practice policy, or a combination of a practice policy and Project specific policy that is also primary and non-contributory.

If drones or an unmanned aircraft will be used in the course of the Project, the commercial general liability coverage shall be endorsed to cover drones or unmanned units with limits not less than $5,000,000 per occurrence. If the commercial general liability policy cannot be endorsed, the Progressive Contractor shall procure and maintain a separate unmanned aircraft liability policy at such policy limits.

2.3 Automobile Liability Insurance

The Progressive Contractor shall obtain and maintain commercial automobile liability insurance covering all owned/leased, non-owned, and hired vehicles used in the performance of Work, both on and off the Site, including loading and unloading.

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The following limits of liability and other requirements shall apply:

(a) $1 million combined single limit for bodily injury and property damage liability.

(b) Coverage shall be provided on ISO form number CA 00 01 10 01 or equivalent.

(c) The policy shall be endorsed to include Motor Carrier Act endorsement – Hazardous Materials Cleanup (MCS-90), if applicable.

The limits of the commercial automobile liability insurance may be satisfied between any combination of a primary and excess policy.

2.4 Excess (Umbrella) Liability Insurance

The Progressive Contractor shall obtain and maintain umbrella or excess liability insurance with limits of not less than $[10] million per occurrence and $[10] million annual aggregate which will provide bodily injury, death, personal injury, and property damage liability at least as broad as the primary coverages set forth above, including employer's liability, commercial general liability, and commercial automobile liability, as set forth in Section 2.1 (*Workers' Compensation and Employer's Liability Coverage*), Section 2.2 (*Commercial General Liability Insurance*), and Section 2.3 (*Automobile Liability Insurance*), in each case of this Exhibit I. The excess (umbrella) liability insurance shall be primary and non-contributory coverage, rather than excess or contributing, to any insurance maintained by any other Person. Umbrella and excess policies shall be "follow-form" and comply with all insurance requirements, terms and provisions set forth in this Agreement for the applicable type of coverage. **[NTD: limit to be [10]% of the contract value (e.g. a $[60] million project requires a $6 million umbrella/excess limit and a $[100] million project requires $[10] million (can round this up or down to keep it at $[5M], $[10]M, $[15]M; $[20]M; $[25]M; $[30]M; etc.)]**

2.5 Contractor's Pollution Liability Coverage

The Progressive Contractor shall obtain and maintain contractor's pollution liability coverage. The following limits and conditions shall apply:

(a) The limit of liability shall be not less than $5 million per occurrence and annual aggregate. The limits of the contractor's pollution liability coverage may be satisfied between any combination of primary and excess policies.

(b) The Department shall be named as an additional insured.

(c) The policy form shall be written on an occurrence-based form.

2.6 Professional Liability Insurance

The Lead Designer shall maintain project-specific professional liability insurance coverage for the Lead Designer's operations on the Project, as follows:

(a) Limits of Liability shall be not less than $5 million per claim and in the aggregate.

(b) The policy shall have an extended reporting period of three years from Final Acceptance with respect to all events that occurred, but were not reported, during the term of the policy.

(c) The policy shall protect against any negligent act, error, or omission arising out of the Lead Designer's design or engineering activities with respect to the Project.

(d) The policy shall have a retroactive date of no later than the execution date of this Agreement.

(e) The policy shall be primary and non-contributory with any other professional liability policies on the Project.

Each entity that performs design or engineering activities with respect to the Project shall maintain practice professional liability insurance coverage for its operations on the Project, with limits of liability of not less than $1 million per claim and an annual aggregate. The applicable Subcontract with each such entity shall require the entity to renew the policy annually for three years following Final Acceptance or secure a three year extended reporting period to ensure that a professional liability policy is in place to cover that professional's liability on the Project during the Project and for three years following Final Acceptance.

2.7 Cyber Liability Insurance

The Progressive Contractor shall carry and maintain cyber liability insurance with limits not less than $3,000,000 per incident to include coverage for loss of revenue, infringement of intellectual property, including infringement of copyright, trademark and trade dress, information theft, damage to or destruction of electronic information, alteration of electronic information, extortion, network security, breach response costs, and regulatory fines and penalties. Coverage shall be extended to include both first and third party damages.

2.8 Builder's Risk Insurance

(a) The Progressive Contractor carry builder's risk insurance on an all-risk basis to cover the full replacement cost of all materials, labor, profit and overhead pursuant to the Project;

(b) The Department shall be a loss payee under this policy to cover its financial interests in the project at the time of loss;

(c) The Progressive Contractor shall be solely responsible for all deductibles or self-insured retentions associated with this coverage;

(d) Coverage shall be obtained prior to the start of construction and maintained until Final Acceptance;

(e) The policy shall be written on an "all risk," replacement cost basis with no coinsurance clauses or penalties;

(f) During any period of exposure to loss of property in transit, the policy shall cover transit, including ocean marine (unless insured by the Supplier or through a separate marine cargo policy), with sub-limits sufficient to insure the full replacement value of the Project;

(g) The policy shall cover physical damage arising because of faulty workmanship or materials; and

(h) The policy shall cover water damage and flood, (including the overflow of inland or tidal waters, the unusual accumulation or runoff of surface waters from any source, or mudslides or mudflows which are caused by flooding) with a sublimit of no less than $5,000,000.

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2.9 [Railroad Protective Liability Insurance

The Progressive Contractor shall provide insurance coverage terms and conditions as may be required by any railroad as a condition of the railroad's consent for entry into or work nearby railroad facilities or property. All Railroad Protective Liability Insurance Policies shall be in form either prescribed, and if not prescribed, then acceptable to the railroad. The original Railroad Protective Liability Insurance Policy shall be submitted to the railroad with the railroad as the named insured. Copies of all other insurance policies shall be submitted to the owning railroad and, if different from the owning railroad, the operating railroad, and the Department, and be approved by the railroad(s) prior to any entry by any Progressive Contractor- Related Entity upon or nearby railroad facilities or real property rights.]***[NTD: include if railroad interface contemplated by the Project]***

2.10 Subcontractor Insurance Requirements

Except to the extent that a Subcontractor is covered as a named insured under a policy maintained by the Progressive Contractor, each such Subcontractor shall be required to procure and maintain, and to provide proof of, as the Department may request in its sole discretion, the following minimum insurance coverages:

(a) Workers' Compensation and Employer's Liability Insurance with statutory workers' compensation (Coverage A) limits and employer's liability (Coverage B) limits of $1,000,000 bodily injury by accident, each accident, and $1,000,000 bodily injury by disease, each employee, and aggregate. Coverage will be extended, if needed, to cover any claims under the United States Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950) and the Jones Act (46 U.S.C. § 30104).

(b) Commercial General Liability Insurance including coverage for premises and operations, independent contractors, personal injury, product and completed operations, explosion, collapse, and underground, and contractual liability. Minimum limits shall be no less than $1,000,000 per occurrence and annual aggregate.

(c) Automobile Liability Insurance with a limit of at least $1,000,000 combined single limit for bodily injury and property damage covering all owned (if any), non-owned, hired, or borrowed vehicles on site or off.

(d) (Professional services only) Professional Liability Insurance as specified, at a minimum, under Section 2.6 (*Professional Liability Insurance*) of this Exhibit I above.

(e) Umbrella/Excess Liability Insurance in excess of the underlying limits noted above for employer's liability, commercial general liability, and automobile liability for contracts valued at more than $10,000,000, coverage shall be in the amount of $5,000,000 per occurrence and annual aggregate.

The Indemnified Parties shall be included as additional insureds on a primary, non-contributory basis for the coverages set forth in clause (b), clause (c), and clause (e) just above, and a waiver of subrogation shall apply to the Indemnified Parties under all such policies.

Any insurance required in this Section 2.10 carried by any Subcontractor is not required to be project-specific.

Should the Progressive Contractor implement a contractor-controlled insurance program (CCIP) providing compliant insurance for all participants with regard to on-site activities, all construction Subcontractors enrolled in the CCIP shall still be responsible for procuring and maintaining automobile liability insurance and the other insurance coverages noted above with regard to off-site work with the

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Indemnified Parties as additional insureds on a primary, non-contributory basis for the applicable insurance coverages set forth in clause (b), clause (c), and clause (e) just above.

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Exhibit J

PARTNERING AND DISPUTE RESOLUTION

1 Partnering

1.1 Partnering Overview

The Department and the Progressive Contractor have developed and intend to continue fostering a cohesive relationship to carry out their respective responsibilities under this Agreement through a voluntary, non-binding "partnering" process drawing upon the strengths of each organization to identify and achieve reciprocal goals.

The provisions of this Section 1 are not part of the Informal Resolution Procedures or the Dispute Resolution Procedures. Compliance with the provisions of this Section 1 or the terms of any partnering charter is not required as a condition precedent to any Party's right to initiate a Claim or seek resolution of any Dispute under this Section 1.

1.2 Partnering Goals

The objectives of the partnering process are to (a) identify potential problem areas, issues and differences of opinion early, (b) develop and implement procedures for resolving them in order to prevent them from becoming Claims and Disputes, (c) achieve effective and efficient performance and completion of the Work in accordance with the Contract Documents, and (d) create mutual trust and respect for each Party's respective roles and interests in the Project while recognizing the respective risks inherent in those roles.

1.3 Partnering Process

In continuance of their existing partnering process, within 90 days after the Effective Date, the Department and the Progressive Contractor shall attend a team-building workshop and through such workshop negotiate and sign a mutually acceptable non-binding partnering charter to govern the process of partnering for the Project. The charter shall include non-binding rules and guidelines for engaging in free and open communications, discussions and partnering meetings between them, in order to further the goals of the partnering process. The charter shall call for the formation and meetings of a partnering panel, identify the Key Personnel of the Progressive Contractor and key representatives of the Department who shall serve on the partnering panel, and set the location for meetings. The charter also shall include non-binding rules and guidelines on whether and under what circumstances to select and use the services of a facilitator, where and when to conduct partnering panel meetings, who should attend such meetings, and, subject to Section 2.5, exchange of statements, materials and communications during partnering panel meetings. Should the charter include the use of a facilitator, the Progressive Contractor shall bear any associated costs. In any event, the partnering charter shall recognize and be consistent with the obligations of the Department and the Progressive Contractor contained in this Agreement with respect to communications, cooperation, coordination and procedures for resolving Claims and Disputes.

Under the non-binding procedures, rules and guidelines of the partnering charter, the Parties will address at partnering meetings specific interface issues, oversight interface issues, division of responsibilities, communication channels, application of alternative resolution principles and other matters.

If the Department and the Progressive Contractor succeed in resolving a Claim or Dispute through the partnering procedures, they shall memorialize the resolution in writing, including execution of

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Preconstruction Phase Change Orders or Construction Phase Change Orders, or both, as appropriate, and promptly perform their respective obligations in accordance therewith.

2 Dispute Resolution Procedures

2.1 Disputes Governed by These Procedures

2.1.1 Any Claim or Dispute arising out of, relating to, or in connection with this Agreement that is not resolved by partnering per Section 1 shall be resolved pursuant to this Section 2.

2.1.2 Resolutions of Claims and Disputes pursuant to this Section 2 shall be final, binding, conclusive and enforceable as set forth in this this Section 2.

2.1.3 FAILURE OF THE PROGRESSIVE CONTRACTOR TO CONFORM TO THE DISPUTE RESOLUTION PROCEDURES IN ALL MATERIAL RESPECTS AS TO ANY DISPUTE OR CLAIM SUBJECT THERETO SHALL CONSTITUTE A FAILURE TO PURSUE DILIGENTLY AND EXHAUST THE ADMINISTRATIVE PROCEDURES IN THE CONTRACT DOCUMENTS AND SHALL OPERATE AS A BAR TO THE DISPUTE OR CLAIM. THIS SECTION 2.1.3 SHALL NOT BAR A CLAIM OR DISPUTE IF THE FAILURE TO MEET APPLICABLE DEADLINES IS DUE TO CONDUCT ON BEHALF OF THE DEPARTMENT OR ITS REPRESENTATIVES.

2.1.4 The Parties adopt these expedited methods for resolving Disputes between or among the Department, the Progressive Contractor, and units of local government that contain any part of the Project, all of whom are proper parties to these dispute resolution procedures.

2.2 Burden of Proof

The Party bringing a Claim or Dispute shall bear the burden of proving the same.

2.3 Mandatory Informal Resolution Procedures

2.3.1 Notice of Dispute to Designated Agent

(a) A Party desiring to pursue a Dispute against the other Party shall initiate the informal dispute resolution procedures described in this Section 2.3.1 (the "Informal Resolution Procedures") by serving a notice on the other Party's designated agent. Unless otherwise indicated by notice from one Party to the other Party, each Party's designated agent shall be its Authorized Representative. The notice shall contain a concise statement describing:

(i) the date of the act, inaction or omission giving rise to the Dispute;

(ii) an explanation of the Dispute, including a description of its nature, circumstances and cause;

(iii) a reference to any pertinent provision(s) from the Contract Documents;

(iv) if applicable, the estimated dollar amount of the Dispute, and how that estimate was determined (including any cost and revenue element that has been or may be affected);

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(v) if applicable, an analysis of the Project Schedule and Completion Deadlines showing any changes or disruptions (including an impacted delay analysis reflecting the disruption in the manner and sequence of performance that has been or will be caused, delivery schedules, staging, and adjusted Completion Deadlines);

(vi) if applicable, the claiming Party's plan for mitigating the amount claimed and the delay claimed;

(vii) the claiming Party's desired resolution of the Dispute; and

(viii) any other information the claiming Party considers relevant.

(b) The notice shall be signed by the Authorized Representative of the claiming Party, and shall contain a written certification by the claiming Party that:

(i) the notice of Dispute is served in good faith;

(ii) except as to specific matters stated in the notice as being unknown or subject to discovery, all supporting information is reasonably believed by the claiming Party to be accurate and complete;

(iii) the Dispute accurately reflects the amount of money or other right, remedy or relief to which the claiming Party reasonably believes it is entitled; and

(iv) the Authorized Representative is duly authorized to execute and deliver the notice and such certification on behalf of the claiming Party.

(c) Any notice by the Progressive Contractor shall be delivered within ten days after any decision, action, order or position of the Department (including any rejection or modification of a proposed Preconstruction Phase Change Order or Construction Phase Change Order by the Department) to which the Progressive Contractor objects. The Department may initiate the Dispute Resolution Procedures at any time by delivering to the Progressive Contractor a notice.

(d) The Parties shall attempt in good faith to resolve such Dispute within 15 days after delivery of the notice of Dispute to the responding Party. If the responding Party agrees with the claiming Party's position and desired resolution of the Dispute, it shall so state in a written response. The notice of the Dispute and such response shall suffice to evidence the Parties' resolution of the subject Dispute unless either Party requests further documentation. Upon either Party's request, within seven days after the claiming Party's receipt of the responding Party's response in agreement, the Parties' designated representatives shall state the resolution of the Dispute in writing.

2.3.2 Authorized Representatives Meetings

If either or both "designated agent(s)" under Section 2.3.1(a) was/were not a Party's Authorized Representative, and if the Dispute is not resolved pursuant to Section 2.3.1(d), then commencing within 14 days after the notice of Dispute is served and concluding 14 days thereafter, the Authorized

Representatives of each Party, or his or her designee, shall meet and confer to seek to resolve the Dispute raised in the claiming Party's notice of Dispute. If they succeed in resolving the Dispute, the Progressive Contractor and the Department shall memorialize the resolution in writing.

2.3.3 Time Limitations

Time limitations set forth for the Informal Resolution Procedures may be changed by mutual written agreement of the Parties. Changes to the time limitations for the Informal Resolution Procedures agreed upon by the Parties shall pertain to a particular Dispute only and shall not affect the time limitations for Informal Resolution Procedures applicable to other or subsequent Disputes.

2.4 Failure to Resolve Dispute with Informal Resolution Procedures

2.4.1 If a Dispute is not timely resolved under the Informal Resolution Procedures, then the Parties shall participate in a mediation in accordance with Indiana Rules for Alternative Dispute Resolution, Rule 8 (Optional Early Mediation).

2.4.2 If a Dispute is not timely resolved under the Informal Resolution Procedures or by mediation, either Party may file a lawsuit in the Indiana Commercial Court in Marion County, Indiana as provided in Section 2.6.2.

2.5 Confidentiality of Settlement Negotiations and Other Documents Used in the Dispute Resolution Process

2.5.1 All discussions, negotiations, Informal Resolution Procedures, and mediation described in Section 2.3 and Section 2.4.1 between the Parties to resolve a Dispute, and all documents and other written materials furnished to a Party or exchanged between the Parties during any such discussions, negotiations, procedures or proceedings shall be considered confidential and not subject to disclosure by either Party.

2.5.2 The Parties may also request a protective order in any judicial proceeding to prohibit the public disclosure of any other information they believe is confidential. Determinations of such requests by the court shall be governed by the standards in the Indiana Rules of Evidence and Indiana Rules of Trial Procedure and/or Indiana's Administrative Rules, as applicable.

2.6 Administrative Hearings; Venue and Jurisdiction

2.6.1 The Department acknowledges that the Progressive Contractor Claims are not subject to the jurisdiction of any Indiana administrative agency, and the Department agrees that no defense based on failure to exhaust administrative remedies not otherwise set forth in this Agreement may be raised in any court proceeding arising out of or relating to the Project.

2.6.2 The Parties agree that the exclusive original jurisdiction and venue for any legal action or proceeding, at law or in equity, that is permitted to be brought by a Party in court arising out of the Contract Documents shall be the Indiana Commercial Court in Marion County, Indiana. All rights to jury trial are hereby waived. The Commercial Court Rules established by the Indiana Supreme Court shall apply.

2.7 Continuation of Disputed Work and Payments

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2.7.1 At all times during these Dispute Resolution Procedures, the Progressive Contractor and all other Progressive Contractor-Related Entities shall continue with the performance of the Work and their obligations, including any Disputed Work or obligations, diligently and without delay, in accordance with this Agreement, except to the extent enjoined by order of a court or otherwise approved by the Department, in its sole discretion. The Progressive Contractor acknowledges that it shall be solely responsible for the results of any delaying actions or inactions taken during the course of Dispute Resolution Procedures relating to the Disputed Work even if the Progressive Contractor's position in connection with the Dispute ultimately prevails.

2.7.2 During the course of any Dispute Resolution Procedure, the Parties shall continue to comply with all provisions of the Contract Documents, the Governmental Approvals, the Other Approvals, and applicable Law.

2.7.3 Throughout the course of any Disputed Work, the Progressive Contractor shall keep complete records that provide a clear distinction between the incurred direct and indirect costs of Disputed Work and that of undisputed Work. The Progressive Contractor shall provide the Department access to all Project-related books and records on an open book basis as the Department desires to evaluate the Dispute. Such records shall be retained for a period of not less than one year after the date of resolution of the Dispute pertaining to such Disputed Work (or for any longer period required under any other applicable provision of the Contract Documents).

2.7.4 During the course of any Dispute Resolution Procedure, the Department shall continue to pay to the Progressive Contractor when due all undisputed amounts owing under this Agreement.

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Exhibit K

[FORM OF GUARANTY[6]

This Guaranty (the "Guaranty") is made by [____], a [_____] organized under the laws of [_____] ("Guarantor"), in favor of the Indiana Department of Transportation, an agency of the State of Indiana (the "Department").

WHEREAS, [_____], as Progressive Contractor ("Progressive Contractor"), and the Department are parties to that certain Agreement, as amended (the "Agreement") pursuant to which the Progressive Contractor has agreed to develop, design, and construct the Project. Unless the context otherwise requires, capitalized terms used but not separately defined in this Guaranty will have the meaning given to them in the Agreement.

To induce the Department to (i) enter into the [Agreement] [a "Pricing Package Amendment" (as defined and administered under the Agreement) pertaining to [_____]] ***[NTD: insert and fill in as applicable if pertaining to a Pricing Package Amendment]*** (as defined thereunder); and (ii) consummate the transactions contemplated thereby, Guarantor has agreed to enter into this Guaranty.

Progressive Contractor is a [_____]. The Guarantor is a [_____]***[entity]***. The execution of the [Agreement] [subject Pricing Package Amendment] by the Department and the consummation of the transactions contemplated by the Agreement [and subject Pricing Package Amendment] will materially benefit Guarantor. Without this Guaranty, the Department would not have entered into the [Agreement] [subject Pricing Package Amendment] with Progressive Contractor. In consideration of the Department's execution of the Agreement and consummation of the transactions contemplated by the Agreement [and the subject Pricing Package Amendment], Guarantor has agreed to execute this Guaranty.

NOW, THEREFORE, in consideration of the foregoing Recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor agrees as follows:

1. Guaranty.

a. Guarantor guarantees to the Department and its successors and assigns the full and prompt payment and performance when due of all of the obligations of the Progressive Contractor arising out of, in connection with, under or related to the [Agreement] [subject Pricing Package Amendment and Agreement as pertains to such Pricing Package Amendment] (including, without limitation, the Progressive Contractor's obligation to make payment to the Department for Liquidated Damages, stipulated damages, and indemnity). The obligations guaranteed pursuant to this Guaranty are collectively referred to in this Guaranty as the "Guaranteed Obligations." [As used henceforth, the term Agreement shall mean the Agreement as modified by the subject Pricing Package Amendment.] ***[NTD: insert and fill in as applicable if pertaining to a Pricing Package Amendment]***

b. Guarantor covenants to the Department that if at any time the Progressive Contractor should default in the performance when due of, observance when due of, or should commit a breach of, any of the Guaranteed Obligations, Guarantor shall promptly, upon written notice by the Department, perform or pay the Guaranteed Obligations or cause the performance or payment of the Guaranteed Obligations.

c. Guarantor agrees that, to the extent Guarantor's obligations under this Guaranty relate to obligations of the Progressive Contractor which require performance other than the payment of money, the Department may proceed against Guarantor to effect specific performance of such obligations (to the extent that such relief is available). Guarantor agrees to assume or to procure the assumption of the Agreement, and to perform or to procure the performance of all of the terms and conditions under the Agreement should the

[6] Remove if no Guarantor

Agreement be disaffirmed or rejected by a trustee or court in a bankruptcy proceeding involving the Progressive Contractor, or, at the option of the Department, Guarantor shall, in the event of the Progressive Contractor's bankruptcy, make and enter into or have made and entered into, by one or more entities reasonably satisfactory to the Department, new contract documents for the balance of the term of the Agreement, which new contract documents shall be in form and substance identical to the replaced Agreement.

2. Unconditional Obligations. This Guaranty is a guaranty of payment and performance and not of collection. Except as provided in Section 20, this Guaranty is an absolute, unconditional and irrevocable guarantee of the full and prompt payment and performance when due of all of the Guaranteed Obligations, whether or not from time to time reduced or extinguished or hereafter increased or incurred, and whether or not enforceable against the Progressive Contractor. If any payment made by the Progressive Contractor or any other Person and applied to the Guaranteed Obligations is at any time annulled, set aside, rescinded, invalidated, declared to be fraudulent or preferential or otherwise required to be repaid or refunded, then, to the extent of such payment or repayment, the liability of Guarantor will be and remain in full force and effect as fully as if such payment had never been made. Guarantor covenants that this Guaranty will not be fulfilled or discharged, except by the complete payment and performance of the Guaranteed Obligations, whether by the primary obligor or Guarantor under this Guaranty. Without limiting the generality of the foregoing, Guarantor's obligations under this Guaranty will not be released, discharged or otherwise affected by:

a. except as to applicable statutes of limitation, failure, omission, delay, waiver or refusal by Progressive Contractor to exercise, in whole or in part, any right or remedy held by Progressive Contractor with respect to the Agreement or any transaction under the Agreement;

b. any change in the Agreement or the obligations under the Agreement, any change in the existence, structure or ownership of Guarantor or the Progressive Contractor, or any dissolution, winding up, liquidation, insolvency, bankruptcy, reorganization or similar proceeding affecting the Progressive Contractor, Guarantor or their respective assets or any defense that may arise in connection with or as a result of such dissolution, winding up, liquidation, insolvency, bankruptcy, reorganization or other proceeding;

c. the existence of any Claim or set-off which the Progressive Contractor has or Guarantor may have against the Department, whether in connection with this Guaranty or any unrelated transaction, provided that nothing in this Guaranty will be deemed a waiver by Guarantor of any Claim or prevent the assertion of any Claim by separate suit;

d. any release of Progressive Contractor from any liability with respect to the Agreement any failure of consideration or lack of authority of the Progressive Contractor, any lack of validity or enforceability, illegality or defect or deficiency, or any other defense to formation of the Agreement (or any term, condition or covenant thereof);

e. any change in the time, manner, terms, place of payment of, or any other term of all or any of the Guaranteed Obligations, or any other amendment, waiver of, or any consent to departure from any Agreement executed in connection therewith;

f. the incapacity or lack of power or authority of, or dissolution or change in, the members or shareholders of the Progressive Contractor;

g. any release or subordination of any collateral then held by the Department as security for the performance by Progressive Contractor of the Guaranteed Obligations; or

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h. any other circumstance that might otherwise constitute a defense available to, or a discharge of, Guarantor with respect to the Guaranteed Obligations, other than performance or payment in full of the Guaranteed Obligations.

This Guaranty will in all respects be a continuing, absolute, and unconditional guaranty irrespective of the genuineness, validity, regularity or enforceability of the Agreement, Guaranteed Obligations or any part thereof or any instrument or agreement evidencing any of the Guaranteed Obligations or relating thereto, or the existence, validity, enforceability, perfection, or extent of any collateral therefor or any other circumstances relating to the Guaranteed Obligations, except as provided in Section 20, which applies to all of the subsections in this Section 2.

3. Independent Obligations. Guarantor agrees that the Guaranteed Obligations are independent of the obligations of the Progressive Contractor and if any default occurs under this Guaranty, a separate action or actions may be brought and prosecuted against Guarantor whether or not the Progressive Contractor is joined therein. the Department may maintain successive actions for other defaults of Guarantor. The Department's rights under this Guaranty will not be exhausted by the exercise of any of its rights or remedies or by any such action or by any number of successive actions until and unless all Guaranteed Obligations have been indefeasibly paid and fully performed.

a. Guarantor agrees that the Department may enforce this Guaranty, at any time and from time to time, without the necessity of resorting to or exhausting any security or collateral and without the necessity of proceeding against the Progressive Contractor. Guarantor waives the right to require the Department to proceed against the Progressive Contractor, to exercise any right or remedy under any of the Agreement or to pursue any other remedy or to enforce any other right.

b. Guarantor will continue to be subject to this Guaranty notwithstanding: (i) any modification, agreement or stipulation between the Progressive Contractor and the Department or their respective successors and assigns, with respect to any of the Agreement or the Guaranteed Obligations; (ii) any waiver of or failure to enforce the Guaranteed Obligations or any of the terms, covenants or conditions contained in any of the Agreement or any modification thereof; (iii) subject to Section 20, any release of the Progressive Contractor from any liability with respect to any of the Agreement; or (iv) any release or subordination of any collateral then held by the Department as security for the performance by the Progressive Contractor of the Guaranteed Obligations.

c. The Guaranteed Obligations are not conditional or contingent upon the genuineness, validity, regularity or enforceability of any of the Agreement or the pursuit by the Department of any remedies which the Department either now has or may hereafter have with respect thereto under any of the Agreement.

d. Progressive Contractor and Guarantor acknowledge and agree that Guarantor's obligations and undertakings under this Guaranty are derivative of, and not in excess of, the Guaranteed Obligations and Guarantor shall be entitled to all rights and defenses of Progressive Contractor except as previously waived or disclaimed in this Guaranty. Notwithstanding any other term or provision of this Guaranty, in the event that the Progressive Contractor's obligations have been changed by any modification, agreement or stipulation between Progressive Contractor and the Department or their respective successors or assigns, the term "Guaranteed Obligations" as used in this Guaranty shall mean the Guaranteed Obligations as so changed, except that the Guaranteed Obligations shall be determined without regard to the effect of any such modification, agreement or stipulation in the context of a bankruptcy or insolvency proceeding in which Progressive Contractor is the debtor, unless otherwise specified in the modification, agreement or stipulation.

4. Liability of Guarantor.

a. the Department may enforce this Guaranty upon the occurrence of a breach by the Progressive Contractor of any of the Guaranteed Obligations, notwithstanding the existence of any dispute between the Department and the Progressive Contractor with respect to the existence of such a breach.

b. Guarantor's performance of some, but not all, of the Guaranteed Obligations will in no way limit, affect, modify or abridge Guarantor's liability for those Guaranteed Obligations that have not been performed.

c. the Department, upon such terms as it deems appropriate, without notice or demand and without affecting the validity or enforceability of this Guaranty or giving rise to any reduction, limitation, impairment, discharge or termination of Guarantor's liability under this Guaranty, from time to time may (i) with respect to the financial obligations of the Progressive Contractor, if and as permitted by the Agreement, renew, extend, accelerate, increase the rate of interest on, or otherwise change the time, place, manner or terms of payment of financial obligations that are Guaranteed Obligations, and/or subordinate the payment of the same to the payment of any other obligations, (ii) settle, compromise, release or discharge, or accept or refuse any offer of performance with respect to, or substitutions for, the Guaranteed Obligations or any agreement relating thereto, (iii) request and accept other guarantees of the Guaranteed Obligations and take and hold security for the payment and performance of this Guaranty or the Guaranteed Obligations, (iv) release, surrender, exchange, substitute, compromise, settle, rescind, waive, alter, subordinate or modify, with or without consideration, any security for performance of the Guaranteed Obligations, any other guarantees of the Guaranteed Obligations, or any other obligation of any Person with respect to the Guaranteed Obligations, (v) enforce and apply any security hereafter held by or for the benefit of the Department in respect of this Guaranty or the Guaranteed Obligations and direct the order or manner of sale thereof, or exercise any other right or remedy that the Department may have against any such security, as the Department in its discretion may determine, and (vi) exercise any other rights available to it under the Agreement.

d. This Guaranty and the obligations of Guarantor under this Guaranty will be valid and enforceable and will not be subject to any reduction, limitation, impairment, discharge or termination for any reason (other than indefeasible performance in full of the Guaranteed Obligations), including without limitation the occurrence of any of the following, whether or not Guarantor will have had notice or knowledge of any of them: (i) any failure or omission to assert or enforce an agreement or election not to assert or enforce, or the stay or enjoining, by order of court, by operation of law or otherwise, of the exercise or enforcement of, any Claim or demand or any right, power or remedy (whether arising under the Agreement, at law, in equity or otherwise) with respect to the Guaranteed Obligations or any agreement or instrument relating thereto; (ii) any rescission, waiver, amendment or modification of, or any consent to departure from, any of the terms or provisions (including without limitation provisions relating to events of default) of the Agreement or any agreement or instrument executed pursuant thereto; (iii) the Department's knowledge of or consent to the change, reorganization or termination of the corporate structure or existence of the Progressive Contractor; (iv) any defenses, set-offs or counterclaims that the Progressive Contractor may allege or assert against the Department in respect of the Guaranteed Obligations, except as provided in Section 20.

5. Waivers. To the fullest extent permitted by law, Guarantor hereby waives and agrees not to assert or take advantage of:

a. any right to require the Department to proceed against the Progressive Contractor or any other Person or to proceed against or exhaust any security held by the Department at any time or to pursue any right or remedy under any of the Agreement or any other remedy in the Department's power before proceeding against Guarantor;

b. any defense that may arise by reason of the incapacity, lack of authority, death or disability of, or revocation hereby by Guarantor, the Progressive Contractor or any other Person or the failure of the

Department to file or enforce a claim against the estate (either in administration, bankruptcy or any other proceeding) of any such Person;

c. any defense that may arise by reason of any presentment, demand for payment or performance or otherwise, protest or notice of any other kind or lack thereof;

d. any right or defense arising out of an election of remedies by the Department even though the election of remedies, such as non-judicial foreclosure with respect to any security for the Guaranteed Obligations, has destroyed the Guarantor's rights of subrogation and reimbursement against the Progressive Contractor;

e. all notices to Guarantor or to any other Person, including, but not limited to, notices of the acceptance of this Guaranty or the creation, renewal, extension, modification, accrual of any of the obligations of the Progressive Contractor under the Agreement, or of default in the payment or performance of any such obligations, enforcement of any right or remedy with respect thereto or notice of any other matters relating thereto;

f. any defense based upon any act or omission of the Department which directly or indirectly results in or aids the discharge or release of the Progressive Contractor, Guarantor or any security given or held by the Department in connection with the Guaranteed Obligations;

g. any duty on the part of the Department to disclose to Guarantor any facts the Department may now or hereafter know about the Progressive Contractor, regardless of whether the Department has reason to believe that any such facts materially increase the risk beyond that which Guarantor intends to assume, has reason to believe that such facts are unknown to Guarantor, or has a reasonable opportunity to communicate such facts to Guarantor. Guarantor acknowledges that it is fully responsible for being and keeping informed of the financial condition of the Progressive Contractor and of all circumstances bearing on the risk of non-payment of any Guaranteed Obligations; and

h. any and all suretyship defenses under applicable law.

6. Waiver of Subrogation and Rights of Reimbursement. Until the Guaranteed Obligations have been indefeasibly paid in full, Guarantor waives any claim, right or remedy which it may now have or may hereafter acquire against the Progressive Contractor that arises from the performance of Guarantor under this Guaranty, including, without limitation, any claim, right or remedy of subrogation, reimbursement, exoneration, contribution, or indemnification, or participation in any claim, right or remedy of the Department against the Progressive Contractor, or any other security or collateral that the Department now has or hereafter acquires, whether or not such claim, right or remedy arises in equity, under contract, by statute, under common law or otherwise. All existing or future indebtedness of the Progressive Contractor or any shareholders, partners, members, joint venturers of the Progressive Contractor to Guarantor is subordinated to all of the Guaranteed Obligations until such time as all Guaranteed Obligations shall have been indefeasibly paid in full. Whenever and for so long as the Progressive Contractor shall be in default in the performance of a Guaranteed Obligation, no payments with respect to any such indebtedness shall be made by the Progressive Contractor or any shareholders, partners, members, joint venturers of the Progressive Contractor to Guarantor without the prior written consent of the Department. Any payment by the Progressive Contractor or any shareholders, partners, members, joint venturers of the Progressive Contractor to Guarantor in violation of this provision shall be deemed to have been received by Guarantor as trustee for the Department.

7. Cumulative Rights. All rights, powers and remedies of the Department under this Guaranty will be in addition to and not in lieu of all other rights, powers and remedies given to the Department, whether at law, in equity or otherwise.

8. Representations and Warranties. In addition to the representations and warranties with respect to solvency set forth in Section 17, Guarantor represents and warrants that:

a. it is a corporation duly organized, validly existing, and in good standing under the laws of the State of _____ ***[NTD: to be inserted based on Guarantor entity]*** and qualified to do business and is in good standing under the laws of the State of Indiana;

b. it has all requisite organizational power, right, and authority to execute, deliver and perform this Guaranty;

c. the execution, delivery, and performance by Guarantor of this Guaranty have been duly authorized by all necessary corporate action on the part of Guarantor and proof of such authorization will be provided with the execution of this Guaranty;

d. this Guaranty has been duly executed and delivered and constitutes the legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms;

e. neither the execution nor delivery of this Guaranty nor compliance with or fulfillment of the terms, conditions, and provisions hereof, will conflict with, result in a material breach or violation of the terms, conditions, or provisions of, or constitute a material default, an event of default, or an event creating rights of acceleration, termination, or cancellation, or a loss of rights under: (1) the certificate of incorporation or by-laws of Guarantor, (2) any judgment, decree, order, contract, agreement, indenture, instrument, note, mortgage, lease, governmental permit, or other authorization, right, restriction, or obligation to which Guarantor is a party or any of its property is subject or by which Guarantor is bound, or (3) any federal, state, or local law, statute, ordinance, rule or regulation applicable to Guarantor;

f. it now has and will continue to have full and complete access to any and all information concerning the transactions contemplated by the Agreement or referred to therein, the financial status of the Progressive Contractor and the ability of the Progressive Contractor to pay and perform the Guaranteed Obligations;

g. it has reviewed and approved copies of the Agreement and is fully informed of the remedies the Department may pursue, with or without notice to the Progressive Contractor or any other Person, in the event of default of any of the Guaranteed Obligations;

h. it has made and so long as the Guaranteed Obligations (or any portion thereof) remain unsatisfied, it will make its own credit analysis of the Progressive Contractor and will keep itself fully informed as to all aspects of the financial condition of the Progressive Contractor, the performance of the Guaranteed Obligations and of all circumstances bearing upon the risk of nonpayment or nonperformance of the Guaranteed Obligations. Guarantor hereby waives and relinquishes any duty on the part of the Department to disclose any matter, fact or thing relating to the business, operations or conditions of the Progressive Contractor now known or hereafter known by the Department;

i. no consent, authorization, approval, order, license, certificate, or permit or act of or from, or declaration or filing with, any governmental authority or any party to any contract, agreement, instrument, lease, or license to which Guarantor is a party or by which Guarantor is bound, is required for the execution, delivery, or compliance with the terms hereof by Guarantor, except as have been obtained prior to the date of this Guaranty;

j. there is no pending or, to the best of its knowledge, threatened action, suit, proceeding, arbitration, litigation, or investigation of or before any Governmental Entity which challenges the validity or enforceability of this Guaranty;

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k. it is not subject to any outstanding judgment, rule, writ, injunction or decree of any Governmental Entity that adversely affects its ability to perform its obligations under this Guaranty; and

l. it derives a substantial direct or indirect economic benefit from the Agreement [and the subject Pricing Package Amendment].

9. Governing Law. This Guaranty shall be governed by and construed in accordance with the law of the State of Indiana, without regard to conflict of law principles. The venue of any court, judicial or referee proceeding under this Guaranty shall be in Marion County, Indiana, unless changed by the judicial officer.

10. Entire Agreement. This Guaranty contains the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties with respect to their subject matter.

11. Amendments. No amendment of this Guaranty shall be effective unless in writing and signed by Guarantor and the Department. No waiver of any provision of this Guaranty nor consent to any departure by Guarantor therefrom shall in any event be effective unless such waiver shall be in writing and signed by the Department. Any such waiver shall be effective only in the specific instance and for the specific purpose for which it was given.

12. Severability. If any clause, provision, section or part of this Guaranty is ruled invalid (including invalid due to Change in Law) by a court having proper jurisdiction, it will be adjusted rather than voided, to achieve the intent of the parties. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of this Guaranty, which shall be construed and enforced as if this Guaranty did not contain such invalid or unenforceable clause, provision, section or part.

13. Notices. Any communication, notice or demand of any kind whatsoever under this Guaranty shall be in writing and delivered by personal service (including express or courier service), by electronic communication (if confirmed in writing sent by registered or certified mail, postage prepaid, return receipt requested), or by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to the Department:

_____
_____
Attention: _____
Telephone: _____
Email: _____

With copy to:

_____
_____
Attention: _____
Telephone: _____
Email: _____

If to Guarantor:

_____
_____

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Attention: _____
Telephone: _____
Email: _____

Either Guarantor or the Department may from time to time change its address for the purpose of notices by a similar notice specifying a new address, but no such change is effective until it is actually received by the party sought to be charged with its contents.

All notices and other communications required or permitted under this Guaranty which are addressed as provided in this Section 13 are effective upon delivery, if delivered personally or by overnight mail, and, are effective five days following deposit in the United States mail, postage prepaid if delivered by mail.

14. Captions. The captions in this Guaranty are for convenience only and shall not be deemed part of this Guaranty or considered in construing this Guaranty.

15. Assignability. This Guaranty is binding upon and inures to the benefit of the successors and assigns of Guarantor and the Department, but is not assignable by Guarantor without the prior written consent of the Department, which consent may be granted or withheld in the Department's sole discretion. Any assignment by Guarantor effected in accordance with this Section 15 will not relieve Guarantor of its obligations and liabilities under this Guaranty.

16. Construction of Agreement. Ambiguities or uncertainties in the wording of this Guaranty will not be construed for or against any party, but will be construed in the manner that most accurately reflects the parties' intent as of the date hereof.

17. No Waiver. Any forbearance or failure to exercise, and any delay by the Department in exercising, any right, power or remedy under this Guaranty will not impair any such right, power or remedy or be construed to be a waiver thereof, nor will it preclude the further exercise of any such right, power or remedy.

18. Bankruptcy; Post-Petition Interest; Reinstatement of Guaranty; Solvency.

a. The obligations of Guarantor under this Guaranty will not be reduced, limited, impaired, discharged, deferred, suspended or terminated by any proceeding, voluntary or involuntary, involving the bankruptcy, insolvency, receivership, reorganization, liquidation or arrangement of the Progressive Contractor or by any defense which the Progressive Contractor may have by reason of the order, decree or decision of any court or administrative body resulting from any such proceeding. the Department is not obligated to file any claim relating to the Guaranteed Obligations if the Progressive Contractor becomes subject to a bankruptcy, reorganization, or similar proceeding, and the failure of the Department so to file will not affect Guarantor's obligations under this Guaranty.

b. Guarantor acknowledges and agrees that any interest on any portion of the Guaranteed Obligations which accrues after the commencement of any proceeding referred to in clause (a) above (or, if interest on any portion of the Guaranteed Obligations ceases to accrue by operation of law by reason of the commencement of said proceeding, such interest as would have accrued on such portion of the Guaranteed Obligations if said proceedings had not been commenced) will be included in the Guaranteed Obligations because it is the intention of Guarantor and the Department that the Guaranteed Obligations should be determined without regard to any rule of law or order which may relieve the Progressive Contractor of any portion of such Guaranteed Obligations. Guarantor will permit any trustee in bankruptcy, receiver, debtor in possession, assignee for the benefit of creditors or any similar person to pay the Department, or allow the claim of the Department in respect of, any such interest accruing after the date on which such proceeding is commenced.

19. **Attorneys' Fees**. Guarantor agrees to pay to the Department without demand reasonable attorneys' fees and all costs and other expenses (whether by lawsuit or otherwise, and including such fees and costs of litigation, arbitration and bankruptcy, and including appeals) incurred by the Department in enforcing, collecting or compromising any Guaranteed Obligation or enforcing or collecting this Guaranty against Guarantor or in attempting to do any or all of the foregoing.

20. **Joint and Several Liability**. If the Guarantor is comprised of more than one individual and/or entity, such individuals and/or entities, as applicable, shall be jointly and severally liable for the Guaranteed Obligations. If more than one guaranty is executed with respect to the Progressive Contractor and the Project, each guarantor under such a guaranty shall be jointly and severally liable with the other guarantors with respect to the obligations guaranteed under such guaranties.

21. **Defenses.** Notwithstanding any other provision to the contrary, Guarantor shall be entitled to the benefit of all defenses available to the Progressive Contractor under the Agreement except (a) those expressly waived in this Guaranty, (b) failure of consideration, lack of authority of the Progressive Contractor and any other defense to formation of the Agreement, and (c) defenses available to the Progressive Contractor under any federal or state law respecting bankruptcy, arrangement, reorganization or similar relief of debtors. Action against Guarantor under this Guaranty shall be subject to no prior notice or demand.

22. **Additional Guarantor Waivers and Acknowledgements.**

a. Guarantor hereby waives any and all defenses it might have that liquidated damages or stipulated damages constitute a penalty or that they do not bear a reasonable relation to the actual damages.

b. GUARANTOR ACKNOWLEDGES HAVING READ ALL OF THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS. IN ADDITION, GUARANTOR UNDERSTANDS THAT THIS GUARANTY IS EFFECTIVE UPON EXECUTION OF THIS GUARANTY. NO FORMAL ACCEPTANCE BY THE DEPARTMENT IS NECESSARY TO MAKE THIS GUARANTY EFFECTIVE. THIS GUARANTY IS EFFECTIVE AS OF THE DATE HEREOF.

[SIGNATURES ON NEXT PAGE]

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IN WITNESS WHEREOF, Guarantor has caused this Guaranty to be duly executed and delivered by its duly authorized officer effective as of this [_____] day of [_____] 202[_].

[_____]

By:_____

Name: _____

Title: _____]

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Exhibit L

INDOT DBE REQUIREMENTS

SECTION 1. General Requirements

49 CFR Part 26 requires the following policy and disadvantaged business enterprise obligation to be included in all subsequent agreements between the Progressive Contractor and all Subcontractors as follows:

(a) It will be the policy of the Department to create a level playing field on which DBE's can compete fairly for federally funded contracts. Consequently, the disadvantaged business enterprise requirements of 49 CFR Part 26, as outlined in the Department's DBE Program Manual, apply to this Agreement.

(b) The Progressive Contractor shall not discriminate on the basis of race, color, national origin, religion, sex, sexual orientation or gender identity in the award and performance of this Agreement. The Progressive Contractor shall carry out the applicable DBE requirements in the award and administration of federally funded contracts. Failure by the Progressive Contractor to carry out these requirements is a material breach of this Agreement which may result in the termination of this Agreement or such other remedy as the Department deems appropriate, which may include, but is not limited to: withholding progress payments; assessing sanctions; liquidated damages; and/or disqualifying the Progressive Contractor from future bidding as non-responsible. The Progressive Contractor shall include language prohibiting discrimination on the basis of race, color, national origin, religion, sex, sexual orientation or gender identity in the performance of this Agreement and all Subcontracts.

SECTION 2. Definitions

The following definitions will apply.

(1) "**Disadvantaged Business Enterprise**" or "**DBE**" means Small Business Concern which is at least 51% owned by one or more Socially and Economically Disadvantaged Individuals, or, in the case of a publicly owned business, at least 51% of the stock of which is owned by one or more Socially and Economically Disadvantaged Individuals; and whose managements and daily business operations are controlled by one or more of the Socially and Economically Disadvantaged Individuals who own it.

(2) "**Small Business Concern**" means small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto, except that a Small Business Concern shall not include a concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has annual average gross receipts in excess of $16.6 million over the previous three fiscal years.

(3) "**Socially and Economically Disadvantaged Individuals**" means those individuals who are citizens of the United States or lawfully admitted permanent residents and who are women, black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, or other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act.

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(4) "**Certified DBE**" means business enterprise which has completed and filed a request for certification with the Department, and that the business enterprise has been reviewed and determined to comply with the guidelines established in 49 CFR Part 26 (or a Kentucky Transportation Cabinet-certified DBE pursuant to the "Agreement Between the Indiana Department of Transportation and the Kentucky Transportation Cabinet Concerning Reciprocity of DBE Certifications," dated July 12, 2019). Business enterprises which are determined to be eligible will be certified as DBEs to perform specific types of work.

SECTION 3. Goal

The Progressive Contractor shall meet or exceed the DBE goal as set forth in Section 4.2 *(DBE Goal)* of the Agreement, or demonstrate that it could not be met despite good faith efforts. Achievement of the goal does not relieve the Progressive Contractor of the requirement for affirmative action on subsequent subcontracting on this Agreement. Only work with listed DBEs that are certified prior to the date of the letting will count toward the goal. Credit towards contract goals will be given only for work performed by Certified DBEs in the work areas for which they have been certified. The same requirements with respect to obtaining the goal apply for a Progressive Contractor that is certified as a DBE. In such case, Progressive Contractor shall either achieve the goal utilizing other DBE firms or demonstrate that the goal could not be met despite good faith efforts.

Contracting may be in the form of a subcontract, lease agreement, or material supply agreement. Prime contractors will receive 100% credit for work done by the DBE under Subcontracts and lease agreements. [Credit for utilization of a DBE material supplier depends on whether the supplier is a manufacturer, regular dealer or broker. Full credit will be given for suppliers who manufacture the items and are certified as Supplier Manufacturer in the DBE repository. Credit will be limited to 60% of the expenditure for suppliers acting as a regular dealer and are certified as Supplier Regular Dealer in the DBE repository. Credit will be limited to fees and commissions for suppliers acting as a broker and are certified as Supplier Broker in the DBE repository. Suppliers shall also perform a commercially useful function in order for credit to be received.]***[NTD: INDOT to consider on project-specific basis]***

The Progressive Contractor shall not terminate or reduce a commitment to a DBE, or an approved substitute DBE firm, that was listed in the Progressive Contractor's Proposal without the prior written consent of the Department. This includes, but is not limited to, instances in which the Progressive Contractor seeks to perform work originally designated for a DBE Subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. Unless the Department provides written consent, the Progressive Contractor shall not be entitled to any payment for work or materials unless it is performed or supplied by the listed DBE.

Written consent will only be provided by the Department if the Progressive Contractor has good cause to terminate or reduce its commitment to the DBE firm. Good cause shall consist of any of the following circumstances:

(a) The listed DBE Subcontractor fails or refuses to execute a written contract.

(b) The listed DBE Subcontractor fails or refuses to perform the work of its subcontract in a manner consistent with normal industry standards, unless such failure or refusal of the DBE Subcontractor to perform its work on the Subcontract results from the bad faith or discriminatory action of the Progressive Contractor.

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(c) The listed DBE Subcontractor fails or refuses to meet the Progressive Contractor's reasonable, nondiscriminatory bond requirements.

(d) The listed DBE Subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.

(e) The listed DBE Subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1200 or applicable state law.

(f) The Department has determined that the listed DBE Subcontractor is not a responsible contractor.

(g) The listed DBE Subcontractor voluntarily withdraws from the Project and provides the Department written notice of its withdrawal.

(h) The listed DBE is ineligible to receive DBE credit for the type of work required.

(i) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the subject Subcontract.

(j) Other documented good causes, that the Department will determine, which compels the termination of the DBE Subcontractor. Good cause does not exist, however, if the Progressive Contractor seeks to terminate a DBE it relied upon to obtain the Agreement so that it can self-perform the Work for which the DBE Subcontractor was engaged or so that the Progressive Contractor can substitute another DBE or non-DBE Subcontractor after the Agreement has been awarded.

Before transmitting to the Department its request to terminate or reduce a commitment made to a listed DBE, the Progressive Contractor shall give written notice to the affected DBE, with a copy to the Department, of its intent to request termination or reduction and the reasons for the request. The DBE Subcontractor shall be given five days to respond to the Progressive Contractor and the Department of the reasons, if any, why it objects to the proposed termination or reduction, and why the Department should not approve the Progressive Contractor's action. If required in a particular case, as a matter of public necessity and safety, the Department may specify a response period shorter than five days.

When a DBE Subcontractor is terminated as specified herein or fails to complete its work on the Agreement for any reason, the Department will require the Progressive Contractor to make good faith efforts to find another DBE Subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the Agreement as the DBE Subcontractor that was terminated, to the extent needed to meet the Agreement goal the Department established for the contract.

In order to receive DBE credit for commitments made as part of the prime contract award process, a DBE firm shall be certified before the due date for bids on the prime contract. There may be situations after the award of the prime contract in which it is appropriate to count DBE credit for the use of a DBE firm. To be eligible to obtain DBE credit in these situations, the DBE firm shall be certified prior to participation on the contract.

If a non-DBE contractor joint ventures with a DBE contractor, the portion of the joint venture which is performed by a DBE may be utilized to achieve the DBE goal. Two types of DBE joint ventures are allowed and are defined as follows:

3.1. DBE Joint Venture Type A

A DBE contractor and a non-DBE contractor bidding on specific pay items to be performed by each company.

3.2. DBE Joint Venture Type B

A DBE contractor and a non-DBE contractor combining resources and agreeing upon a percentage of the total work to be performed by each contractor.

DBE joint ventures Type A do not require DBE joint venture certification. DBE joint ventures Type B do require DBE joint venture certification. A request for DBE joint ventures Type B certification shall be submitted no later than 9:00 a.m. local time the last business day before the letting and shall be approved prior to bidding in order to receive credit toward the DBE goal. The DBE shall be certified with the Department prior to requesting DBE joint venture certification. The work for the DBE contractor shall be identified, performed, managed, and supervised by its forces.

SECTION 4. DBE Performance Plan

The Progressive Contractor shall develop a DBE Performance Plan in accordance with Section 4.2.3 *(DBE Performance Plan)* of the Agreement.***[NTD: INDOT note – the requirements of Section 103.01(d) have been folded in under the DBE Performance Plan in Section 4.2.3 of the Agreement.]***

SECTION 5. Determination of Good Faith Efforts

Appendix A of 49 CFR Part 26 has been used for guidance in preparing the Department's procedures to determine the adequacy of good faith efforts. Additional factors consistent with 49 CFR Part 26, and the Department's policies and procedures have also been utilized.

5.1. Good Faith Efforts Prior to Award

The following factors will be considered in determining good faith efforts prior to award of a contract. The Progressive Contractor (including where the Progressive Contractor is a DBE contractor), shall submit evidence on each of the factors.

(a) The Progressive Contractor shall make reasonable effort to contact all ready, willing, and able DBEs who express a desire to work on any of the pay items of the contract.

(b) To effectively participate, the DBE shall have the opportunity to analyze the contract and submit quotations prior to letting. Information provided by the Progressive Contractor to the DBEs shall include, at a minimum, the contract number, pay items, quantities for those pay items to be subcontracted, and the date the subcontract bid is desired.

(c) The Progressive Contractor shall select the portions of the work to be performed by DBEs in order to increase the likelihood of DBE participation. This shall include, where appropriate, an attempt to break down the Agreement into economically feasible units to facilitate DBE participation.

(d) The Progressive Contractor shall provide the interested DBEs with complete information about the plans, specifications, and requirements of the contract. Attempts shall be made to have plans available or to notify the DBE of the location of available plans. The Progressive Contractor shall notify the DBE of revisions to the contract.

(e) It will be considered unacceptable to avoid subcontracting to DBEs if such subcontracting to DBEs results in the need to further subdivide remaining work items.

(f) The Progressive Contractor shall negotiate in good faith with interested DBEs and not reject such DBEs as unqualified without sound reasons based on thorough investigation of their capabilities. Confirmed documentation that a DBE has not been able to perform previous work through no fault of others will be considered to be sound reason. Unacceptable criteria include, but are not limited to, unsubstantiated oral statements and unsigned documentation.

(g) The Progressive Contractor shall make efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by the State, however, the Progressive Contractor shall affirmatively consider waiving requirements it may have in order to assist the DBE.

(h) Only firms certified as DBEs prior to the issuance date of the RFP can be used to meet the Agreement goal for the Department's DBE program.

The Progressive Contractor will be considered to have made good faith efforts if it either:

(i) Documents that it has obtained enough DBE participation to meet the goal, or

(ii) Documents that it made adequate good faith efforts in accordance with the factors set out above to meet the goal even though it did not succeed in obtaining enough DBE participation to do so.

[If a DBE goal has been established for the contract, the Progressive Contractor shall take good faith efforts to achieve the established goal prior to the bid opening. The Affirmative Action Certification shall be completed and submitted with the Proposal to indicate both race/gender conscious and race/gender neutral proposed DBE utilization.

The award of the Agreement will be made to the lowest and best bidder when all other requirements have been met and good faith efforts have been taken toward meeting the DBE goal, if required, in accordance with these requirements.

If the apparent low bidder has not achieved the Agreement DBE goal, the bidder shall respond by email or in writing within five business days after notification by the Department of the failure to meet the DBE goal. The response shall provide evidence identifying the bidder's good faith efforts and all affirmative actions taken prior to letting to achieve the required DBE goal. Failure to respond within the five business day period will result in rejection of the bid, and may result in forfeiture of the bid bond, and the referral of the bidder to the Prequalification Committee.

Responses shall be sent to the Department's Division of Contract Administration. The Department will review the bidder's good faith efforts for compliance with these requirements.

If the Department determines that adequate good faith efforts have been made, and the bidder has met all other bidding requirements, the Agreement will be awarded.

If the Department determines that good faith efforts were inadequate, the Department will notify the bidder of the determination by email. The determination will outline the reasons for determination of non-compliance with good faith effort requirements.

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The bidder may request a review of a determination of non-compliance by email or written submittal within five business days of the bidder's receipt of notification of non-compliance from the Department. The request for review shall include evidence disputing the Department's reasons for issuing a determination of non-compliance. The request shall be sent to the Department's Division of Contract Administration.

Upon receipt of a request, the Department will contact the bidder to schedule a review. The review will be held by the Department's Deputy Commissioner and Chief Legal Counsel, or a designee who did not participate in the original determination of non-compliance. The review will be conducted in accordance with the Department's policy for review of good faith efforts requirements. A copy of the policy is available on the Department's website or through the Division of Contract Administration.

If the Deputy Commissioner's finding determines that the bidder's good faith efforts were adequate, and the bidder has met all other bidding requirements, the Agreement will be awarded and the Department will adjust the contract time by the number of calendar days from the date of the original determination of non-compliance to and including the date of the Deputy Commissioner's findings.

If the Deputy Commissioner's finding determines that the bidder's good faith efforts were inadequate, the finding will be forwarded to the Commissioner. The Commissioner will review the Deputy Commissioner's finding and issue a written Contract Award Determination.

If the Commissioner's Contract Award Determination finds that the bidder's good faith efforts were adequate, and the bidder has met all other bidding requirements, the Agreement will be awarded and the Department will adjust the contract time by the number of calendar days from the start of the original determination of noncompliance to and including the date of the Commissioner's determination.

If the Commissioner's Contract Award Determination finds that the bidder's good faith efforts were inadequate, at the Commissioner's sole option and without further proceedings, either all bids will be rejected or the Agreement will be awarded to the next lowest and qualified bidder. An apparent low bidder who has not met the DBE goal and requirements for good faith efforts may be requested not to rebid on this Agreement during subsequent lettings.

The Commissioner's Contract Award Determination will be the final decision of the Department.]***[NTD: subject to continuing INDOT review and comment]***

(1) **[Reserved][NTD: INDOT's programmatic "Extra Work" provisions are reserved here as the DBE goal should automatically adjust on PDB/CMGC to include any change orders that alter the price of the contract.]**

SECTION 6. [Reserved]

SECTION 7. Subcontracts

If the Progressive Contractor intends to subcontract a portion of the work, affirmative action shall be taken to seek out and consider DBEs as potential Subcontractors prior to the subcontractual commitment.

The contacts made with potential DBE Subcontractors and the results thereof shall be documented and made available to the Department and the FHWA upon request.

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If the Progressive Contractor originally did not intend to subcontract a portion of the work and later circumstances dictate subcontracting a portion of the work, the affirmative action contacts described herein shall be performed.

Upon receipt of notification from the Department, a Disadvantaged Business Enterprise Utilization Affidavit, Form DBE-3, shall be completed by the Progressive Contractor and returned to the Department. The Progressive Contractor and the Subcontractor/lessor/Supplier shall certify on Form DBE-3 that specific amounts have been paid and received. A DBE-3 Form certification shall be completed and submitted for every DBE utilized on the contract, whether or not there was a DBE contract goal.

SECTION 8. Leases and Rentals

Hauling leases made with DBEs shall be submitted to the Department for approval before beginning work. Leases for hauling, when used, shall be submitted when borrow, subbase, compacted aggregate, HMA mix, cement concrete mix, or a combination of the above is to be hauled by a DBE. The lease shall show the dollar amount of anticipated work before the work begins. The actual dollar amount shall be reported to the Department after the work has been completed.

In order to perform a commercially useful function on a contract, the dollar volume of hauling by a DBE trucking firm that is counted toward the DBE goal is limited to the total value of transportation services provided by the DBE's own trucks; the total value of transportation services a DBE lessee provides with its own trucks; and the total value of transportation services a non-DBE lessee provides with its own trucks, not to exceed the value of transportation services provided by DBE-owned trucks. In addition, DBE credit will also be given for any fee or commission the non-DBE lessee receives as a result of the lease arrangement for any additional non-DBE trucks.

In order to count leased trucks toward the goal, the lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from being used by others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck.

Leased trucks must display the name and identification number of the DBE. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting the DBE goals.

The Progressive Contractor shall provide the Department with copies of any lease agreements between DBE trucking Subcontractors and any DBE or non-DBE trucking firms or owner/operators that will be used to supplement the DBE trucking subcontractor's trucks for the purpose of meeting the DBE goal. Copies of these lease agreements shall be provided by the time of use of any supplemental trucks on the Agreement.

The name of trucking firm shall be included on each ticket for material delivered to the job site by a DBE trucking Subcontractor or lessee.

The Progressive Contractor shall notify the Department when purchases or rental of equipment, other than leases for hauling, are made with DBEs. The information submitted shall include the name of the business, the dollar amount of the transaction, and the type of purchase made or type of equipment rented.

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If a Subcontract between the Progressive Contractor and a majority Subcontractor requires that the majority Subcontractor sublease a portion of its hauling to a DBE, the Progressive Contractor may receive credit toward the Agreement goal. The Progressive Contractor shall notify the Department when sublease agreements exist, the name of the DBE, the dollar amount of anticipated hauling before the work begins, and the actual dollar amount after the work is completed. The Subcontractor shall certify actual utilization of the DBE at the end of the work and provide such certification to the Progressive Contractor for submission to the Department.

SECTION 9. Records and Reports

The Progressive Contractor shall keep such records as necessary to determine compliance with its DBE utilization obligations and compliance with the factors for determining good faith set forth in Section 5.1. The Progressive Contractor's records shall indicate the minimum requirements as follows:

(a) The number of disadvantaged, non-minority, and women subcontractors and suppliers and type and dollar value of work or materials services being performed on or incorporated into this Agreement.

(b) The progress and efforts being made in seeking out disadvantaged contractor organizations and individual disadvantaged Subcontractors for Work on this Agreement.

(c) Documentation of all correspondence, contacts, or telephone calls to obtain the services of DBEs on this Agreement.

Reports shall be submitted as required by the Department for those contracts and other business agreements executed with DBEs with respect to the records referred to above.

All such records shall be maintained for a period of five years following acceptance of final payment and shall be available for inspection by the Department and the FHWA and their authorized representatives.

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