



INDIANA DEPARTMENT OF TRANSPORTATION

ALTERNATIVE DELIVERY MANUAL

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1.0 Overview

The purpose of this manual is to be a resource for the Department, consultants, and contractors to guide delivery of projects through the various alternative delivery methods that the Department is authorized to use. This manual does not contemplate P3 projects. All P3 projects must be coordinated with the Department's Major Projects Delivery Director for further guidance. While this manual can be used as a general guide, each project is unique and may require unique processes. The Department reserves the right to modify any of the following processes to satisfy the requirements of a specific project.

This manual is organized into three main sections:

- Common alternative delivery project procedures
 - This section provides an overview of the procedures that are used in all alternative delivery projects for all project delivery methods.
- Design-Build
 - This section details the procedures used for Design-Build Low Bid projects and Design-Build Best Value projects.
- Progressive Delivery (PDB/CMGC)
 - This section details the procedures used for Progressive Design-Build and Construction Manager/General Contractor projects.

This manual includes several appendices, and the appendices are integral to describing the Department's approach to alternative delivery. ~~The body of the manual is intended to be read with reference to the appendices.~~ The body of the manual is intended to be read with reference to the appendices. The manual uses bookmarks to improve navigation within the document. Bookmarks work best when the file is opened in a PDF reader, such as Bluebeam or Adobe. To use bookmarks, look for the bookmarks panel typically found on the left or right side of the window. If it's not visible, you can open it by clicking on the bookmark icon. To jump to a specific section, click on the bookmark in the bookmarks panel and the document will automatically scroll to the corresponding page. Capitalized terms have the meaning set forth in the template documents included in the appendices. For ease of reference, Table 1-1 includes definitions for some frequently used terms.

Table 1-1: Definitions

Term	Meaning
"Agreement"	A contract entered into between the Department and the selected proposer.
<u>"Alternative Technical Concept (ATC)"</u>	<u>Means a proposed deviation from the contract requirements, approved by INDOT during the procurement.</u>

Term	Meaning
“Award”	The opportunity presented to the selected proposer to enter into an agreement with the Department to deliver a project.
“Construction”	The physical work undertaken to build any portion of a project.
“Guaranteed Maximum Price (GMP)”	The maximum amount of compensation due for work established by a CMGC or PDB agreement.
“Pre-Procurement”	The time prior to advertising a solicitation.
“Procurement”	The process by which a contractor or Design-Builder is selected which may differ depending on which delivery method is used.
<u>“Progressive Contractor”</u>	<u>The contractor for either PDB or CMGC.</u>
<u>“Progressive Delivery”</u>	<u>Since there are many similarities with PDB and CMGC, this term is used when referencing both PDB and CMGC.</u>
“Proposer”	An entity that is participating in a procurement or has submitted a statement of qualifications or a proposal.
“Request For Proposals (RFP)”	The solicitation document that includes requirements for development, submittal, and evaluation of a proposal.
“Request For Qualifications (RFQ)”	The solicitation document that includes requirements for development, submittal, and evaluation of a Statement of Qualifications.
<u>“Reference Information Documents (RIDs)”</u>	<u>Means the non-contractual documents and information provided with the RFP.</u>
“Solicitation”	The process by which the department receives information and makes a determination to award a project.

1.1 Project Delivery Methods

The Department primarily uses design-bid-build to deliver projects and has used design-build since the 1990s. The authority to use Construction Manager-General Contractor (CMGC) and Progressive Design-Build (PDB) for a five-year pilot program became effective in July 2023. This additional pilot authority will further improve the Department’s ability to deliver the infrastructure commitments described in the State’s Transportation Improvement Program (STIP).

1.1.1 Alternative Delivery Methods

This section provides a description of each alternative delivery method the Department is authorized to use including:

- Design-Build (DB)
 - Design-Build Low Bid (DBLB)
 - Design-Build Best Value (DBBV)
- Progressive Delivery
 - Progressive Design-Build (PDB)
 - Construction Manager General Contractor (CMGC)

See Appendix A (Alternative Delivery Comparison Summary) for a matrix summarizing the different aspects of Design-Build, CMGC, and PDB.

Design-Build Low Bid is a delivery method in which design and construction are delivered under a single agreement with the Department with a lump sum price determined at the time of award.

Progressive Design-Build is a delivery method in which design and construction are delivered under a single, two-phase agreement: with the Department. The two-phase agreement consists of a Preconstruction Phase and a Construction Phase. The purpose of the Preconstruction Phase is to develop the design and agree upon cost and other requirements for the Construction Phase. The Preconstruction Phase will include participation of an Independent Cost Estimator (ICE) contracted directly with the Department to develop estimates for the cost of Construction Work. The Construction Phase includes the actual construction of a project based on a project design and other requirements agreed to during the Preconstruction Phase. The Construction Phase may involve Construction Work that is authorized by one or more Pricing Packages. Each Pricing Package will have a GMP.

Construction Manager General Contractor is a delivery method in which design and construction are delivered under two separate agreements: one agreement ~~with~~between a professional services consultant (designer) and the Department and one agreement ~~with~~between a construction manager/general contractor (CMGC Contractor) ~~and the Department~~. The designer performs preliminary engineering and develops a project design and specifications of a project. The CMGC Contractor performs services pursuant to a two-phase agreement that includes a Preconstruction Phase and the Construction Phase. The purpose of the Preconstruction Phase is to agree upon cost and other requirements for the Construction Phase. The Preconstruction Phase will include participation of an ICE to develop estimates for the cost of Construction Work. The Construction Phase includes the actual construction of a project based on a project design and other requirements agreed to during the Preconstruction Phase. The Construction Phase may involve Construction Work that is authorized by one or more Pricing Packages. Each Pricing Package will have a GMP.

In order to validate the price given by the builder in both PDB and CMGC, the Department will retain the services of an ICE. The role of the ICE is further described in Section 4.4.2.6 (Cost Estimating).

2.0 Common Project Delivery Procedures

Each alternative delivery method has its own unique attributes and processes through the different phases of a project lifecycle. However, many common procedures exist among the different methods. This Section 2 describes those commonalities.

Figure 2-1 shows a comparison of project activities for the various delivery methods and how the activities may overlap.

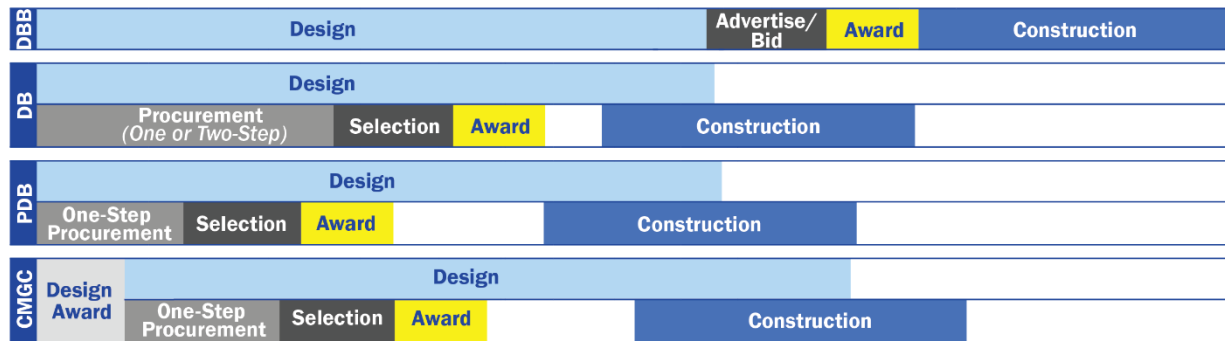


Figure 2-1: Delivery Method Process Comparison

2.1 Pre-procurement Activities

This Section 2.1 details the common activities that occur for each alternative delivery method to reach procurement.

2.1.1 Delivery Method Selection Process

No single delivery method is appropriate for every type of project. The decision to use alternative delivery should be based on the constraints, goals, and risks of a project. This section describes the process the Department will follow for identifying alternative delivery projects which includes:

1. Initial Screening – A project is screened to determine if the use of alternative delivery is generally appropriate. This includes answering yes or no questions to determine if an alternative delivery method could benefit the delivery of a project.
2. Controlling Criteria Development – If it is determined that alternative delivery may be appropriate for a project, project specific constraints, goals, and risks are developed which will be used to evaluate different alternative delivery methods on a comparative basis.
3. Pass Fail Evaluation – Each alternative delivery method is evaluated on a pass-fail basis to determine if any project constraint makes the method non-viable.
4. Numerical Scoring – Each alternative delivery method will be evaluated based on its ability to achieve project goals and mitigate project risks using a numerical scoring method.
5. Results Summary – Results are summarized to allow for a comparative evaluation based on the numerical scores.

Other factors that are not specifically contemplated in the process described above, such as staff availability and legislative constraints, may also impact which alternative delivery method is most appropriate. The Department reserves the right to use the delivery method that it determines to be in its best interest.

2.1.1.1 Project Constraints

Project constraints are project outcomes that must or must not happen on a project. Project constraints are used to assess if an alternative delivery method is compatible for use with a project. If common characteristics of an alternative delivery method are unable to achieve a project constraint, the alternative delivery method should be removed from consideration for use with the project.

The following are examples of project constraints:

- Project cost must not exceed a specific amount
- Agreement execution must occur prior to a specified date
- Substantial Completion must be achieved by a specified date

2.1.1.2 Project Goals

Project goals identify priorities that should be considered during project development, procurement, implementation, and administration. An understanding of project goals is essential to the selection of an appropriate method of delivery. Project goals will be evaluated as part of the numerical scoring process described above.

Following are some examples of project goals for transportation projects. Although project goals can be similar from project to project, each project is unique and must be considered independently. Project goals should be considered over the life of a project to ensure that decisions are made in alignment with them.

Schedule	Cost	Function
<ul style="list-style-type: none">• Minimize project delivery time• Complete the project before a specified date• Make project fully operational prior to a specified date• <u>Reduce likelihood of unexpected delays</u>	<ul style="list-style-type: none">• Minimize project cost• Maximize project budget• Complete the project on budget• Maximize project scope and improvements within project budget	<ul style="list-style-type: none">• Maximize the life cycle performance of the project• Maximize capacity and mobility improvements• Provide innovative solutions to the complex project problems• Minimize inconvenience to the traveling public during construction• Maximize safety of workers and the traveling public during construction• Improve safety through access control• Minimize the work zone impacts with efficient Maintenance of Traffic

When and how goals are set should consider the size and complexity of a project. A goal setting workshop should be held early in project development, prior to selection of the delivery method. The workshop can be conducted by the project team or can be facilitated by an outside expert. Facilitated goal setting workshops preferably include participants with expertise in both goal setting for transportation projects and use of alternative delivery methods.

Recommended participants at a goal setting meeting include:

- Major Project Delivery – Project Manager
- Central Office – Corridor Development
- District Staff:

- Capital Program Delivery – Project Manager (or Deputy)
- Design Manager
- Technical Services Staff
- Systems Asset Manager
- Pavement Asset Manager
- Bridge Asset Manager
- Scoping
- Traffic
- Maintenance
- Construction
- Environmental
- Right-of-Way
- Utilities/Railroad

2.1.1.3 Project Risks

Project risks are threats to the success of a project that should be considered during project development, procurement, implementation, and administration. Risk management is one of the core concepts of alternative delivery, and understanding a project's risks is essential to the selection of an appropriate method of delivery. Project risks will be evaluated as part of the numerical scoring process described above.

The Department will conduct preliminary risk workshop prior to the delivery method selection. This risk workshop is intended to identify potential risks related to the project that could cause adverse impacts. Once potential risks are identified, each risk should be assessed to determine the likelihood of the risk occurring and the potential impact the risk has on the project. This initial risk assessment can be used to inform future risk workshops during preconstruction.

Following are some examples of transportation project risks:

- Utility Issues (likely several risk register items related to utilities)
- Unexpected Geotechnical issues
- Constructability issues
- Railroad involvement
- Late changes requested by stakeholders
- Maintenance of Traffic
- Change in conditions
- Archeological findings
- Endangered Species
- Issues with new materials or technologies
- Right-of-way availability
- 4f properties
- EJ communities
- Budget Overruns
- Conflicts with adjacent construction projects
- Poor or incomplete project scope
- Design changes in the field
- Labor availability
- Market conditions
- Funding issues
- Hazardous materials
- Coordination with Government agencies
- Errors in Survey
- Noise impacts
- Weather related delays
- Land Acquisition
- Change in Government priorities

Recommended participants at a risk workshop include the individuals listed in Section 2.1.1.2 (Project Goals). Combining the risk workshop and goal setting workshop is encouraged.

2.1.2 FHWA Coordination

As a partner in the delivery of federally funded projects, the Department will coordinate with FHWA in the development, procurement, and administration of alternative delivery projects.

2.1.3 Technical Advisor

Given the level of effort that is required to manage an alternative delivery project, the Department may procure the services of a technical advisor to support the Department in the implementation of the processes described in this Manual.

2.1.4 Project Development

Project development should generally follow the activities described in the [Indiana Design Manual](#) (IDM). However, project development should be aligned with the selected alternative delivery method to ensure that future project advances in a manner that maximizes project value. The level of development needed to support procurement and administer a project will depend on the chosen alternative delivery method. In general, the project development prior to procurement will be advanced further when using Design-Build than when using progressive delivery. The ~~primary~~ design related elements to consider for ~~each alternative~~ Design-Build projects is discussed in Section 3.1.1 (Design-Development). The design related elements to consider for progressive delivery method is depicted in Figure 2-2. projects is discussed in Section 4.1 (Pre-Procurement Activities).

Design-Build	Progressive Design-Build	CMGC
<ul style="list-style-type: none">• Approximately 30% design development• Identification of reports, plans and other materials that can be included in RIDs• Development of technical provisions• Advancement of engineering studies/activities to mitigate risks (e.g., utility conflicts) and obtain necessary permits• Support in ATC evaluations• Review of design-builder plan submittals	<ul style="list-style-type: none">• Development of alternatives and preliminary design necessary for NEPA• Coordination with the contractor to align• Constructability considerations with alternatives• Advancement of engineering studies/activities to mitigate risk• Support risk management discussions• Identification of reports, plans, and other materials that can be included in RIDs• Evaluations of deviations during preconstruction	<ul style="list-style-type: none">• Development of alternatives and preliminary design necessary for NEPA• Coordination with contractor to address constructability in design• Construction support regarding design issues

Figure 2-2: Project Development Activities

2.2 Procurement and Evaluation

Each alternative delivery method requires a solicitation to secure the services of a designer and a contractor. Although the procurement process may differ between each alternative delivery method, they generally follow the process depicted in [Figure 2-2: Alternative Delivery Procurement Process](#)~~Figure 2-3: Alternative Delivery Procurement Process~~.

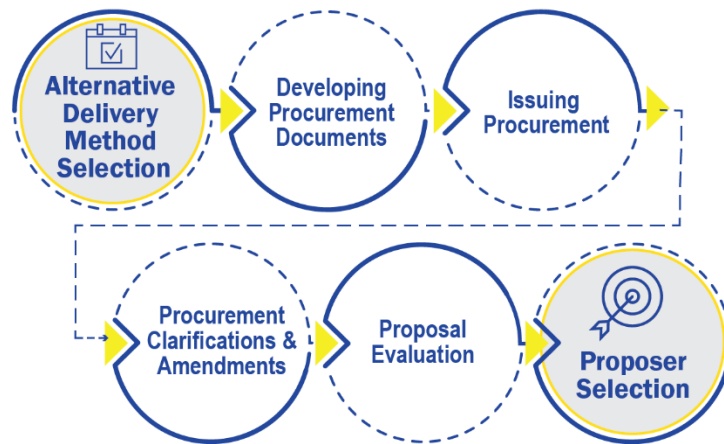


Figure 2-23: Alternative Delivery Procurement Process

2.2.1 Developing Procurement Documents

Procurement documents define the requirements, expectations, and guidelines for the contractor, designer, and the Department in the delivery of a project. The procurement documents used for each alternative delivery method differ. The list below includes the Sections of the Manual for additional information related to the development of procurement documents for each delivery method.

- DBLB Section 3.2.3.1 (Design-Build Low Bid)
- DBBV Section 3.2.3.2 (Design-Build Best Value)
- Progressive Delivery Section 4.2.3 (Developing Procurement Documents)

2.2.2 Issuing Procurement Documents

A website will be used to advertise a project and relay project information to proposers during the procurement process. The Department will maintain the website which contains information related to the procurement of alternative delivery projects. The primary audience for the website is proposers, but all information is open to the public. The website will contain solicitation documents, procurement schedules, links to project data, and other information. The location of the website will be described in the solicitation documents.

2.2.3 Procurement Clarifications and Amendments

Upon issuance of the procurement documents, proposers may submit questions and/or requests for clarification on the procurement documents. The procurement documents should establish a deadline for questions to be submitted and responded to. The timeline should provide enough time for proposers to adjust their proposals to accommodate any responses.

Proposer requests for clarification received as described in the procurement documents will be reviewed by the Department and formal responses will be provided to proposers as described in the [RFQ or RFP](#).

It may be necessary to issue formal amendments to the procurement documents in response to proposer questions to clarify requirements, to correct errors, or to provide supplemental information. The intent of the amendment process is to formally respond to questions and modify the procurement documents in advance of the proposal due date.

2.2.4 Proposal Evaluation

Proposals will be received and evaluated based on the criteria defined in the RFP. An evaluation manual specific to each project will be developed and training will be provided. The level of training will depend on the skill and experience of the evaluation team, the size and complexity of the project, and other factors identified on a project specific basis.

2.2.5 Proposer Selection

Upon completion of proposal evaluations, a proposer will be selected pursuant to the process described in the RFP. Depending on the alternative delivery method used, selection may be based on either low cost, best value, or qualifications.

2.3 Conflict of Interest

INDOT's "Consultant Conflict of Interest Policy", as set forth in Exhibit H, Attachment 1 of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement), is applicable to each alternative delivery method procurement under this manual and shall be complied with in all respects during the procurement and project phases. The state regulations specifically prohibit firms from participating on both the Department's team and the proposer's team for the same project.

2.4 Self-Performance Requirements

The Department will include contract terms requiring the prime contractor to self-perform a minimum percentage of work for all alternative delivery methods. For Design-Build (both low-bid and best-value, the self-performance requirements may be the same as those the Department requires for its design-bid-build program as described in Section 108.01 of the Standard Specifications (50% self-performance). The Department may also, on a project specific basis, lower the minimum self-performance requirement to 30% through Special Provision 108-C-89. For Progressive Delivery, the CMGC Agreement Template and PDB Agreement Template include a minimum self-performance requirement of 30%. Because of the negotiated pricing process for Progressive Delivery, lowering the self-performance requirements to 30% increases the opportunity for competitive selection of subcontractors. On a project specific basis, the Department may also consider including contract terms that establish a maximum percentage of work that the Progressive Contractor may self-perform. In determining whether to set a maximum self-performance requirement the Department will consider the size and complexity of the project, whether competitive subcontracting will provide pricing benefits, subcontractor availability, and other relevant factors.

2.32.5 Template Management

Template procurement documents for each alternative delivery method are available in the appendices. These template documents provide a framework that is in compliance with federal and state requirements at the time of drafting. For each project, the RFP will be substantially the same, unaltered from the template documents. The Department's counsel must approve any changes to the template documents that are not identified within the templates as subject to modification by the project team.

2.42.6 Document Management

The Department will operate the document management system used for submittals to the Department for projects during preconstruction and construction using Autodesk Construction Cloud (ACC) or a similar platform.

3.0 Design-Build

This Section details the unique attributes and processes of the Design-Build delivery method. ~~See~~ Section 2 describes common procedures among each alternative delivery method.

3.1 Pre-Procurement Activities

Design-Build procurements require pre-procurement project development to produce the ~~RFP documents, procurement documents, referred to as the Contract Information Book (CIB) in DBLB and the RFP in DBBV.~~ Project development should be aligned to achieve project goals and mitigate project risks to ensure the project advances in a manner that maximizes project value.

3.1.1 Design Development

~~In addition to the list of activities described in Section 2.1.4 (Project Development),~~ Design-Build specific design development activities include:

- Approximately 30% design development (or as needed to obtain NEPA Approval)
- Identification of reports, plans, and other materials that can be included in the RIDs
- Development of Scope of Services (SOS) in DBLB or Technical Provisions in DBBV
- Advancement of engineering studies/activities to mitigate risks (e.g., utility conflicts) and obtain necessary permits

The design development activities should: ensure the project scope and requirements are well defined and reflect the project goals; ensure the project is constructible within the identified budget; provide necessary data, investigations, and analyses to proposers; and advance the design as necessary to properly identify, manage, and allocate risks.

3.1.2 Risk Management

Risk management will be used to inform project activities including cost estimating, project budgeting, pre-procurement development activities, and development of the procurement documents. Each identified project risk should describe in detail how a project will advance while addressing the risk. The Department should address high risk items prior to releasing the RFP to avoid inflated bid results including contingences for unknown risk.

3.1.3 Site Investigations

The Department or its representatives will undertake on-site investigations to gather information needed to define project requirements ~~and allocate risk,~~ allocate risk, obtain governmental approvals, and perform other necessary project development activities. Site investigations usually include topographic surveys, utility and geotechnical investigations, examining existing drainage and maintenance problems, and inventory of existing assets.

3.1.4 Cost Estimate

Cost estimating is an important part of the design development process. Most large Design-Build projects have budgetary constraints, so it is vital to ensure that the Basic Configuration can be constructed within a set budget.

The project team will need to develop accurate project cost estimates without reliance on a detailed bid item quantity breakdown since Design-Build projects are bid on a lump sum basis prior to completion of final design.

Parametric estimating is one method that is often employed to prepare cost estimates for Design-Build projects prior to initiating procurement. This method identifies historical projects of similar character and evaluates costs of various elements of work as a percentage of core item costs for a project. Another method is to identify the elements of a project that bear the highest costs and perform detailed estimates for those items. Developing an accurate estimate usually requires using a combination of methods and possibly an independent review.

It may be appropriate to engage an ICE to validate critical cost estimates. ICE firms perform production-based cost estimates using the same procedures that contractors employ in bidding projects. The method can provide a significant improvement in the level of confidence in the accuracy of the cost estimate.

~~3.21.1 Conflict of Interest~~

~~Care should be exercised to make sure that all team members understand INDOT's conflict of interest policy. The state Design-Build regulations specifically prohibit firms from participating on both the Department's team and the Design-Builder's team.~~

~~3.33.2 Procurement and Evaluation~~

~~3.3.13.2.1 Typical Procurement Process~~

The procurement process for Design-Build projects differs depending on whether a project is a low bid or best-value project. Design-Build Low Bid projects will be procured using a one-step process. Design-Build Best Value projects will be procured using a two-step process.

Figure 3-1 depicts the typical Design-Build Low Bid procurement process.

Figure 3-2 depicts the typical Design-Build Best Value procurement process.

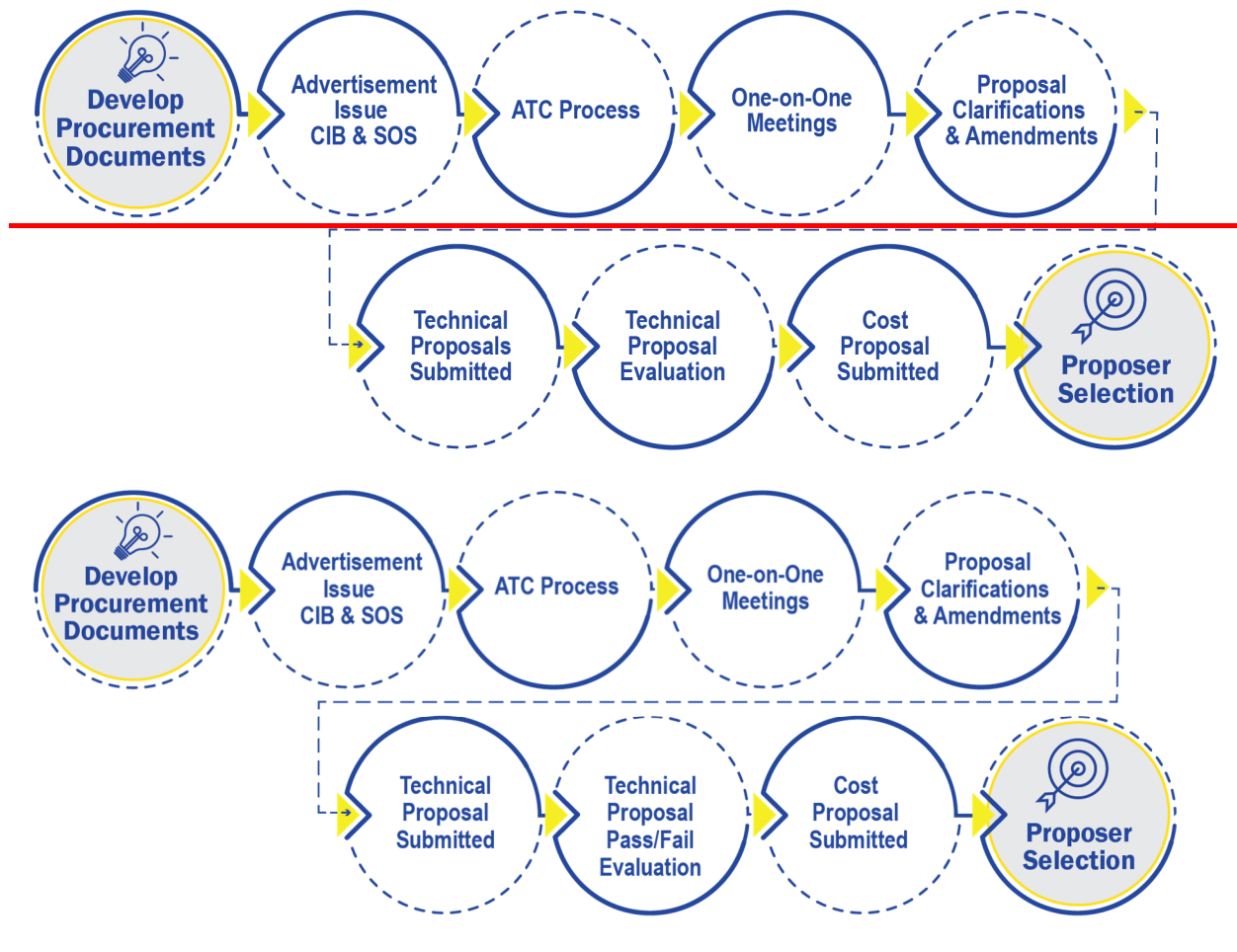


Figure 3-1: Design-Build Low Bid Procurement Process

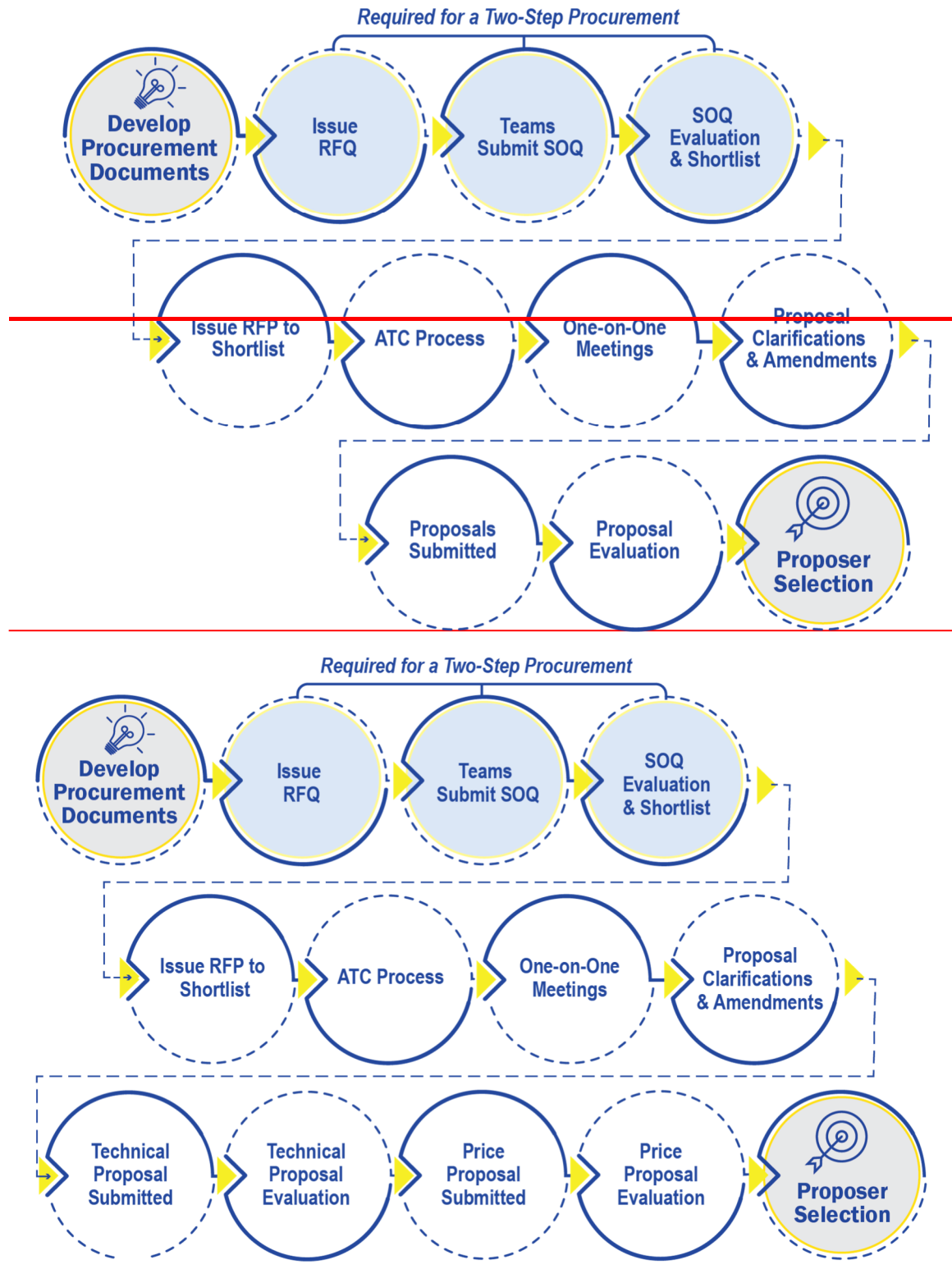


Figure 3-2: Design-Build Best Value Procurement Process

3.3.23.2.2 Typical Procurement Timeline

For Design-Build Low Bid, the typical duration from advertisement to proposer selection is approximately 14 to 18 weeks. Project teams should also consider the time that will be required to develop the solicitation documents and obtain necessary Department approvals to begin a procurement. This time will depend on a variety of factors including a project's size, complexity, and importance to the Department and other stakeholders.

For Design-Build Best Value, the typical duration from advertisement to proposer selection is approximately 7 months. The increase in required duration compared to low bid is a result of the two-step process and additional time needed ~~for proposer interaction~~ to develop a technical proposal that will be reviewed and ~~feedback from scored as part of the~~ Department through one-one meetings, questions, and ATCs. ~~best value determination.~~ Project teams should also consider the time that will be required to develop the solicitation documents and obtain necessary Department approvals to begin a procurement. This time will depend on a variety of factors including a project's size, complexity, and importance to ~~INDOT the Department~~ and other stakeholders. Generally, project teams should expect a higher pre-procurement level of effort and longer duration for best value compared to low bid.

3.3.33.2.3 Developing Procurement Documents

3.3.3.13.2.3.1 Design-Build Low Bid

Design-Build Low Bid procurement documents consist of primarily the ~~Contract Information Book (CIB)~~,_{7L} which contains the ~~Scope of Services (SOS)~~,_{7L} and RIDs. The CIB contains construction information similar to a DBB project like the Schedule of Pay Items and Special Provisions. The Scope of Services portion contains additional items such as design requirements and details for delivery and construction. The RIDs contain the 30% plans, environmental review document, permits and other important background information. The time needed to develop the documents varies and is based on the complexity of the project and if right-of-way acquisition is necessary.

DBLB procurements should be developed using the template documents available in Appendix B (Template DBLB Documents).

3.3.3.23.2.3.2 Design-Build Best Value

Design-Build Best Value procurement documents consist of the ~~Request for Qualifications (RFQ)~~ and the RFP. The RFQ is the first step of a Design-Build Best Value solicitation. In addition to project information, instructions, and other administrative requirements, the RFQ includes requirements related to the qualifications that a proposer must describe in the Statement of Qualifications (SOQ) submitted in response to the ~~SOQ RFQ~~. The RFQ also includes requirements for how the SOQ will be evaluated. These requirements should be developed considering the constraints, goals, and risks of a project.

Examples of information that may be requested in the RFP includes:

- ~~Submitter~~Proposer Organization
- Key Personnel
- Project Understanding
- Project Approach

After SOQs are received, they will be evaluated by the Department and a shortlist of proposers will be identified to proceed to the RFP step. The review and evaluation of SOQs will be performed by a team of

subject matter experts, scoring members, legal staff, and process oversight experts. Scoring of the SOQs will consist of either consensus scoring or individual scoring, as determined by the Department. Scores from the SOQs will not be carried over to the evaluation of the final RFP responses.

The RFP is the second step of a two-step solicitation of a Design-Build Best Value project and is comprised of several documents including:

- Instruction to Proposers (ITP) - The ITP is not a contractual document. It includes the procurement process, evaluation criteria, and format for submitting technical and price proposals. The information described in Section 3.2.4 (Communication with Proposers during Procurement) will be included in the ITP.
- Agreement - The agreement includes the commercial terms and conditions that will govern project delivery. The agreement also contains defined terms and other requirements.
- Technical Provisions - Technical Provisions (TPs) include project-specific requirements and are tailored to each project. The TPs also contain the standards that must be used on a project.
- RIDs - It is important to understand that the RIDs are for information only and do not dictate design requirements to the Design-Builder. Similarly, the Design-Builder is not entitled to rely on any designs that are provided in the RIDs and has the responsibility to validate the information.

DBBV procurements should be developed using the template documents available in Appendix C (Template DBBV Documents).

3.3.43.2.4 Communication with Proposers during Procurement

3.3.4.13.2.4.1 One-on-one meetings

One-on-one meetings are to discuss a project and project-related documents or communications provided by the Department or proposers. One-on-one meetings also provide a venue for ATC collaboration. Participation by proposers in these meetings is mandatory, and the discussion within the meetings is confidential.

Confidentiality must be strictly maintained, and to that end the participating members of the Department and its representatives should consist of a core group that has decision-making authority and can provide a strong basic understanding of a project and the SOS. The core group will be supplemented by technical experts as necessary to address the specific topics of the meeting.

Proposers will provide agendas in advance of the meetings as required by the RFP to allow the Department and its advisors to familiarize themselves with the topics and provide any necessary technical expertise at the meeting. To maintain security and confidentiality, no physical documentation or electronic files should be taken from the meeting.

To maintain confidentiality, formal minutes of the meetings will not be distributed to the attendants. Therefore, it is important for the Department to have a notetaker to have a clear internal record of the discussions.

3.3.4.23.2.4.2 Questions and Answers

The questions and answers process allows the Department to respond to proposer questions during the RFP advertisement period. Responses to questions need to be carefully drafted for consistency and ensure fair competition. Responses are meant to clarify the RFP but should not be used for material

changes to the RFP. Some responses to questions may result in a change to the procurement documents which would be made through the amendment process. See Section 2.2.3 (Procurement Clarifications and Amendments) for further information.

~~3.3.4.3~~3.2.4.3 Alternative Technical Concepts

ATCs are concepts developed by proposers that are equal or better than the requirements of the RFP. Proposers create ATCs during the proposal phase for the Department to consider implementing on a project. The Department may reject or approve ATCs and only ATCs that have received written approval can be included in a proposal.

The Department should strive to provide strong, reliable direction on ATCs to proposers at the one-on-one meetings. ATCs can have significant impact on proposers' designs, which will be rapidly advanced during the procurement. If proposers wait for formal responses to submittals to understand the Department's position on their ATCs, their design development process may be negatively impacted. If the Department provides reliable feedback at the meetings, the proposer has greater opportunities to refine ATCs and obtain approvals.

~~3.3.5.2~~3.2.5 Proposal Evaluation

The Department uses two methods of selection for Design-Build projects including low bid and best value. The differences in these selection processes are further described in Section 3.2.5.1 (Low Bid) and 3.2.5.2 (Best Value). Selection criteria requires a detailed review of both the technical ~~proposal price and cost proposals~~. Resources to support this effort should be identified as part of making the determination to use DB.

~~3.3.5.1~~3.2.5.1 Low Bid

For a low bid project selection, a project will be awarded to the proposer that submits the lowest price proposal and has a responsive technical proposal. To be responsive, the technical proposal must meet or exceed the requirements specified in the RFP.

~~3.3.5.2~~3.2.5.2 Best Value

As opposed to the low bid project selection, a best-value selection considers factors beyond cost. Low bid selection can sometimes result in sacrificing quality, innovation, and long-term benefits in favor of immediate cost savings. Best Value procurement aims to address these shortcomings by considering both quantitative and qualitative factors in the selection process. Careful consideration should be given to the selection factors since they allow the Department to select the proposer that best meets a project's constraints and goals. For example, if a project must be complete by a certain date, more points can be allocated to a proposer's construction schedule. Similarly, if a project requires maintaining traffic during construction at a certain level, more points can be allocated to a proposer's maintenance of traffic plan.

~~3.3.6~~3.2.6 Stipends

The Department may elect to offer unsuccessful proposers a stipend for the work product that they submit with their proposal in response to an RFP. The use by the Department of any design element

contained in an unsuccessful proposal is at the sole risk and discretion of the Department and does not confer liability on the unsuccessful proposer(s). The amount of a stipend will be included in the RFP.

After payment of the stipend, the Department and the unsuccessful proposer will jointly own the rights to and may make use of any work product contained in the proposal including the technologies, techniques, methods, processes, ideas, and information contained in the proposal, project design, and project financial plan. The use by the unsuccessful proposer of any part of the work product contained in the proposal is at the sole risk of the unsuccessful proposer and does not confer liability on the Department.

3.43.3 Preconstruction Activities

During the preconstruction phase the Department's responsibilities for contract administration will involve monitoring agreement compliance and schedules, processing progress payments, performing quality assurance activities, assisting in permitting and right-of-way acquisitions, negotiating agreement amendments, and resolving disputes.

Technical submittals by the Design-Builder will be reviewed by the Department and its advisors for conformance to the technical criteria. In some cases, design and construction will be over-lapped and staggered, requiring timely processing by the Department to avoid impacts to a project schedule. The agreement should identify review timelines that the Department and any relevant third parties will be entitled to use for submittals, and it should further identify how many cumulative submittals the Design-Builder will be allowed to submit at any given time.

3.53.4 Construction Activities

As the construction phase starts, the Department~~s~~ will continue to transfer responsibility and authority to the Design-Builder to manage and control the work. The Department's responsibilities for contract administration will involve monitoring agreement compliance and schedules, processing progress payments, performing quality assurance activities including inspections, negotiating agreement amendments, resolving disputes, and final acceptance of the work.

4.0 Progressive Delivery (PDB/CMGC)

This Section details the unique attributes and processes of the progressive delivery methods. ~~See~~ Section 2 describes common procedures among each alternative delivery method.

4.1 Pre-Procurement Activities

A key feature of progressive delivery methods is early contractor involvement. Early onboarding of the contractor will limit the amount of the pre-procurement activities that need to be performed and require a lower level of project development compared to Design-Build.

For PDB there will be a designer responsible for preliminary design necessary for NEPA, and a designer responsible for full development of the construction plans. The change over of the design team increases project administration effort and the impact should be considered when selecting a delivery method and developing a project schedule.

Common pre-procurement activities for CMGC and PDB include:

- Development of alternatives and preliminary design necessary for NEPA
- Advancement of engineering studies/activities to mitigate risk
- Support risk management discussions
- Identification of reports, plans, and other materials that can be included in the RIDs

4.1.1 Progressive Design-Build Federal Regulatory Considerations

Approval to use PDB from FHWA through the Special Experimental Project No. 14 (SEP-14) process may be required. SEP-14 approval is required for any alternative delivery method which deviates from the competitive bidding procedures in 23 U.S.C. 112 and the associated Code of Federal Regulation sections. A common reason for requiring SEP-14 approval on PDB Projects is if NEPA has already been completed. 23 CFR 636.302(a)(1) requires an evaluation of price in the selection of the design-builder where construction is a significant component of the scope of work if the NEPA process has been completed. Since PDB excludes project pricing, SEP-14 approval is required to deviate from the requirement in 23 CFR 636(a)(1) and select a design-builder based solely on qualifications. Note that if NEPA is not complete, price is not required to be evaluated and thus no SEP-14 approval is required.

4.1.2 Construction Manager General Contractor Federal Regulatory Considerations

A pre-procurement activity specific to CMGC will be the procurement of a design consultant for full development of construction plans. The scope of work for the design consultant will include requirements to coordinate with the ICE and the progressive contractor.

Unlike PDB, SEP-14 is not required for CMGC following the passage of MAP-21; however, 23 CFR 635 and other federal regulatory requirements apply.

4.2 *Procurement and Evaluation*

Unlike traditional design-build procurements, developing a compliant proposal does not typically require significant design development ~~and CMGC requires no design development.~~ Selection criteria is typically based on evaluation of a technical proposal and an interview as described in the RFP. This reduces the level of effort and time required for proposal development and evaluation and reduces the overall procurement duration.

4.2.1 Typical Procurement Process

Progressive delivery procurements follow the process depicted in Figure 4-1.

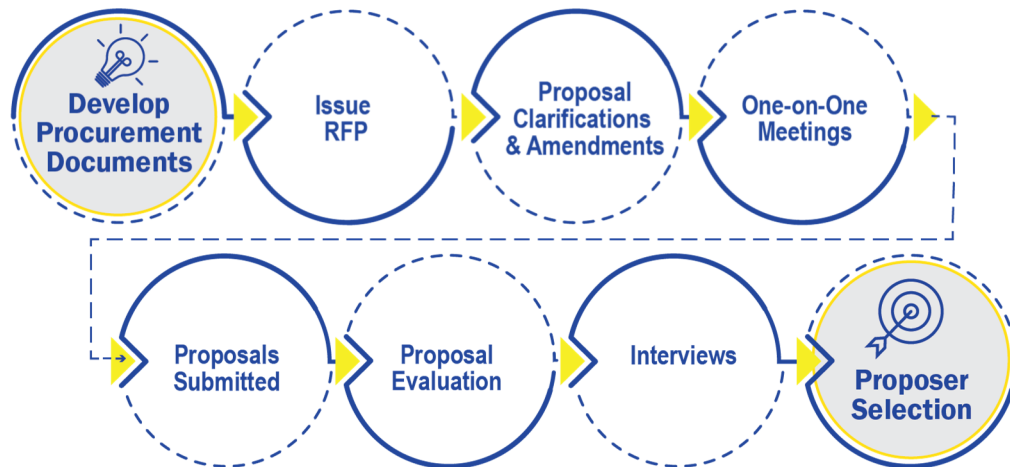


Figure 4-1: Progressive Delivery Procurement Process

4.2.2 Typical Procurement Timeline

Progressive delivery will always be procured through a one-step process. For progressive delivery, the typical duration from advertisement to proposer selection is approximately 12 weeks. Project teams should also consider the time that will be required to develop the solicitation documents and obtain necessary Department approvals to begin a procurement. This time will depend on a variety of factors including a project's size, complexity, and importance to the Department and other stakeholders. It will also depend on the project team's understanding of the delivery model. If a project team has not used a progressive delivery model before, additional time may be needed to develop the solicitation documents.

4.2.3 Developing Procurement Documents

The template documents for progressive delivery consist of a one-step RFP that will be used for both CMGC and PDB projects and a unique agreement for each CMGC and PDB delivery method.

4.2.3.1 RFP Development

The RFP outlines the agreement requirements, project scope, project standards, and instruction for developing and submitting a compliant proposal. The development of the RFP requires an accumulation of information gathered or created during preliminary engineering and other pre-procurement activities.

The RFP is comprised of the following documents including:

- RFP - The RFP includes the agreement requirements, project scope, project standards, and instruction for how to develop and submit a compliant proposal. The information described in Section 4.2.4 (Communication with Proposers during Procurement) will be included in the RFP.
- Agreement - The agreement includes the commercial terms and conditions, defined terms, and other requirements.
- RIDs - It is important to understand that the RIDs are for information only and do not dictate design requirements. ~~Unlike Design-Build, the~~ The progressive contractor can request reliance on RIDs during the Preconstruction Phase. If the Department allows the reliance, the applicable RIDs become part of the Construction Phase Requirements included in a Pricing Package Amendment. An example of RIDs that may benefit all parties for reliance is soil borings. Since

RIDs are generally design oriented, reliance on RIDs is more applicable to PDB than CMGC, but the concept is applicable to both alternative delivery methods. For example, project value may be generated by allowing the CMGC Contractor to rely on survey RIDs.

The RFP should be developed using the template documents available in Appendix D (Template Progressive RFP).

The CMGC Agreement should be developed using the template documents available in Appendix E (Template CMGC Agreement).

The PDB Agreement should be developed using the template documents available in Appendix F (Template PDB Agreement).

4.2.4 Communication with Proposers During Procurement

4.2.4.1 One-on-one meetings

One-on-one meetings in progressive delivery are different than Design-Build projects and are generally more informal. One-on-one meetings allow proposers the opportunity to learn about the Department's process for the applicable alternative delivery method, project goals, and provide an opportunity to familiarize the Department staff with proposers.

To maintain confidentiality, formal minutes of the meetings will not be distributed to the attendants. However, it is important for the Department to have a notetaker to have a clear internal record of the discussions.

4.2.4.2 Questions and Answers

The questions and answers process allows the Department to respond to proposer questions during the RFP advertisement period. Responses to questions need to be carefully drafted for consistency and ensure fair competition. Responses are meant to clarify the RFP but should not be used for material changes to the RFP.

4.2.5 Proposal Evaluation

Proposals will be received and evaluated based on the criteria defined in the RFP. In general, proposals will be shorter than those received on Design-Build projects. Generally, progressive delivery proposals will be evaluated based on items such as the experience of the firms, key personnel, and approach to the project.

4.2.6 Interview

As part of the evaluation and scoring process, proposers will be required to attend an interview with the Department. The interview will consist of a presentation from the proposer followed by a question and answer period. All proposers will be asked the same questions. Questions can be posed to specific interviewee or to the team as a whole. The interview will be scored by the selection panel based on the evaluation criteria set forth in the RFP.

4.2.7 Proposer Selection

Upon completion of proposal evaluations, a proposer will be selected as described in the RFP. Because proposals for progressive delivery projects require much less effort than Design-Build proposals, no stipends are offered to unsuccessful proposers.

4.3 *Progressive Delivery Project Progression*

The CMGC process is described in the Appendix E (Template CMGC Agreement) Section 2 (Construction Manager/General Contractor Process) and the PDB process is described in the Appendix F (Template PDB Agreement) Section 2 (Progressive Design-Build Process).

Upon selection of a progressive contractor, the initial Preconstruction Phase Scope and Compensation Cap will be negotiated, ~~along with the corresponding method of payment (hourly rates, lump sum).~~ The work will progress with an initial goal of a defined preliminary design submittal. Once design reaches a preliminary design level, the progressive contractor will estimate the cost of construction, formally called a Pricing Milestone Estimate (PME). This pricing exercise includes an independent cost estimate created by the ICE to compare to the PME. If both estimates are within the threshold agreed to in the Preconstruction Phase Requirements, the design work will continue to the next defined milestone. If the estimate is outside of the threshold, the ICE and the progressive contractor will identify the differences in cost principles that drove the different estimates and work to correct those for the next PME. This process will continue until a GMP is agreed to between the Department and the progressive contractor, ~~or until either party decides to take an off ramp.~~ Ideally, there are three or fewer PME's prior to agreement on a GMP.

A Pricing Package, further described in Section 2.2.2 (Pricing Package Amendments) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement), 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.

The Department may agree to execute more than one Pricing Package Amendment and allow construction to begin on a portion of a project or authorize purchase of long lead time materials before a GMP has been agreed to for the entire project. Projects should be delivered through as few Pricing Packages as possible.

A diagram describing the progression for progressive delivery projects is shown in Figure 4-2.

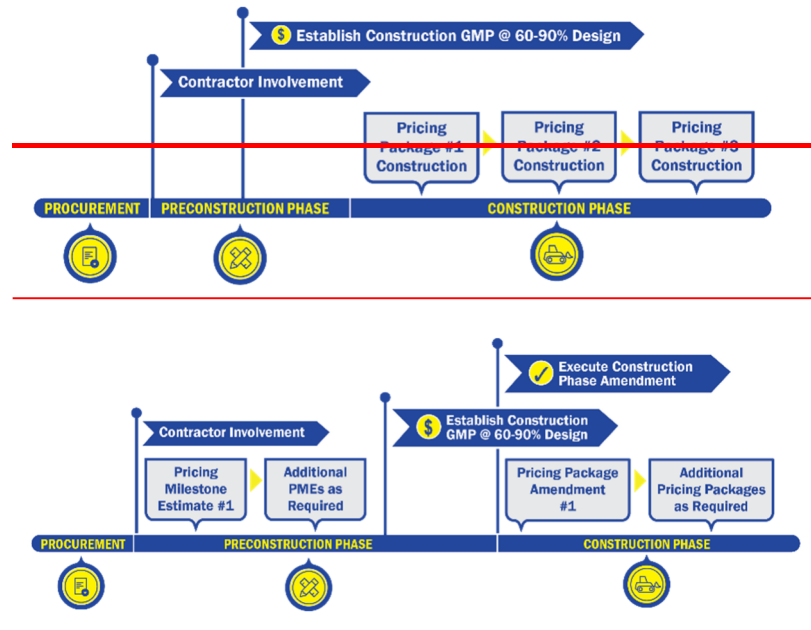


Figure 4-2: Progressive Project Delivery Progress

4.4 Preconstruction Activities

The initial scope of the Preconstruction Work will be negotiated upon selection of the progressive contractor and is included as Exhibit E (Preconstruction Phase Scope and Compensation Cap) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement). The initial Preconstruction Work included in Exhibit E is the authorization of work to be performed. During the Preconstruction Phase, the scope of Preconstruction Work may change, and tasks may need to be assigned or removed from the progressive contractor. All changes in scope and compensation will be managed through Preconstruction Phase Change Orders. Preconstruction Phase Change Orders include:

- a description of the scope of Preconstruction Work;
- an anticipated completion date for the Preconstruction Work; and
- the Preconstruction Phase Compensation Cap, fully-loaded hourly rates, distribution of hours, and allowable direct costs.

4.4.1 Payment during Preconstruction

As described in Section 19 (Payment) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement), payment during the Preconstruction Phase compensation will be based on hourly rates for work performed plus approved direct expenses. The ~~Department is in the process of developing a~~ Department's policy for ~~includes~~ approval of indirect cost rates and profit percentages to be applied to direct labor rates for the purposes of establishing the hourly rates to be paid pursuant to the CMGC and PDB agreements. Information related to this policy ~~will be provided in a future update~~ is included as Appendix G (Preconstruction Phase Hourly Rate Policy).

4.4.2 Preconstruction Phase Requirements

The Preconstruction Work, included as Exhibit E (Preconstruction Phase Scope and Compensation Cap) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement), details what work needs to be completed by the contractor. The performance requirements for the Preconstruction Work are described in Exhibit B (Preconstruction Phase Requirements) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement). The sections included in Exhibit B are described below in Sections 4.4.2.1 through 4.4.2.11.

4.4.2.1 Design and Project Development Considerations

Exhibit B, Section 1 (Design and Project Development Considerations) details the requirements for the progressive contractor's organization chart and directory, defines the standards for the Work, and defines the design submittals and milestones.

Given the fundamental differences in the contractual relationship with the designer between the CMGC and PDB delivery methods, the interface with the designer is unique to each delivery method. In CMGC the designer is expected to work collaboratively with the CMGC Contractor to produce a constructible, cost-effective design that meets project goals. In doing so, the CMGC Contractor's input on items such as phasing, materials, constructability, traffic control, and risk mitigation must be reviewed and potentially incorporated into the design. Managing the interface between the designer and the CMGC Contractor may require additional effort from the Department or the technical advisor.

Additional requirements for the progressive contractor to interface with the designer on CMGC projects is included in Section 7.3 (Department Design Engineer Interface) of Appendix E (Template CMGC Agreement).

In PDB, since the designer is under the same agreement as the contractor, collaboration on project design and strong communication between the designer and contractor is in the team's best interest.

4.4.2.2 Preconstruction Phase Quality Management Plan

Exhibit B, Section 2 (Preconstruction Phase Quality Management Plan) details the progressive contractor's responsibilities for quality management during the Preconstruction Phase which includes the development and submittal of the Preconstruction Phase Quality Management Plan.

4.4.2.3 Preconstruction Phase Schedule Management

Exhibit B, Section 3 (Preconstruction Phase Schedule Management) details the progressive contractor's responsibilities for schedule management during the Preconstruction Phase which includes the development and submittal of the Preconstruction Phase Schedule Management Plan, the development and submittal of the initial Preconstruction Phase Project Schedule, and monthly updates of the Preconstruction Phase Project Schedule.

4.4.2.4 Risk Management

Exhibit B, Section 4 (Risk Management) details the progressive contractor's responsibilities for developing and maintaining the Risk Register.

The Risk Register contains mitigation plans and strategies for all risks identified during the Preconstruction Phase. The risks that are not mitigated during the Preconstruction Phase will be developed into Department risks, Provisional Risks, and Contractor risks. The Risk Register will contain the contractual terms associated with the risk and describe in detail how a project will advance while addressing the risk. This may include payment terms such as unit prices or lump sum for each risk. This practice essentially pre-negotiates the change process to make administration more efficient and avoid disputes.

This approach to mitigating risk improves a project’s cost certainty, protects the contractor in the event of unanticipated changes in the scope of work, and assures the Department that the construction cost is not inflated to include unidentified risks.

Progressive delivery Risk Register concepts are identified in the Figure 4-3. Additional Risk Register information is located in Section 2.4 (Risk Register) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement).

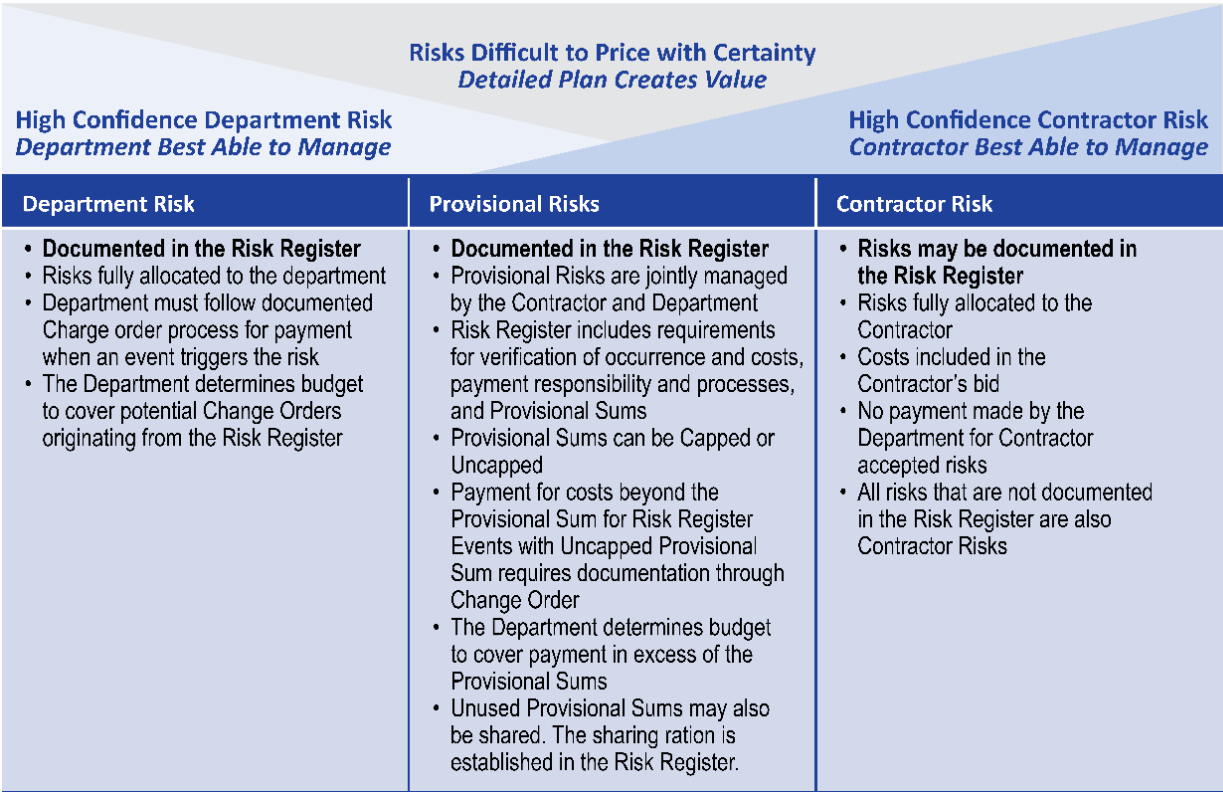


Figure 4-3: Progressive Delivery Risk Management

The key concepts of risk management in progressive delivery include:

- The Risk Register is an essential part of the progressive delivery process that is collaboratively developed during the Preconstruction Phase.
- The Risk Register becomes a contractual element through incorporation into a Pricing Package Amendment (or upon early approval).

- By the end of the Preconstruction Phase, the Risk Register should describe all known Provisional Risks and Department Risks, define unit costs or other payment mechanisms for Provisional Sum items, and set forth requirements for payment of the Risk Register Events.

A Sample Risk Register is provided in Appendix [GH](#) (Sample Risk Register).

4.4.2.5 Pricing Package Plan

See Section 2.2.2 (Pricing Package Amendments) and Exhibit B, Section 5 (Pricing Package Plan) describes of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement). These sections describe the concept of the Preliminary Pricing Package Plan and the Final Pricing Package Plan. ~~The purpose of these plans is to document how the project will be divided into different packages if construction work is intended to be priced and authorized through more than one Pricing Package. The Preliminary Pricing Package Plan, will include less detail than the progressive contractor identifies and describes the Buildable Units that are anticipated to be constructed as part of one or more Pricing Packages.~~ Final Pricing Package Plan. The primary function of the Preliminary Pricing Package Plan is to provide sufficient information to allow the Department and the Progressive Contractor to manage the pricing process. If the Preliminary Package Plan is agreeable to the Department, the progressive contractor will submit a Final Pricing Package Plan ~~which includes~~ prior to submission of the Construction Phase Agreement. The Final Pricing Package Plan will provide additional details including estimated costs, ~~schedules, schedule, and other items needing to obtain authorization of construction.~~ information for each Pricing Package. This information is intended to provide additional confidence that although the project is being divided into more than one Pricing Package, it can still be delivered within the Department's budget. It is important to note that a Pricing Package is not the same as a Buildable Unit. A Pricing Package may be divided into one or more Buildable Units for the purpose of managing design and construction.

4.4.2.6 Cost Estimating

Exhibit B, Section 6 (Cost Estimating) describes the cost estimating and pricing requirements that will be used to achieve a fair price for the Construction Work so the progressive contractor and the Department and its advisors understand how the cost estimating and pricing strategy will be implemented.

One of the cost estimating and pricing strategy procedures is the use of an ICE. The ICE is a consultant hired by the Department with considerable experience producing production-based, contractor-style estimates using contractor-style estimating software. The purpose of the ICE is to provide another perspective to the progressive contractor's estimate that helps ensure a fair and reasonable price for construction.

Prior to beginning cost estimating at each milestone, the ICE and the progressive contractor will need to agree on quantities. A sample quantity reconciliation sheet is included in Appendix [HJ](#) (Sample Quantity Reconciliation Sheet).

Review of innovative designs and construction approaches is an integral part of the cost estimating process to ensure that the Department understands the value of proposed innovation. An innovation log should be kept to track the identification, vetting, and implementation of project innovations. The progressive contractor is typically the best party to manage the development of the innovation log. A sample innovation log is included in Appendix [IJ](#) (Sample Innovation Log).

4.4.2.7 Safety Management Plan

Exhibit B, Section 7 (Safety Management Plan) details the progressive contractor's responsibilities for safety which includes the development and submittal of the Safety Management Plan.

4.4.2.8 Subcontracting Plan

Exhibit B, Section 8 (Subcontracting Plan) details the requirements for subcontracting work and the progressive contractor's responsibilities to develop and submit a Subcontracting Plan, a DBE Performance Plan, and a CAP Report. The Subcontracting Plan includes who will perform the work, how subcontracting opportunities are advertised and selected, subcontracting procurement process, and subcontractor availability and local economic conditions.

4.4.2.9 Construction Phase Requirements

Exhibit B, Section 9 (Construction Phase Requirements) describes how the Construction Phase Requirements will be developed in collaboration between the Department and the progressive contractor. The Construction Phase Requirements establish the requirements that govern the design and construction during the Construction Phase as well as describes how the progressive contractor will administer the Construction Work.

4.4.2.10 Construction Phase Amendment

Exhibit B, Section 10 (Construction Phase Amendment) lists the elements that comprise the Construction Phase Amendment.

4.4.2.11 Pricing Package Amendments

Exhibit B, Section 11 (Pricing Package Amendment) lists the elements that comprise the Pricing Package Amendments.

4.5 Protentional Preclusion of Progressive Contractor Following Termination

In the event the parties are unable to agree on a GMP or other contractual terms, the Department may elect to terminate the Agreement pursuant to Section 25.2 (Termination for Failure to Agree on Construction Phase Amendment or Pricing Package Amendment) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement).

Upon termination, the Department may elect to re-procure delivery of the project using any available delivery method. If a new procurement is initiated, the Department, in its sole discretion, may determine the terminated Progressive Contractor is precluded from participating in the re-procurement. The decision to preclude the terminated Progressive Contractor will be made depending on project specific considerations including whether the termination is the result of actions of the Progressive Contractor, the amount of time that has elapsed between the initial procurement and re-procurement, whether the Progressive Contractor will have an unfair competitive advantage in the re-procurement.

4.5.4.6 Construction Activities

The Construction Phase will begin upon execution of a Construction Phase Amendment and Initial Pricing Package Amendment. Construction Work is authorized by execution of one or more Pricing Package

Amendments and not by the execution of a Construction Phase Amendment. See Section 2.2 (Construction Phase) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement) for additional information.

The Department may agree to execute more than one Pricing Package and allow construction to begin on a portion of a project or authorize purchase of long lead time materials before a GMP has been agreed to for the entire project. Projects should be delivered through as few Pricing Packages as possible.

As the Construction Phase starts, the Departments will continue to transfer responsibility and authority to the progressive contractor to manage and control the work. The Department's responsibilities for contract administration will involve monitoring agreement compliance and schedules, administering the Risk Register, processing progress payments, performing quality assurance activities including inspections, negotiating agreement amendments, resolving disputes, and final acceptance of the work.

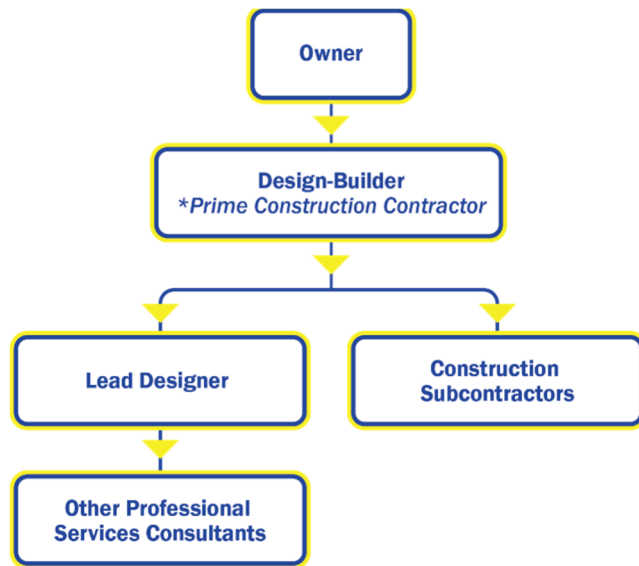
4.5.14.6.1 Administering the Risk Register during Construction

Because progressive delivery uses the Risk Register as a contractual element, active tracking and reporting on the occurrence of Risk Register Events will be a critical part of contract administration. If a Risk Register Event occurs, the work will be completed and paid in accordance with the resolution defined in the Risk Register. This approach to risk management improves a project's cost certainty, protects the contractor in the event of unanticipated changes in the scope of work, and assures the Department that the construction cost is not inflated to include unidentified risks.

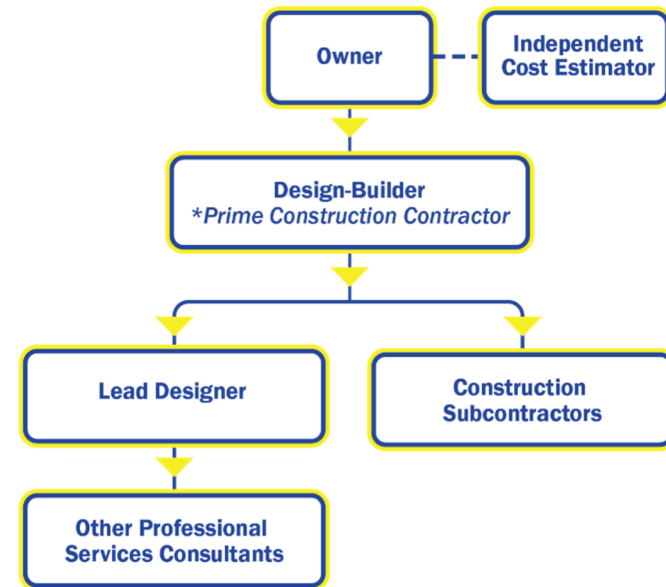
Additional information regarding compensation triggered by the occurrence of a Risk Register Event is located in the Section 19 (Payments) of both Appendix E (Template CMGC Agreement) and Appendix F (Template PDB Agreement).

Appendix A: Alternative Delivery Comparison Summary

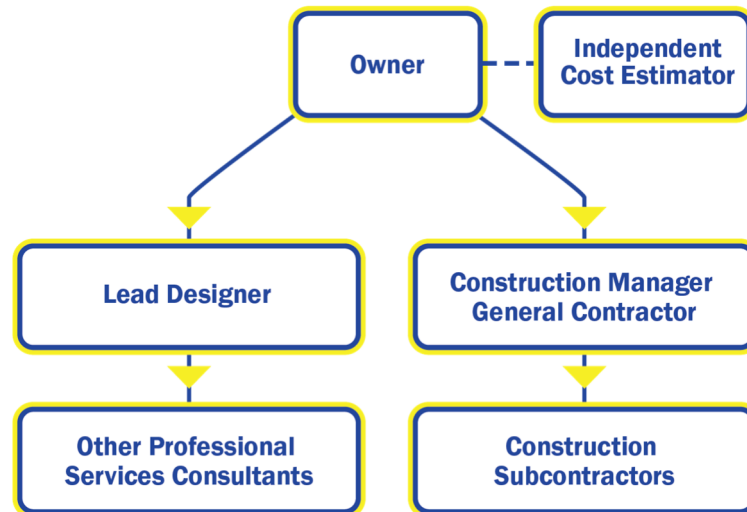
Design-Build Contractual Relationship



PDB Contractual Relationship



CMGC Contractual Relationship



	Design-Build (DB) CMGC	Design-Build (Progressive DB)	CMGC Progressive DB
Agreement Structure	<ul style="list-style-type: none"> Combines design and construction services under a single agreement. The Department contracts a CMGC Contractor to act as an advisor prior to construction. Upon services under a single agreement of a GMP with the Department, the CMGC Contractor performs the Construction Work. Traditionally a lump sum, fixed price agreement. 	<ul style="list-style-type: none"> Combines design and construction services under a single agreement. Traditionally a lump sum, fixed price agreement. Following development of design to an appropriate amount to allow fixed pricing, the PDB team will develop a GMP. Upon agreement of a GMP with the Department, the PDB team will complete the design and perform the Construction Work. 	<ul style="list-style-type: none"> The Department contracts with a designer. The Department contracts a CMGC Contractor. Combines design and construction services under a single agreement. Following development of design to an appropriate amount, act as an advisor prior to allow fixed pricing, the PDB team will develop a GMP. construction. Upon agreement of a GMP with the Department, the PDB team will complete the design and perform CMGC Contractor performs the Construction Work.
Department Control and Risk	<ul style="list-style-type: none"> The Department retains control over scope, of NEPA and portions of preliminary design requirements, and construction requirements with greater emphasis on use of performance specifications. Collaborative Risk allocation occurs at the early stages of design when the bid is submitted which may impact ability to facilitate risk management and early contractor engagement prior to construction allows for identification and mitigation of risks prior to pricing. The Department retains design risk cost control. 	<ul style="list-style-type: none"> The Department retains control of NEPA and portions of preliminary design maintains input on scope, design with greater emphasis on use of performance specifications. Design risk transferred to the design-builder (assuming technical provisions/requirements are drafted appropriately), and construction requirements throughout the process. Risk allocation occurs at the early stages of design when the bid is submitted which may impact ability to facilitate Collaborative risk management and cost control. early contractor engagement prior to construction allows for identification and mitigation of risks prior to pricing. 	<ul style="list-style-type: none"> The Department maintains input on retains control over scope, design requirements, and construction requirements throughout the process. Design risk is transferred to the PDB team Collaborative risk management and early contractor engagement prior to construction allows for identification and mitigation of risks prior to pricing.
Level of Plan Development at Bid/Proposal	<ul style="list-style-type: none"> Preliminary design can vary to facilitate competitive bids and manage contingency in bid prices, but 30% development is typical. Conceptual plans provided to the CMGC Contractor during procurement. Amount of design should not preclude CMGC Contractor refinements. The GMP is established, and construction is authorized based on plans and specifications that are approximately 90% complete. Various off-ramps may be utilized at pricing milestones and during GMP negotiations 	<ul style="list-style-type: none"> Conceptual plans provided to the Progressive design-build team during procurement. Amount of design should not preclude PDB team refinements. Design should be advanced to a point that allows the PDB team to develop a GMP considerate of project risks and risk allocation as established in the risk register (typically 60-90%). Various off-ramps may be utilized at pricing milestones and during GMP negotiations which allow the ability to terminate the PDB agreement. Preliminary design can vary to facilitate competitive bids and manage contingency in bid prices, but 30% development is typical. 	<ul style="list-style-type: none"> Conceptual plans provided to the Progressive design-build team CMGC Contractor during procurement. Amount of design should not preclude PDB team CMGC Contractor refinements. Design should be advanced to a point that allows the PDB team to develop a GMP considerate of project risks and risk allocation as established in the risk register (typically 60-90%). The GMP is established, and construction is authorized based on plans and

	<p>which allow the ability to terminate the CMGC Agreement.</p>		<p><u>specifications that are approximately 90% complete.</u></p> <ul style="list-style-type: none"> Various off-ramps may be utilized at pricing milestones and during GMP negotiations which allow the ability to terminate the PDB agreement. <u>CMGC Agreement.</u>
Selection Methodology	<ul style="list-style-type: none"> DBLB selection based on one-step low bid procurement DBBV <u>Selection of the CMGC Contractor is made using qualifications-based selection</u> <u>two-step best value procurement</u> <u>ATCs may be used during procurement.</u> 	<ul style="list-style-type: none"> Selection of the PDB team is DBLB selection based on one-step low bid procurement DBBV <u>made using two-step best value procurement</u> <u>Alternative Technical Concepts (ATCs) may be used during procurement</u> <u>qualifications-based selection.</u> 	<ul style="list-style-type: none"> Selection of the PDB team <u>CMGC Contractor</u> is made using qualifications-based selection.
Typical Project Characteristics	<ul style="list-style-type: none"> Projects with multiple design solutions that could benefit from innovative solutions through proposer ATC's during the procurement. <u>Rehabilitation of existing infrastructure where exact scope of repair is unknown</u> Projects needing major railroad coordination Major bridge projects 	<ul style="list-style-type: none"> <u>Fast track schedules</u> <u>High level of third party coordination</u> <u>Projects needing a dynamic design and decision making environment</u> Projects with multiple design solutions that could benefit from innovative solutions through proposer ATC's during the procurement 	<ul style="list-style-type: none"> <u>Rehabilitation of existing infrastructure where exact scope of repair is unknown</u> Fast track schedules High level of third party coordination Projects needing a dynamic design and decision making environment <u>major railroad coordination</u> <u>Major bridge projects</u>

Appendix B: Template DBLB Documents

To be provided at a future date. This template will be similar to previous DBLB projects.

Appendix C: Template DBBV Documents

To be provided at a future date. This template will be similar to previous DBBV projects.

Appendix D: Template Progressive RFP

REQUEST FOR PROPOSALS

TO

[DESIGN AND]/[NTD: unbracket for ~~CM/GC~~PDB only]/CONSTRUCT

THE

[] PROJECT

THROUGH A

[PROGRESSIVE DESIGN-BUILD AGREEMENT]/[CONSTRUCTION MANAGER/GENERAL CONTRACTOR AGREEMENT]/[NTD: ~~delete inapplicable delivery method~~]

A PROJECT OF THE

INDIANA DEPARTMENT OF TRANSPORTATION



REQUEST FOR PROPOSALS

RFP #: []

ISSUED: [], 202[]/[NTD: enabling legislation expires July 1, 2028 (IC § 8-23-9.5(28))]

[AMENDMENT # [], ISSUED [], 202[]/[NTD: include and conform only if amendments (f/k/a addenda) issued]

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ATTACHMENTS

Attachment A Form of Agreement

FORMS

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Form B Proposer and Identified Contractor Certification

Form C Key Personnel Hourly Rates

Form D Identified Contractors

Form E Firm Experience

Form F Key Personnel Experience

Form G Proposer Questions

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Form I Prequalification Identification

Form J ~~Proposal Bond~~

~~Form K~~ Other Department Requirements

Form K ACC Access/Proposer Authorized Representative Designation Form

SECTION 1 INTRODUCTION AND GENERAL INFORMATION

1.1 Introduction

This Request for Proposals (“RFP”) is issued by the Indiana Department of Transportation (the “Department”) to seek competitive proposals (individually, a “Proposal” and collectively, “Proposals”) for a [progressive design-build project through a progressive design build agreement (“Progressive Design-Build Agreement”, or “Agreement”)]/[project to be delivered under a construction manager/general contractor method and agreement (“Construction Manager/General Contractor Agreement, or “Agreement”)]**[NTD: adjust based upon project delivery method]**. This RFP is issued further to the notice of anticipated issuance, dated [] [NTD: date of notice] by the Department. Upon execution, the Agreement will provide that the Apparent ~~Best Value~~Selected Proposer ~~(i.e., the Proposer whose Proposal, including assembled team, if accepted, is in the best interests of the State of Indiana)~~¹ (as defined in Section 5.6 (Final Scoring and Announcement)) ~~(and such party upon execution of the Agreement being the~~ “Progressive Contractor” ~~(such party being the [“PDB” as defined under IC § 8-23-9.5.10]/[“CMGC” as defined under IC § 8-23-9.5.2]))~~ shall develop[, design,] **[NTD: adjust based upon project delivery method]** ~~shall develop[, design,]~~ and potentially construct the [] **[NTD – insert Project name]** project (the “Project”). The form of Agreement is included as Volume II of the RFP. The entity desiring to enter into the Agreement (individually, a “Proposer” and collectively, “Proposers”) is invited to submit a Proposal. The Proposer shall comply with the requirements set forth within this RFP during the procurement. The Proposer shall also take into consideration the Project goals identified in Section 1.3 (Project Goals) in drafting its Proposal.

It is anticipated that the Proposer will include, as part of its team, the Lead Contractor, [Lead Designer,]**[NTD: delete for CM/GC]** Key Personnel Firms, and any entities required for the team to meet the Project prequalification requirements described in Section 3.5 (Department Prequalification) (such parties, together with any other firms listed on Form D (Identified Contractors), being the “Identified Contractors”). The Proposer shall provide certain items as required in this RFP.

All times in this RFP are Eastern Time. Capitalized terms and acronyms not otherwise defined herein are defined in Agreement Exhibit A (Acronyms, Abbreviations, Definitions, and Submittals).

1.2 RFP Documents

1.2.1 Documents Comprising the RFP

The RFP consists of these instructions to Proposers and the attachments and forms hereto. For avoidance of doubt, the RFP includes the form of [Progressive Design-Build]/[Construction Manager/General Contractor] **[NTD: delete inapplicable delivery method]** Agreement (including its exhibits and attachments), attached as Attachment A (Form of Agreement).

¹ Note that the Progressive Contractor is the “CMGC” as defined under IC § 8-23-8.5.2.

1.2.2 RFP Amendments

The Department reserves the right to revise, modify, or change the RFP and procurement at any time before the Proposal Due Date (as set forth in Section 1.5 (Procurement Schedule)) or thereafter as described in Section 4.1 (General Submittal and Format Requirements) (each a “RFP Amendment”).

1.2.3 Errors

If any mistake, discrepancy, deficiency, ambiguity, error, or omission is identified in any of the documents by a Proposer at any time during the procurement, the Proposer shall notify the Department, and is encouraged to suggest a recommended correction, in writing in accordance with Section 2.5 (Questions and Responses Regarding the RFP).

1.2.4 Reference Information Documents

Additional information that may prove helpful to the Proposer in understanding the Project will be made available from time to time as Reference Information Documents (“RIDs”) or RIDs updates. The Department has not determined whether any documents included in the RID are accurate, complete, or pertinent. The RIDs are provided for information only and are not currently envisioned to become part of the Agreement.

1.3 Project Goals

The Department has identified the following goals for the Project:

- (1) Maximize use of the Project budget to provide the best value to the Department;
- (2) Minimize impacts to the natural and built environment;
- (3) Incorporate innovative project management processes to maximize efficiency;
- (4) Realize the benefits of [progressive design-build]/[construction manager/general contractor] project delivery;
- (5) [_____] **[NTD – project goals 1-4 are of general applicability and can be included on each project (but tailored as necessary); additional goals (if applicable) may be added in project goal 5 and onwards in accordance with Section [2.1.1.2] of the INDOT Alternative Project Delivery Manual (APDM)]**

1.4 Project Description and Status

The Project includes [_____] **[NTD – describe scope, location, and status of Project; refer to constraints in IC § 8-23-9.5(11)(a), (b) (i.e., what can be a “project” under the enabling legislation)].**

The Department ~~is scheduled to complete~~ anticipates completing the National Environmental Policy Act (NEPA) process in [_____] **[NTD – describe contemplated NEPA approval timing]**. The Department will retain NEPA responsibilities, as detailed in the Agreement **[Section 4.1 (Compliance with 23 CFR 636.109)]** **[NTD: PDB.A]** **[Section 4.1 (NEPA)]** **[NTD: CM/GC]**.

1.5 Procurement Schedule

The following represents the current anticipated schedule for the procurement. Further dates may be provided in subsequent iterations of the procurement schedule via RFP Amendments or other communication with [would-be]~~[NTD: remove from DRAFT RFP]~~ Proposers.

Table 1: Procurement Schedule~~[NTD – complete with applicable Project dates]~~

Activity	<u>Date</u> /Anticipated Date
<u>Date of notice of anticipated issuance date</u>	<input type="text"/>
DRAFT RFP issued	<input type="text"/>
<u>Deadline for submittal of ACC Access/Proposer Authorized Representative Designation Form</u>	<input type="text"/>
[Anticipated date of Department engagement of professional services consultant to perform design services for the Project] [NTD: CM/GC only]	<input type="text"/>
Issue Final RFP	<input type="text"/>
[Deadline to Submit Questions on Final RFP]	[[<input type="text"/>]]
[Deadline for effective date of all required prequalifications]	[[<input type="text"/>]]
[Issue Answers to Questions on Final RFP]	[[<input type="text"/>]]
Proposer submits draft <u>Form C (Key Personnel Hourly Rates)</u> to <u>the Department's External Audit division</u> for approval	<input type="text"/>
<u>Deadline for effective date of all required prequalifications</u>	
<u>Issue answers to Questions on Final RFP</u>	
Proposal Due Date	<input type="text"/> at <input type="text"/> p.m. ET
Proposer Interviews	<input type="text"/>
Apparent Best Value <u>Selected</u> Proposer Announced	<input type="text"/> <input type="text"/>
<u>and</u> Project Award-	
(exp.) Agreement Negotiations Concluded	<input type="text"/> [NTD: X months following project award]
<u>Agreement Executed</u>	<input type="text"/>

Where the RFP provides a deadline or due date for submission of documents, correspondence, or other materials to the Department, the submission will only be considered timely if the Department

receives the submission by the date and, if applicable, the time identified. If no time is identified, a submission will be considered timely if it arrives before 4:00 p.m. EST on the day identified.

1.6 ~~Total Anticipated Project Funding Cost~~

~~Total anticipated Project construction cost is \$[] of which the Department has, as of the date of this RFP, programmed \$[] million in available funding~~**[NTD – input price of construction and programmed funding as applicable]**. This amount reflects []. Available funds must cover all Project costs including but not limited to costs for design, preconstruction, construction, management, utility relocations, Governmental Approval compliance, construction and engineering inspections required to complete the Project.

~~[If additional funding is not secured by [], 202[]~~**[NTD – confirm funding deadline]**, the unfunded portion of the Project, the limits and scope of which will be determined by both Parties, will not be included in this Project (see Agreement Section 1.5 (Potential Funding Constraints and Project Authorization) for additional guidance).

The total current anticipated Project construction cost is \$60 million.

1.7 [Federal Requirements]**[NTD – include only if federalized deal]**

1.7.1 General Obligations

To preserve the ability of the Department to use federal funding for the Project, the procurement and the Agreement shall comply with applicable federal Laws. The Project is a Federal-aid highway contract and the Progressive Contractor will be required to comply with all federal laws and regulations, as more fully set forth in Agreement Exhibit HG (Federal Requirements), in addition to analogous and other State laws and regulations.

1.7.2 Disadvantaged Business Enterprise Program

It is the policy of the Department that Disadvantaged Business Enterprises (“DBEs”) shall have the opportunity to participate in the development and performance of highway construction projects financed in whole or in part by federal funds in order to create a level playing field for all businesses who wish to contract with the Department. To that end, the Department will comply with the regulations found in 49 CFR Part 26, and the definitions and requirements contained therein shall be adopted as if set out verbatim herein.

No party involved on the Project shall discriminate on the basis of race, color, national origin, or sex in the performance of work performed pursuant to Department contracts. The Progressive Contractor shall carry out applicable requirements of 49 CFR 26 in the award and administration of federally assisted highway construction projects. The Progressive Contractor shall include this provision in all its subcontracts and supply agreements pertaining to contracts with the Department.

Failure by the Progressive Contractor to carry out these requirements will be considered a material breach of the Agreement, which may result in the termination of the Agreement or such other remedies as may be available thereunder.

1.7.2.1 DBE Goal

The DBE goal for the Project will be established after selection of the Progressive Contractor and prior to authorization of any Construction Work. It is expected to range between []% and []% **[NTD— insert DBE goal range]** of the total Project value. The Progressive Contractor will be required to exercise all necessary and reasonable steps to ensure that the DBE goal is met.

1.7.2.1 Obligation of the Progressive Contractor

The Progressive Contractor shall designate and make known to the Department a DBE compliance manager who is responsible for developing, managing, and implementing the DBE Performance Plan on a day-to-day basis, for carrying out technical assistance activities for DBEs, and for working with the DBE Liaison in disseminating information on available business and subcontracting opportunities so that DBEs are provided an equitable opportunity to compete and perform the Work.

1.7.3 Civil Rights/Equal Employment Opportunity

The Indiana Civil Rights Law (IC § 22-9-1) and the federal Civil Rights Act of 1964 (as well as 41 CFR Part 60 and 23 CFR Part 230) shall each apply to the Project and the Agreement.

1.7.4 Prevailing Wage Requirements

Prevailing wage requirements under the federal Davis-Bacon Act will be applicable to the Project.

SECTION 2 PROCUREMENT PROCESS

2.1 Procurement Method

The Department intends to use a single step with interview procurement method to select the Progressive Contractor. The Department reserves the right to modify the procurement to comply with applicable Law or address the best interests of the Department and the State of Indiana, including canceling the procurement at any time.

2.2 [Progressive Design-Build]/[CM/GC] Model **[NTD: delete the inapplicable delivery method]**

[Progressive Design-Build (“PDB”) is an alternative contracting method in which a contractor teams with a designer and other firms in any legal manner (sub-prime, joint venture, etc.) to perform design and other preconstruction services for a project. In this model, the Department enters into a progressive design-build agreement with a legal entity or joint venture (as the “Progressive Contractor”) to perform “preconstruction services” and “design services” (each as defined under IC 8-23-9.5). If the Department determines that the Progressive Contractor, with and through its assembled team, has been successful in meeting the goals of the particular project, the Progressive Contractor (with its team) will be given an opportunity to construct it. The Progressive Contractor, with and through its team, shall share pricing information with the Department to facilitate price discussions and to help ensure the Department is receiving a fair price for the work to deliver the project as designed. The Department will utilize an Independent Cost Estimator (“ICE”) to evaluate the Progressive Contractor’s “Cost Model” and “Pricing Milestone Estimates” (“PME”). If the Department is satisfied with the performance of the

Agreement Exhibit B (Preconstruction Phase Requirements) outlines potential services to be performed during the Preconstruction Phase of the Project. The scope of work for Preconstruction Phase services will be negotiated with each Preconstruction Phase Amendment, see Agreement Section 2.1 (Preconstruction Phase) for additional information. **[NTD: Include foregoing two paragraphs if procuring under CM/GC, and delete the alternative (PDB) above]**

For purposes of IC § 8-23-9.5(16)(a)(9) and (6), the “GMP” is the aggregate of Preconstruction Phase Work and, if the Department elects to pursue construction of the Project, the Pricing Package amendments.

2.3 Department Authorized Representative

The Department has designated the following individual to be its authorized representative for the procurement (“Department Authorized Representative”) who (or whose designee) will provide all official Project communications, as intended under Section 3.8.1 (Proposer Communications):

[NTD – insert Director of Major Projects information below]

[name]
Director of Major Projects
Indiana Department of Transportation
[physical address]
E-mail: [project-specific email address]@indot.IN.gov

2.4 Rules of Contact

The rules of contact remain in effect until identification of the Apparent ~~Best-Value~~ Selected Proposer or until the formal cancellation of the procurement by the Department. The Proposer shall comply with all applicable Laws and refrain from lobbying any governmental authority in connection with the procurement. No employee, member, agent, advisor, or consultant of any Proposer or Identified Contractor may undertake any ex-parte communications, directly or indirectly, regarding this procurement with any representative of the State of Indiana, the Department, or FHWA, including staff, advisors, contractors, or consultants, except for communications expressly permitted by this RFP.

All communications between the Department and the Proposer, other than “Proposer Questions” under Section 2.5 (Questions and Responses Regarding the RFP) before grant of access to ACC and otherwise as expressly directed hereunder, shall be in writing utilizing the Department Authorized Representative’s e-mail listed in Section 2.3 (Department Authorized Representative). All communications thereafter (including “Proposer Questions” shall be via ACC. For avoidance of doubt, all communications with the Department’s External Audit division shall be as set forth under Section 3.7 (Key Personnel Fully-Loaded Hourly Rates) and not with the Department Authorized Representative or via ACC.

2.5 Questions and Responses Regarding the RFP

The Proposer shall review the RFP and any RFP Amendments issued by the Department prior to the Proposal Due Date. If the Proposer identifies any real or perceived mistake, discrepancy, deficiency, ambiguity, error, or omission contained therein, the Proposer shall request written clarification or pose

questions using Form G (Proposer Questions). Unless expressly agreed otherwise, in advance and in writing by the Department Authorized Representative, the Proposer may only submit any such requests for written clarification or to pose questions through the Proposer Authorized Representative.

Proposers may also request written clarification or pose questions using Form G (Proposer Questions) with respect to the RFP documents set forth in Section 1.2.1 (Documents Comprising the RFP). Clarification requests and questions in this regard should be in the nature of seeking additional information rather than proposing adjustments to risk apportionment, terms, or conditions.

The Department will consider questions in issuing the final RFP and any RFP Amendments. The Department also may elect, at its discretion, to respond to questions through written responses. Responses to questions will be issued on the dates specified in Section 1.5 (Procurement Schedule). Any written responses to questions given by the Department will be for the information of the Proposer only and will not become part of the Agreement, except to the extent that the Department, in its discretion, may incorporate the substance of a response into, as appropriate, the RFP, whether in the final RFP issuance or by means of any RFP Amendments.

The Department will only consider questions submitted using Form G (Proposer Questions) via email ACC, after submission of the ACC Access/Proposer Authorized Representative Designation Form and thereafter access granted to the Department's Department Proposer Authorized Representative ~~in accordance with the requirements described below. All communication between the Department and the Proposer shall be in writing utilizing the Department Authorized Representative's e-mail listed in Section 2.3 (Department Authorized Representative).~~

Questions shall be submitted prior to the dates specified in Section 1.5 (Procurement Schedule) using Form G (Proposer Questions) ~~in its native~~ Microsoft Word format. If a question is submitted after a due date, the Department, at its discretion, may elect to respond to the question in a subsequent answers to questions issuance. In completing Form G (Proposer Questions), the Proposer shall specify the relevant document (e.g., the RFP, form of Agreement, etc.), including the relevant page and section number, for reference. With respect to each Question Deadline specified in Section 1.5 (Procurement Schedule), the Proposer is encouraged to submit all questions at one time and in one submission. All questions shall:

- (1) Be listed separately;
- (2) Not identify the Proposer in the body of the question or comment;
- (3) Be sequentially numbered;
- (4) Specifically reference the relevant document and Section (include the exact language in question) unless it is a general question;
- (5) Address a single issue per question on an eligible topic;
- (6) Clearly indicate why the comment was made; and
- (7) Conspicuously identify whether the Proposer views its question or comment as confidential or proprietary in nature by indicating on Form G (Proposer Questions). The question shall explain why the Proposer considers the question to be confidential or proprietary.

The Department, in its sole discretion, may disagree with a Proposer's assessment regarding confidentiality of a question in the interest of maintaining a fair process or complying with applicable Law. Under such circumstances, it will inform the Proposer and may allow the Proposer to withdraw the question, rephrase the question, or have the question answered non confidentially.

2.6 Pre-Proposal One-on-One Meetings

The Department may invite Proposers to participate in a one-on-one meeting. If invited, the Proposer shall submit an agenda for the one-on-one meeting by the date specified in Section 1.5 (Procurement Schedule). The agenda shall include a list of names of individuals from the Proposer who will be in attendance as well as general topics for discussion. This information will be used to assure that the Department includes appropriate representation at the meeting. One-on-one meetings will be held on the dates set forth in Section 1.5 (Procurement Schedule). One-on-one meetings may in the Department's sole discretion be held virtually, in-person at [100 North Senate, Indianapolis, Indiana 46204], or hybrid virtually/in-person.

During one-on-one meetings, the Proposer may ask questions and the Department may provide responses for informational purposes. Any responses provided by the Department during one-on-one meetings may not be relied upon; provided, however, that the Department may, in its discretion, and subject to Section 2.5 (Questions and Responses Regarding the RFP), incorporate the substance of its responses into the RFP. The Department reserves the right to disclose to all Proposers any issues raised during the one-on-one meetings, except to the extent that the Department determines such disclosure would reveal a Proposer's confidential business strategies, intellectual property, or technical solutions. The Department will maintain the confidentiality of information related to Proposers and their Proposals to the extent permitted by Law.

2.7 Confidentiality

2.7.1 Release of Information and the Access to Public Records Act

All Proposals will be deemed, once submitted, to be the property of the Department. The Department will not disclose any portion of any Proposal prior to award to anyone outside the Department, other than representatives of the federal government (if required) and any State personnel or outside consultants engaged by the Department in connection with this procurement. Upon the execution of the Agreement, the Department will have the right to duplicate, use, or disclose all Proposal data, ~~except proprietary data~~, submitted by Proposers in response to this solicitation as a matter of public record. ~~Records and other prequalification~~The Department's requirements for the content of the Technical Proposal are not intended to include proprietary data or other information, nor does the Department seek proprietary information ~~confidentially disclosed as part of the bid process shall be exempt from disclosure as provided in IC § 5-14-3-4. If a Proposer believes information or materials submitted to the Department constitute trade secrets or are otherwise exempt from disclosure of any Proposer. No portion of any Proposal shall be designated as "confidential" or "proprietary" information under the IC § 5-14-3-4, the Proposer 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 or otherwise, and it is the Department' intent to publish entire Proposals pursuant to Section 5.9 (Public Posting of Scoring and Technical Proposals; Proposer~~

Debrief)). Information declared by the Proposer to be confidential, either in whole or in part may be deemed unresponsive to the solicitation, and shall may be accompanied by a concise statement of reasons supporting the claim including the specific applicable exemption from disclosure under IC § 5-14-3-4 rejected.

Information declared by the Proposer to be confidential, either in whole or in part, other than described in this Section 2.7.1, may be deemed unresponsive to the solicitation, and may be rejected. Except as provided in this RFP, the Department will have the right to use all ideas, or adaptations of those ideas, contained in any received response to the solicitation. Selection or rejection of the Proposal shall not affect this right.

2.7.2 Observers During Evaluation

The Proposer is advised that observers from federal or other agencies including FHWA, as well as Department consultants, may observe the Proposal evaluation process and will be permitted to review the Proposals. All persons provided with access to the Proposals will maintain confidentiality of the information contained therein in accordance with Department policy.

2.8 Changes in Proposer's Organization and Identified Contractors

Except as provided in this RFP, a Proposer may not make any changes with respect to the ownership of the Proposer or any Identified Contractor following the Proposal Due Date. Between the Proposal Due Date and execution of the Agreement, the Department will consider requests by Proposers to make changes with respect to the ownership of the Proposer and any Identified Contractors, such determination to be made in the Department's sole discretion based upon its written determination that a legitimate reason exists for the subject replacement. Any violation of the foregoing restrictions may result in disqualification of the Proposer from the procurement, including invalidating award of the mandate.

2.9 Notice to Proposers

To report bid rigging activities call: 1-800-424-9071.

The U.S. Department of Transportation (DOT) operates the above toll-free "hotline" Monday through Friday, 8:00 a.m. to 5:00 p.m. ET. Anyone with knowledge of possible bid rigging, bidder collusion, or other fraudulent activities should use the "hotline" to report such activities.

The "hotline" is part of the DOT's continuing effort to identify and investigate highway construction contract fraud and abuse and is operated under the direction of the DOT Inspector General. All information will be treated confidentially, and caller anonymity will be respected.

SECTION 3 GENERAL REQUIREMENTS FOR PROPOSERS

3.1 Organizational Conflicts of Interest

The Proposer is prohibited from receiving any advice or discussing any aspect relating to the Project or the procurement with anyone with an organizational conflict of interest. The Proposer shall include a full disclosure of all potential organizational conflicts of interest in the Proposal, including all relevant facts concerning any past, present, or currently planned interests which may present an organizational conflict of interest, as required by 23 CFR 636.116.

Each of the following circumstances shall be deemed an organizational conflict of interest disqualifying the Proposer:

- (1) Participation by any of the following firms on more than one Proposer team:
 - (a) Lead Contractor;
 - (b) [Lead Designer;]**[NTD: delete for CM/GC]**or
 - (c) Key Personnel Firm.
- (2) Participation by an Affiliate of any such entity identified in clause (1) above, on another Proposer team.
- (3) [Participation by, or by an Affiliate of, the professional services consultant (designer) retained by the Department for the Project]**[NTD: CM/GC only]**

Without limiting the foregoing, the Proposer and Progressive Contractor shall comply in all respects with the Department Conflict of Interest Policy set forth in Agreement Exhibit H, Attachment 1 (*Department Conflict of Interest Policy*).

The Proposer and each Identified Contractor shall disclose all conflicts of interest, including all present or planned contractual arrangements with the Department's project management team in Form B (*Proposer and Identified Contractor Certification*). The Proposer and each Identified Contractor shall, in the disclosure, identify planned efforts to avoid, neutralize, or mitigate any potential conflict of interest between such entity on the Project and such other contractual arrangements.

The Proposer is encouraged to disclose all potential organizational conflict of interest in advance of the Proposal Due Date for determination by the Department if such organizational conflict exists. If an organizational conflict of interest is determined to exist at the time of Proposal submittal, the Department may, in its sole discretion, disqualify the Proposer from the procurement. If the Proposer was aware of an organizational conflict of interest prior to the award of the Agreement and did not disclose the conflict to the Department using the prescribed form of notification in this RFP, the Department may terminate the Agreement for breach of contract.

3.2 Ineligible Individuals and Firms

No entity that has been debarred or suspended from bidding or is otherwise ineligible for state or federal contracts may participate on any Proposer team.

At the time of submitting its Proposal, the Proposer, and each Identified Contractor shall certify on Form B (*Proposer and Identified Contractor Certification*) that it is not presently debarred, suspended, proposed for debarment, voluntarily excluded, or disqualified from bidding by any federal or state agency and shall certify and indicate exceptions to the statements identified in ~~*~~Form B (*Proposer and Identified Contractor Certification*).

The Department, in its sole discretion, may reject a Proposal based on any such exception except to the extent the Department has evaluated the item during Proposal evaluation as provided in Section 5.1 (*Responsiveness and Pass/Fail Evaluation*) and there is no new information following Proposal submission that warrants rejection of the Proposal.

3.3 Restricted Firms

The following firms are not allowed to participate on any Proposer team due to a conflict of interest:

(1) [____]; *[NTD – list out any firms that would be prohibited by conflict of interest guidelines from participating on a Proposer Team]*

3.4 Registration with the Secretary of State

The Apparent ~~Best-Value~~Selected Proposer will be required to provide to the Department evidence of the Apparent ~~Best-Value~~Selected Proposer's and each Identified Contractor's authorization to transact business in the State, prior to execution of the Agreement and as a condition precedent to the Department's execution thereof. Depending on the form of organization, such evidence may be in the form of (i) a certificate of authority to do business in the State along with a "certificate of good standing" (or equivalent) from the state of organization of such party; (ii) a "Certificate of Existence" from the Indiana Secretary of State; or (iii) other evidence acceptable to the Department, in its sole discretion. Each such party shall also provide a valid State business license.

3.5 Department Prequalification

In order to submit a Proposal ~~and~~ applicable Identified Contractors shall be prequalified with the Department prior to the Proposal Due Date for all classifications of work identified in ~~this~~ Section 3.5. If any such party is a partnership, joint venture, or consortium, then the foregoing shall be construed to apply to its partners or members. All subcontractors utilized by the Proposer on the Project shall ~~be pre-qualified to perform work for the Department or their services shall not be allowed~~ satisfy the prequalification requirements set forth in Section 3.5.1 (Prequalification Types) prior to performing applicable work.

See Section 3.5.1 (~~Contractor~~ Prequalification Types) for additional, specific information as to the particular prequalifications required and those entities that must be prequalified. Responses that do not have all mandatory areas of prequalification fulfilled will be deemed nonresponsive.

Information on Department contractor prequalification is available at: <https://www.in.gov/indot/doing-business-with-indot/contractorsconstruction/contractors-prequalification/>.

3.5.1 Prequalification Types *[NTD: modify to remove design prequalifications/entities for CMGC, mindful that some CMGC Contractor as "Progressive Contractor" scope may require design/engineering professionals]*

As part of the Technical Submittal to be provided by the Proposer, the Proposer shall must demonstrate compliance with the following requirements:

(1) Consistent with IC § 8-23-10, the Proposer (as Progressive Contractor) or its Lead Contractor, and any subcontractors proposed to perform more than \$300,000 of construction services, as defined in IC-8-23-9.5(8), must collectively have certain INDOT Certificates of Qualification and INDOT Prequalification Work Type Certifications (<https://www.in.gov/indot/2740.htm>) and Department construction prequalification types as set forth below: *[NTD – complete as applicable to each Project]*

Work Type	Prequalification

Proposer must have a Department “Certificate of Qualification” for at least ~~\$(—) million~~ the anticipated total Project cost as described in Section 1.6 (Anticipated Project Cost) as of the Proposal Due Date. Subcontractors will not be counted toward this assessment of prequalification.

(2) ~~The~~ It is anticipated that, as part of the Work under the Agreement, the Proposer (as Progressive Contractor) ~~-or its Lead Designer,~~ and any subcontractors that are to perform ~~design or other~~ professional services, as defined in IC-~~8-23-9.5~~ (48-23-9.5(9)), must collectively have certain INDOT Certificates of Qualification and INDOT Prequalification Work Type Certifications (<https://www.in.gov/indot/2740.htm>) and Department consultant prequalification types as set forth below: **[NTD – complete as applicable to each Project]**

Work Type	Prequalification <u>Description</u>

In addition to the above, other members of a Proposer team that will be undertaking work on the Project that requires a Department “Prequalification Work Type Certification” must have the applicable a Department “Prequalification Work Type Certification” prior to performing the applicable work assigned to such member.

3.6 Insurance, Licensing, and Permits

The Proposer shall ensure that, if selected as the Progressive Contractor, it will comply with those insurance, licensing to provide insurance specified in the Agreement.

All firms participating in this procurement, or the Agreement, shall obtain all licenses and permits and take all necessary steps to conduct business in the State of Indiana and perform the Work required under the Agreement, including proposing and carrying out contracts consistent with the laws of the State of Indiana.

All licensed professionals identified in the Proposal who are required to be licensed for the Project shall be licensed in the State of Indiana on or before the Proposal Due Date.

3.7 ~~Approved Overhead or Labor Burden~~ Key Personnel Fully-Loaded Hourly Rates

Proposers shall, on or before the date specified in Section 1.5 (Procurement Schedule), submit to the Department’s External Audit division (in Microsoft Excel format via email to externalaudit1@indot.IN.gov with the subject line RFP # PD2401 – Key Personnel Fully-Loaded Hourly Rates) the hourly rates on Form C (Key Personnel Hourly Rates) that, in each case, are consistent with the Department’s rate policy as provided to the Proposer, ~~evincing such prior Department approval of the same.~~ Proposer shall provide such backup documentation and other justifications as are consistent with such rate policy and otherwise as may be requested by the Department’s External Audit division. The Proposer shall, as a precondition of any submittal of a Proposal, obtain the Department’s External Audit

division's written approval as to the conformance of all such Key Personnel hourly rates to the Department's provided rate policy.

In the event that (a) a Proposer believes it will not be able to satisfy the submission deadline for Key Personnel hourly rates specified in Section 1.5 (*Procurement Schedule*); (b) the Department's External Audit division has not issued a response to the Proposer's timely submittal of Key Personnel hourly rates three business days prior to the Proposal Due Date; or (c) the Department's External Audit division has responded to a timely submittal of Key Personnel hourly rates with a request for additional information that the Proposer believes may not feasibly be submitted to and approved by the Department's External Audit division prior to the Proposal Due Date, then in each instance the Proposer shall promptly notify the Department Authorized Representative. Following such a notification, the Department may elect (in its sole discretion) to issue an extension to the submission deadline for Key Personnel hourly rates specified in Section 1.5 (*Procurement Schedule*) or the Proposal Due Date.

3.8 Proposer Communications; ACC Access Request; Proposer Authorized Representative

3.8.1 Proposer Communications

The Department intends to facilitate communications by the Department relating to the Project and this procurement via ACC. Initial communications to facilitate access to ACC, or other communications expressly stated hereunder as to be handled outside of ACC are exceptions.

3.8.2 ACC Access/Proposer Authorized Representative Designation Form

Proposers shall, on or before the date specified in Section 1.5 (*Procurement Schedule*), submit to the Department at alternativedelivery@indot.in.gov the form attached as Form K (*ACC Access/Proposer Authorized Representative Designation Form*) (the "ACC Access/Proposer Authorized Representative Designation Form"). Any party that fails to submit a complete ACC Access/Proposer Authorized Representative Designation Form in the manner required under this Section 3.8.2 prior to the date specified in Section 1.5 (*Procurement Schedule*) shall be precluded from submitting a Proposal in response to this RFP.

3.8.3 Proposer Authorized Representative

The Proposer authorized representative identified in each Proposer's ACC Access/Proposer Authorized Representative Designation Form (the "Proposer Authorized Representative") shall be such Proposer's sole point of contact with the Department regarding this procurement (except as may be authorized by the Department during one-on-one meetings pursuant to Section 2.6 (*Pre-Proposal One-on-One Meetings*) or Proposer interviews pursuant to Section 5.5 (*Interviews*)). The Proposer may modify its designated Proposer Authorized Representative upon written notice to the Department Authorized Representative. Following grant of access to ACC, the Department may afford access to some or all of the materials therein to an individual person nominated by the Proposer Authorized Representative.

3.9 Other Department Requirements

Proposers shall provide the certifications and verification affidavits with the Proposals, as more fully set forth in Section 4.2 (*Compilation and Uploading of Proposal*), evidencing compliance (and intent to comply) with certain State laws and Department policies (e.g., drug-free workplace, employment eligibility, prohibitions on certain investments, etc.). All such certifications and verification documents shall be submitted as the forms attached as Form KJ (*Other Department Requirements*), some of which will be attached to the Agreement as representations and warranties thereunder.

SECTION 4 PROPOSAL SUBMITTAL REQUIREMENTS

4.1 General Submittal and Format Requirements

Proposals shall be received no later than the time on the Proposal Due Date specified in Section 1.5 (*Procurement Schedule*). Late submittals will not be considered.

A [EDMS] site has been established for the purpose of receiving Proposals.

Only PDF files of the Proposal shall be submitted. The PDF files shall include bookmarks aligned with the organization described in Section 4.2 (*Compilation and Uploading of Proposal*) to facilitate navigation of the document. If more than one PDF attachment comprising the Proposal is transmitted, the Proposer shall ensure that each PDF is separated by volume with the cover of each volume of the Proposal referencing (1) the Project name “[]” (2) RFP # [] and (3) volume number. **[NTD – complete with project specifics]**

An 8½ by 11-inch format (½ inch margins) is required for typed submissions and an 11 by 17-inch format is required for technical/design drawings, with individual file sizes limited to a maximum of 50 megabytes. For ease of review, Proposers are requested to minimize the number of pages with, and size of, color three-dimensional graphics and renderings. ~~Preliminary schedule submissions shall be submitted in Primavera P6 format.~~ All pages should be sequentially numbered. Typed text must be single-spaced with the type font size being no smaller than 12-point (either Times New Roman or Arial), provided the font in organizational charts, graphics and tables may be as small as 10-point so long as the organizational charts, graphics and tables are legible, as determined by the Department, in its sole discretion. The use of 11 by 17-inch pages for tables, graphics and maps is acceptable in the main body of the Proposal. Each 11 by 17-inch page will be considered one page. ~~Use of section dividers is allowed and dividers will not count against the total page count.~~

It should be noted that once uploaded Proposals cannot be modified; however, prior to the date and time specified in Section 1.5 (*Procurement Schedule*), revised versions of the Proposal may be uploaded to [EDMS]. Revised versions, if required, shall be clearly identifiable as submissions, and Proposers are invited to notify the Department Authorized Representative, via email, of the appropriate version to use. The Department will not accept any unsolicited amendments, addenda, revisions, or alterations to any Proposal after the Proposal Due Date. If the Department issues a RFP Amendment after the Proposal Due Date, then the Proposer may respond. The Proposer’s response shall precisely respond to the contents of the RFP Amendment.

4.2 Compilation and Uploading of Proposal

The Proposal shall consist of two volumes: the Administrative Submittal (Proposal Volume I) and the Technical Submittal (Proposal Volume II).

The contents of the Proposal Volumes shall be organized in the order set forth in this Section 4.2 (Compilation and Uploading of Proposal).

The Proposer shall provide one electronic copy of each component part of the Proposal to the Department by uploading to the [EDMS] site that has been established for receipt of Proposals.

4.2.1 Administrative Proposal (Proposal Volume I)

The requirements and information to be submitted, in the order noted below, in Volume 1 of the Proposal are as follows:

- (1) Form A (Proposal Letter);
- (2) Form B (Proposer and Identified Contractor Certification);
- (3) ~~Form C (Key Personnel Hourly Rates)~~; Evidence of the Department's External Audit division's written approval as to the conformance of all such Key Personnel fully-loaded hourly rates to the Department's provided rate policy;²
- (4) Form D (Identified Contractors);
- (5) Form H (Form of Commitment Letter);
- (6) Form I (Prequalification Identification);
- (7) The certifications and verification documents set forth in Form KJ (Other Department Requirements); and
- (8) All required attachments relevant to each form.

4.2.1.2 Surety Letter

Proposal Volume I shall include a letter from a Surety or insurance company indicating that the Surety has reviewed the Proposer's and relevant entities' financial statements, works in progress, and other diligence information and is of the opinion that the Proposer could obtain both P&P Bonds, each with a penal sum of not less than the ~~estimated~~anticipated total Project cost as described in Section 1.6 (~~Total Anticipated Project Funding Cost~~) and otherwise in accordance with the requirements of Section 5.8 (Delivery of P&P Bonds) and the Agreement. If the Progressive Contractor is to be a joint venture, partnership, limited liability company, or other association, then a separate letter shall be submitted for each member or partner thereof with respect to which the Surety is certifying to the entity's bonding capacity with the foregoing requirements. Letters indicating "unlimited" bonding capability are not

² Proposers shall include only the Department's External Audit division written approval[, if received][NTD: INDOT project-specific determination] and shall not include Form C (Key Personnel Hourly Rates) or proposed key personnel hourly rates other than that submitted to the Department's External Audit division[, appending such division's approval][NTD: INDOT project-specific determination].

acceptable, nor letters with unreasonable qualifications or that admit of deferred due diligence, to be determined in the Department's sole discretion.

4.2.1.3 Identified Contractors

Proposal Volume I shall include a list of Identified Contractors in the form of Form D (*Identified Contractors*). Pursuant to the Agreement, engagement and selection of subcontractors and subconsultants after execution of the Agreement is subject to competitive selection and Department approval. All firms identified on Form D (*Identified Contractors*) shall be subject to the requirements of the Agreement, including being subject to Open Book Basis requirements.

4.2.2 Technical Proposal (Proposal Volume II)

The contents of Proposal Volume II shall be organized in the order set forth in this Section 4.2.2.

4.2.2.1 General Organization

The Proposer shall provide the organization and communication structure among the Lead Contractor, [the Lead Designer]~~[NTD: delete for CM/GC]~~, any Key Personnel Firms, and, if applicable, any other Identified Contractors. This information shall be submitted in a one-page organization chart in 11-inch by 17-inch format.

4.2.2.1 Preliminary Staffing Plan and Organizational/Staffing

Approach

The Proposer shall provide a brief narrative identifying the particular skills, roles, and other information to demonstrate which entity, and which persons, within the organizational structure submitted pursuant to Section 4.2.2.1 (General Organization), so as to describe the Proposer's intended approach to completing the Work under the Agreement. ~~This information shall specifically identify these entities and persons responsible for [cost estimating, risk register building/management, []], and []].~~ This information shall be submitted in no more than two pages of narrative.

4.2.2.2 Experience of the Firms

The Proposer shall provide a narrative detailing work capacity and experience of the any Identified Contractors. (4 pages total)

In addition, using Form E (*Firm Experience*) and following the instructions provided, provide firm experience for the Lead Contractor [and Lead Designer]~~[NTD: delete for CM/GC]~~. Experience shall be relevant to the Project. The Proposer shall outline, with specifics, how a collaborative design or construction environment was maintained. The Proposer shall provide examples where the firm has added value through innovative strategies, including use of effective risk management, value engineering, and alternative technical concepts.

4.2.2.3 Key Personnel Experience

The Proposer shall submit a completed Form F (Key Personnel Experience) for each of the required Key Personnel. The same individual may fill more than one Key Personnel position; however, a separate form is required for each position.

The Proposer shall include the name and contact information of the project representative for each project listed on Form F (Key Personnel Experience). It is the responsibility of the Proposer to verify the accuracy of the contact information provided. If experience cannot be validated by the Department due to inaccurate contact information, the experience will not be considered in the evaluation of Proposals. Project representatives shall be owners or clients for whom the Key Personnel performed the work on the project.

Key Personnel requirements: **[NTD: GEC to modify for each project.]**

(1) **[Project Manager: Shall** The Project Manager shall have demonstrable, meaningful, relevant experience of sufficient duration in or directly relating to construction and management of design and construction of highway projects. ~~Preference will be given to a~~ The Project Manager that shows the ability to coordinate must demonstrate experience facilitating third-party involvement and ~~experience~~ with major earthwork projects. The Project Manager will be responsible for the overall construction, maintenance, contract administration, safety, quality, and environmental compliance on behalf of Progressive Contractor. The Project Manager shall hold a full-time position within the Lead Contractor's organization with authority to make decisions affecting any aspect of the Project. The Project Manager ~~will be responsible for the overall design, construction, maintenance, contract administration, safety, quality, and environmental compliance on behalf of Progressive Contractor.~~ ~~The Project Manager~~ shall be in the position to take full responsibility for the prosecution of the Work and will act as a single point of contact on all matters on behalf of Progressive Contractor. The Project Manager is expected to be assigned to the Project on a part-time basis during the Preconstruction Phase and full-time for the Construction Phase of the Term of the Agreement. *Preferred duration of experience in same/similar role: 10 years.*

(2) **Construction Manager: Shall** The Construction Manager shall have demonstrable, meaningful, relevant experience of sufficient duration in or directly relating to construction and construction management on highway and bridge projects. ~~Preferred duration of experience in same/similar role: 10 years.~~ The Construction Manager is responsible for ensuring that the Project is constructed in accordance with the Contract Documents. The Construction Manager will be responsible for coordinating with ~~[the Lead Designer]~~ **[NTD: delete for CM/GC]** ~~[the Department's professional services consultant retained for the Project]~~ **[NTD: delete for PDB]** to resolve any issues that occur during construction.

(3) ~~[Design The Construction Manager: Shall be a Professional Engineer licensed in the State of Indiana. Shall be a direct, full-time employee of the Lead Designer. Shall have demonstrable, meaningful, relevant experience of sufficient duration in or directly relating to managing design for multidisciplinary highway and bridge projects is expected to be assigned to the Project on a part-time basis during the Preconstruction Phase and full-time for the Construction Phase of the Term of the Agreement.~~ *Preferred duration of experience in same/similar role: 10 years.*

~~The Design Manager will be responsible for ensuring the design Work is completed and design criteria and requirements are met. The Design Manager will be responsible for coordinating with Key Personnel, the Lead Contractor, and the Department to ensure that any design issues are resolved expediently.]~~ **[NTD: reserve for CM/GC]**

(3) **Lead Estimator:** Shall have demonstrable, meaningful, relevant experience of sufficient duration in or directly relating to preparing production-based construction costs estimates, managing risk, and managing construction schedules for projects with similar scope and complexity. *Preferred duration of experience in same/similar role: 7 years.*

The Lead Estimator will be responsible for complying with the open-book process as well as coordinating with the ICE to help reach agreement during Construction Cost Estimate Review Meetings. The Lead Estimator will assist the Department in managing the Risk Register, provide input on the Project Schedule, and coordinate with the Lead Contractor [and Lead Designer] **[NTD: delete for CM/GC]** in regard to managing and mitigating risks.

(4) **Geotechnical Lead:** Shall be a Professional Engineer licensed in the State of Indiana. Shall have demonstrable, meaningful, relevant experience of sufficient duration in or directly relating to geotechnical engineering. *Preferred duration of experience in same/similar role: 10 years.*

The Geotechnical Lead will be responsible for ensuring the design and analysis of all geotechnical elements are completed and design criteria requirements are met.

(5) **[Structure Design Lead:** Shall be a Professional Engineer licensed in the State of Indiana. Shall have Demonstrable, meaningful, relevant experience of sufficient duration in or directly relating to the structural design of highway projects, including retaining walls. *Preferred duration of experience in same/similar role: 10 years.*

The Structure Design Lead will be responsible for overseeing the design and construction of all structural elements of the Project to ensure design requirements are met.] **[NTD: reserve for CM/GC]**

(6) **Environmental Compliance Manager:** Shall Demonstrable, meaningful, relevant experience of sufficient duration in or directly relating to a combination of environmental archeology, cultural-historic analysis, NEPA documentation, terrestrial ecosystems, hazardous materials, and environmental commitment compliance. *Preferred duration of experience in same/similar role: 10 years.*

The Environmental Compliance Manager will be responsible for monitoring, documenting, and reporting the current status of environmental compliance for the Work [(Design design and Construction)] **[NTD: delete for CM/GC]** construction reporting and coordinating all issues directly with the Department and the Project Manager.] **[NTD: GEC to adjust roles; drafter to map to final PDBA/CMGCA exhibit]**

4.2.2.4 Preconstruction Phase Approach

The Proposer's Preconstruction Phase Approach shall include:

(1) The Proposer's overall approach to delivery of preliminary engineering and other Work required during this phase;

(2) [The Proposer's approach to Project design in alignment with the Project goals, including collaboration with the Department and integration of the funding, environmental, geographic features, as well as the following additional design considerations:

(a) [] *[NTD: GEC to adapt for project-specifics]* *[NTD: delete for CM/GC]*

(3) The Proposer's schedule management approach and methods to optimize the construction schedule with design.

(4) The Proposer's approach to identifying potential Pricing Packages;

(5) The Proposer's approach to pricing and subcontracting, including specifically, open-book strategies, competitive solicitations, ensuring Department equal employment opportunities, as well as:

(a) [] *[NTD: GEC to adapt for project-specifics]*

(6) The Proposer's approach to risk management including methods used to identify, mitigate, and price risk during the Preconstruction Phase; and

(7) [The Proposer's approach to design quality management.] *[NTD: delete for CM/GC]*

The Preconstruction Phase approach shall be limited to 15 pages.

4.2.2.5 Construction Phase Approach

The Proposer's Construction Phase Approach shall include:

(1) The Proposer's overall construction management approach in consideration of the Project goals, including project control methods;

(2) The Proposer's approach to management of construction phasing;

(3) The scope of work the Proposer intends to self-perform ~~to meet self-performance requirements~~ and the scopes of work that the Proposer intends to subcontract;

(4) The Proposer's procedure to manage subcontracting and subcontractor performance;

(5) The Proposer's approach to tracking, documenting, and ensuring compliance with equal employment opportunities requirements[, include DBE requirements] *[NTD: include only if federalized]*;

(6) The Proposer's approach to risk management during the Construction Phase of the Project; and

(7) The Proposer's approach to construction quality management.

The Construction Phase approach shall be limited to 10 pages.

4.3 — Proposal Security

4.3.1 — Proposal Security Requirements and Delivery

~~One original and three certified copies of Proposal security in the form of a bond in the form of Form J (Proposal Bond) (only, if applicable, with such non-material alterations to the form as may be agreed to by the Department in writing, in its sole discretion, prior to the Proposal Due Date) (the “Proposal Security”) shall be delivered to the Department at the address set forth in this Section 4.3.1 prior to or on the date of the electronic submission of the Proposal, and shall be in a single envelope labeled “[Proposer Name]: Proposal Security for the [] Project.” The amount of the Proposal Security shall be \$[]~~**[NTD: GEC recommendation/client decision]**~~. Any Proposal Bond must be issued by an Eligible Surety (as defined under the Agreement). The original of the Proposal Security shall be stamped “original”. The Proposal Security shall be delivered to the Department at the following address:~~

Indiana Department of Transportation
Attn. []**[NTD—insert Department Authorized Representative]**
100 North Senate
Indianapolis, Indiana 46204**[NTD: blanks in this section to be filled in based upon project specifics]**

4.3.2 — Forfeiture of Proposal Security

4.3.2.1 — Events of Proposal Security Forfeiture

~~By submitting its Proposal, each Proposer understands and agrees that it shall forfeit its Proposal Security (a) if the Proposer during the Proposal Validity Period withdraws, repudiates or otherwise indicates in writing that it will not meet any commitments made in its Proposal; or (b) if the Proposer is selected as the Apparent Best Value Proposer and any of the following occur:~~

~~(1) — Following notification from the Department that it is the Apparent Best Value Proposer, the Apparent Best Value Proposer fails to attend or actively participate in reasonably scheduled negotiation meetings with the Department, fails to work towards finalizing the Agreement in a manner consistent with the requirements of Section 5.7 (Finalization and Execution of Agreement), fails to timely submit deliverables as required by this RFP in the course of finalization and execution of the Agreement, or insists upon terms or conditions for any documents to be negotiated or provided by Proposer hereunder that are inconsistent with its Proposal or the Agreement as issued in this RFP (including inclusion of assumptions, qualifications, conditions, key personnel hourly rates, or exceptions not set forth therein);~~

~~(2) — Following notification from the Department that it is the Apparent Best Value Proposer, the Apparent Best Value Proposer fails to provide the P&P Bonds as required under Section 5.8 (Delivery of P&P Bonds) or the authorization to transact business in the State as required under Section 3.4 (Registration with the Secretary of State), or fails to deliver any other deliverable for which delivery as of the effective date of the Agreement is an express requirement of the Agreement;~~

~~(3) — Following finalization of the Agreement, the Apparent Best Value Proposer fails to provide the Department with an executed copy of the Agreement within five business days of the Department’s request therefore as required under Section 5.7 (Finalization and Execution of Agreement);~~

~~(4) — Any other forfeiture event or condition occurs pursuant to the terms of the Proposal Security;~~

~~(5) — Following notification from the Department that it is the Apparent Best Value Proposer, execution of the Agreement does not occur by the deadline specified in Section 1.5 (Procurement Schedule), unless such failure to close is directly attributable to:~~

~~(a) — the Department's cancellation of the procurement or decision not to close with the Apparent Best Value Proposer and end negotiations (without cause by the Apparent Best Value Proposer as described in this Section 4.3.2.1(1), (2), or (3));~~

~~(b) — additional negotiation of the Agreement required by the Department pursuant to Section 5.7 (Finalization and Execution of Agreement) (for avoidance of doubt, excluding negotiation of the Preconstruction Phase Cost Cap);~~

~~(c) — the Department's failure to provide any other deliverable that the Department is required to deliver to the Progressive Contractor as a condition precedent to execution of the Agreement, where such failure is not caused in whole or in part by the acts, omissions, negligence, fault, fraud, bad faith, recklessness or willful misconduct of the Apparent Best Value Proposer;~~

~~(d) — an act or omission by the Department (except as may be consistent with the procedures set forth in this RFP) that materially inhibits the Apparent Best Value Proposer's finalization or execution of the Agreement, where such act or omission does not result in whole or in part by the acts, omissions, negligence, fault, fraud, bad faith, recklessness or willful misconduct of the Apparent Best Value Proposer; or~~

~~(e) — issuance by a court of competent jurisdiction of an order or injunction that prohibits the Department from executing the Agreement and proceeding with execution of the Agreement, where such order or injunction is not caused in whole or in part by the acts, omissions, negligence, fault, fraud, bad faith, recklessness or willful misconduct of the Apparent Best Value Proposer.~~

4.3.2.2 — Proposal Security as Liquidated Damages

~~Forfeiture of Proposal Security in accordance with Section 4.3.2.1 (Events of Proposal Security Forfeiture) will constitute liquidated damages. By submitting its Proposal, Proposer agrees and acknowledges that such liquidated damages:~~

~~(1) — are reasonable in order to compensate the Department for damages it will incur as a result of Proposer's failure to satisfy the obligations under this RFP to which Proposer agreed when submitting its Proposal. Such damages include potential harm to the credibility and reputation of the Project and the Department with policy makers and with the general public, delays to the Project and additional costs of administering this or a new procurement (including engineering, legal, accounting, overhead and other administrative costs);~~

~~(2) — would be difficult and impracticable to measure and prove, are incapable of accurate measurement because of, among other things, the unique nature of the Project and the efforts required to receive and evaluate proposals for it, and the unavailability of a substitute for those efforts;~~

~~(3) — represent good faith estimates and evaluations as to the actual potential damages that the Department would incur as a result of Proposer's failure to satisfy the obligations under the RFP to which Proposer agreed when submitting its Proposal, and do not constitute a penalty; and~~

~~(4) — are agreed by Proposer in order to fix and limit Proposer's costs and to avoid later disputes over what amounts of damages are properly chargeable to Proposer.~~

4.3 Proposal Validity Period; No Withdrawal of Proposals

All Proposals are valid for a period of 150 days after the Proposal Due Date (the "Proposal Validity Period"). No Proposer shall withdraw its Proposal unless (i) the Proposer is notified by the Department that no Agreement for the Project will be awarded by the Department pursuant to the RFP, (ii) the Proposer is notified by the Department that the Department has awarded the Agreement to another Proposer, and the Department has received the executed Agreement and all other required documents from the Apparent ~~Best Value~~Selected Proposer, (iii) the Proposer is notified by the Department that the Department does not intend to award the Agreement to the Proposer; or (iv) the Proposer is not notified prior to expiration of the Proposal Validity Period that the Department has selected the Proposer as the Apparent ~~Best Value~~Selected Proposer. Any Proposer may elect, in its sole discretion, to extend the Proposal Validity Period. Any attempt to withdraw a Proposal in violation of this Section 4.44.3 will result in a draw by preclusion of the Proposer from future contracting opportunities with the Department~~upon the Proposal Security~~.

SECTION 5 PROPOSAL EVALUATION PROCESS

5.1 Proposal Evaluations Generally

The Department will appoint such persons, and conduct the evaluations of the Proposals in accordance with ~~APDM Section [4.2.5]~~ of the Department's "Alternative Project Delivery Manual" and this Section 5 (Proposal Evaluation Process). Without limiting the Department's internal conflict of interest disclosures and policies, and to the extent permitted under applicable laws, by submitting Proposals, Proposers acknowledge and agree that (a) Department personnel's personal knowledge of and experience with Proposer, Identified Contractors, as well as the individual persons (to include proposed Key Personnel) and (b) Department's corporate experience with Proposer, Identified Contractors, and any of their Affiliates are not, in each case, in themselves, irrelevant to the evaluation of the Proposals.

5.2 Responsiveness and Pass/Fail Evaluation

The Department will review each Proposal to confirm that it is responsive. A responsive Proposal shall be complete and shall not deviate from the RFP requirements in any material respect.

Following the Department's determination of responsiveness, the Department will evaluate each Proposal based upon the following pass/fail criteria:

(1) The Proposer has presented evidence showing the makeup of its organization and evidence that its organization has the legal ability to enter into and perform the Agreement to deliver the Project;

(2) The Proposer and each Identified Contractor identified on Form D (Identified Contractors) is not currently suspended, debarred, voluntarily excluded, or disqualified from performing or bidding on work for any federal or state agency;

(3) The information disclosed in Form B (Proposer and Identified Contractor Certification) does not, in the Department's sole determination, materially adversely affect the Proposer's responsibility, including its integrity and ability to carry out the Project responsibilities potentially allocated to it;

(4) The information disclosed in Form B (Proposer and Identified Contractor Certification) does not identify any restricted firms listed in Section 3.3 (Restricted Firms), and Proposer's submitted Form B (Proposer and Identified Contractor Certification) does not modify the certification that it has not and will not engage any such restricted firms, if selected as the Progressive Contractor, to carry out the Project responsibilities potentially allocated to it;

(5) The Proposer demonstrates, in the Department's sole determination, that the Proposer is capable of obtaining the P&P Bonds in the amount set forth in Section 4.2.1.2 (Surety Letter).

(6) The Proposer's rates identified in Form C (Key Personnel Hourly Rates) are determined to be reasonable by the Department (i.e., conform to the rate setting constraints [set forth in the APDM], as more fully set forth in Section 3.7 (Approved Overhead or Labor Burden Rates).- [has received and] submits in its Proposal evidence of the Department's External Audit division's [written approval as to the conformance]/[submission] of all such Key Personnel hourly rates to the Department's provided rate policy.[NTD: INDOT's project-specific basis determination whether submission is sufficient (at this point) or approval is required]

(7) Proposer has delivered the Proposal Security in accordance with the requirements of Section 4.3.1 (Proposal Security Requirements and Delivery).

A Proposal that does not achieve a "pass" rating on any pass/fail element will be deemed unacceptable and will not progress to further evaluation and scoring.

5.3 Proposal Evaluation

The Department intends to identify the Proposer with the highest overall score as the Apparent ~~Best Value~~ Selected Proposer. The Proposer's scores are the sum of the Technical Proposal score and the interview score. Table 4 (Distribution of Points) shows the maximum points allocated to each category.

Table 2: Distribution of Points

Evaluation Criteria		Maximum Score
Technical Proposal	Experience of the Firms	[15] points

	Preconstruction Phase Approach & Organization	[25] points
	Construction Phase Approach & Organization	[10] points
Interview <i>(top 3 Proposers, following Technical Proposal evaluation)</i>		[20] points
Total		100 points

[NTD—: this is a fairly standard point distribution to be tailored as necessary for each project]

5.4 Technical Proposal Evaluation

The Technical Proposal evaluation consists of the scoring of Department evaluators for the following categories:

5.4.1 Experience of the Firms

Firm experience will be evaluated on:

(1) The extent to which the Proposer's experience demonstrates experience relevant to the size, complexity, and composition of the anticipated Project in the areas of the ability to maintain the project schedule, coordinate with adjacent projects, develop and maintain an agile design and construction environment, and construct using innovative ~~designs;~~ methods; or materials; and

(2) The extent to which the Proposer demonstrates proven experience working with owners to develop and implement innovative, cost saving, and value additive concepts on prior projects.

(3) The extent to which the Proposer's experience demonstrates relevant experience that will improve the likelihood of successful project delivery.

The Department will consider all relevant firm experience that demonstrates the likelihood of successful project delivery in its evaluation and scoring.

5.4.2 Key Personnel Experience

Key Personnel Experience will be evaluated based on the extent to which:

(1) The Key Personnel meet or exceed preferred requirements for qualifications and experience;

(2) The experience of each Key Personnel included work of a similar scope, nature, and complexity as the Project; and

(3) The Key Personnel can demonstrate a history of commitment to collaboration among all parties.

5.4.3 Preconstruction Phase and Construction Phase Approach

The evaluation of the Proposer's approach (preconstruction and construction) will be based on the extent the Proposer demonstrates:

- (1) a general management structure and corporate culture that facilitates coordination and collaboration among the parties involved in the Project in a manner that is aligned with [progressive design-build]/[construction manager/general contractor]/NTD: adjust based upon project delivery method delivery;
- (2) an understanding of the Project and alignment of the approach with Project goals;
- (3) technical expertise and management approaches that will increase the likelihood of Project success; and
- (4) an understanding of key points of [progressive design -build]/[construction manager/general contractor]/NTD: adjust based upon project delivery method delivery including the Progressive Contractor's role in Project advancement at each Project phase, likely issues and Project stressors at each Project phase, and understanding of the GMP process and pricing transparency.

5.5 Interviews

All Proposers that submitted Proposals and whose Proposals were determined to be responsive and passed all pass/fail criteria shall be offered an interview with the Department. All such Proposers' respective Proposer Authorized Representative will be notified provided with their Technical Proposal evaluation score (as scored in accordance with Section 5.3 (Technical Proposal Evaluation)), the difference between their score and the then-highest scoring Proposer's score, and whether they are among the Proposers with the three then-highest scoring Technical Proposals. Proposers may elect to accept the Department's offer or decline participation in an interview, in which latter case, the Proposer will have been deemed to waived any right at law or in equity to protest any part of the solicitation. Proposers that accept the Department's offer of an interview, but were not among the those Proposers that submitted the three highest scoring Technical Proposals, will not be eligible for selection pursuant to the Commissioner's final determination under Section 5.6 (Final Scoring and Announcement); provided, however, that in the exercise of any of the Department's relevant reserved rights under Section 6.1 (Reserved Rights) (e.g., disqualification of a Proposer) or if a Proposer withdraws its Proposal under Section 4.3 (Proposal Validity Period; No Withdrawal of Proposals), then the Proposer may be eligible, as among the three highest scoring Technical Proposals as thereafter determined, for selection. For avoidance of doubt, Proposers that decline the Department's offer of an interview with the Department are not deemed to have withdrawn from the solicitation under Section 4.3 (Proposal Validity Period; No Withdrawal of Proposals).

The Proposers that submitted the three highest scoring Technical Proposals will be required to attend an interview with the Department³. For avoidance of doubt, but without limiting the proviso in the

³ Internal note for INDOT – the panel that performs the interviews needs to be the same panel that determines final scoring.

preceding paragraph, only those Proposers that submitted the three highest scoring Technical Proposals will be eligible for the Commissioner's final determination under Section 5.6 (Final Scoring and Announcement).

~~As part of the evaluation and scoring process, the Proposers that submitted the three highest scoring Technical Proposals (as scored in accordance with Section 5.3 (Technical Proposal Evaluation))¹ will be required to attend an interview with the Department².~~ The interviews are anticipated to occur in-person at the Department Central Office. The interview will last 60 minutes and will consist of a 30-minute presentation from the Proposer followed by a 30-minute question and answer period. All Proposers will be asked the same questions. Questions will either be posed to specific Key Personnel or to the team as a whole. No such interview shall be open to the public.

The Proposer may bring to its interview any material it believes may assist the Department in the evaluation process. The Proposer shall attend the interview with all Key Personnel. The Proposer may bring other individuals so long as the total number of attendees does not exceed 10 individuals.

~~The Proposer~~Interviewing Proposers will be evaluated on the quality of the information presented in the interview, including the extent to which:

- (1) the Proposer communicated Project understanding in a clear and concise manner that was easy to understand;
- (2) the Proposer demonstrated technical expertise, ability to anticipate technical issues, and required levels of expertise for each Project phase; and
- (3) the Proposer demonstrated recognition of key points and ideas, including the Progressive Contractor's role in Project advancement at each Project phase, likely issues, and Project stressors at each Project phase, understanding of the GMP process and pricing transparency, and ideas and ability necessary to effectively collaborate with the Department and other stakeholders to achieve Project goals.

5.6 Final Scoring and Announcement

Following completion of the interviews conducted pursuant to Section 5.4.3(4)5.5 (Interviews), the Department shall finalize scoring for each Proposer ~~that was interviewed, as well as those Proposers that were not~~, and as among the Proposers that had submitted the three highest scoring Technical Proposals as of the last interview, the Commissioner of the Department shall make a final determination as to the Apparent ~~Best Value~~Selected Proposer in accordance with IC § 8-23-9.5. Following such determination, the Department shall notify the Proposers of such selection, following which the Department and the Apparent ~~Best Value~~Selected Proposer shall each endeavor to negotiate mutually acceptable Contract Documents. For avoidance of doubt, only the scores for those Proposers that submitted the three highest scoring Technical Proposals will be relevant to the Commissioner's final determination.

5.7 Finalization and Execution of Agreement

Except as expressly set forth in this Section 5.7, the form of Agreement, however, attached as Attachment A (Form of Agreement), is not intended to be negotiated in form or substance with the

Apparent ~~Best Value~~Selected Proposer. By submitting its Proposal, each Proposer commits to enter into the form of Agreement, without variation, except to fill in blanks and include information that the form of Agreement indicates is required from the Proposal.

Promptly upon notification of selection as the Apparent ~~Best Value~~Selected Proposer, the Apparent ~~Best Value~~Selected Proposer and the Department shall engage in negotiations to determine the “Preconstruction Phase Cost Cap” under the Agreement. The Preconstruction Phase Cost Cap amounts to valuation of the anticipated Preconstruction Phase scope of work and shall be determined utilizing the hourly rates submitted in Form C (Key Personnel Hourly Rates) ~~for portions of the Predevelopment Phase Cost Cap attributable to~~ and approved by the Department’s External Audit division pursuant to Section 3.7 (Key Personnel ~~labor~~Fully-Loaded Hourly Rates), unless the Department elects in its sole discretion to further negotiate such hourly rates. The Department anticipates seeking hours estimates from the Apparent Selected Proposer, and when agreed, shall calculate the Preconstruction Phase Cost Cap based upon those hours and the previously-submitted, binding Key Personnel hourly rates. The Department may also elect, in its sole discretion, to negotiate various other aspects of the Contract Documents and scope of Work with the Apparent ~~Best Value~~Selected Proposer. The Apparent ~~Best Value~~Selected Proposer shall be deemed to have committed to attend and actively participate in reasonably scheduled negotiation meetings with the Department.

If the Department is unable to negotiate mutually acceptable Contract Documents with the Apparent ~~Best Value~~Selected Proposer (including a failure to agree on a Preconstruction Phase Cost Cap that the Department and highest scoring Proposer each determine to be fair and reasonable, or if the Apparent ~~Best Value~~Selected Proposer does not provide sufficient information or timely feedback to finalize the Agreement in accordance with schedule set forth in Section 1.5 (Procurement Schedule)), then the Department shall terminate negotiations with the Apparent ~~Best Value~~Selected Proposer and may then undertake negotiations with the Proposer with the next Proposer, designated by the Commissioner, as the new Apparent ~~Best Value~~Selected Proposer, and continue in this manner until an agreement is reached or until a determination is made by the Department to reject all submitted Proposals. The first Proposer designated by the Commissioner (or where the Department is unable to negotiate a contract with the first such designee, the Proposer with which the Department is engaged with in negotiations in accordance with the procedures set forth in this Section 5.6 (Final Scoring and Announcement)), shall be the “Apparent ~~Best Value~~Selected Proposer”.

Upon finalization of the Agreement, the Apparent ~~Best Value~~Selected Proposer shall provide the Department with an executed copy within five business days of the Department’s request therefore.

5.8 Delivery of P&P Bonds

The P&P Bonds, in accordance with Agreement Section 29 (Payment and Performance Security), shall be in place for the Apparent ~~Best Value~~Selected Proposer at the time of the Progressive Contractor’s execution of the Agreement and as a condition precedent to the Department’s execution thereof. Failure of the Apparent ~~Best Value~~Selected Proposer to comply with the foregoing requirement may result in the Department ~~drawing upon the Proposal Security, and~~ disqualifying such Proposer and undertaking negotiations with the next highest scoring Proposer, and preclusion of the Proposer from future contracting opportunities with the Department.

5.9 Public Posting of Scoring and Technical Proposals; Proposer Debrief

The Department shall, following execution of the Agreement, publish on its website the Department's final scoring of each Proposal and a copy of the "Technical Proposal" section of each Proposal. Unsuccessful Proposers may request in writing (no later than 30 days following execution of the Agreement), and the Department shall provide, an explanation of the reasons such Proposer was not chosen as the Apparent ~~Best Value~~Selected Proposer.

~~5.10 — Return of Proposal Security~~

~~Except for any Proposal Security which has been forfeited, the Proposal Security as to each unsuccessful Proposer will be returned to the respective Proposers upon the earliest of (a) expiration of the Proposal Validity Period, (b) 10 business days following execution of the Agreement, and (c) 10 business days following cancellation of the procurement by the Department. The Proposal Security for the Apparent Best Value Proposer shall be returned (i) upon execution of the Agreement, (ii) at such time that the Proposal Validity Period, as may be extended pursuant to Section 4.4 (*Proposal Validity Period; No Withdrawal of Proposals*), has expired, or (iii) upon Department cancellation of the procurement.~~

SECTION 6 MISCELLANEOUS PROVISIONS

6.1 Reserved Rights

The Department reserves to itself all rights (which rights shall be exercisable by the Department in its sole discretion) described herein and available to it by law, including, without limitation, with or without cause, and with or without notice, the right to:

- (1) Develop the Project in any manner that it deems necessary or desirable.
- (2) Seek or obtain data from any source that has the potential to improve the understanding and evaluation of the Proposals, including reference to personal knowledge of evaluators or the corporate knowledge of the Department and to make judgments where evaluations of the Proposals admit of judgements.
- (3) Modify, withdraw, or cancel this solicitation in whole or in part at any time prior to the execution of the Agreement by the Department, including modification of dates, without incurring any costs, obligations, or liabilities.
- (4) Issue a new RFP after withdrawal of this RFP under any procurement method authorized under State law.
- (5) Accept or reject any and all submittals, responses, and Proposals received at any time.
- (6) Modify the RFP process (with appropriate notice to Proposers).
- (7) Issue amendments, supplements, and modifications to the RFP.
- (8) Add or delete Proposer responsibilities from the information contained in the RFP.

FORM A
PROPOSAL LETTER

Proposer:

[Proposal Date]

Indiana Department of Transportation

[NTD – insert Director of Major Projects information below]

Attn: [name]

Director of Major Projects

[physical address]

E-mail: [project-specific email address]@indot.IN.gov

The undersigned (Proposer) submits this proposal in response to the Request for Proposals (RFP) issued by the Indiana Department of Transportation (the Department) for a contract counterparty to enter into a [progressive design build contract (the “Progressive Design-Build Agreement” or “Agreement”)]/[construction manager/general contractor agreement (the “CM/GC Agreement” or “Agreement”)]**[NTD: delete inapplicable delivery method]** to develop the [_____] **[NTD – insert project name]** (Project) as more specifically described in the documents provided with the RFP. Capitalized terms that are used but not defined in this proposal shall have the meanings set forth in the RFP.

The undersigned undertakes [jointly and severally] **[NTD: if Proposer is a joint venture or association other than a corporation, limited liability company or a partnership, leave in words “jointly and severally” and delete the brackets; otherwise delete the entire phrase]** and agrees that the Proposer shall keep this proposal open for acceptance for ~~120~~150 days after the Proposal Due Date without unilaterally varying or amending its terms and without any member or partner withdrawing or any other change being made in the composition of the entity on whose behalf this Proposal is submitted, without first obtaining the prior written consent of the Department, in the Department’s sole discretion.

If selected by the Department, the Proposer agrees:

1. to negotiate the terms of the Agreement with the Department in good faith and in accordance with the requirements of the RFP, if applicable;
2. to enter into and perform its obligations as set forth in the Agreement, including compliance with all commitments contained in its Proposal, and without varying or amending the terms of the Agreement (except for modifications agreed to by the Department in its sole discretion);
3. to satisfy all other conditions to award of the Agreement; and
4. to perform its obligations as set forth in the instructions to Proposers under the RFP, as amended, and the form of Agreement, including compliance with all commitments contained in this Proposal.

Enclosed, and by reference incorporated herein and made a part of this Proposal, are the following:

1. Administrative Proposal; and

2. Technical Proposal.

Proposer acknowledges the following:

1. Proposer has received and reviewed the RFP and all RFP Amendments, and certifies that it has carefully examined and is fully familiar with all provisions of the RFP, as amended, and is satisfied that such provisions provide sufficient detail regarding the Work to be performed and do not contain internal inconsistencies.
2. Proposer acknowledges and will not challenge Department's reserved rights.
3. Proposer represents that all statements made in the Proposal are true, correct, and accurate as of the date hereof.
4. Proposer understands that the Department is not bound to accept any Proposal that it may receive.
5. Proposer understands that all costs and expenses incurred by it in preparing this Proposal and participating in the RFP process will be borne solely by the Proposer.
6. Proposer consents to the Department's disclosure of its Proposal pursuant to the applicable provisions of Indiana law after award of the Agreement.
7. Proposer agrees that the Department will not be responsible for any errors or omissions in its Proposal.
8. Proposer acknowledges and agrees that, under IC § 8-23-9.5(1)(c), participation, selection, entering into a contract with the Department, and performance of the Work thereunder, does not limit or eliminate the responsibility or liability imposed by Indiana law on Proposer (and Proposer's affiliated contract counterparty to the Department under the Agreement) ~~for an~~ in providing services to the Department pursuant to the enabling legislation for this solicitation, including IC § 8-23-9.5, as amended.
9. Proposer acknowledges and agrees that, in the event the Proposer is selected as the Apparent Selected Proposer, the Proposer's Key Personnel hourly rates identified in RFP Form C (Key Personnel Hourly Rates) as approved by the Department's External Audit division in accordance with RFP Section 3.7 (Key Personnel Fully-Loaded Hourly Rates) shall be binding upon the Proposer and shall be utilized in determining the Preconstruction Phase Cost Cap under the Agreement (unless the Department elects in its sole discretion to negotiate further negotiate the Preconstruction Phase Cost Cap).

[To be signed by authorized signatory or signatories of the Proposer, use appropriate signature blocks]

Sample signature block for corporation or limited liability company:

[Proposer Name]

By:

Signature

Typed or Printed Name

Question #	Yes/N	Description
0		<p>private agreement or transaction; (ii) violation of federal or state antitrust statutes (including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging); (iii) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, or obstruction of justice; or (iv) commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects its present responsibility;</p> <p>(c) 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 subsection (b) above;</p> <p>(d) have not within a three year period preceding this proposal had one or more public transactions (federal, State or local) terminated for cause or default;</p> <p>(e) if a corporation, have not been convicted of a felony violation under any Federal law within the two-year period preceding this proposal; and</p> <p>(f) if a corporation, does not have 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.</p>

If the answer to any item above is affirmative, the Proposer/Identified Contractor shall provide complete details about the matter in an attachment to this Form B. While an affirmative answer to any of these items will not automatically disqualify a Proposer from consideration, at the sole discretion of the Department, such an answer and a review of the background details may result in a rejection of the Proposal. The Department will make this decision based on its determination of the seriousness of the matter, the matter's possible impact on the Proposer's performance under the Agreement, and the best interest of the Department.

8. The Proposer/Identified Contractor will not, directly or indirectly, divulge information or data regarding the price or other terms of its Proposal to any other Proposer, or seek to obtain information or data regarding terms of any other Proposal, until after award of the Agreement or rejection of all Proposals and cancellation of the RFP.
9. The Proposer/Identified Contractor nor its affiliates, nor any of its proposed team that may work on or benefit from the Contract through the Proposer has a possible conflict of interest other than the conflicts identified immediately below, including any conflicts of interest identified under (a) 23 CFR Part 636 Subpart A; and (b) the Department Conflict of Interest Policy set forth in Agreement Exhibit H (~~Federal~~Department Requirements), Attachment 1

Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions. The firm/entity for which the undersigned is making this certification also agrees that it shall require that the language of this certification be included in all contractor agreements including lower tier subcontracts, which exceed \$100,000, and that all such sub recipients shall certify and disclose accordingly. Any person who fails to sign or file this required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each failure.

15. The Proposer/Identified Contractor is properly authorized under the laws of the State of Indiana to conduct business in this state; is duly registered with the Indiana Secretary of State to the extent required by Indiana law; and will remain in good standing to do business in the State of Indiana for the duration of the Agreement.
16. The Proposer/Identified Contractor is not delinquent on any state taxes or fees owed to the State of Indiana and will remain in good standing for the duration of the Agreement.
17. [If selected as the Apparent ~~Best Value~~Selected Proposer, the Proposer shall endeavor to negotiate mutually acceptable Contract Documents with the Department.]/***NTD: applicable only to the Proposer; omit for all other entities not comprising the Proposer***

The Proposer/Identified Contractor agrees and acknowledges that, pursuant to IC § 8-23-9.5(27), it is a Class C infraction for a party to make a false statement regarding its financial worth in the Proposal or other written instrument filed by the Proposer with the Department in connection with this procurement. Any party convicted of violating such prohibition will be disqualified from submitting bids on contracts advertised for letting by the Department for a period of two years following the date of conviction.

[signature on succeeding page]

FORM C

KEY PERSONNEL HOURLY RATES *[NTD: INDOT to determine Key Personnel roles on a project by project basis]*

Proposer Name _____

Key Personnel	Fully-Loaded Hourly Rates	Total Hours
Project Manager	\$[_____] .00/hour	
Construction Manager	\$[_____] .00/hour	
[Design Manager] <i>[NTD: delete for CM/GC]</i>	\$[_____] .00/hour	
Lead Estimator	\$[_____] .00/hour	
Geotechnical Lead	\$[_____] .00/hour	
[Structure Design Lead] <i>[NTD: delete for CM/GC]</i>	\$[_____] .00/hour	
Environmental Compliance Manager	\$[_____] .00/hour	

[append Department's External Audit division written approval, if received]*[NTD: INDOT project-specific determination]*

FORM E
FIRM EXPERIENCE

PROPOSER: _____

Instructions: Provide firm experience for no more than three projects for [each of the Lead Designer and] **[NTD: delete for CM/GC]** [the] Lead Contractor. One Form E shall be completed for each project. This form may be modified; however, the information shall be presented in the order requested and prompts shall be conspicuous to facilitate review. The page limit for each project is two pages.

Name of Firm: _____

[Affiliation: Lead Contractor: _____ Lead Designer: _____

*If the Lead Contractor and Lead Designer are a joint venture, check both. **[NTD: delete for CM/GC]**

Name of Client (Owner/Agency, Contractor, etc.): _____

Client Contact Information:

Name: _____ Telephone: _____ Email: _____

Project name, location, description, and nature of work for which firm was responsible:

Project Status (as of Proposal Date):

Project Delivery Method: _____

Project Cost (US\$): _____

Work Performed Date: From: _____ To: _____

Describe major risks or challenges encountered during design/construction and strategies implemented to resolve/mitigate these items:

[Describe use of innovative designs, methods, or materials: **[NTD: delete for CM/GC]**

Highlight the Key Personnel and their role in reference project:

Provide the following information for the referenced project:

Percent of Total Work Performed by Firm (% design or % construction): _____

Value of Liquidated Damages and Claims: _____

Any Litigation against Firm? Yes ____ No ____

FORM F

KEY PERSONNEL EXPERIENCE¹

[NTD: INDOT to determine Key Personnel roles on a project by project basis]

Instruction: The Proposer shall complete for each Key Personnel position indicated below.

PROPOSER:

Position	Name	Years of Experience	License / Certification*
Project Manager			
Construction Manager			
[Design Manager] [NTD: delete for CM/GC]			
Lead Estimator			
Geotechnical Lead			
[Structure Design Lead] [NTD: delete for CM/GC]			
Environmental Compliance Manager			
*Include professional license number where applicable.			

¹ **NTD – these are fairly standard key personnel roles and role description to be tailored as necessary for each project. See note at RFP Section 4.2.2.3**

FORM J

PROPOSAL BOND

Bond No. _____

~~[NTD: insert project specifics in blanks where applicable]~~

~~KNOW ALL PERSONS BY THESE PRESENTS~~, that the [_____] ~~[NTD: insert name of Proposer as the Principal]~~, as Principal and [_____] ~~[NTD: replace as need be to reflect surety/co-sureties organization form]~~, as Surety or as Co-Sureties, a [corporation] ~~[NTD: delete bracketed language if a single bond is provided]~~ duly organized under the laws of the State of Indiana, having its principal place of business at the address listed on the attached page, in the State indicated on the attached page, and authorized as a surety in the State of Indiana, are hereby jointly and severally held and firmly bound unto the Indiana Department of Transportation (the "Obligee"), in the sum of \$[_____] ~~[NTD: insert amount and delete this bracketed text; amount must be \$[_____] if a single bond is provided; multiple bonds in lesser amount may be provided if the sum equals \$[_____]]~~ (the "Bonded Sum"). This Bonded Sum reflects [a portion of] ~~[NTD: delete bracketed language if a single bond is provided]~~ the total amount payable to the Obligee by the Principal if it is identified as the "Apparent Best Value Proposer" or awarded a contract based on its Proposal for the development[, design] and ~~[NTD: delete bracketed language for CM/GC projects]~~ construction of the [_____] Project (the "Project"), for the payment of which we each bind ourselves, and our heirs, executors, administrators, representatives, successors, and assigns, jointly and severally, firmly by these presents.

~~WHEREAS~~, the Principal is herewith submitting its Proposal to develop[, design,] ~~[NTD: delete bracketed language for CM/GC projects]~~ and construct the Project through a [Progressive Design Build] [Construction Manager/General Contractor] ~~[NTD: delete inapplicable form]~~ Agreement (the "Agreement"), which Proposal is incorporated herein by this reference and has been submitted pursuant to the Obligee's Request for Proposals dated as of [_____] 202[___], as amended or supplemented (the "RFP") (capitalized terms not otherwise defined herein shall have the meaning set forth in the RFP);

~~NOW, THEREFORE:~~

1. ~~The condition of this bond is such that, upon occurrence of any of the following events, then this obligation shall be null and void; otherwise it shall remain in full force and effect, and the Bonded Sum will be forfeited to the Obligee as liquidated damages and not as a penalty, upon receipt by Principal and Surety or by Principal and Sureties listed on the attached page (the "Co-Sureties") of notice of such forfeiture from the Obligee:~~
 - ~~(a) Principal's receipt of written notice from the Obligee that either (i) no Agreement for the Project will be awarded by the Obligee pursuant to the RFP, or (ii) the Obligee has awarded an Agreement for the Project, has received the executed Agreement and other required documents, and does not intend to award the Agreement to Principal;~~
 - ~~(b) Except as expressly provided otherwise in the RFP and/or agreed to by the Obligee in writing, Principal's satisfaction of its obligations to achieve commercial close in accordance with the requirements of the RFP; or~~
 - ~~(c) If the Department has not previously delivered notice of forfeiture hereunder, the expiration of the Proposal Validity Period.~~

- ~~2. The Principal and the Surety or Co-Sureties hereby agree to pay to the Obligor the full Bonded Sum hereinabove set forth, as liquidated damages and not as a penalty, within ten days after occurrence of any occurrences in Section 4.3.2.1 (Events of Proposal Security Forfeiture) of the RFP.~~
- ~~3. Principal agrees and acknowledges that such liquidated damages are reasonable in order to compensate the Obligor for damages it will incur as a result of Principal's failure to satisfy the obligations under the RFP to which Principal agreed when submitting its Proposal. Such damages include potential harm to the credibility and reputation of the Obligor's transportation improvement program, including with policy makers and with the general public, delays to the Project and additional costs of administering this or a new procurement (including engineering, legal, accounting, overhead and other administrative costs). Principal further acknowledges that these damages would be difficult and impracticable to measure and prove, are incapable of accurate measurement because of, among other things, the unique nature of the Project and the efforts required to receive and evaluate proposals for it, and the unavailability of a substitute for those efforts. The amounts of liquidated damages stated herein represent good faith estimates and evaluations as to the actual potential damages that the Obligor would incur as a result of Principal's failure to satisfy the obligations under the RFP to which Principal agreed when submitting its Proposal, and do not constitute a penalty. Principal agrees to such liquidated damages in order to fix and limit Principal's costs and to avoid later Disputes over what amounts of damages are properly chargeable to Principal.~~
- ~~4. The following terms and conditions shall apply with respect to this bond:~~
- ~~(a) This Proposal Bond shall not be subject to forfeiture in the event that the Obligor disqualifies the Proposal based on a determination that it is non-responsive or non-compliant.~~
 - ~~(b) If suit is brought on this bond by the Obligor and judgment is recovered, Principal and Surety or Co-Sureties shall pay all costs incurred by the Obligor in bringing such suit, including, without limitation, reasonable attorneys' fees and costs as determined by the court.~~
 - ~~(c) Any extension(s) of the time for award of the Agreement that Principal may grant in accordance with the Agreement or otherwise, shall be subject to the reasonable approval of Surety or Co-Sureties.~~
 - ~~(d) Correspondence or claims relating to this bond should be sent to Surety at the following address:~~

~~_____~~
~~_____~~

~~_____~~
~~_____~~

~~_____~~
~~_____~~

SIGNED and SEALED this _____ day of _____, 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.]

CO-SURETIES

SURETY NAME SURETY ADDRESS INCORPORATED IN

FORM K

OTHER DEPARTMENT REQUIREMENTS²

Form **KJ-1** Drug-Free Workplace Certification

Form **KJ-2** Employment Eligibility Verification Certification

Form **KJ-3** No Investment in Iran **Affidavit** Certification

Form **KJ-4** Non-Collusion Affidavit

Form K-5 { }

FORM ~~K~~J-1

Drug-Free Workplace Certification

[TO BE COMPLETED BY PROPOSER AS "PROGRESSIVE CONTRACTOR"]

Capitalized terms have the meanings ascribed in that certain Agreement, by and between [____], as "Progressive Contractor" and the Indiana Department of Transportation, as "Department" with respect to the [____] project (the "Agreement").

As required by Executive Order No. 90-5, dated April 12, 1990, issued by the Governor of the State of Indiana, the Progressive Contractor hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace. Progressive Contractor will give written notice to the Department within ten days after receiving actual notice that Progressive Contractor or an employee of Progressive Contractor in the State of Indiana 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 the Agreement and/or debarment of contracting opportunities with the State of Indiana for up to 3 years.

In addition to the provisions of the above paragraphs, if the total amount set forth in the Agreement is in excess of \$25,000.00, 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 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 (1) the dangers of drug abuse in the workplace; (2) Progressive Contractor's policy of maintaining a drug-free workplace; (3) any available drug counseling, rehabilitation, and employee assistance programs; and (4) 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 (1) abide by the terms of the statement; and (2) notify 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 Project Sponsors and the Indiana Department of Administration in writing within 10 days after receiving notice from an employee under subdivision (C)(2) above, or otherwise receiving actual notice of such conviction;

E. Within 30 days after receiving notice under subdivision (C)(2) 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: (1) taking appropriate personnel action against the employee, up to and including termination; or (2) 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

FORM ~~K~~J-2

Employment Eligibility Verification Certification

~~{insert}~~

[TO BE COMPLETED BY PROPOSER AS "PROGRESSIVE CONTRACTOR"]

Capitalized terms have the meanings ascribed in that certain Agreement, by and between [], as "Progressive Contractor" and the Indiana Department of Transportation, as "Department" with respect to the [] project (the "Agreement").

As required by IC § 22-5-1.7, the Progressive Contractor swears or affirms under the penalties of perjury that the Progressive Contractor does not knowingly employ an unauthorized alien. The Progressive Contractor further agrees that:

- (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.
- (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 its Subcontractors who perform work under the Agreement to provide the certifications set forth in Paragraphs (a) and (b) above to the Progressive Contractor. The Progressive Contractor agrees to maintain this certification throughout the duration of the term of each Subcontract.

The undersigned affirms, under penalty of perjury that he or she is authorized to execute this certification on behalf of Progressive Contractor.

Dated _____ **Progressive Contractor**

By: _____

Name: _____

Title: _____

FORM ~~KJ~~-3

No Investment in Iran ~~Affidavit~~Certification

~~{insert}~~

[TO BE COMPLETED BY PROPOSER AS “PROGRESSIVE CONTRACTOR”]

Capitalized terms have the meanings ascribed in that certain Agreement, by and between [], as “Progressive Contractor” and the Indiana Department of Transportation, as “Department” with respect to the [] project (the “Agreement”).

Progressive Contractor has not, nor has any successor to, nor an affiliate of, Progressive Contractor, engaged in investment activities in Iran. For purposes of this certification:

a. “Iran” means the government of Iran and any agency or instrumentality of Iran, or as otherwise defined at IC § 5-22-16.5-5, as amended or supplanted from time-to-time.

b. Activities that qualify as engaging in investment activities in Iran shall be as set forth in IC § 5-22-16.5-8, as amended or supplanted from time-to-time.

The undersigned affirms, under penalty of perjury that he or she is authorized to execute this certification on behalf of Progressive Contractor.

Dated _____ Progressive Contractor

By: _____

Name: _____

Title: _____

FORM ~~K~~J-4

Non-Collusion Affidavit

[TO BE COMPLETED BY PROPOSER AND EACH IDENTIFIED CONTRACTOR]

STATE OF _____)
) SS:
COUNTY OF _____)

[Each of t]/[T]he undersigned, being first duly sworn, deposes and says that:

A. [] is the [] of [] and [] is the [] of [], which entit[y is]/[ies are] the [] of [], the entity giving a "Proposal" under that certain Request for Proposals to [design and]/**NTD: unbracket for CM/GC only** construct the [] project through a [progressive design-build agreement]/[construction manager/general contractor agreement]/**NTD: delete inapplicable delivery method**

B. The Proposal is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, joint venture, limited liability company or corporation; the Proposal is genuine and not collusive or sham; Proposer has not directly or indirectly induced or solicited any other Proposer to put in a false or sham Proposal, and has not directly or indirectly colluded, conspired, connived or agreed with any Proposer or anyone else to put in a sham Proposal or that anyone shall refrain from proposing; Proposer has not in any manner, directly or indirectly, sought by agreement, communication or conference with anyone to fix the prices of Proposer or any other Proposer, or to fix any overhead, profit or cost element included in the Proposal, or of that of any other Proposer, or to secure any advantage against the Indiana Department of Transportation or anyone interested in the proposed agreement; all statements contained in the Proposal are true; and, further, Proposer has not, directly or indirectly, submitted its prices or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, or paid, and will not pay, any fee to any corporation, partnership, company, association, joint venture, limited liability company, organization, Proposal depository or any member, partner, joint venture member or agent thereof to effectuate a collusive or sham Proposal.

C. Proposer will not, directly or indirectly, divulge information or data regarding the terms of its Proposal to any other Proposer, or seek to obtain information or data regarding the price or other terms of any other Proposal, until after award of the Agreement or rejection of all Proposals and cancellation of the RFP.

(Signature)

(Signature)

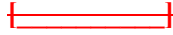
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(Name Printed)

(Title)

(Title)

FORM K-5



ACC ACCESS/PROPOSER AUTHORIZED REPRESENTATIVE DESIGNATION FORM

I-465/US-31 INTERCHANGE MODIFICATION PROJECT

ACC ACCESS/PROPOSER AUTHORIZED REPRESENTATIVE DESIGNATION FORM

DATE: _____

NAME OF PROPOSER: _____

PROPOSER AUTHORIZED REPRESENTATIVE:

Name: _____

Email Address: _____

Telephone Number: _____

ACC ACCESS REQUEST: Proposer, through the Proposer Authorized Representative identified above, requests access to the Project's Autodesk Construction Cloud (ACC) site for purposes of access to information regarding and submissions relating to the procurement with respect to the Project identified above.

Appendix E: Template CMGC Agreement

Indiana Department of Transportation

[Request for Proposals

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

[] Project

via the Construction Manager / General Contractor delivery method

[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 Preconstruction Work as described in and in accordance with Exhibit E (*Preconstruction Phase Scope and Compensation Cap*);

(b) Provide all 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 assist with the development and design, to construct, and otherwise deliver the Project (including construction management services and all necessary coordination with the Department Design Engineer) and maintain it during construction in accordance with the requirements of the Plans, 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 (as to each Pricing Package Amendment), and all other applicable safety, environmental and other requirements, taking into account the **ROW Plans** 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 provide all services necessary to furnish, install, and construct a final, complete, in-place, and fully functional Project which meets all the requirements of the Contract Documents;

(c) 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;

(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;

(d) 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);

(e) 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;

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

(g) 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);

(h) 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;

(i) 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;

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

(k) 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;

(l) 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 ~~efor~~^{for} Site or to other activities unrelated to the Work, as appropriate;

(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 ~~or Section 0~~ (*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. ~~[The Department currently has \$[] [NTD: should be consistent with programmed amount (over time) in Section 1.6 of the final RFP] programmed for the 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”)]**

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 CONSTRUCTION MANAGER/GENERAL CONTRACTOR 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 ~~issue~~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. ~~The Parties shall negotiate to finalize any Preconstruction Phase Change Order on a timely basis.~~ 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); ~~or~~.

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 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 11 (*Pricing Package Amendments*).

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; or

(b) 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 2.3 (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 5.8 (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.

2.3 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 2.3 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,

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 shall as may be required ~~as necessitated~~ under ~~federal Law~~ 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.

4.1 NEPA

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.

The Progressive Contract acknowledges and agrees that the Department's (and the Department Design Engineer's) advancement of the Project design shall be subject in all respects to 23 CFR Part 635.505, which includes, by reference commitments of the "CM/GC contractor" thereunder as part of the Work hereunder. All provisions referenced therein as being required provisions within the "CM/GC contract" are likewise incorporated by reference.

The Department may, without any Progressive Contractor right to additional compensation or extension of a Completion Deadline, 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, any design activities 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 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 [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.

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 [supply and] construction costs, and not separately as to each category of the [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) *Demonstrated* 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]~~INTD: 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.

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~~108.01 of the Standard Specifications have been adhered to by the Progressive Contractor]~~INTD: Subject 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 ~~Section 103.01 of the Standard Specifications~~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*%)~~30%~~~~NTD: 30% for federally funded projects~~ of the Construction Work, as determined under the Approved Subcontracting Plan).

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, 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.

5.2 Engineering and Surveying Personnel

All engineering and surveying Work, if any, furnished by the Progressive Contractor shall be performed by or under the supervision of Persons licensed to practice 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 role, 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 position 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.

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
- (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 ~~Plan~~ for Construction Work

(a) The Progressive Contractor and Lead Contractor shall collectively self-perform no less than [30%] ~~INTD: 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 this Section 5.5 (Identified Contractors) to Section 4.7.5.10 (~~Subcontracting—Plan~~ General Responsibility for ~~Construction—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.

(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.

~~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. 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.~~

~~5.2~~ **Engineering and Surveying Personnel**

~~All engineering and surveying Work, if any, furnished by the Progressive Contractor shall be performed by or under the supervision of Persons licensed to practice 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 role **for the applicable period identified under Table 2 of Exhibit C (Progressive Contractor Team)** (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); **provided, however, that** 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; 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.~~

~~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~~

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 CONSTRUCTION MANAGEMENT; NON-CONSTRUCTION WORK

7.1 Standards for all Non-Construction Work

7.1.1 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.

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

The Progressive Contractor shall furnish and perform all other non-Construction 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, and 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, and (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.

Construction Work within contemplated Completion Deadlines and the applicable Pricing Package GMP;

(B) identifying potential risks and scheduling, pricing, or safety issues;

(C) providing cost and timing estimates;

(D) confirming all necessary Work has been included in the subject Design Documents; and

(E) eliminating areas of conflict, overlapping trade jurisdictions, and other overlap in the Work to be performed by the various Subcontractors; and

(iv) coordinating with and supporting the Department Design Engineer with respect to the Department Design Engineer's development and implementation of Preconstruction Phase Change Orders, Construction Phase Change Orders, and Design Exceptions; and

(v) coordinating site access and investigations in an efficient and orderly manner.

(b) The Progressive Contractor shall promptly notify the Department in the event the Department Design Engineer is in any instance not coordinating or cooperating with the Progressive Contractor to the extent reasonably necessary for the Progressive Contractor to progress the Preconstruction Work in accordance with the requirements of this Agreement.

7.4 Design Document Deviations

The Progressive Contractor may apply in writing to the Department for approval of Design Document Deviations which may be granted in the sole discretion of the Department. The Progressive Contractor may not proceed to perform any work in reliance upon the Department's approval of any such Design Document Deviation before and until such approval is received.

SECTION 8 ACCESS & RIGHT-OF-WAY

8.1 Right-of-Way Plans

The Department and the Progressive Contractor shall jointly produce ~~ROW Plans~~ Right-of-Way plans during the Preconstruction Phase which identify the ~~ROW~~ 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 ~~ROW~~ Right-of-Way identified on the ~~ROW Plans~~ Right-of-Way plans in connection with each Pricing Package Amendment. The Parties shall manage risks related to the ~~ROW~~ 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

SECTION 9 UTILITY WORK

9.1 Generally

The Progressive Contractor acknowledges and agrees that it shall be responsible for the Utility Work agreed upon by the Parties and documented under the Construction Phase Amendment and any Pricing Package Amendment.

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.

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. The Progressive Contractor shall work with the Department Design Engineer during the Preconstruction Phase to facilitate a Project design that minimizes the need for, and the costs relating to any necessary, Relocations.

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

~~Each~~ The Parties intend that each Relocation itself with respect to each Utility (and with respect to each respective Utility Owner) ~~shall~~ 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.

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 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, ~~the~~, 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.

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.

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 has provided, or caused to be provided to, the Progressive Contractor, the RFC Documents corresponding to the scope of work under a Pricing Package Amendment;

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

(c) 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;

(d) 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;

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

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

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

(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.

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 ~~Request~~. 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.

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.

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~~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~~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.

(m) 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 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 and materials furnished (i) in accordance with the requirements of the Contract Documents, and, except as may otherwise have been agreed, and subject to customary deviations, the Design Documents, and specifically all requirements for Project Completion of all Pricing Packages have been and remain satisfied, and (ii) in reasonably close conformance with the lines, grades, cross-sections, dimensions, and material requirements, including tolerances, set forth in the Design Documents (excepting for any Design Document Deviations with respect to which the Department's prior written approval was obtained);

(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 construction with respect to the Project have been

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.

18.2.1 ~~Maintenance~~, Rebuilding, Repair, and Restoration of Damaged Work

Until the ~~Final Acceptance Date~~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 ~~maintain~~, rebuild, repair, and restore all damaged Work at the Site, ~~whether or on any parcel~~ owned by ~~the Progressive Contractor, the Department, or~~ 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 ~~maintain~~, 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 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 ~~ROW~~Right-of-Way and the Work until ~~execution of 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. ~~If there are multiple Pricing Packages~~

Without limiting Section 30 (Warranties), ~~then at the Department will relinquish such other portions of the Site subject to the Pricing Packages to the Progressive Contractor to assume such maintenance responsibility.~~

~~Upon Final Acceptance~~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).

~~However, in~~ 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 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 ~~tenth~~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 ~~30~~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 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

~~The~~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 ~~a form~~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~~ 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 ~~as and when required under each Pricing Package Amendment~~ within 35 days after the approval of the 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. 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 ~~Update~~ 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.

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 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 2.3.2 (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.

(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.

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 2.3 (*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.

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.

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 ~~Order~~ 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 ~~Order~~ 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

(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).

(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) **(~~ii~~)** there occurs any disqualification, suspension, or debarment (distinguished from ineligibility due to lack of financial qualifications), or ~~otherwise excluded~~**other exclusion** from bidding, or proposing or contracting with a federal or a State department or agency of **(~~i~~A)** the Progressive Contractor; **(~~ii~~B)** any Progressive Contractor-Related Entity (excluding Subcontractors), or **(~~iii~~C)** any Affiliate of the Progressive Contractor for whom transfer of ownership would constitute a Change of Control, or **(~~b~~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.

(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, and other documents, that the Department deems necessary for completion of the Work.

(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 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

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.

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.

(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.

25.4 Responsibility After Notice of 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, 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

(a) the Department has delegated performance of the obligation to the Progressive Contractor under the Contract Documents, 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 construction of the Project and or any non-Project Utility Work.

(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.

(d) Any material defect inherent in the Design Documents or a prescriptive 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

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), ~~and any other insurance policies~~ or as may otherwise be required ~~by~~ 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, ~~and the~~.

The Department reserves the right to require commercially reasonable deductibles ~~or~~ and self-insured retentions without the Progressive Contractor having recourse to additional compensation hereunder. [NTD: project-specific consideration]

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 ~~28.2~~ 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 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~~ 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 (~~and/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 (~~and/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.]

~~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.~~ **[NTD: remove if no Guaranty, and include only if INDOT entertaining different form of guaranty, in which case, delete brackets in first paragraph as well requirement.]**

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) the Project shall be free of defects, except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents; (b) 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; (c) equipment furnished by or on behalf of any Progressive Contractor-Related Entity shall be of modern design and in good working condition; (d) the Work shall meet all of the requirements of the Contract Documents; (e) 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 (f) the Project materials and equipment furnished by or on behalf of any Progressive Contractor-Related Entity under the Contract Documents~~ shall each be fit for use for ~~the~~their intended function; and (g) any working drawings, shop drawings, or similar work product furnished by the Progressive Contractor to the Department shall meet the requirements set forth in Section 7.1 (Standards for all Non-Construction Work) (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 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

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.

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.

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 ~~reserve~~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. 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;

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 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 ~~Applicable Law;~~ Governmental Approvals; Other Approvals

The Progressive Contractor has familiarized itself with the requirements and conditions of any and all ~~applicable Law and the conditions of any~~ 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 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.

32.5 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, 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.

32.6 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.

32.7 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.

32.8 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.

32.9 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.

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 4.75.5 (~~Subcontracting Plan~~ Identified Contractors) to Section 5.10 (General Responsibility for ~~Construction~~ 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]**

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.

Definitions	
Term	Meaning
“Construction Phase Requirements”	<p>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.</p> <p>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.</p> <p>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).</p> <p>[NTD: include INDOI form CPRs of “general application” to PDBCMGC projects in Construction Phase Amendment; project-specific CPRs should be included in Pricing Package Amendments.]</p>
“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 <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“Critical Path”	<p>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.</p> <p>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</p>

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Term	Meaning
	Department, in either case, hereunder, at law, or in equity.
“Department Design Engineer”	[____], the design professional (including any sub-consultants of such design professional) contracted by the Department to design, and provide design administration services with respect to, the Project, and any subsequent design professional(s) contracted by the Department for this purpose. [NTD: insert Department-contracted design professional]
“Department-Provided Governmental Approval”	<p>The following Governmental Approvals:</p> <ol style="list-style-type: none"> 1. NEPA approval (including subject to <u>Section 10.1.4 (NEPA Modifications)</u>) any NEPA Modifications); and 2. [____]. [NTD: to be completed on a Project-specific basis] <p>and any other Governmental Approvals that the Parties during the Preconstruction Phase mutually determine shall be obtained by the Department.</p>
“Department-Provided Other Approval”	<p>The following Other Approvals:</p> <ol style="list-style-type: none"> 1. [____]. [NTD: to be completed on a Project-specific basis] <p>and any <u>other</u> Other Approvals that the Parties during the Preconstruction Phase mutually determine shall be obtained by the Department.</p>
“Department-Related Entities”	The Department, and all other Persons for whom the Department may be legally or contractually responsible (including specifically the Department Design Engineer), 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 <u>Section 2.3.1 (Department Risks)</u> .
“Design Documents”	The <u>All</u> drawings, specifications, studies, designs, “architectural work” (as such term is defined in the Architectural Works Copyright Protection Act of 1990), reports, calculations, and records, at any stage of development or revision necessary for design of the Project <u>in accordance with the Contract Documents</u> ,

Definitions	
Term	Meaning
	including electronic files thereof, to be prepared by the Department Design Engineer on behalf of the Department or otherwise by the Department.
“Design Exception”	Any portion of the Project where the Department’s 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”.
“Differing Site Conditions”	<p>Subsurface or latent conditions encountered at the Site identified in the work product resulting from Preconstruction Work 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.</p> <p>The term shall specifically exclude the following:</p> <ol style="list-style-type: none"> 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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Term	Meaning
“Disadvantaged Business Enterprise”	The meaning set forth in 49 CFR § 26.5 <u>Section 2 of Exhibit L (INDOT DBE Requirements)</u> .
“Dispute”	<p>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:</p> <ol style="list-style-type: none"> 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 relating to matters within the sole discretion of the Department; 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 <u>Exhibit J, Section 2 (Dispute Resolution Procedures)</u> .
“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

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Term	Meaning
	agencies (Fitch Ratings, Moody’s Investor Service and Standard & Poor’s Ratings Services) 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 <u>Exhibit G</u> (<i>Federal Requirements</i>).
“Final Acceptance”	Acceptance of the Project as described in <u>Section 17.4</u> (<i>Department Issued Notice of Final Acceptance</i>).
“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 <u>Exhibit B, Section 1.3.1.4</u> (<i>Design-Related Transmittals Submittals & Milestones</i>) 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 <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“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

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Term	Meaning
	<p>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:</p> <ol style="list-style-type: none"> 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); 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"	<p>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 engineerconstruction manager, 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</p>

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Term	Meaning
	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.
“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 <u>Section 29.2 (Guaranties)</u> .
“Hazardous Materials”	Any of the following: <ol style="list-style-type: none"> 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

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Term	Meaning
	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 <u>Section 14.2.1</u> (<i>Completion, Other Incident Liquidated Damages</i>).
“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: <ol style="list-style-type: none"> 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.
<u>“Notice of Contract Termination”</u>	<u>A notice issued by the Department to terminate the Agreement.</u>
“Notice of Final Acceptance”	The notice delivered to the Progressive Contractor under <u>Section 17.4</u> (<i>Department Issued Notice of Final Acceptance</i>) stating that final Department acceptance of the Project has occurred.
“Notice of Project Completion of the Pricing Package”	The notice delivered to the Progressive Contractor under <u>Section 17.2</u> (<i>Department Issued Notice of Project Completion for a Pricing Package</i>) stating that Project Completion of the Pricing Package has occurred.
“Notice of Termination”	A notice issued by the Department to terminate the Agreement.
“Open Book Basis”	

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Term	Meaning
	The Department's review and access rights described under <u>Section 2.2.2.1 (Pricing Package GMPs)</u> .
"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 <u>Section 31.6.2 (Intellectual Property)</u> .
"Party" or "Parties" (whether capitalized, as context may require)²²	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 <u>Exhibit B (Preconstruction Phase Requirements)</u> .
"Preconstruction Phase Compensation"	The meaning set forth in <u>Section 19.1 (Preconstruction Phase Compensation)</u> .
"Preconstruction Phase Compensation Cap"	The maximum amount payable by the Department for Preconstruction Work as set forth in <u>Exhibit E (Preconstruction Phase Scope and Compensation Cap)</u> , as may be modified by Preconstruction Phase Change Order.

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Term	Meaning
“Preconstruction Phase Quality Management Plan”	The meaning set forth in <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“Preconstruction Phase Schedule Coordination Plan”	The meaning set forth in <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“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 <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“Preliminary Pricing Package Plan”	The meaning set forth in <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“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 <u>Exhibit B, Section 6</u> (<i>Cost Estimating</i>).
“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 <u>Exhibit B, Section 6</u> (<i>Cost Estimating</i>).
“Pricing Package”	The meaning set forth in <u>Section 2.2.2</u> (<i>Pricing Package Amendments</i>).
“Pricing Package Amendment”	An amendment establishing the commencement of a Pricing Package and satisfying the requirements set forth in <u>Section 2.2.2</u> (<i>Pricing Package Amendments</i>) and <u>Exhibit B, Section 11</u> (<i>Pricing Package Amendments</i>).
“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 <u>(based on the completion of Project Schedule activities and the values distributed</u>

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Term	Meaning
	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 (<i>Designation of Authorized Representatives</i>), 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 (<i>Breaches; Progressive Contractor Defaults</i>), following notice and opportunity to cure to the extent permitted by Section 24.1.2 (<i>Right to Cure</i>) 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 (<i>Initial Approach to Construction Cost Development</i>).
“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.
“Progressive Contractor Quality Control”	The activities performed by the Progressive Contractor, 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, 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	A fixed sum for a specific line item of Work that may be included

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Term	Meaning
“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 “RFC Documents”	The finalized design documents as described in <u>Exhibit B, [Section 1.31.4 (Design-Related Transmittals Submittals & Milestones)]</u> to be furnished by the Department to the Progressive Contractor with respect to the scope of each Pricing Package Amendment.
“Relief Event”	The meaning set forth in <u>Section 20.1.1 (Relief Event Defined)</u> .
“Relief Event Notice”	The meaning set forth in <u>Section 20.2.1 (Relief Event Notice)</u> .
“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

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Term	Meaning
“ROW Plans”	The meaning set forth in <u>Section 8.1 (Right of Way Plans)</u>.
“Schedule Coordination Plan”	The schedule coordination plan identified in <u>Exhibit B (Preconstruction Phase Requirements)</u> .
“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 <u>Section 2.3.2 (Provisional Risks)</u> .
“Site”	The parcels of ROW <u>Right-of-Way</u> identified on the ROW Plans <u>Right-of-Way plans</u> 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 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”	

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Term	Meaning
“Surety Bonds”	The approved security described in <u>Section 28.229</u> (<i>Payment and Performance Security</i>) in the form of <u>Exhibit F</u> (<i>Form of Surety Bonds</i>), executed by the Progressive Contractor and the Surety.
“Term”	The meaning set forth in <u>Section 1.2</u> (<i>Term</i>).
“Termination Compensation Cap”	The meaning set forth in <u>Section 25.5.3</u> (<i>Termination Compensation Cap</i>).
“Third Party”	Any Person other than a Department-Related Entity (and in the context of <u>Section 27</u> (<i>Indemnification</i>), 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 <u>Section 19.2</u> (<i>Total Construction GMP</i>).
“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.

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

Author/Agency	Title
	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 (including 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-Completion-wide completion of all Pricing Packages), Completion Deadlines, and incorporate design package delivery dates and Construction Work activities through Final Acceptance).

(2) Update the Preconstruction Phase Project Schedule on a monthly basis and submit to the Department for Reviewreview and CommentApproval 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 <u>Section 1.2 (Standards)</u> , 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 ROW <u>Right-of-Way</u> 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 <u>Section 1.2 (Standards)</u> .	Review and Comment
Stage 3 Documents	90 percent complete design. Includes plans, specifications, quantities, updated draft CPM Schedule, and reports for each respective	Review and Comment

Submittal	<u>Description of Submittal</u>	<u>Department Action</u>
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.

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 upon by the Parties, the Progressive Contractor shall submit an updated Preliminary Pricing Package Plan to the Department for [Reviewreview](#) and [Commentcomment](#) 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;
- (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~~review and ~~Comment~~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.

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.

EXHIBIT C

PROGRESSIVE CONTRACTOR TEAM

Table 1: Key Personnel

[NTD: Map over ~~first two columns~~ from RFP Form F (Key Personnel Experience)]

<i>Position</i>	<i>Name</i>
<u>Project Manager</u>	
	[NTD: Template:] [] hours per day, [] days per week [until expiration of the Warranty Period]/[on an as-needed basis with [] hours' notice [thereafter]], for applicable Work during the Warranty Period, if any insert name

Table 2: ~~Key Personnel Availability~~

<i>Key Personnel</i>	<i>Period Required to be Available and Availability for Contact by Department</i>
	[NTD: Template:] [] hours per day, [] days per week [until expiration of the Warranty Period]/[on an as-needed basis with [] hours' notice [thereafter]], for applicable Work during the Warranty Period, if any

<i>Key Personnel</i>	<i>Period Required to be Available and Availability for Contact by Department</i>

Table 3: 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]**

<i>Key Personnel Position</i>	<i>Liquidated Damages – Preconstruction Phase</i>	<i>Liquidated Damages – Construction Phase</i>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	\$[] per occurrence <u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	\$[] per occurrence <u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	\$[] per occurrence <u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>

Attachments: Key Personnel commitments from Proposal **[NTD: insert all Form H submissions for all Key Personnel]**

EXHIBIT D

HOURLY RATES

(see attached)

[NTD: TO INCLUDE FULLY LOADED HOURLY RATES ~~PROPOSED IN FORM D (HOURLY RATES) OF~~ ACCEPTED BY INDOT'S DEPARTMENT OF EXTERNAL AUDIT UNDER THE PROPOSAL RFP.]

EXHIBIT E

PRECONSTRUCTION PHASE SCOPE AND COMPENSATION CAP

| [NTD: Insert from post-selection exercise]

| The Preconstruction Phase Compensation Cap is \$[_____ -]

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:

(b) complete the work covered by this Bond in accordance with the terms and conditions of the Agreement then in effect, or

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~~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 [].

DMFIRM #409397955 v18

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 provision of construction management services and for 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.

of this Bond, solely due to acts of Principal, 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.

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 ~~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 [_____].

EXHIBIT G

FEDERAL REQUIREMENTS

<u>Exhibit Description</u>	<u>NO. of Pages</u>
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}

ATTACHMENT 2 TO EXHIBIT G

FHWA-1273

Revised October 23, 2023 *[NTD: ensure most current version used in letting]*

ATTACHMENT 3 TO EXHIBIT G
FEDERAL PREVAILING WAGE RATE

PROJECT WAGE RATES ~~—LOCALITY 4/~~ FEDERAL

The contractor shall use the appropriate Davis Bacon Act ~~Wage Determinations~~ ~~WD~~ # ~~_____~~ wage determinations that are effective 10 calendar days prior to the execution of the ~~Constriction~~ Construction Phase Amendment. ~~The~~ [NTD: Construction Phase Amendment to include DBA wage rates.] Applicable project wage determinations can be found at the following link:

[SAM.gov | Search](#)

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 OLS/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 products¹ 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 product², 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 materials³ 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 products⁵ *[NTD: verify waiver still in place; if no, remove footnote]* not meeting the requirements set forth in subsections (b) and (c)

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.

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 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:

P.I. No. [] ~~[NTD: include solicitation's P.I. Number]~~ —Contract ID # [] ~~[NTD: provide the Project's name from the same]~~ 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 _____, _____.

Notary Public/Justice of the Peace

My Commission Expires: _____

OR

CERTIFICATE FOR NONCOMPLIANCE

With respect to the following project:

P.I. No. [_____] **[NTD: include solicitation's P.I. Number]** ~~Contract ID #~~ [_____] **[NTD: provide the Project's name from the same 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.

Attachment 4 to Exhibit G

EXHIBIT H

DEPARTMENT REQUIREMENTS

<u><i>Exhibit Description</i></u>	<u><i>No. of Pages</i></u>
Attachment 1 – Department Conflict of Interest Policy	3
[Attachment 2 – []]	

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}/{binder}~~ **[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 ~~certified~~ 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 2.82.10 (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. ~~This~~ 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 ~~a current policyholder's management and financial size category~~ an A.M. Best's rating of ~~not less than at least~~ "A-, VII" ~~according to A.M. Best's Insurance Reports Key Rating Guide~~.

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

~~The commercial general liability, excess (umbrella) liability, Progressive Contractor's pollution liability, and, if applicable, professional liability insurance coverage requirements will~~ 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, ~~whichever is greater~~.

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. ~~Each~~ 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 ~~include~~ 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 ~~at~~ 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; ~~and~~

(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.

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 ~~pollution~~cyber liability ~~Insurance Policies~~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.

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 ~~a policy of~~ commercial general liability ~~broad form~~ 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 (ISO) for CG 00 01 10 01.

(a) Limits of liability; general liability:

- (i) \$1 million - each occurrence.
- (ii) \$2 million - general annual aggregate ~~(annually)~~.
- (iii) \$2 million - personal and advertising injury.
- (iv) \$2 million - products/completed operations ~~liability~~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 ~~blanket~~ coverage for explosion, collapse, and underground (XCU) hazards.

(c) Products and completed operations coverage shall be continued for ~~a minimum of five years from~~ 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 ~~occurrence-based~~ 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.

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 ~~with a practice policy, or a between any~~ combination of a ~~practice policy~~ primary and ~~Project specific~~ excess policy.

2.4 Excess (Umbrella) Liability Insurance

The Progressive Contractor shall obtain and maintain ~~a policy of~~ umbrella or excess liability insurance with limits of not less than \$10 million per occurrence and ~~\$25~~ 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 "following 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 \$[5]M, \$[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 ~~per occurrence~~ shall be not less than \$5 million per occurrence and ~~the total Project annual~~ aggregate ~~shall be \$10 million~~. The limits of the contractor's pollution liability coverage may be satisfied ~~with either a Project specific policy or a between any~~ combination of a ~~practice policy~~ primary and ~~Project specific~~ excess ~~endorsement to the practice policy policies~~.
- (b) The Department shall be named as an additional insured ~~(to the extent commercially available as determined by the Department)~~.
- (c) The policy form shall be written on an occurrence-based form.

2.6 Contractor's Professional ~~Liability~~ and Protective Insurance

~~If the Progressive Contractor engages in any services that rely upon engineers or surveyors (or both) engaged under Section 5.2 (Engineering and Surveying Personnel), then the Progressive~~

~~The Contractor shall maintain, or with the Department's prior, written consent, granted in its sole discretion, cause any engineer or surveyor retained as part of the Work, (i) project specific professional liability Contractor's Professional and Protective Insurance (CPPI) insurance coverage for the Designer's operations on the Project, or (ii) also with Department's prior, written consent, granted in its sole discretion, carry under a practice professional liability coverage as part of its corporate insurance program, Work performed under this 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 ~~a five year~~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 Designer's 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.

~~The Department may, in its sole discretion, allow lower per claim and aggregate policy limits, upon request, to be documented by the Parties thereafter.~~

~~If the Department consents to a practice policy rather than a project specific policy, the Progressive Contractor (or, if consented to, the placing Subcontractor(s)) shall renew the policy annually for five years following Final Acceptance, or provide a new policy with a retroactive date of the date the entity first performed design or other engineering activities on the Project.]NTD: include if deemed necessary by INDOT based upon the scope of the Progressive Contractor's work under this Agreement[~~

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 ~~is not required to carry a builder's risk insurance policy; however, the Progressive Contractor~~ shall be solely responsible for all ~~builder's risk claims and the Department shall have no responsibility for any item for which the Progressive Contractor could have obtained coverage under a builder's risk policy.~~ *[NTD: subject to continuing INDOT review and comment, and may change on a Project-specific basis]* 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.

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]*

~~2.9 — []~~

~~*[NTD: insert any other policies, required on a Project-specific basis (e.g. aircraft liability, marine/cargo, etc.)]*~~

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, ~~and excepting the professional liability insurances discussed above (where requirements in this respect exist)~~, 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 ~~\$500,000~~1,000,000 bodily injury by accident, each accident, and ~~\$500,000~~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 ~~in the annual~~ aggregate ~~annually~~.

(c) Automobile Liability Insurance with a limit of at least ~~\$500,000~~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) 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 ~~\$12,000,000~~10,000,000, coverage shall be in the amount of ~~\$4,000,000~~5,000,000 per occurrence and ~~in the 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 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.

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.

(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.

(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.

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.

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.

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.

Appendix F: Template PDB Agreement

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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Exhibit I	Insurance Requirements
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Exhibit K	Form of Guaranty

| [Exhibit L](#) [INDOT DBE Requirements](#)

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 ~~ROW Plans~~ 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;

- (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 ~~or Section 1.4.2(e)~~ (*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 stringent 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. ~~[The Department currently has \$[]]~~~~[NTD: should be consistent with programmed amount (over time) in Section 1.6 of the final RFP]~~~~programmed for the 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”)]

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 ~~issue~~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. ~~The Parties shall negotiate to finalize any Preconstruction Phase Change Order on a timely basis.~~ 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); ~~or~~.

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 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 ~~Amendments~~ 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

(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 5.8 (*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.

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 ~~Order~~ Orders*).

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:

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 ~~shall as may~~ be required ~~as necessitated~~ under ~~federal Law~~ 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.

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 4.3.1.4 (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.

~~**4.2.2.3**~~ 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) ~~Demonstrated~~Methods, procedures, and demonstrated ability to meet or exceed each DBE goal, inclusive of how it will identify Indiana⁴ 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.

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 ~~Section 103.01 of the Standard Specifications~~ 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) ~~%/[30%]~~ **[NTD: 30% for federally funded projects]** of the Construction Work, ~~as determined under the Approved Subcontracting Plan~~).

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.

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.

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
- (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 ~~Plan~~ 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*) ~~]/[4.4 (Identified Contractors) and]~~ [NTD: 4.1 if federal] to [Section 4.95.5 (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.

(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.

~~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. 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.~~

~~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 **role for the applicable period identified under Table 2 of Exhibit C** (*Progressive Contractor Team*) (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*); **provided, however, that** 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; 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.~~

~~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~~

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.

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

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 ~~ROW Plans~~Right-of-Way plans during the Preconstruction Phase which identify the ~~ROW~~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 ~~ROW~~Right-of-Way identified on the ~~ROW Plans~~Right-of-Way plans in connection with each Pricing Package Amendment. The Parties shall manage risks related to the ~~ROW~~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.

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~~ 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.

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

~~Each~~ The Parties intend that each Relocation itself with respect to each Utility (and with respect to each respective Utility Owner) ~~shall~~ 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.

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 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, ~~the~~, 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.

10.3 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.

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.

- (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.

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](#) ~~Request~~. 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

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.

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~~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~~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;

18.2.1 ~~Maintenance~~, Rebuilding, Repair, and Restoration of Damaged Work

Until the ~~Final Acceptance Date~~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 ~~maintain~~, rebuild, repair, and restore all damaged Work at the Site, ~~whether or on any parcel~~ owned by ~~the Progressive Contractor, the Department, or~~ 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 ~~maintain~~, 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 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 ~~ROW~~Right-of-Way and the Work until ~~execution of 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. ~~If there are multiple Pricing Packages~~

Without limiting Section 30 (Warranties), ~~thenat~~ the ~~Department will relinquish such other portions of the Site subject to the Pricing Packages to the Progressive Contractor to assume such maintenance responsibility.~~

~~Upon Final Acceptance~~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).

~~However, in~~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 ~~Compensation Cap~~ Hourly Rate Policy", shall likewise be 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 ~~tenth~~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 ~~30~~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 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

~~The~~ 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 ~~a form~~ 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 ~~as and when required under each Pricing Package Amendment~~ 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 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 ~~Update~~ 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.

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.

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.

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.

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 ~~Order~~ 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 ~~Order~~ 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

(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) (a) there occurs any disqualification, suspension, or debarment (distinguished from ineligibility due to lack of financial qualifications), or ~~otherwise excluded~~ 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 (b) 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 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.

(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.

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.
- (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.

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, 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".

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

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*), ~~and any other insurance policies~~ or as may otherwise be required ~~by~~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, ~~and the~~.

The Department reserves the right to require commercially reasonable deductibles ~~or~~and self-insured retentions without the Progressive Contractor having recourse to additional compensation hereunder. NTD: project-specific consideration

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~~ 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 ~~28.2~~ 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 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 (~~and/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 (~~and/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.]

~~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.~~ **[NTD: remove if no Guaranty, and include only if INDOT entertaining different form of guaranty, in which case, delete brackets in first paragraph as well requirement.]**

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 ~~reserve~~^{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. 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;

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 ~~Applicable Law;~~ Governmental Approvals; Other Approvals

The Progressive Contractor has familiarized itself with the requirements ~~of any and all applicable Law~~ and ~~the~~ 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.

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.

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)] **[4.45.5 (Identified Contractors)]** **[NTD: 4.1 if federal]** to Section 4.95.10 (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]**

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.

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. 

Definitions	
Term	Meaning
Deadline(s)	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 <u>Section 2.2.1</u> (<i>Construction Phase Amendment</i>).
“Construction Phase Change Order”	A written amendment to certain terms and conditions of the Contract Documents issued in accordance with <u>Section 21</u> (<i>Construction Phase Change Orders</i>).
“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”	<p>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.</p> <p>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.</p> <p>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).</p> <p>[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.]</p>

Definitions	
Term	Meaning
“Department-Directed Changes”	<p>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 <u>Section 21</u> (<i>Construction Phase Change Orders</i>), excepting:</p> <ol style="list-style-type: none"> 1. any provision that expressly states that such event or circumstances does not constitute a Department-Directed Change; and 2. those directives or prerogatives expressly reserved to the Department; and (ii) 3. exercise of any right of the Department, in either case, hereunder, at law, or in equity.
“Department-Provided Governmental Approval”	<p>The following Governmental Approvals:</p> <ol style="list-style-type: none"> 1. NEPA approval (including subject to <u>Section 10.1.4</u> (<i>NEPA Modifications</i>)) any NEPA Modifications); and 2. [____], [NTD: to be completed on a Project-specific basis] <p>and any other Governmental Approvals that the Parties during the Preconstruction Phase mutually determine shall be obtained by the Department.</p>
“Department-Provided Other Approval”	<p>The following Other Approvals:</p> <ol style="list-style-type: none"> 1. [____], [NTD: to be completed on a Project-specific basis] <p>and any other Other Approvals that the Parties during the Preconstruction Phase mutually determine shall be obtained by the Department.</p>
“Department-Related Entities”	<p>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”.</p>
“Department Risk”	<p>A risk identified as a Department Risk on the Risk Register described in <u>Section 2.4.1</u> (<i>Department Risks</i>).</p>
“Design Documents”	<p>All drawings, specifications, studies, designs, “architectural work” (as such term is defined in the Architectural Works Copyright Protection Act of 1990), reports, 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.</p>
“Design	<p>A record of engineering decisions related to the Project.</p>

Definitions	
Term	Meaning
Executive Summary”	
“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”	<p>Subsurface or latent conditions encountered at the Site identified in the work product resulting from Preconstruction Work 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.</p> <p>The term shall specifically exclude the following:</p> <ol style="list-style-type: none"> 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.
“Disadvantaged Business Enterprise”	The meaning set forth in 49 CFR § 26.5 Section 2 of Exhibit L (INDOT DBE Requirements) .
“Dispute”	

Definitions	
Term	Meaning
	<p>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:</p> <ol style="list-style-type: none"> 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 relating to matters within the sole discretion of the Department; 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 <u>Exhibit J, Section 2</u> (<i>Dispute Resolution Procedures</i>).
“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) or rated at least “A-/VII” or higher according to A.M. Best’s Financial Strength Rating and Financial Size.

Definitions	
Term	Meaning
“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 <u>Exhibit G</u> (<i>Federal Requirements</i>).
“Final Acceptance”	Acceptance of the Project as described in <u>Section 17.4</u> (<i>Department Issued Notice of Final Acceptance</i>).
“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 <u>Exhibit B, Section 1.3.1.4</u> (<i>Design Submittals & Milestones</i>), 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 <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“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”	<p>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:</p> <ol style="list-style-type: none"> 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); 4. A local, state, or federally mandated quarantine restriction occurring within the Site;

Definitions	
Term	Meaning
	<ul style="list-style-type: none"> 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.
"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).

Definitions	
Term	Meaning
“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 <u>Section 14.2.1</u> (<i>Completion, Other Incident Liquidated Damages</i>).
“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: <ol style="list-style-type: none"> 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.
<u>“Notice of Contract Termination”</u>	<u>A notice issued by the Department to terminate the Agreement.</u>
“Notice of Final Acceptance”	The notice delivered to the Progressive Contractor under <u>Section 17.4</u> (<i>Department Issued Notice of Final Acceptance</i>) stating that final Department acceptance of the Project has occurred.
“Notice of Project Completion of the Pricing Package”	The notice delivered to the Progressive Contractor under <u>Section 17.2</u> (<i>Department Issued Notice of Project Completion for a Pricing Package</i>) stating that Project Completion of the Pricing Package has occurred.

Definitions	
Term	Meaning
“Notice of Termination”	A notice issued by the Department to terminate the Agreement.
“Open Book Basis”	The Department’s review and access rights described under <u>Section 2.2.2.1</u> (<i>Pricing Package GMPs</i>).
“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 <u>Section 31.6.2</u> (<i>Intellectual Property</i>).
“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 <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“Preconstruction Phase Compensation”	The meaning set forth in <u>Section 19.1</u> (<i>Preconstruction Phase Compensation</i>).
“Preconstruction”	The maximum amount payable by the Department for Preconstruction Work as set

Definitions	
Term	Meaning
Package Amendment	the requirements set forth in <u>Section 2.2.2</u> (<i>Pricing Package Amendments</i>) and <u>Exhibit B, Section 11</u> (<i>Pricing Package Amendments</i>).
“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, <u>(based on the completion of Project Schedule activities and the values distributed to such activities in the Approved Schedule of Values)</u> 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 <u>Section 33.5.1</u> (<i>Designation of Authorized Representatives</i>), as may be changed from time to time in accordance with the requirements thereof.
“Progressive Contractor Default”	Means any of the events described in <u>Section 24.1.1</u> (<i>Breaches; Progressive Contractor Defaults</i>), following notice and opportunity to cure to the extent permitted by <u>Section 24.1.2</u> (<i>Right to Cure</i>) 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 <u>Exhibit B, Section 6.2</u> (<i>Initial Approach to Construction Cost Development</i>).
“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.
“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.

Definitions	
Term	Meaning
“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 “RFC Documents”	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 <u>Exhibit B, Section 1.3.1.4</u> (<i>Design Submittals & Milestones</i>), stamped by the engineer of record in accordance with IC § 25-4-1-13.

Definitions	
Term	Meaning
“Risk Register”	The meaning set forth in <u>Section 2.4</u> (<i>Risk Register</i>).
“Risk Register Event”	The meaning set forth in <u>Section 2.4</u> (<i>Risk Register</i>).
“Risk Workshop”	The meetings held to develop and update the Risk Register, as more fully set forth in <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“ROW Plans”	The meaning set forth in <u>Section 8.1</u> (<i>Right of Way Plans</i>).
“Schedule Coordination Plan”	The schedule coordination plan identified in <u>Exhibit B</u> (<i>Preconstruction Phase Requirements</i>).
“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 <u>Section 2.4.2</u> (<i>Provisional Risks</i>).
“Site”	The parcels of ROW <u>Right-of-Way</u> identified on the ROW Plans <u>Right-of-Way plans</u> 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

Definitions	
Term	Meaning
	Contractor) executing one or both of the Surety Bonds.
“Surety Bonds”	The approved security described in <u>Section 28.229</u> (<i>Payment and Performance Security</i>) in the form of <u>Exhibit F</u> (<i>Form of Surety Bonds</i>), executed by the Progressive Contractor and the Surety.
“Term”	The meaning set forth in <u>Section 1.2</u> (<i>Term</i>).
“Termination Compensation Cap”	The meaning set forth in <u>Section 25.5.3</u> (<i>Termination Compensation Cap</i>).
“Third Party”	Any Person other than a Department-Related Entity (and in the context of <u>Section 27</u> (<i>Indemnification</i>), 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 <u>Section 19.2</u> (<i>Total Construction GMP</i>).
“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.

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 [1.3.1.4](#) (*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

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, ~~notable~~notably utility involvement, notable Right-of-Way activities, any "task force" meetings, notable cost model/estimating activities, risk workshops, ~~and Project Completion~~wide completion of all Pricing Packages, ~~and~~ Completion Deadlines, and incorporate design package delivery dates and Construction Work activities through Final Acceptance).

(2) Update the Preconstruction Phase Project Schedule on a monthly basis and submit to the Department for ~~Review~~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	INDOT <u>Department</u> 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 <u>Section 1.2 (Standards)</u> , 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 ROW <u>Right-of-Way</u> 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 <u>Section 1.2 (Standards)</u> .	Review and Comment

Package Plan to the Department for ~~Review~~review and ~~Comment~~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;
- (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](#)[review](#) and [Comment](#)[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.

- (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;
- (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.

(13)

Exhibit C

PROGRESSIVE CONTRACTOR TEAM

Table 1: Key Personnel

[NTD: Map over ~~first two columns~~ from RFP Form F (Key Personnel Experience)]

<i>Position</i>	<i>Name</i>
<u>Project Manager</u>	
	NTD: Template: [] hours per day, [] days per week [until expiration of the Warranty Period]/[on an as-needed basis with [] hours' notice [thereafter]], for applicable Work during the Warranty Period, if any]
	[NTD: Template; insert name]

Table 2: Key Personnel Availability

<i>Key Personnel</i>	<i>Period Required to be Available and Availability for Contact by Department</i>
	[NTD: Template: [] hours per day, [] days per week [until expiration of the Warranty Period]/[on an as-needed basis with [] hours' notice [thereafter]], for applicable Work during the Warranty Period, if any]

Table 3: 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]**

<i>Key Personnel Position</i>	<i>Liquidated Damages – Preconstruction Phase</i>	<i>Liquidated Damages – Construction Phase</i>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>
	<u>\$[] per occurrence</u>	<u>\$[] per occurrence</u>

Attachments: Key Personnel commitments from Proposal **[NTD: insert all Form H submissions for all Key Personnel]**

Exhibit D

HOURLY RATES

(see attached)

[NTD: TO INCLUDE FULLY LOADED HOURLY RATES ~~PROPOSED IN FORM D (HOURLY RATES) OF~~ ACCEPTED BY INDOT'S DEPARTMENT OF EXTERNAL AUDIT UNDER THE PROPOSAL 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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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:

(b) complete the work covered by this Bond in accordance with the terms and conditions of the Agreement then in effect, or

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 ~~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 [].

[signature appears on the succeeding page]

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.

of this Bond, solely due to acts of Principal, 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.

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 ~~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 [_____].

Exhibit G

FEDERAL REQUIREMENTS

<u>Exhibit Description</u>	<u>NO. of Pages</u>
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

ATTACHMENT 2 TO EXHIBIT G

FHWA-1273

Revised October 23, 2023 *[NTD: ensure most current version used in letting]*

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ATTACHMENT 3 TO EXHIBIT G
FEDERAL PREVAILING WAGE RATE

PROJECT WAGE RATES ~~—LOCALITY 4/~~ FEDERAL

The contractor shall use the appropriate Davis Bacon Act ~~Wage Determinations~~ ~~WD~~ ~~#~~ ~~_____~~ wage determinations that are effective 10 calendar days prior to the execution of the ~~Constriction~~ Construction Phase Amendment. ~~The~~ [NTD: Construction Phase Amendment to include DBA wage rates.] Applicable project wage determinations can be found at the following link:

[SAM.gov | Search](#)

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 **OLS/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 products¹ 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 product², 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 materials³ 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 products⁵ [NTD: verify waiver still in place; if no, remove footnote] not meeting the requirements set forth in subsections (b) and (c)

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.

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 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:

P.I. No. [] [NTD: include solicitation's P.I. Number] — Contract ID # [] [NTD: provide the Project's name from the same 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 _____, _____.

Notary Public/Justice of the Peace

My Commission Expires: _____

OR

CERTIFICATE FOR NONCOMPLIANCE

With respect to the following project:

P.I. No. [_____] **[NTD: include solicitation's P.I. Number]** — **Contract ID #** [_____] **[NTD: provide the Project's name from the same 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.

Exhibit H

DEPARTMENT REQUIREMENTS

Exhibit Description

No. of Pages

Attachment 1 – Department Conflict of Interest Policy

3

[Attachment 2 – []]

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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}/{binder}~~ **[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 ~~certified~~ 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. ~~This~~ 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 ~~a current policyholder's management and financial size category~~ an A.M. Best's rating of ~~not less than at least~~ "A-, VII" ~~according to A.M. Best's Insurance Reports Key Rating Guide~~.

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

~~The commercial general liability, excess (umbrella) liability, Progressive Contractor's pollution liability, and professional liability insurance coverage requirements will~~ 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, ~~whichever is greater~~.

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. ~~Each~~ 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 ~~include~~ 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 ~~at~~ 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; ~~and~~

(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.

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 ~~pollution~~cyber liability ~~Insurance Policies~~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.

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 ~~a policy of~~ commercial general liability ~~broad form~~ 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 (ISO) for CG 00 01 10 01.

(a) Limits of liability; general liability:

- (i) \$1 million - each occurrence.
- (ii) \$2 million - general annual aggregate ~~(annually)~~.
- (iii) \$2 million - personal and advertising injury.
- (iv) \$2 million - products/completed operations ~~liability~~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 ~~blanket~~ coverage for explosion, collapse, and underground (XCU) hazards.

(c) Products and completed operations coverage shall be continued for ~~a minimum of five years from~~ 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 ~~occurrence-based~~ 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.

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 ~~with a practice policy, or a~~ between any combination of a practice policy primary and Project specific excess policy.

2.4 Excess (Umbrella) Liability Insurance

The Progressive Contractor shall obtain and maintain ~~a policy of~~ umbrella or excess liability insurance with limits of not less than \$[10] million per occurrence and \$25[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 "following 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 \$[5]M, \$[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 ~~per occurrence~~ shall be not less than \$35 million per occurrence and ~~the total Project annual aggregate shall be \$10 million~~. The limits of the contractor's pollution liability coverage may be satisfied ~~with either a Project specific policy or a~~ between any combination of a practice policy primary and Project specific excess endorsement to the practice policy policies.
- (b) The Department shall be named as an additional insured ~~(to the extent commercially available as determined by the Department)~~.
- (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 ~~a five-year~~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 ~~of \$1 million~~. The ~~contract~~applicable Subcontract with each such entity shall require the entity to renew the policy annually for ~~five~~three years following Final Acceptance; or provide~~secure~~ a ~~new policy with a retroactive date of the date the entity first performed design or other engineering activities on the Project, or a combination of the two types of policies~~three year extended reporting period to ensure that a ~~practice~~ professional liability policy is in place to cover that professional's liability on the Project during the Project and for ~~five~~three years following Final Acceptance. ~~Any entity (other than the Lead Designer) may be relieved from providing a practice professional liability insurance policy if that entity is insured under another entity's practice professional liability policy.~~

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 ~~is not required to~~ carry ~~a~~ builder's risk insurance ~~policy; however, the~~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 ~~builder's risk claims and the Department shall have no responsibility for any item for which the Progressive Contractor could have obtained coverage under a builder's risk policy.~~ [NTD: subject to continuing INDOT review and comment, and may change on a Project specific basis] 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.

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]**

~~2.9 []~~

[NTD: insert any other policies, required on a Project-specific basis (e.g., aircraft liability, marine/cargo, etc.)]

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 ~~\$500,000~~ 1,000,000 bodily injury by accident, each accident, and ~~\$500,000~~ 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 ~~in the annual~~ aggregate ~~annually~~.

(c) Automobile Liability Insurance with a limit of at least ~~\$500,000~~ 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 \$~~12,000,000~~10,000,000, coverage shall be in the amount of \$~~4,000,000~~5,000,000 per occurrence and ~~in the~~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 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.

Exhibit B

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.

(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.
- (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.

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.

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.

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.

Appendix G: Preconstruction Phase Hourly Rate Policy

INDOT Preconstruction Phase Hourly Rate Policy – Progressive Delivery Projects

General Policy Statement

All fully-loaded hourly rates, for engineering firms and non-engineering firms, are set under this Preconstruction Phase Hourly Rate Policy (Policy) for Progressive Delivery contracts on a project-specific basis. A new approval is required for each project and may not be obtained programmatically.

On a project specific basis, the Department may require the setting of project-specific fully-loaded hourly rates for individuals performing Preconstruction Work or for categories of professionals or consultants (or categories of professional or consulting services). The Department will provide direction in the Request for Proposals.

To enable payment for Preconstruction Work performed under Progressive Delivery projects, which are based on hourly rates, the Department will require that each firm supporting the Preconstruction Phase develop fully-loaded hourly rates for the specific Progressive Delivery project based on the requirements of this Policy.

If the Preconstruction Phase will last for more than a year, then firms may update their fully-loaded hourly rates annually.

FAR Firms' Fully-Loaded Hourly Rate

Any engineering firm that will provide professional or consulting services during the Preconstruction Phase (FAR Firm) shall use an existing Department-approved FAR-complaint indirect cost rate and direct hourly billing rates **or** obtain Department approval as described in [the Department's "Professional Services Contract Administration Manual"].

The fully-loaded hourly rates for a specific Progressive Delivery project shall be calculated based upon the formula below, consisting of the following factors: the direct hourly billing rates, audited FAR-compliant indirect cost rate, facilities capital cost of money (FCCM) (expressed as a rate), and profit (also expressed as a rate):

$$\text{Fully-Loaded Hourly Rate (FAR Firm)} = \text{Base} * (1 + \text{FAR}) * (1 + \text{Profit}) + \text{Base} * \text{FCCM}$$

The profit rate will be established by Department on a project specific basis. FAR Firms shall calculate fully-loaded hourly rates using the rate buildup spreadsheet provided by Department.

Non-FAR Firms' Fully-Loaded Hourly Rate

Contractors and other non-engineering firms (Non-FAR Firms) shall follow the process described below for building a non-FAR, fully-loaded hourly rate so as to obtain the Department's approval of the fully-loaded hourly rate developed for the specific Progressive Delivery project.

Process for Building Non-FAR Firm Fully-Loaded Hourly Rate

Non-FAR Firms shall provide the information identified in Table 1 (Indirect Cost Factors), as further described below, to the [Department's External Audit Section] with supporting documentation and a certification from the firm's Chief Financial Officer, or equivalent role, that the provided information is true and accurate.

The Department will review the information for reasonableness and notify the firm that the information is acceptable. The Department will consider the completeness of the information and whether the information aligns with statewide averages of indirect cost rates, industry benchmarks for home office general and administrative (G&A) costs or bonus/fringe/tax/other costs, other states' comparable rates, and other relevant sources, it being the Department's policy that the information provided, when used

in the calculation, provides a rational basis for a Non-FAR Firm's fully-loaded hourly rate. Upon notification by the Department that the information provided is acceptable, the Non-FAR Firm shall calculate fully-loaded hourly rates for the specific Progressive Delivery project using the rate buildup spreadsheet provided by the Department.

$$\text{Fully-Loaded Hourly Rate (Non-FAR Firm)} = \text{Base} * (1 + \text{Approved Markup}) * (1 + \text{Profit})$$

Employee Direct Hourly Rates for Salaried Employees of Non-FAR Firms

Non-FAR Firms shall provide a list of the direct hourly billing rate for each employee that will support the Preconstruction Phase of the Progressive Contracting project. For salaried employees of Non-FAR Firms, the hourly direct billing rate shall be calculated by dividing the employee's base weekly salary by 45. The base salary shall exclude bonuses, fringes, taxes, and other costs as well as G&A costs, as described below. This list may be updated any time additional resources are added to a Progressive Delivery project.

Bonuses, Fringes, Taxes, and other Costs of Non-FAR Firms

Non-FAR Firms shall also provide information related to its labor burden (bonuses, fringes, taxes, and other costs) identified in Table 1 (Indirect Cost Factors) expressed as the average percentage of salary. This information may be provided using firmwide averages or on an employee-specific basis. The Department-provided rate buildup spreadsheet includes options for calculation of fully-loaded rates based on firmwide averages or employee specific information. "Other costs" under this calculation shall generally consist in demonstrable labor burden costs and expenses that would apply to all individuals working on the Progressive Delivery project. If any cost or expense cannot be reduced to a per-employee labor burden cost, then it is a direct cost and not an "other cost" for purposes of this calculation. In each case "other costs" exclude the G&A costs (calculated and described below).

General and Administrative (G&A) Costs of Non-FAR Firms

G&A costs, generally, are non-project-specific costs that relate to the general operations of the Non-FAR Firm's business, which are not generally charged to projects. If a Non-FAR Firm has an audited G&A rate, then the firm shall provide this rate, along with evidence of external auditor certification. If a Non-FAR Firm does not have an audited G&A rate, then the firm shall provide the G&A cost information described in Table 1 (Indirect Cost Factors) along with the most recent audited financial statements that support the data and provide and provide the total number of employees to calculate a G&A rate per employee.

Table 1 (Indirect Cost Factors)

Labor Burden – Bonuses, Fringes, Taxes, and Other Labor Burden Costs	
Bonus, if any	Avg % of salary
Fringe Benefits	
PTO/Holiday	Avg % of salary
Retirement Matching / Pension, if any	Avg % of salary
Health / Dental / other Employee Insurance	Avg % of salary
Taxes	
Social Security	Avg % of salary
Medicare	Avg % of salary
Federal / State Unemployment	Avg % of salary
Other	Avg % of salary
Workers' Comp	Avg % of salary
Other Costs	Avg % of salary
Home Office G&A	
Audited Rate (certified by an external auditor)	% per employee

OR	
Calculated Rate Equivalent	\$ per employee hour
Number of employees	# of employees
Facilities	
Depreciation on Buildings	\$ Annual
Interest on Debt Associated with Certain Buildings	\$ Annual
Equipment and Capital Improvements	\$ Annual
Operations and Maintenance Expenses	\$ Annual
Other	\$ Annual
Administrative	
Director's Office	\$ Annual
Accounting	\$ Annual
Admin Personnel	\$ Annual
Other	\$ Annual
<i>Subtotal G&A Line Items</i>	\$ Annual

| *Appendix HG: Sample Risk Register*

Risk Register

Project Name: [Project Name] Contract Number:																					
General Identification				Preconstruction Allocation of Responsibility					Initial Assessment of Impacts			Contractual Risk Allocation for Pricing Package									
Risk Register Event No.	STATUS (Active or Retired)	Applicable to Pricing Package No.	Description	Champion Entity	Champion Name 1	Champion Name 2	Risk Management Action Plan	Action Plan Review Date	Probability	Cost Impact (Dollars)	Schedule Impact (Days)	Department, Provisional, Progressive Contractor Risk	Provisional Sum or Progressive Contractor Contingency	Capped or Uncapped	Shared Provisional Sum? (Y/N)	Department Share (%)	Progressive Contractor Share (%)	Trigger to Access Provisional Sum	Required Mitigation	Provisional Sum Payment Method	Department Approval of Risk Register Event
Note 2		Note 3		Note 4			Note 5	Note 6	Note 7			Note 8						Note 9	Note 9	Note 9	Note 10
Preconstruction Management - Information not Included in Contractual Allocation.																					

- Note
- 1 The fields in this group relate to general identification. This information and the other green cells will be the contractual information that gets included in a Pricing Package.
 - 2 The Risk Register Event No. will be a unique ID that does not change. This ID will be used to reference supporting info and more detailed requirement that may need to be developed for a Risk Register Event.
 - 3 This will allow risks to be sorted by Pricing Package.
 - 4 The fields in this group are intended for preliminary management during the Preconstruction Phase. Early stages of risk management don't need to include contractual allocation as many risks will be retired.
 - 5 Initially this may include very simple plans that can be retained in this Excel sheet. If more complex plans are needed they will be stored in an EDMS and referenced by the unique Risk Register Event No.
 - 6 Conditional formatting can be applied to this column to show risk that are past their review date in different colors depending on how far past they are (red, yellow).
 - 7 The fields in this group are intended for initial quantification of risks that are likely to be contractually allocated and included in a Pricing Package
 - 8 The fields in this group represent the contractual allocation of the subject Risk Register Event.
 - 9 These fields are likely to need to be more fully described in additional documentation that is retained in the EDMS. Another option may be to put that information on a different sheet. See other sheet as example.
 - 10 In the event a Risk Register Event needs to be approved before inclusion in the Pricing Package Amendment the date of approval is identified here. Advanced allocation prior to Pricing Package Amendment may be necessary.

| *Appendix **IH**: Sample Quantity Reconciliation*

QUANTITY RECONCILIATION FORM

[illegible]

*Appendix **II**: Sample Innovation Log*

INNOVATION LOG

[illegible]